

## HABITAT PLAN MITIGATION FEE PAYMENT AGREEMENT

This Habitat Plan Mitigation Fee Payment Agreement ("Agreement") is entered into by and between the City of San José, a municipal corporation of the State of California ("City"), and the Santa Clara Valley Habitat Agency, a Santa Clara County joint exercise of powers agency ("Agency"), on this \_\_\_\_\_ of \_\_\_\_\_, 2020 ("Effective Date").

### RECITALS

1. In August 2012, City became a party to that certain Santa Clara Valley Habitat Conservation Plan/Natural Communities Conservation Plan, and the associated Implementation Agreement ("Habitat Plan").
2. Among other things, and relevant to this Agreement, the Habitat Plan allows project proponents to pay fees to fund mitigation efforts in order to offset significant environmental impacts affecting "Covered Species" (as defined in the Habitat Plan) that occur as a result of development activity.
3. The City owns and operates the Norman Y. Mineta San José International Airport ("Airport"), upon which are certain Covered Species.
4. The Airport plans to conduct certain development activities, which are set forth in the amended "Airport Master Plan".
5. In April 2020, City certified and adopted a Final Environmental Impact Report (File No. PP18-103), which was required in order to amend the Airport Master Plan ("Airport EIR").
6. The Airport EIR found that the environment of certain Covered Species will be significantly affected by some of the development activities contemplated by the amended Airport Master Plan, and therefore mitigation measures are required.
7. The Airport EIR's Mitigation Monitoring and Reporting Program ("MMRP") provides that some mitigation measures may be satisfied by paying the Agency certain fees in-lieu of providing on-site and/or off-site mitigation.
8. Consistent with the MMRP, City will pay Agency fees in-lieu of performing mitigation measures connected with development activity contemplated by the amended Airport Master Plan that will affect the habitat of certain Covered Species at the Airport.
9. Terms used herein but not defined shall have those meanings ascribed to them in the Final EIR.

**NOW THEREFORE**, the parties hereto agree as follows:

1. **TERM.** The term of this Agreement shall be from the Effective Date through the date of City's final payment as provided in **Exhibit B and Exhibit C**.

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2. **SCOPE OF MITIGATION FEES.** The Final EIR provides that the development activities contemplated under the amended Master Plan would have a substantial adverse effect on the following Covered Species, as further described in **Exhibit A**, entitled “Final EIR Habitat Plan Mitigation Fee Scope”:
  - 2.1 **Burrowing owl.** Mitigation Measure BIO-4.1 provides that City shall pay compensatory mitigation for permanent impacts on the burrowing owl nesting habitat.
  - 2.2 **Bay checkerspot butterfly.** Mitigation Measure BIO-5.1 provides that City shall pay nitrogen deposition fees for permanent impacts on the habitat utilized by the Bay checkerspot butterfly.
3. **PAYMENT SCHEDULE.** The MMRP provides that the fees contemplated by the Mitigation Measures described in **Section 2** shall be calculated and paid as follows:
  - 3.1 **Burrowing owl.** Mitigation Measure BIO-4.1 shall be paid at Agency rates in the amounts set forth in and in accordance with the schedule described in **Exhibit B**, entitled “Burrowing Owl Fee Payments and Schedule”.
  - 3.2 **Bay checkerspot butterfly.** Mitigation Measure BIO-5.1 shall be paid at Agency rates in the amounts set forth in and in accordance with the schedule described in **Exhibit C**, entitled “Nitrogen Deposition Fee Payments and Schedule”.
  - 3.3 **Total Not-to-Exceed Amount.** As discussed in **Exhibit B** and **Exhibit C**, the Burrowing Owl Fee and the Nitrogen Deposition Fee shall be calculated at Agency rates in effect on the due date of the payment. The total not-to-exceed amount for this Agreement shall be \$2,750,000.00. At any time during the term of this Agreement, in the event that the total amount of the Burrowing Owl Fee and the Nitrogen Deposition Fee is projected to exceed this total not-to-exceed amount, the parties agree to negotiate an amendment to this Agreement to increase the not-to-exceed amount as necessary.
4. **NOTICES.** All notices, requests, consents, and approvals served or given under this Agreement shall be in writing and shall be addressed as follows:

Agency: Santa Clara Valley Habitat Agency  
Attn: Executive Officer  
535 Alkire Avenue  
Morgan Hill, CA 95037

City: Director of Aviation  
Norman Y. Mineta San José International Airport  
1701 Airport Blvd., Suite B-1130  
San José, California 95110

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## 5. MISCELLANEOUS.

**Amendments.** This Agreement may be modified only by a written amendment executed by the parties.

**Assignability.** This Agreement is personal and may not be assigned.

**Counterparts.** This Agreement may be executed in any number of counterparts and by each party in separate counterparts, each of which when so executed and delivered shall be deemed to be an original and all of which taken together shall constitute one and the same instrument.

**Entire Agreement.** This Agreement is the final, complete and exclusive understanding of the parties as to the matters contained herein. It supersedes all prior communications and understandings regarding such matters.

**Use of electronic signatures:** Unless otherwise prohibited by law or CITY policy, the parties agree that an electronic copy of a signed contract, or an electronically signed contract, has the same force and legal effect as a contract executed with an original ink signature. The term "electronic copy of a signed contract" refers to a writing as set forth in Evidence Code Section 1550. The term "electronically signed contract" means a contract that is executed by applying an electronic signature using technology approved by the CITY.

**IN WITNESS WHEREOF**, the City and Agency have caused this Agreement to be executed by their respective duly authorized representatives as follows:

APPROVED AS TO FORM:

"CITY"

By: \_\_\_\_\_  
Kevin Fisher  
Chief Deputy City Attorney

By: \_\_\_\_\_  
Toni Taber  
City Clerk

Date: \_\_\_\_\_

APPROVED AS TO FORM:

"AGENCY"

By: \_\_\_\_\_  
Valerie J. Armento  
General Counsel

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

Date: \_\_\_\_\_

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**EXHIBIT A**  
**FINAL EIR HABITAT PLAN MITIGATION FEE SCOPE**

**Airport Master Plan EIR Mitigation Measure BIO-4.1 (Final EIR, Page 127):**

Provide Compensatory Mitigation for Permanent Impacts on Burrowing Owl Nesting Habitat. Compensatory mitigation shall be provided for permanent loss of 32.4 acres of occupied burrowing owl nesting habitat, as well as for the degradation of the remaining 83.4 acres of nesting and roosting habitat at the airfield and the expected increase in annual mortality of burrowing owls due to collisions with aircraft following Amendment implementation. Compensatory mitigation shall be provided via payment of VHP burrowing owl fees for all 32.4 acres of direct, permanent impacts on occupied habitat.

Because the Airport is located within the Habitat Plan area, even though airport improvement projects are not considered “covered activities” under the Habitat Plan, the payment of Habitat Plan burrowing owl fees would be appropriate in lieu of providing on-site and/or off-site mitigation. This mitigation approach would be consistent with the Voluntary Fee Payments Policy of the Santa Clara Valley Habitat Agency, which states that such voluntary burrowing owl fees paid as mitigation “will be applied toward burrowing owl management agreements, burrowing owl habitat management and monitoring, as well as burrowing owl habitat restoration and land acquisition.” Payment of the full, per-acre Habitat Plan burrowing owl fee for all 32.4 acres of direct permanent impacts would satisfy MM BIO-4.1.

Compensatory mitigation for impacts to burrowing owls (i.e., payment of VHP burrowing owl fees) may be phased in accordance with phasing of impacts, so that the amount of mitigation provided for a phased Project activity equals or exceeds that required based on the acreage of burrowing owl habitat impacted by that activity; the mitigation for impacts of a given phased Project activity shall be provided prior to those impacts occurring.

**Airport Master Plan EIR Mitigation Measure BIO-5.1 (Final EIR, Page 131):**

Although the Airport is owned and operated by the City of San Jose, a Local Partner in the Habitat Plan, and the Airport is located within the boundaries of Habitat Plan area, improvement projects at the Airport are excluded as covered activities under the Habitat Plan. Irrespective of this fact, the City as CEQA Lead Agency acknowledges the nitrogen deposition impacts of the Project and is committing to pay the nitrogen deposition fee that applies to covered activities, based on new daily vehicle trips. [Note: Per Table 6 in the traffic analysis prepared as part of this EIR, the Project will generate 29,332 new daily vehicle trips.] According to the Santa Clara Valley Habitat Agency, the fees collected from covered activities do not fully cover the costs related to mitigating nitrogen deposition impacts due to new development. Therefore, the Habitat Agency accepts fees from non-covered activities and states that “nitrogen deposition voluntary fee payments will be applied toward land acquisition, management, and monitoring for Bay checkerspot butterfly and serpentine covered plant species.

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**EXHIBIT B  
BURROWING OWL FEE PAYMENTS AND SCHEDULE**

- A. Payment for 19.0 acres within six (6) months of award of the first construction contract for implementation of one of the following three interrelated projects (whichever comes first):
- Master Plan Project A-26: Convert former Runway 11/29 to a new parallel Taxiway V and extend south to Taxiway C and north to a new cross Taxiway V7.
  - Master Plan Project A-27: Construct new cross Taxiway V7 from north end of new Taxiway V to Taxiway W.
  - Master Plan Project A-38: Construct up to seven new taxiway connectors (V1-V7) between the expanded west side apron (Project G-9) and new Taxiway V (Project A-26).
- B. Payment for 2.0 acres within six (6) months of award of the first construction contract for implementation of Master Plan Project A-17: Extend/widen parallel Taxiway W south from Taxiway B to Runway 12R-30L.
- C. Payment for 5.5 acres within six (6) months of award of the first construction contract for implementation of Master Plan Project A-37: Close existing Taxiway V and replace with a parallel apron-edge taxilane.
- D. Payment for 4.9 acres within six (6) months of award of the first construction contract (or lease of land) for implementation of Master Plan Project G-9: Expand west side general aviation apron to edge of new parallel taxilane (Project A-37).
- E. Payment for 1.0 acres within six (6) months of award of the first construction contract for implementation of Master Plan Project A-23: Widen cross Taxiway J at Runway 12R/30L intersection.

Each payment will be at the Habitat Agency fee per acre in effect on the date of payment.

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**EXHIBIT C**  
**NITROGEN DEPOSITION FEE PAYMENTS AND SCHEDULE**

One payment for 29,332 new daily vehicle trips within three (3) months of award of the first construction contract (or lease of land) for implementation of one of the following three terminal area projects (whichever comes first):

- Master Plan Project T-4: Construct new public short-term parking garage (up to 5,000 spaces) and associated roadway improvements south of existing Rental Car Garage and opposite new Terminal B South Concourse (Project T-13).
- Master Plan Project T-13: Expand Terminal B (South Concourse) to south, including up to an additional 14 air carrier gates and 750,000 sq.ft. of building space, and associated passenger processing facilities.
- Master Plan Project T-16: Construct new multi-story business hotel south of/adjacent to new public short-term parking garage (Project T-4), up to 300,000 sq.ft. in size including up to 330 guest rooms and 300 parking spaces.

Payment will be at the Habitat Agency fee per vehicle trip in effect on the date of payment.

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