

**FUNDING AGREEMENT
BETWEEN THE CITY OF MILPITAS AND
THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
FOR THE SR 237 AND MCCARTHY BOULEVARD MEDIANS PLANTING PROJECT**

THIS AGREEMENT (“Agreement”) dated _____, 2012, 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 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. **Whereas**, on January 16, 2007, CITY and VTA entered into a cooperative agreement entitled “COOPERATIVE AGREEMENT BETWEEN THE CITY OF MILPITAS AND THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY FOR THE ROUTE 237/880 – TASMAN AVENUE INTERCHANGES AND MCCARTHY ROAD MEDIANS HIGHWAY PLANTING PROJECT” for the landscape design, construction administration, landscape planting, irrigation, and storm water management for the Route 237/880 Interchange, Route 880/Tasman Avenue Interchange, and McCarthy Ranch Road medians.

B. **Whereas**, on September 1, 2009, CITY and VTA entered into an amendment to the cooperative agreement to reduce the project limits, scope of work and overall not-to-exceed contribution by the CITY and to eliminate certain VTA obligations due to the reduction in scope.

C. **Whereas**, under the January 16, 2007, agreement, as amended, the landscape design was completed.

D. **Whereas**, the January 16, 2007, cooperative agreement expired on June 30, 2011 without award of the construction contract.

E. **Whereas**, the CITY’s contribution for construction and construction support services was not requested nor made.

F. **Whereas**, the Parties wish to set forth in this Agreement their respective obligations in connection with the completion of the Landscape Construction for the SR 237 and McCarthy Boulevard medians (PROJECT) as originally contemplated in the January 17, 2007, cooperative agreement.

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

II. SCOPE OF AGREEMENT

1. Scope of PROJECT. The scope of the PROJECT includes landscape planting, irrigation, maintenance, permitting and construction administration management services, based on existing landscape design completed under the January 16, 2007, cooperative agreement, as amended. VTA will provide a minimum one-year plant establishment period (PEP) for the portion of the PROJECT that is located within the State right of way, and CITY will provide a minimum of one-year PEP for the portion of the PROJECT that is located within the McCarthy Boulevard medians. PEP for McCarthy Boulevard medians is not part of PROJECT costs.

The PROJECT location is depicted in the attached Exhibit A.

2. CITY's Financial Contribution and Deposit for PROJECT. CITY shall contribute to the PROJECT an amount not to exceed **Five Hundred Thousand Dollars (\$500,000.00)** (hereinafter, "CITY's Contribution"). The CITY shall immediately deposit **\$500,000** into VTA's designated interest-bearing account, following execution of this Agreement and receipt of an invoice from VTA. This deposit is necessary before the PROJECT can proceed.

3. Use of CITY's Contributions. VTA shall draw down on CITY's Contribution only for allowable costs and expenses related to the PROJECT and only as they are incurred for the PROJECT.

PROJECT costs are identified in Exhibit B.

4. CITY's Role in PROJECT. During the term of the PROJECT, CITY shall provide CITY staff oversight and participation, and necessary and appropriate coordination with all departments of the CITY. The CITY shall provide timely permit issuance of submittals by VTA and shall also provide landscape maintenance for McCarthy Boulevard medians after inspection and acceptance of PROJECT.

5. VTA's Role in PROJECT.

- a. Tasks. VTA shall perform and be responsible for the following tasks to complete the PROJECT:
 - i. Serve as PROJECT manager for the entire PROJECT;
 - ii. Complete permit-ready landscape PS&E design package;
 - iii. Coordinate State's permit issuance of PROJECT;
 - iv. Prepare the construction documents, advertise, award and administer the construction contract for PROJECT;
 - v. Administer and provide project management and construction administration services, including project permitting, construction inspection and completion of PROJECT;
 - vi. Process and obtain necessary permits and approvals from State and local agencies governing the construction of PROJECT;
 - vii. Provide a minimum one-year PEP for State right of way. PEP shall begin after landscape contract work, inspections and acceptance.

b. Consultants. VTA may retain consultants to perform any of the functions listed in Section 5(a).

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

d. Final Accounting. VTA shall submit a final report of expenditures to CITY within 120 days after completion of all work associated with the PROJECT.

6. Term of Agreement. This Agreement shall become effective upon full execution of the Agreement and shall remain in effect through June 30, 2015.

7. Written Termination. This Agreement may be terminated as mutually agreed to by the Parties.

8. Refund of CITY's Contribution. Any balance of funds, 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 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.

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 his 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. Pursuant to Government Code Section 895.4, each of the Parties hereto shall fully indemnify, defend and hold the other Party, its officers, employees and agents, harmless from any damage or liability imposed for injury (as defined in Government Code Section 810.8) occurring by reason of the negligent acts or omissions or willful misconduct of the indemnifying Party, its officers, employees or agents, under or in connection with any work, authority or jurisdiction delegated to such Party under this Agreement. Neither Party, nor any officer, employee or agent thereof shall be responsible for any damage or liability occurring by reason of the negligent acts or omissions or willful misconduct of the other Party hereto, its officers, employees or agents, under or in connection with any work, authority or jurisdiction delegated to such other Party under this Agreement.

12. No Waiver. The failure of either Party to insist upon the strict performance of any of the terms, covenant and conditions 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, covenants, and conditions 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, Chief, Congestion Management Agency
3331 North First Street, Bldg. B-2
San Jose, CA 95134-1906

To CITY: City of Milpitas
Kathleen Phalen, Acting Director, Public Works
Department of Public Works
455 East Calaveras Blvd.
Milpitas, CA 95035

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 binding 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 Council. Whenever possible, notice to amend this Agreement shall be provided ninety (90) 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 Milpitas
a municipal corporation

“VTA”
Santa Clara Valley Transportation Authority
a public agency

By: _____
Thomas C. Williams
City Manager

By: _____
Michael T. Burns
General Manager

Date: _____

Date: _____

APPROVED AS TO FORM:

APPROVED AS TO FORM:

By: _____
Michael J. Ogaz
City Attorney

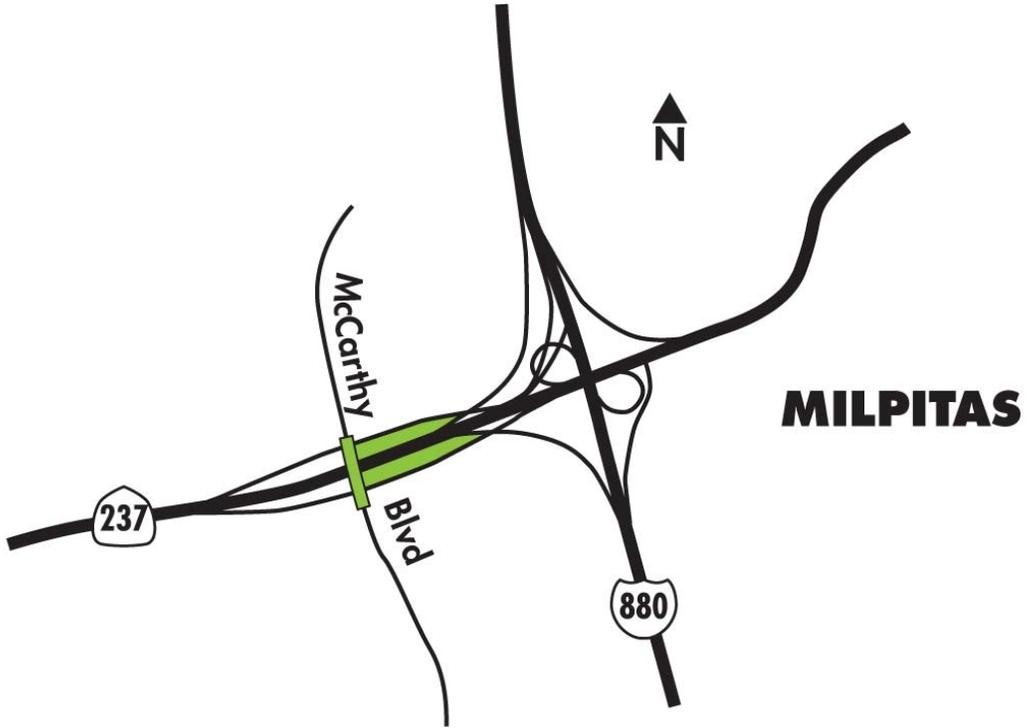
By: _____
VTA Counsel

Date: _____

Date: _____

EXHIBIT A

PROJECT LOCATION MAP



LEGEND	
	SR 237/McCarthy Blvd. Planting

EXHIBIT B
PROJECT COST

<u>Item</u>	<u>Description</u>	<u>Estimated Cost</u>
1.	Construction Contract Preparation and Administration	
	a. Consultant Permit- Ready Packaging & Construction Support	\$ 50,000
	b. VTA Pre Construction & Construction Management/ Administration (Including 1-year Plant Establishment Period)	<u>\$ 120,000</u>
	Subtotal	\$ 170,000
2.	Construction	
	a. SR 237	\$ 150,000
	b. McCarthy Boulevard Medians	\$ 150,000
	c. Construction contingency (10%)	<u>\$ 30,000</u>
	Subtotal	\$ 330,000
3.	Total Estimated Cost	Total \$ 500,000