

INTERGOVERNMENTAL AGREEMENT
Between
Prosper Portland
And
City of Portland Office of Management and Finance
And
Metro
For the
Arlene Schnitzer Concert Hall Marquee Improvement Project

THIS INTERGOVERNMENTAL AGREEMENT (this “Agreement”), dated this _____ day of _____, 2019 (the “Effective Date”), is made by and between City of Portland, Office of Management and Finance (“the City”), Metro, a Oregon metropolitan service district organized under the laws of the State of Oregon and the Metro Charter. (“Metro”) and Prosper Portland, the assumed business name of the Portland Development Commission, the redevelopment and urban renewal agency of the City of Portland, Oregon (“Prosper Portland”). The City, Metro and Prosper Portland may be referred to jointly in this Agreement as the “Parties” and individually as a “Party.”

RECITALS

- A. Prosper Portland, as the duly-designated redevelopment and urban renewal agency of the City of Portland, is granted broad powers under Chapter ORS 457 and the City Charter for the planning, funding and implementation of urban renewal projects.
- B. The South Park Blocks District Urban Renewal Plan was adopted by the Prosper Portland Board July 9, 1985 through resolution No. 3362 and by Portland City Council on July 24, 1985 through Ordinance No. 157635 (as amended from time to time, the “Plan”).
- C. The City, through its Office of Management and Finance (“OMF”) owns the Arlene Schnitzer Concert Hall as part of the Portland’s Centers for the Arts group of venues. The Arlene Schnitzer concert hall opened in 1928 and is located at 1111 SW Broadway which is in the South Park Blocks Urban Renewal Area (the “URA”).
- D. Metro, is an elected regional government that covers three counties and twenty four cities in the Greater Portland region and operates the Portland’s Centers for the Arts.
- E. The Portland’s Centers for the Arts is the fifth largest performing arts center in the United States. It operates five theaters in three separate buildings in downtown Portland. The historic Arlene Schnitzer Concert Hall is one of these five venues. With over 2,700 seats, it is the region’s premiere large concert hall, serves as home of the Oregon Symphony, and is widely known for its iconic Portland blade sign and marquees.

F. The marquees are near their end of life and require a variety of safety-related upgrades including structural/seismic strengthening and electrical upgrades. New digital technologies will return the appearance of the marquee closer to the historic original while allowing remote programming and easy changing of the lettering. These enhancements will greatly improve the appearance and functionality of the marquee, eliminate the time consuming and hazardous process of manually changing the lettering and allow Portland's to use the marquee to easily welcome multiple events and audiences in a single day. The total amount of improvements is estimated to be \$1,800,000 and the work is expected to be complete by 2020.

G. The City and Metro have an operating and management agreement for the oversight of the Portland's venues through the Metropolitan Exposition Recreation Commission ("MERC"), which works to protect the public investment in three of Metro's visitor venues: Oregon Convention Center, Portland Expo Center and Portland's Centers for the Arts. MERC provides expertise, governance, and policy direction to the business of operating the venues.

H. Metro will serve as the agent on behalf of the City to contract and complete the required improvements of the marquees at the Arlene Schnitzer Concert Hall. Prosper Portland will direct funds on behalf of the City to Metro to fund the improvements.

I. The City has remaining proceeds from the 2008B South Park Blocks tax increment financing ("TIF") bond that require investment into a tax-exempt project. In furtherance of the City's commitment to the Portland's venues and the City's social fabric and arts, the City has requested that Prosper Portland provide funding to support the City-owned Arlene Schnitzer Concert Hall scope of improvements ("the Project"). Prosper Portland is willing to enter into this Agreement in support of the City and in furtherance of the important City public policy objectives served by the Project.

J. Prosper Portland's Board of Commissioners amended the Plan by Resolution No. 7316, adopted June 12, 2019, to allow for expenditures for public buildings, including the City-owned Arlene Schnitzer Concert Hall.

K. The Portland City Council approved the Plan amendments and endorsed Prosper Portland's investment in the Project through the adoption of Resolution No. 37436 on June 19, 2019.

L. This Agreement was authorized by Prosper Portland Board of Commissioners Resolution No. [REDACTED], adopted September 11, 2019.

AGREEMENT

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, and the conditions, covenants and agreements set forth below, the Parties hereby agree as follows:

ARTICLE 1 PROSPER PORTLAND GRANT GENERALLY

1.1 Prosper Portland Grant Amount. On the terms and conditions of this Agreement, Prosper Portland agrees to disburse a one-time payment to in a total aggregate amount not to exceed ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000) subject to forecasted availability (the “Prosper Portland Grant”). Metro may use the Prosper Portland Grant funds solely for the Project and on the terms and conditions set forth herein. Metro will be responsible for providing financial resources over and above the grant amount to cover any and all remaining Project costs, and will be responsible for completing the Project regardless of any cost overruns or delays, whether or not in its control.

1.2 Disbursement. Prosper Portland shall disburse the one-time payment of funds to Metro. Metro shall have no obligation to repay the Prosper Portland Grant except upon the occurrence of an Event of Default (as hereinafter defined).

1.2.1 Conditions Precedent to Payment. The disbursement of the payment of the Prosper Portland Grant is subject to the following conditions prior to disbursement:

- (a) Prosper Portland shall have determined, in its sole discretion, that there is sufficient budget appropriation and availability of the Prosper Portland Grant;
- (b) Metro has submitted to Prosper Portland a complete scope of work for the improvements with all sources and uses (including a reasonable contingency) and a project schedule demonstrating the funds will be spent and the Project completed by October 25, 2022.
- (c) Prosper Portland shall have determined that the scope of improvements provided by Metro are TIF-eligible uses: for example, design and engineering for improvements, and construction improvements for the Project;
- (d) No litigation is pending that prevents Prosper Portland or Metro from performing their respective obligations under this Agreement; and
- (e) No Event of Default shall have occurred.

1.3 Proof of TIF-Eligible Costs. Metro will submit certifications, in a form reasonably acceptable to Prosper Portland. The certifications shall be accompanied by certified statements of work and expenses detailing the use of the Prosper Portland Grant. All such certifications and invoices shall be submitted on a quarterly basis, and the final statements are due at the completion of the project which will be on or before October 25, 2022.

1.4 Return of Prosper Portland Grant. Notwithstanding anything set forth herein to the contrary, in the event that Metro has spent less than \$1,500,000 in Grant funds on TIF-eligible

expenses for the Project by October 25, 2022, it shall return the unspent balance to Prosper Portland immediately, regardless of whether the non-expenditure is due to lower than anticipated costs, failure to complete the Project, or otherwise. This Section 1.4 does not limit Prosper Portland's right to demand the full Prosper Portland Grant amount back from Metro should an Event of Default occur (including, without limitation of failure to complete the Project by October 25, 2022).

ARTICLE 2 METRO'S REPRESENTATIONS AND WARRANTIES

2.1 Metro represents and warrants to Prosper Portland as follows:

2.1.1 **Authority.** Metro has full power, authority, and legal right to execute and deliver this Agreement and to incur and perform its obligations hereunder. The execution and performance by Metro of this Agreement has been duly authorized by all necessary action of Metro.

2.1.2 **No Violations or Default.** No event has occurred, and no condition exists that constitutes an Event of Default (as hereinafter defined) by Metro. Each of the following shall constitute an "Event of Default":

- a) **Breach of Agreement.** If Metro breaches a material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after Metro receives written notice from Prosper Portland specifying the breach it, shall be an Event of Default under this Agreement. In the case of a breach that cannot with due diligence be cured within a period of thirty (30) days, it shall be an Event of Default under this Agreement if Metro does not commence the cure of the breach within thirty (30) days after Metro receives written notice from Prosper Portland and thereafter diligently prosecute to completion such cure within sixty (60) days unless such cure requires additional time as is reasonably necessary; or
- b) **Misuse of Funds.** It shall also be an Event of Default under this Agreement and Prosper Portland shall be irreparably harmed by such default, if Metro uses any portion of the Prosper Portland Grant in a manner materially inconsistent with the purposes of this Agreement or in violation of applicable laws, statutes, or rules, including but not limited to the limitations set forth in ORS Chapter 457 regarding tax increment finance expenditures. It shall not be an Event of Default if Prosper Portland's breached its representation that the funds provided under this Agreement are TIF eligible funds.

2.1.3 **Limitations on Expenditure of Prosper Portland Grant Proceeds.** Metro acknowledges and agrees that the Prosper Portland Grant includes resources derived from tax increment financing ("TIF Funds") as represented and warranted by Prosper Portland in Article

4, and such TIF Funds shall only be used for “TIF eligible expenditures” by Metro. “TIF eligible expenditures” means expenditures for urban renewal projects that are permitted under Article XI, Section 1c of the Oregon Constitution, ORS Chapter 457 and the Plan. To the extent that TIF Funds are misspent under this Agreement, such misuse shall constitute an Event of Default hereunder and Prosper Portland shall be entitled to exercise all available legal and/or equitable remedies for such misuse.

ARTICLE 3 CITY’S AGREEMENT AND ACKNOWLEDGMENT

The City acknowledges that the Prosper Portland Grant is being made for the City’s benefit, and that the Arlene Schnitzer Concert Hall is an important City asset. In consideration of Prosper Portland’s willingness to provide the Prosper Portland Grant, the City will fully cooperate in all respects with Metro as needed for implementation and completion of the Project. The City will further acknowledge Prosper Portland’s funding in any promotional materials or signage on or relating to the Project.

ARTICLE 4 PROSPER PORTLAND’S REPRESENTATIONS AND WARRANTIES

4.1 Prosper Portland represents and warrants to Metro as follows:

4.1.1 Authority. Prosper Portland has full power, authority, and legal right to execute and deliver this Agreement and to incur and perform its obligations hereunder. The execution and performance by Prosper Portland of this Agreement has been duly authorized by all necessary action of Prosper Portland.

4.1.2. TIF FUNDS. Prosper Portland represents and warrants that the funds provided to Metro are “TIF” eligible funds for the project described in this Agreement.

4.1.3. Breach of Agreement. If Prosper Portland breaches a material provision of this Agreement, whether by action or inaction, and such breach continues and is not remedied within thirty (30) days after Prosper Portland receives written notice from Metro specifying the breach it shall be an Event of Default under this Agreement. In the case of a breach that cannot with due diligence be cured within a period of thirty (30) days, it shall be an Event of Default under this Agreement if Prosper Portland does not commence the cure of the breach within thirty (30) days after Prosper Portland receives written notice from Metro and thereafter diligently prosecute to completion such cure within sixty (60) days unless such cure requires additional time as is reasonably necessary

ARTICLE 5 METRO’S AFFIRMATIVE COVENANTS

5.1 Metro covenants and agrees as follows:

5.1.1 Records and Inspection. Metro shall keep proper books of account and records on all activities associated with the Prosper Portland Grant (collectively, the “Records”). Metro shall maintain the Records in accordance with generally accepted accounting principles and shall retain the Records in accordance with the records retention laws pertaining to urban renewal projects. Metro shall permit Prosper Portland and/or its duly authorized representatives, including representatives from the City, to inspect, review and make excerpts and transcripts of the Records with respect to the receipt and disbursement of funds received from Prosper Portland, provided that any such examinations and audits shall be at the reviewing party’s sole expense. Access to the Records is not limited to the required retention period. The authorized representatives shall have access to the Records at any reasonable time for as long as the Records are maintained. This Section 4.1.1 shall survive any termination of this Agreement.

5.1.2 Audits. Prosper Portland, either directly or through a designated representative, may conduct financial and performance audits of the use of Prosper Portland Grant proceeds at any time at Prosper Portland's expense; provided, however, that to the extent that an audit reveals any intentional malfeasance, Metro shall reimburse Prosper Portland for any costs associated with the audit and Metro shall correct any deviations discovered as a result of the audit. Audits will be conducted in accordance with generally accepted auditing standards as promulgated in *Government Auditing Standards* by the Comptroller General of the United States General Accounting Office. In the event of an audit, Metro agrees to provide the designated auditor with reasonable access to Metro’s employees and make all such financial, performance and compliance records available to the auditor. This Section 4.1.2 shall survive any termination of this Agreement.

5.1.3 Business and Workforce Equity. Prosper Portland’s Business and Workforce Equity Policies apply due to the nature of the Project and the amount of funding support being provided. However, Prosper Portland has determined that the professional services requirement will not apply as the design of the Project was performed under a separate contract prior to Prosper Portland’s involvement. Prosper Portland agrees to monitor and report on Metro’s compliance with such policies, and Metro agrees to cooperate with Prosper Portland in complying with the Prosper Portland’s policies.

5.1.4. Green Building. If a Green Building Policy is applicable to the scope of work under this Agreement, Metro will adhere to Prosper Portland’s Green Building Policy. It is understood by the Parties that the Green Building Policy does not apply to the marquee upgrades anticipated by the Parties as the Scope of Work. However, if the scope of the project changes the parties will reanalyze the applicability of the Green Building Policy, which addresses building systems and interiors.

5.1.5 Metro’s Obligation to Indemnify. To the extent permitted by law and within the limitations of the Tort Claims Act and the Oregon Constitution, Metro shall defend, save, hold harmless, and indemnify Prosper Portland and the City and their respective officers, employees

and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorneys fees, resulting from, arising out of, or relating to the activities of Metro or its officers, employees, subcontractors, or agents under this Agreement. Metro shall have control of the defense and settlement of any claim that is subject to this paragraph. However, neither Metro nor any attorney engaged by Metro shall defend the claim in the name of Prosper Portland or the City or any department of Prosper Portland or the City, nor purport to act as legal representative of Prosper Portland, the City or any of their respective departments, without first receiving from Prosper Portland's General Counsel and the City Attorney (respectively), authority to act as legal counsel for either entity, nor shall Metro settle any claim on behalf of either entity without the approval of Prosper Portland's General Counsel or the City Attorney, as applicable. Prosper Portland and the City may, at their respective election and expense, assume its own defense and settlement.

ARTICLE 6

CITY'S AFFIRMATIVE COVENANTS

6.1 City covenants and agrees as follows:

6.1.1 Records and Inspection. City shall keep proper books of account and records on all of its activities associated with the Prosper Portland Grant (collectively, the "Records"). City shall maintain the Records in accordance with generally accepted accounting principles and shall retain the Records in accordance with the records retention laws pertaining to urban renewal projects. City shall permit Prosper Portland and/or its duly authorized representatives, including representatives from the City of Portland, to inspect, review and make excerpts and transcripts of the Records with respect to the receipt and disbursement of funds received from Prosper Portland, if any, provided that any such examinations and audits shall be at the reviewing party's sole expense. Access to the Records is not limited to the required retention period. The authorized representatives shall have access to the Records at any reasonable time for as long as the Records are maintained. This Section 6.1.1 shall survive any termination of this Agreement.

6.1.2 Audits. Prosper Portland, either directly or through a designated representative, may conduct financial and performance audits of the use of Prosper Portland Grant proceeds (if any are used by the City) at any time at Prosper Portland's expense; provided, however, that to the extent that an audit reveals any malfeasance on the part of the City, City shall reimburse Prosper Portland for any costs associated with the audit and City shall correct any deviations discovered as a result of the audit. Audits will be conducted in accordance with generally accepted auditing standards as promulgated in *Government Auditing Standards* by the Comptroller General of the United States General Accounting Office. In the event of an audit, City agrees to provide the designated auditor with reasonable access to City's employees and make all such financial, performance and compliance records available to the auditor. This Section 6.1.2 shall survive any termination of this Agreement.

6.1.3 Business and Workforce Equity. Prosper Portland will be responsible for monitoring of Metro’s compliance with Prosper Portland’s workforce and contractor / subcontractor equity policies described in Section 5 above.

6.1.4 City’s Obligation to Indemnify. To the extent permitted by law and within the limitations of the Tort Claims Act, City shall defend, save, hold harmless, and indemnify Prosper Portland, Metro, and their respective officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorneys fees, resulting from, arising out of, or relating to the activities of City or its officers, employees, subcontractors, or agents under this Agreement. City shall have control of the defense and settlement of any claim that is subject to this paragraph. However, neither City nor any attorney engaged by City shall defend the claim in the name of Prosper Portland, Metro or any department of Prosper Portland or Metro, nor purport to act as legal representative of Prosper Portland or Metro or any of their respective departments, without first receiving from Prosper Portland’s General Counsel or the Metro Attorney, as applicable, authority to act as legal counsel for Prosper Portland or Metro, nor shall City settle any claim on behalf of Prosper Portland or Metro without the approval of Prosper Portland’s General Counsel’s Office or the Metro Attorney, as applicable. Prosper Portland or Metro may, at their respective election and expense, assume its own defense and settlement.

ARTICLE 7 PROSPER PORTLAND’S AFFIRMATIVE COVENANTS

7.1 Prosper Portland covenants and agrees as follows:

7.1.1. Prosper Portland Obligation to Indemnify. To the extent permitted by law and within the limitations of the Tort Claims Act, Prosper Portland shall defend, save, hold harmless, and indemnify Metro, the City, and their respective officers, employees and agents from and against all claims, suits, actions, losses, damages, liabilities, costs and expenses of any nature whatsoever, including attorneys fees, resulting from, arising out of, or relating to the activities of Prosper Portland or its officers, employees, subcontractors, or agents under this Agreement. However, neither Prosper Portland nor any attorney engaged by Prosper Portland shall defend the claim in the name of Metro, the City, or any department of Metro or the City, nor purport to act as legal representative of Metro, the City, or any of their respective departments, without first receiving from Metro’s Attorney’s Office or the City Attorney, as applicable, authority to act as legal counsel for Metro or the City, nor shall Prosper Portland settle any claim on behalf of Metro or the City without the approval of Metro’s Attorney’s Office or the City Attorney, as applicable. Metro or the City may, at their respective election and expense, assume its own defense and settlement.

**ARTICLE 8
RIGHTS AND REMEDIES
UPON EVENT OF DEFAULT**

8.1 Rights and Remedies. Upon the occurrence of an Event of Default and at any time thereafter, the non-defaulting party may, at its option, exercise any one or more of the following rights and remedies:

8.1.1 **Repayment.** Prosper Portland may declare the entire original Prosper Portland Grant pursuant to this Agreement, to be immediately due and payable in full and, upon such declaration, Metro shall pay to Prosper Portland the amount declared to be immediately due and payable. This provision will not apply if the parties dispute whether there is an Event of Default.

8.1.2 **No Election Required.** The non-defaulting party shall have any other right or remedy provided in this Agreement, or available at law, in equity, or otherwise in such order and manner as it may select.

8.1.3 **Rights and Remedies Cumulative.** All rights and remedies described in this Article 4 are cumulative and in addition to any other remedy the non-defaulting party may have by agreement, at law, or in equity. Partial exercise of any right or remedy shall not limit or restrict any party's subsequent exercise of such right or remedy nor shall it restrict any party's contemporaneous or subsequent exercise of any other right or remedy.

8.1.4 **No Waiver.** No failure on the part of any party to exercise, and no delay in exercising, any right, power, or privilege under this Agreement shall operate as a waiver of that right or any other right. No modification or waiver of any provision of this Agreement shall be effective unless in writing, and then only in specific instance and for the purpose given. No notice or demand on any party shall entitle that party to any other notice or demand in other similar circumstances.

**ARTICLE 9
MISCELLANEOUS**

9.1 **Counterparts.** This Agreement may be executed in any number of counterparts, and any single counterpart or set of counterparts signed, in either case, by the Parties hereto shall constitute a full and original instrument, but all of which shall together constitute one and the same instrument.

9.2 **Survival.** All agreements, representations, and warranties shall survive the execution and delivery of this Agreement, any investigation at any time made by Prosper Portland or on its behalf and the making of the Prosper Portland Grant.

9.3 **Notice.** Any notice required or permitted under this Agreement shall be in writing and shall be deemed effective (1) when actually delivered in person, (2) one business day after deposit with a commercial courier service for "next day" delivery, (3) two business days after having been deposited in the United States mail as certified or registered mail, or (4) when transmitted by facsimile (answer back or receipt confirmed), addressed to the receiving Party as follows (with copies to any other Parties):

If to Prosper Portland:
Kimberly Branam
Portland Development Commission
222 NW 5th Avenue
Portland, OR 97209

If to the City:
Tom Rinehart
Office of Management and Finance
City of Portland
1120 SW 5th Avenue #1250
Portland, OR 97204

If to Metro:
Metro
Chief Operating Officer
600 NE Grand Avenue
Portland, OR 97232

9.4 **Successors and Assigns.** Neither the City nor Metro may assign this Agreement, in whole or in part, without the prior written consent of Prosper Portland. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective permitted successors and assigns.

9.5 **Subgrants.** Neither City nor Metro may subgrant any portion of the Prosper Portland Grant without the prior written consent of Prosper Portland, which consent shall be entirely within Prosper Portland's sole discretion and which is substantially limited by law. Notwithstanding an approved subgrant, City and Metro shall remain fully responsible for the proper use of all Prosper Portland Grant proceeds.

9.6 **Governing Law, Jurisdiction, Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon, without regard to its conflicts of law principles. Any legal action regarding this Agreement must be brought and conducted in the federal or state court, as appropriate, serving Multnomah County, Oregon, and the parties hereby consent to the jurisdiction and venue of such courts.

9.7 **Validity; Severability.** If any provision of this Agreement is held to be invalid, such event shall not affect, in any respect whatsoever, the validity of the remainder of this Agreement, and the remainder shall be construed without the invalid provision so as to carry out the intent of the Parties to the extent possible without the invalid provision.

9.8 **Time of Essence.** Time is of the essence of this Agreement.

9.9 **Relationship of the Parties.** Nothing contained in this Agreement or any acts of the Parties hereto shall be deemed or construed to create the relationship of principal and agent, or of partnership, or of joint venture or of any other association other than that of independent contracting parties.

9.10 **No Third Party Beneficiary Rights.** No person not a party to this Agreement is an intended beneficiary of this Agreement, and no person not a party to this Agreement shall have any right to enforce any term of this Agreement.

9.11 **Funding Acknowledgement / Signage.** Any oral reports made to neighborhood, business, or other civic organizations, as well as to any members of the press should acknowledge work being done is based on a partnership between City, Metro and Prosper Portland and, if appropriate, financed with funds from the “*the South Park Blocks Urban Renewal Area*”.

9.12 **Amendments.** This Agreement may only be amended by a written agreement signed by Prosper Portland, City, and Metro. Metro’s Chief Operating Officer, City’s Chief Administrative Officer and the Executive Director of Prosper Portland and their respective designees are authorized to take all actions necessary to implement the terms of this Agreement and may authorize non-material amendments of this Agreement without further action by Metro Council, City of Portland’s City Council and the Prosper Portland Board, respectively, so long as the amount of the Prosper Portland Grant is not increased.

9.13 **Merger Clause.** This Agreement contains the entire agreement between Prosper Portland, City, and Metro with respect to the subject matter thereof. It supersedes all prior written or oral discussions or agreements concerning work to be performed by either Party.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

City of Portland	Prosper Portland	Metro
By _____ Ted Wheeler, Mayor	By _____ Kimberly Branam, Executive Director	By _____ Andrew Scott, Interim Chief Operating Officer
APPROVED AS TO FORM: City	APPROVED AS TO FORM:	APPROVED AS TO FORM:
By _____ City Attorney	By _____ Prosper Portland Legal Counsel	By _____ Metro Attorney