

INTERGOVERNMENTAL AGREEMENT
OR 99 Business (Salem Parkway) Tree Planting and Maintenance
City of Salem

THIS AGREEMENT is made and entered into by and between the STATE OF OREGON, acting by and through its Department of Transportation, hereinafter referred to as "ODOT" or "State;" and the CITY OF SALEM, acting by and through its elected officials, hereinafter referred to as "Agency," both herein referred to individually or collectively as "Party" or "Parties."

RECITALS

1. By the authority granted in Oregon Revised Statute (ORS) 190.110, 366.572 and 366.576, State may enter into cooperative agreements with counties, cities, and units of local government for the performance of work on certain types of maintenance or improvement projects with the allocation of costs on terms and conditions mutually agreeable to the contracting parties.
2. Oregon Route 99E Business (Salem Highway) is routed through the corporate limits of Agency and is part of the state highway system under the jurisdiction and control of the Oregon Transportation Commission (OTC). Within the Project area, OR 99E Business is designated as the Salem Parkway.

NOW THEREFORE, the premises being in general as stated in the foregoing Recitals, it is agreed by and between the Parties hereto as follows:

TERMS OF AGREEMENT

1. Under such authority, State and Agency agree to Agency planting sixty-seven (67) approved trees in designated locations on the north side of Salem Parkway between Hyacinth Street and Cherry Avenue, hereinafter referred to as "Project." The Project limits (marked Exhibit A) and planting locations (marked Exhibit B-1, B-2, B-3, B-4, B-5) are approximately as shown on the sketch maps attached hereto and by this reference made a part hereof.
2. State and Agency agree to collaborate on tree selection, for State approval, to substitute previously-approved tree species, if the approved species are unavailable at time of purchase.
3. The Project will be financed by Agency, and State is not contributing funds to the Project. The estimate for the total Project cost is \$26,800.00. Agency shall be responsible for all Project costs, including costs beyond the estimate.
4. This Agreement shall become effective on the date all required signatures are obtained and shall remain in effect for the purpose of ongoing maintenance responsibilities as delineated under Agency Obligations. The Project shall be

completed within one (1) calendar year following the date of final execution of this Agreement by both Parties.

AGENCY OBLIGATIONS

1. Agency shall plant the approved tree species in the designated locations, as follows:
 - a. For Segment 1, as shown on Exhibit B-1, the twenty (20) trees will be planted near the right-of-way fence, with the tree species to be planted designated by the corresponding number on the tree selection legend. The *ginkgo bilboa* "Presidential Gold" will only be the male species.
 - b. For Segment 2, as shown on Exhibit B-2, seven (7) of the twelve (12) trees on the southern portion of the segment will be planted near the right-of-way fence. The remaining five (5) trees on the northern portion of the segment will be centered in a planting strip between the right-of-way fence and the edge of the bike path. The tree species to be planted is designated by the corresponding number on the tree selection legend. The *ginkgo bilboa* "Presidential Gold" will only be the male species.
 - c. For Segment 3, as shown on Exhibit B-3, the two (2) trees will be centered in a planting strip between the right-of-way fence and the edge of the bike path. The tree species to be planted is designated by the corresponding number on the tree selection legend. The *ginkgo bilboa* "Presidential Gold" will only be the male species.
 - d. For Segment 4, as shown on Exhibit B-4, the thirteen (13) trees will be centered in a planting strip between the right-of-way fence and the edge of the bike path. The tree species to be planted is designated by the corresponding number on the tree selection legend. The *ginkgo bilboa* "Presidential Gold" will only be the male species.
 - e. For Segment 5, as shown on Exhibit B-5, the twenty (20) trees will be planted at least nine (9) feet from the edge of the bike path. The tree species to be planted is designated by the corresponding number on the tree selection legend. The *ginkgo bilboa* "Presidential Gold" will only be the male species.
2. Agency shall be responsible for the maintenance of all landscaping associated with maintenance of the Agency planted trees, which includes watering, pruning, removal and replacement of dead or dying trees, brush and weed removal, removal of fallen leaves, and other activities for the successful growth of the trees. If dead or dying trees are replaced, Agency shall request from State approval of replacement trees and any additional new plantings that are of a different species than that planted as part of the Project.
3. Agency shall contact State's District 3 Office two (2) days prior to the commencement of Project planting or maintenance activities that will or may impact travel lanes of

Salem Parkway. Lane restrictions will not be allowed unless Agency receives prior written permission from the District 3 Manager or designee.

4. Agency shall not enter into any subcontracts for any Project activities under this Agreement without obtaining prior written approval from State. Agency has obtained State permission to hire a contractor to maintain the Project only during the first three years of the Project. Agency retains all maintenance responsibilities under this Agreement.
5. Agency shall comply with all federal, state, and local laws, regulations, executive orders and ordinances applicable to the work under this Agreement, including, without limitation, the provisions of ORS 279B.220, 279B.225, 279B.230, 279B.235 and 279B.270 incorporated herein by reference and made a part hereof. Without limiting the generality of the foregoing, Agency expressly agrees to comply with (i) Title VI of Civil Rights Act of 1964; (ii) Title V and Section 504 of the Rehabilitation Act of 1973; (iii) the Americans with Disabilities Act of 1990 and ORS 659A.142; (iv) all regulations and administrative rules established pursuant to the foregoing laws; and (v) all other applicable requirements of federal and state civil rights and rehabilitation statutes, rules and regulations.
6. **Americans with Disabilities Act Compliance:**
 - a. Agency shall ensure that the services it provides under this Agreement (“Services”) comply with Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990 as amended (together, “ADA”). Agency shall use ODOT standards to assess whether the Services comply with the ADA, including, but not limited to, ODOT Maintenance Operational Notices MG 100-107 (“MG 100-107”), MG144-03 (“MG144-03”), and MG Activities-2 (“MG Activities-2”).
 - b. The scope of the services performed under this Agreement is limited to maintenance activities and shall not include alteration, upgrade, or construction of sidewalks or curb ramps, or installation of pedestrian activated signals.
 - c. Agency shall:
 - i. Promptly notify ODOT of completion of Services and allow ODOT to inspect completed Services located on or along a state highway for ADA compliance, prior to acceptance of such Services and release of any Agency contractor, and
 - ii. Ensure that temporary pedestrian routes are provided through or around any work zone as provided in MG Activities-2 and Chapters 1 and 5 of the Oregon Temporary Traffic Control Handbook 2011 (“OTTCH”). For Services included in MG Activities-2 “Situations” Paragraph 2, Agency shall provide ODOT with adequate information to allow ODOT to provide advance notice of any temporary pedestrian route to the public, people with disabilities, and disability organizations. The Parties acknowledge that

providing advance notice may not be possible in some such circumstances, including but not limited to, when Services are provided on an urgent or emergency basis, or where the nature and location of the Services are unknown until the beginning of the workers' shift.

d. ODOT Maintenance Operational Notices MG 100-107, MG144-03, MG Activities-2, and the OTTCH are incorporated herein by reference.

i. The OTTCH is available at

<http://www.oregon.gov/ODOT/Engineering/Pages/OTTCH.aspx>

Copies of MG 100-107, MG144-03, and MG Activities-2 are available for inspection at the ODOT District 3 Office located at 885 Airport Road SE, Building P, Salem, Oregon, during regular business hours, or at the following locations online:

• MG 100-107:

https://www.oregon.gov/ODOT/Engineering/DOCS_ADA/MG100-107_w-diagram.pdf

• MG 144-03:

https://www.oregon.gov/ODOT/Engineering/DOCS_ADA/MG144-03.pdf

• MG Activities-2:

https://www.oregon.gov/ODOT/Engineering/Doc_TechnicalGuidance/MG-Activities-2.pdf

ii. All references to MG 100-107, MG144-03, and MG Activities-2 in this Section refer to the version of the policy in place at the time the Services are performed.

7. Agency shall perform the service under this Agreement as an independent contractor and shall be exclusively responsible for all costs and expenses related to its employment of individuals to perform the work under this Agreement including, but not limited to, retirement contributions, workers compensation, unemployment taxes, and state and federal income tax withholdings.

8. All employers, including Agency, that employ subject workers who work under this Agreement in the State of Oregon shall comply with ORS [656.017](#) and provide the required Workers' Compensation coverage unless such employers are exempt under ORS [656.126](#). Employers Liability insurance with coverage limits of not less than \$500,000 must be included. Agency shall ensure that each of its contractors complies with these requirements.

9. Agency shall require its contractor(s) and subcontractor(s) that are not units of local government as defined in ORS 190.003, if any, to indemnify, defend, save and hold harmless the State of Oregon, Oregon Transportation Commission and its members, Department of Transportation and its officers, employees and agents from and

against any and all claims, actions, liabilities, damages, losses, or expenses, including attorneys' fees, arising from a tort, as now or hereafter defined in ORS 30.260, caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of Agency's contractor or any of the officers, agents, employees or subcontractors of the contractor ("Claims"). It is the specific intention of the Parties that State shall, in all instances, except for Claims arising solely from the negligent or willful acts or omissions of the State, be indemnified by the contractor and subcontractor from and against any and all Claims.

10. Any such indemnification shall also provide that neither Agency's contractor and subcontractor nor any attorney engaged by Agency's contractor and subcontractor shall defend any claim in the name of the State of Oregon or any agency of the State of Oregon, nor purport to act as legal representative of the State of Oregon or any of its agencies, without the prior written consent of the Oregon Attorney General. The State of Oregon may, at anytime at its election assume its own defense and settlement in the event that it determines that Agency's contractor is prohibited from defending the State of Oregon, or that Agency's contractor is not adequately defending the State of Oregon's interests, or that an important governmental principle is at issue or that it is in the best interests of the State of Oregon to do so. The State of Oregon reserves all rights to pursue claims it may have against Agency's contractor if the State of Oregon elects to assume its own defense.
11. Agency acknowledges and agrees that State, the Oregon Secretary of State's Office, the federal government, and their duly authorized representatives shall have access to the books, documents, papers, and records of Agency which are directly pertinent to the specific Agreement for the purpose of making audit, examination, excerpts, and transcripts for a period of six (6) years after completion of Project. Copies of applicable records shall be made available upon request. Payment for costs of copies is reimbursable by State.
12. Agency certifies and represents that the individual(s) signing this Agreement has been authorized to enter into and execute this Agreement on behalf of Agency, under the direction or approval of its governing body, commission, board, officers, members or representatives, and to legally bind Agency.
13. Agency's Contact for this Project is Jennifer Kellar, City of Salem, 1460 20th Street SE, Building 14, Salem, Oregon 97302-1209; 503-588-6336; jkellar@cityofsalem.net, or assigned designee upon individual's absence. Agency shall notify the other Party in writing of any contact information changes during the term of this Agreement.

STATE OBLIGATIONS

1. State is not contributing funds or providing maintenance for the Project.
2. State grants authority to Agency to enter upon State right of way for the purpose of landscaping and maintenance as set forth in this Agreement.

3. State's Contact for this Project is Steve Kubishta, Transportation Maintenance Manager, District 3, 885 Airport Road SE, Building P, Salem, Oregon 97301; 503-986-2643; steve.b.kubishta@odot.state.or.us, or assigned designee upon individual's absence. State shall notify the other Party in writing of any contact information changes during the term of this Agreement.

GENERAL PROVISIONS

1. This Agreement may be terminated by mutual written consent of both Parties.
2. State may terminate this Agreement effective upon delivery of written notice to Agency, or at such later date as may be established by State, under any of the following conditions:
 - a. If Agency fails to provide services called for by this Agreement within the time specified herein or any extension thereof.
 - b. If Agency fails to perform any of the other provisions of this Agreement, or so fails to pursue the work as to endanger performance of this Agreement in accordance with its terms, and after receipt of written notice from State fails to correct such failures within ten (10) days or such longer period as State may authorize.
 - c. If federal or state laws, regulations or guidelines are modified or interpreted in such a way that either the work under this Agreement is prohibited or State is prohibited from paying for such work from the planned funding source.
3. Any termination of this Agreement shall not prejudice any rights or obligations accrued to the Parties prior to termination.
4. If any third party makes any claim or brings any action, suit or proceeding alleging a tort as now or hereafter defined in ORS 30.260 ("Third Party Claim") against State or Agency with respect to which the other Party may have liability, the notified Party must promptly notify the other Party in writing of the Third Party Claim and deliver to the other Party a copy of the claim, process, and all legal pleadings with respect to the Third Party Claim. Each Party is entitled to participate in the defense of a Third Party Claim, and to defend a Third Party Claim with counsel of its own choosing. Receipt by a Party of the notice and copies required in this paragraph and meaningful opportunity for the Party to participate in the investigation, defense and settlement of the Third Party Claim with counsel of its own choosing are conditions precedent to that Party's liability with respect to the Third Party Claim.
5. With respect to a Third Party Claim for which State is jointly liable with Agency (or would be if joined in the Third Party Claim), State shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by Agency in such proportion as

is appropriate to reflect the relative fault of State on the one hand and of Agency on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of State on the one hand and of Agency on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. State's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if State had sole liability in the proceeding.

6. With respect to a Third Party Claim for which Agency is jointly liable with State (or would be if joined in the Third Party Claim), Agency shall contribute to the amount of expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred and paid or payable by State in such proportion as is appropriate to reflect the relative fault of Agency on the one hand and of State on the other hand in connection with the events which resulted in such expenses, judgments, fines or settlement amounts, as well as any other relevant equitable considerations. The relative fault of Agency on the one hand and of State on the other hand shall be determined by reference to, among other things, the Parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such expenses, judgments, fines or settlement amounts. Agency's contribution amount in any instance is capped to the same extent it would have been capped under Oregon law, including the Oregon Tort Claims Act, ORS 30.260 to 30.300, if it had sole liability in the proceeding.
7. The Parties shall attempt in good faith to resolve any dispute arising out of this Agreement. In addition, the Parties may agree to utilize a jointly selected mediator or arbitrator (for non-binding arbitration) to resolve the dispute short of litigation.
8. This Agreement may be executed in several counterparts (facsimile or otherwise) all of which when taken together shall constitute one agreement binding on all Parties, notwithstanding that all Parties are not signatories to the same counterpart. Each copy of this Agreement so executed shall constitute an original.
9. This Agreement and attached exhibits constitute the entire agreement between the Parties on the subject matter hereof. There are no understandings, agreements, or representations, oral or written, not specified herein regarding this Agreement. No waiver, consent, modification or change of terms of this Agreement shall bind either Party unless in writing and signed by both Parties and all necessary approvals have been obtained. Such waiver, consent, modification or change, if made, shall be effective only in the specific instance and for the specific purpose given. The failure of State to enforce any provision of this Agreement shall not constitute a waiver by State of that or any other provision.

THE PARTIES, by execution of this Agreement, hereby acknowledge that their signing representatives have read this Agreement, understand it, and agree to be bound by its terms and conditions.

CITY OF SALEM, by and through its
elected officials

By _____
City Manager

Date _____

STATE OF OREGON, by and through
its Department of Transportation

By _____
Region 2 Manager

Date _____

LEGAL REVIEW APPROVAL
(If required in Agency's process)

By _____
Agency Legal Counsel

Date _____

APPROVAL RECOMMENDED

By _____
State Traffic-Roadway Engineer

Date _____

By _____
Maintenance Operations Manager

Date _____

By _____
District 3 Manager

Date _____

Agency Contact:

Jennifer Kellar
City of Salem
1460 20th Street SE, Building 14
Salem, OR 97302-1209
503-588-6336
jkellar@cityofsalem.net

State Contact:

Steve Kubishta, District 3
Transportation Maintenance Manager
885 Airport Road SE, Building P
Salem, OR 97301
503-986-2643
steve.b.kubishta@odot.state.or.us

APPROVED AS TO LEGAL SUFFICIENCY

By _____
Assistant Attorney General

Date _____

EXHIBIT A – Project Location Map

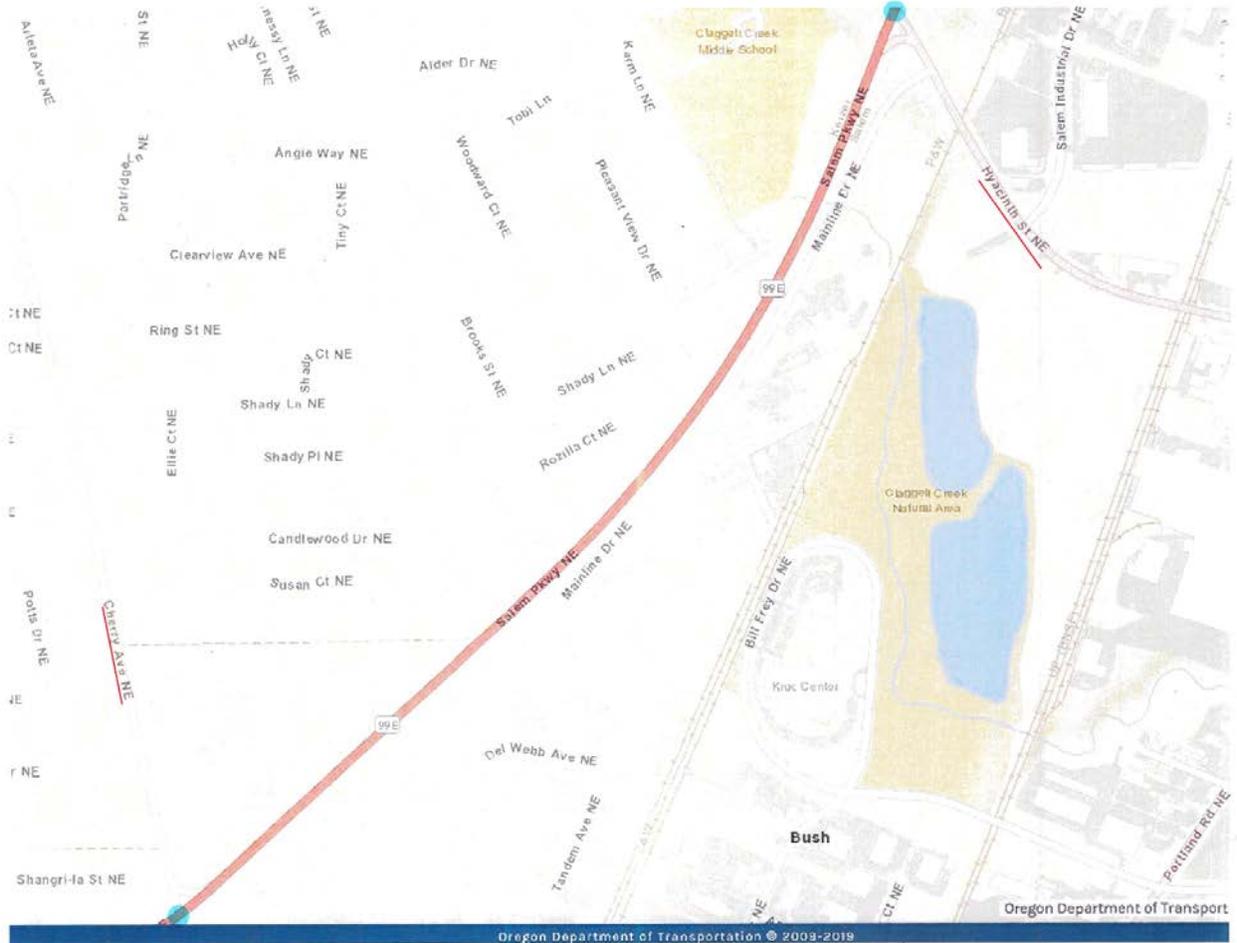


EXHIBIT B-1



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EXHIBIT B-2

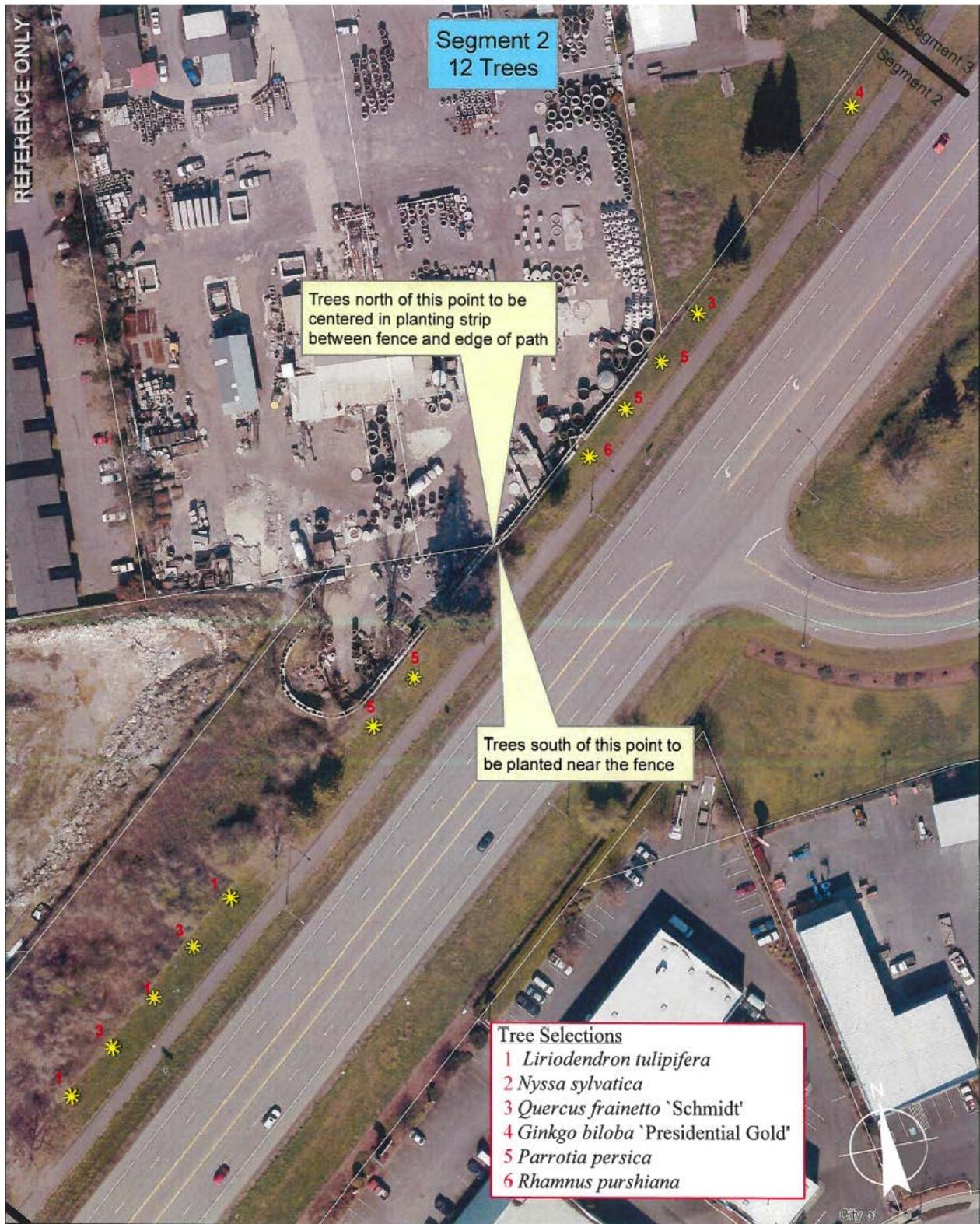


EXHIBIT B-3



EXHIBIT B-4



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EXHIBIT B-5

