

STAFF REPORT FOR CALENDAR ITEM NO.: 8.6
FOR THE MEETING OF: December 13, 2018

TRANSBAY JOINT POWERS AUTHORITY

BRIEF DESCRIPTION:

Authorize the Executive Director to finalize negotiations for and execute an intergovernmental agreement with the San Francisco Department of Building Inspection to provide plan review and field inspection services for tenant improvements.

EXPLANATION:

Pursuant to California Public Resources Code section 5027.1, TJPA has primary jurisdiction with respect to all matters concerning the financing, design, development, construction, and operation of the Transbay Transit Center Program (“Transbay Program”).

As contemplated by the Joint Powers Agreement establishing TJPA, however, various City and County of San Francisco (“City”) departments have provided contracted services in support of the Transbay Program, including the Arts Commission, City Attorney, Municipal Transportation Agency, Planning Department, and Public Works.

TJPA is the authorized public agency with jurisdiction and authority for code application and enforcement at the new transit center. But over the last more than nine years, TJPA has sought and received the Department of Building Inspection’s (DBI’s) contracted assistance in ensuring the project is designed and constructed in a manner meeting governing building codes. This approach has been used by other similarly situated public agencies such as the San Francisco Port, the San Francisco Public Utilities Commission, and the Treasure Island Development Authority.

In 2009, DBI and TJPA entered an Intergovernmental Agreement pursuant to which DBI provides plan review and field inspection services for design and construction of the Transbay Program. Under this agreement, DBI has reviewed architectural, structural, mechanical, plumbing, and electrical plans for the new transit center; provided field inspections; and made recommendations whether the project meets the requirements for temporary and final certificates of occupancy. On November 30, 2018, DBI notified TJPA that it is terminating the 2009 agreement. In October 2018, at DBI’s request, DBI and TJPA entered a separate Intergovernmental Agreement under which DBI is reviewing plans for and conducting inspections of TJPA’s contractor’s proposed repairs to address the cracks in the structural support beams. Under both agreements, TJPA compensates DBI for the services it provides.

TJPA is planning for retail/commercial leasing by private entities, primarily planned to be located on the ground level, second level, and park level of the new transit center. Such retail/commercial leasing will require the retail tenants to engage in certain construction of tenant improvements, which may include base building improvements, in the new transit center, and TJPA may also wish to engage in similar type modifications to its facilities in the future (collectively, “Tenant Improvements”). TJPA desires DBI to provide contracted plan review and

field inspection services for these Tenant Improvements to assist TJPA in ensuring that they are designed and constructed in a manner meeting governing building codes.

DBI has expressed its willingness to provide the desired services. Attached is a draft form of agreement. While it is subject to further review and comment by DBI, TJPA expects that the final form of agreement between the agencies would contain the following key business terms:

- As with the earlier agreements, DBI would provide plan review and field inspection services but would not issue permits to the retail tenants (instead, DBI would issue letters confirming the plans' compliance with code) and would not issue temporary or final certificates of occupancy (instead, DBI would issue letters memorializing its determination that the improvements meet the requirements for such certificates).
- In contrast with the earlier agreements, the retail tenants, rather than TJPA, would directly interface with DBI, submitting the application for project review, presenting their plans, requesting inspections of their construction, and responding to comments and requests for information. DBI generally would apply its customary procedures to plan review and field inspection.
- In contrast with the earlier agreements, the retail tenants, rather than TJPA, would pay DBI's fees and costs related to the plan review and field inspection services, based on fee schedules and payment terms and procedures in the San Francisco Building Code, and in a manner consistent with customary DBI permitting practices.
- Similar to TJPA's 2018 agreement with DBI but in contrast with the 2009 agreement, TJPA would indemnify DBI for claims arising out of DBI's performance of the services except to the extent the claim is caused by the active negligence or willful misconduct of DBI.

In the interest of moving forward with plan review of the retail tenant improvements as expeditiously as possible, staff requests authority to complete negotiations.

RECOMMENDATION:

Staff recommends that the Board of Directors authorize the Executive Director to finalize negotiations for and execute an intergovernmental agreement with the San Francisco Department of Building Inspection to provide plan review and field inspection services for tenant improvements based on the attached agreement, but subject to modifications as he finds reasonable, prudent, and consistent with TJPA's obligations.

ENCLOSURES:

1. Resolution
2. Intergovernmental Agreement (draft)

**TRANSBAY JOINT POWERS AUTHORITY
BOARD OF DIRECTORS**

Resolution No. _____

WHEREAS, The Transbay Joint Powers Authority (TJPA) is a joint powers agency organized and existing under the laws of the State of California to design, build, and operate the Transbay Transit Center Program (Transbay Program); and

WHEREAS, TJPA's construction of the new transit center is nearing completion and TJPA is activating one of the elements of the Transbay Program—commercial/retail leasing by private entities primarily planned located on the ground, second, and park levels. Such retail/commercial leasing will require the retail tenants to engage in certain construction of tenant improvements, which may include base building improvements, in the new transit center, and TJPA may also wish to engage in similar type modifications to its facilities in the future (collectively, "Tenant Improvements"); and

WHEREAS, TJPA is the authorized public agency with jurisdiction and authority for code application and enforcement at the new transit center. But over the last more than nine years, TJPA has sought and received the San Francisco Department of Building Inspection's (DBI's) contracted assistance in ensuring the project is designed and constructed in a manner meeting governing building codes. TJPA desires DBI to provide contracted plan review and field inspection services for the Tenant Improvements; and

WHEREAS, DBI has expressed its willingness to provide the desired plan review and field inspection services related to the Tenant Improvements; and

WHEREAS, At DBI's request, staff has been negotiating terms of a new intergovernmental agreement with DBI for plan review and field inspection services related to the Tenant Improvements and desires to finalize such agreement so that the retail tenants can move forward with plan review of the proposed improvements as expeditiously as possible; now, therefore, be it

RESOLVED, That the TJPA Board authorizes the Executive Director to finalize negotiations and execute an intergovernmental agreement with the Department of Building Inspection for plan review and field inspection services for tenant improvements, consistent with the key business terms outlined in the report to the Board, and based on the form of agreement presented to the Board but subject to such modifications as the Executive Director finds reasonable, prudent, and consistent with TJPA's obligations; and be it

FURTHER RESOLVED, That the TJPA Board authorizes the Executive Director to take all actions and execute all documents as he deems reasonably necessary to implement and effectuate the above approval.

I hereby certify that the foregoing resolution was adopted by the Transbay Joint Powers Authority Board of Directors at its meeting of December 13, 2018.

Secretary, Transbay Joint Powers Authority

INTERGOVERNMENTAL AGREEMENT

between

**CITY AND COUNTY OF SAN FRANCISCO,
DEPARTMENT OF BUILDING INSPECTION**

and

TRANSBAY JOINT POWERS AUTHORITY

for

Plan Review and Field Inspections Services for Tenant Improvements

This Intergovernmental Agreement (“Agreement”) is made this ____ day of December, 2018, by and between the City and County of San Francisco through its Department of Building Inspection (“DBI”) and the Transbay Joint Powers Authority (“TJPA”).

Recitals

WHEREAS, Pursuant to California Public Resources Code section 5027.1, TJPA has primary jurisdiction with respect to all matters concerning the financing, design, development, construction, and operation of the Transbay Transit Center Program (“Transbay Program”); and

WHEREAS, As part of the Transbay Program, TJPA is planning for retail/commercial leasing by private entities (“Retail Tenants”), primarily planned to be located on the ground level, second level, and park level of the new transit center; and

WHEREAS, Such retail/commercial leasing will require Retail Tenants to engage in certain design and construction of tenant improvements, which may include base building improvements, in the new transit center, and TJPA may also wish to engage in similar type modifications to its facilities in the future (collectively, “Tenant Improvements”); and

WHEREAS, TJPA is the authorized public agency with jurisdiction and authority for building code compliance for the Tenant Improvements. TJPA requests, however, that DBI provide certain plan review and field inspection services for the Tenant Improvements to assist TJPA in ensuring that the Tenant Improvements are designed and constructed in a manner meeting governing building codes; and

WHEREAS, DBI is willing to provide such services to TJPA under the terms set forth herein.

Now, THEREFORE, the parties agree as follows:

Article 1 Scope of Work

DBI, acting solely in an advisory capacity and with no jurisdictional authority, shall provide the following services:

A. Project Tracking

TJPA has divided currently contemplated retail/commercial spaces within the Transbay Program into suites (“Suites”). Attachment A hereto contains the current listing of Suite numbers and depiction of Suite spaces; TJPA may update the attachment via written notice to DBI. DBI shall utilize reference to the Suite numbers for purposes of application intake, review/processing, assessment of fees for services, and other similar activities hereunder.

B. Plan Review

DBI shall provide plan review services for the Tenant Improvements (“Plan Review”). As part of Plan Review, DBI shall check the following types of plans as appropriate for the project: architectural (including ADA accessibility, civil, and landscaping); structural; mechanical; plumbing; and electrical.

To initiate Plan Review, each applicant (which is typically expected to be a Retail Tenant or its agents) shall complete an Application for Project Review (or such other form as DBI deems appropriate) at DBI’s Plan Review Services (“PRS”) counter (1660 Mission Street, 2nd Floor) (or such other location as specified by DBI), for record-keeping purposes only.

Plan Review shall be conducted in a manner consistent with customary DBI plan review practices, which may include deferred submittals, except as specified herein.

At completion of Plan Review, plans and specifications shall be returned to the applicant stamped with the DBI approval stamp and job card, as is customary, and accompanied by a letter of compliance, memorializing DBI’s determination that the plans and specifications for the Tenant Improvements appear to be in conformance with governing codes. Attachment B hereto contains the template form of letter; the template may be amended by mutual agreement of the parties. DBI may retain one set of plans and specifications for record-keeping and referencing purposes.

DBI will not issue any permits; DBI’s determinations hereunder are based on DBI review for code compliance only.

C. Field Inspection

DBI shall provide field inspection services for the Tenant Improvements (“Field Inspection”). As part of Field Inspection, DBI shall inspect the following elements as appropriate for the project: building; mechanical; plumbing; and electrical.

Field Inspection shall be conducted in a manner consistent with customary DBI inspection practices, except as specified herein.

After partial completion and at the appropriate time that a temporary certificate of occupancy would otherwise be issued under the building code, DBI shall issue a letter memorializing its determination that the Tenant Improvements appear to meet the requirements for a temporary certificate of occupancy. At final completion and at the appropriate time that a final certificate of occupancy would otherwise be issued under the building code, DBI shall issue a letter memorializing its determination that the Tenant Improvements appear to meet the requirements for a final certificate of occupancy. The letters shall be in the form of Attachment B.

DBI will not issue any certificates of occupancy; DBI's determinations hereunder are based on DBI review for code compliance only.

D. San Francisco Fire Department; Other Departments

DBI shall coordinate San Francisco Fire Department (SFFD) involvement in the Plan Review and Field Inspection process, as necessary, and in a manner consistent with customary DBI permitting practices, including fee collection.

San Francisco General Plan and Planning Code, and associated Planning Department review, are not applicable to the Tenant Improvements; in particular, DBI does not need to include CP-ZOC in the plan review routing process.

Each applicant shall be responsible for seeking plan review, field inspection, and other permitting by any state or City departments and entities other than DBI and SFFD, as necessary.

E. Designated Representative

DBI shall designate a representative responsible for managing the Plan Review and Field Inspection process contemplated hereunder.

F. Appeals

Appeals of DBI and TJPA determinations relative to Plan Review and Field Inspection shall be made to TJPA and responded to by TJPA according to TJPA administrative procedures; the appeal procedures under the San Francisco Building Code are not applicable to the Tenant Improvements.

Article 2 Applicable Code

The requirements set forth in the latest edition of the California Building, Mechanical, Electric, Plumbing, Green Building, and Energy Codes as adopted by the City (collectively, "CBC") shall apply to DBI's Plan Review and Field Inspection hereunder. DBI shall apply the latest edition of the CBC as of the time the applicant files an Application for Project Review.

Article 3 Term of the Agreement

The term of this Agreement shall commence on the date both parties have fully-executed the Agreement and extend to the date when this Agreement is terminated in writing. Either TJPA or DBI may terminate this Agreement upon 14 days prior written notice. Upon termination of this Agreement, DBI shall cease performing services.

Article 4 Compensation

Each applicant (which is typically expected to be a Retail Tenant or its agents) shall compensate DBI in accordance with the fee schedules and payment terms and procedures in the San Francisco Building Code, and in a manner consistent with customary DBI permitting practices. No deferred payment shall be permitted for the Tenant Improvements; all fees must be paid per fee schedule. DBI may withhold issuance of letters of compliance/determination for a project until the applicant or its agents pay all outstanding fees.

Article 5 Indemnification

TJPA shall indemnify and hold harmless City and its officers, agents and employees from, and, if requested, shall defend them from and against any and all claims, demands, losses, damages, costs, expenses, and liability (legal, contractual, or otherwise) arising from or in any way connected with any: (i) injury to or death of a person, including employees of City or TJPA; or (ii) loss of or damage to property (collectively, "Claims"), arising out of the City's performance of the services under this Agreement, except to the extent that such indemnity is void or otherwise unenforceable under applicable law, and except to the extent such Claim is caused in whole or in part by the active negligence or willful misconduct of City in which case TJPA shall indemnify City for the full proportion of the Claim that is not as a result of the City's active negligence or willful misconduct. The foregoing indemnity shall include, without limitation, reasonable fees of attorneys, consultants and experts and related costs and City's costs of investigating any claims against the City.

In addition to TJPA's obligation to indemnify City, TJPA specifically acknowledges and agrees that it has an immediate and independent obligation to defend City from any claim which actually or potentially falls within this indemnification provision, even if the allegations are or may be groundless, false or fraudulent, which obligation arises at the time such claim is tendered to TJPA by City and continues at all times thereafter.

TJPA shall indemnify and hold City harmless from all loss and liability, including attorneys' fees, court costs and all other litigation expenses for any infringement of the patent rights, copyright, trade secret or any other proprietary right or trademark, and all other intellectual property claims of any person or persons arising directly or indirectly from City's or its agent's or its employee's performance of services hereunder, except to the extent that such indemnity is void or otherwise unenforceable under applicable law, and except where such Claim is caused in whole or in part by the active negligence or willful misconduct of City.

Article 6 Liability of the Parties

IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER, REGARDLESS OF WHETHER ANY CLAIM IS BASED ON CONTRACT OR TORT, FOR ANY DAMAGES OR LOSS OR SPECIAL, CONSEQUENTIAL, INDIRECT OR INCIDENTAL DAMAGES, INCLUDING, BUT NOT LIMITED TO, LOST REVENUE, ARISING OUT OF OR IN CONNECTION WITH PERFORMANCE OF THIS AGREEMENT OR THE SERVICES PERFORMED BY DBI IN CONNECTION WITH THIS AGREEMENT.

Article 7 Rights and Duties upon Termination or Expiration.

This Article 7 and Articles 4, 5, 6, and 8 shall survive termination or expiration of this Agreement.

Article 8 General Provisions

A. Notices to the Parties. Unless otherwise indicated in this Agreement, all written communications sent by the parties may be by U.S. mail or e-mail, and shall be addressed as follows:

To CITY: Tom C. Hui, S.E., C.B.O.
Director
City and County of San Francisco
Department of Building Inspection
1660 Mission Street
San Francisco, CA 94103
Email: Tom.Hui@sfgov.org

To TJPA: Mark Zabaneh
Executive Director
Transbay Joint Powers Authority
201 Mission Street, #2100
San Francisco, CA 94105
Email: MZabaneh@tjpa.org

Either Party may change the address to which notice is to be sent by giving written notice thereof to the other Party. If email notification is used, the sender must specify a receipt notice.

B. Sunshine Ordinance. TJPA acknowledges that this Agreement and all records related to its formation, City's and TJPA's performance of obligations hereunder, and applicants' payments to City are subject to the California Public Records Act, (California Government Code §6250 et. seq.), and the San Francisco Sunshine Ordinance, (San Francisco Administrative Code Chapter 67). Such records are subject to public inspection and copying unless exempt from disclosure under federal, state or local law.

C. Modification of this Agreement. This Agreement may not be modified, nor may compliance with any of its terms be waived, except by written instrument.

D. Dispute Resolution Procedure. The parties will attempt in good faith to resolve any dispute or controversy arising out of or relating to the performance of services under this Agreement. If agreed by both parties in writing, disputes may be resolved by a mutually agreed-upon alternative dispute resolution process. If the parties do not mutually agree to an alternative dispute resolution process or such efforts do not resolve the dispute, then either Party may pursue any remedy available under California law. Neither party will be entitled to legal fees or costs for matters resolved under this section.

E. Government Code Claim Requirement. No suit for money or damages may be brought against City or TJPA until a written claim therefor has been presented to and rejected by the entity presented with the claim in conformity with the provisions of San Francisco Administrative Code Chapter 10 and California Government Code Section 900, et seq. Nothing set forth in this Agreement shall operate to toll, waive or excuse a party's compliance with the California Government Code Claim requirements set forth in San Francisco Administrative Code Chapter 10 and California Government Code Section 900, et seq.

F. Agreement Made in California; Venue. The formation, interpretation and performance of this Agreement shall be governed by the laws of the State of California. Venue for all litigation relative to the formation, interpretation and performance of this Agreement shall be in San Francisco.

G. Construction. All paragraph captions are for reference only and shall not be considered in construing this Agreement.

H. Entire Agreement. This contract sets forth the entire Agreement between the parties relative to the Tenant Improvements, and supersedes all other oral or written provisions relative to the Tenant Improvements. Notwithstanding the foregoing, to the extent the parties have entered other prior agreements, such agreements remain in full force and effect pursuant to their terms.

I. Compliance with Laws. TJPA shall keep itself fully informed of the City's Charter, codes, ordinances and duly adopted rules and regulations of the City and of all state, and federal laws in any manner affecting the performance of this Agreement, and must at all times comply with such local codes, ordinances, and regulations and all applicable laws as they may be amended from time to time.

J. Severability. Should the application of any provision of this Agreement to any particular facts or circumstances be found by a court of competent jurisdiction to be invalid or unenforceable, then (a) the validity of other provisions of this Agreement shall not be affected or impaired thereby, and (b) such provision shall be enforced to the maximum extent possible so as to effect the intent of the parties and shall be reformed without further action by the parties to the extent necessary to make such provision valid and enforceable.

K. Cooperative Drafting. This Agreement has been drafted through a cooperative effort of City and TJPA, and both parties have had an opportunity to have the Agreement reviewed and revised by legal counsel. No Party shall be considered the drafter of this Agreement, and no

presumption or rule that an ambiguity shall be construed against the Party drafting the clause shall apply to the interpretation or enforcement of this Agreement.

DRAFT

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective on the day first mentioned above.

CITY
Department of Building Inspection

TJPA

Tom C. Hui, S.E., CBO
Director

Mark Zabaneh
Executive Director

Approved as to Form:

Approved as to Form:

Dennis J. Herrera
City Attorney

SHUTE, MIHALY & WEINBERGER LLP

By: _____
Randy Parent
Deputy City Attorney

By: _____
Deborah L. Miller

Transbay Joint Powers Authority
Board of Directors

Resolution No. _____
Adopted: _____
Attest:

Secretary, TJPA Board

DRAFT

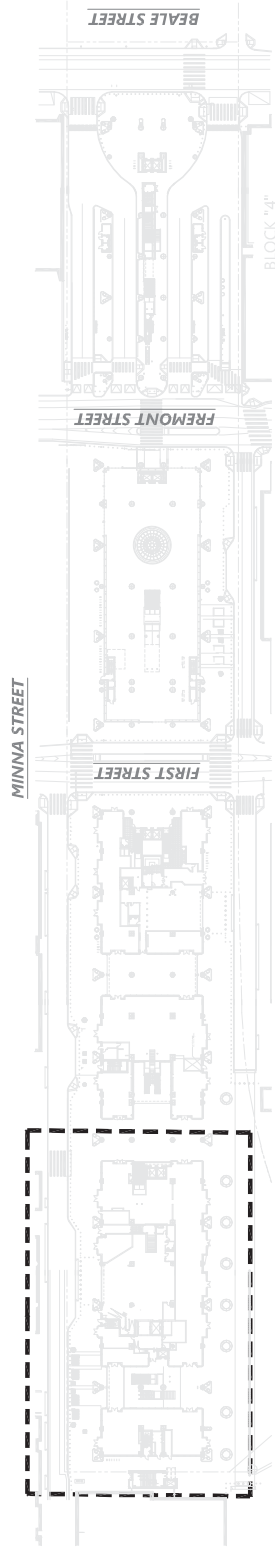
Attachment A

Suites

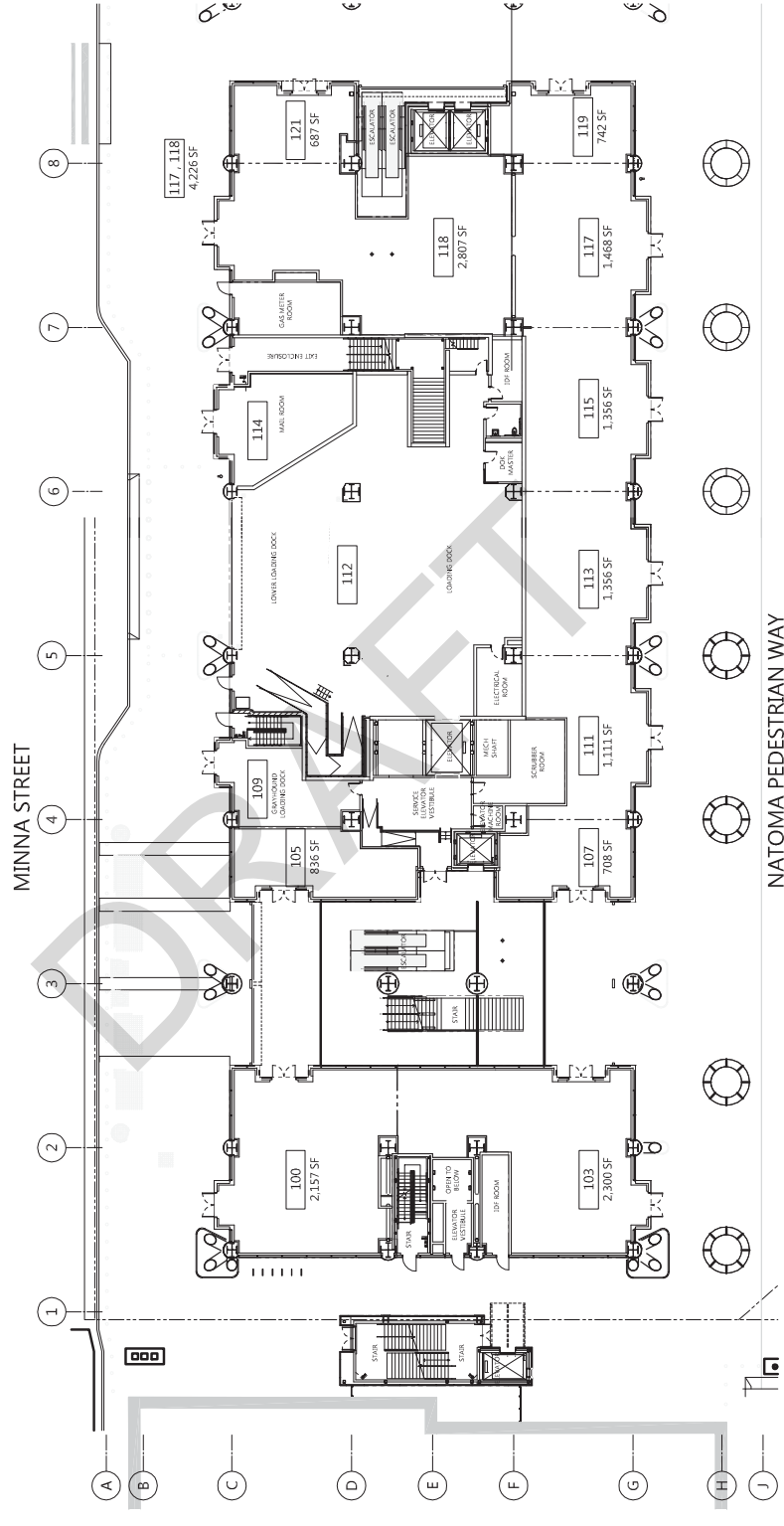
Transit center suite numbers:

100, 103, 105, 107, 109, 111, 112, 113, 114, 115, 117, 118, 119, 121, 123, 125, 127, 129, 131, 133, 135, 137, 139, 141, 143, 145, 147, 200, 204, 206, 207, 208, 212, 216, 218, 220, 222, 224, 226, 232, P1 and P2

DRAFT



KEY PLAN



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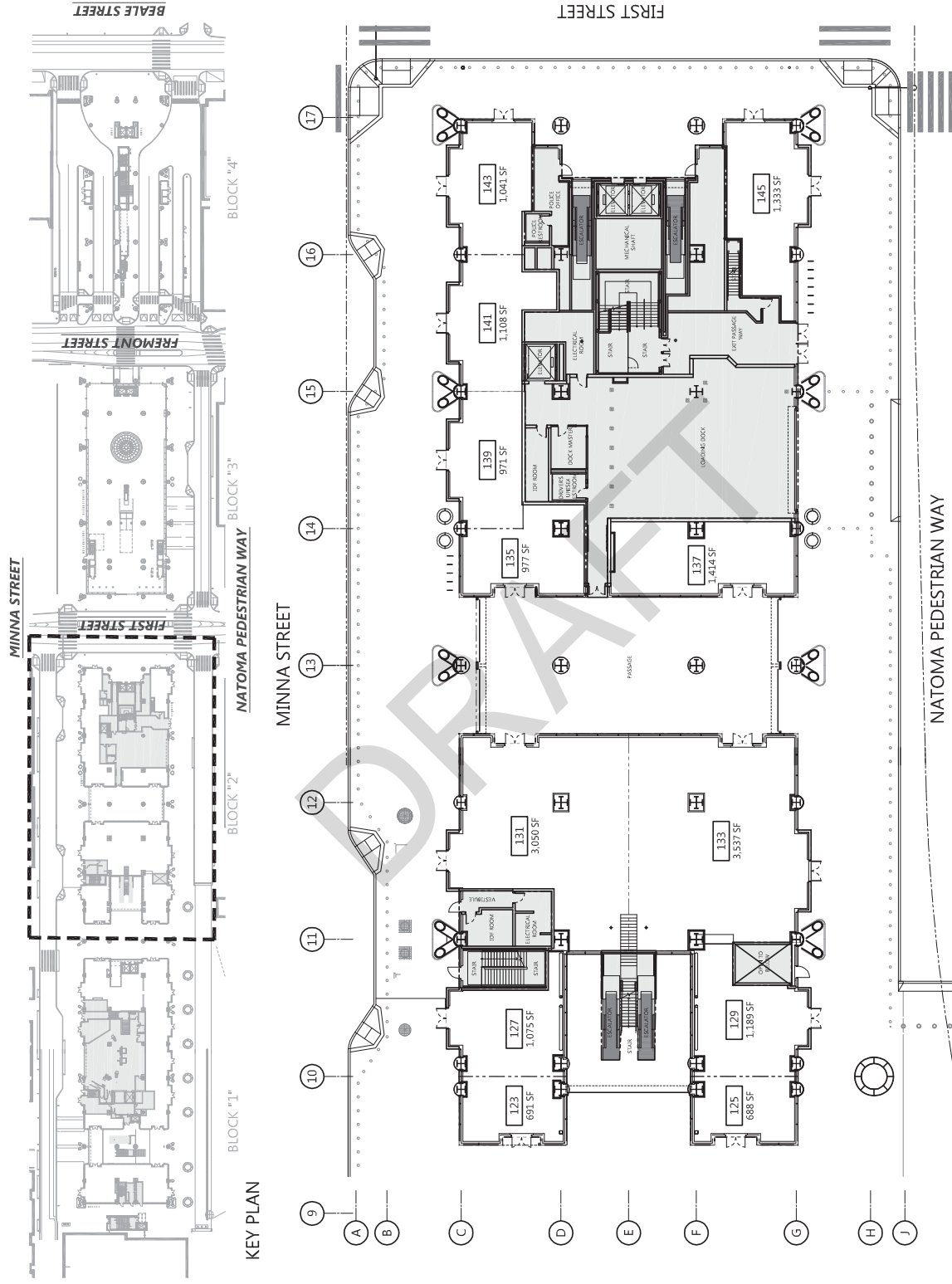
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- LEASE SPACE OUTLINE

GROUND FLOOR PLAN, BLOCK "1"

salesforce TRANSIT CENTER

TENANT SPACE: 103 | AREA: 2,300 S.F. | DATE: OCT 13, 2017





KEY PLAN

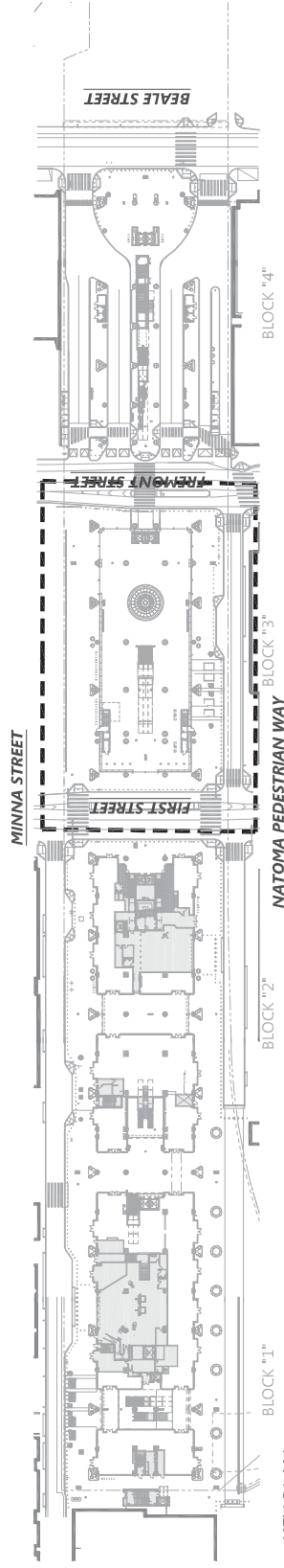
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- LEASE SPACE OUTLINE

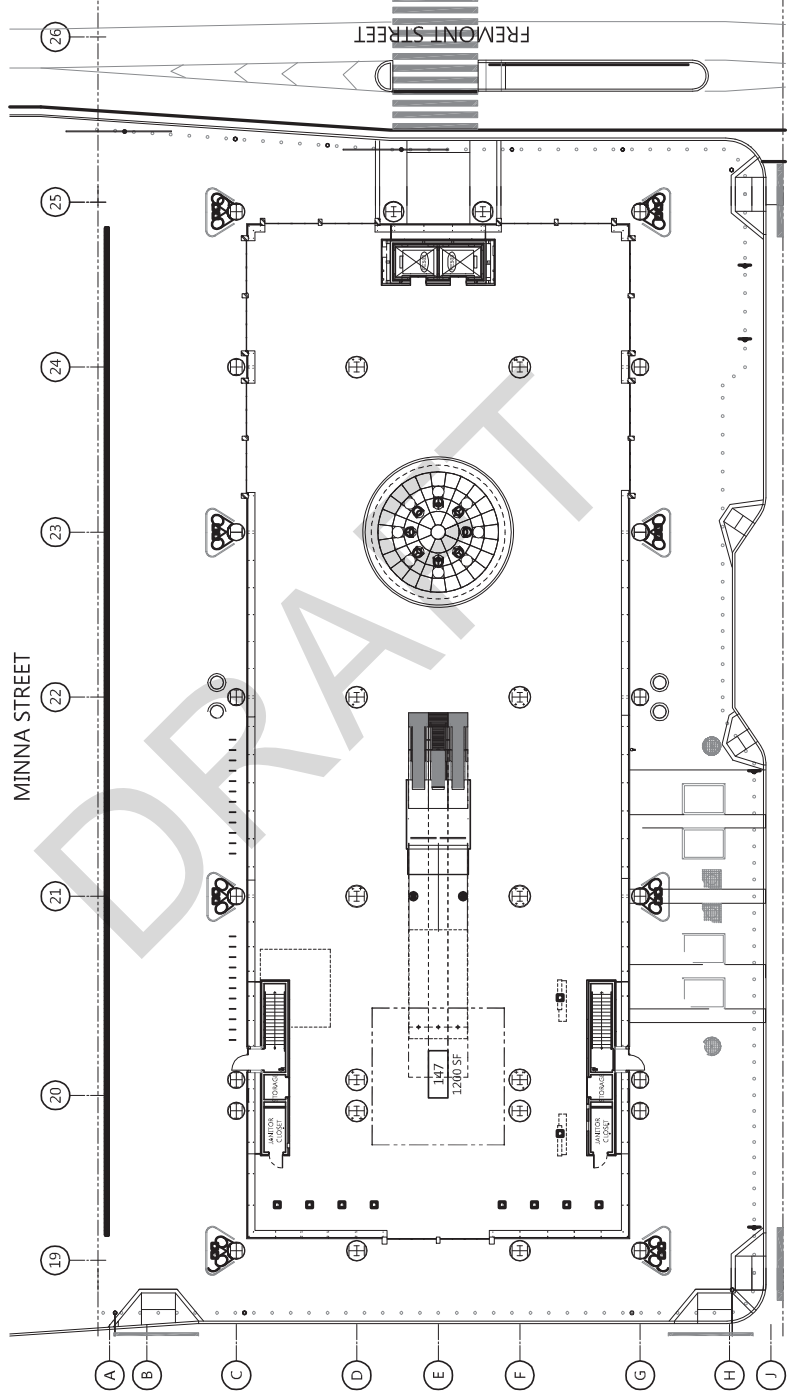
GROUND FLOOR PLAN, BLOCK "2"

TENANT SPACE: 125 | AREA: 688 SF. | DATE: OCT 13, 2017





KEY PLAN



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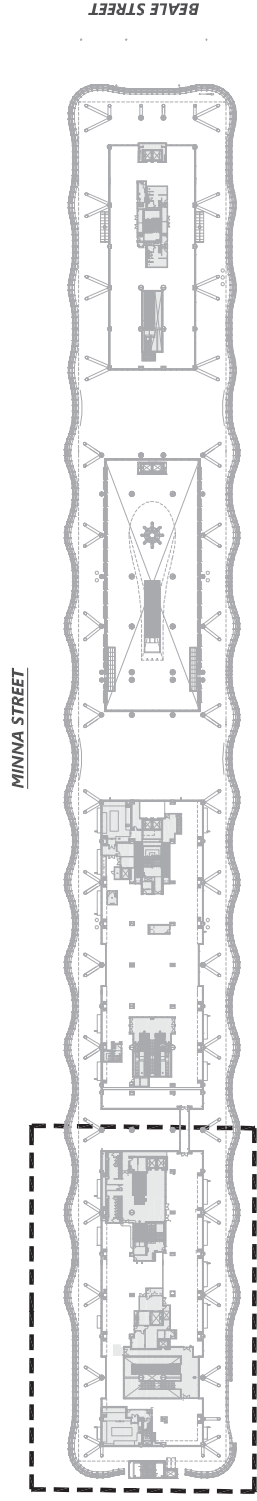
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- LEASE SPACE OUTLINE

GROUND FLOOR PLAN, BLOCK "3"

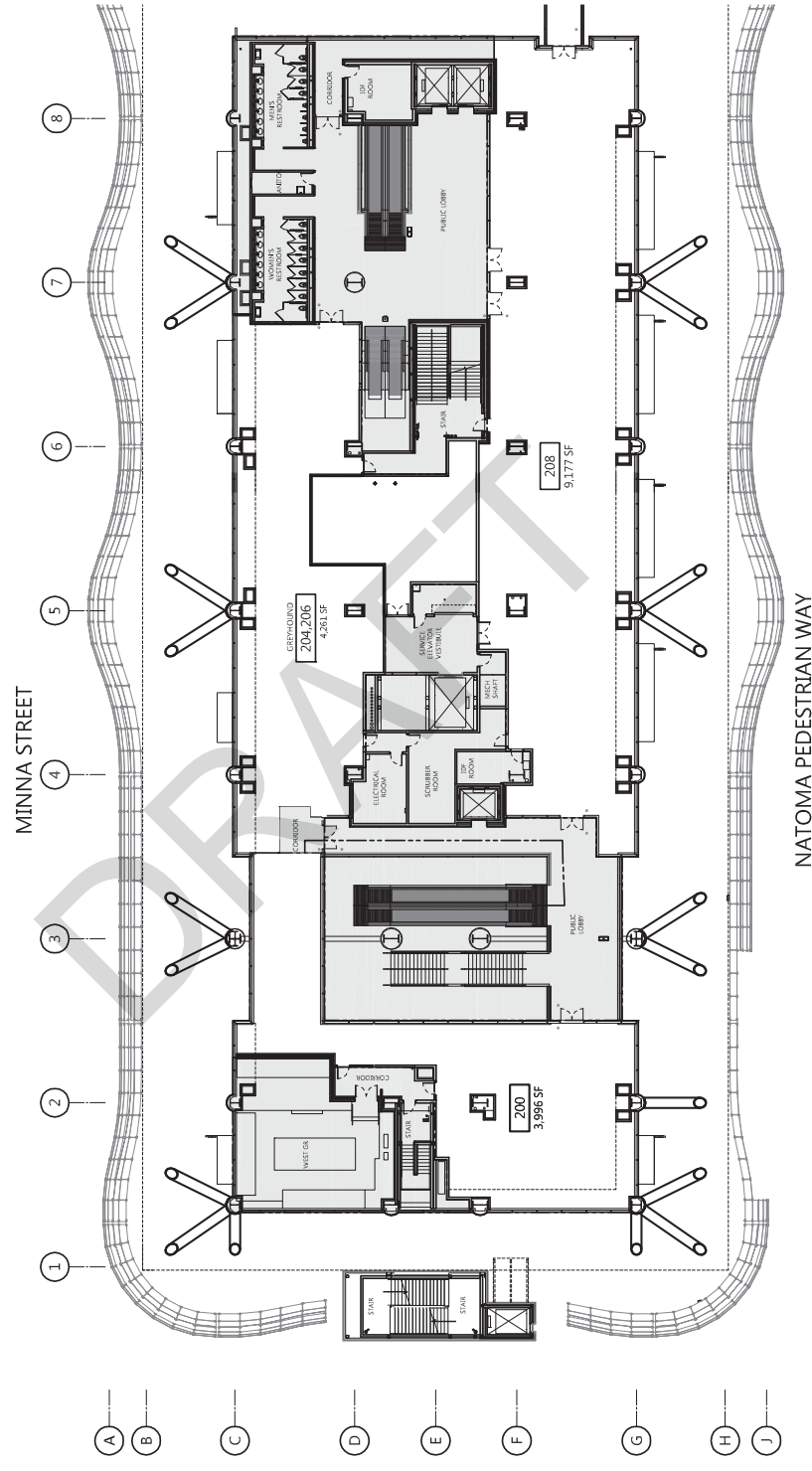
salesforce TRANSIT CENTER

TENANT SPACE: 147 | AREA: 1,200 S.F. | DATE: OCT 13, 2017





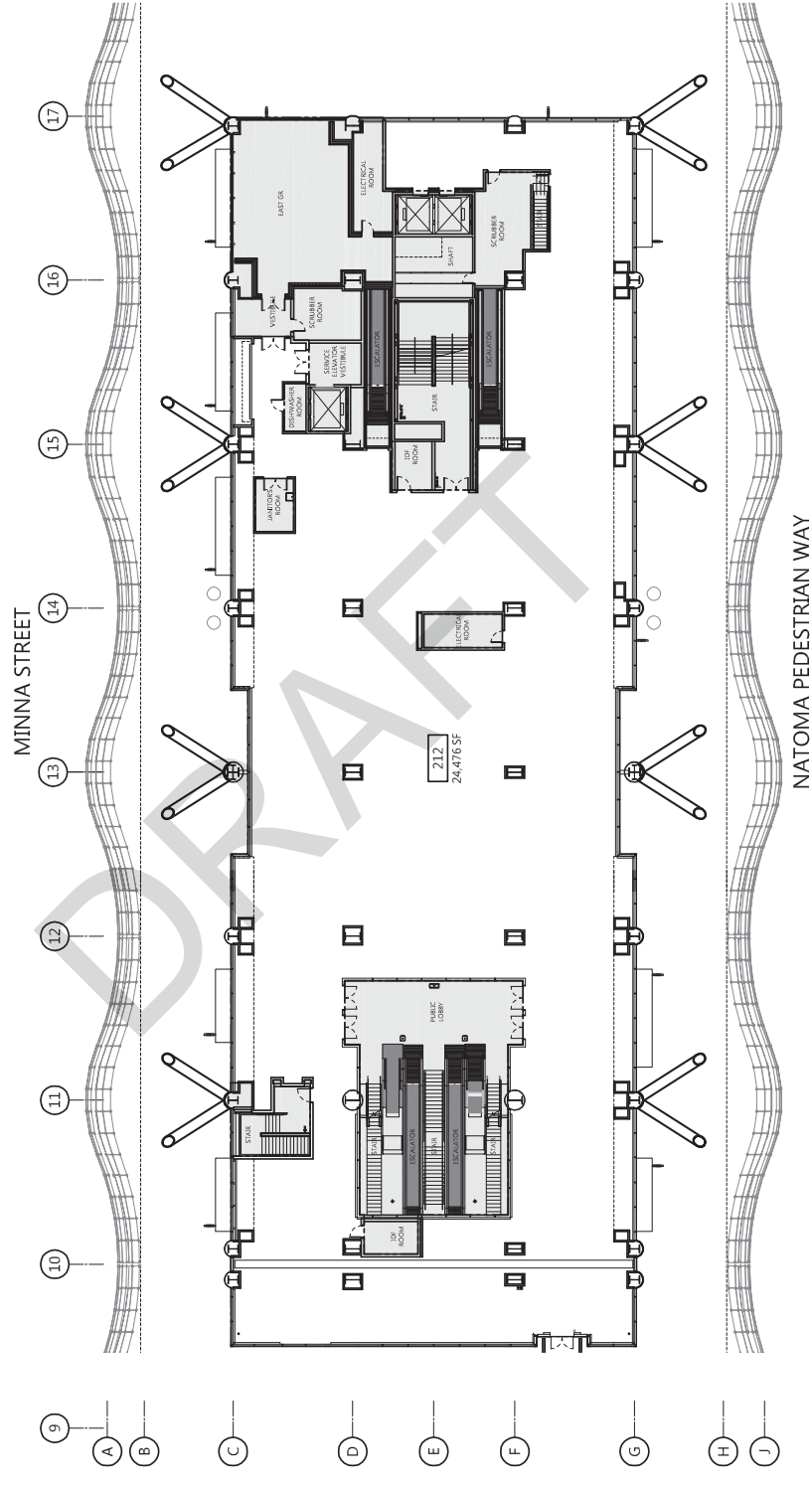
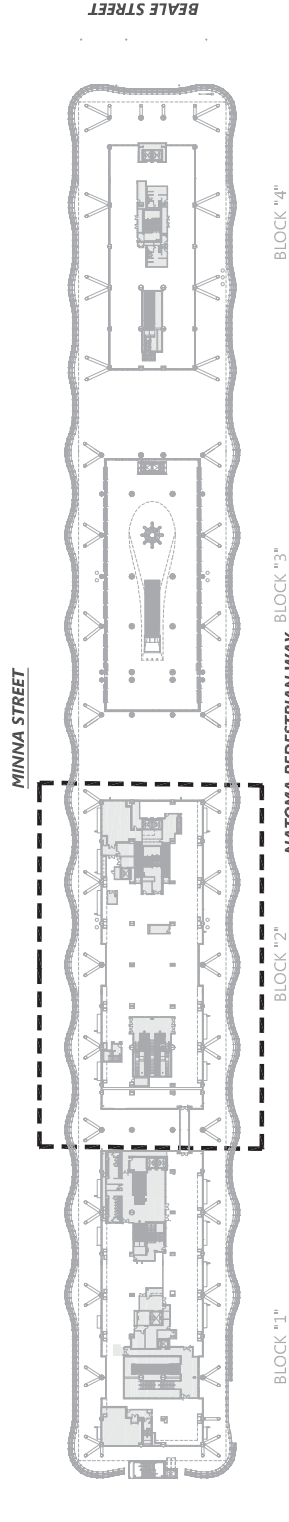
KEY PLAN



LEGEND:

- RETAIL: SPACE #
XXX SF
- NON RETAIL:
- LEASE SPACE OUTLINE:

SECOND FLOOR PLAN, BLOCK "1"



LEGEND:

RETAIL SPACE #
XXX SF

NON RETAIL

LEASE SPACE OUTLINE

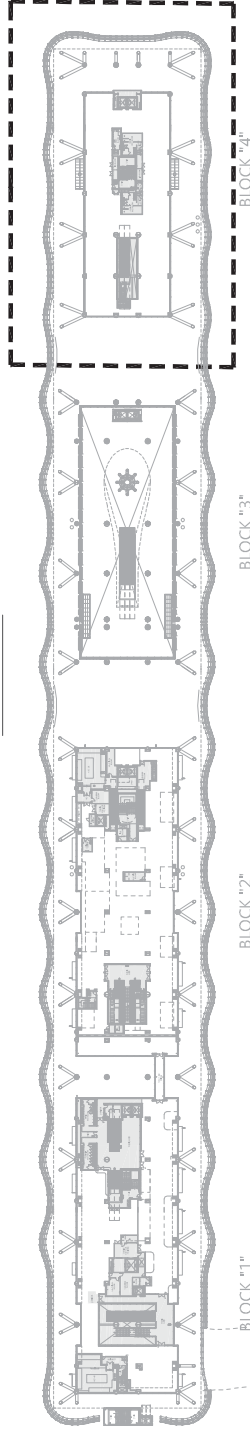
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TENANT SPACE: 212 | AREA: 24,476 S.F. | DATE: OCT 13, 2017

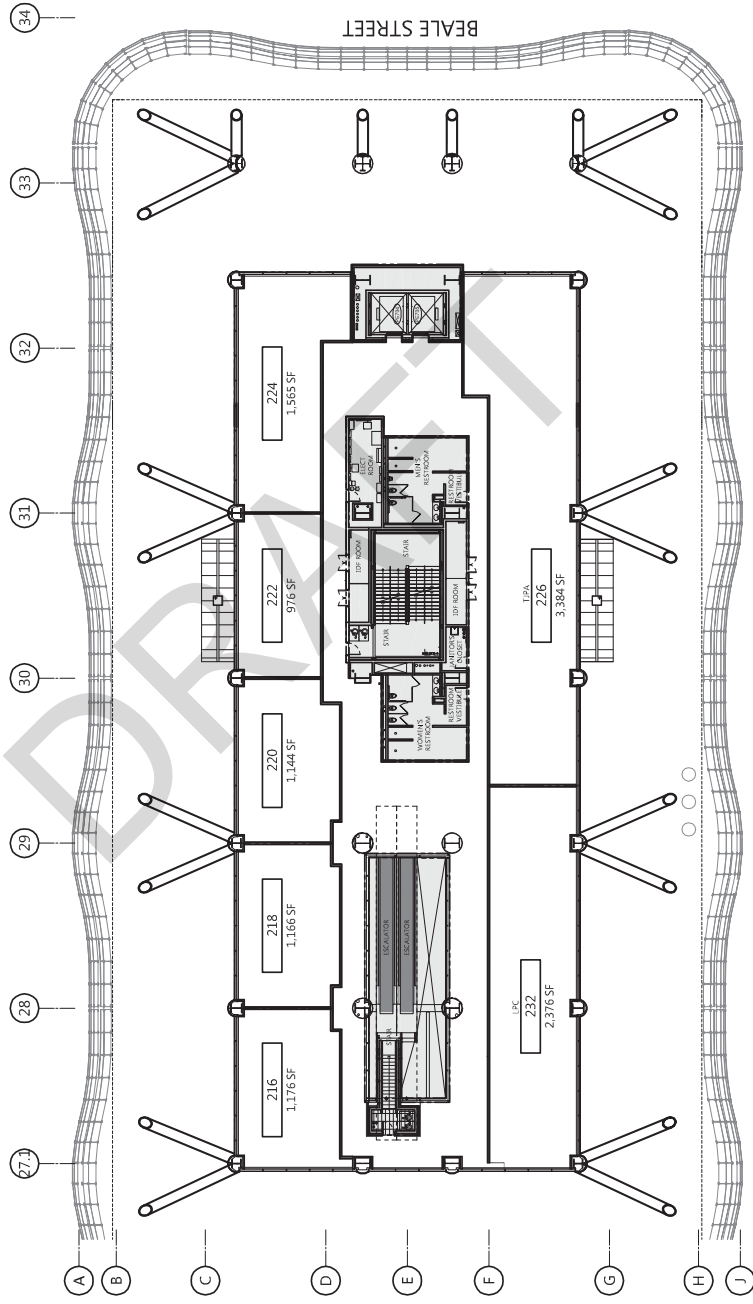


MINNA STREET

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KEY PLAN



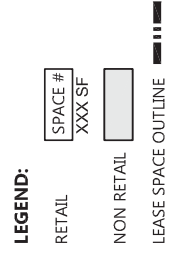
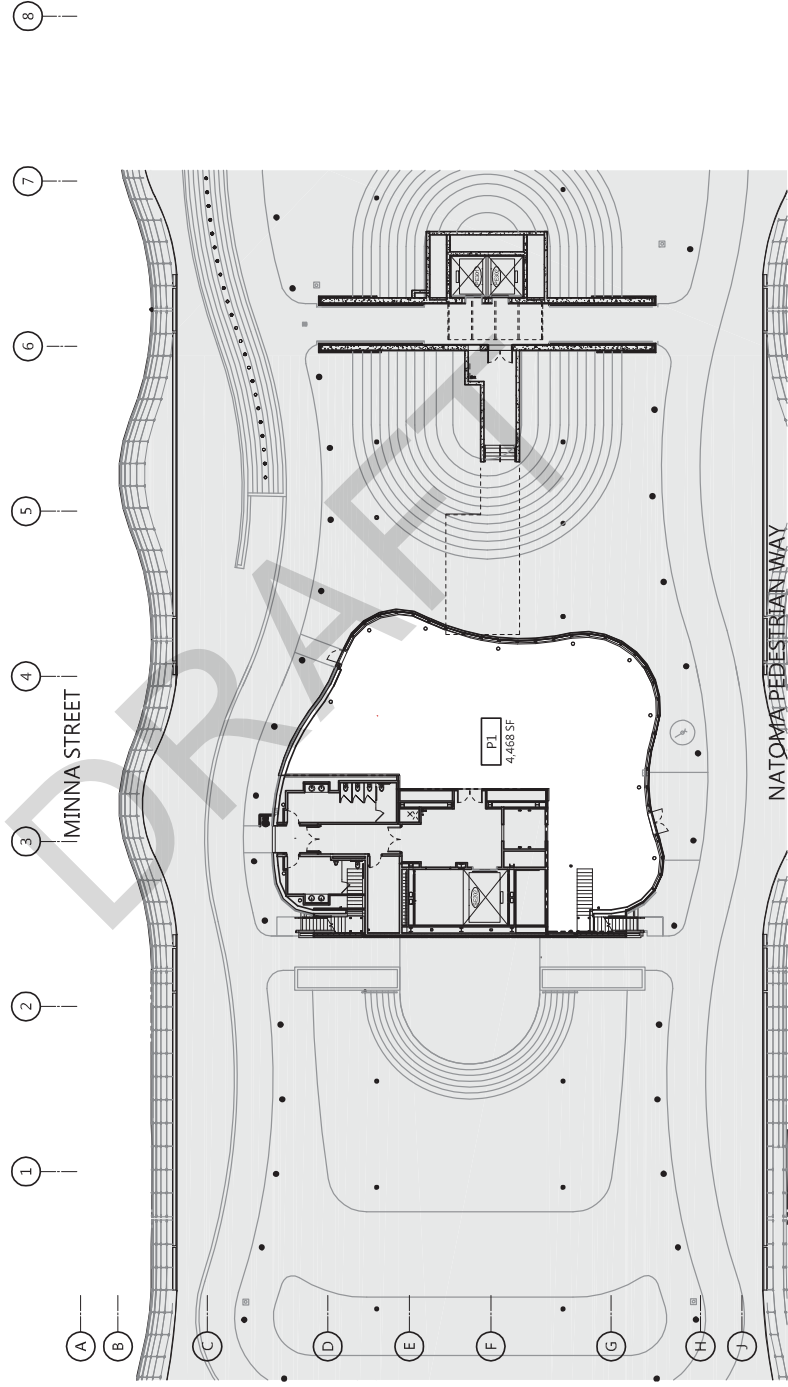
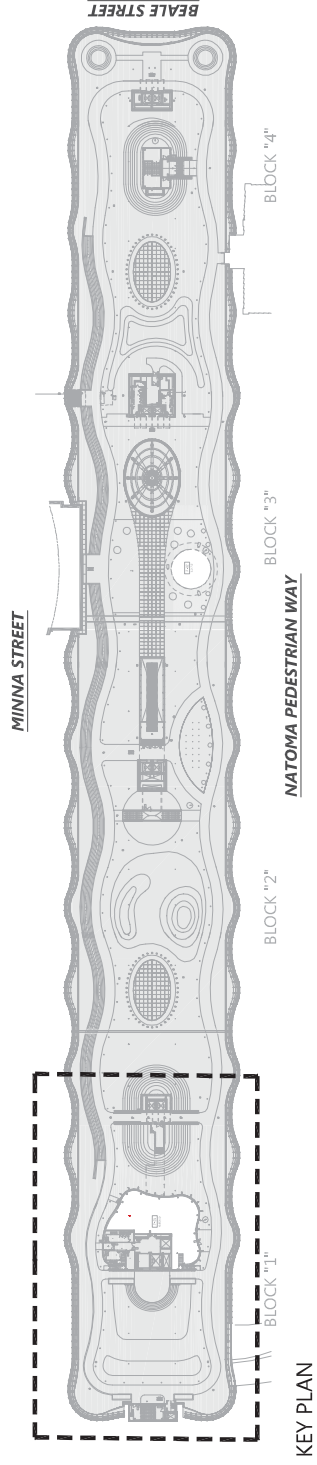
BEALE STREET



LEGEND:

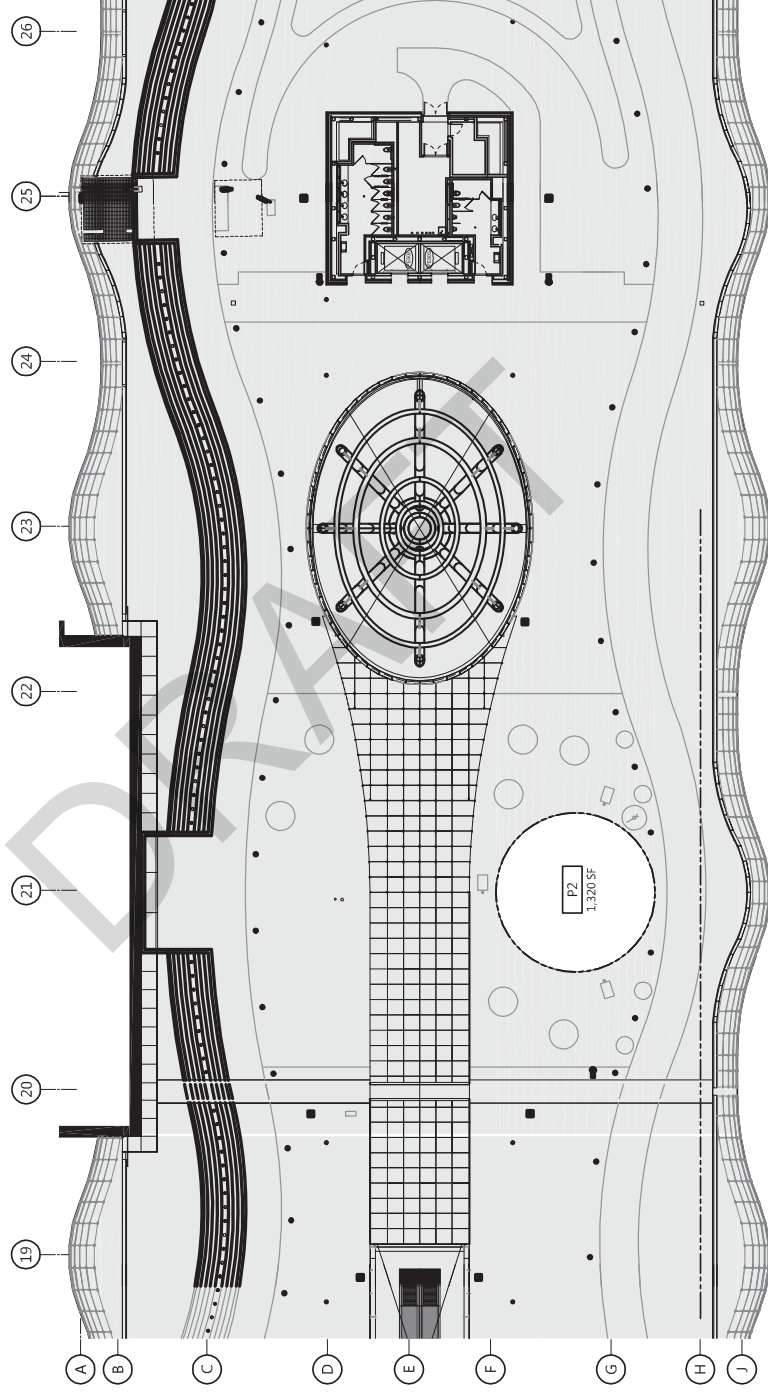
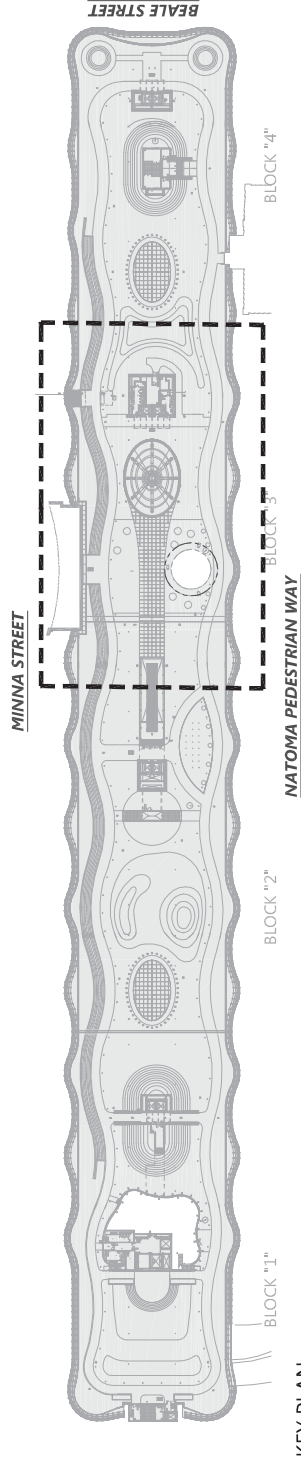
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XXX SF
- NON RETAIL
- LEASE SPACE OUTLINE

SECOND FLOOR PLAN, BLOCK "4"



PARK FLOOR PLAN, BLOCK "1"





LEGEND:

- RETAIL: SPACE #
XXX SF
- NON RETAIL:
- LEASE SPACE OUTLINE:



PARK FLOOR PLAN, BLOCK "3"

Attachment B

Template Form of Letter of Compliance/Determination

DRAFT

[DBI letterhead]

[date]

Subject: Transbay Program -- Tenant Improvement Project
[applicant's name – typically retail tenant or its agent]
Suite # [suite number]
(Reference # _____)

Dear Mr./Ms. _____:

The City and County of San Francisco Department of Building Inspection (DBI) and San Francisco Fire Department (SFFD) have concluded their plan review of the proposed tenant improvement project referenced above (“Tenant Improvement Project”). We are pleased to inform you that we have found the proposed plans for the Tenant Improvement Project appear to be in conformance with the 2016 San Francisco Building Code [update reference as appropriate], based on our review of the following:

[list plans and specs, and dates]

Enclosed are the above-referenced plans and specifications, stamped with DBI’s approval stamp, as customary, as well as a job card.

For DBI field inspection services, please contact DBI Inspection Division at [xxx-xxx-xxxx]. DBI inspectors will also coordinate plumbing, electrical, and SFFD inspections, if any, as necessary. Please provide a minimum of three working dates advanced notice prior to the date of inspections, as required.

Sincerely,

[name]
Building Inspector
Plan Review Services

Enclosures

cc: [Reference DBI staff as appropriate]
[name], SFFD
Ed Sum, TJPA

[DBI letterhead]

[date]

Subject: Transbay Program -- Tenant Improvement Project
[applicant's name – typically retail tenant or its agent]
Suite # [suite number]
(Reference # _____)

Dear Mr./Ms. _____:

The City and County of San Francisco Department of Building Inspection (DBI) and San Francisco Fire Department (SFFD) have concluded their inspection of the construction of the tenant improvement project referenced above (“Tenant Improvement Project”). We are pleased to inform you that we have found the construction of the Tenant Improvement Project appear to meet the requirements for a [temporary/final] certificate of occupancy under the 2016 San Francisco Building Code [update reference as appropriate].

Sincerely,

[name]
Building Inspector
Plan Review Services

cc: [Reference DBI staff as appropriate]
[name], SFFD
Ed Sum, TJPA