

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILPITAS APPROVING PURCHASE OF REAL PROPERTY FROM THE COUNTY OF SANTA CLARA

WHEREAS, Section I-2-12.01 of the Milpitas Municipal Code exempts the purchase or lease of real property from the procedures set forth in the Purchasing Ordinance (Chapter 2 of Title I) and authorizes the City Council to otherwise proceed in accord with law; and

WHEREAS, pursuant to Government Code Section 37350 the City has full authority to purchase real property for the common benefit; and

WHEREAS, the County of Santa Clara has determined that the real property located at the corner of Great Mall Parkway and Able Street in the City of Milpitas (hereafter PIQ), as more particularly described in the legal description attached to the accompanying Agreement for Purchase and Sale of Real Property, is surplus property and appropriate for sale to the City; and

WHEREAS, the City Manager has been authorized to negotiate the purchase of the PIQ from the County for public use by the City; and

WHEREAS, pursuant to two appraisals commissioned by the City and the County, one completed by Hulberg and Associates valuing the property at \$540,000, and one by Diaz, Diaz and Boyd valuing the property at \$418,000, and then arriving at the difference between the two and concluding that the amount of \$479,000, the purchase price herein, is a fair and reasonable price for the PIQ based upon this appraisal data; and

WHEREAS, the funds for the purchase of the PIQ are available from existing accounts set aside for such purposes; and

NOW, THEREFORE, the City Council of the City of Milpitas hereby finds, determines, and resolves as follows:

1. That the recitals set forth above are true and correct and incorporated by reference.
2. That the Mayor is authorized to execute the Agreement for Purchase and Sale of Real Property accompanying this Resolution and any other documents in association with the close of Escrow for said purchase and sale, subject to approval as to form by the City Attorney.

PASSED AND ADOPTED this ____ day of _____, 2008, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Robert Livengood, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

AGREEMENT FOR PURCHASE AND SALE OF REAL PROPERTY
SOUTH ABEL STREET & GREAT MALL PARKWAY, MILPITAS
APN: 086-12-010

THIS AGREEMENT OF PURCHASE AND SALE (this “**Agreement**”), dated as of this ____ day of _____, 20__ is entered into by and between the County of Santa Clara, a political subdivision of the State of California (hereafter, “**County**” or “**Seller**”) and the City of Milpitas, a public City (hereafter (“**City**” or “**Buyer**”). County and City are hereinafter collectively referred to as the “**Parties**” or individually as a “**Party**.”

RECITALS

WHEREAS, County is the owner of fee title to that certain real property consisting of approximately 0.48 acre remnant parcel, located at South Abel Street & Great Mall Parkway in Milpitas, commonly known as Santa Clara County Assessor’s Parcel No. 086-12-010, and more particularly described in Exhibit A attached hereto and incorporated herein (the “**Property**”); and

WHEREAS, County has determined that the Property is not needed for County purposes and is surplus property, and that the public interest and necessity will be served by its sale; and

WHEREAS, City intends to purchase the Property to incorporate it into the adjacent Centria (D. R. Horton) housing development project as part of the open space to be maintained as a public open space; and

WHEREAS, the County understands that the City intends to use the Property for development of a public park.

NOW, THEREFORE, in consideration of the mutual covenants contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows.

1. Purchase. County shall sell to City, and City shall purchase from County, the Property in accordance with the terms, covenants and conditions set forth herein.
2. Purchase Price. The purchase price for the Property (“**Purchase Price**”) shall be the sum of four hundred and seventy-nine thousand dollars (\$479,000.00).
3. Payment of Purchase Price. The Purchase Price shall be payable at the close of escrow (as defined below) in check made payable to Chicago Title Company (Escrow # 97701139). No less than one (1) business day prior to the close of escrow, City shall deposit into escrow immediately available funds in the amount equal to the Purchase Price and all closing costs to be paid by Buyer.

4. Escrow. No later than five (5) business days following the execution of the Agreement by the County, the County shall open an escrow to consummate the purchase and sale of the Property pursuant to this Agreement at the office of Chicago Title Company located at 675 North First Street, Suite 300, San Jose, California 95112 (“**Title Company**” or “**Escrow Agent**”). Upon the opening of escrow, the Parties shall deposit with the Escrow Agent an executed copy of this Agreement, which shall serve as the joint escrow instructions of County and City for this transaction, together with such additional instructions consistent with this Agreement as may be executed by the Parties and delivered to the Escrow Agent.

5. Title. County shall deliver a grant deed conveying title to the Property prior to the Close of Escrow. City will pay for title insurance in connection with conveyance. In the event that County shall, for any reason, be unable to convey marketable title to the Property, City shall have the right to rescind the sale, but shall not be entitled to recover any damages from the County.

6. Close of Escrow. Unless this Agreement is terminated pursuant to the terms hereof or extended by mutual written consent of the Parties, escrow shall close no later than the date that is thirty (30) days following mutual execution of the Agreement (“**Closing Date**”). The Escrow Agent shall close escrow by: (i) causing the Grant Deed to be recorded in the official records of Santa Clara County, California; and (ii) issuing the Title Policy and delivering same to City. Possession of the Property shall be delivered to City at the close of escrow.

7. Closing Costs. Buyer shall bear the cost to record any instruments necessary to clear Seller’s title in conformity with Section 5, the cost of any County transfer taxes (if any), the escrow fees and the cost of the premium for a CLTA title insurance policy. Buyer shall bear the cost of the additional premium for an ALTA title insurance policy, the Survey, title insurance endorsements, and the recording fee for the Grant Deed. If the Closing does not occur for any reason, any and all escrow charges, including cancellation costs, shall be borne by Buyer.

8. AS-IS Sale. City acknowledges and agrees that except as expressly set forth in this Agreement, County is not making any representations or warranties with respect to matters concerning the Property, whether express or implied, including without limitation:

- a) The quality, nature, adequacy and physical condition of the Property
- b) The quality, nature, adequacy and physical condition of soils, geology and any groundwater
- c) The potential of the Property, and the Property’s use, habitability, merchantability, or fitness, suitability, value or adequacy of the Property for any particular purpose
- d) The zoning or other legal statute of the Property or any other public or private restrictions on use of the Property

e) The compliance of the Property or its operation with any applicable codes, laws, regulations, statutes, ordinances, covenants, conditions and restrictions of any governmental or quasi-governmental entity or of any other person or entity

f) The presence or removal of hazardous or toxic materials, substances or wastes on, under or about the Property or the adjoining or neighboring property.

Except as expressly provided in this Agreement, City takes the Property “AS-IS” “WHERE IS” and “WITH ALL FAULTS,” and no patent or latent defect or deficiency in the condition of the Property whether or not known or discovered, shall affect the rights of either City or County hereunder, nor shall the Purchase Price be reduced as a consequence thereof. In City’s discretion, City shall inspect the Property and examine the legal, environmental, zoning, land use, seismic, title, survey and physical characteristics and condition of the Property, and by purchasing the Property, City shall be deemed to have approved of all such characteristics and conditions, and except for any representations expressly made by County in this Agreement, City shall acquire the Property solely upon the basis of its independent inspection and investigation of the Property.

9. County's Representations and Warranties. County hereby represents and warrants that to County’s knowledge, as of the close of escrow: (a) except as disclosed in the Preliminary Title Report, to County’s knowledge, no third party has any right to the use, occupation or possession of the Property; (b) there is no pending (nor has County received notice of any threatened) action, litigation, condemnation or other proceeding against the Property or against County with respect to the Property; (c) County has received no notice from any governmental authority having jurisdiction over the Property to the effect that the Property is not in compliance with applicable laws and ordinances (including any laws concerning the use, generation, handling, disposal or storage of Hazardous Materials); and (d) all documents, if any, provided to the City by the County regarding the condition of the Property are true and correct copies, provided however, County makes no representation as to the accuracy of documents prepared by third parties. As used herein, the phrase “to County’s knowledge,” means the actual (not constructive or imputed) personal knowledge of the management employees of County with knowledge of the Property.

County further represents and warrants that this Agreement shall at the time of its delivery: (i) has been duly authorized, executed, and delivered by County; (ii) be the binding obligations of County; (iii) be sufficient to transfer all of County's right, title and interest in and to the Property; and (iv) not be in violation of the provisions of any agreement to which County is a party or which affects the Property. County further represents and warrants that the persons who have executed this Agreement on behalf of County are duly authorized to do so, that County has the legal right to enter into this Agreement and to perform all of its terms and conditions, and that this Agreement is enforceable against County in accordance with its terms.

10. City's Representations, Warranties and Covenants. City represents, warrants and covenants that this Agreement and all other documents delivered in connection herewith, prior to or at the close of escrow shall at the time of their delivery: (i) have been duly authorized, executed, and delivered by City; (ii) be the binding obligations of City; and (iii) not be in

violation of the provisions of any agreement to which City is a party. City further represents and warrants that the persons who have executed this Agreement on behalf of City are duly authorized to do, that City has the legal right to enter into this Agreement and to perform all of its terms and conditions, and that Agreement is enforceable against City in accordance with its terms.

11. Release. City agrees that, upon the close of escrow, City shall fully and forever release and discharge and the County and its respective elected and appointed officers, officials, employees, agents and representatives (collectively, the “**Releasees**”) from any and all liabilities, losses, claims (including third party claims), demands, damages (of any nature whatsoever), causes of action, costs, penalties, fines, judgments, attorney’s fees, consultants’ fees and costs and experts’ fees, orders, decrees and administrative actions (collectively, the “**Claims**”), whether direct or indirect, known or unknown, foreseen or unforeseen, that may arise on account of or in any way be connected with the Property including, without limitation, the physical, environmental and seismic condition of the Property or any law or regulation applicable thereto, including, without limitation, any Claim relating to or arising from (i) the presence or alleged presence of Hazardous Materials on, in, under or about the Property (provided that this release shall not apply to any Hazardous Material that originates from any County-owned property other than the Property and which migrates onto the Property after the Close of Escrow, or any Hazardous Materials that are generated or caused by the Releasees’ acts or omissions after the Close of Escrow), (ii) any patent or latent defects or deficiencies with respect to the Property, and (iii) any and all matters related to the Property or any portion thereof, including without limitation, the condition and/or operation of the Property and each part thereof, provided, however, that the Releasees shall not be released from any claim involving fraud or intentional misrepresentation of any Releasee or Claims that arise due to the gross negligence or willful misconduct acts or omissions of the Releasees. City expressly waives the provisions of Section 1542 of the California Civil Code which provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.

Without limiting the foregoing, if Buyer has actual knowledge of (a) a default in any of the covenants, agreements or obligations to be performed by Seller under the Agreement and/or (b) any breach or inaccuracy in any representation of Seller made in the Agreement, and Buyer nonetheless elects to proceed to Closing, then, upon the consummation of the Closing, Buyer shall be conclusively deemed to have waived any such default and/or breach or inaccuracy and shall have no Claim against Seller or hereunder with respect hereto.

The provisions of this Section shall survive the close of escrow and shall not be deemed merged into any instrument or conveyance delivered at the close of escrow.

COUNTY’S INITIALS:

CITY’S INITIALS:

12. Condemnation. If prior to Close of Escrow, a material portion of the Property is taken by eminent domain (or an action of eminent domain has been commenced against all or any portion of the Property) (excluding for purposes of this Section, the exercise of any eminent domain powers by the County), upon County's receipt of notice thereof County shall promptly notify City of such fact, and City shall have the option to terminate this Agreement upon notice to County given not later than ten (10) days after City's receipt of County's notice. If City elects to terminate this Agreement, all funds and documents deposited into escrow by or on behalf of City shall be returned to City, and all rights and obligations hereunder shall terminate, after the City has satisfied any rents, expenses, fees or amounts owed to the County.

If City does not exercise such option to terminate this Agreement, County shall assign to City at the close of escrow, and City shall be entitled to negotiate for, receive, and keep, all awards, and rights to receive future awards, for such taking by eminent domain, and the transaction contemplated by this Agreement shall be consummated pursuant to the terms hereof, without any reduction of the Purchase Price.

13. Indemnification. Each party hereto shall defend, indemnify and hold harmless the other party from and against any loss, cost, expense, claim, demand, liabilities or damages, including attorneys' fees (including any fees and expenses incurred in enforcing this indemnity), resulting from any misrepresentation, breach of express warranty, breach of this Agreement, or breach of covenant made by such indemnifying party in this Agreement or in any document, certificate, schedule or exhibit given or delivered to the other party pursuant to or in connection with this Agreement or for any claims for personal injury or real or personal property administrative proceedings (including informal proceedings), judgments, damages, punitive damages, penalties, fines, costs, liabilities (including sums paid in settlement of claims), interest or losses, including consultant fees and expert fees that arise directly or indirectly from or in connection with the condition of the property that is due to the willful misconduct or negligent conduct of the indemnifying party, and such indemnification obligations shall survive the Close of Escrow.

14. Notices. Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by:

- (i) personal delivery, in which case notice is effective upon delivery;
- (ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;
- (iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service;
- (iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated

reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient's time or on a non-business day.

City: City of Milpitas
455 East Calaveras
Milpitas, CA 95035
Attention: Executive Director
Facsimile: (408) 586-3056

County: County of Santa Clara
Facilities and Fleet Department
North First Street, 2nd Floor, Ste 200
San Jose, CA 95131
Attn: Property Management
Facsimile: (408) 993-4777

County of Santa Clara
70 West Hedding Street, 9th Floor
San Jose, CA 95110
Attn: County Counsel
Facsimile: (408) 292-7240

15. No Brokers. Each Party hereby represents and warrants to the other Party that it has retained no broker or other party to whom a commission or finder's fee is due with respect to the transactions contemplated hereby.

16. Attorney's Fees. If either Party fails to perform any of its obligations under this Agreement, or if any dispute arises between the Parties concerning the meaning or interpretation of any provision hereof, then the prevailing party in any proceeding in connection with such dispute shall be entitled to the costs and expenses it incurs on account thereof and in enforcing or establishing its rights hereunder, including, without limitation, court costs and reasonable attorneys' fees and disbursements.

17. Entire Agreement. This Agreement constitutes the entire agreement of the Parties with respect to the subject matter hereof and supersedes all prior negotiations and agreements with respect thereto.

18. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

19. Interpretation; Captions. The section headings used herein are solely for convenience and shall not be used to interpret this Agreement. The Parties acknowledge that this Agreement is the product of negotiation and compromise on the part of both Parties, and the

Parties agree, that since both Parties have participated in the negotiation and drafting of this Agreement, this Agreement shall not be construed as if prepared by one of the Parties, but rather according to its fair meaning as a whole, as if both Parties had prepared it.

20. No Third Party Beneficiaries. Nothing contained in this Agreement is intended by the Parties, nor shall any provision of this Agreement be deemed or construed by the Parties or by any third person, to be for the benefit of any third party, nor shall any third party have any right to enforce any provision of this Agreement or be entitled to damages for any breach by County or City of any of the provisions of this Agreement.

21. Amendments. This Agreement may be modified or amended only by an instrument in writing executed by both County and City.

22. Assignment. This Agreement and the rights conferred hereunder may not be assigned by either party without the written consent of the Parties and any such assignment is subject to the terms of the Agreement.

23. Escrow Cancellation Charges. If the escrow fails to close by reason of a default by County or City hereunder, such defaulting party shall pay all escrow or other Title Company charges and any other costs incurred by a party because of the default. If the escrow fails to close for any reason other than default by County or City, City shall each pay such charges.

24. Further Assurances. City and County each agree to undertake such other actions as may reasonably be necessary to carry out the intent of this Agreement, including without limitation, the execution of any additional documents which may be required to effectuate the transactions contemplated hereby.

25. Severability. If any term, provision, or condition of this Agreement is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Agreement shall continue in full force and effect unless the rights and obligations of the Parties have been materially altered or abridged thereby.

26. Non-Liability of Officials, Employees and Agents. No member, official, employee or agent of County or City shall be personally liable in the event of any default or breach hereunder by either Party.

27. Time of Essence. Time is of essence for each condition, term and provision in this Agreement.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates as signed below.

COUNTY OF SANTA CLARA

THE CITY OF MILPITAS

By: _____
Larry Jinkins
Director of Facilities and Fleet Department
Board of Supervisors

By: _____
Robert Livengood, Mayor

ATTEST:

Mary Lavelle, City Clerk

APPROVED AS TO FORM:

Neysa A. Fligor, Deputy County Counsel

Michael J. Ogaz, City Attorney

APPROVED:

Emily Harrison, Deputy County Executive

Exhibit A

PROPERTY

(Attach legal description of property)

Site Map 1

