City of Milpitas, California

*RA12

BUDGET CHANGE FORM

Type of Change	From		To	
	Account	Amount	Account	Amount
Check one: ☒ **Budget Appropriation** ☐ **Budget Transfer**	350-2931	$200,000	350-910-4237	$200,000

Explain the reason for the budget change:

In August 2006 The City entered into a Settlement Agreement with the City of San Jose to address fair-share contributions towards mitigation of transportation impact within each City from the North San Jose Area Development Policies Update and the Milpitas Transit Area Specific Plan (TASP) projects. One of Milpitas' obligations in the agreement is to provide San Jose $200,000 to address significant traffic impacts from the TASP to the Capitol Avenue corridor in San Jose within 120 days of the certification of the TASP Environmental Impact Report.

The funding of this obligation was included in the Transit Area Development Impact fee program. The Transit Area Impact Fee Fund does not have any funding available since no fees have been collected. Therefore, staff is recommending the Redevelopment Agency advance $200,000 to the Transit Area Impact Fee Fund to cover the payment to San Jose.

Approve the advance of $200,000 from the Redevelopment Fund to the Transit Area Impact Fee Fund and appropriate $200,000 in the Transit Area Impact Fee Fund for traffic impact fee payment.

☒ **Check if City Council Approval required.** **Meeting Date**: November 04, 2008

Itemization of funds, if needed:	Amount

Requested by:	**Division Head:**	**Date:**
	Department Head: [signature]	**Date:** 10/28/08
Reviewed by:	**Finance Director:** [signature]	**Date:** 10/28/08
Approved by:	**City Manager:**	**Date:**

Date approved by City Council, if required: **Confirmed by:**

SETTLEMENT AGREEMENT

This Settlement Agreement is made by and between Respondents City of San Jose, the City Council of the City of San Jose (collectively "SAN JOSE") and Petitioner City of Milpitas ("MILPITAS"). This Settlement Agreement addresses San Jose's fair-share contributions towards mitigation of transportation impacts within the City of Milpitas arising out of the North San Jose Area Development Policies Update project and constitutes the fair-share agreement between the parties for that project. As set forth herein, this Settlement Agreement shall also constitute the fair-share agreement between the cities of San Jose and Milpitas for the mitigation of transportation impacts arising from the City of Milpitas' as-of-yet unapproved Transit Area Plan. The effective date of this Settlement Agreement is August 22, 2006.

RECITALS

A. Whereas on July 28, 2006 the City of Milpitas filed suit against San Jose in the Santa Clara County Superior Court, case number 1-05-CV-046013, entitled *City of Milpitas, a municipal corporation v. City of San Jose, a municipal corporation; City Council of the City of San Jose, the governing body of the City of San Jose; and Does 1 through 10, inclusive* ("Action");

B. Whereas this Action alleged, *inter alia,* that San Jose's approval of the North San Jose Area Development Policies Update ("NSJ Project") and certification of the North San Jose Area Development Policies Update Environmental Impact Report ("NSJ EIR") violated various provisions of the California Environmental Quality Act;

C. Whereas this Action was ultimately consolidated with two separate actions: *County of Santa Clara v. City of San Jose, et al.,* No. 1-05-CV-046005, *and City of Santa Clara, et al. v. City of San Jose, et al.,* No. 1-05-CV-046025, under master case number 1-05-CV-046005;

D. Whereas the trial in this consolidated action was held on March 2, 2006 before the Hon. Leslie Nichols in Department 6 of the Santa Clara County Superior Court;

E. Whereas in its March 2, 2006 Notice of Decision, the court held that San Jose's findings were timely, that San Jose's findings concerning potable water supply were supported by substantial evidence, that San Jose's findings that the project would not have cumulative impacts on wastewater facilities were supported by substantial evidence, and that there was not substantial evidence to support San Jose's determination that there were no feasible mitigation measures for impacts to transportation facilities under the jurisdiction or control of other public agencies;

F. Whereas on March 28, 2006, a Judgment and a Peremptory Writ of Mandate were entered in accordance with the March 2, 2006 Notice of Decision; and

G. Whereas the parties now undertake to settle this action;

THEREFORE, the Parties agree as follows:

1. The NSJ EIR outlines a number of proposed improvements for the Montague Expressway within the City of San Jose to mitigate traffic impacts from the NSJ Project. The implementation of these improvements is scheduled to occur during specified phases of the NSJ Project as described in the NSJ EIR. In its Findings for the NSJ Project, Resolution No. 72768, the San Jose City Council determined that the NSJ Project included a comprehensive package of roadway improvements (including upgrades to freeway, expressway, and local street facilities). The Findings' Mitigation Monitoring and Reporting Program holds that the San Jose Department of Public Works will ensure implementation of the identified mitigation as described in the NSJ EIR based upon conditions and commitments included in the Final Public Works Clearance for development within the project area. The Mitigation Monitoring and Reporting Program further

holds that 85%of all infrastructure mitigation for any individual phase (and all infrastructure for any previous phase) must be built or its implementation reasonably assured prior to issuance of building permits for any subsequent phase.

2. San Jose affirms that it intends to enter into a Settlement Agreement with the County of Santa Clara ("County") which will include the following general elements:

   a. San Jose Constructed Projects. In and as a part of the implementation of Phase I of the NSJ Plan, San Jose shall complete and fund mitigations as follows: Montague widening to eight lanes between Lick Mill to Trade Zone all portions of the Expressway regardless of City boundaries, including Interchange modifications at I-880 and the Trimble flyover; San Jose shall complete the McCarthy-O'Toole Interchange as a part of the implementation of Phase III of the NSJ Plan.

   b. San Jose Funded Projects. San Jose shall fund up to an amount not to exceed $11 million dollars, and County shall construct the Montague "base project" eight-lane improvements as identified in the Comprehensive County Expressway Planning Study –Montague Expressway Implementation Plan Tier 1A project, specifically:

      (i) Complete Interchange modifications at I-680
      (ii) Widening between I-680 and Park Victoria, and
      (iii) Any widening remaining to be done between Capitol and I-680.

      San Jose shall provide such funding no later than June 30, 2010. County shall make a good faith effort to complete all of these improvements within five and one-half years of receipt of San Jose's funds so long as San Jose's $11 million contribution is sufficient to cover the improvements or alternate funds are available to complete the improvements.

c. Montague/Mission/101 Interchange Project. County and San Jose agree to continue their support for inclusion in the Valley Transportation Plan 2030 ("VTP 2030 Plan") the reconstruction of the interchange at Montague and Highway 101, with improvements to Mission College Boulevard as identified in the Comprehensive County Expressway Planning Study – Montague Expressway Implementation Plan, Tier 1B project ("Montague/Mission/101 Interchange Project"). San Jose and County also agree that this is a high priority for State Transportation Improvement Program ("STIP") funding. County shall be solely responsible for all planning and design activities related to the Montague/Mission/101 Interchange Project. Such activities shall include but not be limited to: (i) the completion of the Project Study Report ("PSR"), estimated to cost $500,000, within six months from the date of this Settlement Agreement; and (ii) the submission of such PSR to Caltrans within one year of the effective date of this Settlement Agreement. County shall fund and complete environmental clearance and final design work on the Montague/Mission/101 Interchange project, an estimated value of $1.5 million, no later than June 30, 2010. If funding for the construction of the Montague/Mission/101 Interchange Project is not available on or before July 1, 2014, the County shall allocate $1,500,000 to be used to commence construction of improvements for the Mission College Boulevard and Montague Expressway intersection and such other design work as may be necessary to improve the intersection for the ultimate interchange improvements at Highway 101 and Montague Expressway.

d. San Tomas at Stevens Creek Widening Project. County and San Jose agree that STIP funding to extend the limits of the mitigation project for San Tomas Expressway widening to eight lanes at Stevens Creek (as identified in the EIR) to Saratoga to the north and Moorpark to the south is a high priority.

e. County acknowledges that San Jose's consideration, as set forth in paragraph 4(a)-(d) above, constitutes adequate mitigation for traffic

impacts to County facilities outside of San Jose City limits arising from the NSJ Plan.

3. In light of San Jose's commitments identified in paragraphs 1 and 2 above, Milpitas agrees to accept the NSJ Project's transportation impacts to intersections and other facilities in Milpitas without further mitigation from San Jose.

4. Milpitas agrees that for purposes of this Settlement Agreement, the maximum number of trips from its Transit Area Plan project shall be the number of trips arising from a project with 7,185 housing units, 0.813 million sq ft Office, and 0.52 million sq ft of Retail ("Maximum Trips"). Milpitas may subsequently approve different proportions of housing, office and retail space for the Transit Area Plan, but approvals for the Transit Area Plan shall not result in development that would exceed the Maximum Trips.

5. Given that Milpitas shall not approve a Transit Area Plan that would exceed the Maximum Trips, San Jose agrees to the following as the limits of Milpitas' responsibility related to mitigation of San Jose traffic issues/impacts arising from the Transit Area Plan except as set forth in paragraph 7, below:

   a. Milpitas shall work with the County and Santa Clara Valley Transportation Authority to finance and implement a plan for the improvement of the Montague Expressway in the Great Mall/ Capitol area consistent with the regional plan for Montague (estimated cost: $35 million); Milpitas shall have discretion over the nature of its financing for these improvements (examples include, but are not limited to, the use of redevelopment funds, general funds, developer fees, etc.); and

   b. Within one hundred twenty (120) days after its certification of the Environmental Impact Report for the Transit Area Plan becomes final, Milpitas shall provide San Jose $200,000 to address significant traffic impacts from the Transit Area Plan in the Capitol Avenue corridor.

6. Given that Milpitas shall not approve a Transit Area Plan that would exceed the Maximum Trips, San Jose will accept transportation impacts to intersections within the North San Jose industrial area arising from the Transit Area Plan.

7. Should the total number of trips from the Transit Area Plan exceed the Maximum Trips, San Jose reserves the right to seek additional mitigation for transportation impacts from Milpitas.

8. San Jose agrees to engage in good faith negotiations for Milpitas' potential lease of up to one million gallons per day (MGD) of San Jose's wastewater discharge capacity allocation subject to the terms of the Master Agreement for Wastewater Treatment between the City of San Jose, City of Santa Clara and City of Milpitas, dated March 1, 1983, as amended, and any other applicable documents, statutes, or regulations.

9. Milpitas shall waive its costs and attorney's fees arising out of this Action and shall withdraw its pending motion for attorney's fees.

10. Milpitas shall support amendment of the March 28, 2006 Judgment, dismissal of the Action, discharge of the Peremptory Writ of Mandate, and any other reasonable steps designed to allow the Project to move forward as quickly as possible. Milpitas shall not require that San Jose set aside any NSJ Project approvals or recirculate any environmental documents for the NSJ Project.

11. This Settlement Agreement is contingent upon:

    a. The City, Council, and the Redevelopment Agency of the City of San Jose executing an agreement with the County of Santa Clara to resolve the Fairgrounds and North San Jose litigation; and

    b. The City and Redevelopment Agency of Santa Clara executing a settlement agreement with the County of Santa Clara or the City of San Jose to resolve the North San Jose litigation.

12. This Settlement Agreement shall become effective upon execution of the agreements described in paragraph 11 above, and the City of Milpitas' obligations under this Settlement Agreement shall commence at that time. Counsel for San Jose shall provide counsel for Milpitas with copies of the agreement(s) upon their execution. Except as set forth above, the City of Milpitas hereby waives any and all other claims relating to the Action, the NSJ Project, or the NSJ EIR. Section 1542 of the Civil Code of the State of California provides as follows:

> *A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor.*

Milpitas hereby represents that Civil Code Section 1542 has been read and reviewed with counsel and understood, and that it hereby waives any and all present and future rights and benefits under Section 1542 to the extent it would permit claims relating to, arising out of, or any way connected with the NSJ Project, Action, or NSJ EIR based on facts found to be different from the facts believed to be true at the time this Settlement Agreement was executed.

13. The parties agree that this is a judicially supervised settlement pursuant to the terms of California Code of Civil Procedure Section 664.6, and that the court shall retain jurisdiction over the parties to enforce the terms of this Settlement Agreement should enforcement become necessary.

14. This Settlement Agreement may be modified or amended only by a written instrument signed by all parties hereto.

15. The laws of the State of California shall govern this Settlement Agreement.

16. Each person executing this Settlement Agreement on behalf of any other person or entity hereby warrants that he or she has full authority to do so.

17. The unenforceability, invalidity, or illegality of any provisions shall not render the other provisions of the Settlement Agreement unenforceable, invalid or illegal.

18. Nothing stated herein shall be construed as an admission of liability by any party to the Settlement Agreement.

IN WITNESS WHEREOF, the City of San Jose, City Council of San Jose, and the City of Milpitas have executed this Settlement Agreement upon the day and year above written.

CITY OF MILPITAS

City Manager, City of Milpitas

CITY OF SAN JOSÉ

Richard Doyle, City Attorney, as
Authorized Agent for Respondent,
CITY OF SAN JOSE

APPROVED AS TO LEGAL FORM

for

Steve Mattas
City Attorney, CITY OF MILPITAS

APPROVED AS TO LEGAL FORM:

George Rios, Assistant City Attorney
CITY OF SAN JOSE