

FUNDING AGREEMENT
BETWEEN THE CITY OF MILPITAS AND
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
FOR THE STATE ROUTE 237 NEAR TERM IMPROVEMENTS PROJECT

THIS AGREEMENT (“Agreement”) dated _____, 2019, for purposes of reference, is made and entered into by and between the CITY OF MILPITAS, 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, on June 24, 2016, the VTA Board of Directors adopted a resolution to place a ballot measure before the voters of Santa Clara County in November 2016 to authorize a one-half of one percent retail transaction and use tax (“**2016 MEASURE B**”) for 30 years for nine transportation-related program categories; and
- B. Whereas, on November 8, 2016, the voters of Santa Clara County enacted 2016 MEASURE B for 30 years to pay for the nine transportation-related program categories; and
- C. Whereas, on October 5, 2017, the VTA Board of Directors established the 2016 Measure B Program (“PROGRAM”) and adopted the 2016 Measure B Program Category Guidelines; and
- D. Whereas, the PROGRAM includes a “Highway Interchange” program category (HIGHWAY IC CATEGORY), which includes a list of eligible projects, that funds highway projects throughout the valley; and
- E. Whereas, CITY and VTA each recognize the need to improve traffic operations and improve circulation in the City of Milpitas in the County of Santa Clara by adding a high occupancy vehicle (HOV) bypass lane at the westbound SR 237/Calaveras Boulevard on ramp and by extending the westbound SR 237/McCarthy Boulevard HOV bypass lane across the McCarthy Boulevard/Calaveras Boulevard intersection limit line, hereinafter referred to as “PROJECT;” and
- F. Whereas, the PROJECT is eligible for HIGHWAY IC CATEGORY funds; and
- G. Whereas, the 2016 Measure B Program Category Guidelines for the HIGHWAY IC CATEGORY requires a minimum 10% non-2016 Measure B contribution for development of PROJECT.

H. Whereas, this Agreement is intended to delineate the duties, and funding responsibilities of the Parties for the PROJECT.

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

II. AGREEMENT

1. **The PROJECT.** The Parties agree to construct the Project pursuant to the terms and conditions set forth herein.
2. **Cost of PROJECT.** The anticipated total cost of PROJECT is \$2,000,000 (Two million dollars).
3. **CITY's Financial Contribution for PROJECT.** CITY agrees to contribute to the PROJECT an amount not to exceed TWO-HUNDRED THOUSAND (\$200,000) dollars (hereinafter, "CITY's Contribution") towards the development of PROJECT.

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.

CITY's Contribution and any interest earned will be considered toward the required minimum 10% non-2016 Measure B contribution for the listed cost of PROJECT as identified in the 2016 Measure B Program Category Guidelines for the HIGHWAY IC CATEGORY.

4. City's Role in PROJECT.

During the term of the PROJECT, CITY shall provide CITY staff oversight of, and participation in, the PROJECT, and necessary and appropriate coordination with all departments of the CITY. CITY will issue, if required, necessary encroachment permits for the PROJECT at no cost. The CITY shall provide timely reviews, comments, and approvals of PROJECT's documents submitted by VTA to CITY. CITY will attend any Project Development Team meetings. CITY costs to administer and participate in PROJECT as described in this Agreement will not be allowable costs against CITY's Contribution.

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 as necessary to allow for its review and approval of PROJECT;

- iii. Obtain all necessary permits and rights of way for PROJECT; and
- iv. Conduct preliminary engineering, and planning activities for PROJECT.
- v. Complete Environmental Clearance and Permit Engineering Evaluation Report (PEER)
- vi. Complete Construction of 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 4(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 an amount exceeding \$2,000,000 is required to complete PROJECT, VTA shall notify CITY in writing that additional funds are needed pursuant to Section II Article 7. VTA shall not perform any work beyond the amount of funds provided in Section II, Articles 2 and 3 until an amendment to this AGREEMENT is executed, adding funds to cover PROJECT completion.

- d. Other Project Management Duties VTA shall include CITY staff as an active participant within VTA's project management process, VTA will hold periodic meetings as agreed upon by the PROJECT team to assess the progress of PROJECT and address PROJECT issues as they arise.

6. Use of CITY's Contribution. VTA will use the CITY's Contribution and the interest earned thereon for allowable costs and expenses related to work on the PROJECT, as set forth in this Agreement. The use of the City's Contribution shall not exceed 10% of total allowable costs incurred to date. Any portion of the City Contribution not used shall be returned to the City upon termination of the PROJECT and/or this Agreement.

7. Additional Funds. The final PROJECT cost may ultimately exceed current cost estimates. Any additional eligible costs resulting from increased contract prices or change orders arising from unforeseen conditions shall be submitted to CITY for review and CITY's responsibility for such additional costs shall not exceed 10% of the total PROJECT cost.

8. Compliance with Governmental Requirements. VTA shall comply with all laws and regulations pertaining to the PROJECT.

9. Compliance with 2016 Measure B requirements. VTA and CITY will comply with all 2016 Measure B requirements as identified in the 2016 Measure B Program and Program Guidelines for the HIGHWAY IC CATEGORY.

10. Term of Agreement. This Agreement shall become effective upon full execution and shall remain in effect through the earlier of: (i) December 31, 2023, or (ii) completion of PROJECT. If the PROJECT is delayed beyond December 31, 2023, 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.

11. 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 to the City for inspection within a reasonable time, upon City's written request. VTA will repay any portion of the City Contribution used for unallowable expenses as determined by the audit.

12. 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 ("Director"), or the Director's designee, is hereby made the representative of CITY for all purposes under this Agreement.

13. Indemnification.

a. Neither VTA nor any officer or employee thereof shall be responsible for any damage or liability occurring by reason of CITY's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction associated with the PROJECT. In addition, 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 CITY's negligence, recklessness, or willful misconduct under or in connection with any work, authority or jurisdiction delegated to CITY under this Agreement. This provision will survive the termination or expiration of this Agreement.

b. Neither CITY nor any officer or employee thereof shall be responsible for any damage or liability occurring by reason of VTA's negligence, recklessness, or willful misconduct in the completion of any work associated with the PROJECT. In addition, 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 VTA's negligence, recklessness, or willful misconduct in the completion of the work, undertaken by VTA pursuant to this Agreement. This provision will survive the termination or expiration of this Agreement.

14. 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.

15. 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
Casey Emoto, Interim Chief Planning and Engineering Officer
3331 North First Street, Bldg. B
San Jose, CA 95134-1906
casey.emoto@vta.org

To CITY: City of Milpitas
Steve Erickson, City Engineer/Engineering Director
Department of Public Works
455 E. Calaveras Blvd.
Milpitas, CA 95035
serickson@ci.milpitas.ca.gov

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

16. 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.

17. 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.

18. Amendments. No alteration or variation of the terms of this Agreement will be valid unless made in writing and signed by both of the Parties hereto, and no oral understanding or agreement not incorporated herein will be binding on any of the Parties hereto.

19. 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.

20. 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.

21. Governing Law. The laws of the State of California will govern this Agreement, as well as any dispute that might arise between VTA and CITY, without regard to conflict of law provisions.

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

“CITY”

City of Milpitas
a municipal corporation

“VTA”

Santa Clara Valley Transportation Authority
a public agency

Steven McHarris
Interim City Manager

Nuria I. Fernandez
General Manager/CEO

Date

Date

APPROVED AS TO FORM:

APPROVED AS TO FORM:

Christopher Diaz
City Attorney

Victor Pappalardo
Senior Assistance Counsel