

**FUNDING AGREEMENT
BETWEEN THE CITY OF SUNNYVALE AND
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
FOR STATE ROUTE 237 EXPRESS LANES PHASE PROJECT**

THIS AGREEMENT ("Agreement") dated December 23, 2014, for purposes of reference, is made and entered into by and between the CITY OF SUNNYVALE, a municipal corporation of the State of California ("CITY"), and the SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public agency organized as a special district under California law ("VTA"). Hereinafter, CITY and VTA may be individually referred to as "Party" or collectively referred to as "Parties".

I. RECITALS

A. CITY and VTA each recognize the need for freeway lane modifications to provide High Occupancy Toll ("HOT") lanes, hereinafter known as Express Lanes ("EL") on State Route 237 ("SR 237") between United States Highway 101 ("US 101") and Lawrence Expressway within CITY limits as part of the SR 237 Express Lanes Phase 2 Project to relieve congestion and improve circulation in the City of Sunnyvale in the County of Santa Clara as identified in the Silicon Valley Express Lanes Program.

B. The CITY has received five hundred seventy-seven thousand sixty-two dollars (\$577,062) from developer contributions earmarked for regional transportation projects.

C. CITY wishes to use the aforementioned funds to pay for a portion of the required modifications to SR 237 to provide Express Lanes.

D. The Parties wish to set forth their respective obligations in regard to the PROJECT (as defined below).

NOW, THEREFORE, in consideration of the mutual promises contained in this Agreement, the Parties agree as follows:

II. AGREEMENT

1. **Scope of PROJECT.** The scope of the project to be undertaken by VTA pursuant to this Agreement ("**PROJECT**") includes, but is not limited to: (i) construction; and (ii) all steps necessary to receive approvals from any and all relevant governmental and/or regulatory agencies or entities. The PROJECT is further described in the attached EXHIBIT A.

2. **CITY's Financial Contribution for PROJECT as Environmental Mitigation for the Moffett Place Development.** CITY shall contribute to the PROJECT an amount not to exceed FIVE HUNDRED SEVENTY-SEVEN THOUSAND SIXTY-TWO AND 00/100 DOLLARS (\$577,062) (hereinafter, "**CITY's Contribution**"). Upon execution of the Agreement, VTA shall invoice CITY for the CITY's Contribution and, upon receipt, will deposit the CITY's Contribution into an interest-bearing account.

3. **Use of CITY's Contributions.** VTA will use the CITY's Contribution and the interest earned thereon for allowable costs and expenses related to the PROJECT. VTA shall provide CITY with invoice showing funds spent and shall thereafter be entitled to remove the funds for which it has provided an invoice from the interest bearing account for deposit with VTA.

4. **VTA's Role in PROJECT.**

a. **Tasks.** VTA shall perform and/or be responsible for the following tasks to complete the PROJECT:

- i. Serve as project manager for the entire PROJECT;
- ii. Coordinate with the State of California for its review and approval of THE PROJECT;
- iii. Advertise, award and administer construction contract and
- iv. Close-out the PROJECT.

Costs and expenses to perform these tasks shall be considered allowable costs and expenses pursuant to this Agreement.

b. **Consultants.** VTA may retain consultants to perform any of the functions listed in Section 4(a).

c. **Other Project Management Duties.** VTA shall include CITY staff as an active participant within VTA's project management process, hold periodic meetings as agreed upon by the PROJECT team to assess the progress of PROJECT construction and address PROJECT issues as they arise. VTA shall also prepare regular reports on PROJECT activity and progress for CITY.

d. **Expenditure Updates.** VTA shall actively monitor actual PROJECT expenditures to ensure that CITY's Contribution will be used to pay for allowable PROJECT expenditures. If, at any time, planned PROJECT expenditures are projected not to exceed the City Contribution or if the PROJECT is delayed or cancelled, VTA shall immediately notify CITY of such facts. The Parties shall then have the following options:

- i. VTA may reimburse CITY for any unused **CITY's Contribution** funds.
- ii. VTA may formulate and implement a strategy to continue the PROJECT to the satisfaction of the CITY'S Director of Public Works.
- iii. The Parties may terminate this Agreement which can be accomplished

by either Party giving written notice to the other party of such termination consistent with Section 9 below.

5. **Compliance with Governmental Requirements.** VTA shall comply with all laws and regulations pertaining to the PROJECT.
6. **Term of Agreement.** This Agreement shall become effective upon full execution of the Agreement and shall remain in effect through December 31, 2018. Upon written request of VTA, the CITY's Director of Public Works or his designee is authorized to extend the term of the Agreement for up to six (6) months after the initial termination date, upon written notice to VTA and without formal amendment of this Agreement.
7. **Written Termination.** This Agreement may be terminated upon mutual written agreement of the Parties.
8. **Refund of CITY Contribution.** Any balance of CITY contribution, including interest, remaining after completion of the PROJECT or, if the PROJECT does not proceed for any reason, or upon early termination of the PROJECT, less any amounts necessary to pay for eligible expenses incurred prior to the date of completion of the PROJECT or the effective date of the termination of the Agreement, shall be refunded to CITY. VTA shall refund to CITY the remaining balance, if any, within thirty (30) calendar days of the effective date of completion of the PROJECT or sooner termination of the Agreement.
9. **Audit and Record Retention.** CITY may audit the expenses incurred in the performance of this Agreement. VTA shall retain all records related to the PROJECT for three (3) years after the completion of the PROJECT. During this period, VTA shall make these records available within a reasonable time to the CITY for inspection upon request.
10. **Parties' Representatives.** The General Manager of VTA or the General Manager's designee is hereby made the representative of VTA for all purposes under this Agreement. The Director of the Public Works for CITY or the Director's designee is hereby made the representative of CITY for all purposes under this Agreement.
11. **Indemnification.**
 - a. Neither VTA nor any officer or employee thereof shall be responsible for any damage or liability occurring by reason of anything done or omitted to be done by CITY under or in connection with any work, authority or jurisdiction associated with the Intersection. In addition, pursuant to Government Code §895.4, CITY shall fully indemnify and hold VTA harmless from any liability imposed for injury (as defined by Government Code §810.8) occurring by reason of anything done or omitted to be done by CITY under or in connection with any work, authority or jurisdiction delegated to CITY under this Agreement.
 - b. Neither CITY nor any officer or employee thereof shall be responsible for any

damage or liability occurring by reason of anything done or omitted to be done by VTA under or in connection with any work, authority or jurisdiction associated with the Intersection. In addition, pursuant to Government Code §895.4, VTA shall fully indemnify and hold CITY harmless from any liability imposed for injury (as defined by Government Code §810.8) occurring by reason of anything done or omitted to be done by VTA under or in connection with any work, authority or jurisdiction delegated to VTA under this Agreement.

12. No Waiver. The failure of either Party to insist upon the strict performance of any of the terms of this Agreement shall not be deemed a waiver of any right or remedy that either Party may have, and shall not be deemed a waiver of their right to require strict performance of all of the terms thereafter.

13. Notice. Any notice required to be given by either Party, or which either party may wish to give, shall be in writing and served either by personal delivery or sent by certified or registered mail, postage prepaid, addressed as follows:

To VTA: Santa Clara Valley Transportation Authority
John H. Ristow, Director of Planning and Program Development
3331 North First Street, Bldg. B-2
San Jose, CA 95134-1906

To CITY: City of Sunnyvale
Manuel Pineda, Director of Public Works
Department of Public Works
456 West Olive Avenue
Sunnyvale, CA 94086

Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the United States mail.

14. Dispute Resolution. If a question arises regarding interpretation of this Agreement or its performance, or the alleged failure of a Party to perform, the Party raising the question or making the allegation shall give written notice thereof to the other Party. The Parties shall promptly meet in an effort to resolve the issues raised. If the Parties fail to resolve the issues raised, alternative forms of dispute resolution, including mediation or arbitration, may be pursued by mutual agreement. It is the intent of the Parties to the extent possible that litigation be avoided as a method of dispute resolution.

15. Entire Agreement. This Agreement constitutes the entire Agreement between the Parties pertaining to the subject matter contained therein and supersedes all prior or contemporaneous agreements, representations and understandings of the Parties relative thereto.

16. Amendments. Future amendments to this Agreement shall be processed by mutual

written agreement of the Parties. Unless otherwise provided herein, any amendments to this Agreement must be approved by CITY's Director of Public Works and the VTA's General Manager. Whenever possible, notice to amend this Agreement shall be provided thirty (30) calendar days prior to the desired effective date of such amendment.

17. Warranty of Authority to Execute Agreement. Each Party to this Agreement represents and warrants that each person whose signature appears hereon has been duly authorized and has the full authority to execute this Agreement on behalf of the entity that is a Party to this Agreement.

18. Severability. If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions and provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

WITNESS THE EXECUTION HEREOF the day and year first hereinabove set forth.

"CITY"
City of Sunnyvale
a municipal corporation

By: _____
Deanna Santana
City Manager

"VTA"
Santa Clara Valley Transportation
Authority
a public agency

By: Nuria Fernandez
Nuria Fernandez
General Manager

Date: January 7, 2015

APPROVED AS TO FORM:

By: _____
City Attorney

APPROVED AS TO FORM:

By: Victor Pappalardo
Victor Pappalardo
Senior Assistant Counsel