

SECTION IV. ONGOING OPERATING, MAINTENANCE AND CAPITAL COSTS AND FUNDING

A. INTRODUCTION

This section of the Agreement is concerned with ongoing operating, maintenance, and capital costs and funding for the SVRT Extension, once it becomes operational.

B. GENERAL AGREEMENTS

1. The Parties agree that the ongoing operating, maintenance and capital costs caused by operation of the SVRT Extension, both those that occur within and/or outside Santa Clara County, are the financial responsibility of VTA.
2. It is the intention of both Parties to establish a system that will provide stable, reliable ongoing funding for future ongoing operating, maintenance and capital expenses.
3. Operation of the SVRT Extension and its impacts on the BART Core System will complement to some extent the existing system by creating a reverse commute. SVRT Extension ridership will also occur in the commute direction on the BART Core System. It is the intention of the Parties that operation of the SVRT Extension will not degrade the operation of the BART Core System nor cause deterioration of the District's ability to maintain BART Standards.
4. Ridership and other causal factors on the BART Core System and on the SVRT Extension may be used as a basis for apportioning responsibility for future operating or capital costs. Actual ridership will be determined based on BART's DAS as expanded to include the SVRT Extension.

C. OPERATING AND MAINTENANCE COSTS

Operating and maintenance costs for the SVRT Extension for which VTA is financially responsible will include the costs of operating and maintaining the SVRT Extension as an integral part of the BART system consistent with BART

service requirements and standards as set forth in Section VII.C. of this Agreement. More specifically, these costs will include the following:

1. Direct Costs

VTA will bear responsibility for the operating and maintenance costs directly attributable to the operation of the SVRT Extension.

2. Fixed Overhead Costs

VTA will also bear responsibility for a fully allocated share of BART's fixed overhead costs. VTA acknowledges that such costs are necessary to general operation of the system, the District and, ultimately, the provision of SVRT Extension service. BART acknowledges VTA's concern that not all fixed costs initially may be allocable and VTA acknowledges BART's concern that some costs initially assumed to be fixed may over time prove to be direct costs. BART and VTA will mutually work to review Fixed Overhead Costs periodically to insure that such costs are appropriately categorized.

3. Calculating Operating & Maintenance Costs

Once the SVRT Extension commences revenue service, a process and model described below in Section IV.F. and in Exhibit B. attached hereto and incorporated by reference as if fully set forth herein, will be used annually to determine the amount of VTA's financial responsibility for each of the costs described above.

4. Additional Operating & Maintenance Costs

Should VTA request BART to maintain performance standards on the SVRT Extension which are higher than BART Core System performance standards, such higher service standards and associated costs and revenues will be mutually agreed to in writing by the Parties in subsequent agreements.

D. CAPITAL COSTS

The Parties agree that VTA will bear financial responsibility for the ongoing cost of capital investments for the SVRT Extension and a proportional share of the cost of capital investments for the BART Core System. The purpose of these

investments is to keep the SVRT Extension and the BART Core System operating to BART's Operational Standards and Practices.

1. More specifically, capital investments VTA is financially responsible for will include investments that respond to items such as:
 - a. Ridership Increases on the BART Core System or SVRT Extension - Modifications, replacements, additions or improvements to increase or expand the passenger carrying or handling capacity of the SVRT Extension or the impacts of the SVRT Extension on the BART Core System. Examples include but are not limited to additional fare gates, stairways and/or revenue vehicles. Ridership attributed to the SVRT Extension will be monitored on an annual basis to identify any necessary investments.
 - b. Regulatory Changes - Modifications and replacements necessitated by changes in government or industry regulations or standards. Examples include but are not limited to changes in station signage to respond to new ADA requirements or modifications to maintenance facilities to respond to new OSHA requirements.
 - c. Technology Improvements or Changes - Modifications and/or replacements determined to be necessary or economically prudent to respond to improved or changing technology. Examples include but are not limited to new train control systems or equipment or conversion of fare gates to accept new types of payment (e.g., proximity cards).
 - d. Rehabilitation, Renovation, and Replacement - Investments to rehabilitate, restore, or replace facilities and equipment which are aging, worn, or destroyed through use. Examples include but are not limited to replacement of revenue vehicles which have exceeded their useful life, replacement

of worn fare collection equipment, or major repairs to a maintenance facility. This provision regarding aging and wear due to use will not apply for three (3) years following commencement of revenue service on the SVRT Extension nor to items which the Parties mutually agree were not in a state of good repair at the time revenue service commences on the SVRT Extension.

This category of expenses will also include investments to restore or replace facilities or equipment which are lost, destroyed or damaged by accidents, acts of God, or criminal acts. In such instances the first three (3) year limitation on VTA's financial responsibility will not apply. In instances of accidents or criminal acts caused by neither BART nor VTA, BART will make every reasonable legal effort to identify those responsible for the damage and compel them to pay for the repairs or replacements to restore the damaged equipment or facilities to their previous condition.

2. The cost of ongoing capital investments will be borne by VTA in proportion to the use, or change in use, of the facility, equipment and/or system by the SVRT Extension. The proportion of facility, equipment, and/or system usage will be determined with reference to the most appropriate measure or measures of use for the particular type of facility, equipment, or system. For example, an upgrade or replacement of BART's automated fare collection ("AFC") and DAS would likely be allocated on the basis of ridership. Track work would likely be allocated on the basis of car miles.
 - a. For large investments, the proportion of financial responsibility will be determined by the proportion of SVRT Extension use, or change in use, of the facility or equipment from the commencement of revenue service on

the SVRT Extension and extending over the projected useful life of the investment. As used herein, large investments are those costing \$5,000,000 or more escalated annually at the regional CPI growth rate from the effective date of this Agreement.

- b. For small investments, the proportion of financial responsibility will be determined by the proportion of SVRT Extension use, or change in use, of the facility or equipment during the most recent year for which statistics are available prior to the time the investment is made. As used herein, small investments are those costing less than \$5,000,000 escalated annually at the regional CPO growth rate from the effective date of this Agreement. The Parties recognize that in some instances VTA's proportionate share may be so small as to be considered de minimus, in which case the Parties will meet and discuss appropriate resolution of the responsibility.
 - c. For investments affecting an entire facility (i.e., a station or maintenance building) a single proportion of use for the overall facility will be developed and applied to all small investments within the facility.
3. Specific determination of the need for and the magnitude, cost and funding of capital investments under this Agreement will be made as follows:
- a. Starting in the year revenue service commences on the SVRT Extension and on an annual basis thereafter, BART will develop ten year Capital Improvement Program ("CIP") for the SVRT Extension. The SVRT Extension CIP will be developed as part of BART's overall BART CIP process and will be prepared in the same manner as the CIP is developed for the overall system. BART will consult

with VTA staff in the development of the CIP for the SVRT Extension.

- b. Pursuant to the CIP, BART and VTA will jointly develop an annual capital investment financial plan describing the scope, schedule, budget and funding plan for all capital investments to be initiated and/or continued within the next year. The BART and VTA General Managers will agree to the annual capital investment financial plan in writing.
 - c. Cost estimates for capital projects in the CIP and annual capital investment financial plans will be developed to the same level of detail as estimates BART typically develops for BART Core System capital projects. Project costs will include direct costs and fringes, and other additives (e.g., capital overhead allocations in accordance with the OMB Circular A-87 at the time cost estimates are developed) on a basis consistent with other BART projects associated with the BART Core System. Overhead allocations on capital projects will not duplicate overhead allocations included in the overhead component of operating and maintenance costs.
 - d. BART will establish priorities and schedules for implementation and coordination of all ongoing capital work on the SVRT Extension and the BART Core System.
4. VTA will have no financial responsibility for seismic upgrade on the BART Core System resulting from changes in seismic standards or design and construction practices which occur prior to the commencement of revenue service on the SVRT Extension. VTA will be supportive of BART's efforts to obtain regional, state, and/or federal funds for such purposes.

5. VTA's future responsibility for ongoing capital costs of extensions of the BART service area will be defined in subsequent agreements pertaining specifically to such extensions.

E. ANNUAL SOURCES OF REVENUE FOR OPERATING, MAINTENANCE, AND CAPITAL COSTS

The Parties agree that the annual sources of revenue described below will be credited by BART toward VTA's SVRT Extension ongoing operating, maintenance and capital financial responsibilities under Sections IV.C. and D above. The revenues will be credited by BART first to VTA's SVRT Extension operating and maintenance cost responsibilities, second to VTA's SVRT Extension capital reserve accounts, and then distributed to VTA all as more fully described in Section IV.F. of this Agreement.

1. Dedicated Revenue

- a. VTA will advance to BART for SVRT Extension operating, maintenance and capital costs as described in Sections IV.C. and D. of this Agreement a subsidy in the amount of \$12 million per quarter (\$48 million annually) in Fiscal Year 01/02 dollars. Such amount The "Subsidy") will be adjusted quarterly from December 31, 2001 at a rate equal to the growth rate of all taxable sales in Santa Clara County for the most recent quarter for which taxable sales data is available versus the same quarter of the prior year. VTA will remit the full amount of the adjusted quarterly payments to BART on the first day of the BART fiscal quarter in which BART service commences on the SVRT Extension. After that first quarterly payment, VTA will remit to BART the full amount of all subsequent quarterly payments on the first day of each BART fiscal quarter. Such adjusted payments will continue for the duration of this Agreement.

- b. VTA will dedicate to BART in payment of the Subsidy a revenue stream from new or existing ongoing tax source (s) sufficient to cover the Subsidy as adjusted and described in Section IV.E. 1.a. All documents pertaining to said dedication must be transmitted to BART at least thirty (30) days before their scheduled approval date by VTA, and must be approved in advance by BART. Said dedication must be fully effective prior to commencement of revenue service, or no later than January 1, 2009.
- c. In the event VTA does not fulfill its obligations as set forth in Section IV.E. 1 .b above on or before January 1, 2009, the automatic dedication of Transportation Development Act ("TDA") Funds described in Section IV.E. 1.d) shall be implemented immediately and automatically without any further action by VTA's Board of Directors.
- d. Within six (6) months of approving this Agreement, VTA's Board of Directors will dedicate to BART VTA's TDA Funds in the amount of the Subsidy described in Section IV.E. 1 .c. and will take all necessary steps to execute such dedication, such that it may be implemented immediately and automatically without further action by VTA's Board of Directors. All documents pertaining to said dedication must be mutually agreed to by both Parties and must be transmitted to BART at least thirty (30) calendar days before their scheduled approval date by VTA. The dedication of TDA funds described in this Section IV.E. 1.d will terminate if VTA satisfies the conditions in Section IV.E.1.b.

2. Fare Revenues

- a. Basic Fare Revenues - The responsibility and authority to establish fares for the SVRT Extension will reside

exclusively with BART. Such fares for the SVRT Extension will be consistent with those in effect on the BART Core System. Net fare revenue will be calculated as base fares paid by passengers using the SVRT Extension stations for entry and/or exit* as determined by BART's DAS, net of discounts and deductions taken. If possible, within the capabilities and limitations of DAS, BART will calculate discounts and deductions specifically for SVRT Extension basic fares. If not possible within said capabilities and limitations, discounts and deductions will be based on the systemwide average. All SVRT Extension basic fare revenues will be collected and accounted for and credited by BART, according to the process described in Section IV.F.

- b. Fare Surcharges and Premium Fares - At the request of VTA, BART will establish such fares at any of the stations on the SVRT Extension. Such fares will be collected, accounted for and credited by BART according to the process described in Section IV.F.

3. Ancillary Revenues

- a. Concession, Fiber Optic and Advertising Revenues - VTA may enter into agreements with vendors of goods and services on the SVRT Extension or into franchises for advertising in accordance with Section VIII.A.2.b.(2) of this Agreement. Alternatively, BART and VTA may jointly determine that in some instances it may be more beneficial for BART to enter into certain agreements and franchises for both the SVRT Extension and the BART Core System. Revenues from concession and fiber optic agreements and franchises will be allocated proportionately to the SVRT

Extension and the BART Core System on the basis of the most appropriate measure as agreed to by the Parties. All agreements and franchises described herein will provide for net revenues attributed to the SVRT Extension to be remitted directly to BART and will be accounted for and credited by BART according to the process described in Section IV.F.

- b. Parking Revenues - Parking revenues from parking facilities on the SVRT Extension will be collected by BART or its agents and accounted for and credited by BART according to the process described in Section IV.F.
- c. Parking Fines - All parking fines will be collected by BART or its agents at SVRT Extension stations and at parking facilities on the BART Core System for which VTA has paid a proportionate share of initial capital costs. Such fines will be accounted for and credited by BART according to the process described in Section IV.F.
- d. Other - Any investments on the BART Core System for which VTA has paid a proportional share of initial capital costs which generate ancillary revenue (e.g., parking) will be collected, accounted for, and credited by BART according to the process described in Section IV.F.

F. PROCESS FOR ALLOCATING ANNUAL REVENUES FOR OPERATING, MAINTENANCE, AND CAPITAL COSTS

The process for allocating the annual revenues under Section IV.E. to the operating, maintenance, and capital costs as described in Sections IV.C. and D. will be as follows:

- 1. On an annual basis, within sixty (60) days after BART's audited financial statements are approved by BART's Board of Directors, BART will calculate for the previous fiscal year the amount of SVRT Extension annual revenues received as described in Section IV.E. and

will also calculate the amount of such revenues to be credited toward SVRT Extension operating and maintenance costs for the previous fiscal year. SVRT Extension operating and maintenance costs will be calculated using the BART Operating and Maintenance (O&M) Cost Model as developed by Manuel Padron and Associates, or a similar model mutually agreed upon by BART and VTA, collectively referred to herein as the "Model". The process for using the Model to calculate operating and maintenance costs is described in Exhibit B. If BART and VTA differ on the service level inputs described in Step 2 of Exhibit B, they will mutually agree on an independent consultant to help resolve their differences.

2. The balance of revenues for the fiscal year, over and above revenue used to cover operations and maintenance costs, will be allocated to an interest bearing, segregated capital reserve fund. Starting with the first year of operation, the minimum capital reserve fund allocation will be 5% of the operating and maintenance costs, as determined in accordance with Section IV.F.1.above. The minimum capital reserve fund allocation will increase annually by an amount equal to 1% of the operating and maintenance cost to a level, not to exceed 20% of the operating and maintenance cost as shown in Exhibit C, attached hereto and incorporated by reference as if fully set forth herein. The maximum capital reserve fund allocation in any year will be 30% with the exception of circumstances as described in Section IV.F.5 below.
3. The capital reserve fund and all interest accruing to that fund will be used as a source of funding for ongoing capital costs under this Agreement. The CIP and annual capital investment financial plan as described in Section III. above will be used to determine the amounts from the capital reserve fund to be used for particular capital projects.
4. If revenues less operating and maintenance allocations in any fiscal year are insufficient to cover the required minimum capital contributions as described in Section IV.F.2. and Exhibit C, BART will invoice VTA

and VTA will remit the balance of funds needed to meet these commitments within sixty (60) days of being invoiced by BART.

5. If revenues less operating and maintenance allocations and capital reserve fund allocations in any fiscal year are more than the required maximum of 30% capital reserve fund allocation as determined in Exhibit C, BART will remit the excess revenues to VTA within sixty (60) days of such determination or, at VTA's option such excess revenues may be carried forward to cover VTA's capital reserve fund allocations in future years.

However, during the first fifteen 15 years of SVRT Extension operation, VTA will not receive revenues in excess of the required maximum 30% capital reserve fund allocations unless mutually agreed levels of revenue vehicles, shop capacity, and AFC equipment have been provided by VTA to support actual and projected ridership levels for the next five (5) year period. Such revenues will be allocated to an interest bearing, segregated excess capital reserve fund. The excess capital reserve fund will be used to fund investments in additional revenue vehicles, shop capacity, and AFC equipment. The excess capital reserve fund will be held until such time that sufficient funds for mutually agreed levels of revenue vehicles, shop, and AFC capacity have been committed.

6. Within sixty (60) days of BART Board of Directors' approval of BART audited financial statements, BART will supply VTA with a report on a) all revenues received under Section IV.E., b) allocations made to operating and maintenance costs, the capital reserve fund, and the excess capital reserve fund, c) earnings on the capital reserve and excess capital reserve funds, and d) funds drawn from the capital reserve fund and the excess capital reserve fund in the previous fiscal year.
7. VTA and BART will mutually agree on the method of determining when or if superfunding of the capital reserve exists and the appropriate remedies.

G. JOINT DEVELOPMENT REVENUES

1. VTA will be entitled to all joint development revenues from stations on the SVRT Extension net of any operating and capital expenses directly related to such development that may be incurred by BART.
2. BART will be entitled to all joint development revenues from stations in the BART District. VTA will not be charged for any capital expenses BART may incur in support of such development.

H. ADDITIONAL SOURCES OF FUNDING FOR CAPITAL COSTS

It is the Parties expectation that the capital reserve and excess capital reserve funds alone will not be sufficient to cover all capital costs of the SVRT Extension. The Parties agree that VTA will meet its remaining responsibility for SVRT Extension ongoing capital costs as described in Section IV.D. herein by obtaining or allocating grants, formula funds, or other funding from private, local, regional, state, and federal sources.

1. Formula funds, including but not limited to, Section 5307 Fixed Guideway, and Section 5309 Urbanized Area formula funds which VTA and/or Santa Clara County receive(s) because of the operation of the SVRT Extension in Santa Clara County will be allocated to, and used to meet VTA's financial responsibilities for ongoing capital costs.

I. FUTURE EXTRAORDINARY EVENTS

1. The Parties agree that VTA will have financial responsibility to contribute funds to resolve fixture Extraordinary Events. As used herein an "Extraordinary Event" consists of a) a major, unforeseen, unplanned, future event affecting the BART system; b) an event that would necessitate the expenditure of \$5,000,000 or more, escalated at the annually regional CPI growth rate from the effective date of this Agreement to restore or preserve the full operating capability of the

BART system; and c) an event that satisfies the requirements of Section IV.I.4.

2. Restoration or preservation of full SVRT Extension operating capability within Santa Clara County shall be entirely and exclusively the financial responsibility of VTA.
3. Because restoration of portions of the BART system located outside Santa Clara County may be necessary to provide service to passengers utilizing the SVRT Extension, Santa Clara County may be determined to have some financial responsibility to assist with restoration of BART system operating capability outside Santa Clara County. The portion of financial responsibility to be borne by VTA for restoration or preservation of some portion of the BART system located outside Santa Clara County will be in proportion to the use of the facility, equipment, or system by the SVRT Extension. The proportion of facility, equipment and/or system usage will be determined with reference to the most appropriate measure or measures for the particular type of facility, equipment, and/or system. For example, a replacement of BART's AFC and DAS would likely be allocated on the basis of ridership. Track work would likely be allocated on the basis of car miles.
4. The occurrence of an extraordinary event must be determined and declared by a declaration of emergency by the President of the United States or the Governor of the State of California or by the Boards of Directors of BART and VTA acting jointly. In the event of a disagreement regarding the occurrence of an extraordinary event, the matter will be resolved in accordance with the terms set forth in Section X, Dispute Resolution of this Agreement.
5. Once the occurrence of an extraordinary event is determined and declared and the share of VTA's financial responsibility determined, VTA will identify a funding source which can be drawn upon within ninety (90) days of the occurrence of the event. In the interim period, BART will have the right to fund expenses from either of the capital

reserve Finds as described above. If such resources are used, VTA will have responsibility for replenishing the reserves in the same time frame as BART would typically replenish such reserves following such an event.

J. PERIODIC REASSESSMENT

1. VTA and BART acknowledge that potential impacts, costs and benefits cannot be conclusively ascertained until actual operating experience is realized. After five (5) years of revenue service, either party can seek reassessment and adjustment of this section of the Agreement. Such reassessment can occur in the absence of renegotiating the entire Agreement.
2. Once either party gives notice of a desire to reassess, the Parties agree to meet and negotiate.
3. If the Parties mutually agree to adjustments, this section or the Agreement will be amended in writing accordingly.
4. If the Parties cannot agree, the matter will be resolved in accordance with the terms set forth in Section X, Dispute Resolution, of this Agreement.

* In negotiating this Agreement the Parties agreed that BART Core System riders who would be diverted from Core System stations to SVRT Extension stations upon the commencement of revenue service on the SVRT Extension will not be deducted from the total number of passengers using the SVRT Extension stations for entry and/or exit. At the same time, the Parties also agreed that BART will have no financial responsibility for any ongoing capital investments south of the WSX Project.