

**FUNDING AGREEMENT
BETWEEN THE CITY OF SUNNYVALE AND
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
FOR THE STATE ROUTE 237 EXPRESS LANES PHASE 2 PROJECT**

THIS AGREEMENT ("**Agreement**") dated _____, 2017, 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 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. Whereas, as a condition of development related to the Moffett Towers II Project, located at 1111 Lockheed Martin Way in the City of Sunnyvale, the developer, MT II LLC (not a party to this Agreement) agrees to make a onetime freeway fair share contribution to CITY. CITY will allocate this amount to VTA for the mitigation of project impacts to existing freeway on State Route (SR) 237.
- B. CITY and VTA each recognize the need for freeway improvements to SR 237 to relieve congestion and improve circulation in the City of Sunnyvale in the County of Santa Clara.
- C. The Parties wish to set forth in this Agreement their respective obligations in regard to the freeway improvements to the SR 237 Express Lanes Phase 2 Project (PROJECT).

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 PROJECT includes, but is not limited to: (i) all necessary approvals required from any and all governmental or regulatory agency or entity, (ii) those construction activities necessary to complete the PROJECT's Construction phase.
- 2. **CITY's Financial Contribution for PROJECT.** CITY shall contribute to PROJECT an amount not to exceed Three Hundred Eighty Thousand (\$380,000.00) dollars (hereinafter, "**CITY's Contribution**") towards the development and completion of PROJECT.
- 3. **Invoicing.** 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. CITY shall pay to VTA the CITY's Contribution within thirty (30) calendar days after receipt of invoice.

4. **Use of CITY's Contribution.** VTA will use the CITY's Contribution and the interest earned thereon for allowable costs and expenses for the sole purpose of completing the PROJECT, as set forth in this Agreement.

5. **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 PROJECT;
 - ii. Coordinate with the State of California for its review and approval of PROJECT;
 - iii. Advertise, award and administer the construction contract;
 - iv. Conduct construction activities for PROJECT; and
 - v. 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 design consultants to perform any of the functions listed in Section 5(a). VTA's administrative costs to procure and manage consultant agreements as well as the actual costs of such consultants shall be allowable costs pursuant to this Agreement.
- c. **Project Cost Updates.** VTA shall actively monitor actual PROJECT expenditures to ensure that CITY's Contribution is used to pay for allowable PROJECT expenditures. If PROJECT expenditures are projected not to exceed CITY's Contribution, VTA shall reimburse CITY for any unused CITY's Contribution funds.
6. **Refund of City's Contribution.** Any balance of CITY's 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 either the date of completion of the PROJECT or the effective date of the termination of the Agreement, shall be refunded to the 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.
7. **Compliance with Governmental Requirements.** VTA shall comply with all laws and regulations pertaining to the PROJECT.
8. **Term of Agreement.** This Agreement shall become effective upon full execution of the Agreement and shall remain in effect through VTA's full expenditure of CITY's Contribution on PROJECT related expenses, or **December 31, 2019**, or completion of PROJECT, whichever occurs first. Upon written request of VTA, the CITY's Director

of Public Works or his/her designee and VTA's General Manager or his/her designee, each in his or her sole discretion, are authorized to extend the term of the Agreement for up to six (6) months after the initial termination date, without formal amendment of this Agreement. If the PROJECT is delayed beyond December 31, 2019, or cancelled completely, either Party 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.

9. Written Termination. In addition to termination pursuant to the terms of the preceding section, this Agreement may be terminated upon mutual written agreement of the Parties.

10. 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 PROJECT. During this period, VTA shall make these records available within a reasonable time to the CITY for inspection upon request.

11. 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.

12. 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 PROJECT. 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 PROJECT. 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.

13. 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.

- 14. 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
Carolyn Gonot, Acting 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.

- 15. 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.

- 16. 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.

- 17. 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 the City Council and VTA Board. Whenever possible, notice to amend this Agreement shall be provided ninety (90) calendar days prior to the desired effective date of such amendment.

- 18. 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.

- 19. 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

“VTA”

Santa Clara Valley Transportation Authority
a public agency

By: _____
Deanna Santana
City Manager

By: _____
Nuria Fernandez
General Manager

Date: _____

Date: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: _____
Robert Boco
Sr. Assistant City Attorney

By: _____
Victor Pappalardo
Senior Assistant Counsel