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MASTER AGREEMENT
BETWEEN
THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY
AND THE CITY OF MILPITAS
RELATING TO THE SILICON VALLEY RAPID TRANSIT PROGRAM BERRYESSA
EXTENSION PROJECT

Milpitas - (2.17.10)

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TABLE OF CONTENTS

This is a Master Agreement (“Agreement”) between the City of Milpitas, a general law city of the State of California (“City”) and the Santa Clara Valley Transportation Authority, a public transit district (“VTA”) (collectively, the “Parties”). This Agreement is entered into this ____ day of ____ 2010 (the “Effective Date”).

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RECITALS

A. The Bay Area Rapid Transit system (“BART”) comprises a network of four heavy-rail rapid transit lines serving several of the urbanized counties (San Francisco, Alameda, Contra Costa, and San Mateo) of the San Francisco Bay Area. At present, the southern terminus of the system is in the City of Fremont in Alameda County. There is no BART service within Santa Clara County. VTA has undertaken a program of activities leading to extension of BART service into Santa Clara County. Ultimately, VTA intends to construct an extension of approximately 16 miles, providing service to the Cities of Milpitas, San Jose and Santa Clara. The extension, referred to as Silicon Valley Rapid Transit, will be constructed by VTA and operated by BART.

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B. The Bay Area Rapid Transit system (“BART”) extension into City and Santa Clara County is intended to provide a higher quality of life, economic vitality and many other benefits to the Milpitas community and County region. VTA and City will work together to achieve positive impacts (both short-term and long-term) to the City of Milpitas, by delivering a well designed system that is a good balance between excellent design and costs.

C. To maximize the opportunities for development of a transit orientated community, City has made land-use changes to its General Plan by adopting a “Transit Area Specific Plan” around the proposed Milpitas BART station and creating a developer impact fee program to fund portions of the infrastructure needed, such as the extension of Milpitas Boulevard, support the mixed use redevelopment of this area, and provide increased and long term sustained BART ridership patronage.

D. The project is expected to be developed in phases. An initial phase of approximately ten miles has been proposed, which would extend from the planned Warm Springs station

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(currently under development in the city of Fremont), through the City, to a temporary terminal station at Berryessa in the City of San Jose. This phase is referred to as the Berryessa Extension Project (SVBX) (“Project”) and includes two stations, one in Milpitas at the intersection with the VTA Alum Rock/Santa Theresa Light Rail Line near Great Mall Parkway and one near the temporary terminus in San Jose, near Berryessa Road.

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E. VTA, along with the Federal Transit Administration (“FTA”), has prepared a final environmental impact statement (“FEIS”) for the Project and has proposed a mitigation monitoring and reporting plan (“MMRP”) which includes mitigation measures in the City. As part of the FEIS process, the City reviewed the environmental documents and provided comments and suggestions on, and proposed revisions to, the Project.

F. In addition, VTA and the City have consulted on the design, engineering, and urban planning aspects of the Project. The City desires to cooperate with VTA to facilitate the construction and operation of the Project and VTA recognizes the importance of public health, safety and various other public services which the City provides to the community for economic and quality of life benefits. Construction of the BART guideway and stations will require reconstruction or relocation of existing City infrastructure, including roads and utilities. The project will also relocate infrastructure owned by other agencies and VTA will need to coordinate these relocations to minimize temporary and permanent impacts on all Parties and the public. Accordingly, through this Agreement, VTA and the City desire to create and memorialize an overall structure for interagency cooperation, processes, elements, City permitting, execution of the project design and construction, and consultation between the Parties.

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- Deleted: regarding the Project. VTA has incorporated many of the City’s comments into
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- Deleted: . VTA and the City desire to memorialize the interagency cooperation and consultation between the Parties in this Master Agreement.¶
<#>The Parties acknowledge that the Project is funded in part with funds made available by the Federal Transit Administration. Accordingly, this Comprehensive Agreement and the obligations imposed on the Parties hereby shall be interpreted in a manner consistent with both Federal and State laws and regulations; including the requirements of 49 U.S.C. Section 5309 (“New Starts”),¶
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G. VTA and the City acknowledge that it will be necessary to develop procedures to ensure careful and continued cooperation between the Parties, including the following: (1) procedures for finalizing any necessary design and construction options relating to City Infrastructure; (2) procedures to avoid unnecessary delays to either the contracting or construction process; and (3) procedures for inspecting the construction, relocation, and replacement, as necessary, of city infrastructure. (4) procedures for minimizing and controlling negative impacts to the community both during and post-construction.

H. The Parties acknowledge that the Project is funded in part with funds made available by the Federal Transit Administration. Accordingly, this comprehensive agreement and the obligations imposed on the Parties hereby shall be interpreted in a manner consistent with both Federal and State laws and regulations; including the requirements of 49 U.S.C. Section 5309 (“New Starts”).

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Comment [A1]: To VTA: There are various requirements under the New Starts regulations for different types of projects. We would appreciate a discussion as to how the funding application is being formulated with regards to the New Starts requirements.

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I. The Parties recognize that this Agreement may not reasonably anticipate all aspects of the Project and changes thereto which may occur due to unforeseen circumstances. Accordingly, the Parties acknowledge their respective obligations to act reasonably and in good faith and to modify the terms hereof when necessary to accomplish their mutual goals.

NOW, THEREFORE, in consideration of the foregoing, the Parties agree as follows:

SECTION 1: OPERATIVE DATE

This Agreement will be effective when executed by both Parties.

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SECTION 2: DEFINITIONS

The following definitions relate to such terms found in the entire Agreement, including, without limitation, all Exhibits hereto.

Deleted: <#>The requirement for FTA to issue a Record of Decision (ROD) before VTA may take any actions regulated under the National Environmental Policy Act (NEPA); and <#>Completion of a Full Funding Grant Agreement (FFGA) between VTA and FTA, which is a necessary component of the project’s financial arrangements.

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A. “VTA” The Santa Clara Valley Transportation Authority, its officers, employees, agents, consultants, and contractors.

B. “Base Level” The City infrastructure of the size, capacity, and capabilities (i) in existence at the time of the execution this Agreement and (ii) the City infrastructure of the size, capacity, and capabilities already programmed, at the time of the execution of this Agreement, for future construction within a twenty-year period along the BART corridor and in the Milpitas Transit Area Specific Plan, City master plans, capital improvements programs, and other long range documents.

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C. “Betterment” The upgrading (e.g., increase in capacity) of a City facility that is not necessitated by construction of the SVBX Project and is made solely for the benefit of and at the election of City (not including a technological improvement which is able to

achieve such upgrade at costs equal to or less than the costs of a “like-for-like” replacement or relocation). A Betterment shall constitute an increase or oversize above the Base Level. VTA shall not be obligated to pay for the portion of the facility reconstruction that constitutes a Betterment.

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D. “Bid Package” The Invitation to Bid, Instructions to Bidders, Forms for the submittal of Bids, and all other documents provided to prospective Bidders.

E. “CEQA” The California Environmental Quality Act, Public Resources Code Section 21000 et.seq.

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F. “City” The City of Milpitas, its officers, employees, agents, consultants and contractors.

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G. “City Infrastructure” All City-owned facilities and appurtenances including, but not limited to, City streets (pavement sections, pavement markings, curbs, gutters and sidewalks), traffic control devices, storm drains, sanitary sewers, water lines, hydrants, street lighting systems, landscaping, irrigation systems, fiber optics, other communication systems.

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H. “Contract Documents” The executed base agreement, contract drawings, construction drawings and construction specifications, design criteria, bonds, addenda, change orders, materials incorporated by reference by the base agreement, and other documents that set forth the legally bindings rights and obligations of VTA and its chosen contractor for the construction of the Project or its subcomponents.

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I. “FEIS” The Final Environmental Impact Statement for the Project. The FEIS process will be completed when a Record of Decision is issued by FTA. This is currently expected to occur in the spring of 2010.

- Deleted: <#>“Contract Documents” . The executed Contract; Contract Drawings; Contract Book; Construction Drawings and Construction Specifications; design criteria; Contract Bonds; Addenda; Change Orders; and additional documents incorporated by express reference into the Contract.¶
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J. “FTA” The United States Department of Transportation, Federal Transit Administration.

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K. “MMRP” The Mitigation Monitoring and Reporting Plan for the Project.

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L. “MTC PCI Index” The Pavement Condition Index methodology set forth in the December 1988 Metropolitan Transportation Commission Pavement Management System Users Guide.

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M. “NEPA” The National Environmental Policy Act

N. “Parties” The City and VTA

O. “Plans and Specifications” Drawings, documents, plans, specifications, general and special conditions, and related construction documents defining the work to be done for the “Project.”

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P. “Project” or “SVRT Project” The Berryessa Extension Project as defined in the FEIS and this Agreement. The Project is also referred to as “SVBX” in the locally Preferred Alternative document submitted to FTA.

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Q. “Project Owner” VTA is the owner of the Project and shall be responsible for fulfillment of engineering studies, design, right of way clearance, construction management, plans and specification preparation, construction, inspection, and environmental clearance requirements.

R. “ROD” The Record of Decision issued by the Federal Transit Administration for the Project, indicating FTA’s acceptance of the FEIS and the conclusion of the environmental review process for the Project.

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S. “Standard Specifications” The standard construction details, drawings, general and special conditions, and construction methods usually and customarily utilized by the City for public works projects.

T. “VTA” Santa Clara Valley Transportation Authority.

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SECTION 3: PURPOSE OF THE AGREEMENT

The purpose of this Agreement is to memorialize the Parties’ consultation and cooperation thus far, define their respective rights and obligations, and ensure future cooperation between VTA and the City in connection with the Project. The Parties shall enter into subsequent agreements

or permits for specific sub-components of the Project as necessary. This Agreement is also intended to create a framework for offsets and reimbursements for lost City developer impact fees, connection fees, and other City fees and charges for development that is being displaced or precluded by the Project.

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SECTION 4: FUNDING AND ENVIRONMENTAL APPROVAL CONSTRAINTS

The parties acknowledge that VTA's ability to act in accordance with this Agreement is constrained by external factors, including but not limited to:

- The requirement for FTA to issue a Record of Decision (ROD) before VTA may take any actions regulated under the National Environmental Policy Act (NEPA); and
- Completion of a Full Funding Grant Agreement (FFGA) between VTA and FTA, which is a necessary component of the project's financial arrangements.

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SECTION 5 SPECIFIC MITIGATION MEASURES

NEPA requires that each significant adverse environmental impact of a project be identified in the Project's Environmental Impact Statement and that feasible mitigation measures or alternatives be identified and implemented. The FEIS identifies each significant environmental impact of the proposed project. A comprehensive list of mitigations associated with the Project is set forth in the MMRP. VTA will comply with and implement the requirements of the MMRP.

SECTION 5: PROJECT FEATURES

The Project features set forth in Paragraphs A through L below, are not intended to constitute a comprehensive list of project features, but are described in this Agreement because they are of particular concern and have a direct impact to the City. A comprehensive list of project features associated with the Project is set forth in the FEIS.

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- A. Dixon Landing—BART crossing at grade: VTA shall design and construct the retained cut option for the Dixon Landing Road Crossing with Dixon Landing Road at grade.

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- B. Milpitas Boulevard Extension: VTA shall do all right-of-way acquisition, design and construction of the Milpitas Boulevard Extension as part of the Milpitas BART Station construction.
- C. Milpitas BART Station: VTA shall design and construct the Milpitas BART Station West Option alternative.
- D. City Utility Crossings
- E. Montague Expressway Widening
- F. Piper Drive Improvements
- G. Pedestrian Bridge at Grade connecting Piper Drive to Great Mall
- H. Seismic Retrofit of Calaveras Boulevard Bridge
- I. BART Corridor improvements including soundwalls, storm pump stations and other necessary street and utility infrastructure.

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SECTION 6: GENERAL COMMITMENTS

A. Impacts on City Infrastructure and Construction of New City Infrastructure

1. The Parties recognize and agree that Project construction and delivery trucks will negatively impact public street surfaces. VTA acknowledges that the weight and operation of construction vehicles reduce the useful life of pavement sections and subbases without damage being readily visible. Accordingly, the Parties desire to ensure that such latent construction impacts be objectively measured and that the City not suffer a diminution in the value or useful life of such streets. Accordingly, the Parties agree to use as a baseline a pre-construction survey of City streets and infrastructure in order to determine Project impacts.
2. VTA shall pay for the construction, reconstruction, relocation and repair of City facilities associated or impacted by the Project and offer for dedication to the City all improvements after the Project is completed, subject to the maintenance provisions in this Agreement and a one year limited warranty period. VTA shall

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provide as-built drawings in hard copy format and electronic AutoCAD format 2009 or latest edition.

3. The mechanics for these processes are set forth in greater detail in Exhibit B.

B. City Private Job Account—VTA shall make payments to the City via the City’s Private Job (PJ) Account system for cost recovery of City plan check, inspection, coordination and other administrative costs caused by the Project. VTA shall deposit an initial amount of \$700,000, upon execution of this agreement and shall maintain a minimum positive balance of \$25,000 at all times until the end of the Project.

C. City Permit Agreement and Encroachment Permits

1. VTA shall enter into a city permit agreement prior to issuing the Bid Package for the SVRT Project and for work related to the City’s infrastructure. This city permit agreement shall require VTA, as the project owner, to comply with City encroachment requirements and regulations when working in City right of ways and/or engaging in work affecting City infrastructure. In addition, the City permit agreement shall require VTA to contractually require its chosen general contractors and its subcontractors to obtain City encroachment permits, prior to commencement of work, within the City right of way and prior to work on City infrastructure.

2. VTA agrees to pay the customary sewer and water connection fees, treatment plant fee, and storm drain connection fees in accordance with the City Municipal Code.

3. VTA agrees to obtain permits from the City Building and Fire Departments for all building structures including the BART station and parking garages and pay permit-related fees. Review timelines for such permits shall be as set forth in the Milpitas Municipal Code and resolutions.

D. Easements and Right of Ways—VTA shall acquire and transfer ownership to the City all easements and right of ways necessary to relocate any City facilities 12 months after construction is completed or prior to the opening of the Milpitas BART Station, whichever is sooner. VTA shall pay for all costs associated with the acquisition and transfer of any easements or new right of ways.

- E. Acquisition of New Property rights—VTA shall acquire all property rights necessary for the Milpitas Blvd extension and construct all related improvements as part of the Milpitas BART Station Project.
- F. Transit Area Specific Plan Design Compliance—VTA shall comply with all land use policies and plan line features as adopted in the Transit Area Specific Plan, including but not limited to the following provisions of the Transit Area Specific Plan: (i) Section 3 – Land Use, Circulation and Parks; (ii) Section 4 – Development Policies for Plan Subdistricts; (iii) Section 5—Development Standards and Design Guidelines; (iv) Section 6 – Utilities and Public Facilities; and (v) Section 7- Implementation of Transit Area Specific Plan.
- G. Cost Sharing Agreement—VTA and the City shall enter into a cost sharing agreement to cover costs associated with the Milpitas Boulevard Extension. The City shall reimburse up to 50 percent of Milpitas Boulevard Extensions costs, not to exceed the amount set forth in the Milpitas Transit Area Specific Plan Impact Fee, provided that the City collects sufficient developer impact fees to cover this cost. VTA shall also provide to the City payments or credits for displaced/lost TASP Impact Fees through this cost share agreement.
- H. VTA shall design and construct improvements as part of the SVRT Project all projects listed in the Project’s Features section above as described in Section 5.
- I. Flood Mitigation – VTA shall construct storm drainage improvements beneath Montague Expressway at Piper Drive, and Wrigley Creek Improvements along Piper Drive downstream of Montague Expressway to carry the 100 year flood event consistent with City’s updated Strom Drainage Master Plan.
- J. VTA Payment of Normal City Fees-- VTA shall pay all applicable water, sewer and storm connection fees and TASP impact fees mitigating the loss of the fees per the TASP.
- K. No Delayed Phasing of Important Community Improvements – VTA shall not phase any improvements as part of the project prior to obtaining City Approval for affected City

facilities to avoid deferral of “incidental work” such as landscaping and final street paving.

- L. Continuity of Service – The City is a municipal corporation including fire, police, water, sewer and storm drainage, responsible for essential community, public health and public safety services. Construction activities and the installation of permanent Project improvements will bisect the City of Milpitas from north to south. VTA and the City agree that the City must be able to continue to seamlessly provide those essential public health and public safety services throughout the entire construction and post-construction periods. VTA will therefore have to provide temporary and permanent provisions, as required, for the City to continue providing these essential services.
- M. Project Delivery Methods—It is understood by VTA and the City, that the design and construction process underway for the Project is a traditional Public Works– design/bid/build delivery method. This BART project represents the largest Public Works project traversing the City, since the construction of State Highway 680. The design/bid/build delivery method requires that all design packages including: utilities, roadways, guideways, station, parking garage and all other systems, be coordinated. In addition, all designs shall be finalized and permitted prior to bidding for construction.
1. Should VTA decide to change the Project construction program method to a design/build delivery method, for purposes of expediting the schedule and achieving cost efficiencies, VTA agrees to ensure that additional safeguards are provided to the City in recognition of the greater burdens such a delivery method would place on the City. Specifically, VTA acknowledges that a change to a design/build delivery method would require a compressed City permitting and encroachment agreement processing timeline. VTA also acknowledges that a switch to design/build delivery method would pose a significant resource impact on the City, due to compressed design review periods occurring while the contractor is under way with construction. VTA also acknowledges that a design/build delivery method would pose higher potential cost risks upon VTA for any design deficiencies, unforeseen circumstances, resolution of design

disagreements, construction rework and many other risks, which might ultimately lead to potential schedule delays, and cost risks. Accordingly, the VTA hereby agrees to negotiate in good faith an amendment of this Agreement in order to address these concerns if a design/build delivery method is used. At a minimum, VTA hereby agrees to include provisions in any amendment of this Agreement that shall defend, indemnify and hold harmless the City from any damages, liabilities, claims, injuries or damages arising from the use of a design/build delivery method. Furthermore, VTA shall provide additional funding to the City to pay for independent advice, overtime for plan reviews and input on design issues in the event the City determines that such advice is needed following the award of the design/build project. VTA shall also ensure the provision of increased additional insured coverage for the City and VTA. VTA shall ensure that the City has at least 30 days for initial plan and submittal review in a design/build delivery context.

N. Public Utility Relocation—VTA and the City acknowledge that they intend to enter into a separate agreement relating to City-owned utilities that will be affected by the Project, allowing VTA to modify and/or relocate those City-owned utilities. Attached Exhibit A identifies City-owned utilities currently known to be affected. The City further agrees to cooperate with VTA to identify said utilities, and to work cooperatively to identify possible cost-effective designs for the modified or relocated facilities. Notwithstanding the foregoing, the Parties agree that any cost-effective or value-engineered designs must comply with City engineering and infrastructure standards and conform to City planning and capital improvement plans for the placement, quality and character of City infrastructure, including but not limited to the Milpitas Transit Area Specific Plan and the City's master plans.

O. Relocation of Private Utilities—The relocation of private utilities within City public right of ways and easements by VTA shall require separate permit agreements between the City, the private utilities, and VTA. Such permit agreements shall be reviewed and approved by the City prior to the issuance of the Bid Package. VTA shall also finalize

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and grant all necessary licenses, easements, and other property rights twelve months after the completion of the private utility relocation or the opening of the new Milpitas BART Station, whatever is sooner.

P. Federal Requirements—VTA is pursuing federal funding through the Section 5309 New Starts funding program. The requested New Starts funding is an essential component of the financial plan for the Project, and is also a pre-requisite to allow the collection of the Measure B sales tax increment that will fund operation of the BART extension. The parties acknowledge the necessity of complying with FTA requirements under the New Starts program, and agree to cooperate and act in good faith in the effort to secure said funding.

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Q. City Review of Final Construction Documents—After development of final construction documents, VTA will provide the City with plan(s) addressing construction delivery routes for City review and approval, which approval shall not be unreasonably withheld. VTA will provide the City with plan(s) addressing storage areas, contractor employee parking, construction yard location, and construction site ingress and egress for review and comment. Street cleaning on streets affected by construction of the Project will be performed in accordance with the Contract Documents. Site drainage and storm water pollution prevention shall be performed in accordance with the City's stormwater quality protection program to ensure the City's compliance with its NPDES discharge permit, also known as the San Francisco Bay Region Municipal Regional Permit, and the requirements of the Regional Water Quality Control Board.

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R. Emergency Contact Personnel—During construction of the Project, VTA shall provide the City with a list of VTA personnel to be contacted in the event of an emergency on the Project construction sites within the City. VTA shall also develop fail/safe processes and procedures for 24/7 VTA response to health and safety emergencies.

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S. VTA Minimization of Community Impacts-- VTA acknowledges that the minimization of the effects of noise, dust, vibration, traffic, and lighting disruptions is a key City concern. Accordingly, VTA shall ensure that local business and community disruptions are kept to a minimum. VTA shall be prepared for a rise in the number of grievances

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received during the construction phase of the Project and shall devote additional resources and take such reasonable measures to mitigate noise, dust, vibration, traffic and lighting disruptions as required and as directed by the City within 48 hours or as mutually agreed by the Parties.

T. Community Outreach—Before and for the duration of Project construction, VTA shall assign a lead representative to perform outreach and handle Project-related complaints from City residents, City officials, and/or staff. VTA shall provide written notice to the City and shall publicize the telephone number, fax number, and E-mail address of the lead representative. City shall provide a list of City stakeholder groups. Before and during the Project, the VTA lead representative shall perform outreach and hold informational meeting with said stakeholder groups. The lead representative shall also make an initial response to all complaints within 24 hours. Follow-up of complaints will be completed within a reasonable time following initial contact with the complainant. VTA shall work in good faith and take reasonable actions to ensure resolution of complaints and take corrective actions within a reasonable period of time following the initial contact with the complainant, assuming the complaint is found to be valid and the necessary corrective action can be undertaken. It is VTA's intent that its community liaison staff will effectively and satisfactorily meet the needs of the City staff and residents.

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U. Economic Analysis Related to Preservation of Business Viability: Construction of the Project will disrupt accessibility to existing businesses on Dixon Landing from its BART Crossing to its intersection with the VTA right of way. The City will hire a consultant to analyze the current economic viability of businesses within the Montague/Capitol Ave and Dixon/Milmont Business area, estimate the economic impact of the Project during its construction and make recommendations to maintain continued viability. The cost incurred by City in the preparation of this analysis shall be reimbursed by VTA through the City's PJ account system. City estimates the cost of this analysis shall not exceed \$50,000.

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SECTION 7: CITY INFRASTRUCTURE

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A. Construction Standards: VTA-administered construction of City Infrastructure will be in accordance with City Standard Specifications and City Standard Drawings in effect at the time the contract documents are prepared unless modification of the standards is necessary, ~~and unless the City Engineer requires modifications of Standards,~~ to accommodate unique aspects of the Project. Any such modifications will be approved in advance ~~and in writing by the City.~~

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B. City Review of Project Plans and Specifications:

1. During each major phase of Project design development (e.g., preliminary engineering and final engineering), VTA will provide the City with Plans and Specifications showing work to be performed on or directly affecting City Infrastructure for review and approval, which approval shall not be unreasonably withheld. City approval will include, but not be limited to elements of the Project affecting City Infrastructure, and other facilities and appurtenances owned by, or which will be conveyed to, the City pursuant to the terms and conditions of this Agreement. Approval or disapproval of the Plans and Specifications will be delivered in writing to VTA no later than 30 calendar days from the City's receipt of such Plans and Specifications. VTA and the City may agree in writing to mutually convenient time extensions. VTA will make reasonable efforts to provide the City with ten working days notice prior to submission of plans pursuant to this Section 7(B)(1) in order to allow the City to mobilize review forces.

- Comment [A2]: To VTA: City cannot agree to a single fixed review period, due to extensive variables with the different design packages. In some cases the City will need to have a consultant run hydraulic models of proposed revisions and alternatives.....secondly, if plans are incomplete or insufficient, the City cannot complete thorough reviews
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- Deleted: <#>Comments received from the City regarding the proposed construction affecting City Infrastructure will be considered by VTA and incorporated into the Project Plans and Specifications to the extent that they can be accommodated without adversely affecting the overall schedule and budget of the Project.¶
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2. At the time of issuance of a Notice to Proceed to the construction contractor, VTA will provide the City with a construction schedule for review and comment. VTA will also provide periodic construction progress schedules as they are developed by the contractor for the City's review and comment.

- Deleted: <#>The parties acknowledge that the City of Milpitas intends to contract with a consultant to provide plan review services related to the Project. VTA will reimburse the City for fees paid to its consultant for review of the Plans and Specifications identified in Section 7(B)(1), above, subject to the following limitations:¶
- <#>VTA shall participate in the selection of the consultant. The consultant shall have no conflict of interest related (... [1])

C. Betterments:

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If the City determines that any City Infrastructure should be improved beyond the ~~Base~~ ~~Level~~, this shall constitute a Betterment. The City shall reimburse or credit VTA for the value of any such work or Betterment. In that event, VTA and the City shall enter into a separate cooperative agreement on the nature and extent of any Betterment, including related Plans and Specifications, and on the amount of credit due to VTA, prior to commencement of construction of any such Betterment. Credit for any salvage value of facilities which were either removed or retained by the City during replacement, modification, enlargement or expansion shall be based on the resale value of these facilities, less selling expenses. The schedule of payment to be paid to VTA by City shall be defined in the cooperative agreement. The City shall reimburse VTA for all Betterments within 30 days from the date a VTA invoice calculated according to the credit provisions provided above is received by the City. Notwithstanding the terms set forth in this Section 7, VTA and the City may agree in writing, with supporting documentation, on a case-by-case basis, that, where construction of the Project will preclude future economical access to or repair, improvement or construction of City utilities, inclusion of methods to mitigate such future detriment shall not be construed to be a Betterment.

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D. Completion and Acceptance

Upon completion of construction, reconstruction, enlargement, expansion or relocation of any City Infrastructure and at such time as it is appropriate for the City to become responsible for operation of such City Infrastructure, VTA will notify the City that said infrastructure has been completed. The City will accept such infrastructure or any useable portion thereof in a timely manner and in accordance with the City's usual and customary practice for accepting such infrastructure, if, after inspection by the City, it is determined that the work, including any work performed pursuant to a change order, has been performed in accordance with the contract documents for each Contract for work to be performed within the City. If, after inspection by the City, it is determined that the work has not been so performed, the City shall notify VTA of any claimed deficiency within ~~thirty (30)~~ working days from City's discovery of the defect. Thereafter, VTA will investigate and if VTA agrees with the City's determination, VTA will correct the work

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prior to City acceptance. Except for warranty work, the City will become responsible for these facilities upon acceptance.

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E. As-Built Drawings:

Upon completion of work by VTA on City Infrastructure, and acceptance of such work by the City, VTA shall provide to the City, within twelve months after completion of the Project, electronic files compatible with Autocad and a set of reproducible plastic film As-Built Drawings, and any parts, operations, and maintenance manuals that are readily available for City Infrastructure showing the completed work in place. Such As-Built Drawings shall be in such detail as the City customarily requires of the City's own public works contractors.

SECTION 8: TRAFFIC MAINTENANCE AND DETOURS

VTA will assume responsibility for maintaining all traffic detours in service during construction of the Project in a manner reasonably satisfactory to the City, consistent with applicable California Department of Transportation standards. All traffic control, lane closure, and detour plans shall be submitted to the City for approval prior to commencement of any phase of construction requiring either traffic control or detour(s), which approval shall not be unreasonably withheld. The traffic control, lane closure, and detour plans shall specify the length of time that portions of City streets will likely be closed.

In all cases, Public Safety service levels shall not be compromised, by project detours, temporary closures and other construction impacts to traffic. VTA agrees to make proper accommodations, and temporary improvements, as required to maintain the Public Safety current service levels. Greater detail on the mechanics of these obligations are set forth in Exhibit C.

Deleted: <#>Although certain City streets will be, of necessity, partially closed for some period during construction of the Project, VTA will, to the greatest extent practicable, maintain all City streets and related City Infrastructure in service within the limits of the Project area in a manner reasonably satisfactory to the City.¶
<#>In its Contract Documents, VTA will require its contractor(s) to submit traffic plans showing haul routes, temporary closures, and the method of traffic maintenance and staging to the City for approval, which approval shall not be unreasonably withheld. VTA will also require its contractor(s) to use reasonable efforts to provide the City with three working days notice prior to submitting traffic plans. The City shall approve or disapprove the plans no later than ten working days following the City's receipt of such plans.¶
<#>In its Contract Documents, VTA will, prior to the temporary closure to traffic of all or part of any street, sidewalk, or other public access, require that its contractor(s) provide at least ten working days notice of such closure to the City. Deviation from this ten working day requirement may be permitted in bona fide emergency situations as determined by VTA and the City.¶
<#>At least 72 hours prior to the temporary closure to traffic of all or part of any street, sidewalk, or other public access, VTA will post notice of such closure. VTA will also provide closure information fliers to residents, schools, and businesses within a 100 foot radius of any such closure.¶

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SECTION 9: STORM WATER POLLUTION CONTROL

VTA shall require its contractors to provide a Storm Water Pollution Prevention Plan (SWPPP) to retain sediments on site in accordance with Regional Water Quality Control Board requirements. City shall have an opportunity to review the Contract Documents prior to issuance of the construction bid package to confirm that the contract storm water requirements standards are at least as stringent as those of the City.

SECTION 10: DESIGNATED AGENT OF THE PARTIES

The City contact person for all matters related to this Agreement will be the City Manager or his or her designee. VTA's contact person for all matters related to this Agreement will be the General Manager or his or her designee.

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SECTION 11: CONTRACT DOCUMENTS INDEMNITY

For any work performed on City Infrastructure, VTA will require in its general conditions of its contracts that all of the Project's construction contractors defend, indemnify and hold the City, its officers and employees harmless against any liability arising out of the acts or omissions of each such contractor and such contractor shall include the City, its elective and appointed officers, employees and agents as additional insured in any insurance policies obtained by them, at no cost to the City.

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SECTION 12: INDEMNIFICATION

It is understood and agreed that neither the City nor any officer, agent or employee of the City is responsible for any damages or liability occurring by reason of anything done or omitted to be done by VTA, its directors, officers, agents and employees, under or in connection with any work, authority or jurisdiction delegated to VTA under this Agreement. It is also understood and agreed that, pursuant to Government Code Section 895.4, VTA will indemnify, hold harmless and defend in any claim or litigation, the City, its officers, agents and employees from any damage or liability arising from the actions of VTA, its directors, officers, agents and employees in connection with any work, authority or jurisdiction delegated to VTA under this Agreement. The duty of VTA to indemnify and hold harmless, as set forth above, shall include the duty to defend as set forth in Section 2778 of the California Civil Code; provided, however, that nothing herein shall be construed to require VTA to indemnify the City, its officers, agents, and employees against any responsibility or liability in contravention of Section 2782 of the California Civil Code.

It is understood and agreed that neither the VTA nor any officer, agent or employee of VTA is responsible for any damages or liability occurring by reason of anything done or omitted to be done by the City, its directors, officers, agents and employees, under or in connection with any

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work, authority or jurisdiction delegated to the City under this Agreement. It is also understood and agreed that, pursuant to Government Code Section 895.4, the City will fully indemnify, hold harmless and defend in any claim or litigation, VTA, its officers, agents and employees from any damage or liability occurring by reason of anything done by the City, its directors, officers, agents and employees under or in connection with any work, authority or jurisdiction delegated to the City under this Agreement. The duty of the City to indemnify and hold harmless, as set forth above, shall include the duty to defend as set forth in Section 2778 of the California Civil Code; provided, however, that nothing herein shall be construed to require the City indemnify VTA, its officers, agents, and employees against any responsibility or liability in contravention of Section 2782 of the California Civil Code.

SECTION 13: INSURANCE

VTA shall include in its Contract Documents a requirement that the City be named an additional insured on all policies of insurance required of its contractors.

SECTION 14: WARRANTIES

VTA will require warranties from its contractors for work performed and for all contractor-installed equipment and materials supplied in connection with the Project. VTA acceptance of all work performed and for all contractor-installed equipment and materials supplied in connection with City Infrastructure shall be predicated upon City acceptance of such work, equipment, and materials. All VTA warranties to the City shall be for a period of 12 months from acceptance by the City, except where the manufacturer's usual warranty is for a longer period. In that event, the longer period, less 30 days, will apply. Upon written request by the City, VTA will pursue all of its available remedies under those warranty provisions for correction of any defects in materials and/or workmanship discovered within the warranty period. VTA will endeavor to commence correction of such defects in the work performed for the City within sixty working days of written notification to VTA by the City, so long as the notification is within the warranty period.

SECTION 15: RESOLUTION OF DISPUTES

SECTION 16: NOTICES

Deleted: If any dispute under this Agreement cannot be resolved by the Parties, upon the written request of either of the Parties, the matter shall be dealt with as described below:¶
<#>**First Level:** Each party will designate project staff or individuals to be the initial person or persons to discuss any apparent dispute or disagreement between the parties and initiate this procedure. Each such designated first level person may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Project. For the City the first level person shall be designated by the City at the time of execution of this Agreement. For VTA, the first level person, unless VTA shall designate otherwise in writing, shall be the _____¶
<#>**Urgent Matter:** For any matter designated by the initiating party as "urgent," the other party shall make its first response within twenty-four hours, or within such other period as the first level persons may agree.¶
<#>**Non-Urgent Matters:** Unless a matter is designated "urgent" by the initiating party, the other party shall respond within five working days, or within such other period as the first level persons may agree.¶
<#>**Second Level:** Each party will designate individuals to whom matters not resolved at the First Level shall be referred. Each such designated second level person may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Project. For the City, the second level person shall be designated by the City at the time of execution of this Agreement. For VTA, the second level person, unless VTA shall designate otherwise in writing, shall be the Chief SVRT Program Officer.¶
<#>**Urgent Matters:** For any matter designated by the initiating party as "urgent," the other party shall make its first response within twenty-four hours, or within such other period as the second level persons may agree.¶
<#>**Non-Urgent Matters:** Unless matter is designated "urgent" by the initiating party, the other party shall respond within three working days, or within such other period as the second level persons may agree.¶
<#>**Third Level:** Each party will designate individuals to whom matters not resolved at the second level shall be referred. These designated third level persons shall constitute the final internal level with VTA and the City for ... [2]

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All notices required hereunder may be given by personal deliver, US Mail, courier service (e.g. Fedex) or telecopier transmission. Notices shall be effective upon receipt at the following addresses:

To VTA by U.S. Mail: Santa Clara Valley Transportation Authority
3331 N. First St.
San Jose, CA 95134
Attention: Chief SVRT Program Officer
Phone: 408-321-5623
Telefax: 408-321-5715

To City by U.S. Mail:

SECTION 17: PARTIES NOT CO-VENTURERS

Nothing in this Agreement is intended to nor does it establish the Parties as partners, co-venturers or principal and agent with one another.

SECTION 18: FURTHER ASSURANCES, TIME PERIODS AND RECORDS

A. Each party shall work in good faith to execute and deliver to the other all such additional instruments or documents as may be necessary to carry out this Agreement or to assure and secure to the other party the full and complete enjoyment of its rights and privileges under this Agreement, subject to appropriate approvals of each party's governing body.

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Notwithstanding the foregoing, the VTA shall be subject to all applicable City permitting and approval requirements.

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B. Should unforeseen circumstances occur, VTA and the City shall negotiate in good faith to reach agreement on any amendment(s) that may be necessary to fully effectuate the Parties' respective intentions in entering into this Agreement.

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- C. The City agrees to establish and maintain records pertaining to the fiscal activities of the Project, which records shall show the actual time devoted and the costs incurred by the City with respect to any work performed under this Agreement. The accounting systems of the City shall conform to generally accepted accounting principles, and all records shall provide a breakdown of total costs charged to the Project, including properly executed payrolls, time records, invoices and vouchers. Upon written request, the City shall, at a mutually convenient time, permit VTA to inspect, examine, re-examine, and copy the City's books, records, accounts, and any and all data relevant to this Agreement for the purpose of auditing and verifying statements, invoices or bills submitted by the City pursuant to this Agreement, and shall provide such assistance as may be reasonably required in the course of such inspection. The City shall, at VTA's request, provide a letter of representation concerning its usual and ordinary charges for work similar to the work to be performed under this Agreement, as well as the accounting systems utilized by the City for work to be performed under this Agreement.
- D. VTA reserves the right to examine and re-examine such books, records, payrolls, accounts and data during the three year period after final payment under this Agreement and until all pending matters are closed, and the City shall in no event dispose of said books, records, payrolls, accounts and data in any manner whatsoever for three years after the final payment under this Agreement or until all pending matters are closed, whichever is later.
- E. Pursuant to California Government Code Section 8546.7, the Parties shall be subject to the examination and audit of the State Auditor, at the request of VTA or as part of any audit of VTA by the State Auditor, for a period of three years after final payment under this Agreement. The examination and audit shall be confined to those matters connected with the performance of this Agreement including, but not limited to, the cost of administering the Agreement.
- F. The Project financing includes significant federal funding. VTA may be subject to audits or requests for information from FTA and City agrees to cooperate in furnishing the required information.

SECTION 19: NON-LIABILITY OF OFFICIALS, EMPLOYEES, AND AGENTS

No director, member, official, employee or agent of the City or VTA shall be personally liable to any party to this Agreement or any successor in interest in the event of any default or breach of this Agreement or for any amount which may become due on any obligation under the terms of this Agreement.

SECTION 20: HEADING AND TITLES

Any titles of the Sections of this Agreement are inserted for convenience of reference only, and shall be disregarded in construing or interpreting any part of its provisions.

SECTION 21: APPLICABLE LAW

This Agreement shall be interpreted under and pursuant to the laws of the State of California and applicable federal law. The Parties agree that the jurisdiction and venue of any dispute between the Parties to this Agreement shall be the Superior Court of Santa Clara County.

SECTION 22: SEVERABILITY

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

SECTION 23: BINDING UPON SUCCESSORS

This Agreement shall be binding upon and inure to the benefit of the transferees, successors and assigns of each of the Parties to it, except that there shall be no transfer of any interest by any of the Parties to this Agreement except pursuant to the terms of the Agreement.

SECTION 24: REMEDIES NOT EXCLUSIVE

No right or remedy conferred upon or reserved to VTA or the City under this Agreement is intended to be exclusive of any other right or remedy, except as expressly stated in this Agreement, and each and every right or remedy shall be cumulative and in addition to any other right or remedy given under this Agreement or now or hereafter existing at law or in equity or by statute, except such rights or remedies as are expressly limited in this Agreement.

SECTION 25: FORCE MAJEURE

In addition to specific provisions of this Agreement, performance by either party shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lockouts, riots, floods, earthquakes, fires, quarantine restrictions, casualties, acts of God, acts of the public enemy, epidemic, government restrictions on priorities, freight embargoes, shortage of labor or materials, unusually inclement weather, lack of transportation, court order, or any other similar causes beyond the control or without the fault of the party claiming an extension of time to perform. An extension of time for any cause will be deemed granted if notice by the party claiming such extension is sent to the other party within thirty days from the commencement of the cause and such extension is not rejected in writing by the other party within thirty days of receipt of the notice. Time of performance under this Agreement may also be extended by mutual agreement, signed by both Parties.

SECTION 26: INTEGRATION

This Agreement represents the full, complete and entire agreement of the Parties with respect to the subject matter hereof, and supersedes any and all other communications, representations, proposals, understandings or agreements, whether written or oral between the Parties hereto with respect to such subject matter. This Agreement may not be modified or amended, in whole or in part, except by a writing signed by an authorized officer or representative of each of the Parties hereto.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement by their duly authorized officers as set forth below.

SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY

By: _____

Michael T. Burns

General Manager

APPROVED AS TO FORM:

By: _____

General Counsel

CITY OF _____

By: _____

City Manager

APPROVED AS TO FORM:

By: _____

City Attorney

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The parties acknowledge that the City of Milpitas intends to contract with a consultant to provide plan review services related to the Project. VTA will reimburse the City for fees paid to its consultant for review of the Plans and Specifications identified in Section 7(B)(1), above, subject to the following limitations:

VTA shall participate in the selection of the consultant.

The consultant shall have no conflict of interest related to the proposed work of the Project.

The parties acknowledge that the consultant is being retained in part to facilitate timely responses to Project submittals and to expedite resolution of issues. Therefore, the consultant shall have authority to communicate directly with VTA regarding clarifications or minor issues, and shall have access to city staff members who are empowered to act on more significant matters.

The consultant's billing rate schedule shall be subject to VTA's approval prior to execution of a consulting contract by the City.

The consultant shall work under incremental task authorizations for each phase of the Project. These authorizations shall indicate maximum allowable fees and shall extend over a period no longer than one year. VTA shall have the right of approval over the maximum dollar value and written scope of each such task authorization. Prior to payment by the City, the City and VTA shall jointly review the invoices submitted by the City's consultants referred to herein.

Senior City staff will participate in project meetings and review documents as necessary at no cost to VTA.

Payments under this Agreement shall meet all applicable Federal and State funding guidelines, and shall be subject to audit pursuant to the terms set forth in Section 18, below.

Permits:

The City will issue all necessary permits for work to be performed on City Infrastructure in accordance with the City of Milpitas Ordinance Code. VTA shall be responsible for payment of usual and customary fees charged by the City for such permits. The City will cooperate with VTA in identifying all City permits necessary for work to be performed under this Agreement.

Construction Management and Inspection:

VTA shall be responsible for all construction management, inspection and testing necessary to ensure that all construction of City Infrastructure is performed in accordance with the contract documents. VTA shall provide test results and construction documentation to the City on a timely basis to enable the City to review the adequacy of the work during construction and to permit timely acceptance of the completed work.

VTA will pay the usual and customary inspection fees charged by the City for any inspection, oversight services, and testing performed by City inspectors on City Infrastructure. Testing may include compaction for utility trenches, roadway backfill and structural sections, traffic control devices, inspection of sanitary sewer lines and storm drains, or testing to determine the quality of materials applied to the work performed by VTA.

The City retains the right to exercise control over the employment, compensation, and discharge of its personnel performing any inspection or testing services under this Agreement. The City agrees to coordinate all inspections and/or testing by city personnel through the VTA Resident

Engineer. VTA retains the right to direct the contractor's construction activities.

Construction Impacts to City Infrastructure Other Than Streets:

VTA shall be responsible for the repair, relocation, or replacement, as appropriate under the terms set forth in this Agreement, of City Infrastructure other than streets affected by construction of the Project.

VTA, in consultation with the City, shall perform a pre-construction survey including photographs of all City-owned facilities other than streets which will be affected by construction activities. VTA will repair any facilities determined by VTA to have been damaged by project construction to a condition reasonably satisfactory to the City and VTA, as supported by the pre-construction survey.

Construction Impacts to City Streets:

Repair and Reconstruction of City Streets: Both before and after construction, VTA, in consultation and cooperation with the City, will perform a pavement survey and videotape of City streets which may be affected by construction activities. Said pre-construction and post-construction pavement surveys will be performed in accordance with the December 1988 Metropolitan Transportation Commission Pavement Management System Users Guide (the "MTC PCI Index") VTA and the City agree that, in accordance with the MTC PCI Index, VTA will pay the City the Dollar Amount reflecting the decline in the PCI directly attributable to construction of the Project. The relevant pages of the MTC PCI Index and the methodology for determining any decline are attached hereto as Exhibit B. VTA and the City shall enter into a separate cooperative agreement ("MOU") implementing disbursement

of funds to the City for any decline in the PCI attributable to construction of the Project.

If any dispute under this Agreement cannot be resolved by the Parties, upon the written request of either of the Parties, the matter shall be dealt with as described below:

First Level: Each party will designate project staff or individuals to be the initial person or persons to discuss any apparent dispute or disagreement between the parties and initiate this procedure. Each such designated first level person may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Project. For the City the first level person shall be designated by the City at the time of execution of this Agreement. For VTA, the first level person, unless VTA shall designate otherwise in writing, shall be the _____.

Urgent Matter: For any matter designated by the initiating party as “urgent,” the other party shall make its first response within twenty-four hours, or within such other period as the first level persons may agree.

Non-Urgent Matters: Unless a matter is designated “urgent” by the initiating party, the other party shall respond within five working days, or within such other period as the first level persons may agree.

Second Level: Each party will designate individuals to whom matters not resolved at the First Level shall be referred. Each such designated second level person may contact his or her counterpart at the same level at any time to raise any apparent disagreement related to the Project. For the City, the second level person shall be designated by the City at the time of execution of this Agreement. For VTA, the second level person, unless VTA shall designate otherwise in writing, shall be the Chief SVRT Program Officer.

Urgent Matters: For any matter designated by the initiating party as “urgent,” the other party shall make its first response within twenty-four hours, or within such other period as the second level persons may agree.

Non-Urgent Matters: Unless matter is designated “urgent” by the initiating party, the other party shall respond within three working days, or within such other period as the second level persons may agree.

Third Level: Each party will designate individuals to whom matters not resolved at the second level shall be referred. These designated third level persons shall constitute the final internal level with VTA and the City for resolution of issues between the parties. Each such designated third level person may contact his or her counterparty at the same level at any time to raise any apparent disagreement related to the Project. For the City, the third level person shall be designated by the City at the time of execution of this Agreement. For VTA, the third level person, unless VTA designates otherwise in writing, shall be the VTA General Manager.

Response: The initiating third level person will request a response from his or her counterpart and that response will be made within a time period agreed between the third level persons.

Alternative Dispute Resolution Board: If the designated third level individuals are unable to reach resolution, upon written response of either party, the matter shall be presented to an Alternative Dispute Resolution Board (“ADRB”) as follows:

Composition of the ADRB: The ADRB shall consist of one member selected by VTA and one member selected by the City. These two members shall, within 40 days of their selection, choose the third member who will chair the ADRB. If the two members cannot agree on the third member, either member may request the American Arbitration Association to appoint the third member. It is desirable that all ADRB members be experienced with the type of construction involved in this

Agreement, and interpretation of Contract Documents. No member of the ADRB shall have any conflict of interest, which would prevent the member from impartially serving on the ADRB. No member shall have a financial interest in the Agreement, except for payment for services on the ADRB. No member shall have been an employee, within a period of one year prior to the Effective Date of this Agreement, of any entity with a financial interest in the Agreement; except that service as a member of other Alternative Dispute Resolution Boards on other VTA or BART contracts will not preclude a member from serving on the ADRB for this Agreement. All prospective members of the ADRB shall make full disclosure of all financial interest in, or other involvement with, the work contemplated under this Agreement and any entities associated with the work, including any close professional or personal relationships.

Cost of the ADRB: VTA and the City shall pay compensation for fees and expenses for the ADRB member each has selected. VTA and the City shall each pay one-half of all compensation for fees and expenses for the Chair.

Hearing of Disputes: When a written notice of a dispute is referred to the ADRB, a hearing shall be held within thirty (30) days of referral. The ADRB may request written documentation and arguments from both parties prior to the hearing. A party furnishing written documentation to the ADRB must furnish a copy to the other party at least fifteen (15) days before the hearing begins.

Hearing Procedure: VTA and the City shall be represented at all hearings by their respective project management. Lawyers may participate only by agreement of both parties. VTA and the City shall each be afforded an opportunity to be heard by the ADRB and to offer evidence. The ADRB members may ask questions, seek clarification, or request further data. The ADRB may request from either party documents or information that would assist the ADRB in making its findings and

recommendations. A refusal by a party to provide information requested by the ADRB may be considered by the ADRB in making its findings and recommendations. Additional hearings may be necessary in order to consider all evidence presented by both parties. The ADRB may make any other rules applicable to its proceedings, which it deems necessary.

Post-Hearing Procedures: After the hearings are concluded, the ADRB shall meet in private and reach a conclusion supported by two or more members. As soon as practicable thereafter, its findings and recommendations, together with its reasons, shall be submitted as a written report to both parties, at the addresses indicated in Section 16, below. If the decision is not unanimous, the dissenting member may prepare a minority report.

Nonbinding Nature of ADRB Recommendations: Although both parties should strongly consider the ADRB recommendations, such recommendations are not binding. Either party may appeal to the ADRB for reconsideration of a recommendation when there is new evidence to present. If the ADRB's recommendations do not resolve the dispute, however, it is the intent of the parties that all documents submitted to it and its hearing record and written report pertaining to the dispute will be admissible as evidence, to the extent permitted by applicable law, in any subsequent proceeding. The Parties expressly acknowledge that the foregoing provisions of this Section 15 are the sole and exclusive administrative or non-judicial remedies which must be exhausted prior to seeking any remedy provided at law or equity for a default hereunder. Notwithstanding the above, nothing in this Section shall prevent either party from seeking an interim remedy in extraordinary circumstances.