

**FUNDING AGREEMENT  
BETWEEN THE CITY OF SAN JOSE AND  
THE SANTA CLARA VALLEY TRANSPORTATION AUTHORITY  
FOR THE DESIGN AND CONSTRUCTION OF THE U.S. HIGHWAY 101  
IMPROVEMENTS BETWEEN STORY ROAD AND YERBA BUENA ROAD**

This Agreement ("Agreement") dated \_\_\_\_\_, 2011, for purposes of reference, is made and entered into by and between the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and the SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a public agency organized as a special district under California law ("VTA"). Hereinafter, City and VTA may be individually referred to as "Party" or collectively referred to as "Parties".

**I. RECITALS**

**A. Whereas**, on January 8, 2009, the VTA Board of Directors adopted the Valley Transportation Plan ("VTP") 2035, which provides a planning and policy framework for developing transportation projects in Santa Clara County over the next 25 years. Included in VTP 2035 are operational and safety improvements of the U.S. Highway 101 Corridor, from Story Road to the Yerba Buena Road Interchange, in San José, California ("Project").

**B. Whereas**, Caltrans is the lead agency who will operate and maintain the improved highway upon completion of the Project; City will operate and maintain the local streets upon completion of the Project; and VTA is the funding sponsor who is coordinating the Project between Caltrans and the City.

**C. Whereas**, the Project is being implemented in two phases. Phase I includes construction of an additional lane on southbound U.S. Highway 101 from south of Story Road to Capitol Expressway, replacement of the Tully Road overcrossing at U.S. Highway 101, and reconfiguration of the U.S. Highway 101/Tully Road interchange ("Phase I").

**D. Whereas**, Phase II includes modification to the U.S. Highway 101/Capitol Expressway interchange, construction of an auxiliary lane and extension of the fifth southbound lane from Capitol Expressway to Yerba Buena Road, construction of a separate southbound U.S. Highway 101 off-ramp onto Yerba Buena Road, and addition of a northbound slip ramp and modification of the northbound collector-distributor road between Capitol Expressway and Yerba Buena Road ("Phase II").

**E. Whereas**, on April 14, 2009, CITY and VTA entered into a funding agreement whereby the City contributed Four Million Dollars (\$4,000,000) for the design of Phase I and, subject to future City Council appropriation, would contribute an additional amount of Six Million Dollars (\$6,000,000) toward the construction of Phase I, for a total City contribution amount of Ten Million Dollars (\$10,000,000) ("Phase I Funding Agreement").

**F. Whereas**, following the execution of the Phase I Funding Agreement, the estimated cost to complete the design and construction of Phase I was reduced from Sixty-Two Million Nine Hundred Seventy-Five Thousand Dollars (\$62,975,000) to Forty-Five Million One Hundred Twenty-Eight Thousand Seven Hundred Fifty Dollars (\$45,128,750) due to a favorable low bid for the construction of Phase I.

**G. Whereas**, as a result of the favorable low bid for the construction of Phase I, the City's planned contribution to the construction of Phase I was reduced from Six Million Dollars (\$6,000,000) to Two Million Six Hundred Twenty-Six Thousand One Hundred Eighty-Two Dollars (\$2,626,182) based on a formula that pro-rated savings to all funding sources.

**H. Whereas**, City has provided VTA with Four Million Dollars (\$4,000,000) under the previous Phase I Funding Agreement, VTA has completed design of Phase I, and construction of Phase I has commenced and is anticipated to be completed by May 2012.

**I. Whereas**, the current available project budget to complete the design and construction of Phase II is Twenty Eight Million Three Hundred Fifty-Six Thousand Dollars (\$28,356,000) and in June 2011, the State of California awarded Twenty-Four Million Dollars (\$24,000,000) of State Proposition 1B funds to VTA for construction of Phase II.

**J. Whereas**, to further the Parties' interest in completing the Project and in recognition of the reduced construction cost to Phase I, City now desires to contribute Two Million Six Hundred Twenty-Six Thousand One Hundred Eighty-Two Dollars (\$2,626,182) toward the construction of Phase I and One Million Five Hundred Seventy-Three Thousand Eight Hundred and Eighteen Dollars (\$1,573,818) toward the design of Phase II for a total contribution amount of Four Million Two Hundred Thousand Dollars (\$4,200,000) under this Agreement.

**K. Whereas**, inclusive of the City's contribution toward the design phase of Phase I, the City's total planned contribution to the Project will be reduced from the not-to-exceed amount of Ten Million Dollars (\$10,000,000) as set forth in the previous Phase I Funding Agreement to Eight Million Two Hundred Thousand Dollars (\$8,200,000) as described herein, comprised of Four Million Dollars (\$4,000,000) toward the design of Phase I, Two Million Six Hundred Twenty-Six Thousand One Hundred Eighty-Two Dollars (\$2,626,182) toward the construction of Phase I, and One Million Five Hundred Seventy-Three Thousand Eight Hundred Eighteen Dollars (\$1,573,818) toward the design of Phase II.

**L. Whereas**, the Parties wish to set forth in this Agreement their respective obligations in connection with the Project and City's Contribution to assist in the funding of the construction of Phase I and the design of Phase II of the Project.

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

## II. SCOPE OF AGREEMENT

1. **Scope of Project.** The purpose of this Agreement is to provide City funding for the construction of Phase I and design of Phase II of the Project. The scope of the construction of Phase I under this Agreement includes construction of one additional lane in the southbound direction from south of Story Road interchange to north of the Capitol Expressway interchange, modification of the U.S. 101/Tully Road interchange to a partial clover leaf, and rebuilding the existing Tully Road overcrossing.

The scope of the design of Phase II under this Agreement consists of project development that includes the completion of the plans, specifications and estimates (PS&E) for modification of the U.S. Highway 101/Capitol Expressway interchange, modification of the northbound collector-distributor system between Capitol Expressway and Yerba Buena Road, addition of an auxiliary lane between Capitol Expressway and Yerba Buena Road, addition of a slip ramp and modification of the southbound off-ramp at Yerba Buena Road ("Design for Phase II").

The Project location is depicted in the attached **Exhibit A.**

2. **City's Role in Project.** During the term of the Project, City shall provide City staff oversight and participation to implement the Project, and if necessary, coordination with all City departments. City shall also provide timely reviews, comments, and approvals of submittals by VTA to City. City costs to administer and participate in the construction phase of Phase I and the design phase of Phase II as described in this Agreement will not be reimbursed by VTA.

3. **City's Financial Contribution and Deposit for Project.** Under the terms and conditions of this Agreement and notwithstanding the provisions of the Phase I Funding Agreement, City shall contribute to the Project an additional total sum of **Four Million and Two Hundred Thousand Dollars (\$4,200,000)** (City's Contribution) as follows:

- a. Upon the execution of this Agreement and receipt of an invoice from VTA, City shall deposit **Two Million Six Hundred Twenty-Six Thousand One Hundred Eighty-Two Dollars (\$2,626,182.00)** ("City's Phase I Contribution") into VTA's designated interest-bearing account. The Parties agree and acknowledge that City's Phase I Contribution will be solely used to partially fund construction capital costs for Phase I construction as described herein. VTA shall use City's PHASE I Contribution, including interest earned thereon, for the sole purpose of completing the construction of Phase I of the Project, as set forth in this Agreement.
- b. Following receipt of an invoice from VTA, dated no earlier than January 1, 2012, City shall deposit an additional **One Million Five Hundred Seventy-Three Thousand Eight Hundred Eighteen Dollars (\$1,573,818.00)** ("City's Phase II Contribution") into VTA's designated

interest-bearing account for the Design of Phase II. The Parties agree and acknowledge that City's Phase II Contribution will be used solely to partially fund the design of Phase II as set forth herein. VTA shall use City's Phase II Contribution, including interest earned thereon, for the sole purpose of completing the Design for Phase II, as set forth in this Agreement.

**4. VTA's Role in Project.**

- a. Tasks. VTA shall perform and be responsible for the following tasks associated with and necessary for successful completion of the construction of Phase I, including:
- i. Manage Design Support During Construction; and
  - ii. Construction oversight, including schedule review, public outreach and Phase I field support as needed.

For the Design of Phase II, VTA shall perform and be responsible for the following tasks associated with and necessary for successful completion of the Design for Phase II of the Project, including:

- i. Serve as Project Manager for the design of the Project;
- ii. Coordinate Caltrans review and approval of the Design for Phase II of the Project;
- iii. Coordinate any other required review and approval of the Project;
- iv. Complete activities necessary to deliver the PS&E for the Project;
- v. Complete required preconstruction utility relocations for the Project;
- vi. Obtain Caltrans Right of Way Certification for the Project;
- vii. Prepare construction bid documents for the Project.

Consultants. VTA may retain consultants to perform any of the functions listed in Section 4(a).

- b. Expenditure Updates. VTA shall provide City with the final expenditure report provided by Caltrans on construction of Phase I, and with regular (at least once every four (4) months) cost reports and progress updates showing expenditures on the Design for Phase II. In the event that the planned expenditures, as shown in **EXHIBIT C**, of the Project are projected to exceed budgeted amounts, VTA shall notify and meet with City to determine the appropriate course of action. The Parties shall then have the following options:
- i. Revise the Project scope in accordance with the available funds, which revision can be accomplished only by written amendment mutually agreed upon by the Parties and approved by the City Council;

- ii. Revise the financial responsibilities of each Party, which revision can be accomplished only by written amendment mutually agreed upon by the Parties and approved by the City Council; or
  - iii. Terminate this Agreement, which can be accomplished by either Party giving written notice to the other party of such termination consistent with Section 7 below.
- d. Deliverables. VTA shall complete or cause to be completed those items listed in **EXHIBIT B**, attached hereto and incorporated herein, no later than the time designated in **EXHIBIT B**.
- e. Community Outreach. VTA shall support City efforts in community outreach as the Project develops and/or as needed, as requested by City and not to exceed two (2) times annually during the term of this Agreement. VTA's support efforts shall include providing VTA staff and/or its consultants to answer questions about the Project at public outreach meetings that the City may hold regarding the Project and providing data or visuals necessary for such meetings. City shall provide sufficient notice of least thirty (30) days to VTA so that VTA may prepare for the public outreach meeting.
- f. Final Accounting. VTA shall submit a final report of expenditures for the Project and of City's Contribution to the Project, to City within one hundred twenty (120) calendar days after completion of all work associated with the Project.

5. **Use of CITY's Contribution**. VTA shall draw down on City's Contribution only for allowable costs and expenses related to the Project as described in this Section 5, and only as they are incurred for the Phase II of the Project. VTA shall include supporting documentation for all allowable expenses for Phase II with regular (at least once every four (4) months) cost reports and progress updates sent to City. In the event City determines any City's Contribution was used in any manner inconsistent with this Agreement, VTA shall reimburse City within thirty (30) days of receiving such notice.

- a. City's Phase I Contribution. During the term of this Agreement, the following costs and expenses are allowable and shall be documented on the final report of expenditures provided by Caltrans for Phase I:
  - i. Payment to Caltrans or its contractor, with no mark up, for the construction of Phase I.
- b. City's Phase II Contribution. During the term of this Agreement, the following costs and expenses are allowable and shall be itemized on all VTA quarterly cost reports to City for Phase II:

- i. VTA's actual cost of employee salaries, benefits, and overhead. VTA labor shall be computed based on VTA's prevailing fixed labor prices, which are composed of direct labor costs and overhead, for the appropriate job categories.
- ii. Actual consultant costs with no markup.
- iii. Project specific mileage, at the current IRS rate.
- iv. Actual costs from contractors and utility agencies with no markup.
- v. Actual costs for postage, printing, shipping/mailing and reproduction of plans and documents, with no markup.

Expenses not listed above are not allowable and shall not be reimbursed unless previously approved in writing by the City's Director of Transportation or designee. City's Director of Transportation or designee shall have the authority to approve, in writing, additional expenses not specified above.

VTA shall draw down against City's Contribution equally with VTA funds for Phase II design of the Project until the City's maximum Phase II Contribution of One Million Five Hundred Seventy-Three Thousand Eight Hundred Eighteen Dollars (\$1,573,818) has been exhausted.

**6. Term of Agreement.** This Agreement shall become effective upon full execution of the Agreement and shall remain in effect through December 31, 2015.

**7. Written Termination.** Either Party may terminate this Agreement at any time for any reason, upon giving thirty (30) calendar days written notice to the other Party. The City's Director of Transportation is authorized to terminate this Agreement on behalf of the City. The VTA's Chief Congestion Management Agency Officer is authorized to terminate this Agreement on behalf of the VTA.

**8. Refund of CITY's Contribution.** Any balance of City funds, including interest, remaining after completion of Phase I or Phase II of the Project or, if the Project does not proceed for any reason, or upon early termination of the Project, less any amounts necessary to pay for eligible expenses incurred prior to the date of completion of the Project or the effective date of the termination of the Agreement, shall be refunded to the Parties in proportion to their respective contribution to the cost of a particular phase of the Project. VTA shall refund to City its share of the remaining balance, if any, within ninety (90) calendar days of the effective date of completion of the Project or sooner termination of the Agreement.

**9. Audit and Record Retention.** City may audit the expenses incurred in the performance of this Agreement. VTA shall retain all records related to the Project for three (3) years after the completion of the Project. During this period, VTA shall make these records available within a reasonable time to the City for inspection upon request.

**10. Parties' Representatives.** The General Manager of VTA or his designee is

hereby made the representative of VTA for all purposes under this Agreement. The Director of the Department of Transportation for City or the Director's designee is hereby made the representative of City for all purposes under this Agreement.

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

**12. No Waiver.** The failure of either Party to insist upon the strict performance of any of the terms, covenant and conditions of this Agreement shall not be deemed a waiver of any right or remedy that either Party may have, and shall not be deemed a waiver of their right to require strict performance of all of the terms, covenants, and conditions thereafter.

**13. Notice.** Any notice required to be given by either Party, or which either party may wish to give, shall be in writing and served either by personal delivery or sent by certified or registered mail, postage prepaid, addressed as follows:

To VTA: Santa Clara Valley Transportation Authority  
John H. Ristow, Chief, Congestion Management Agency  
3331 North First Street, Bldg. B-2  
San Jose, CA 95134-1906

To CITY: City of San Jose – Department of Transportation  
Hans F. Larsen, Director  
200 E. Santa Clara Street, 8<sup>th</sup> Floor Tower  
San Jose, CA 95113-1905

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

**14. Dispute Resolution.** If a question arises regarding interpretation of this Agreement or its performance, or the alleged failure of a Party to perform, the Party raising the question or making the allegation shall give written notice thereof to the other Party. The Parties shall promptly meet in an effort to resolve the issues raised. If the Parties fail to resolve the issues raised, alternative forms of dispute resolution, including mediation, may be pursued by mutual agreement. It is the intent of the Parties to the extent possible that litigation be avoided as a method of dispute resolution.

15. **Entire Agreement.** This Agreement constitutes the entire Agreement between the Parties pertaining to the subject matter contained therein and supersedes all prior or contemporaneous agreements, representations and understandings of the Parties relative thereto.

16. **Amendments.** Future amendments to this Agreement shall be processed by mutual written agreement of the Parties. Unless otherwise provided herein, any amendments to this Agreement must be approved by City's City Council. Whenever possible, notice to amend this Agreement shall be provided ninety (90) calendar days prior to the desired effective date of such amendment.

17. **Warranty of Authority to Execute Agreement.** Each Party to this Agreement represents and warrants that each person whose signature appears hereon has been duly authorized and has the full authority to execute this Agreement on behalf of the entity that is a Party to this Agreement.

18. **Severability.** If any term, covenant, condition or provision of this Agreement, or the application thereof to any person or circumstance, shall to any extent be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the terms, covenants, conditions and provisions of this Agreement, or the application thereof to any person or circumstance, shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

19. **Governing Law.** This Agreement shall be construed and its performance enforced under California law.

20. **Venue.** In the event that suit shall be brought by either Party to this Agreement, the Parties agree that venue shall be exclusively vested in the State courts of the County of Santa Clara or, if federal jurisdiction is appropriate, exclusively in the United States District Court for the Northern District of California, in San José, California.

**WITNESS THE EXECUTION HEREOF** the day and year first hereinabove set forth.

**[SIGNATURES ON THE NEXT PAGE]**

"City"  
City of San José  
a municipal corporation

By: \_\_\_\_\_  
DENNIS D. HAWKINS, CMC  
City Clerk

APPROVED AS TO FORM:

By: \_\_\_\_\_  
JOHNNY V. PHAN  
Deputy City Attorney

"VTA"  
Santa Clara Valley Transportation  
Authority, a public agency

By: \_\_\_\_\_  
MICHAEL T. BURNS  
General Manager

Date: \_\_\_\_\_  
APPROVED AS TO FORM:

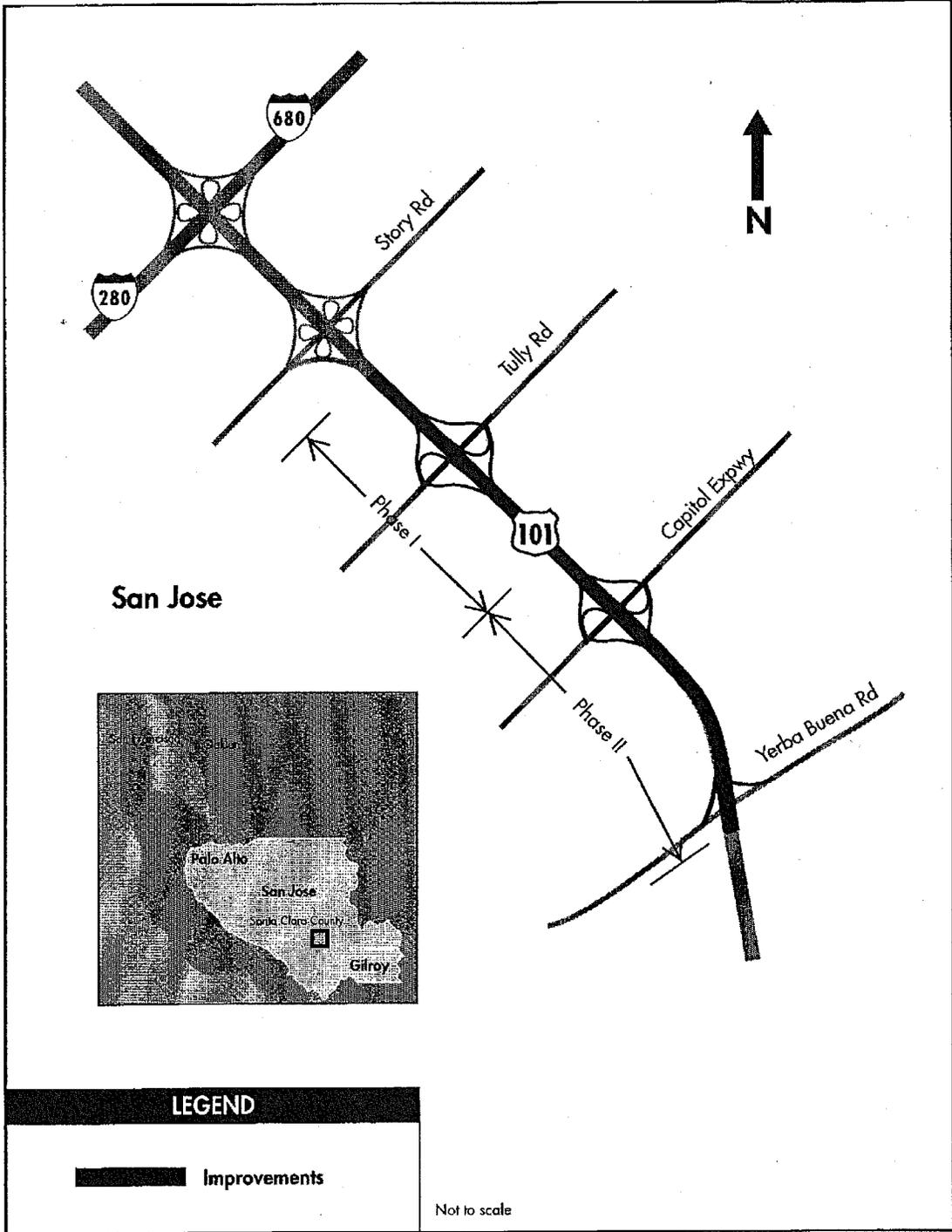
By: \_\_\_\_\_  
Counsel  
Date: \_\_\_\_\_

**EXHIBIT A**

**PROJECT LOCATION MAP**

**U.S. 101 Improvement Project**

**U.S. Operational Improvements Project**



**EXHIBIT B**

**DELIVERABLES AND MILESTONE SCHEDULE**

**DELIVERABLES & MILESTONES**

**MONTH/YEAR**

**Phase I and II**

Complete Environmental Phase (PA&ED)

March 2009 (completed)

**Phase I**

Begin Design Phase

January 2008 (completed)

End Design Phase (Ready to List)

November 2009 (completed)

Right of Way Certification

November 2009 (completed)

Begin Construction

November 2010 (completed)

Proposed Complete Construction

May 2012

Proposed Begin Closeout Phase

June 2012

Proposed End Closeout Phase

December 2012

**Phase II**

Begin Design Phase

March 2010 (completed)

End Design Phase (Ready to List)

March 2012

Right of Way Certification

December 2011

Proposed Begin Construction

July 2012

Proposed Complete Construction

December 2013

Proposed Begin Closeout Phase

January 2014

Proposed End Closeout Phase

June 2014

**EXHIBIT C**

**PROJECT COST BREAKDOWN**

**Phase I:**

PA &ED (Includes Phase II)	\$ 3,320,000
PS&E	\$ 6,650,000
Construction Support	\$ 6,690,000
Right of Way	\$ 1,850,000
Construction Capital	<u>\$26,618,750</u>
<b>TOTAL</b>	<b>\$45,128,750</b>

**AVAILABLE PROJECT BUDGET BREAKDOWN**

**Phase II:**

PA&ED (Included in Phase I)	\$ 0
PS&E	\$ 4,356,000
Construction Support	\$ 3,130,000
Right of Way	\$ 0
Construction Capital	<u>\$20,870,000</u>
<b>TOTAL</b>	<b>\$28,356,000</b>

<b><u>PROJECT TOTAL</u></b>	<b><u>\$73,484,750</u></b>
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