FIRST AMENDED AND RESTATED INTERGOVERNMENTAL AGREEMENT BETWEEN THE CITY OF ASPEN (CITY) AND THE ROARING FORK TRANSPORTATION AUTHORITY (RFTA) TO COMPLETE THE RUBEY PARK TRANSIT CENTER (RUBEY PARK) DEVELOPMENT PROJECT WITH ONE CONSTRUCTION CONTRACT MANAGED BY RFTA

This **FIRST AMENDED AND RESTATED** INTERGOVERNMENTAL AGREEMENT (hereinafter "Agreement") is made and entered into this 22 day of June, 2015, by and between the CITY OF ASPEN, COLORADO, a Colorado Home Rule Municipality, acting by and through its City Council (hereinafter "City") and the ROARING FORK TRANSPORTATION AUTHORITY (hereinafter "RFTA"), a regional transportation authority created pursuant to Section 43-4-601, et seq., C.R.S., as amended, whose address is 2037 Wulfsohn Road, Glenwood Springs, Colorado 81611. City and RFTA are also sometimes referred to herein as a "Party" or the "Parties."

WITNESSETH:

WHEREAS, The City and RFTA entered into an *Intergovernmental Agreement* (hereinafter "IGA") on February 9, 2015 establishing and acknowledging funding for the improvements to Rubey Park Transit Center Project (hereinafter "Rubey Park" or the "Project").

WHEREAS, The City and RFTA desire to amend the IGA as result of the EOTC meeting on March 5, 2015 when the EOTC approved $1,000,000 in additional funding and the City agreed to provide $418,000 in additional funding

WHEREAS, the Project went out for a formal Invitation to Bid after approval of the Intergovernmental Agreement and received the low bid on March 3, 2015

WHEREAS, the Project received an acceptable construction bid equal to or less than the proposed funding committments

NOW, THEREFORE, in consideration of the mutual benefits to be derived hereby, the City and RFTA amend and restate the IGA of February 9, 2015, and said Agreement shall replace and supersede all prior agreements of any kind pertaining to the Rubey Park Transit Center renovation project, and the previous IGA is hereby cancelled and of no further effect and to read as follows:

RECITALS

1. City and RFTA desire to complete improvements to the City owned Rubey Park Transit Center located at 450 East Durant Street, City of Aspen budgeted at 9,318,000 million dollars. A plan of Rubey Park improvements to be completed is attached as Exhibit A, and is sometimes referred to herein as "the Project."

2. City and RFTA acknowledge that funding for the Project is anticipated to be accomplished as follows:

RFTA- CDOT Faster Grant	$1,000,000
RFTA- FHWA FLAP Grant	$2,000,000
City- Appropriation from EOTC	$4,900,000
City- Appropriation	$ 918,000
RFTA Appropriation	$ 500,000
Total Funding	**$9,318,000**

3. City and RFTA agree that construction of the improvements will not commence until the entirety of funding is appropriated.

4. City and RFTA agree to coordinate the funding and completion of the construction of Rubey Park improvements by means of a single construction contract, the management of which shall be delegated to RFTA.

5. RFTA agrees to assume the primary responsibility for bidding and managing the construction of the Project and for ensuring a functional facility at the conclusion of the Project on or before November 25, 2015 with the Final completion of the Project, which will entail minor fit and finish, to be accomplished by the spring of 2016 or as soon as possible thereafter as provided for herein.

6. City shall deliver CDOT/FHWA compliant design documents for bidding purposes no later than January 30, 2015. Timely receipt of the design documents by RFTA is critical to the successful delivery of the Project as defined in this agreement. City shall also assume full responsibility for Errors and Omissions in the delivered Plans, Specifications, Reports and Estimates provided by the City's design professionals.

7. City and RFTA each acknowledge that the discovery or occurrence of extraordinary unforeseen site conditions after the start of construction may delay completion of the Project for an unknown period of time and could also affect the overall cost of the Project.

AGREEMENT

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements set forth herein, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, City and RFTA agree as follows.

1. **PROJECT FUNDING AND CASHFLOW**

   a. RFTA is the grantee of a $1,000,000 FASTER grant from CDOT and a $2,000,000 Federal Land Access Program (FLAP) grant from the FHWA Central Federal Lands for a total of $3,000,000, which will be used as funding for the Project. The $3,000,000 in grant funds will be used exclusively for construction costs of Rubey Park. Construction costs do not include Consultant Construction Management fees associated with the Project as defined in the FHWA and CDOT grants.

   b. RFTA shall contribute $500,000 of its funds to the construction project and provide construction oversight of the Contractor and Consultant Construction Management professionals.

   c. The City will provide up to $5,818,000 in funding consisting of a combination of Elected Officials Transportation Committee (EOTC) funding of $4,900,000 and $918,000 of City funds.

   d. Commencement of the Project and this Agreement are expressly contingent on receipt of an acceptable construction bid equal to or less than the proposed Funding Commitments of $9,318,000 ("Funding"). If the apparent low bid for the construction of the Project exceeds the Funding, the commencement of the Project shall be held in abeyance until the City provides, in writing, a mutually acceptable decision regarding one of the of the following actions no later than March 15, 2015:

      i. The authority to use its Owner's Project Contingencies to cover the deficit and proceed with the Project;

      ii. A supplemental appropriation from the City Council or EOTC to cover the deficit and proceed with the Project;

      iii. Authorization of RFTA to re-solicit bids for construction of the Project; or

      iv. Authorization of RFTA to request additional time to expend the CDOT/FHWA grants and/or to reduce the scope of the Project to reflect the budget.

e. In all cases of these actions, there shall be a written addendum to this Agreement executed by each party.

f. If the apparent low bid for the construction of the Project is less than the Funding, the City's construction contingency shall be increased by the amount less than budgeted. Should the completed construction costs be less than the budgeted amount, the project commitments shall be adjusted in accordance with a formula approved by the City Transportation Director.

g. RFTA shall not execute the Construction Contract until such time as the City's Director of Transportation certifies that the City has sufficient funds for the Project and that City will pay for all costs incurred that are attributable to the Rubey Park construction and Consultant Construction Management contracts per the funding arrangements specified in Section 1 of the Recitals above, and that the City will comply in all respects with its obligations as Owner of the Facility.

h. RFTA will not incur costs associated with the FASTER or FLAP grants until it receives an executed grant agreement from both CDOT and FHWA and written authorization from CDOT and FHWA that will enable RFTA to be reimbursed for costs incurred in connection with the anticipated FASTER and FLAP grants, prior to execution of the grant agreements.

i. FASTER and FLAP grants will require a 20% ($750,000) total local match, making the amount of funding encumbered by the FASTER and FLAP grants a total of $3,750,000. It is understood by the City and RFTA that until FHWA and CDOT authorize RFTA to incur construction costs associated with the FLAP and FASTER grants, RFTA also cannot expend the local match value of the Construction Contract.

j. All payment applications or invoices from RFTA for expenses incurred shall be routed through the City's Director of Transportation, or the Director of Transportation's designee, for approval on a monthly basis, which shall not be unreasonably withheld. Approved payments to RFTA shall be made within 30 days of the City's receipt of payment applications or invoices from RFTA.

k. City shall provide a total of up to $5,818,000 in funding ($4,900,000 in EOTC funding and $918,000 in City funding) to pay for the construction and associated professional services of the Project. At the onset of the Construction Contract, RFTA will begin submitting Contractor invoices to CDOT/FHWA for reimbursement as they are received from the Contractor. At that time, RFTA will only invoice the City for the 20% local share of the FASTER/FLAP grant expenses, until all grant funds have been expended or to a maximum allowable amount as defined by either FHWA/CDOT.

l. If all of the FASTER/FLAP grant funds have been expended before Rubey Park is completed, RFTA will resume submitting the entire amount of Contractor invoices to the City until its overall contribution of $5,818,000 is met. If at any point during the life of the Project the City authorizes additional funds, RFTA will continue to submit Contractor and Consultant invoices up to the newly authorized amount.

   i. RFTA will expend its $500,000 contribution to the Project as the last $500,000 in construction costs. This shall ensure that RFTA does not become the cash flow entity during the life of the Project due to delayed payments from CDOT/FHWA or their retainage of funds by those parties until the Project's final completion.

m. If additional funds for construction, in excess of Funding, are required to complete the Rubey Park project, the funds may be either fully appropriated by the City or the City may request to be reimbursed by an entity such as EOTC for any additional expenditures. RFTA shall not be deemed to be a guarantor of the cost of the project.

   i. Overall project expense reports and forecasts will be presented to and discussed by the Construction Management Team (Team) as often as practicable, but at least on a monthly basis, during the life of the construction project. RFTA will not incur costs for the project in excess of Funding without prior written authorization from the City. If, for any reason, it appears that the cost of completing construction of Rubey Park could exceed Funding, RFTA will notify the City and request written instructions as to whether it should continue or discontinue constructing mutually agreed upon nonessential portions of the Project.

n. Grant Agreements with CDOT/FHWA do not allow for additional funding requests to make up Project Funding shortfalls and RFTA will not solicit supplementary Funding from them.

o. Consultant Construction Management (Design Assistance, Public Information, Inspections, Testing, Commissioning, and Certifications) costs shall be assigned directly to Project costs based upon the level of effort required by the funding agencies, which costs shall be identified and allocated in the overall project construction budget that is reliant on Funding. In other words, the Funding shall cover all hard and soft costs related to completing the Project.

p. All indirect and direct costs, other than Consultant Construction Management costs provided in paragraph N. above that are assigned to the Project in the Project Budget, which are above the contributions made from FHWA, CDOT and RFTA, shall be paid by City. It is understood that the Elected Officials Transportation Committee (EOTC) could provide a substantial portion of the funding difference; however, for purposes of this Agreement any funding provided by the EOTC for the Project shall be disbursed to RFTA by the City.

2. **PROJECT BID AND AWARD**

a. RFTA will solicit competitive bids from potential contractors for constructing the Project using the RFTA/CDOT/FHWA procurement procedures. RFTA shall structure the Invitation for Bids and resulting contract to ensure segregation of all project costs between paying entities as directed in the grant agreements.

b. The Rubey Park Construction Contract will not exceed Funding unless there is an additional appropriation from the City Council or the EOTC.

c. The City's Director of Transportation shall review the bids and provide written concurrence that the City's funding will be sufficient to defray all agreed upon costs associated with construction of the project, construction management by consultants and all required permits. Any additional costs beyond the Funding shall be paid for by City or the EOTC.

d. No construction contract shall be awarded and entered into with regard to the construction of Rubey Park without the written approval of the City's Director of Transportation, which approval shall not be unreasonably withheld.

e. Contingent upon the City's written authorization, and subject to RFTA's satisfaction that it meets RFTA/CDOT/FHWA requirements, RFTA shall execute the construction contract with the selected construction contractor (hereinafter, "Contractor") with the goal of obtaining substantial completion of the Project by the November 25, 2015 construction season, with final completion by June 2016, or as soon as practicable thereafter.

f. RFTA shall not proceed with the Construction Contract if the cost is anticipated to exceed Funding, unless otherwise directed in writing by the City's Director of Transportation, with assurances that funds have been appropriated and that the extra cost will be paid for by the City or the EOTC. RFTA shall not be deemed to be a guarantor of the cost of the project.

3. **PROJECT CONSTRUCTION**

a. The Project shall be constructed under the management and supervision of RFTA, with direct input from the City as the owner.

b. RFTA, directly and/or through an engineering consultant, shall manage the construction of the Project and ensure that design specifications are followed, testing protocols are met, and the Project is constructed in accordance with the engineered plans and specifications provided and approved by City that meet City/CDOT/FHWA standards.

c. RFTA will manage all required utility relocations during construction, all of which are located on City rights of way, property or easements.

d. RFTA shall pay the Contractor as appropriate for work satisfactorily performed pursuant to the Construction Contract and shall request reimbursement from City, EOTC though the City, CDOT and FHWA by means of monthly or periodic pay applications or invoices.

e. City shall:
   i. obtain all required permits, including permits for all required utility relocations, from the City's Community Development and Building Departments;
   ii. obtain and/or provide all Rights of Way (ROW) clearances;
   iii. attend and provide input at weekly construction meetings with RFTA; and
   iv. provide Design Support Services, including making periodic site visits as needed, by the Architect and Engineers of Record retained by City.

f. All consultant services provided prior to award of a construction contract (i.e. Engineering, Environmental Clearances, ROW services, Utility Engineering) shall be paid for by City as incurred.

g. The City's Director of Transportation or a designee of the City's Director of Transportation shall be available when needed to evaluate and approve proposed modifications to the approved design and to authorize any necessary change orders no later than five (5) working days after presentation by RFTA and before RFTA issues any change orders to the Contractor.

h. City shall be responsible for and manage and approve in writing the design, commissioning, coordination, permits, testing and inspections, cost allocation, approval of change orders, and funding of its portion of the construction of the Project.

i. All required utility relocations on the site that will occur during the life of the Project and the utility costs associated from those independent entities shall be promptly paid by the City as they are incurred.

4. PROJECT COLLABORATION AND CHANGE ORDER APPROVAL

a. City and RFTA shall cooperate in forming a collaborative Construction Management Team with FHWA and CDOT (hereinafter "Team") that will meet at least weekly throughout the life of the Project to address construction issues and changes as they develop throughout construction.

b. Project design modifications and other project decisions will be made on a consensus basis by the Team.

c. All change orders with regard to Rubey Park must be approved by the City's Director of Transportation or his designee prior to execution by RFTA and the Contractor.

d. City's Director of Transportation, or his designee, shall be available on short notice to discuss critical issues and provide necessary authorization for changes that otherwise might result in costly time delays and financial impacts for the Facility.

5. **PROJECT COMPLETION AND FINAL PAYMENTS**

a. Project acceptance and final payment for the construction of the Project shall be approved by RFTA, FHWA, CDOT, and the City's Director of Transportation. Once approved by the Team, any outstanding balances to RFTA for work performed by the Contractor and Consultants, will be made by the City within 30 days of receiving a pay application or invoice from RFTA, once the City's Director of Transportation, or his designee, approves the final acceptance.

b. Prior to final acceptance of the Project, City and RFTA shall execute a Lease for RFTA use of the property.

c. Upon final completion and reconciliation of the Project, the City and RFTA shall be responsible for all maintenance of Rubey Park in accordance with the Lease.

d. Upon final completion of the Project the responsibility for ongoing utility costs shall be paid in accordance with the Lease.

6. **PUBLIC OUTREACH**

a. City and RFTA shall coordinate a robust public outreach campaign to provide the public with project information before Project initiation

b. City and RFTA will provide regular public updates throughout the Project.

c. City shall operate as the lead entity and may augment this effort with Consultants; however all public outreach information shall be approved by the City and RFTA point of contact individuals before it is made public.

d. The single point of contact for City and RFTA responsible for this coordinated effort and public information are: Ben Ludlow, RFTA Project Manager and Lynn Rumbaugh, City of Aspen Transportation Manager

7. **HOLD HARMLESS**

To the extent permitted by law, City and RFTA shall each defend and hold harmless the other from and against any injury, claim or damage to any third party arising out of or in connection with each party's operations under this Agreement. Nothing in this Agreement, however, is intended or shall be construed to constitute a waiver on the part of RFTA or the City of the provisions of Section 24-10-101, *et seq.*, Colorado Revised Statutes, commonly known as the Colorado Governmental Immunity Act.

8. **CHOICE OF LAW**

This Agreement and every related document shall be governed and construed in accordance with the laws of the State of Colorado.

9. **ATTORNEYS' FEES**

In the event the interpretation or enforcement of this Agreement should ever become the subject of litigation, arbitration or mediation between RFTA (or its successors and assigns) and City, the substantially prevailing party shall be awarded its reasonable costs and attorneys' fees and costs incurred in connection therewith.

10. **NOTICES**

All notices or other communication required or permitted under this Agreement shall be in writing, shall be personally delivered or sent by certified mail, postage prepaid and return receipt requested, and such notices shall be deemed given when received. Notices shall be directed to the following addresses:

To City of Aspen:
City of Aspen Transportation Department
Attn: Director of Transportation
130 S. Galena St
Aspen, CO 81611

With a copy to:
City Attorney
130 S. Galena St
Aspen, CO 81611

To RFTA:
Roaring Fork Transportation Authority

Attn: Rubey Park Project Manager
1340 Main Street
Carbondale, CO 81623

With a copy to:
Roaring Fork Transportation Authority
Attn: CEO
2307 Wulfsohn Road
Glenwood Springs, CO 81601

Notice of any change of address shall be given by written notice in the manner detailed in this paragraph.

1. **PERFORMANCE**
   The Parties agree to perform any and all acts, without limitation, as may be reasonably necessary to fully effectuate the intent and purposes of this Agreement. Whenever any action is required or permitted to be taken by the Parties under the terms of this Agreement, such action may be taken and performed by any authorized officer, director, agent or other representative of the Parties.

2. **NO THIRD PARTY BENEFICIARIES.**
   It is the intent of the Parties that no third party beneficiary interest is created in this Agreement. The Parties hereto are not presently aware of any actions by them or any of their authorized representatives which would form the basis for interpretation construing a different intent and expressly disclaim any such acts or actions.

3. **NO WAIVER OF GOVERNMENTAL IMMUNITY.**
   RFTA and the City, their directors, officials, officers, agents and employees are relying upon and do not waive or abrogate, or intend to waive or abrogate by any provision of this Agreement the monetary limitations or any other rights immunities or protections afforded by the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as it may be amended from time to time.

4. **BREACH OR TERMINATION.**
   In the event of a breach of any provision of this Agreement, written notice of the breach, which shall include a reasonably specific description of what constitutes the breach and what corrective action or cure is required by the party giving the notice, shall be given by the non-breaching party. If within ten (10) days after receipt of such written notice, the breaching party has not cured the breach, of if cure cannot be reasonably accomplished within ten (10) days, the breaching party has not commenced what curative measures are possible and is not prosecuting the same to timely completion, the non-breaching party may, in addition to such contractual remedies as may be available, ask a court of competent jurisdiction for appropriate injunctive relief.

5. **DISPUTES.**
Any unresolved dispute arising under this Agreement which is not resolved by agreement shall be referred to the RFTA CEO and City Manager, who shall promptly confer with each other and members of the their Boards, and who shall reduce their decisions to writing and mail or otherwise furnish a copy thereof to the Parties. The decision of the RFTA CEO and the City Manager shall be final and conclusive unless, within five (5) days from the date of receipt of such decision or lack thereof, either Party furnishes to the other a written notice of appeal.

In the event of an appeal, such dispute shall then be referred to the RFTA Board and the City Council who shall meet in joint session within ten (10) calendar days thereof. If no resolution is then achieved, the dispute may be settled by appropriate legal proceedings, or, if the Parties mutually agree, through mediation, arbitration or administrative process. Pending any binding arbitration or administrative decision, appeal or judgment referred to in this paragraph or the settlement of any dispute arising under this Agreement, RFTA shall nonetheless proceed diligently with the performance of this Agreement as directed by the RFTA.

6. **ENTIRE AGREEMENT.**
This Agreement constitutes the entire and complete agreement of the Parties in regard to the subject matter herein. No promise or undertaking has been made by any party, and no understanding exists with respect to the transaction herein contemplated except as expressly set forth herein. All prior and contemporaneous negotiations and understandings between the Parties are embodied and merged into this Agreement.

7. **SEVERABILITY.**
If any term or provision of this Agreement shall be held to be invalid or unenforceable, the remaining terms and provisions of this Agreement shall continue to exist and shall be valid and enforceable to the fullest extent permitted by law.

8. **AMENDMENT.**
This Agreement may only be amended by a written document executed by the City and RFTA, or its successors and assigns.

9. **VENUE.**
Venue for any legal action relating to this Agreement shall be in the District Court in and for the County of Pitkin, Colorado.

10. **APPROPRIATION.**
All financial obligations of RFTA or the City under and pursuant to this Agreement are subject to prior appropriations of monies expressly made by RFTA or the City for the purpose of this Agreement.

11. **NO PERSONAL LIABILITY.**
No elected official, director, officer, agent or employee of RFTA or the City shall be charged personally or held contractually liable by or to the other party under any term or provision of this Agreement or because of any breach thereof or because of its or their execution, approval or attempted execution of this Agreement.

12. **PARAGRAPH HEADINGS.**
The paragraph headings in this Agreement have been inserted solely for convenience of reference and are not a part of this instrument and shall have no effect upon construction or interpretation.

13. **WAIVER.**
No failure or delay of the Parties to exercise any power or right under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise of any such right or power, or any abandonment or discontinuance of steps to enforce such right or power, preclude any other or further exercise thereof or the exercise of any other right or power. Nothing contained in this Agreement shall constitute a waiver of any right, power or authority of the Parties hereto, except as expressly provided for herein.

14. **COUNTERPARTS.**
This Agreement may be executed in duplicate original counterparts, each of which shall constitute an original, but all of which shall constitute one and the same document.

15. **AUTHORITY TO EXECUTE.**
By signing this Agreement, the Parties acknowledge and represent to one another that all procedures necessary to validly contract and execute this Agreement have been performed and that the persons signing for each party have been duly authorized to do so. The Parties acknowledge and agree that no representation or inducement has been made regarding the rights set forth in this Agreement that is not expressly set forth herein.

16. **FORCE MAJEURE.**
RFTA shall not be in violation of this Agreement by failure to perform any obligation express or implied hereunder by causes beyond RFTA's control, including, without limitation, acts of God, boycotts, strikes, embargoes, unforeseen shortages of labor, fuel, or other items essential to provide service, acts of public enemy, riots, rebellions, accidents, vandalism, or governmental laws, regulations, or approvals. RFTA shall, as soon as reasonably practicable, but in no event later than ten (10) days of any such failure, potential delay or default, notify the City in writing of the causes of the failure, potential delay or default and the facts relating thereto.

17. **INDEPENDENT CONTRACTOR.**

RFTA's relationship to City and the performance of this Agreement is that of an independent contractor. RFTA personnel performing services under this Agreement shall at all times be under RFTA's exclusive direction and control and shall be employees of RFTA and not employees of City. RFTA shall have and exercise complete control over the supervision of its employees.

Nothing in this Agreement shall be construed to convey any title or interest to City in RFTA facilities or equipment; nor shall anything in this Agreement be construed to convey any title or interest in City facilities or equipment to RFTA; nor shall RFTA and City be deemed to have created a partnership or joint venture.

IN WITNESS WHEREOF, the Parties have hereunto set their hands and seals as of the day and year first above written.

ASPEN CITY COUNCIL
OF PITKIN COUNTY, COLORADO

By: _____
Steven Skadron, Mayor

ATTEST:

By: _____
Linda Manning, Clerk

APPROVED AS TO FORM:

by: _____
James R. True, City Attorney

ROARING FORK TRANSPORTATION AUTHORITY

By: _____
Stacey Patch-Bernot, Chair, RFTA Board of Directors

ATTEST:

By: _____
Edna Aden, RFTA Secretary

APPROVED AS TO FORM:

by: _____
Paul J. Taddune, General Counsel, RFTA