# FUNDING AND IMPROVEMENT AGREEMENT FOR ADDITIONAL CHILCO LEFT TURN LANE

This Funding and Improvement Agreement ("Agreement") is made this 30 day of May, 2018 ("Execution Date") by and between Hibiscus Properties, LLC, a Delaware limited liability company ("Hibiscus"), and the City of Menlo Park ("City"), each referred to as a "Party" and collectively referred to as the "Parties."

## RECITALS

WHEREAS, in 2010, the City approved an application from Bohannon Development Company, a California corporation, David D. Bohannon Organization, a California corporation, 125 Constitution Associates, a California limited partnership, and Bohannon Trusts Partnership II, a California limited partnership (collectively, the "Bohannon Applicant") to redevelop the property located at 100 to 190 Independence Drive (the "Independence Site") and 101 to 155 Constitution Drive (the "Constitution Site") (collectively, the "Menlo Gateway Project");

WHEREAS, Section 8.65 of the conditional development permit for the Menlo Gateway Project requires the Bohannon Applicant to fund and construct an additional eastbound left turn lane from Chilco Street to Bayfront Expressway (the "Additional Chilco Left Turn Lane") in connection with the redevelopment of the Constitution Site as a condition of project approval;

WHEREAS, Hibiscus is in the process of redeveloping the property located at 301 to 309 Constitution Drive (the "TE Site"), which is in the vicinity of the Menlo Gateway Project, and involves the construction of, among other things, two new office buildings and a new hotel (the "Facebook Campus Expansion Project");

WHEREAS, the Facebook Campus Expansion Project Mitigation Monitoring and Reporting Program for the Facebook Campus Expansion Project requires Hibiscus to construct improvements to and around the intersection of Chilco Street and Constitution Drive (the "Chilco/Constitution Improvements");

WHEREAS, Hibiscus has agreed to design and construct the Additional Chilco Left Turn Lane as shown on Exhibit A attached hereto (collectively the "Work"), along with the Chilco/Constitution Improvements, in order to minimize construction interference and maximize coordination and efficiency;

WHEREAS, Bohannon MG2, LLC, a Delaware limited liability company ("Bohannon") (an affiliate of the Bohannon Applicant") has agreed to pay, without limitation, the fixed sum of $1,217,547 (one million two hundred seventeen thousand five hundred and forty-seven dollars) in consideration of Hibiscus’ agreement to perform the Work (the "Bohannon Funds"); and

WHEREAS, Bohannon has agreed to pay the Bohannon Funds directly to Hibiscus pursuant to a separate agreement between Hibiscus and Bohannon.

NOW, THEREFORE, the Parties agree as follows:

## SECTION 1: SCOPE OF WORK AND REPORTING

1.1 **Scope of Work.** Hibiscus shall be responsible for completion and construction of the Work. Hibiscus shall be responsible for procuring and administering any professional services and/or other contracts entered into in connection with the Work. Hibiscus shall oversee completion of the Work. Hibiscus may appoint a designee or engage contractor(s) to perform work necessary to complete the Work, but Hibiscus remains responsible to the City for completion of the Work.
1.2 Required Approvals: Compliance with Laws. Facebook has submitted plans to construct the portion of the Work within Caltrans right of way to the City and Caltrans, and Caltrans approved an encroachment permit to construct the portion of the Work within Caltrans right of way on or about March 22, 2018. The portion of the Work within City right of way is subject to review and approval of the Public Works Department. Hibiscus shall construct the Work prior to occupancy of Building 22. Hibiscus must comply with all applicable federal, state, and local laws and regulations applicable to the Work. Hibiscus shall coordinate obtaining approvals and performing the work with approvals and construction of the Chilco/Constitution Improvements.

SECTION 2: TERM

The term of this Agreement will commence on the Execution Date and conclude upon, as applicable, (a) the later of (i) the City’s acceptance of the Work to the extent such Work is within the City’s jurisdiction and (ii) Caltrans’ acceptance of the Work to the extent such Work is within Caltrans’ jurisdiction or (b) the release from responsibility to construct the Work and payment of the cost of the Work (as set forth in Section 1.2).

SECTION 3: INDEMNIFICATION AND INSURANCE

3.1 Indemnity by Hibiscus. Hibiscus agrees, while engaged in the Work provided for in this Agreement, to place and maintain suitable safeguards sufficient to prevent injury to any persons and to indemnify, defend, and save harmless the City, its officers, representatives, and employees from and against any and all claims for loss, injury, or damage (the “Claims”) resulting from the prosecution of the Work except to the extent any Claim arises out of the negligence or willful misconduct of the City.

3.2 Insurance. While Hibiscus is performing the Work, Hibiscus agrees to maintain comprehensive public liability and property damage insurance naming the City, its officers, agents, and employees as additional insureds in a combined single limit of $2,000,000 for the death and injury of any persons in any one occurrence; and for property damage in any one occurrence. A certificate of said insurance policy shall be filed with the City.

SECTION 4: CONDITION PRECEDENT

Notwithstanding anything to the contrary in this Agreement, Hibiscus’ receipt of the Bohannon Funds is an express condition precedent to the effectiveness of this Agreement. This Agreement shall not be effective until Hibiscus receives the Bohannon Funds in their entirety.

SECTION 5: MISCELLANEOUS

5.1 Notices. All notices required or permitted to be given under this Agreement must be in writing and mailed postage prepaid by certified or registered mail, return receipt requested, by personal delivery, or overnight courier to the appropriate address indicated below or at such other place(s) that either Party may designate in written notice to the other. Notices are deemed received upon delivery if personally served, one day after mailing if delivered via overnight courier, or two days after mailing if mailed as provided above.

To the City: City of Menlo Park
Attn: Public Works Director
701 Laurel Street
Menlo Park, California 94025-3409
5.2 **No Waiver.** No waiver of any default or breach of any covenant of this Agreement by either Party will be implied from any omission by either Party to take action on account of such default if such default persists or is repeated. Express waivers are limited in scope and duration to their express provisions. Consent to one action does not imply consent to any future action.

5.3 **Assignment.** The Parties are prohibited from assigning, transferring, or otherwise substituting their interests or obligations under this Agreement without the written consent of the other Party, provided however, Hibiscus shall have the right to assign this Agreement to an affiliated entity of Hibiscus that is the owner of the TE Site, without the prior approval or consent of the City.

5.4 **Governing Law.** This Agreement is governed by the laws of the State of California as applied to contracts that are made and performed entirely in California.

5.5 **Compliance with Laws.** In performance of this Agreement, the Parties must comply with all applicable Federal, State, and local laws, regulations, and ordinances.

5.6 **Modifications.** This Agreement may only be modified in a writing executed by both Parties.

5.7 **Attorneys' Fees.** In the event legal proceedings are instituted to enforce any provision of this Agreement, the prevailing Party in said proceedings is entitled to its costs, including reasonable attorneys' fees.

5.8 **Relationship of the Parties.** It is understood that this is an Agreement by and between independent contractors and does not create the relationship of agent, servant, employee, partnership, joint venture, or association, or any other relationship other than that of independent contractor.

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

5.10 **Severability.** If any portion of this Agreement, or the application thereof is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining portions of this Agreement, or the application thereof, will remain in full force and effect.

5.11 **Counterparts.** This Agreement may be executed in counterparts.
5.12 **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties pertaining to its subject matter and supersedes any prior or contemporaneous written or oral agreement between the parties on the same subject.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of May 30, 2018.

**HIBISCUS:**
Hibiscus Properties, LLC,
a Delaware limited liability company

[Signature]
John Tenanes, Vice President

[Signature]
Ted Price

9/24/18
Date

**CITY:**
City of Menlo Park
A municipal corporation

[Signature]
Alex D. McIntyre, City Manager

5/30/18
Date

**APPROVED AS TO FORM:**

[Signature]
William L. McClure, City Attorney

5/15/18
Date

**ATTEST:**

[Signature]
Judi A. Herren, City Clerk

5/31/18
Date
*Design shown is preliminary and is subject to review and approval by the City.