

AMENDMENT TO SETTLEMENT AGREEMENT AND GENERAL RELEASE

This Agreement amends the November 16, 2006 Settlement Agreement and General Release by and between the City of Santa Clara, a chartered California municipal corporation, the Redevelopment Agency of the City of Santa Clara, a government entity (collectively "Santa Clara"), the City of San José, a chartered California municipal corporation, and the Redevelopment Agency of San José, a governmental entity (collectively "San José"). The November 16, 2006 Settlement Agreement and General Release shall be referred to herein as the "2006 Agreement," while this Amendment to the 2006 Settlement Agreement shall be referred to as the "Amended Settlement Agreement." Santa Clara and San José may be referred to in this Amended Settlement Agreement either individually as "Party," or collectively as the "Parties."

The Parties have entered into this Amended Settlement Agreement in consideration of and in reference to the following:

RECITALS

- A. Recitals A through E of the 2006 Settlement Agreement are incorporated as if fully set forth herein.
- B. San José's North San Jose Area Development Policy (NSJ-ADP) meters development permits in the policy area by the maximum industrial and commercial square footage and the number of housing units that may be developed within each of four phases specified in the NSJ-ADP, along with funding for transportation improvements identified in the policy.
- C. Santa Clara has alleged an anticipatory breach of San José's Phase I obligations in the 2006 Settlement Agreement by San José, while San José contends that the conditions precedent and deadlines for the performance of its Phase I and later phase obligations in the 2006 Settlement Agreement have not yet occurred (the "Dispute").
- D. The Parties acknowledge that San José desires to amend the NSJ-ADP to render it inapplicable to future development in that area and that the 2006 Settlement Agreement requires amendment to modify the benefits and burdens of the 2006 Settlement Agreement that are tied to the phasing of development permits in the NSJ-ADP. San José has completed the appropriate CEQA clearance and any other actions to amend the NSJ-ADP, and also to amend the traffic impact fee so that it will not apply to future development approvals in the NSJ-ADP area and will only continue to apply to previously-approved projects where a condition of approval requires the payment of the traffic impact fee (hereinafter the "North San Jose Amendments"). San José will maintain the General Plan Planned Job Capacity and Housing contemplated in the North San José Growth Area as detailed in Appendix 5: Growth Areas Planned Capacity by Horizon of the San Jose 2040 Envision General Plan.

- E. The Parties also acknowledge that San José may receive applications for development permits prior to San José's amendment of the NSJ-ADP and that it will be required to evaluate and consider the approval of development permits in accordance with the NSJ-ADP in effect prior to the effective date of such rescission.
- F. Santa Clara and San José have engaged in mediation over their dispute in accordance with the terms of the 2006 Settlement Agreement.
- G. Santa Clara and San José participated in a mediation process which resulted in a recommended proposal for resolution that each party believes will resolve the disputed obligations.
- H. The Parties acknowledge that the milestones for the completion of Phase I of the NSJ-ADP and the advancement from Phase I to Phase II of the NSJ-ADP have not yet occurred, and that this Amended Settlement Agreement will replace all of the Parties' benefits and burdens under the 2006 Settlement Agreement relating to all of the phases of development specified in the NSJ-ADP and the 2006 Settlement Agreement.
- I. There is no payment obligation to, and no enforceable obligation of, the redevelopment agencies in the 2006 Settlement Agreement or this Amended Settlement Agreement that would accrue to the San José and Santa Clara Successor Agencies.
- J. The Parties now desire to amend the 2006 Settlement Agreement under the terms and conditions set forth in this Amended Settlement Agreement, without the expense and inconvenience of further mediation, arbitration, or litigation, and without any admission or concession as to any liability, fact, claim, or defense by either Party.

**AMENDED SETTLEMENT AGREEMENT
PROVISIONS**

- 1. The Recitals above are hereby incorporated and made a part of this Amended Settlement Agreement by this reference.
- 2. The Effective Date of this Amended Settlement Agreement shall be the date upon which it is executed by all Parties.
- 3. The Operative Date of this Amended Settlement Agreement is the effective date of the North San José Amendments ("Operative Date"). If San José does not adopt the North San José Amendments, this Amended Settlement Agreement shall have no further force and effect.
- 4. Sections 1.2 of the 2006 Settlement Agreement is hereby amended in its entirety and replaced as follows:

“1.2

- a. \$1.5 million to County for the Montague I-880 Interchange. Subject to the terms of a separate written settlement agreement between San José and Santa Clara County (“County”), San José agrees to pay a total of One Million Five Hundred Thousand Dollars (\$1,500,000) to the County.
- b. 8-Lane Montague over Guadalupe River from 1st St. to Lick Mill.
 - (i) San José shall commence construction of the 8-Lane Montague over Guadalupe River from 1st Street to Lick Mill project within three (3) years from the Operative Date.
 - (ii) The project is required to be completed within five (5) years from the Operative Date.
 - (iii) San José shall obtain all permits and environmental clearance for the project. In the event that delays outside of San José’s control within the time period for completion of construction, San José will promptly notify County and Santa Clara of any reasons for delays and length of proposed extensions.
 - (iv) In the event that San José fails to complete the project, San José will be required to complete alternative projects of substantially the same value that are beneficial to County and Santa Clara subject to County and Santa Clara’s prior consent which shall not be unreasonably withheld.
 - (v) “Unanticipated delay” includes delays in permit review by outside agencies, CEQA litigation, force majeure events including but not limited to weather construction delays, failure to receive responsible or responsive bids for construction contracts, pandemic related delays, supply shortages, unexpected changes in state law that prevents the construction of the project, and other events of similar nature beyond the control of San José.
- c. Tasman Complete Streets Plan 2021 and Montague Expressway and North First Street Improvements (Trimble Flyover Substitute).

Santa Clara will accept completion of the following obligations in lieu of San José’s obligations to complete the Trimble Flyover in Section 1.2 of the 2006 Settlement Agreement:

Subject to Section 1.2.c(vi) below, San José shall contribute a total of Twenty Eight Million Dollars (\$28,000,000) to improvements in the Tasman Complete Streets Plan 2021 (as finally adopted by the Valley Transportation Authority), Montague Expressway & North First Street, or other mutually agreed upon improvements with the County, through investment of Nine Million Three Hundred Forty Thousand Dollars (\$9,340,000) in plan improvements in San José, Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000) in plan improvements in Santa Clara, and Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000) in plan improvements in the County, which may be reduced in accordance with Subsections below, in the following manner:

- (i) San José shall complete improvements valued at Nine Million Three Hundred Forty Thousand Dollars (\$9,340,000) and Santa Clara shall complete improvements valued at Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000) under the Tasman Complete Streets Plan 2021 or Montague Expressway and North First Street within its own jurisdictions, but in no case will this obligation exceed the lesser of the full cost of the improvements or Seventy-Five percent (75%) of Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000), the equivalent of Six Million Nine Hundred Ninety Thousand Dollars (\$6,990,000).
- (ii) Improvements to be constructed within the County's jurisdiction will be subject to a separate settlement agreement between San José and the County.
- (iii) Any money not spent on Tasman Complete Streets Plan 2021, Montague Expressway and North First Street, or mutually agreed upon improvements with the County must have a similar beneficial effect on transportation in the geographic area of the NSJ-ADP.
- (iv) San José shall pay Santa Clara Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000) for the construction to complete Tasman Complete Streets Plan 2021 improvements within its jurisdiction in accordance with Section 1.2.c.(i) hereinabove within five (5) years of the Operative Date in accordance with the schedule below:
 - a) One Million Five Hundred Thousand Dollars (\$1,500,000) within ninety (90) days of the Operative Date.
 - b) One Million Five Hundred Thousand Dollars (\$1,500,000) one (1) year following the payment date in Section 1.2.c(iv)(a) above.
 - c) One Million Seven Hundred Fifty Thousand Dollars (\$1,750,000) two (2) years following the payment date in Section 1.2.c(iv)(a) above.
 - d) One Million Seven Hundred Fifty Thousand Dollars (\$1,750,000) three (3) years following the payment date in Section 1.2.c(iv)(a) above.
 - e) One Million Five Hundred Thousand Dollars (\$1,500,000) four (4) years following the payment date in Section 1.2.c(iv)(a) above.
 - f) One Million Three Hundred Thirty-Three Thousand Dollars (\$1,330,000) five (5) years following the payment date in Section 1.2.c(iv)(a) above.
- (v) Santa Clara agrees that payment from San José to Santa Clara in the total amount of Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000) as described in Section 1.2.c(iv) above shall fully satisfy San José's obligation for the Trimble Flyover in Section 1.2 of the 2006 Settlement Agreement.
- (vi) Notwithstanding any of the foregoing, Santa Clara further agrees and acknowledges that San José's commitment to construct improvements within its jurisdiction and the County's commitment to

construct improvements within its jurisdiction as described in this Section 1.2.c shall be subject to a separate written settlement agreement between San José and the County.

- (vii) In the event (a) San José does not enter into a separate settlement agreement (or amended settlement agreement) with the County for construction of improvements value at Nine Million Three Hundred Thirty Thousand Dollars (\$9,330,000) or more and the statute of limitations have expired for the County to enforce the 2006 Settlement Agreement, or (b) County does not take any action through mediation, litigation, or otherwise within the applicable statute of limitations period to enforce the 2006 Settlement Agreement or challenge the North San José Amendments, then San José agrees to make an additional payment to Santa Clara in the amount of Four Million Seven Hundred Thousand Dollars (\$4,700,000). This additional payment shall be no earlier than six (6) years following the payment date in Section 1.2.c(iv)(a) above."

5. Satisfaction of Sections 1.5 through 1.8.

- a. The Parties acknowledge and agree that the obligations in Sections 1.5 and 1.6 of the 2006 Settlement Agreement no longer exist and are replaced by this Amended Settlement Agreement.
 - b. The Parties acknowledge completion of the obligations in Sections 1.7 and 1.8 of the 2006 Settlement Agreement.
6. Nothing in this Agreement shall affect, bind, or hinder the Parties' exercise of their respective police powers in considering legislative and adjudicative actions on land use and development projects within each Party's respective jurisdiction.

7. Third Party Litigation

- a. In the event of third party litigation challenging this Amended Settlement Agreement or enforcement of the original 2006 Settlement Agreement as a result of this Amended Settlement Agreement, including litigation with the County, San José shall protect, defend, hold harmless and indemnify Santa Clara from and against any claim, injury, liability, loss, cost, and/or expense or damage, including all third party costs and third party attorney's fees in providing a defense to any such claim or other action, and whether sounding in law, contract, tort, or equity, in any manner arising from, or alleged to arise in whole or in part from, or in any way connected with this Amended Settlement Agreement. San José shall have sole and exclusive authority to control the defense of any third-party litigation, or otherwise settle any third-party litigation, including without limitation absolute and sole discretion to use the San José City Attorney's Office as defense counsel representing both San José and Santa Clara; to decide if an actual conflict of interest requires independent counsel to represent Santa Clara; and, if so, to select independent counsel to represent Santa Clara. In reliance on San Jose's

compliance with the terms of this Agreement to ensure fair and reasonable representation for Santa Clara, Santa Clara hereby agrees it will not seek to disqualify the San José City Attorney's Office from continuing to represent Santa Clara in the event a conflict of interest arises during the course of such litigation. Nothing contained in this Amended Settlement Agreement precludes Santa Clara from engaging counsel of its own choosing, however any such engagement shall be at Santa Clara's sole expense without the right of indemnity or reimbursement pursuant to this Amended Settlement Agreement.

- b. San José shall have no obligation under this Section 7 if Santa Clara (i) has breached or is in breach of this Amended Settlement Agreement, (ii) fails to immediately notify San José in writing of any third party notices, claims or litigations, (iii) fails to fully cooperate and provide information, documents or reasonable assistance in the defense of such third party litigation, (iv) takes any action which may materially impede the ability of San José to defend the third party litigation, or (v) is in violation of State or federal laws pertaining to this Agreement. Santa Clara agrees and acknowledges that San José's obligations under this Section 7 (i) do not extend to any cost or reimbursement directly or indirectly related to Santa Clara's employees, consultants, independent contractors, or others who may assist in the defense of the third party litigation, (ii) do not extend to grossly negligent acts or omissions, or willful misconduct of Santa Clara, and (iii) is Santa Clara's sole and exclusive remedy for any third party litigation arising from, or alleged to arise in whole or in part from, or in any way connected with this Amended Settlement Agreement.
- c. In the event that this Amended Settlement Agreement or any material term herein is invalidated as a result of such third party litigation, the terms of the original 2006 Settlement Agreement shall remain in full force and effect.

8. Release of Claims.

Upon completion of San José's obligations as set forth in Section 4 above, Santa Clara agrees to execute a release of claims, in the form attached hereto as Exhibit 1, with respect to the aforementioned Disputes.

9. Covenant Not to Sue.

San José has provided to Santa Clara all the analysis, CEQA, any other documents and analysis required to amend the NSJ-ADP applicability to future development approvals prior to execution of this Amended Settlement Agreement. Santa Clara agrees that has reviewed all the analysis, CEQA, and any other documents required to amend the NSJ-ADP prior to execution of this Amended Settlement Agreement. Santa Clara further agrees that after execution of this Amended Settlement Agreement, it shall not maintain any action, whether in arbitration, mediation, or suit in law or equity, challenging the North San José Amendments as defined in Recital D herein. If San José makes any modifications to the provided documents prior to Council consideration these modifications shall be provided to Santa Clara for review.

10. All of the terms and provisions of the 2006 Settlement Agreement that have not been modified by this Amended Settlement Agreement shall remain in full force and effect.

11. The Parties agree that there is no payment obligation to, and no enforceable obligation of, the redevelopment agency parties to the 2006 Settlement Agreement and this Amended Settlement Agreement that would accrue to the successor agencies of the respective redevelopment agencies.

The Parties acknowledge and accept the terms and conditions of this Amended Settlement Agreement as evidenced by the following signatures of their duly authorized representatives. It is the intent of the Parties that this Amended Settlement Agreement shall become valid and enforceable as of the Effective Date.

CITY OF SANTA CLARA:

By: _____
RAJEEV BATRA
Interim City Manager

Date: _____

Approved as to form:

JAMES SANCHEZ,
Interim City Attorney

CITY OF SAN JOSE:

JENNIFER A. MAGUIRE
City Manager

Date: _____

Approved as to form:

NORA FRIMANN
City Attorney

**EXHIBIT 1
RELEASE OF ALL CLAIMS**

For and in consideration of the completion of payments and projects set forth in the Amendment to the November 16, 2006 Settlement Agreement and General Release Between the City of San Jose, City of Santa Clara, et al., dated [DATE] ("the Amendment"), the City of Santa Clara does hereby release and forever discharge the City of San José, its employees, officers, and agents, from any and all actions, claims, causes of actions, rights, liabilities, and demands, including, but not limited to, claims for damages related to the Disputes.

The undersigned expressly agree that this Release extends to all claims of every nature and kind, known and unknown, suspected or unsuspected, vested or contingent, arising from or attributable to the City of San Jose, its employees, officers and agents related to the Disputes described in the Amendment occurring before the execution of this Release, notwithstanding Section 1542 of the California Civil Code which provides as follows:

"A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY."

Thus, the undersigned hereby expressly relinquish and waive the provisions of Section 1542 of the California Civil Code pertaining to the Disputes. The undersigned understand and acknowledge the significance of the specific waiver of the provisions of Section 1542 and hereby assume full responsibility for any damage, loss or liability which the undersigned hereinafter incur by reason of such waiver.

The undersigned agree that this Release is binding upon and shall inure to the benefit of the parties hereto, their respective elected officials, officers, employees, agents, successors in interest, representatives, heirs, executors, administrators and assigns.

The undersigned acknowledge that this document was executed voluntarily and with the understanding that it constitutes the complete and exclusive statement of the terms of this Release relating to the rights granted by it and the obligations assumed under it. This Release supersedes any previous oral agreement or understanding between the parties regarding any matter contained in it.

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CITY OF SANTA CLARA:

By: _____
RAJEEV BATRA
Interim City Manager

Date: _____

Approved as to form:

JAMES SANCHEZ
Interim City Attorney

PRIVILEGED SETTLEMENT COMMUNICATION