

**AGREEMENT BETWEEN THE CITY OF SAN JOSE AND
THE WILLOW GLEN BUSINESS ASSOCIATION FOR
FUNDING DISTRICT FEASIBILITY AND FORMATION FOR THE
EXPANSION AND RENEWAL OF THE WILLOW GLEN
COMMUNITY BENEFIT IMPROVEMENT DISTRICT**

THIS AGREEMENT is made and entered into this _____ day of _____ 2024, by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (the "CITY"), and the WILLOW GLEN BUSINESS ASSOCIATION, a 501(c)(6) non-profit corporation (the "ASSOCIATION").

RECITALS

- A. ASSOCIATION has circulated petitions to affected property owners related to the expansion and renewal of the Willow Glen Community Benefit Improvement District (the "District"); and
- B. ASSOCIATION and CITY desire to investigate the feasibility of renewing the District with expanded boundaries to fund services in the Willow Glen area; and
- C. CITY staff time will be required to investigate the feasibility of District renewal and to take the initial steps required to renew the District; and
- D. CITY and ASSOCIATION desire to enter into this AGREEMENT for ASSOCIATION to fund the CITY'S costs to investigate the feasibility of renewing the District, including engaging any necessary consultants and all other costs incurred by the CITY to conduct proceedings to renew the District.

NOW, THEREFORE, in consideration of their mutual promises and subject to the terms, provisions, and conditions hereinafter set forth, the parties hereto agree as follows:

1. RESPONSIBILITIES OF ASSOCIATION

ASSOCIATION shall perform the obligations to the reasonable satisfaction of CITY'S Director of Public Works (the "Director");

- 1.1 Payment of CITY'S Costs.** ASSOCIATION shall advance sufficient funds to pay for all CITY'S costs, direct and indirect, incurred in performing the scope of work described in Section 2.1.

- 1.2 Deposits.**

- 1.2.1 Payment.** ASSOCIATION shall make an initial deposit with CITY of THIRTY-ONE THOUSAND, THREE HUNDRED AND SIXTY-SIX DOLLARS (\$31,366.00), (the "Deposit") to pay for all CITY'S costs related to District renewal. The Deposit shall be made within five (5) business days following full

execution of this AGREEMENT by CITY and ASSOCIATION. Notwithstanding anything to the contrary in this AGREEMENT, ASSOCIATION shall have no obligation to pay CITY any amount in excess of the Deposit without ASSOCIATION'S written authorization. Nor shall CITY be obligated to perform any services in excess of the initial Deposit of \$31,366.00 until such time as ASSOCIATION makes an additional deposit as set forth in Section 1.2.3 below.

- 1.2.2 Accounting. The Deposit may be comingled with other funds of the CITY, but the CITY shall at all times maintain records as to the expenditure of the Deposit.
- 1.2.3 Additional Deposits. Requests to ASSOCIATION for additional deposits will be made in writing by the Director or the Director's designee. ASSOCIATION shall make additional deposits in TEN THOUSAND DOLLAR (\$10,000.00) increments to CITY as necessary pursuant to this AGREEMENT within thirty (30) calendar days of receipt of the written request for additional funds from the Director or designee. Such requests shall be deemed received by ASSOCIATION no later than five (5) calendar days from the date of mailing by the City. If the Deposit, including interest, is wholly expended, CITY will do no further work related to the District until ASSOCIATION deposits with CITY additional funds to cover estimated remaining CITY expenses for the District as provided herein.
- 1.2.4 Relationship to Other Fees and Charges. The funds deposited with CITY pursuant to this Section 1.2 do not cover any fees or charges set by resolution or ordinance of CITY as part of the development process, including but not limited to, fees and charges collected in connection with subdivision maps, planning permits, environmental review, encroachment permits (collectively, "Development Permits"), and improvement agreements.

1.3 No Commitment by CITY.

- 1.3.1 ASSOCIATION acknowledges and understands that this AGREEMENT is only for the purpose of allowing CITY staff and CITY consultants to perform necessary tasks connected with the feasibility investigation and initial steps toward the District renewal. ASSOCIATION agrees and acknowledges that this AGREEMENT in no way commits CITY to approve any project proposed by ASSOCIATION, nor in any other way commits CITY regarding of the District.
- 1.3.2 ASSOCIATION acknowledges that, even if CITY decides not to renew the District, or does not complete the work described in Section 2.1, ASSOCIATION shall remain responsible for payment of all costs incurred by CITY pursuant to this AGREEMENT, and all other payments required of ASSOCIATION under this AGREEMENT.

1.4 Engineering and Architectural Work. ASSOCIATION shall provide a description of the services proposed to be provided by the District, including reports, plans, maps, and diagrams as requested by CITY. ASSOCIATION shall meet with CITY as necessary to determine the level of services to be provided by the District. All information collected

and/ provided to the City by ASSOCIATION under this section shall be collectively referred to as the "Engineering Services."

1.5 ASSOCIATION'S Consultants. ASSOCIATION has hired or intends to hire the following consultants to perform the Engineering Services.

Design:	Kristin Lowell, Inc. Hofmann & Associates, Inc.
Engineering:	Kristin Lowell, Inc.

CITY agrees to ASSOCIATION'S use of the foregoing consultant(s) and/or subconsultants. In the event ASSOCIATION determines that additional or substitute consultants are needed, ASSOCIATION agrees to work with CITY to ensure that the most qualified consultants are selected. CITY shall have the right to reject ASSOCIATION'S consultant selections. CITY shall approve in advance any additional or substitute subconsultants retained by prime consultant to perform work pursuant to this AGREEMENT. CITY shall have the right to review and approve the scope of the services for any additional or substitute consultants or subconsultants.

In the event this AGREEMENT expires or is terminated as provided herein, ASSOCIATION shall provide CITY with all reports, drawings, and other work product related to the Engineering Services that ASSOCIATION owns (collectively, "Work Product"), and ASSOCIATION shall grant to the CITY an irrevocable, non-exclusive royalty-free license to use the Work Product in connection with the development, maintenance and provision of services to the District.

1.6 INTENTIONALLY OMITTED

1.7 Indemnity. To the fullest extent permitted by law, ASSOCIATION shall defend, indemnify and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from the performance of ASSOCIATION'S obligations under this AGREEMENT due to the willful or negligent acts (active or passive) or omissions by ASSOCIATION'S officers, employees or agents. ASSOCIATION'S obligations to indemnify and hold harmless exclude only such claim, loss or liability to the extent due to the active negligence or willful misconduct of CITY, its officers, employees and/or agents.

ASSOCIATION shall cause and require all Consultants hired by ASSOCIATION to defend, indemnify and hold harmless CITY, its officers, employees and agents against any claim, loss or liability arising out of or resulting in any way from the performance of its consultant's obligations to perform work in advancement of the work under this AGREEMENT due to the willful or negligent acts (active or passive) or omissions by ASSOCIATION'S consultant, its officers, its employees or its agents. ASSOCIATION shall require all its consultants to indemnify and hold harmless CITY excluding only such claim, loss or liability to the extent due to the active negligence or willful misconduct of CITY, its officers, employees and/or agents. ASSOCIATION shall cause each of its consultants to defend, indemnify and hold harmless the CITY, its officers, employees and

agents from any defect or other flaw of the Engineering Services or the Documents and services to be performed pursuant to Section 2.1.3 of this AGREEMENT.

2. RESPONSIBILITIES OF CITY

2.1 Scope of Work

2.1.1 District Feasibility & Formation. CITY will conduct a preliminary investigation of the feasibility of District renewal, including, without limitation, investigating the following: District boundaries; improvements, maintenance and/or activities to be provided by the District; rate, method of apportionment and manner of collection of the assessments; and the cost of providing the improvements, maintenance and/or services to be included in the District. If the CITY determines that District renewal is feasible, the CITY will initiate the process to expand and renew the District.

2.1.2 Engineering & Architectural Work. CITY will perform necessary engineering and other work required pursuant to the Property and Business Improvement District Law of 1994, as amended, Part 7 of Division 18, commencing at Section 36600, of the California Streets and Highway Code.

2.1.3 Review and Approval of Documents. At appropriate intervals during the renewal process, ASSOCIATION shall submit to CITY for review and approval all reports, plans, maps, diagrams, drawings, cost estimates and other documents (collectively, "Documents") required to be prepared by ASSOCIATION or ASSOCIATION'S consultants pursuant to Section 1.4. CITY will review each submittal and provide ASSOCIATION its review comments. ASSOCIATION shall address CITY'S comments and incorporate them into the Documents as necessary.

2.1.4 Meetings. CITY staff will attend meetings with the ASSOCIATION and ASSOCIATION'S consultants as needed to implement the purposes of this AGREEMENT.

2.2 Consultants. CITY, in its sole discretion, may engage outside consultants to assist CITY in its performance of this AGREEMENT, for which ASSOCIATION shall be obligated to pay subject to the provisions of Section 1.2.1.

2.3 Deposit.

2.3.1 Accounting.

- a. The Department of Public Works will keep records of all funds advanced by ASSOCIATION pursuant to this AGREEMENT and of all expenditures of such funds.

- b. CITY will bill work at hourly rates based on CITY'S direct and indirect costs, including but not limited to, salaries, benefits, overhead and other administrative expenses. Fees and other costs of any consultants hired by CITY in connection with the scope of work described in Section 2.1 shall be billed at the rate actually incurred by CITY. Fees and other costs of publication of notices, preparation and mailing of ballots and other costs related to renewal process with respect to the District shall be billed at the rate incurred by the CITY.
- c. At any time during normal business hours, but upon no less than forty-eight (48) hours notice, and not more than once every three (3) months, ASSOCIATION may request, and CITY will make available to ASSOCIATION for examination, all records, contracts, invoices, materials, conditions of employment and other data relating to all matters covered by this Agreement.

2.3.2 Refunds. If, following the expiration or earlier termination of this Agreement, a portion of the amount(s) deposited by ASSOCIATION remain unexpended and unencumbered, CITY will return such amount(s) to ASSOCIATION within thirty (30) calendar days of the final accounting.

3. OBLIGATIONS OF BOTH PARTIES

3.1 Termination and Expiration. Either ASSOCIATION or CITY may terminate this Agreement by delivering to the other party ten (10) calendar days advance written notice of election to terminate. In addition, this AGREEMENT may be terminated for default as provided in Section 3.2. If not subject to earlier termination, as provided herein, this Agreement shall expire upon the later to occur of: (1) a determination by CITY not to proceed with District renewal; or (2) the date that the District is renewed.

3.2 Default.

3.2.1 Default by ASSOCIATION. In the event of default by ASSOCIATION of any of the terms and/or conditions of this AGREEMENT, the Director will give written notice of such default ("Default Notice") to ASSOCIATION. If ASSOCIATION does not remedy such default within thirty (30) calendar days of ASSOCIATION'S receipt of such Default Notice (or, if the obligation cannot reasonably be performed within thirty (30) calendar days, if ASSOCIATION does not commence the performance of the obligation within the thirty (30) calendar day period and thereafter diligently pursue the completion of the obligation), the Director may terminate this Agreement by delivering written notice of such termination to ASSOCIATION.

3.2.2 Default by CITY. In the event of default by CITY of any of the terms and/or conditions of this AGREEMENT, ASSOCIATION shall give a Default Notice to CITY. If CITY does not remedy such default within thirty (30) calendar days of

CITY'S receipt of such Default Notice (or, if the obligation cannot reasonably be performed within thirty (30) calendar days, if CITY does not commence the performance of the obligation within the thirty (30) calendar day period and thereafter diligently pursue the completion of the obligation), ASSOCIATION may terminate this AGREEMENT by delivering written notice of such termination to CITY.

3.3 Disposition of Deposit. If this AGREEMENT expires or is terminated as provided herein, the balance of any unexpended and unencumbered Deposits shall be refunded to ASSOCIATION within thirty (30) calendar days after the date of expiration or termination. CITY shall not refund any portion of the Deposits expended or encumbered prior to the expiration date or the date of the termination notice, nor be responsible for any reimbursement of such expended or encumbered funds. Within thirty (30) calendar days after the date of expiration or termination, ASSOCIATION shall reimburse CITY for any additional costs incurred by CITY in accordance with this Agreement prior to the expiration date or the date of the termination notice that exceed the Deposits.

3.4 Notices. All notices to be given hereunder shall be in writing and shall be served, either personally or by mail, postage prepaid, to the addresses set forth below, or to any other address provided by one party to the other in writing.

To CITY: City of San José
Department of Public Works
Development Services Division
Attn: Stanley Wong
200 East Santa Clara Street, 3rd Floor
San José, CA 95113

To ASSOCIATION: c/o Tim Mulcahy
Willow Glen Business Association
1261 Lincoln Avenue, Suite 217
San Jose, CA 95125

The effective date of such written notice shall be the date of personal delivery or the date of receipt by certified mail or three calendar days after mailing in the United States Mail.

3.5 Entire Agreement. This AGREEMENT contains the entire understanding between the parties with respect to the subject matter herein. There are no representations, AGREEMENTS, arrangements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this AGREEMENT, which are not fully expressed herein. This AGREEMENT may not be amended except pursuant to a written instrument signed by all parties.

3.6 Assignment. ASSOCIATION shall not assign any interest in this AGREEMENT and shall not transfer any interest in the same (whether by assignment or novation), without the prior written approval of CITY.

- 3.7 **Waiver.** The parties agree that waiver by either party of any breach of one (1) or more of the terms, covenants or conditions under this AGREEMENT or any default in the performance of any obligations under this Agreement shall not be construed as waiver by that party of any other term, covenant, condition or obligation, nor shall a waiver of any incident of breach or default constitute a continuing waiver of same.
- 3.8 **Applicable Law and Venue.** This AGREEMENT shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either party to enforce or interpret the terms of 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, Northern District of California, San José, California.
- 3.9 **No Third-Party Beneficiaries.** This AGREEMENT shall not be construed as, or deemed to be, an Agreement for the benefit of any third party or parties, and no third party or parties shall have any right or action hereunder for any cause whatsoever.

APPROVED AS TO FORM:

“CITY”

CITY OF SAN JOSE,
a municipal corporation

JOHNNY PHAN
Chief Deputy City Attorney

By _____
TONI J. TABER, CMC
City Clerk

“ASSOCIATION”

WILLOW GLEN BUSINESS
ASSOCIATION, a non-profit 501(c)(6)
corporation

By _____
Tim Mulcahy
Board President