

**SETTLEMENT AGREEMENT BETWEEN THE COUNTY OF SANTA CLARA AND  
CITY OF SAN JOSE REGARDING NORTH SAN JOSE**

This Settlement Agreement (“Agreement”) is made and entered into by and between the County of Santa Clara (“County”) and the City of San José (“City”). The above parties are collectively referenced herein as “Parties” and individually as a “Party.” This Agreement shall be effective upon execution by all Parties and City of Santa Clara’s execution of an Acknowledgement, Agreement, and Mutual Release, as specified in Section 9 of this Agreement.

**RECITALS**

**WHEREAS**, on June 21, 2005, the City adopted the North San José Development Policy (“Policy”) which included General Plan amendments, modifications to the North San José Area Development Policy, the North San José Deficiency Plan, the Floodplain Management Plan for North San José, and an infrastructure fee program, which created the framework for new residential, industrial, retail, and office development in North San José;

**WHEREAS**, the Policy 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 Policy, along with construction of transportation improvements identified in the Policy;

**WHEREAS**, in July 2005, the County, the City of Santa Clara, and related parties filed lawsuits challenging the Policy and alleging violations of the California Environmental Quality Act (CEQA);

**WHEREAS**, in March 2006, the Santa Clara County Superior Court rendered judgment in favor of the County and the City of Santa Clara on the basis that the City’s determination that there were no feasible mitigation measures for impacts to transportation facilities under the jurisdiction or control of non-City entities was not supported by substantial evidence;

**WHEREAS**, on November 16, 2006, the County, the City, the City of Santa Clara, and related parties executed two settlement agreements to resolve the CEQA litigation (collectively, the “2006 Settlement Agreement”), attached hereto as **Exhibit A**;

**WHEREAS**, the 2006 Settlement Agreement required the City to fund and construct certain traffic improvements and the County to fund and complete certain studies and designs for traffic improvements;

**WHEREAS**, since the adoption of the Policy, the City alleges there have been significant changes to State laws, priorities, and circumstances that affect the City’s approach to long-range and future planning;

**WHEREAS**, due to changes to State laws, priorities, and circumstances, on May 17, 2022, the City Council adopted amendments to the Policy, as well as related amendments to the City’s General Plan, Zoning Ordinance, and Municipal Code (collectively, the “NSJ Amendments”) and

a corresponding Addendum to the Envision San José 2040 General Plan Environmental Impact Report and Envision San José 2040 Supplemental Environmental Impact Report (“Addendum”);

**WHEREAS**, among other changes, the NSJ Amendments eliminate several roadway improvements described in the 2006 Settlement Agreement, modify the Policy’s phased mitigation plan, and allow the City to conduct a project-by-project analysis of transportation impacts for future development projects;

**WHEREAS**, prior to the City Council’s consideration of the NSJ Amendments and the Addendum, the County submitted a public letter asserting its rights under the 2006 Settlement Agreement and raising several CEQA issues (“County Letter”), attached hereto as **Exhibit B**;

**WHEREAS**, among other things, the County Letter asserts that the NSJ Amendments and the Addendum violate CEQA;

**WHEREAS**, on June 21, 2022, the City Council considered, adopted, and subsequently executed a settlement agreement with the City of Santa Clara (“2022 Settlement Agreement”);

**WHEREAS**, in the 2022 Settlement Agreement, the City of Santa Clara releases claims against the City related to the NSJ Amendments and 2006 Settlement Agreement in exchange for completion of the Montague Expressway expansion from 1<sup>st</sup> Street to Lick Mill and other consideration;

**WHEREAS**, prior to the City Council’s approval of the 2022 Settlement Agreement, the County submitted public comments arguing that the 2022 Settlement Agreement repudiated the City’s obligations under the 2006 Settlement Agreement (“Second County Letter” and, collectively with County Letter, “County Comment Letters”), attached hereto as **Exhibit C**;

**WHEREAS**, on June 9 and June 10, 2022, the County and the City executed a Tolling Agreement related to the County’s CEQA claims (“Tolling Agreement”);

**WHEREAS**, the County and the City subsequently amended the Tolling Agreement several times to extend the tolling period through December 15, 2022;

**WHEREAS**, the Parties participated in mediation in an attempt to resolve the differences between the Parties; and

**WHEREAS**, the Parties wish to completely and fully settle all claims and issues related to the NSJ Amendments, Addendum, 2006 Settlement Agreement, and allegations raised in the County Comment Letters.

**NOW, THEREFORE**, for and in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the foregoing terms as follows:

## TERMS OF SETTLEMENT

1. I-880 Interchange Improvement. City shall design, develop, construct, and deliver an interchange improvement at the intersection of the Montague Expressway and I-880 (“I-880 Interchange Improvement”), as specified in this Section 1 and subject to the terms and conditions of this Agreement.
  - a. Project Description. The I-880 Interchange Improvement requires reconstructing the existing interchange and converting it from a full cloverleaf design to a partial cloverleaf design with two new traffic signals. The City shall design and deliver the project based on the geometric study attached hereto as Exhibit D, except that City and County may mutually agree in writing to an alternate project design if the California Department of Transportation (“Caltrans”) determines that the design in Exhibit D is not acceptable, or if the alternate design achieves comparable or better congestion relief.
  - b. Project Design
    - i. On or before December 31, 2024, City shall complete and submit a Project Study Report (PSR) for the I-880 Interchange Improvement to Caltrans for Caltrans review and approval, consistent with Caltrans’s Project Development Procedures Manual. City shall diligently respond to Caltrans comments and pursue approvals of the PSR from Caltrans until such approvals are obtained.
    - ii. On or before December 31, 2029, City shall complete and submit Plans Specifications & Estimate (PS&E) to Caltrans for Caltrans review and approval to allow for solicitation of proposals from qualified contractors to construct the project. City shall diligently respond to Caltrans comments and pursue approvals of the PS&E from Caltrans until such approvals are obtained.
  - c. Environmental Review and Other Approvals. City shall be responsible for preparing all required environmental clearance—including CEQA and National Environmental Policy Act (NEPA) compliance—for the I-880 Interchange Improvement. On or before December 31, 2026 City shall prepare and submit to Caltrans for Caltrans review and approval all necessary environmental documents, including, as necessary, a Negative Declaration, Environmental Impact Report (EIR), and/or Environmental Impact Study (EIS). City shall diligently respond to Caltrans if Caltrans has comments on the environmental documents.
  - d. Additional Approvals. If any other approvals are required for the I-880 Interchange Improvement in addition to the PSR, PS&E, and environmental clearance to allow the City to publicly advertise, bid, and award the project to qualified contractors consistent with public contracting codes once full funding guarantees from third parties are obtained, the Parties agree to meet and confer as specified in Section 13

to discuss any additional necessary time for the City to complete the additional deliverables and obtain necessary approvals. City shall thereafter diligently pursue the additional permits and approvals from Caltrans and any other agency until such approvals are obtained and effective.

- e. Funding. City shall be responsible for obtaining funding from third parties for the I-880 Interchange Improvement. The City shall use reasonable efforts to diligently apply for reasonably available sources of local, state, and federal funding until the project is fully funded. The City shall also use reasonable efforts to prepare grant applications to Santa Clara Valley Transportation Authority (VTA), Metropolitan Transportation Commission (MTC), California Transportation Commission, and other public agencies. County acknowledges that City does not control the timing of third-party funding decisions.
  - f. Construction Implementation. Upon obtaining full funding guarantees from third parties for construction and any necessary approval from Caltrans or other public agencies as applicable, City shall (i) be responsible for having the project publicly advertised, bid, and awarded to qualified contractors consistent with public contracting codes; (ii) perform construction administration and construction management services consistent with practices described in the Caltrans Construction Manual; and (iii) be responsible for the completion of construction of the project. City may execute agreements to designate another public agency or other third party to manage all or parts of the project delivery steps. City, or a designated managing agency, shall solicit proposals from qualified contractors for the project, execute a contract, and commence work within 12 months of receiving full funding guarantees and Caltrans approval for the project.
2. McCarthy/O’Toole Interchange. City shall design, develop, construct, and deliver an interchange at the intersection of the Montague Expressway, McCarthy Boulevard, and O’Toole Avenue (“McCarthy/O’Toole Interchange”), as specified in this Section 2 and subject to the terms and conditions of this Agreement.
- a. Project Description. The McCarthy/O’Toole Interchange requires reconstructing the existing at-grade intersection and constructing a grade-separated interchange. Specifically, the McCarthy/O’Toole Interchange shall be designed as a “single-point urban” interchange or, if mutually agreed upon in writing by the Parties, a design that achieves similar project goals and limits the need for right-of-way acquisition. It shall maintain all turning movements allowed by the existing at-grade intersection. The City shall design and construct the project based on the geometric study attached hereto as **Exhibit E**, except that City and County may mutually agree in writing to an alternate project design.
  - b. Project Design.
    - i. On or before December 31, 2024, City shall complete and submit a Design and Project Alternatives Study to the County for review and approval.

- ii. On or before December 31, 2029, City shall complete and submit Plans Specifications & Estimate (PS&E) to County and other stakeholders for approval prior to solicitation of proposals from qualified contractors to construct the project.
  - c. Environmental Review and Other Approvals. City shall be responsible for obtaining all required environmental clearance—including CEQA and NEPA compliance—for the McCarthy/O’Toole Interchange. On or before December 31, 2026, City shall complete and obtain approval of the appropriate environmental clearance—including, as necessary, a Negative Declaration, EIR, and/or EIS.
  - d. Additional Approvals. If any other approvals are required for the McCarthy/O’Toole Interchange beyond those specified in this Section to allow the City to publicly advertise, bid, and award the project to qualified contractors consistent with public contracting codes once full funding guarantees from third parties are obtained, the Parties agree to meet and confer as specified in Section 13 to discuss any additional necessary time for the City to complete the additional deliverables and obtain necessary approvals. City shall thereafter diligently pursue the additional permits and approvals until such approvals are obtained and effective.
  - e. Funding. City shall be responsible for obtaining funding from third parties for the McCarthy/O’Toole Interchange. The City shall use reasonable efforts to diligently apply for reasonably available sources of local, state, and federal funding until the project is fully funded. The City shall use reasonable efforts to prepare grant applications to the VTA, MTC, California Transportation Commission, and other public agencies. County acknowledges that City does not control the timing of third-party funding decisions.
  - f. Construction Implementation. Upon obtaining full funding guarantees from third parties for construction and any necessary approvals, City shall (i) be responsible for having the project publicly advertised, bid, and awarded to qualified contractors consistent with public contracting codes; (ii) perform construction administration and construction management services consistent with practices described in the Caltrans Construction Manual; and (iii) be responsible for the completion of construction of the project. City may execute agreements to designate another public agency or other third party to manage all or parts of the project delivery steps. City, or a designated managing agency, shall solicit proposals from qualified contractors for the project, execute a contract, and commence work within 12 months of receiving full funding guarantees and (if applicable) Caltrans approval for the project.
3. Montague Widening (North 1<sup>st</sup> Street to Lick Mill Boulevard). City shall develop, construct, and deliver the widening of Montague Expressway to four lanes between North 1<sup>st</sup> Street and Lick Mill Boulevard (“North 1<sup>st</sup> to Lick Mill Widening”), as specified in this Section 3 and subject to the terms and conditions of this Agreement.

- a. Project Description. The North 1<sup>st</sup> to Lick Mill Widening requires expanding the Montague Expressway to eight through lanes—four lanes in each direction from North 1<sup>st</sup> Street to Lick Mill Boulevard—including the crossing of the Guadalupe River. It shall also include the construction of an adjacent bicycle/pedestrian crossing over the Guadalupe River.
  - b. Environmental Review and Other Approvals. City shall be responsible for obtaining all required environmental clearance—including CEQA and NEPA compliance—and all other required approvals to construct the North 1<sup>st</sup> to Lick Mill Widening. City shall diligently pursue all necessary permits and approvals from Santa Clara Valley Water District (“Valley Water”), United States Army Corps of Engineers, and any other agency, until such approvals are obtained and effective.
  - c. Construction Implementation. City shall complete construction of the North 1<sup>st</sup> to Lick Mill Widening by no later than December 31, 2027.
  - d. Concurrent Water District Projects. The County shall waive the City’s obligation to construct the bicycle/pedestrian crossing if Valley Water makes a legally binding commitment by no later than December 31, 2024 to complete the crossing by no later than December 31, 2031.
4. Matching Funds for Measure B Projects. City shall provide 10% of total project costs for VTA’s Measure B Expressway Program Projects 6A, 6B, and 6C to satisfy the local match requirement for widening projects along the mainline of Montague Expressway.
- a. Project Description.
    - i. Project 6A: Complete 8-lane widening including HOV lanes and auxiliary lanes between Trade Zone Boulevard and Main Street along Montague Expressway.
    - ii. Project 6B: Complete 8-lane widening including HOV lanes and auxiliary lanes between Great Mall Parkway and Trade Zone Boulevard along Montague Expressway.
    - iii. Project 6C: Complete 8-lane widening including HOV lanes and auxiliary lanes between Main Street and the McCarthy/O’Toole intersection along Montague Expressway.
  - b. Cost Calculation. The City shall make full payment to the County of 10% of the total project cost for each project, which shall be calculated at the time the projects are complete. Projects shall be considered complete when notice of completion and acceptance is recorded for the construction contract. County shall use reasonable efforts to diligently design, fund, and complete Projects 6A, 6B, and 6C. Further, County shall coordinate the design of the projects as part of the quarterly meetings described in Section 13 below.

- c. Timing and Form of Payment to Satisfy Local Match Requirement.
- i. The City shall make full payment of 10% of total project costs within one year of each project's completion except as otherwise specified in this Section 4(c).
  - ii. If the total project costs for Project 6A, 6B, or 6C exceeds the currently estimated costs adjusted annually based on the Department of General Services California Construction Cost Index ("Adjusted Estimate"), City shall pay 10% of the Adjusted Estimate within one year of the project's completion and 10% of any amount in excess of the Adjusted Estimate within five years of the project's completion. The currently estimated costs in 2022 dollars are:
    - (1) Project 6A: \$13 million (City's 10% share is \$1.3 million)
    - (2) Project 6B: \$13 million (City's 10% share is \$1.3 million)
    - (3) Project 6C: \$22 million (City's 10% share is \$2.2 million)
- d. In-kind Local Match in Lieu of Cash Payment for Project 6C. County recognizes that City will perform work under Section 1 of this Agreement on the I-880 Interchange Improvement that may include the scope of Project 6C. If the scope of Project 6C is incorporated in the City's work under Section 1, the costs incurred from the overall I-880 Interchange Improvement with Project 6C included may be considered sufficient "in-kind" value to satisfy the City's obligation to pay the 10% local match requirement for Project 6C. If the scope of Project 6C is not incorporated in the I-880 Interchange Improvement and Project 6C is delivered separately by the County, or if the VTA objects to use of this in-kind value as a sufficient local match, the City is responsible for the 10% local match pursuant to this Section 4.
5. Trimble Road Vehicle Delay Studies. After the City completes the construction of the I-880 Interchange Improvement and the McCarthy/O'Toole Interchange, the City shall conduct a series of three vehicle delay studies at the intersection of the Montague Expressway and Trimble Road ("Studies"). If any of the three Studies reveals delays above the threshold identified below, the City shall be responsible for designing, obtaining funding from third parties, and completing the Trimble Flyover, as specified in Section 6, and subject to the terms and conditions of this Agreement.
- a. Costs and Consultant Selection. The City and the County shall identify a mutually agreeable consultant to execute the Studies and shall equally share the cost of the Studies.
  - b. Methodology. The Studies shall evaluate the existing traffic at the intersection of the Montague Expressway and Trimble Road using the Congestion Management Program Traffic Level of Service Analysis Methods in VTA's Traffic Level of

Service Guidelines, originally published in January 1995 and updated in June 2003. Such methods are currently described in Sections 2.1 through 2.9 of the Guidelines. City and County may mutually agree in writing to an alternative methodology.

- c. Study Timeline. The City and County shall commission the three Studies after the completion of both the I-880 Interchange Improvement and the McCarthy/O’Toole Interchange, according to the following timeline:
  - i. Study 1 – Two years after completion
  - ii. Study 2 – Seven years after completion
  - iii. Study 3 – Twelve years after completion
- d. Study Finalization. The Studies specified in Section 5(c) shall be finalized within six months of being commissioned.
- e. Threshold. If any of the three Studies reveals that the “Average Control Delay” for vehicles is at Level F as defined by the Congestion Management Program Traffic Level of Service Analysis Methods in VTA’s Traffic Level of Service Guidelines specified above (or a different threshold mutually agreed upon in writing by the Parties), the City shall be responsible for completing the Trimble Flyover, as specified in Section 6.
- f. Cost-Benefit Analysis. If the Study threshold in Section 5(e) is met, the City and the County mutually agree to conduct a cost-benefit analysis and evaluate alternative projects to mitigate traffic congestion on Montague Expressway. Based on the results of the Study, the City and the County may mutually agree that the City shall carry out an alternative traffic mitigation project on the Montague Expressway pursuant to specific benchmarks and timelines to be agreed upon in writing by City and County. Absent mutual agreement regarding an alternative mitigation project, the City shall be responsible for completing the Trimble Flyover, as specified in Section 6.
  - i. City and County shall identify a mutually agreeable consultant to execute the cost-benefit analysis and shall equally share the cost of the analysis. City and County shall use their best efforts to agree upon and execute a contract with a consultant to carry out the analysis within six months of the Study threshold being met.
  - ii. The cost-benefit analysis shall be complete within one year of the Study threshold being met. If the cost-benefit analysis is not timely completed, or the City and County do not reach mutual agreement in writing regarding an alternative mitigation project within 15 months of the Study threshold being met, the City shall be responsible for completing the Trimble Flyover, as specified in Section 6.



6. Trimble Flyover. If the City is required to complete the Trimble Flyover based on the procedures and standards set forth in Section 5, the City shall develop, construct, and deliver a flyover ramp at the intersection of the Montague Expressway and Trimble Road (“Trimble Flyover”), as specified in this Section 6 and subject to the terms and conditions of this Agreement.
- a. Project Description. The Trimble Flyover requires reconstructing the existing at-grade intersection to create a grade-separated interchange. The interchange shall be designed to grade separate westbound left turns from Montague Expressway to westbound Trimble Road from eastbound Montague Expressway traffic. Other turning movements at the existing intersection may be accommodated through traffic signal control. The City shall design and execute the project based on the geometric study attached hereto as Exhibit F, except that City and County may mutually agree in writing to an alternate project design.
  - b. Project Design. Within 48 months of the triggering Study, City shall complete the PS&E to allow for solicitation of proposals from qualified contractors to construct the project.
  - c. Environmental Review and Other Approvals. City shall be responsible for environmental clearance—including CEQA and NEPA compliance—for the Trimble Flyover. Within 24 months of when a Study threshold is met, as specified in Section 5(d), City shall complete and act on appropriate environmental clearance—including preparing, as necessary, a Negative Declaration, Environmental Impact Report (EIR), and/or Environmental Impact Study (EIS). City shall diligently pursue all necessary permits and approvals until such approvals are obtained and effective.
  - d. Funding. City shall be responsible for obtaining funding from third parties for the Trimble Flyover. City shall use reasonable efforts to diligently apply for reasonably available sources of local, state, and federal funding until the project is fully funded. It shall prepare grant applications to the VTA, MTC, California Transportation Commission, and other public agencies. County acknowledges that City does not control the timing of third-party funding decisions.
  - e. Construction Implementation. Upon obtaining full funding guarantees from third parties for construction and any necessary approvals, City shall (i) be responsible for having the project publicly advertised, bid, and awarded to qualified contractors consistent with public contracting codes; (ii) perform construction administration and construction management services consistent with practices described in the Caltrans Construction Manual; and (iii) be responsible for the completion of construction of the project. City may execute agreements to designate another public agency or other third party to manage all or parts of the project delivery steps. City, or a designated managing agency, shall solicit proposals from qualified contractors for the project, execute a contract, and commence work within 12 months of receiving full funding guarantees and necessary approvals for the project.

7. Design, Development, and Construction Standards
  - a. Construction Requirements. As applicable, City shall comply with the California Public Contract Code, the City Charter, and all other applicable laws in its designs, bids, awards, and construction of the improvements required by Sections 1, 2, 3, and 6. City shall provide construction administration and construction management services consistent with practices described in the Caltrans Construction Manual.
  - b. Complete Streets Design Standards. If applicable, all transportation improvements identified in this Agreement shall be designed and constructed in accordance with Caltrans's, County's, and City's Complete Streets Design Standards & Guidelines, as may be amended or replaced.
8. Valley Transportation Plan 2050. City and County shall each use their best efforts to ensure that the I-880 Interchange Improvement, the McCarthy/O'Toole Interchange, and the Trimble Flyover are included in VTA's Valley Transportation Plan 2050.
9. Termination of 2006 Settlement Agreement
  - a. This Agreement shall not become effective until and unless the County and the City of Santa Clara execute the Acknowledgement, Agreement, and Mutual Release, the form of which is attached hereto as Exhibit G, but which form may be modified by mutual agreement between the County and City of Santa Clara. City and County agree that the 2006 Settlement Agreement shall remain effective and that the City and County retain all rights and obligations under the 2006 Settlement Agreement until and unless the County and the City of Santa Clara execute an Acknowledgement, Agreement, and Mutual Release. County shall deliver a fully executed copy to City in accordance with Section 14.
  - b. Subject to the requirements of Section 9(a), the City and County hereby agree that the 2006 Settlement Agreement is terminated and shall no longer have any force or effect.
  - c. The City of Santa Clara shall not be considered a Party under this Agreement.
10. Material Breach, Enforcement, and Remedies.
  - a. Meet and Confer Process. If either Party believes that the other has materially breached this Agreement, it must request to meet and confer with the other Party. The Party receiving such a request shall meet with the Party alleging a breach within 14 days of receiving the request.
  - b. Notice of Default. If the Parties are not able to resolve a dispute through the meet and confer process in Section 10(a), the Party alleging a breach of this Agreement shall send a written notice of default to the other Party specifying the nature of the alleged breach and, if possible, the manner in which said default may be satisfactorily cured. The Party receiving the notice of default shall have 30 days to

cure the default. If the alleged breach cannot reasonably be cured within 30 days, then the Party receiving the notice of default shall have 30 days to commence a cure and shall diligently complete it thereafter.

- c. Mediation. Any Party seeking to file a legal action or proceeding to enforce this Agreement or the rights of the Parties must first seek to mediate the dispute. If either Party requests mediation in writing, the other Party shall agree to mediate as soon as is feasible, and not more than 45 days after receiving such a request, unless the Parties mutually agree in writing to extend the 45 days. If the Party receiving a request for mediation does not attend mediation within 45 days, the mediation requirement in this Section 10(c) shall be waived. City and County shall equally share the cost of mediation. Subject to Sections 10(a) and 10(b) above, if either Party determines that mediation was unsuccessful, it may file a legal action or proceeding to enforce this Agreement or its rights under the Agreement. The 45-day time period in this Section 10(c) may run concurrently with the 14-day time period in Section 10(a) and the 30-day time period in Section 10(b).
  - d. Material Breach. Except as otherwise provided herein, a material breach of this Agreement shall include, but not be limited to, any failure by City or County to perform the obligations of this Agreement within the timeframes specified in this Agreement.
  - e. Attorneys' Fees. In any action at law or suit in equity to enforce this Agreement or the rights of the Parties, the prevailing Party shall be entitled to reasonable attorneys' fees and all other reasonable costs and expenses incurred in such action or suit.
  - f. Specific Performance. In any action at law or suit in equity, if a court determines that City or County has breached this Agreement, the Parties further agree that, in addition to any other rights of the Parties, the Parties shall be entitled to specific performance if reasonably applicable, and neither Party shall oppose specific performance as a remedy if specific performance is reasonably applicable.
11. Release. Except for the rights and duties set forth in this Agreement and except those provisions that survive termination, cancellation, or expiration of this Agreement, the Parties, individually and on behalf of each of their officials, employees, heirs, estates, executors, administrators, assigns, agents, representatives, insurers, and attorneys, hereby forever release and fully discharge one another and each of their officials, employees, heirs, estates, executors, administrators, assigns, agents, representatives, insurers, and attorneys from (1) any and all claims, disputes, or causes of action relating to the NSJ Amendments, (2) Addendum, (3) 2006 Settlement Agreement, and (4) any claims or allegations asserted in the County Comment Letters and corresponding public comments to the City Council.
12. Waiver of Civil Code Section 1542. The Parties each acknowledge that they are familiar with California Civil Code section 1542. This Agreement is intended to release the claims and causes of action described herein, and the Parties hereby expressly waive the

provisions of California Civil Code section 1542 only with respect to the claims and causes of action described in this Agreement. California Civil Code section 1542 provides:

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 THE RELEASED PARTY.

13. Quarterly Meetings and Extensions of Time.

- a. The Parties acknowledge and agree that the design, environmental clearance, funding, and completion of the projects described in this Agreement require significant coordination and review and approval by third parties (i.e., Caltrans and Valley Water). Therefore, the completion of each deliverable within the timeline in this Agreement may be outside the direct control of the City. The Parties agree to meet on a quarterly basis to discuss the City's compliance with this Agreement and any unanticipated delays in completing the deliverables that are beyond the direct control of the City.
- b. City may request reasonable extensions to the deadlines specified in Sections 1-6 of this Agreement as necessary to address delays that occur for reasons that are beyond the City's direct control. City shall provide notice of any anticipated delays and shall request in writing to meet and confer with the County within 14 calendar days of the occurrence or commencement of the relevant event or circumstance giving rise to the anticipated delay. City and County shall meet and confer as soon as is feasible, and not more than 14 days after receiving such a request. The County Executive or their designee agrees to act reasonably in reviewing such extension requests and may agree to provide reasonable extensions to the deadlines specified in Sections 1-6 as necessary to complete the specified deliverables.
- c. The meet and confer process in this Section 13 shall be available to the Parties if unanticipated delays, third-party approvals, or other factors impact the completion of the projects described in Sections 1-6. County shall agree to reasonable extensions as necessary to allow the City to secure unanticipated permits and approvals.
- d. City and County acknowledge that any extension granted under this Section 13 shall only be for the time period reasonably necessary to accommodate for circumstances beyond the City's direct control.
- e. Any extension of time, or request for extension of time, shall not relieve City of its responsibility to complete the projects in this Agreement.

14. Notices. Unless otherwise provided in this Agreement, any notice required or permitted to be given hereunder shall be in writing and signed by the Party, officer, agent, or attorney

of the Party from whom it is to be sent, and shall be sent by both electronic mail and either (i) personally delivered to the Party to whom it is to be sent, (ii) sent by overnight courier service (such as Federal Express), or (iii) sent by certified or registered mail, return receipt requested, postage prepaid, to the respective address of the persons and/or parties set forth below, or to such other address as the Parties may specify in writing. Each notice shall be deemed to have been given on the date of receipt (or refusal to accept delivery) as indicated on the customary receipt used by the delivering service or, in the case of electronic mail transmission, acknowledgement of receipt of the transmission.

If to City: City of San José, Department of Transportation  
200 East Santa Clara Street, 8th Floor  
San José, CA 95113  
Attn: Director of Transportation  
Tel: (408) 535-3500  
Email: john.ristow@sanjoseca.gov

City of San José, City Manager's Office  
200 East Santa Clara Street, 17th Floor  
San José, CA 95113  
Attn: City Manager  
Tel: (408) 535-4800  
Email: jennifer.maguire@sanjoseca.gov

With a copy thereof to: City of San José, Office of the City Attorney  
200 East Santa Clara Street, 16th Floor  
San José, CA 95113  
Attn: City Attorney  
Tel: (408) 535-1900  
Email: cao.main@sanjoseca.gov  
nora.frimann@sanjoseca.gov

If to County: Office of the County Counsel, County of Santa Clara  
70 West Hedding Street, East Wing, 9th Floor  
San Jose, CA 95110-1770  
Attn: County Counsel/Aaron Forbath/Tony LoPresti  
Tel: (408) 299-5900  
E-mail: county.counsel@cco.sccgov.org  
aaron.forbath@cco.sccgov.org  
tony.lopresti@cco.sccgov.org

15. General Provisions

a. Integration. The terms of this Agreement, including all exhibits, are contractual, and not merely recital, and constitute a fully binding and complete agreement between the Parties regarding its subject matter. This Agreement supersedes any and all prior or contemporaneous agreements, representations, and understandings of or between the Parties, and the Parties each warrant that they are not relying on any such prior representations.

b. Headings. The headings in this Agreement are included solely for convenience of reference and shall not affect the interpretation of any provision in this Agreement or any of the rights and obligations of the Parties.

c. Ambiguities. Each Party and its attorney cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any Party.

d. Amendments. The terms of this Agreement may not be altered, amended, modified, or otherwise changed in any respect except by a writing duly executed by City and County.

e. Time of the Essence. Time is of the essence in respect to all provisions of this Agreement that specify a time for performance.

f. Governing Law. This Agreement shall be deemed to have been entered into in Santa Clara County, California, and all questions of validity, interpretation, or performance of any of its terms or of any rights or obligations of the parties to this Agreement shall be governed by California law.

g. Additional Acts. The Parties agree to do such acts and to execute such documents as are necessary to carry out the terms and purposes of this Agreement.

h. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the Parties' successors, assigns, agents, and representatives.

i. Authority to Execute Agreement. By signing below, each signatory warrants and represents that they executed this Agreement in their authorized capacity and that, by their signature on this Agreement, they or the entity upon behalf of which they acted, executed this Agreement.

j. Attorneys' Fees and Costs. Except as specified in Section 10, the Parties agree that each Party hereto shall bear its own attorneys' fees and costs incurred in connection with the events that are subject to this Agreement, and each Party waives any claim for attorneys' fees or costs against any other Party.

k. Severability. If any portion or provision of this Agreement is found to be illegal, invalid, unenforceable, nonbinding, or otherwise without legal force or effect, the remaining portion(s) will remain in force and be fully binding.

l. Counterparts. This Agreement may be executed in counterparts with the same force and effectiveness as though executed in a single document.

m. Contract Execution. Unless otherwise prohibited by law or County or City policy, the Parties agree that an electronic copy of a signed agreement, or an electronically signed agreement, has the same force and legal effect as an agreement executed with an original ink signature. The term “electronic copy of a signed agreement” refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of an original signed agreement in a portable document format. The term “electronically signed agreement” means a contract that is executed by applying an electronic signature using technology approved by the County and City.

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties have executed this Agreement as of the Effective Date.

**COUNTY OF SANTA CLARA**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
JAMES R. WILLIAMS  
County Counsel

APPROVED AS TO FORM AND LEGALITY

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Aaron Forbath  
Deputy County Counsel

*[signatures continue on following page]*

**CITY OF SAN JOSE**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
JENNIFER A. MAGUIRE  
City Manager

APPROVED AS TO FORM

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
NORA FRIMANN  
City Attorney

Attachments

Exhibit A: 2006 Settlement Agreement

Exhibit B: County Letter

Exhibit C: Second County Letter

Exhibit D: I-880 Interchange Improvement Geometric Design

Exhibit E: McCarthy-O'Toole Interchange Geometric Design

Exhibit F: Trimble Flyover Geometric Design

Exhibit G: County and City of Santa Clara Acknowledgement, Agreement, and Mutual Release

2746623



# **Exhibit A**

## SETTLEMENT AGREEMENT AND GENERAL RELEASE

### PREAMBLE

This settlement agreement and general release ("Settlement Agreement") is made and entered into on ~~October~~<sup>November</sup> 16, 2006 (the "Effective Date"), by and between the City of Santa Clara, California, a chartered California municipal corporation, with its primary business address at 1500 Warburton Avenue, Santa Clara, California 95050, the Redevelopment Agency of the City of Santa Clara, a governmental entity, with its primary business address at 1500 Warburton Avenue, Santa Clara, California, 95050 (collectively "Santa Clara"), the County of Santa Clara, a political subdivision of the State of California, with its primary business address at 70 West Hedding St., 11<sup>th</sup> Floor, East Wing,, San José, California 95110 ("County"), the City of San José, a chartered California municipal corporation, with its primary business address at 200 East Santa Clara Street, San José, California 95113 and the Redevelopment Agency of San José, a governmental entity, with its primary business address at 200 East Santa Clara Street, 14<sup>th</sup> Floor, San José, California 95113 (collectively "San José"). Santa Clara, County and San José may be referred to in this Settlement Agreement either individually as a "Party," or collectively as the "Parties" or the "Parties to this Agreement." The Parties have entered into this Settlement Agreement in consideration of and in reference to the following:

### RECITALS

- A. On June 21, 2005, the City of San José approved the North San José Development Policies which included General Plan amendments, modifications to the North San José Area Development Policy, the North San José Deficiency Plan, the Floodplain Management Plan for North San José, and infrastructure implementation. ("North San José Project"). Qualifying as a "project" under the California Environmental Quality Act ("CEQA"), *California Public Resources Code section 21000 et seq. and California Code of Regulations, Title 14, Section 15000 et seq.*, the City of San José prepared and certified an environmental impact report ("EIR") in support of the project.
- B. On July 28, 2005, Santa Clara filed a petition for writ of mandate, challenging San José's approval of the North San José Project, *City of Santa Clara, et al., v. City of San José, et al.*, 1-05-CV-046025. The City of Milpitas filed a separate petition for writ of mandate challenging the City of San José's approval of the North San José Project, *City of Milpitas, a municipal corporation v. City of San José, et al.*, 1-05-CV-046013. County filed a separate petition for writ of mandate, also challenging San José's approval of the North San José Project, *County of Santa Clara v. City of San José, et al.*, 1-05-CV-046005. These actions were consolidated under master case number 1-05-CV-046005 (collectively, "Litigation.")
- C. Trial in the Litigation was held on March 2, 2006, before the Honorable Leslie Nichols. The court ultimately rendered judgment in favor of County, the City of

Milpitas, and Santa Clara on the basis that San José's determination that there were no feasible mitigation measures for impacts to transportation facilities under the jurisdiction or control of other public agencies was not supported by substantial evidence. However, the court found that San José's findings were timely made and that San José's findings concerning potable water supply and cumulative impacts on wastewater facilities were supported by substantial evidence.

- D. A Judgment and Peremptory Writ of Mandate were entered on March 28, 2006. At the suggestion of Santa Clara County Superior Court Judge Leslie Nichols, the Parties have been meeting and conferring since entry of the Judgment to develop a fair share traffic mitigation agreement.
- E. On May 8, 2006, Santa Clara filed a Notice of Appeal from the Litigation, and that appeal is now pending before the California Court of Appeal, Sixth Appellate District, Case No. H030242 ("Appeal").
- F. The Parties now desire to settle all their respective disputes concerning, relating to, or arising out of the Litigation and the Appeal on the terms and under the conditions set forth in this Settlement Agreement, without the expense and inconvenience of further litigation, and without any admission or concession as to any liability, fact, claim or defense by either Party.

In consideration of the foregoing and in consideration of the covenants, warranties and promises set forth below, receipt of which is hereby acknowledged, the Parties agree as follows:

#### **AGREEMENT PROVISIONS**

1. **Settlement Terms.**

In consideration for terms and conditions set forth in this Settlement Agreement, the Parties shall take the following actions:

- 1.1 The Effective Date of this Settlement Agreement shall be when both it has been executed and when the separate Settlement Agreement between San José and the County relating to the Litigation has been executed. Santa Clara shall dismiss its Appeal within fifteen (15) days of the effective date of this Settlement Agreement and seek immediate issuance of a Remittitur from the Court of Appeal. Within seven days from issuance of a Remittitur from the Court of Appeal, Santa Clara shall dismiss its action filed with the Santa Clara County Superior Court, Case No. 1-05-CV-046025. In addition to the aforementioned dismissals, Santa Clara shall take all reasonable steps necessary to resolve the Litigation in a manner that will allow the North San José Project to be implemented and go forward as soon as possible, including, but not limited to supporting discharge of the Peremptory Writ of Mandate. Neither Santa Clara nor the County shall require or insist that San José set aside any existing North San José project approvals or recirculate any environmental documents for the North San José project.

- 1.2 As part of the Phase I infrastructure improvements, San José shall complete and fund mitigations as follows: widening Montague Expressway to 8-lanes between Lick Mill and Trade Zone, including all portions of the Expressway regardless of City boundaries, including Interchange modifications at I-880 and the Trimble flyover. As part of Phase III implementation, San José shall complete the McCarthy-O'Toole Interchange. (The phases referred to in this Settlement Agreement are identified in the March 2005 Draft Environmental Impact Report for the North San José Development Policies Update ("EIR") (pp. 15-18).)
- 1.3 The Comprehensive County Expressway Planning Study, Implementation Plan – Montague Expressway dated August 19, 2003, ("Expressway Study") identified the need to improve the interchange at Montague Expressway and Highway 101, with improvements to Mission College Boulevard as identified in the Expressway Study, Tier 1B project ("Montague/Mission/101 Interchange Project"). County, at its sole expense, shall provide funding for the preparation of and shall complete a Project Study Report ("PSR") for the Montague/Mission/101 Interchange Project.. The PSR shall be prepared and submitted to CalTrans no later than twelve months after the Effective Date of this Settlement Agreement.
- 1.4 On or before June 30, 2010, County shall fund the design work for the construction of the Montague/Mission/101 Interchange Project as contemplated in the PSR prepared in accordance with this Settlement Agreement. The design work shall be completed on or before June 30, 2014. In no event shall County's funding responsibility exceed \$1,500,000.00.
- 1.5 Commencing immediately and until such time as funding is secured, VTA representatives from County and San José shall take all lawful actions to support the inclusion in the Valley Transportation Plan 2030 ("VTP 2030 Plan") and as a high-priority item for State Transportation Improvement Program ("STIP") funding the completion of construction of the Montague/Mission/101 Interchange Project. If funding for the construction of the Mission College improvements is not available on or before July 1, 2014, San José shall pay \$1,500,000 to County, and County shall allocate that \$1,500,000 for construction of the Montague/Mission/101 Interchange Project in conformity with the PSR and such other design work as may be necessary to improve the intersection for the ultimate interchange improvements at Highway 101 and Montague Expressway.
- 1.6 A sufficient time prior to when Phase IV of the project commences and continuing until funding occurs, County of Santa Clara representatives and City of San José representatives shall take all lawful actions to have the mitigation project for San Tomas Expressway Widening to 8-lanes between Moorpark (at the south) and El Camino Real (at the north) designated as a high-priority item for STIP funding. The intent of this subsection is to secure STIP funding for these improvements and have the improvements commenced by the time Phase IV begins.
- 1.7 Within six (6) months of the Effective Date of this Settlement Agreement, San José shall pay to Santa Clara Unified School District ("District") the sum of \$25,000 to retain a consultant agreeable to both the City of San José and the District to be used

by District to prepare a pupil generation report for students from the North San José Project area. Within six (6) months of the Effective Date of this Settlement Agreement, San José shall consult with District to create a scope of a school facility plan.

- 1.8 Within six (6) months from the completion of the pupil generation report, San José, working with the District, shall create a school facility plan, agreeable to both the City of San José and the District, to provide for designation of potential school sites. The City of San José shall prepare an analysis of the construction costs and operational impacts to District arising from approval of the North San José project based on information requested by the City of San José and provided by the District in a timely manner to the City of San José. This Settlement Agreement, preparation of the school facility plan, and preparation of the analysis of construction costs and operational impacts to District shall in no way create any additional legal or financial obligations between the City of San José and District.
- 1.9 Adjustments in the amount of the estimated construction costs of providing the specified public facilities listed above shall be adjusted according to adjustments in the Engineering News Record Construction Cost Index, published by the Engineering News Record (Twenty Cities Construction Index). Adjustments in the amount of the estimated planning, engineering, and other studies specified above shall be adjusted according to adjustments in the Consumer Price Index for All Urban Consumers (CPI-U) Engineering News Record Construction Cost Index, reported by the United States Department of Labor, Bureau of Labor Statistics (San Francisco-Oakland-San José index).

2. **Settlement by San José with City of Milpitas and County of Santa Clara.**

It is understood by all parties that the City of San José is in settlement discussions with the City of Milpitas regarding resolution of litigation pertaining to the North San José Development Policies and related matters, and that the City, Council and Redevelopment Agency of the City of San José are in settlement discussions with the County of Santa Clara to resolve litigation regarding the County's Fairgrounds and the North San José Development Policies. It is expressly understood and agreed that this Settlement Agreement is not contingent on the outcome of either of these matters.

2.1 Acceptance of Traffic Impacts

In light of San José's commitments identified in paragraphs (1.2) through (1.8) above, Santa Clara agrees to accept the NSJ Project's transportation impacts within the City of Santa Clara without further mitigation from San José.

3. **Releases by Santa Clara.**

Except for the obligations, representations, and warranties expressly created by, made in, or arising out of this Settlement Agreement, Santa Clara does hereby fully, finally and forever relieve, release, and discharge San José and County and their respective past and present affiliates, officers, directors, partners, members, trustees, beneficiaries, servants, employees, contractors, subcontractors agents, insurers, representatives, attorneys, and the predecessors, successors, assigns, partners, insurers, and all other related individuals and entities of each of them, from any and all claims, demands, damages, debts, liabilities, accounts, costs, expenses, liens, obligations, injunctive relief, fees, actions, causes of action (at law, in equity, or otherwise), suits, agreements, promises, rights, rights to subrogation, rights to contribution, and remedies of any nature whatsoever, known or unknown, fixed or contingent, which Santa Clara now has, ever had, or hereafter may have against San José and County, by reason of any matter, cause, or thing arising out of, based upon, or in any way relating to the June 2005 North San José Project approvals or any re-approvals or other actions required for dismissal, discharge of the Peremptory Writ of Mandate, or other final resolution of the Litigation. Nothing contained herein shall in any way limit Santa Clara's right and ability to challenge future approvals related to the North San José Project, except that Santa Clara agrees not to challenge any future approvals on the basis of environmental impacts either (1) previously identified in the existing EIR, or (2) alleged in the Litigation to have been unidentified, unmitigated, or insufficiently mitigated in the existing EIR or existing project approvals.

4. **Releases by County.**

Except for the obligations, representations, and warranties expressly created by, made in, or arising out of this Settlement Agreement, County on behalf of itself and all of its affiliates, does hereby fully, finally and forever relieve, release, and discharge the Santa Clara and San José and their respective past and present affiliates, officers, directors, partners, members, trustees, beneficiaries, servants, employees, contractors, subcontractors, agents, insurers, representatives, attorneys, and the predecessors, successors, assigns, partners, insurers, and all other related individuals and entities of each of them, from any and all claims, demands, damages, debts, liabilities, accounts, costs, expenses, liens, obligations, injunctive relief, fees, actions, causes of action (at law, in equity, or otherwise), suits, agreements, promises, rights, rights to subrogation, rights to contribution, and remedies of any nature whatsoever, known or unknown, fixed or contingent, which County now has, ever had, or hereafter may have against Santa Clara or San José and/or the Santa Clara Parties by reason of any matter, cause, or thing arising out of, based upon, or in any way relating to the June 2005 North San José Project approvals or any re-approvals or other actions required for dismissal, discharge of the Peremptory Writ of Mandate, or other final resolution of the Litigation. Nothing contained herein shall in any way limit County's right and ability to challenge future approvals related to the North San José Project, except that County agrees not to challenge any future approvals on the basis of environmental impacts either (1) previously identified in the existing EIR, or (2) alleged in the Litigation to have been unidentified, unmitigated, or insufficiently mitigated in the existing EIR or existing project approvals.

5. **Releases by San José.**

Except for the obligations, representations, and warranties expressly created by, made in, or arising out of this Settlement Agreement, San José, on behalf of itself and all of its affiliates, does hereby fully, finally and forever relieve, release, and discharge Santa Clara and County and their respective past and present affiliates, officers, directors, partners, members, trustees, beneficiaries, servants, employees, contractors, subcontractors, agents, insurers, representatives, attorneys, and the predecessors, successors, assigns, partners, insurers, and all other related individuals and entities of each of them, from any and all claims, demands, damages, debts, liabilities, accounts, costs, expenses, liens, obligations, injunctive relief, fees, actions, causes of action (at law, in equity, or otherwise), suits, agreements, promises, rights, rights to subrogation, rights to contribution, and remedies of any nature whatsoever, known or unknown, fixed or contingent, which San José now has, ever had, or hereafter may have against Santa Clara or County by reason of any matter, cause, or thing arising out of, based upon, or in any way relating to the Litigation.

6. **California Civil Code Section 1542 Waiver.**

It is the intention of the Parties in executing this Settlement Agreement that this instrument shall be effective as a full and final release, accord and satisfaction of each and every matter released. In furtherance of this intention, Santa Clara, San José and County each acknowledge their familiarity with and expressly, knowingly and intentionally waive the benefit of California Civil Code Section 1542, which is set forth below, and specifically agree that this release shall extend to all claims arising out of transactions related to the Gateway Project prior to the date of this Settlement Agreement which they do not know or expect to exist in their favor at this time. California Civil Code Section 1542 provides:

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

The Parties understand and acknowledge the significance and consequences of this Settlement Agreement and of such specific waiver of Civil Code Section Section 1542 and expressly consent that this Settlement Agreement shall be given full force and effect according to each and all of its express terms and provisions, including those relating to unknown and unsuspected claims, demands, obligations and causes of action, if any, as well as those relating to any other claims, demands, obligations or causes of action specified above. The Parties each further acknowledge and agree that their waivers of rights under California Civil Code Section 1542 are essential and material terms of this Settlement Agreement, and, without such waivers, this Settlement Agreement would not have been entered into.

7. **Discovery of Facts.**

Each of the Parties expressly and knowingly acknowledges that it or its attorneys may, after execution of this Settlement Agreement, discover claims, damages, facts, or law different from or in addition to those which each now knows or believes to exist or be applicable with respect to this Settlement Agreement. Nonetheless, it is the Parties' intention fully, finally and forever to settle and release each and every matter released in this Settlement Agreement, known and unknown, suspected or unsuspected, which now exist, may exist, or heretofore have existed, which is released in this Settlement Agreement. In furtherance of this intention, the releases given by Santa Clara, San José and County shall be and remain in effect as full and complete releases of all released matters notwithstanding the discovery or existence of any such additional or different claims, damages, facts, or law.

8. **No Admission of Liability.**

The Parties acknowledge that this Settlement Agreement is a compromise of disputed claims, and that neither this Settlement Agreement, nor any compliance with this Settlement Agreement or consideration pursuant to this Settlement Agreement, shall be construed as an admission by any of the Parties to this Settlement Agreement of any liability whatsoever and all such liability is hereby expressly denied. The Parties agree that this Settlement Agreement shall not be used by any Party in any other proceeding to establish liability or as evidence of any such liability.

9. **Entire Agreement between San José and Santa Clara.**

This Settlement Agreement contains all the terms and conditions agreed upon by Santa Clara and San José regarding the subject matter of this Settlement Agreement. Any prior agreements, promises, negotiations, or representations, either oral or written, relating to the subject matter of this Settlement Agreement not expressly set forth or referred to in this Settlement Agreement are of no force or effect. The Parties agree that this Settlement Agreement is not contingent on the outcome of the separate settlements referenced in paragraph 2, above.

9.1 **Entire Agreement between Santa Clara and County**

This Settlement Agreement contains all the terms and conditions agreed upon by Santa Clara and County regarding the subject matter of this Settlement Agreement. Any prior agreements, promises, negotiations, or representations, either oral or written, relating to the subject matter of this Settlement Agreement not expressly set forth or referred to in this Settlement Agreement are of no force or effect. The Parties agree that this Settlement Agreement is not contingent on the outcome of the separate settlements referenced in paragraph 2, above.



10. **Agreement Interpretation.**

This Settlement Agreement shall be deemed to have been drafted jointly by the Parties. It is agreed and understood that the general rule that ambiguities are to be construed against the drafter shall not apply to this Settlement Agreement.

11. **Enforcement of Agreement.**

The Parties, and each of them, agree that any action or proceeding brought to interpret or enforce the terms of this Settlement Agreement, or to seek damages for breach of a Party's performance of the terms of this Settlement Agreement, shall be brought before a mediator, at a mutually convenient location in California, and if such mediation is unsuccessful, then before a mutually agreeable impartial arbitrator. Any arbitration held pursuant to this Settlement Agreement shall be non-binding.

12. **Governing Law.**

This Settlement Agreement shall be construed and governed exclusively by the substantive laws of the State of California, without giving effect to its conflict of laws provisions.

13. **Headings.**

The headings of this Settlement Agreement are provided for convenience and reference only and shall not bear upon the interpretation or enforcement of this Settlement Agreement.

14. **Successors.**

This Settlement Agreement shall bind and inure to the benefit of the Parties and the respective successors, and assigns of each of them.

15. **Amendment and Modification.**

Any amendment or modification of this Settlement Agreement must be in writing, and signed by all of the Parties. Any amendment or modification not made in this manner shall have no force or effect.

16. **Notice.**

Any notice to be given to one of the Parties shall be in writing and shall be given either by personal delivery, overnight delivery, or by registered or certified mail with return receipt requested (with contemporaneous notice by facsimile) and addressed as follows:

To Santa Clara:  
City of Santa Clara  
City Manager  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Telephone: (408)615-3001  
Facsimile (408)249-7846

with a copy to:  
Office of the City Attorney  
City of Santa Clara  
1500 Warburton Avenue  
Santa Clara, CA 95050  
Telephone: (408) 615-2230  
Facsimile (408) 249-7846

To Redevelopment Agency of the City of Santa Clara:  
Redevelopment Agency of  
the City of Santa Clara  
1500 Warburton Ave.  
Santa Clara, CA 95050

To County of Santa Clara  
County Executive  
70 West Hedding Street  
11<sup>th</sup> Floor, East Wing  
San José, California 95110

with a copy to:  
Office of the County Counsel  
County of Santa Clara  
70 W. Hedding St.  
9<sup>th</sup> Floor, East Wing  
San José, CA 95110

To City of San José  
City Manager  
200 East Santa Clara Street  
17<sup>th</sup> Floor Tower  
San José, California 95113

with a copy to:  
Office of the City Attorney  
200 East Santa Clara Street  
San José, CA 95113-1905

To Redevelopment Agency of the City of San José  
Executive Director  
200 East Santa Clara Street  
14<sup>th</sup> Floor Tower  
San José, California 95113

with a copy to:  
Office of the General Counsel  
200 East Santa Clara Street  
San José, CA 95113-1905

Any Party may, by written notice to the others, designate a different person, address, telephone or facsimile number, or other information specified above, which shall be substituted for the one specified above.

17. **No Waiver.**

The failure of any of the Parties to insist upon strict adherence to any provision of this Settlement Agreement, or to object to any failure to comply with any provision of this Settlement Agreement, shall not be a waiver of that provision or preclude that Party from enforcing that provision. None of the provisions of this Settlement Agreement, including the provisions of this paragraph, shall be deemed to be waived, except by a writing signed by the Party against whom enforcement of the waiver is sought.

18. **Further Assurances.**

Each of the Parties agrees to do any and all acts or things reasonably necessary in connection with the performance of its obligations under this Settlement Agreement without undue delay or expense.

19. **Assistance of Counsel.**

The Parties, and each of them, represent and warrant that each has investigated the facts as deemed necessary to execute this Settlement Agreement; that each has had the opportunity to review and discuss this Settlement Agreement with their counsel; and that no payments, promises, representations, or inducements for the execution of this Settlement Agreement have been made or in any way relied on in executing this Settlement Agreement except for the separate settlement agreement between San José and County and as solely described in this Settlement Agreement.

20. **Costs and Fees.**

It is agreed and understood that each of the Parties shall bear its own costs and attorneys' fees with respect to the Litigation, the Appeal, and this Settlement Agreement, including all costs and attorneys' fees incurred in connection with, or in any way related to, the negotiation or consummation of this Settlement Agreement.

21. **Due Authority.**

Each individual signing this Settlement Agreement expressly states and warrants that he or she has due authority to sign and execute this Settlement Agreement on behalf of the person or entity for whom the individual signs.

22. **Counterparts**

This Settlement Agreement may be executed in one or more counterparts, each of which shall be deemed an original, all of which together shall constitute one and the same instrument.

23. **Severability.**

If any provision of this Settlement Agreement is determined to be unenforceable, invalid, or illegal, the other provisions of this Settlement Agreement shall continue in full force and effect.

24. **Effective Date.**

This Settlement Agreement shall become effective, final, and binding on the Effective Date of this Settlement Agreement.


25. Incorporation of Preamble and Recitals.

The Parties to this Settlement Agreement agree and attest to the truth and accuracy of the provisions contained in the Preamble and Recitals set forth above. The provisions of the Preamble and Recitals are hereby incorporated and made a part of this Settlement Agreement by this reference. The Parties agree that this Settlement Agreement has been entered into, at least in part, in consideration of the provisions contained in the Preamble and Recitals, as well as the provisions contained in the balance of this Settlement Agreement.

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

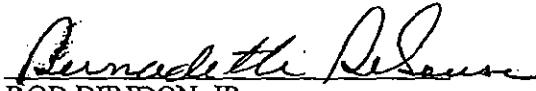
**CITY OF SANTA CLARA, CALIFORNIA,**  
a chartered California municipal corporation

Approved as to form:

  
MICHAEL R. DOWNEY  
City Attorney

By:   
JENNIFER SPARACINO  
City Manager

Attest:

  
for ROD DIRIDON, JR.  
City Clerk

1500 Warburton Avenue  
Santa Clara, CA. 95050  
Telephone: (408)615-2210  
Fax: (408)241-6771

Approved as to form:

COUNTY OF SANTA CLARA

\_\_\_\_\_  
ANN RAVEL  
County Counsel  
COUNTY OF SANTA CLARA

\_\_\_\_\_  
Chairperson  
Board of Supervisors

ATTEST

\_\_\_\_\_  
Clerk  
Board of Supervisors

25. Incorporation of Preamble and Recitals.

The Parties to this Settlement Agreement agree and attest to the truth and accuracy of the provisions contained in the Preamble and Recitals set forth above. The provisions of the Preamble and Recitals are hereby incorporated and made a part of this Settlement Agreement by this reference. The Parties agree that this Settlement Agreement has been entered into, at least in part, in consideration of the provisions contained in the Preamble and Recitals, as well as the provisions contained in the balance of this Settlement Agreement.

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

**CITY OF SANTA CLARA, CALIFORNIA,**  
a chartered California municipal corporation

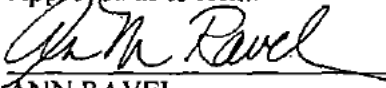
Approved as to form:

\_\_\_\_\_  
MICHAEL R. DOWNEY  
City Attorney

Attest:

\_\_\_\_\_  
ROD DIRIDON, JR.  
City Clerk

Approved as to form:

  
ANN RAVEL  
County Counsel  
COUNTY OF SANTA CLARA

ATTEST

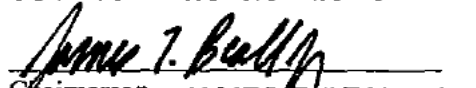
  
Clerk PHYLLIS A. PEREZ  
Board of Supervisors

By: \_\_\_\_\_

JENNIFER SPARACINO  
City Manager

1500 Warburton Avenue  
Santa Clara, CA 95050  
Telephone: (408)615-2210  
Fax: (408)241-6771

COUNTY OF SANTA CLARA

  
Chairperson JAMES T. BEALL, JR.  
Board of Supervisors

APPROVED AS TO LEGAL FORM:

City Attorney

CITY OF SAN JOSE

Mayor

ATTEST

City Clerk

APPROVED AS TO LEGAL FORM:

General Counsel

REDEVELOPMENT AGENCY OF THE  
CITY OF SAN JOSE

Chairperson

ATTEST

Secretary

## SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made as of this 16 day of November, 2006, by and among the County of Santa Clara ("County"), the Santa Clara County Financing Authority ("SCCFA"), the Silicon Valley Theatre Financing Corporation ("SVTFC"), sometimes collectively referred to as the "County Parties," and the City of San Jose ("City") and the Redevelopment Agency of the City of San Jose ("Agency"), sometimes the City and Agency are collectively referred to herein as the "City Parties." This Agreement shall also constitute the settlement agreement between the City and County for the mitigation of transportation impacts arising from the North San Jose Area Development Policies Update ("NSJ Project.")

### RECITALS

- A. The County, City and Agency previously entered into an Amended and Restated Agreement among the Redevelopment Agency of the City of San Jose, the County of Santa Clara, and the City of San Jose dated May 22, 2001 ("May 2001 Agreement"). The May 2001 Agreement remains in effect, and nothing herein is intended to amend that May 2001 Agreement except that Section VII, Paragraph I, Subpart 7, of the May 2001 Agreement, respecting the annexation of County pockets, shall now be read and interpreted in conjunction with that which is set forth in this Agreement.
- B. The County Parties entered into various agreements with several private parties to construct and operate a theater at the County's fairgrounds property ("Fairgrounds").
- C. On August 2, 2004, the City Parties filed a Complaint in Santa Clara County Superior Court, Case No. 104CV024291 ("Case No. 024291" or "Fairgrounds Litigation"), seeking a judicial determination as to whether the County's approval of the theater project at the Fairgrounds violated the May 2001

Agreement. This complaint set forth claims for declaratory relief against the County, and preliminary and permanent injunction against the County Parties.

- D. On or about October 14, 2004, the City Parties filed a First Amended Complaint in Case No. 024291, setting forth a claim for declaratory relief against the County, and interference with contractual relationship against SCCFA and SVTFC.
- E. On or about October 20, 2004, the venue was changed to the San Mateo County Superior Court, and this civil action was later transferred and assigned Case No. CIV442629 ("Case No. 442629").
- F. On December 13, 2004, the City Parties filed a Second Amended Complaint in Case No. 442629, setting forth claims for declaratory relief against the County, interference with contractual relationship against SCCFA and SVTFC, breach of contract against the County, petition for alternative and peremptory writs of mandamus against the County, and petition for writ of administrative mandamus against the County. On February 28, 2005, the County Parties filed an Answer to this Second Amended Complaint, and later on March 3, 2005, filed an Amended Answer.
- G. On April 28, 2005, the County filed a Cross-Complaint in Case No. 442629, setting forth claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and intentional interference with prospective economic relations against the City Parties. On or about July 13, 2005, the City Parties filed an Answer to this Cross-Complaint.
- H. On January 9, 2006, the Court of Appeal of the State of California, First Appellate District, reversed the November 22, 2004 Superior Court Order granting County Parties' special motion to strike as to the City Parties' injunction cause of action in the original August 2, 2004 complaint.



- I. On February 16, 2006, the San Mateo County Superior Court granted the County Parties' Motion for Summary Judgment in Case No. 442629, and issued an Order that all claims alleged in the Second Amended Complaint are adjudicated in favor of the County Parties and against the City Parties. In a separate Order dated February 28, 2006, the San Mateo County Superior Court granted the City Parties' Motion for Summary Adjudication as to the First Cause of Action (breach of Paragraph VII(P)(3) of the May 2001 Agreement) and Fifth Cause of Action (intentional interference with prospective economic relations) of the Cross-Complaint. The City Parties' motion was denied as to the Cross-Complaint's remaining causes of action.
- J. On July 28, 2005, the County filed suit against the City in the Santa Clara County Superior Court, Case No. 105CV046005, entitled *County of Santa Clara v. City of San Jose, et al.* ("Case No. 046005" or "North San Jose Litigation"), alleging, *inter alia*, that the City's approval of the NSJ Project and certification of the North San Jose Area Development Policies Update Environmental Impact Report ("NSJ EIR") violated various provisions of the California Environmental Quality Act of 1970 ("CEQA"). This North San Jose Litigation was later consolidated with two separate actions filed by the City of Santa Clara and Redevelopment Agency of the City of Santa Clara, and the City of Milpitas, and the consolidated action continued under Case No. 046005.
- K. On March 2, 2006, a trial was held in the North San Jose Litigation. In the Notice of Decision issued on March 2, 2006, the Court held that there was not substantial evidence to support the City's determination that there were no feasible mitigation measures for impacts to transportation facilities under the jurisdiction or control of other public agencies. The Court further held that San Jose's findings were timely, that San Jose's findings concerning potable water supply were supported by substantial evidence, and that San Jose's findings that the NSJ Project would not have cumulative impacts on wastewater facilities were supported by substantial evidence. On March 28,

2006, a Judgment and a Peremptory Writ of Mandate were entered in accordance with the Notice of Decision in the North San Jose Litigation.

- L. The County Parties and City Parties desire to settle and compromise all claims and defenses that were asserted in the Fairgrounds Litigation. The City Parties and the County further desire to settle and compromise all claims and defenses that were asserted in the North San Jose Litigation.

ACCORDINGLY, THE PARTIES AGREE AS FOLLOWS:

1. Resolution of the Fairgrounds Litigation

a. Entry of Judgment

In regard to the Second Amended Complaint in Case No. 442629, the City Parties agree to allow Judgment to be entered in favor of the County Parties against the City Parties respecting the February 16, 2006 Court Order granting the County Parties' Motion for Summary Judgment. The City Parties waive any appeal, and the County Parties waive their costs of suit and attorneys' fees respecting such judgment.

b. Dismissal of County Cross-Complaint

The County agrees to execute a request for dismissal with prejudice of its Cross-Complaint as to all cross-defendants, including the City Parties, within two weeks from the date of this Agreement.

c. Waiver of Claims and Damages

The County Parties hereby waive any and all claims or damages relating to or arising out of the Fairgrounds Litigation.

d. Payments by City and/or Agency

The City and/or Agency shall contribute the sum of \$22.5 million to County in three (3) equal installments of \$7.5 million to be used towards a community project that has been identified as the construction of a County Crime Laboratory, seismic upgrades to Superior Court or Valley Medical Center facilities, or seismic upgrades of other existing facilities that would benefit the citizens of City. The first payment shall be made no later than July 1, 2007; the second payment shall be made no later than July 1, 2008; and, the third payment shall be made by no later than July 1, 2009. It is the intent of the City and Agency that these payments will be made out of Agency bond funds. It is understood that if Agency bond funds are not available when installment payments are due, the City and/or Agency shall nevertheless make each installment payment from other sources of their choosing. It is further understood that these contributions shall be made in addition to any pass-through or delegated fund payments contained in the May 2001 Agreement.

The contribution of the funds set forth in this paragraph (d) shall be expressly contingent upon the execution of separate settlement agreements between the City of San Jose, the City of Santa Clara, the Santa Clara Redevelopment Agency, and the City of Milpitas to resolve the consolidated North San Jose Litigation. The County agrees to provide its best efforts to achieve final resolution of the consolidated North San Jose Litigation through executed settlement agreements between City Parties and the Cities of Milpitas and Santa Clara.

e. Annexation of County Pockets

In terms of the annexation of existing County Pockets (or urban unincorporated "islands") of unincorporated land that are scattered throughout the City's Urban Service Area, the parties agree as follows:

i. Annexation of County Pockets of 150 Acres or Less

City shall immediately initiate a process leading to the consideration by City's City Council of the annexation of all such existing County Pockets of 150 acres or less, and the City shall make good-faith efforts to complete all such County Pocket annexations by April 15, 2011. The respective parties recognize that legislative changes could affect the City's ability to annex such County Pockets, and that City shall not be held liable or responsible for delays or incapacities directly created by or resulting from changes in applicable State legislation. The County agrees that, in order to facilitate the processing of these annexations, it shall absorb the usual County costs associated with preparing annexation maps and providing Assessor's and Surveyor's reports, for which the County normally charges fees to the annexing entity. County shall pay for any LAFCO work and fees related to such annexations. County shall further pay any State Board of Equalization fees related to such annexations.

ii. Annexation of County Pockets Greater than 150 Acres

a) City will use good-faith efforts to initiate the processing of annexations for such existing County Pockets of greater than 150 acres by April 15, 2011, by commencing the processes necessary for the City Council to consider adoption of a Specific Annexation Plan for each such pocket subject to all applicable conditions and requirements of California law. The respective parties recognize that legislative changes could affect the City's ability to process or annex such County Pockets as contemplated herein, and that City shall not be held liable or responsible for delays or incapacities created by or resulting from changes in the applicable State legislation.

b) Each Specific Annexation Plan shall include estimated dates for the following (i) when pre-zoning will

be completed; (ii) when information regarding a comparison of services and charges will be mailed to property owners and registered voters; (iii) at least two community information meetings to be held; (iv) when the City will prepare and submit an annexation map to LAFCO; (iv) when the City Council will consider formal initiation of annexation by resolution; and (v) when the City will hold a protest hearing, if necessary. The City shall comply with the Cortese Knox Hertzberg Local Government Reorganization Act, and either consider immediate termination of the annexation proceeding, immediate completion of annexation without voter election, or immediate approval of annexation subject to voter election with an attempt to hold said election as soon as possible thereafter. An adverse election result for approval of annexation of any County Pocket shall relieve City from any further obligations under this Agreement to seek annexation of said County Pocket, unless there is a subsequent change in state law that would allow for annexation of said County Pocket without an election.

iii. The County shall cooperate with the City by providing, at the County's sole cost and expense, information that is reasonably necessary in order for the City to prepare a comparison of services and charges to be mailed to property owners and registered voters. The County shall provide to the City such information within a reasonable time following receipt of the City's request for such information.

iv. The parties shall meet and confer, pursuant to the provisions of Revenue and Taxation Code §99 and any other applicable California law, to discuss the sharing of revenues from the County pockets subject to annexation.

v. Force Majeure Provision

A court order, judgment, administrative proceeding, litigation, or legislation that prohibits the annexations of pocket(s) contemplated herein shall excuse the City's annexation obligation/performance under this Agreement. Any court order,

administrative proceeding, judgment, litigation, or legislation that delays the annexation of pocket(s) contemplated herein will affect the City's compliance with the April 15, 2011 deadline, but City shall complete the annexations as soon as possible subject to any and all legal requirements caused by the delay.

2. Resolution of the North San Jose Litigation

a. The NSJ EIR outlines a number of proposed improvements for the Montague Expressway within the City to mitigate traffic impacts from the NSJ Project. The implementation of these improvements is scheduled to occur during specified phases of the NSJ Project as described in the NSJ EIR. In its Findings for the NSJ Project, Resolution No. 72768, the City Council determined that the NSJ Project included a comprehensive package of roadway improvements (including upgrades to freeway, expressway, and local street facilities). The Findings' Mitigation Monitoring and Reporting Program holds that the City Department of Public Works will ensure implementation of the identified mitigation as described in the NSJ EIR based upon conditions and commitments included in the Final Public Works Clearance for development within the project area. The Mitigation Monitoring and Reporting Program further holds that 85% of all infrastructure mitigation for any individual phase (and all infrastructure for any previous phase) must be built or its implementation reasonably assured prior to issuance of building permits for any subsequent phase.

b. The County, City, and Agency agree to settle the North San Jose lawsuit as described herein conditioned on the following:

i. City Constructed Projects.

In and as a part of the implementation of Phase I of the NSJ Plan, City shall complete and fund mitigations as follows:  
Montague Expressway widening to 8 lanes between Lick Mill

and Trade Zone, all portions of the Expressway regardless of City boundaries, including Interchange modifications at I-880 and the Trimble flyover; City shall complete the McCarthy-O'Toole Interchange as a part of the implementation of Phase III of the NSJ Plan.

ii. City Funded Projects.

City shall fund up to an amount not to exceed \$11 million dollars, and County shall construct the Montague "base project" 8-lane improvements as identified in the Comprehensive County Expressway Planning Study, Implementation Plan - Montague Expressway Tier 1A project, specifically:

- (a) completion of Interchange modifications at I-680,
- (b) widening between I-680 and Park Victoria, and
- (c) any widening remaining to be done between Capitol and I-680.

City shall provide such funding no later than June 30, 2010. County shall make a good faith effort to complete all of these improvements within 5 ½ years of receipt of City's funds so long as City's \$11 million contribution is sufficient to cover the improvements or alternate funds are available to complete the improvements.

iii. Montague/Mission/101 Interchange Project.

County and City agree, to the extent allowed by law, to continue their support for inclusion in the Valley Transportation Plan 2030 ("VTP 2030 Plan") the reconstruction of the interchange at Montague and Highway 101, with improvements to Mission College Boulevard as identified in the Comprehensive County Expressway Planning Study, Implementation Plan - Montague Expressway, Tier 1B project ("Montague/Mission/101

Interchange Project"). The County and City also agree that this is a high priority for State Transportation Improvement Program ("STIP") funding. County shall be solely responsible for all planning and design activities related to the Montague/Mission/101 Interchange Project; provided, however, that County's financial obligations for the Montague/Mission/101 Interchange Project shall not exceed the amounts set forth in this Section 2.b.iii. Such activities shall include, but not be limited to, the completion of the Project Study Report ("PSR") estimated to cost \$500,000 and the submission of such PSR to Caltrans within 1 year of the effective date of this Agreement. On or before June 30, 2010, County shall fund the design work for the construction of the Montague/Mission/101 Interchange Project, as identified in the Expressway Study and as contemplated in the PSR prepared in accordance with this Settlement Agreement. The design work shall be completed on or before June 30, 2014. In no event shall County's funding responsibility for the design work exceed \$1,500,000.00. If funding for the construction of the Montague/Mission/101 Interchange Project is not available on or before July 1, 2014, City Parties shall pay \$1,500,000 to County, and County shall allocate that \$1,500,000 for construction of the Montague/Mission/101 Interchange Project in conformity with the PSR and such other design work as may be necessary to improve the intersection for the ultimate interchange improvements at Highway 101 and Montague Expressway.

iv. San Tomas at Stevens Creek Widening Project.

County and City agree that STIP funding to extend the limits of the mitigation project for San Tomas Expressway widening to 8 lanes between Moorpark (at the south) and El Camino Real (at the north) is a high priority. Commencing immediately and until such time as funding is secured, VTA representatives from County and City shall take all lawful actions to support the inclusion of the widening of San Tomas Expressway to 8 lanes between Moorpark and El Camino Real, as identified and



described in the Expressway Study in the VTP 2030 plan, as a high-priority item for STIP funding.

c. In light of City Parties' commitments identified in Paragraph 2(b) above, County agrees to accept the NSJ Project's transportation impacts on transportation facilities under the County's jurisdiction or control without further mitigation from City Parties.

d. County shall take all reasonable steps necessary to resolve the North San José Litigation in a manner that will allow the NSJ Project to proceed, including, but not limited to, supporting a motion to set aside the March 28, 2006 Judgment in Case No. 046005, discharge of the Peremptory Writ of Mandate, and dismissal of Case No. 046005. County shall neither require nor insist that City Parties set aside any of their existing approvals or circulate any new environmental documents for the NSJ Project.

### 3. No Admission of Liability

The parties agree that this Agreement is part of a compromise and settlement of disputed claims. The parties further acknowledge and agree that this Agreement shall not be construed or deemed to be evidence of any admission of any fact, matter or thing.

### 4. Waiver of Costs

The parties agree to waive all costs, fees, or sanctions against one another respecting the Fairgrounds Litigation and North San Jose Litigation.

### 5. Joint Statement

The parties have previously agreed on a joint statement regarding this Agreement.

6. Governing Law, Forum, and Jurisdiction.

a. This Agreement, respecting the resolution of Case No. 442629, shall be interpreted in accordance with and covered in all respects by the laws of the State of California, and the respective parties submit to the exclusive jurisdiction and venue of the San Mateo County Superior Court, the Honorable Mark Forcum, for purposes of interpretation and enforcement. In the event Judge Forcum is no longer sitting on the San Mateo County Superior Court bench at the time any issue regarding interpretation or enforcement arises, then the parties agree to submit the matter to a Judge selected by the Presiding Judge of the San Mateo County Superior Court.

b. This Agreement, respecting the resolution of the North San Jose Litigation, shall be interpreted in accordance with and covered in all respects by the laws of the State of California, and the respective parties submit to the exclusive jurisdiction and venue of the Santa Clara County Superior Court, the Honorable Leslie Nichols, for purposes of interpretation and enforcement. In the event Judge Nichols is no longer sitting on the Santa Clara County Superior Court bench at the time any issue regarding interpretation or enforcement arises, then the parties agree to submit the matter to a Judge selected by the Presiding Judge of the Santa Clara County Superior Court. To the extent that any dispute between City Parties and County regarding the North San Jose Litigation involves the City of Santa Clara and the separate Settlement Agreement entered into between City Parties, County, the City of Santa Clara, and the Redevelopment Agency of the City of Santa Clara, then the resolution provisions of that separate Settlement Agreement shall prevail.

7. Integration

The parties agree that the terms of this Agreement are contractual, and not mere recital, and constitute a fully binding and complete agreement between the County and the City

Parties. Except for the settlement agreement between the City Parties, City of Santa Clara, Redevelopment Agency of the City of Santa Clara, and County of Santa Clara in the North San Jose Litigation, which is intended to be consistent with the provisions of this Agreement with respect to the North San Jose Litigation, this Agreement supersedes any and all prior or contemporaneous agreements, representations, and understandings of and between the parties on those matters addressed in this Agreement. The parties understand that the terms of this Agreement may not be altered, amended, modified or otherwise changed in any respect of particular except by a writing duly executed by all of the parties hereto.

8. Construction and Interpretation

The parties, through their counsel, cooperated in the drafting in preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any party. Further, the titles and headings of sections of this Agreement are for convenience of reference only and shall not affect the construction of any provision of this Agreement. The terms 'include', 'including' and similar terms shall be construed as though followed immediately by the phrase 'but not limited to.'

9. Severability

In the event that, any time subsequent to the execution of this Agreement, any portion or provision of it is found to be illegal, invalid, unenforceable, nonbinding or otherwise without legal force or effect, the remaining portion(s) will remain in force and be fully binding.

10. Counterparts

This Agreement may be executed by the parties in counterparts.

11. Additional Acts

The parties agree to do such acts and execute such documents as are necessary to carry out the provisions and purposes of this Agreement.

12. Notice

All notices and other communications required or permitted to be given under this Agreement shall be in writing and shall be personally served or mailed, postage prepaid and return receipt requested, addressed to the respective parties as follows:

To County

Parties: County of Santa Clara  
County Executive  
70 West Hedding Street  
11<sup>th</sup> Floor, East Wing  
San Jose, California 95110

To City:

City of San Jose  
City Manager  
200 East Santa Clara Street  
17<sup>th</sup> Floor Tower  
San Jose, California 95113

To Agency:

Redevelopment Agency of the City of San Jose  
Executive Director  
200 East Santa Clara Street  
14<sup>th</sup> Floor Tower  
San Jose, California 95113

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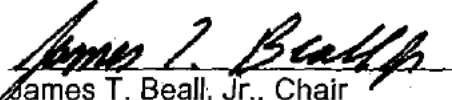
Notice shall be deemed effective on the date personally delivered or, if mailed, three (3) days after deposit in the mail.

IN WITNESS WHEREOF the parties have executed this Agreement upon the day and year above written.

ATTEST:

  
Phyllis A. Perez Clerk  
Board of Supervisors


COUNTY OF SANTA CLARA

  
James T. Beall, Jr., Chair  
Board of Supervisors

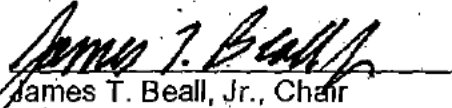
APPROVED AS TO FORM AND LEGALITY:

  
Ann Miller Ravel  
County Counsel

ATTEST:

  
Phyllis A. Perez  
Secretary

SANTA CLARA COUNTY FINANCING AUTHORITY

  
James T. Beall, Jr., Chair

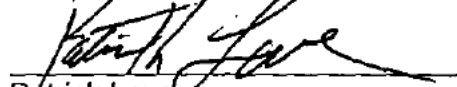
APPROVED AS TO FORM AND LEGALITY:

  
Ann Miller Ravel  
County Counsel

APPROVED AS TO FORM AND LEGALITY:

  
Ann Miller Ravel  
County Counsel

SILICON VALLEY THEATRE FINANCING CORPORATION

  
Patrick Love  
Executive Director

//

ATTEST

City Clerk

*[Handwritten Signature]*

CITY OF SAN JOSE

Mayor

*[Handwritten Signature]*

APPROVED AS TO LEGAL FORM:

City Attorney

*[Handwritten Signature]*

ATTEST

Secretary

*[Handwritten Signature]*

REDEVELOPMENT AGENCY OF THE  
CITY OF SAN JOSE

Chairperson

*[Handwritten Signature]*

APPROVED AS TO LEGAL FORM:

General Counsel

*[Handwritten Signature]*

# **Exhibit B**

**OFFICE OF THE COUNTY COUNSEL  
COUNTY OF SANTA CLARA**

**James R. Williams  
COUNTY COUNSEL**

County Government Center  
70 West Hedding Street  
East Wing, 9<sup>th</sup> Floor  
San José, California 95110-1770



Greta S. Hansen  
**CHIEF ASSISTANT COUNTY COUNSEL**

Robert M. Coelho  
Tony LoPresti  
Steve Mitra  
Kavita Narayan  
Douglas M. Press  
Gita C. Suraj

**ASSISTANT COUNTY COUNSEL**

(408) 299-5900  
(408) 292-7240 (FAX)

May 17, 2022

**SENT VIA EMAIL TO CITY CLERK FOR DISTRIBUTION TO HON. MAYOR AND  
CITY COUNCIL**

Hon. Mayor Sam Liccardo and Councilmembers  
City of San José  
200 East Santa Clara Street  
San José, California 95113

**Re: May 17, 2022 City Council Meeting Item No. 10.2:** Comments on Draft Settlement Agreement Amendment with the City of Santa Clara and Proposed Amendments to the San José General Plan and North San José Development Policy, Addition of Chapter 20.65 to the Zoning Ordinance Regarding Overlay Districts, Amendments to Municipal Code Chapter 14.29 Regarding the North San José Traffic Impact Fee, and Addendum to the Envision San Jose 2040 General Plan Environmental Impact Report

Dear Mayor Liccardo and Council Members:

The County of Santa Clara (“County”) submits this letter to protect its rights pursuant to existing settlement agreements with the City of San José (“City”) and its former Redevelopment Agency (“RDA”) and to express its concerns regarding the Draft Settlement Agreement Amendment (“2022 Draft Amendment”) and the City’s rushed and legally flawed process for the above-referenced amendments to the San José General Plan, the North San José Development Policy, Zoning Ordinance, and Municipal Code (collectively, the “NSJ Amendments”). The County also submits the following comments on the corresponding Addendum to the Envision San Jose 2040 General Plan Environmental Impact Report and Supplemental Program Environmental Impact Report (SCH#2009072096) and Addenda Thereto (collectively, “Addendum”).

The County is extremely concerned that approval of such actions are, among other things, legally unenforceable and would constitute breach of contract, bad faith, and breach of the covenant of good faith and fair dealing as a result of the City’s blatant disregard of the binding settlement agreements that currently exist between the City and the County, and between the City, the County, and the City of Santa Clara. The County is truly disappointed by the City’s



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course of action in putting the 2022 Draft Amendment and NSJ Amendments in front of the City Council for consideration.

**The County respectfully requests that the City Council continue this item to a date uncertain so that the relevant parties can continue their productive discussions and hopefully reach a mutually agreeable resolution.** While the County supports the City's efforts to encourage additional housing production in North San José, the City must recognize its previous binding commitments to improve the County's transportation infrastructure that serves these areas to ensure that the planned housing development does not exacerbate traffic congestion that harms our mutual residents and hampers the regional economy. The currently effective settlement agreements were intended to mitigate negative impacts to the county's residents. While the County is certainly willing to consider appropriately amending these binding agreements in a legal manner, any change to them must provide adequate substitute mitigation, consistent with law and sound public policy.

#### **I. Background**

The City's North San José Development Policy ("Policy") was originally enacted in 2005 with the goal of making North San José an important employment center and innovation district. In summary, the existing Policy authorizes up to 32,000 housing units, 26.7 million square feet of research and development and office space, 2.7 million square feet of retail uses, and 1,000 hotel rooms.

The existing Policy currently in effect is phased. Given the overarching goal of creating an employment center, each phase includes *both* housing *and* industrial development. The Policy's concurrent development of jobs-creating land uses together with housing partially mitigates traffic impacts associated with the Policy by allowing people to live near their jobs and decreasing the number of long-distance trips. Specifically, each of the first three phases includes 8,000 dwelling units and 7 million square feet of industrial development. The fourth and final phase allows 8,000 dwelling units and 5.7 million square feet of industrial development. Each phase includes transportation improvement projects to help mitigate traffic impacts, and the Policy does not allow for the next Phase to occur—in whole or in part—until, among other things, the required transportation improvements from the preceding phase are reasonably assured to be completed.

In 2005, the County, along with the cities of Milpitas and Santa Clara, challenged the approval of the Policy and alleged that the Environmental Impact Report (EIR) certified by the City violated the California Environmental Quality Act (CEQA) because it failed to properly consider or impose mitigation for the Policy's impacts to transportation facilities under the jurisdiction or control of the non-City entities. In March 2006, in a consolidated action, the Santa Clara County Superior Court rendered judgment in favor of the County, Milpitas, and the City of Santa Clara. The Court held that there was not substantial evidence to support the City's conclusion that mitigation measures were infeasible for non-City transportation facilities.

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On November 16, 2006, the County, the City, the RDA, and related parties executed two settlement agreements to resolve the CEQA litigation (collectively the “Settlement Agreement”).<sup>1</sup> Generally, the Settlement Agreement requires that the City undertake and/or fund specified transportation improvements prior to initiation of Phase 2 to mitigate the Policy’s impacts on the County’s Montague Expressway, which is an extremely important East-West thoroughfare that, among other things, links I-680 with Highway 101. The Court-approved stipulation dismissing the cases recognized that the County was foregoing its legal rights in exchange for the City’s binding commitment to provide major traffic mitigation projects. Importantly, the Settlement Agreement establishes that discovery of new facts (e.g., the City’s incorrect assumptions about market interest in certain development types) or new law (e.g., the State Legislature revises methodologies for calculating traffic impacts) would not affect the binding nature of the Settlement Agreement.<sup>2</sup>

Although virtually the full allocation of Phase 1 housing has been completed, other Phase 1 development has not been completed, and many of the Phase 1 traffic improvements are outstanding. The outstanding improvements are vital to relieving congestion on the Montague Expressway, a critical infrastructure backbone that affects county residents beyond those living in North San José.<sup>3</sup> The list below summarizes the status of the traffic mitigation improvements that the City agreed in the binding Settlement Agreement to fund and/or construct before the initiation of Phase 2 of the Policy:

1. Fund and construct improvements to Montague Expressway, including eight lanes between Lick Mill and Trade Zone:
  - Widening between I-880 and First St. (Status: Complete)

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<sup>1</sup> One settlement agreement included the City, the City of Santa Clara, and related parties (“City, City of Santa Clara and County Agreement”). The other settlement agreement only include the City and County and related parties (“County Agreement”). The two settlement agreements had identical terms with respect to the Policy. One of the agreements also settled separate disputes with the City involving a proposal for a theatre at the Santa Clara County Fairgrounds, annexation of County pockets, and pass-through payments from the City’s redevelopment agency to the County.

<sup>2</sup> Section 7 of the settlement agreement between the County, City, and RDA states: “Each of the Parties expressly and knowingly acknowledges that it or its attorneys may, after execution of this Settlement Agreement, discover claims, damages, facts, or law different from or in addition to those which each now knows or believes to exist or be applicable with respect to this Settlement Agreement. Nonetheless, it is the Parties’ intention fully, finally and forever to settle and release each and every matter released in this Settlement Agreement, known and unknown, suspected or unsuspected, which now exist, may exist, or heretofore have existed, which is released in this Settlement Agreement. In furtherance of this intention, the releases given by Santa Clara, San Jose and County shall be and remain in effect as full and complete releases of matters notwithstanding the discovery or existence of any such additional or different claims, damages, facts, or law.”

<sup>3</sup> The attachments indicate what Settlement Agreement projects have been completed and not completed as of April 2022.

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- Widening between Lick Mill Blvd. and First St. (Status: Outstanding)
  - Widening between I-880 and Trade Zone Blvd. (Status: Outstanding)
  - Interchange modifications at I-880 (Status: Outstanding)
  - The Trimble flyover (Status: Outstanding)
  - The McCarthy-O'Toole Interchange (Prior to Phase 3)(Status: Outstanding)
2. Fund up to an amount not to exceed \$11 million to the County for the construction of the Montague Expressway widening project from East Capitol Avenue easterly to Park Victoria Drive, including the I-680 interchange modification. (Status: Complete)
  3. Fund \$1.5 million to the County for the Montague/Mission/US-101 Interchange study. (Status: Outstanding)

**II. Current Status of Settlement Agreement and Request for Continuance to Date Uncertain**

On March 23, 2022, the City's Planning Commission approved a recommendation to the City Council for approval of the NSJ Amendments consistent with the City's plans to move forward with residential development originally planned for Phase 2 and later phases without completing the previously required infrastructure in advance of each phase. The NSJ Amendments eliminate the phasing plan and would allow development beyond Phase 1 to move forward without the required infrastructure improvements described in the Policy and required by the Settlement Agreement. The NSJ Amendments now under consideration by the City Council would violate the City's commitments in the Settlement Agreement.

The County recently discovered that the City has been negotiating for some time with the City of Santa Clara and engaged in an extended mediation process to discuss alternate terms under the settlement agreement that includes the City of Santa Clara and the County. Alarming, the City has not included the County in these conversations despite its obligations under the Settlement Agreement, the County's shared interest in traffic mitigation, and the integrated responsibilities of the three jurisdictions for many of the improvements. The County has engaged in recent discussions with City and City of Santa Clara representatives on potential amendments to the existing Settlement Agreement. Notwithstanding these discussions, the City has put the 2022 Draft Amendment in front of the City Council for discussion even though the 2022 Draft Amendment violates the existing Settlement Agreement on its face.

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### **III. Enforcement of the Settlement Agreement**

Notwithstanding that City staff has appeared to recognize in writing on numerous occasions that amendments to the Settlement Agreement are a necessary prerequisite for the NSJ Amendments to move forward (even the 2022 Draft Amendment contemplates the need to negotiate with the County), the City Council is considering the NSJ Amendments and 2022 Draft Amendment on an expedited basis with no County concurrence in place.

Significantly, paragraph 7 of the Stipulation approving the Settlement Agreement provides:

Collectively the [Settlement] Agreements represent Respondents' [City's] commitment to invest millions of dollars for traffic improvements on Santa Clara County facilities in Milpitas and Santa Clara and to support regional funding for major traffic projects within Santa Clara.

The Settlement Agreement requires that the projects be completed “[i]n and as a part of the implementation of Phase I of the NSJ Plan.”<sup>4</sup> Thus, the fundamental consideration for the Settlement Agreement was the City’s commitment to mitigate impacts to the County’s Expressway caused by development under the Policy concurrent with or prior to the development occurring, as required by the phasing plan.

If the City Council approves the NSJ Amendments, the County will consider this action to be a breach and/or anticipatory breach of contract, extreme bad faith, and a breach of the covenant of good faith and fair dealing. The NSJ Amendments would allow for the development of far more than the 8,000 housing units allowed in Phase 1, even though the Phase 1 traffic mitigation improvements will not be completed. In other words, the NSJ Amendments purport to allow the City to move forward with the housing portion of Phase 2 without fulfilling its prerequisite traffic mitigation commitments under the Settlement Agreement. The City cannot rewrite history and ignore the agreements that resolved the County’s successful CEQA challenge and allowed the City to execute the Policy since 2006. The County and its residents must receive the benefit of its bargain with the City, and the County is prepared to utilize all its available remedies to ensure that this occurs.

In addition, the 2022 Draft Amendment attached to the May 17, 2022 City Council Agenda packet purports to amend the November 16, 2006 Settlement Agreement and General Release (referred to herein as the City, City of Santa Clara and County Agreement) relating to North San José that included the City of Santa Clara, the Redevelopment Agency of the City of Santa Clara, the County of Santa Clara, the City of San José and the Redevelopment Agency of San José. However, the 2022 Draft Amendment only mentions and includes as signatories the City of San José, and the City of Santa Clara, and not the other parties to the City, City of Santa

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<sup>4</sup> City, City of Santa Clara and County Agreement ¶ 1.2; County Agreement ¶ 2(a).

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Clara and County Agreement, including the County. This is in direct contradiction to basic contract law and Section 15 of the City, City of Santa Clara and County Agreement which states that:

Any Amendment or modification of this Settlement Agreement must be in writing, and signed by all of the Parties. **Any amendment or modification not made in this manner shall have no force and effect.** (Emphasis added)

The City's proposed intentional breach of the City, City of Santa Clara and County Agreement by entering into the 2022 Draft Amendment and approval of the NSJ Amendments (that ignore the City's obligation under Settlement Agreement) constitute extreme bad faith and a breach of the covenant of good faith and fair dealing, in addition to breach of contract and/or anticipatory breach. If the 2022 Draft Amendment moves forward, the County will have no choice but to assert its rights under the Settlement Agreement against the City and the City of Santa Clara.

#### **IV. CEQA Compliance and Comments on the Addendum**

The Addendum before the City Council fails to satisfy CEQA's procedural and substantive standards in several respects. A new or subsequent Environmental Impact Report (EIR) must be prepared for the NSJ Amendments because substantial changes have been made to the project and the circumstances surrounding the project.

##### **A. The Addendum Violates CEQA's Fundamental Purpose to Promote Informed Decision-Making**

Informed decision-making and public participation are fundamental purposes of the CEQA process.<sup>5</sup> The prior Planning Commission staff report and Addendum violate basic principles of transparency and CEQA because there is only one passing reference to the Settlement Agreement in the Addendum in Section 2.1.2 (Areas of Known Controversy) and no discussion of the Settlement Agreement's mitigation requirements. There is also no mention of the 2022 Draft Amendment in the Addendum. These omissions result in an inaccurate and misleading project description in violation of CEQA.

As explained above, the mitigation measures required by the Settlement Agreement address the legal inadequacies of the EIR for the North San José Development Policy identified in the Court's judgment. Given this context, it is unconscionable and a clear abuse of discretion for the City to move forward with the NSJ Amendments and the 2022 Draft Amendment without

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<sup>5</sup> See *Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184-1185. The EIR thus works to "inform the public and its responsible officials of the environmental consequences of their decisions before they are made," thereby protecting "not only the environment but also informed self-government." *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 (quoting *Laurel Heights Improvement Ass'n. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392).

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any analysis of the Settlement Agreement in the Addendum. This omission makes informed public participation and decision-making impossible and violates the most fundamental CEQA tenets.<sup>6</sup>

The City's failure to implement the mitigation projects according to the phasing plan will also result in new and different physical impacts to the environment. These impacts are not analyzed in the Addendum. Omission of key information that CEQA mandates be included in an environmental analysis constitutes a failure to proceed in the manner required by law, and the City has failed to set forth sufficient information to foster informed public participation.<sup>7</sup> Moreover, eliminating the phasing plan and abandoning the City's obligations under the Settlement Agreement constitutes a significant change that makes use of an addendum inappropriate. Finally, the City's deferral of analysis to future individual projects constitutes inappropriate "piecemealing."

The Addendum concludes that the environmental impacts of the NSJ Amendments were addressed by the Final EIR for the Envision 2040 General Plan<sup>8</sup> but there is no discussion of *how* these are addressed. Moreover, it is not clear from the face of the Final EIR for the Envision 2040 General Plan that these impacts are addressed in that document. Also, there is no discussion of the relationship between the original EIR for the Policy and the 2040 Envision General Plan EIR. In other words, the City fails to offer a coherent explanation for why it is legally acceptable to address the environmental impacts of the NSJ Amendments in an addendum to the 2040 Envision General Plan EIR, instead of preparing a subsequent EIR to the Policy EIR. This creates a confusing record and makes it impossible for the public to understand and participate in the City's decision-making process. For example, as discussed below, the traffic study attached to the 2040 Envision General Plan EIR Addendum discusses the EIR for the original Policy, even though the Addendum modifies the 2040 Envision General Plan EIR.

#### **B. The Addendum's Conclusions Are Not Supported by Substantial Evidence**

As a general rule, if an EIR has been prepared for a project, the lead agency must prepare a subsequent or supplemental EIR under Public Resources Code section 21666 and section 15162 of the CEQA Guidelines if substantial changes are made to the project or circumstances surrounding the project. The agency's determination must be supported by substantial evidence.<sup>9</sup> Importantly, substantial evidence includes fact, reasonable assumptions based on

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<sup>6</sup> See *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429 (invalidating addendum and requiring supplemental environmental review under abuse of discretion standard where county omitted key fact from addendum, i.e. that building had increased by fifteen feet in height from what was analyzed in prior EIR).

<sup>7</sup> *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516.

<sup>8</sup> Addendum, Cover Memo, p. 2.

<sup>9</sup> CEQA Guidelines § 15162(a).

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fact, and expert opinion supported by facts.<sup>10</sup> Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence that is not credible.<sup>11</sup>

Here, the City's Addendum (to the wrong EIR) concludes that no subsequent or supplemental environmental review is required and therefore the Addendum to the 2040 Envision General Plan EIR is the appropriate CEQA document.<sup>12</sup> But the City's key conclusions are not supported by substantial evidence.

The Addendum repeats on numerous occasions that abandoning the Policy's phasing plan and the Transportation Impact Fee (TIF) will not increase the maximum residential development beyond 32,000 residential units (as analyzed in the 2040 General Plan EIR) and, therefore, the NSJ Amendments will have no new or increased impacts. This conclusion is not supported by evidence or analysis, and therefore does not satisfy CEQA's standards. Given the substantial intervening development in North San José and the surrounding area since the original Policy EIR was prepared, it strains credulity to assume that accelerating residential development, abandoning nearby job-center development, delaying traffic improvements, and eliminating a key funding source will not lead to new or increased impacts.

To justify its conclusion of no new or increased impacts, the Addendum mentions Senate Bill 743 and states that the Vehicle Miles Travel (VMT) standard will be used to evaluate traffic impacts of individual projects moving forward.<sup>13</sup> However, the City fails to apply this standard to the NSJ Amendments or to explain why—under the new standard—the elimination of the phasing plan and the TIF will not lead to new or increased environmental impacts.

The Addendum references and attaches as an exhibit the North San José Traffic Impact Fee Plan Update, dated February 18, 2022 ("Hexagon Study"). The Addendum's reliance on this study suffers from several defects. First, and most importantly, the Hexagon Study *does not analyze* the NSJ Amendments and therefore does not provide substantial evidence to support the conclusion that the NSJ Amendments will result in no new or increased impacts. Moreover, reliance on the VMT standard does not relieve the City from analyzing the potential impacts of the NSJ Amendments on potentially significant transportation impacts related to air quality, noise, safety, or any other impact associated with transportation.<sup>14</sup>

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<sup>10</sup> Pub. Res. Code § 20080(e)

<sup>11</sup> *Id.*

<sup>12</sup> Addendum, p. 2.

<sup>13</sup> *Id.*, p. 66.

<sup>14</sup> Pub. Res. Code § 21099(b)(3).

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Among other things, an adequate CEQA traffic study would need to compare existing traffic patterns to projected patterns after implementation of the proposed project. The Hexagon Study does not include such an analysis. In other words, it does not compare the transportation impacts of the NSJ Amendments to transportation impacts under the existing 2040 General Plan and Policy. Nor does it consider changed circumstances since the original Policy was adopted in 2006. Instead, the Hexagon Study “reviews 16 years of built development and traffic growth to update the required improvements to serve Phase 1 of the NSJADP that were previously identified.”<sup>15</sup> Crucially, it ignores the possible impact of abandoning the phasing plan, expediting the development of thousands of housing units, and eliminating the TIF. Indeed, as discussed below, the Hexagon Study’s analysis of mitigation measures appears to rest on the false assumption that the Policy—and the phasing plan—will remain in place.

The Addendum and the Hexagon Study also include misstatements and inaccuracies. Importantly, they both describe the Montague Expressway Widening project as “complete.”<sup>16</sup> This is false—the widening between Lick Mill Boulevard and First Street and between I-880 and Trade Zone Boulevard are both outstanding. The Hexagon Study also states that the Trimble Road and Montague Expressway Flyover are “no longer necessary” without considering the City’s obligations under the Settlement Agreement.<sup>17</sup> The County attaches a traffic analysis prepared by WSP, Inc. to support these comments.

The Addendum assumes that the 2040 General Plan Transportation Network will remain in place after the NSJ Amendments, even though the TIF will be eliminated for new projects.<sup>18</sup> This assumption is unfounded. The TIF provided the vast majority of funds for the completed traffic improvements.<sup>19</sup> The City relies on the unsupported and speculative assertion that it will be able to obtain funding from other sources.<sup>20</sup> No specific alternative funding sources or mechanisms are identified, and the Addendum does not consider any challenges to securing new financing or its likelihood of success. In other words, the Addendum does not account for the fact that it is replacing a stable and secure source of funding for traffic improvements with an unspecified and purely conjectural source of funding.

Eliminating the TIF is a major change that requires new environmental analysis and is not appropriate for consideration in an addendum. There is no substantial evidence to support the

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<sup>15</sup> Addendum, p. 66.

<sup>16</sup> *Id.*, p. 9, 65.

<sup>17</sup> Hexagon Study, p. 18.

<sup>18</sup> Addendum, p. 68.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*



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City's conclusion that alternative fundings sources will be available other than the TIF to ensure completion of the vast majority of the General Plan Transportation Network.

With respect to specific impacts to the County's infrastructure, the Addendum contains two findings as follows:

Impacts to Adjacent Jurisdictions – Same as 2040 General Plan EIR.

The 2040 General Plan EIR and SEIR found that implementation of the 2040 General Plan would result in significant increases in traffic congestion on already congested roadways in neighboring cities and on County and Caltrans facilities. Amendment of the NSJADP would not contribute to new or substantially more severe traffic congestion in adjacent jurisdictions because no additional development capacity would be added to NSJ. As indicated previously, the City would continue to implement planned traffic improvement projects in the NSJ area using alternate funding mechanisms.<sup>21</sup>

**Impact TRANS-5:** Implementation of the 2040 General Plan, including development in NSJ, would result in significant increases in traffic congestion on congested roadways in neighboring cities and on County and Caltrans facilities. (Significant Unavoidable Impact).<sup>22</sup>

These findings are not supported by substantial evidence and are legally defective. They fly in the face of the Court's ruling that there was no substantial evidence to support the City's conclusion that mitigation measures for impacts to County facilities were infeasible. They also fail to address the City's obligations under the Settlement Agreement to construct traffic improvements to mitigate impacts to the County's Expressway prior to the initiation of further development. Moreover, there is no analysis to substantiate the bald conclusion in the first finding that no net increase in total development necessarily means that there will not be an increase in traffic impacts. As stated above, the 2005 Policy relied in large part on synergies between housing and job-center development to address traffic impacts. Those synergies will be gone under the proposed actions. Rather than rely on back-of-the-envelope generalities, CEQA demands that the City analyze the impacts of removing job-center development from the Policy while proceeding with the housing development.

**C. The Addendum Violates CEQA's Requirements for Mitigation Measures**

The most current and operative version of the Policy—adopted in 2015 and amended in 2017—also includes the improvements required by the Settlement Agreement and the mandatory

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<sup>21</sup> *Id.*, p. 69.

<sup>22</sup> *Id.*, p. 82.

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phasing plan.<sup>23</sup> It explains that “[e]ach improvement must be built, under construction, or funded and within one year from beginning of construction before the next phase of development can begin.”<sup>24</sup>

Under CEQA, if an EIR identifies feasible mitigation measures that avoid or substantially lessen significant environmental impacts, these mitigation measures must be “required in” or “incorporated into” the project—unless they are within the responsibility and jurisdiction of another agency and have been (or can and should be) adopted by another agency.<sup>25</sup> Such mitigation measures must be enforced and can only be modified under certain conditions.

The improvements mandated by the Settlement Agreement *are* legally required mitigation measures. The original Policy EIR identifies the improvements and explained that they would reduce and/or avoid significant project impacts at certain intersections.<sup>26</sup> The only justification for excluding them from the project was “because the intersections are not within the jurisdiction of the City of San José.”<sup>27</sup> This justification was squarely rejected by the Court, and the Court-approved stipulation describes the Settlement Agreement as fulfilling the purpose of the Court’s judgment by requiring “the mitigation of extra-jurisdictional traffic impacts arising from the Project.”<sup>28</sup> Finally, the Settlement Agreement requires that the projects be completed “[i]n and as a part of the implementation of Phase I of the NSJ Plan,”<sup>29</sup> which is consistent with CEQA’s requirement that mitigation measures be made enforceable by, among other things, “incorporating” them into a plan or policy.<sup>30</sup>

CEQA requires public agencies to ensure that mitigation measures are “fully enforceable” and to adopt monitoring programs to ensure implementation.<sup>31</sup> “The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as

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<sup>23</sup> [Development Policy](#) (rev. 2015).

<sup>24</sup> *Id.*, p. 29.

<sup>25</sup> *See* Pub. Res. Code § 21081(a)(1).

<sup>26</sup> [Development Policy Draft Program EIR](#) (March 2005), p. 169.

<sup>27</sup> *Id.*

<sup>28</sup> Stipulation ¶ 3; *see also id.* ¶ 8 (similar language); County Agreement ¶ 2(b) (same). The California Supreme Court subsequently validated the Superior Court’s analysis in *City of Marina v. Board of Trustees of the Cal. State Univ.* (2006) 39 Cal.4th 341.

<sup>29</sup> County Agreement ¶ 2(a).

<sup>30</sup> Pub. Res. Code § 21081.6(b).

<sup>31</sup> *Id.* § 21081.6.

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a condition of development, and not merely adopted and then neglected or disregarded.”<sup>32</sup> Crucially, mitigation measures may not be avoided by treating phases of the project as separate projects as this constitutes unlawful piecemealing.<sup>33</sup>

Here, the City is attempting to do just that. As stated in the Addendum, “the distribution and density of land uses . . . will remain unchanged.”<sup>34</sup> The Addendum goes on to explain—without justification—that the improvement projects will now be implemented on a new timeline based on project-specific CEQA analyses.<sup>35</sup> In other words, the City is swapping a whole-project analysis with corresponding mitigation measures for a piecemeal approach that would provide the City an (unlawful) opportunity to avoid its mitigation obligations based on a project-by-project analysis.

The City cannot abandon its mitigation obligations without proper evidence, analysis, and consideration. “[W]here a public agency has adopted a mitigation measure for a project, it may not authorize destruction or cancellation of the mitigation . . . without reviewing the continuing need for the mitigation, stating a reason for its actions, and supporting it with substantial evidence.”<sup>36</sup> Similarly, “[i]f a mitigation measure later becomes ‘impracticable or unworkable,’ the governing body must state a legitimate reason for deleting an earlier adopted mitigation measure, and must support that statement of reason with substantial evidence.”<sup>37</sup> As explained above, the Addendum does not satisfy these standards.

As discussed above, the Addendum also fails to squarely address the scope and conclusions of the Hexagon Study. The stated purpose of the study is “to update the required improvements to serve Phase 1 of the [Policy].”<sup>38</sup> It concludes that based on recent development patterns, only “three of the four major roadway improvements continue to be required to support Phase 1 development levels.”<sup>39</sup> However, the proposed amendments would abandon the Policy’s requirements to complete the outstanding improvements during Phase 1. Instead, it proposes a

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<sup>32</sup> *Fed’n of Hillside and Canyon Ass’ns v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 (citing Pub. Res. Code § 21002.1).

<sup>33</sup> See *Lincoln Place Tenants Ass’n v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.

<sup>34</sup> Addendum, p. 68.

<sup>35</sup> *Id.*, p. 71.

<sup>36</sup> *Katzeff v. Dept. of Forestry & Fire Protec.* (2010) 181 Cal.App.4th 601, 614.

<sup>37</sup> *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1165-1166 (cleaned up); see also *Mani Brothers Real Est. Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1403.

<sup>38</sup> Hexagon Study, p. 40.

<sup>39</sup> *Id.*

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project-by-project traffic mitigation plan.<sup>40</sup> The Addendum does not properly address the impact of this fundamental change to legally binding mitigation measures.

Finally, the Addendum violates CEQA's rule against deferred formulation of mitigation measures. The CEQA Guidelines provide that the "[f]ormulation of mitigation measures shall not be deferred until some future time."<sup>41</sup> An agency may only delay the details of a mitigation measure "when it is impractical or infeasible to include those details during the project's environmental review," and only if the agency:

1. *Commits itself to the mitigation,*
2. *Adopts specific performance standards the mitigation will achieve, and*
3. *Identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.*

The Addendum does not satisfy any of these requirements. The NSJ Amendments would abandon the phasing plan without a clear substitute. The Addendum itself does not adopt performance standards, but instead references "the City's Transportation Analysis Policy (Council Policy 5-1)."<sup>42</sup> Although this policy provides a general framework for analyzing traffic impacts, it does not include specific performance standards for mitigating the impact of the NSJ Amendments.

Courts routinely approve CEQA settlement agreements that require public agencies to implement additional mitigation measures.<sup>43</sup> The NSJ Amendments and 2022 Draft Amendment threaten the effectiveness of the Settlement Agreement here, and undermine the legal viability of the proposed development. If a public agency settles a CEQA action by committing to mitigation measures for a regional development plan, it cannot abandon its obligations by pivoting to a project-by-project CEQA approach—especially if the underlying land-use regulations remain unchanged.

Again, we respectfully request that the City Council take no action at this time and continue the matter to a date uncertain so that the parties can continue to discuss a mutually agreeable resolution. Absent an amended Settlement Agreement agreed to by all parties, the

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<sup>40</sup> Addendum, p. 71 ("Individual development projects and transportation improvement projects in the NSJ policy area will be required to undergo project-level transportation analysis using VMT based on the City's Transportation Analysis Policy.").

<sup>41</sup> CEQA Guidelines § 15126.4.

<sup>42</sup> Addendum, p. 71.

<sup>43</sup> See 2 Stephen L. Kosta & Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 23.115 (rev. ed. 2022).

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proposed actions are unlawful and the County will be compelled to act accordingly to ensure Montague Expressway is not negatively impacted.

In the event that the City Council moves forward with approval of the NSJ Amendments and the 2022 Draft Amendment, the County has no choice but to pursue all of its available legal remedies to protect its rights, including enforcement of the existing settlement agreements, causes of action for, among other things, bad faith and breach of the covenant of good faith and fair dealing, as well as legal challenges to the flawed process that the City has utilized to consider the NSJ Amendments and 2022 Draft Amendment.

Thank you for your consideration.

Very truly yours,

JAMES R. WILLIAMS  
County Counsel

DocuSigned by:  
  
B179ECE83EEF431...  
CHRISTOPHER CHELEDEN  
Lead Deputy County Counsel

cc: Honorable Board of Supervisors (via email with attachments)  
Jeffrey V. Smith, JD, MD, County Executive (via email with attachments)  
Miguel Márquez, JD, MPP, Chief Operating Officer (via email with attachments)  
James R. Williams, County Counsel (via email with attachments)  
Jennifer Maguire, City Manager (via email with attachments)  
Nora Frimann, City Attorney (via email with attachments)

Attachments

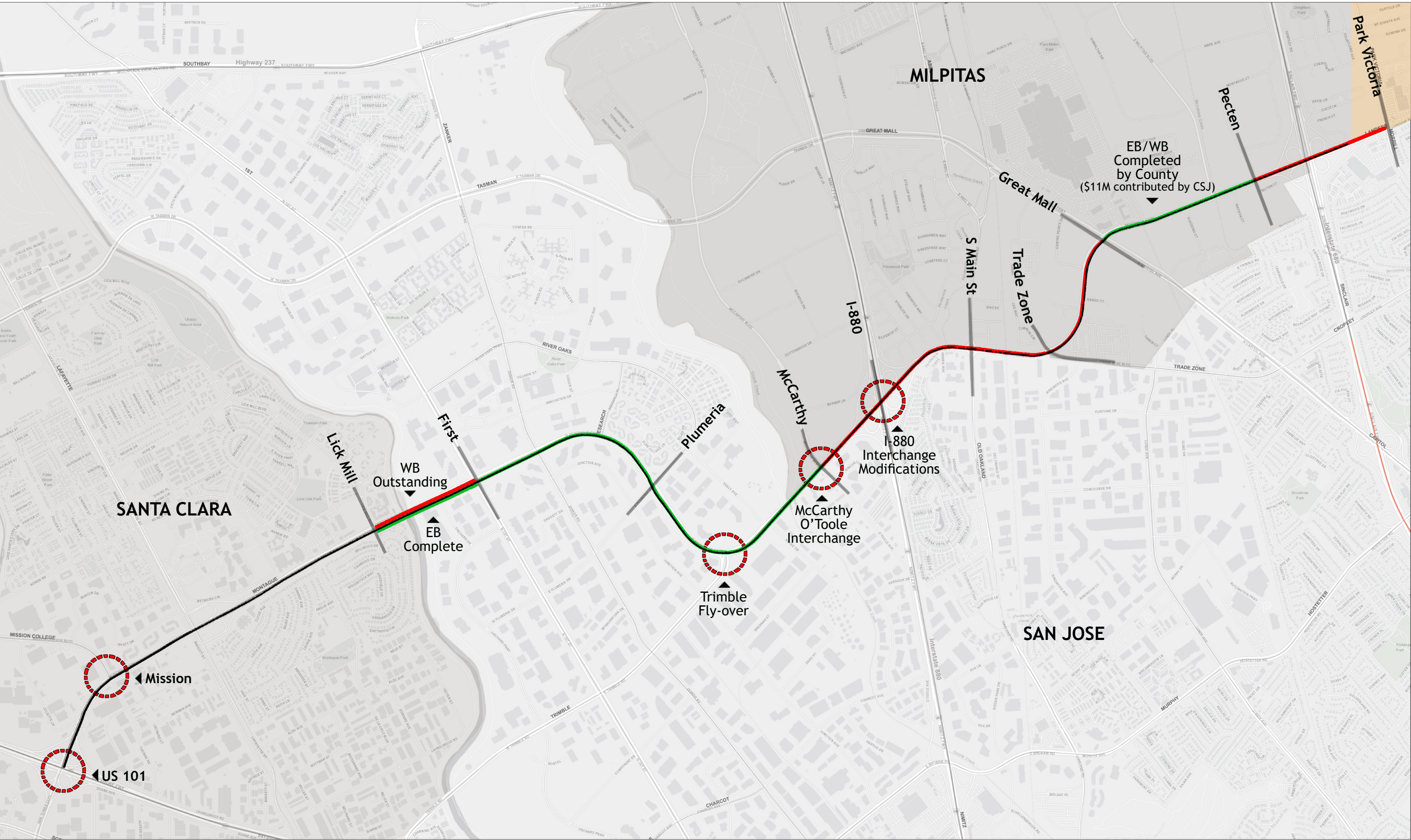
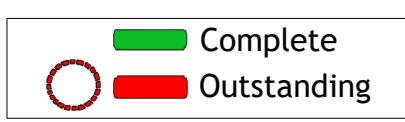
1. Completed and Outstanding Traffic Improvement Projects Required by Settlement Agreement (Table and Map)
2. WSP USA Memorandum, dated May 16, 2022

Attachment 1

*Settlement Agreements Projects – as described by the 2006 Settlement Agreement between County of Santa Clara, Santa Clara County Financing Authority, Silicon Valley Theatre Financing Corporation, City of San José, and Redevelopment Agency of City of San José and the 2006 Settlement Agreement between the County, City of San José and City of Santa Clara (Agreements contained same terms with regard to NSJ/County)*

Required Improvement	Status	Comment
<b>Section 2.B.i – City Constructed Projects</b>		
In and as part of the implementation of Phase I of the NSJ Plan, City shall complete and fund mitigations as follows:		
Widen to 8 lanes between Lick Mill to Trade Zone	Incomplete	Widening is outstanding between Lick Mill Ave to First St, and widening is outstanding from McCarthy to Trade Zone
Widen to 8 lanes all portions of the Expressway regardless of City Boundary	Incomplete	Incomplete from Trade Zone to Great Mall Complete from Great Mall to Pecten Ct. Incomplete from Pecten Ct. to Park Victoria
Including the I-880 Interchange	Incomplete	Outstanding
Trimble Flyover	Incomplete	Outstanding
Montague Expressway/McCarthy-O’Toole Interchange (as Part of NSJ Phase 3)	Incomplete	Outstanding
<b>2.B.ii – City Funded Projects</b> City shall fund up to an amount not to exceed \$11 million dollars to widen Montague east of Capitol Ave/Great Mall	Complete	City contributed \$11 million
<b>2.B.iii - Montague and 101 and Mission and 101 Interchanges</b>	Incomplete	City has not contributed \$1.5 million

# Settlement Agreement Projects



SANTA CLARA

MILPITAS

SAN JOSE

EB/WB Completed by County (\$11M contributed by CSJ)

Park Victoria

Pecten

Great Mall

Trade Zone

S Main St

I-880

McCarthy

Plumeria

Trimble Fly-over

McCarthy O'Toole Interchange

I-880 Interchange Modifications

WB Outstanding

EB Complete

Lick Mill

First

Mission

US 101



## MEMO

TO: Harry Freitas, Director of Santa Clara County Roads and Airports

FROM: [WSP USA](#)

SUBJECT: Transportation Improvement Documents

DATE: [May 16, 2022](#)

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WSP was tasked by the County of Santa Clara with providing an overview of several transportation improvement reports regarding details related to the Trimble Flyover at Montague Expressway. This Memorandum presents that overview.

## SUMMARY OF NORTH SAN JOSE TRANSPORTATION REPORTS

North San Jose Deficiency Plan by Hexagon (Jan 2006) – This original Hexagon Report (“2006 Report”) is 15 years old and does not use state of the practice traffic operations methodology, which is HCM 2000 in Traffix software, and doesn’t account for upstream/downstream effects of congestion. The “future condition” in the Hexagon Study is the base year (2000) + assumed build-out of the North San Jose Development Plan, so it doesn’t account for other growth, and no future analysis year is stated.

- The 2006 Report calls for inclusion of a Trimble Flyover as part of Phase 1 improvements and estimates a cost of \$30M

North San José Transportation Improvement Phasing Study by City of San Jose (Draft) (October 2018) (“2018 Report”) analyzes a future condition that is existing plus future development not including any growth not part of the NSJ development plan. Phase 4 improvements are likened to 2040 conditions. This 2018 Report assumes the flyover for 2040 conditions and says it should be included as part of Phase “B” improvements (Phase B = Phases 3+4 from the original 4 phases). The 2018 Report also states that, while the flyover would provide improvement at the intersection, it wouldn’t enhance for through capacity on the corridor, and recommends a new I-880 overcrossing at Charcot Ave as more cost-effective.

- The 2018 Report’s analysis methodology appears to be partial toward what it designates as “major roadway improvements”.
- The 2018 Report’s intersection analysis is isolated, for example it doesn’t account for congestion from upstream/downstream intersections.
- The 2018 Report’s roadways are studied with link-based (and screenline-based) volume-to-capacity ratio analysis which rely on link capacity—ignoring that intersections are the primary source of congestion on arterials.





As a result, the 2018 Report draws a conclusion that the Trimble flyover serves the intersection but doesn't provide benefit for the corridor as a whole, even though intersection delays control corridor travel times and the Montague/Trimble intersection was one of the most congested in the corridor. Corridor benefits should be evaluated from the cumulative effect of intersection and roadway improvements—not roadway improvements in isolation.

The NSJ Phase 1 Transportation Improvements Update by Hexagon (April 2021) ("2021 Report") looks at conditions in 2018 and compares them to what was forecast in the North San Jose Deficiency Plan by Hexagon (Jan 2006) Report for Phase 1 conditions. It points out the differences including that in 2018 a Trimble flyover wasn't necessary (in 2018). The 2021 Report concludes that Phase 1 improvements for Trimble/Montague are complete (with the additional 4<sup>th</sup> through lane on Montague).

The analysis provided in the 2018 Report relies on determining level-of-service based on screenline volume to capacity (V/C) ratios using outputs generated from the City of San Jose 2015 model. Based on Figure 3 of the 2021 Report, which shows the screenlines used in the analysis, it is difficult to determine the rationale for the screenlines. For example, if the analysis is focused on development in North San Jose, a more reasonable location for the East and North screenlines would be to locate the screenlines closer to the San Jose city limits at Milpitas (East Screenline) and Santa Clara (North Screenline), to better isolate impacts caused by North San Jose Phase 1 and subsequent phase developments. In particular, the North Screenline seems problematic towards isolating North San Jose development impacts, as it is too long, as well as located on the wrong side of US 101 to capture travel on and off from US 101 to North San Jose.

For the screenline analysis, the 2015 City of San Jose (CSJ) model is used in the 2021 Report to determine the segment volume to capacity ratio for segment level of service for peak hour and 4-hour peak period traffic levels. Results from the model reported in Tables 4 and 5 (East Screenline) show counterintuitive volumes for Brokaw Road and significant underestimation of volumes on East Tasman Drive in the PM peak conditions. Prior to use in the study, validation of the City of San Jose model is needed, to validate to actual screenline counts to demonstrate that the model volumes are reasonable; the 2021 Report does not indicate whether this validation was performed by Hexagon. In particular, it is not standard practice for models to be validated to 4-hour counts (which Hexagon appears to have done in its 2021 Report), which introduces uncertainty regarding the use of 4-hour volumes for estimating screenline level-of-service analysis.

The findings in the 2021 Report on the East Screenline improvements for Phase 1 should be revised, as there is a deficiency indicated for the AM eastbound direction in the screenline analysis reported in Table 4. This deficiency is based on the statement in the report: "If the volume-to-capacity ratio of a screenline for a four-hour commute or peak-hour periods under Year 2015 Conditions is higher than 0.9 (i.e. LOS E or F), the major roadway improvements would be needed to increase the overall capacity of the screenline." Based on the results shown on Table 4 of the 2021 Report, AM peak hour westbound screenline V/C is greater than 0.9 (0.92 on Table 4), therefore the capacity is inadequate for Phase 1 development levels according to the impact thresholds. The concluding statements in the 2021 Report for the improvements required for Phase 1 for the East Screenline should be updated to address the deficiency. Finally, this and future analysis for North San Jose development policies should reflect the latest decision by the City of San Jose to not proceed with the Charcot Road overcrossing, and how the project phasing conclusions for projects originally defined in the North San Jose Deficiency Plan (January 2006) are impacted without the overcrossing.



The NSJ Traffic Impact Fee Plan Update by Hexagon (February 2022) ("2022 Report") provides an update to The NSJ Phase 1 Transportation Improvements Update (2021 Report) to consist of Year 2021 Updates within Section 4. Discussion related to COVID's affect on transportation were also included within the 2022 Report. Several discussion points related to the I-880/Charcot interchange were also removed from various sections of the report.

The overall assessment of this document is the same as those noted within the section above.

## KEY TAKAWAYS

The analysis methods included within the above reports do not provide sufficient detail and results to determine the effectiveness of a proposed flyover at the Trimble Road/Montague Expressway intersection. The Reports did not include a future analysis (20-Year Horizon) to determine future needs at the intersection. The Reports note that future improvements within the corridor should include the proposed flyover but do not provide quantitative analysis. Trimble Flyover would provide benefits at the Trimble Road/Montague Expressway intersection. Furthermore, it would also improve flow along Montague Expressway in combination with other intersection improvements along the corridor.

# **Exhibit C**

**OFFICE OF THE COUNTY COUNSEL  
COUNTY OF SANTA CLARA**

County Government Center  
70 West Hedding Street  
East Wing, 9<sup>th</sup> Floor  
San José, California 95110-1770

(408) 299-5900  
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Kavita Narayan  
Douglas M. Press  
Gita C. Suraj

ASSISTANT COUNTY COUNSEL

June 17, 2022

**SENT VIA EMAIL TO CITY CLERK FOR DISTRIBUTION TO HON. MAYOR AND  
CITY COUNCIL**

Hon. Mayor Sam Liccardo and Councilmembers  
City of San José  
200 East Santa Clara Street  
San José, California 95113

Re: **June 21, 2022 City Council Meeting Item No. 2.8:** Comments on North San José Settlement Agreement with City of Santa Clara

Dear Mayor Liccardo and Council Members:

The County of Santa Clara (“County”) submits this letter to the City of San José (“City”) to express its concerns and preserve its objections to the above-referenced draft settlement agreement with the City of Santa Clara (“Draft Agreement”).

The Draft Agreement purports to modify the City’s obligations under a 2006 settlement agreement between the County, the City, and the City of Santa Clara (“2006 Agreement”). At its May 17, 2022 meeting, the City Council considered a similar Draft Settlement Agreement Amendment (“Draft Amendment”) and related amendments to the North San José Development Policy, the San José General Plan, Zoning Ordinance, and Municipal Code (collectively, the “NSJ Amendments”).

The County submitted a letter objecting to the Draft Amendment and the NSJ Amendments (the “May 17 Letter”). It explained that the City’s proposed actions violated the California Environmental Quality Act (CEQA) and constituted a breach and/or anticipatory breach of contract, extreme bad faith, and breach of the covenant of good faith and fair dealing by, among other things, disregarding the mitigation measures required under the 2006 Agreement.

Despite the County’s objections, the City adopted the NSJ Amendments and approved the 2022 Draft Amendment. On June 10, 2022, the City and the County executed a Tolling

Letter to Hon. Mayor and Councilmembers  
Re: Proposed North San José Settlement with City of Santa Clara  
June 17, 2022  
Page 2 of 2

Agreement to preserve their respective positions and attempt to avoid litigation. The Tolling Agreement requires the parties to mediate and use their best efforts to resolve all disputes related to the 2006 Agreement, the NSJ Amendments, and the May 17 Letter. The County is therefore deeply concerned by the City's consideration of the Draft Agreement, which would, in an identical way to the Draft Amendment, result in the City's intentional breach of the 2006 Agreement. The Draft Agreement seems to fly in the face of the City's commitment to negotiate in good faith with the County as part of the mediation.

As explained in the May 17 Letter, the 2006 Agreement cannot be modified without the County's approval. The Draft Agreement attempts to sidestep this obvious issue by styling itself as a new agreement and disclaiming any impact on the County's rights under the 2006 Agreement. These changes are immaterial. The Draft Agreement suffers from the same defect as the Draft Amendment—it abandons the City's obligations under the 2006 Agreement without the County's consent. As explained in the May 17 Letter, the City's actions also violate CEQA by modifying binding mitigation measures without proper environmental analysis.

The County therefore reiterates and incorporates by this reference all the claims and objections asserted in the May 17 Letter. The County will use its best efforts to resolve this matter in mediation, as required under the Tolling Agreement. However, if the Draft Agreement moves forward and mediation is unsuccessful, the County reserve its right to assert these claims in court, subject to the extended timeline provided by the Tolling Agreement.

Thank you for your consideration.

Very truly yours,

JAMES R. WILLIAMS  
County Counsel

DocuSigned by:  
  
DC26D98842D94EF...  
AARON FORBATH  
Deputy County Counsel

- c: Honorable Board of Supervisors (via email)
- Jeffrey V. Smith, JD, MD, County Executive (via email)
- Miguel Márquez, JD, MPP, Chief Operating Officer (via email)
- Jennifer Maguire, City Manager (via email)
- Nora Frimann, City Attorney (via email)



# **Exhibit D**





# **Exhibit E**

# Montague Overpass at O'Toole/McCarthy Concept

Bike ramps to/from the expressway would require approx. 5-10' wide ROW acquisition for each ramp. Ramps can stay at or near the existing grade.

Ramp from O'Toole/McCarthy feeds into new #1 lane

Right turn from WB Montague Expy to McCarthy Ave underneath the expressway through lanes

Montague begins rising above grade

850'

Approx. ROW

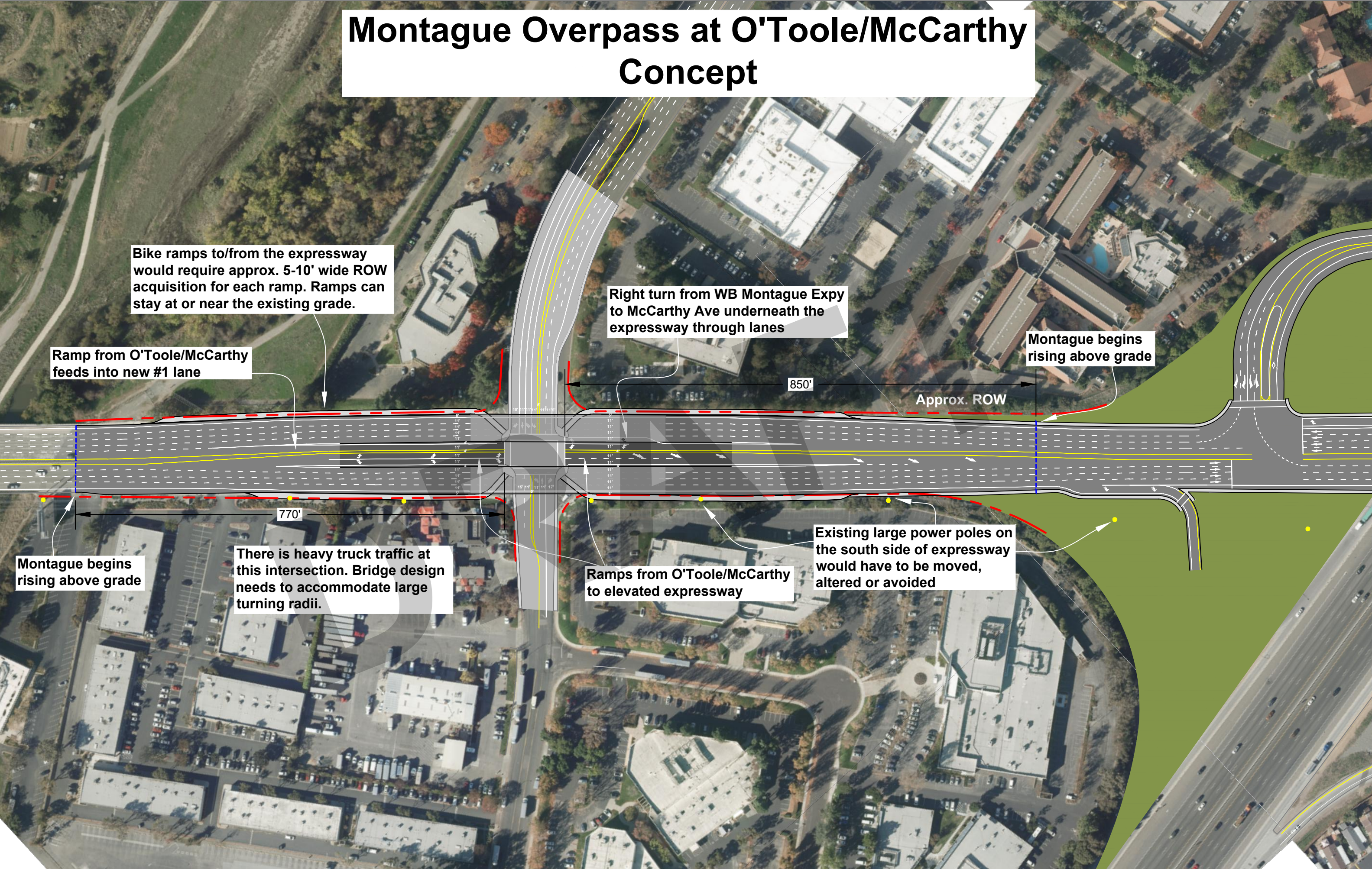
770'

Montague begins rising above grade

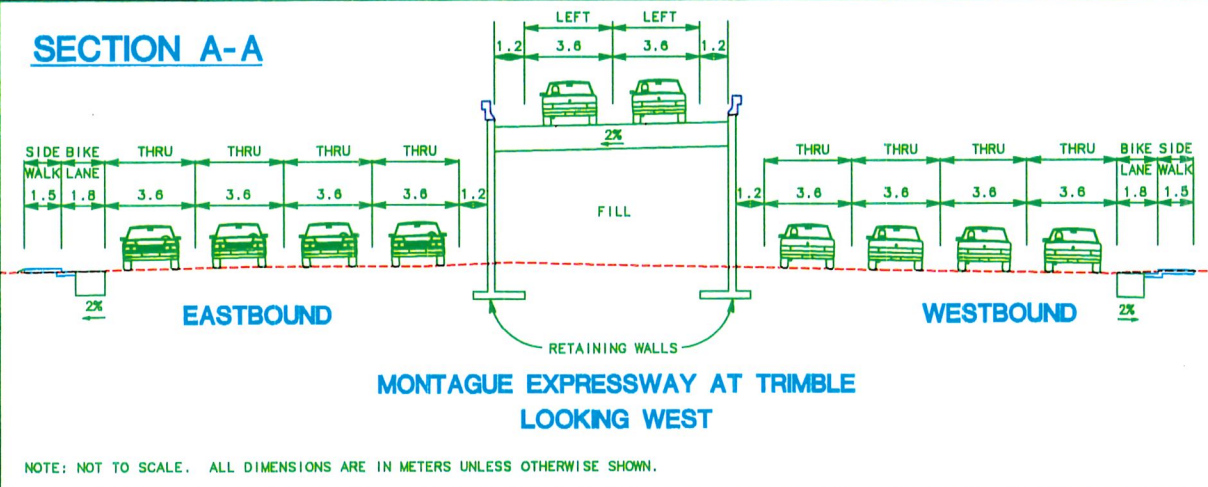
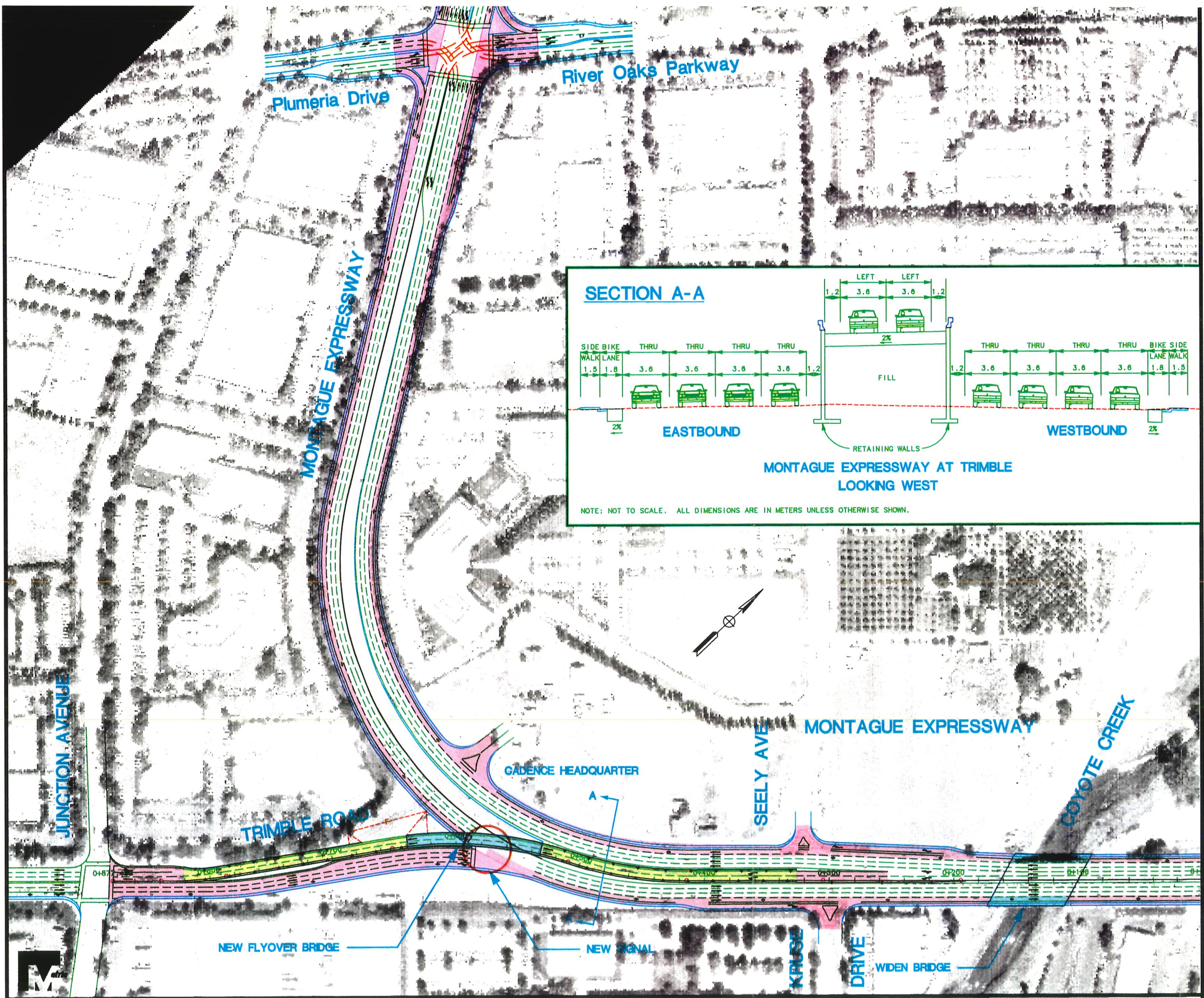
There is heavy truck traffic at this intersection. Bridge design needs to accommodate large turning radii.

Ramps from O'Toole/McCarthy to elevated expressway

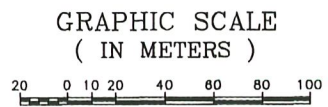
Existing large power poles on the south side of expressway would have to be moved, altered or avoided



# **Exhibit F**



**MARK THOMAS & CO. INC.**  
CONSULTING CIVIL ENGINEERS & MUNICIPAL PLANNERS



- STRUCTURE
- ELEVATED
- AT GRADE

**TRIMBLE ROAD AT MONTAGUE EXPWY**  
**OPTION B1:**  
**WB FLYOVER W/ EB SIGNAL**

# **Exhibit G**

***DRAFT AGREEMENT***

**ACKNOWLEDGMENT, RELEASE, AND SETTLEMENT AGREEMENT BETWEEN  
THE COUNTY OF SANTA CLARA AND THE CITY OF SANTA CLARA REGARDING  
THE NORTH SAN JOSÉ DEVELOPMENT POLICY**

This Acknowledgement, Release, and Settlement Agreement (“Agreement”) is made and entered into by and between the County of Santa Clara (“County”) and the City of Santa Clara (“City”), with the acknowledgement of the City of San José. The City and the County are collectively referenced herein as “Parties” and individually as a “Party.”

**RECITALS**

**WHEREAS**, on June 21, 2005, the City of San José (“San José”) adopted the North San José Development Policy (“Policy”) which included General Plan amendments, modifications to the North San José Area Development Policy, the North San José Deficiency Plan, the Floodplain Management Plan for North San José, and an infrastructure fee program, which created the framework for new residential, industrial, retail, and office development in North San José;

**WHEREAS**, the Policy 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 Policy, along with construction of transportation improvements identified in the Policy;

**WHEREAS**, in July 2005, the County, the City, and related parties filed lawsuits challenging the Policy and alleging violations of the California Environmental Quality Act (CEQA);

**WHEREAS**, in March 2006, the Santa Clara County Superior Court rendered judgment in favor of the County and the City on the basis that San José’s determination that there were no feasible mitigation measures for impacts to transportation facilities under the jurisdiction or control of non-City entities was not supported by substantial evidence;

**WHEREAS**, on November 16, 2006, the County, the City, San José, and related parties executed two settlement agreements to resolve the CEQA litigation (collectively, the “2006 Settlement Agreement”), attached hereto as **Exhibit A**;

**WHEREAS**, the 2006 Settlement Agreement required San José to fund and construct certain traffic improvements and the County to fund and complete certain studies and designs for traffic improvements;

**WHEREAS**, due to changes to State laws, priorities, and circumstances, on May 17, 2022, the San José City Council adopted amendments to the Policy, as well as related amendments to the City’s General Plan, Zoning Ordinance, and Municipal Code (collectively, the “NSJ Amendments”) and a corresponding Addendum to the Envision San José 2040 General Plan

Environmental Impact Report and Envision San José 2040 Supplemental Environmental Impact Report (“Addendum”);

**WHEREAS**, among other changes, the NSJ Amendments eliminate several roadway improvements described in the 2006 Settlement Agreement, modify the Policy’s phased mitigation plan, and allow San José to conduct a project-by-project analysis of transportation impacts for future development projects;

**WHEREAS**, prior to the San José City Council’s consideration of the NSJ Amendments and the Addendum, the County submitted a public letter asserting its rights under the 2006 Settlement Agreement and raising several CEQA issues (“County Letter”), attached hereto as **Exhibit B**;

**WHEREAS**, on June 28, 2022, the City and San José executed a settlement agreement (“2022 Settlement Agreement”);

**WHEREAS**, in the 2022 Settlement Agreement, the City releases claims against San José related to the NSJ Amendments in exchange for various roadway improvements and other consideration outside the scope of the 2006 Settlement Agreement;

**WHEREAS**, prior to the City’s approval of the 2022 Settlement Agreement, the County submitted a letter to the City arguing that the 2022 Settlement Agreement improperly modified the 2006 Settlement Agreement without the County’s approval (“Second County Letter” and, collectively with County Letter, “County Comment Letters”), attached hereto as **Exhibit C**;

**WHEREAS**, on December 15, 2022, the County and San José executed a settlement agreement with San José to resolve all claims related to the NSJ Amendments and all issues raised in the County Comment Letters (“NSJ Settlement Agreement”), attached hereto as **Exhibit D**;

**WHEREAS**, the NSJ Settlement Agreement does not take effect unless and until the County and the City execute this Agreement; and,

**WHEREAS**, the Parties wish to completely and fully settle all claims and issues raised in the County Comment Letters, except as otherwise provided herein.

**NOW, THEREFORE**, for and in consideration of the foregoing recitals and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree to the foregoing terms as follows:

### **TERMS OF SETTLEMENT**

1. **Termination of 2006 Settlement Agreement**. The City and County hereby agree that, in light of this Agreement, the 2022 Settlement Agreement, and the NSJ Settlement Agreement, the 2006 Settlement Agreement is terminated upon full execution of this

Agreement and that the 2006 Settlement Agreement shall no longer have any force or effect.

2. Release. Except for the rights and duties set forth in this Agreement and except those provisions that survive termination, cancellation, or expiration of this Agreement, the Parties, individually and on behalf of each of their officials, employees, heirs, estates, executors, administrators, assigns, agents, representatives, insurers, and attorneys, hereby forever release and fully discharge one another and each of their officials, employees, heirs, estates, executors, administrators, assigns, agents, representatives, insurers, and attorneys from (1) any and all claims, disputes, or causes of action relating to the NSJ Amendments, (2) Addendum, (3) 2006 Settlement Agreement, (4) any claims or allegations asserted in the County Comment Letters and corresponding public comments to the City, and (5) the execution of the NSJ Settlement Agreement.

3. Waiver of Civil Code Section 1542. The Parties each acknowledge that they are familiar with California Civil Code section 1542. This Agreement is intended to release the claims and causes of action described herein, and the Parties hereby expressly waive the provisions of California Civil Code section 1542 only with respect to the claims and causes of action described in this Agreement. California Civil Code section 1542 provides:

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 THE RELEASED PARTY.

4. Enforcement and Remedies. In any action at law or suit in equity to enforce this Agreement or the rights of the Parties, the prevailing Party shall be entitled to reasonable attorneys' fees and all other reasonable costs and expenses incurred in such action or suit.

5. Effective Upon Execution. This Agreement shall become effective upon execution by both parties ("Effective Date").

6. General Provisions

a. Integration. The terms of this Agreement, including all exhibits, are contractual, and not merely recital, and constitute a fully binding and complete agreement between the Parties regarding its subject matter. This Agreement supersedes any and all prior or contemporaneous agreements, representations, and understandings of or between the Parties, and the Parties each warrant that they are not relying on any such prior representations.

b. Headings. The headings in this Agreement are included solely for convenience of reference and shall not affect the interpretation of any provision in this Agreement or any of the rights and obligations of the Parties.



c. Ambiguities. Each Party and its attorney cooperated in the drafting and preparation of this Agreement. Hence, in any construction to be made of this Agreement, the same shall not be construed against any Party.

d. Amendments. The terms of this Agreement may not be altered, amended, modified, or otherwise changed in any respect except by a writing duly executed by City and County.

e. Governing Law. This Agreement shall be deemed to have been entered into in Santa Clara County, California, and all questions of validity, interpretation, or performance of any of its terms or of any rights or obligations of the parties to this Agreement shall be governed by California law.

f. Additional Acts. The Parties agree to do such acts and to execute such documents as are necessary to carry out the terms and purposes of this Agreement.

g. Successors and Assigns. This Agreement shall be binding upon, and inure to the benefit of, the Parties' successors, assigns, agents, and representatives.

h. Authority to Execute Agreement. By signing below, each signatory warrants and represents that they executed this Agreement in their authorized capacity and that, by their signature on this Agreement, they or the entity upon behalf of which they acted, executed this Agreement.

i. Attorneys' Fees and Costs. Except as specified in Section 4, the Parties agree that each Party hereto shall bear its own attorneys' fees and costs incurred in connection with the events that are subject to this Agreement, and each Party waives any claim for attorneys' fees or costs against any other Party.

j. Severability. If any portion or provision of this Agreement is found to be illegal, invalid, unenforceable, nonbinding, or otherwise without legal force or effect, the remaining portion(s) will remain in force and be fully binding.

k. Counterparts. This Agreement may be executed in counterparts with the same force and effectiveness as though executed in a single document.

l. Contract Execution. Unless otherwise prohibited by law or County policy, the Parties agree that an electronic copy of a signed agreement, or an electronically signed agreement, has the same force and legal effect as an agreement executed with an original ink signature. The term "electronic copy of a signed agreement" refers to a transmission by facsimile, electronic mail, or other electronic means of a copy of an original signed agreement in a portable document format. The term "electronically signed agreement" means a contract that is executed by applying an electronic signature using technology approved by the County.

*[signatures on following page]*

**IN WITNESS WHEREOF**, and intending to be legally bound, the Parties have executed this Agreement as of the Effective Date.

**COUNTY OF SANTA CLARA**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
JAMES R. WILLIAMS  
County Counsel

APPROVED AS TO FORM AND LEGALITY

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Aaron Forbath  
Deputy County Counsel

**CITY OF SANTA CLARA**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
[]  
[]

APPROVED AS TO FORM

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
[]  
[]

**ACKNOWLEDGED BY CITY OF SAN JOSÉ:**

Although not a Party to this Agreement, the City of San José acknowledges this Agreement; that the 2006 Settlement Agreement is terminated pursuant to the combination of this Agreement, the 2022 Settlement Agreement, and the NSJ Settlement Agreement; and that the City of San José is a party to the 2022 Settlement Agreement and the NSJ Settlement Agreement.

**CITY OF SAN JOSÉ**

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
JENNIFER A. MAGUIRE  
City Manager

APPROVED AS TO FORM

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
NORA FRIMANN  
City Attorney