MEMORANDUM OF UNDERSTANDING BETWEEN MENLO GATEWAY, LP AND CITY OF MENLO PARK (MENLO GATEWAY OFF-SITE IMPROVEMENTS)

This Memorandum of Understanding ("MOU") is made and entered into as of October 31, 2017 ("Effective Date"), by and between MENLO GATEWAY, LP, a California limited partnership ("Bohannon"), and the CITY OF MENLO PARK, a California municipal corporation ("City," and collectively with Bohannon, the "Parties") with reference to the following facts:

RECITALS

A. Bohannon is the project sponsor and lead developer of the Menlo Gateway Project, located at 100 to 190 Independence Drive and 101 to 155 Constitution Drive within City of Menlo Park, County of San Mateo, State of California (the "Property").

B. On June 15, 2010, the City Council voted to approve an application for the development of a new office, hotel, and health club complex, including three office buildings and a hotel to be located on two non-contiguous sites (the "Project"). Among other actions, the City Council: (i) approved the application subject to certain conditions of approval as set forth in the Conditional Development Permit approving the Project (the "Conditions of Approval"); (ii) certified the Final Environmental Impact Report for the Project; and (iii) approved a Development Agreement by and between City and Bohannon’s predecessors-in-interest, Bohannon Development Company, David D. Bohannon Organization, 125 Constitution Associates, LP, and Bohannon Trusts Partnership II, dated December 7, 2010 (the "Development Agreement"). The City Council’s approvals became effective on December 7, 2010, after Measure T was approved by the voters.

C. On May 4, 2015, the City’s Planning Commission approved certain changes to the Project which were found to be substantially consistent with the original Project. As approved, the Project consists of two phases including an office building, parking structure, hotel, and fitness facility to be located at 100 to 190 Independence Drive (the "Independence Phase"), and two office buildings and two parking structures to be located at 101 to 155 Constitution Drive (the "Constitution Phase"). Construction commenced on the Independence Phase in 2016 and is expected to be complete by August 2017. Construction of the Constitution Phase is anticipated to commence in 2018 and be complete by late 2019.

D. The Development Agreement requires Bohannon to make off-site improvements in certain areas of City. Section 5.2 requires Bohannon to pay for and construct capital improvements in the amount of up to $1,250,000, which are to be constructed in areas determined through a public outreach process (the "Capital Improvements"). The Development Agreement provides that a minimum of $750,000 dollars of Bohannon’s funding contribution should be invested in improvements in the Belle Haven neighborhood, and that the remaining funding should be invested in improvements within Bedwell Bayfront Park or other city-wide recreational improvements (approximately $500,000), at the City Council’s discretion. In addition, a minimum of $350,000 must be used for projects within Bedwell Bayfront Park.
E. The Development Agreement also requires Bohannon to make off-site landscaping improvements to certain areas for the purpose of improving the aesthetics, architectural, circulatory and habitat connections with surrounding areas. Section 5.3 of the Development Agreement provides that Bohannon is required to pay for and construct off-site landscaping improvements which may include pedestrian/bicycle pathways, hardscape, and other architectural and landscape features in addition to plantings, in certain areas surrounding the Property in an amount not to exceed $500,000 (the “Landscaping Improvements”).

F. The Development Agreement contemplated that City would conduct a public outreach and planning process to identify the specific location and scope of the Capital Improvements, and that Bohannon and City together would manage the public outreach and planning process for the Landscaping Improvements.

G. In accordance with City staff’s direction, Bohannon initiated early design efforts and commenced a public outreach process in April 2015 to develop conceptual proposals for the Capital Improvements and the Landscaping Improvements. At the time, City had requested that Bohannon take the lead role in managing the public outreach and planning processes. Bohannon engaged consultants (SWA, the landscape architect for the Project, and Thuillot Associates) to develop proposals that were shared with City staff and community members at various community meetings during the summer and fall of 2015. As a result of these efforts, Bohannon incurred more than $35,000 in design costs.

H. In February 2016, City staff requested that City assume responsibility for coordinating the Capital Improvements and Landscaping Improvements as part of a future Bedwell Bayfront Park master planning process. Bohannon requested confirmation from City that it would take on primary responsibility for community outreach and the additional planning process, as well as extend the deadline for compliance with Sections 5.2 and 5.3 of the Development Agreement so that any delays arising from City’s process – or that are outside of Bohannon’s control – would not affect occupancy of the Independence office building upon completion or the issuance of permits for the Independence Phase of the Project. In May 2016, City confirmed its intent to defer determination of the Capital Improvements to coincide with public outreach for development of a Bedwell Bayfront Park Master Plan and agreed that any delay in conducting the public outreach would not delay issuance of building permits or construction of the Project’s Independence Phase. City also agreed to keep Bohannon informed of the outreach process as details become available. Bohannon agreed to City’s requests and suspended its consultants’ work and community engagement efforts.

I. In September 2016, City agreed to “freeze” the amount of Bohannon’s financial obligations related to the Capital Improvements and the Landscaping Improvements as of March 2016 due to City accepting responsibility for coordination and public outreach. Reflecting CPI adjustments through March 2016, Bohannon’s financial obligations are now capped at (i) $851,864.34 for the Belle Haven neighborhood improvements, (ii) $567,909.56 for Bedwell Bayfront Park and/or other recreational improvements, and (iii) $567,909.56 for the Landscaping Improvements. The status of Bohannon’s financial obligations was confirmed in writing by City as reflected in City’s sixth annual Development Agreement review of the Project, which occurred before City’s Planning Commission on January 9, 2017.
J. City recently initiated a master planning process to address existing maintenance and capital improvements for the Bedwell Bayfront Park. The park has seen a significant increase in usage over the years and the recreational interests and needs of the users have changed, and City Council has authorized City staff to develop a Bedwell Bayfront Park operations and maintenance plan to enhance use, improve access and determine sustainable funding sources for ongoing maintenance. As indicated above, City believes that this master planning process, which will involve coordinated community outreach, stakeholder meetings, and other forms of community involvement, is the appropriate mechanism to help the community identify the Capital Improvements.

K. The purpose of this MOU is to consolidate and restate the existing agreements and understanding between Bohannon and City and to establish an efficient and orderly process for the identification and construction of the Capital Improvements and Landscaping Improvements.

NOW, THEREFORE, the Parties agree as follows:

1. **Bohannon’s Obligations.** Bohannon’s obligations under Sections 5.2 and 5.3 of the Development Agreement shall be satisfied as follows:

A. Capital Improvements.

   i. Bohannon’s funding contribution for the Capital Improvements shall be fixed at $1,419,773.90 (the “Capital Improvements Fixed Funding Contribution”) to account for CPI adjustments through March 2016, and subject to a credit for the cost of design work performed in early 2015 as described in Recital G, above. No less than $851,864.34 of this amount shall be allocated to capital improvements within the Belle Haven neighborhood. No less than $397,536.69 shall be allocated to Bedwell Bayfront Park.

   ii. If, through a public outreach process to be managed by City, City determines the scope and estimated cost of the schematic design of the Capital Improvements by June 1, 2018, and the estimated cost of the Capital Improvements are within 5% of the Capital Improvements Fixed Funding Contribution, then Bohannon shall be responsible for the design and construction of the Capital Improvements. Bohannon’s obligation to design and construct the Capital Improvements shall be subject to City identifying the scope of work and establishing a mechanism to ensure that Bohannon is not financially responsible for costs that exceed the Capital Improvements Fixed Funding Contribution arising from the construction or design process. The Parties agree that in the event of a cost overrun, the City and Bohannon will collaborate in good faith to pursue one of the following three options to reduce project costs: (i) the City shall reduce the scope of Bohannon’s work obligations or modify the Capital Improvements to be constructed in order to reduce costs below the Capital
Improvements Fixed Funding Contribution; (ii) the City shall assume responsibility for construction of the Capital Improvements with Bohannon remitting the Capital Improvements Fixed Funding Contribution to the City less any costs incurred by Bohannon for design and construction of the Capital Improvements, or (iii) to the extent legally feasible, the City shall reimburse Bohannon for any additional costs associated with the work that exceed the Fixed Capital Improvements Fixed Funding Contribution.

iii. If Bohannon is responsible for the design and construction of the Capital Improvements, then Bohannon shall complete the Capital Improvements prior to occupancy of the second office building as part of the Constitution Phase, unless the Parties mutually agree upon a different completion date. The time for performance of this obligation shall be extended where delays or failures to perform are due to circumstances or factors beyond the reasonable control or without the fault of Bohannon. If a delay occurs, Bohannon shall use reasonable efforts to promptly notify the City of the delay.

iv. If City has not identified the Capital Improvements by June 1, 2018, then Bohannon and City shall enter into an agreement whereby Bohannon shall pay the City the Capital Fixed Funding Contribution directly, in which case (i) Bohannon shall be relieved of its obligation to design and construct the Capital Improvements and its obligations under Section 5.2 of the Development deemed satisfied, and (ii) City shall be responsible for the design and construction of the Capital Improvements.

B. Landscaping Improvements.

i. Bohannon’s funding contribution for the Landscaping Improvements shall be fixed at $567,909.56 to account for CPI adjustments through March 2016 (the “Landscaping Fixed Funding Contribution”).

ii. Bohannon shall, in collaboration with City, coordinate a public planning process to identify the scope of the Landscaping Improvements to be constructed. Consistent with Section 5.3 of the Development Agreement, the Parties agree that the Landscaping Improvements to be identified through this public process must be within City’s right-of-way or on public property and must be visible from either Marsh Road or Bayfront Expressway, and may include the following as shown on the diagram attached as Exhibit A:

a. landscape improvements on the West Bay Sanitary District pump station property at the entrance to Bedwell Bayfront Park;
b. landscape improvements within Caltrans' property near the entrance to Bedwell Bayfront Park at the corner of Marsh Road and the Bayfront Expressway;

c. landscape improvements along the Caltrans right-of-way frontage along the northern side of the Bayfront Expressway between Marsh Road and Chrysler;

d. landscape improvements within the Caltrans' right-of-way frontage at the intersection of Chrysler and the Bayfront Expressway;

e. landscape improvements along the Caltrans right-of-way frontage on the south side of Bayfront Expressway between Marsh and Chrysler;

f. landscape improvements adjacent to the Menlo Gateway site within the City's right-of-way along the eastern side of Marsh Road; and

g. landscape improvements within Caltrans right-of-way frontage along the eastern side of Marsh Road.

iii. Following the public planning process, Bohannon and City shall determine the appropriate Landscaping Improvements to be constructed, and Bohannon shall provide detailed plans and specifications for construction of the Landscaping Improvements to the City for final review and approval of the City Manager or designee.

iv. Bohannon shall be responsible for the design and construction of the Landscaping Improvements.

v. Bohannon shall complete the Landscaping Improvements as soon as reasonably practicable, but in no event later than occupancy of the second office building as part of the Constitution Phase, unless the Parties mutually agree upon a different completion date. The time for performance of this obligation shall be extended where delays or failures to perform are due to circumstances or factors beyond the reasonable control or without the fault of Bohannon. If a delay occurs, Bohannon shall use reasonable efforts to promptly notify the City of the delay.

vi. Upon completion of the Landscaping Improvements, Bohannon shall be responsible for maintenance of any Landscaping Improvements that are contiguous to the Constitution Phase site and not separated by any street, roadway or freeway on-ramp.

2. **City's Obligations.** City shall be responsible for the following:

A. Capital Improvements.
i. City shall coordinate a public outreach process, whether through the master planning process for Bedwell Bayfront Park or otherwise, to determine the scope of the Capital Improvements and agrees to timely inform Bohannon of all material developments in connection with City’s public outreach and community engagement efforts. The Parties acknowledge that the City may implement different outreach processes for different elements of the Capital Improvements in its discretion.

ii. Upon completion of City’s public outreach process (or processes), City shall make a final decision as to the scope of Capital Improvements, which the Parties anticipate may require consultation with the City Council, and provide notice to Bohannon as to the Capital Improvements desired to be constructed as well as rough order of magnitude cost estimates.

iii. If City makes its final determination and provides notice to Bohannon regarding the scope and estimated cost for design and construction of the Capital Improvements on or before June 1, 2018, and the estimated cost of the Capital Improvements is within 5% of the Capital Improvements Fixed Funding Contribution, then City shall have no obligation for the design and construction of the Capital Improvements. For purposes of developing cost estimates for the scope of design and construction of potential Capital Improvements, City agrees to coordinate with Bohannon and select a mutually agreed upon third-party consultant to prepare reasonable cost estimates. Bohannon’s obligation to design and construct the Capital Improvements shall be subject to City identifying the scope of work and establishing a mechanism to ensure that Bohannon is not financially responsible for costs that exceed the Capital Improvements Fixed Funding Contribution arising from the construction or design process. The Parties agree that in the event of a cost overrun, the City and Bohannon will collaborate in good faith to pursue one of the following three options to reduce project costs: (i) the City shall reduce the scope of Bohannon’s work obligations or modify the Capital Improvements to be constructed in order to reduce costs below the Capital Improvements Fixed Funding Contribution; (ii) the City shall assume responsibility for construction of the Capital Improvements with Bohannon remitting the Capital Improvements Fixed Funding Contribution to the City less any costs incurred by Bohannon for design and construction of the Capital Improvements, or (iii) to the extent legally feasible, the City shall reimburse Bohannon for any additional costs associated with the work that exceed the Fixed Capital Improvements Fixed Funding Contribution.

iv. If City’s final determination and notice to Bohannon are provided after June 1, 2018, then City shall be responsible for designing and constructing the Capital Improvements. In that case, Bohannon shall make a cash payment to City in the amount of the Capital Fixed Funding Contribution. Upon receipt of that payment, Bohannon shall be deemed to have satisfied
its obligations under Section 5.2 of the Development.

v. City shall be solely responsible for maintenance of the Capital Improvements.

B. Landscaping Improvements.

i. City shall cooperate with Bohannon to coordinate a public planning process to identify the scope of the Landscaping Improvements. The City Manager or designee shall be responsible for reviewing the Landscaping Improvements proposed by Bohannon and approving the scope of the Landscaping Improvements.

ii. City shall be responsible for maintenance of the Landscaping Improvements that are not contiguous to the Property and that are separated from the Property by any street, roadway or freeway on-ramp. In the event that the Landscaping Improvements are installed on the West Bay Sanitary District pump station property, West Bay shall be responsible for maintenance of the improvements.

3. Extensions of Time. City agrees that Bohannon’s obligation to complete the Capital Improvements and Landscaping Improvements are deferred until after City and Bohannon conducts their respective public outreach processes and identify the specific improvements to be constructed. City further agrees that it will not withhold or impair the ability of Bohannon to obtain building or occupancy permits for the Independence or Constitution Phases of the Project based on delays in conducting the public outreach process for the Capital Improvements and the Landscaping Improvements. In addition, if permits or approvals are required from outside agencies and such permits or approvals delay issuance of permits or completion of construction, then Bohannon shall have additional time to complete such improvements as may be reasonably necessary; in addition, delays resulting from factors that are beyond Bohannon’s reasonable control shall not impede or impair the ability of Bohannon to obtain building or occupancy permits for the Constitution Phase of the Project. Bohannon shall work diligently and in good faith with the City to obtain the necessary permits or approvals from outside agencies. If permits or approvals from outside agencies are rejected for reasons beyond Bohannon’s reasonable control, then Bohannon shall not be obligated to complete that particular improvement and the Parties shall work together to determine alternate or substitute improvements.

4. Construction Bond Requirements. If the Capital Improvements or the Landscaping Improvements are not completed prior to occupancy of the second office building as part of the Constitution Phase, then Bohannon shall furnish a bond to City guaranteeing the completion of the Capital Improvements or Landscaping Improvements.

5. Credit for Expenses. City acknowledges that Bohannon has incurred approximately $35,250.88 in design and planning fees for the Capital Improvements and Landscaping Improvements, and agrees that such expenses shall be credited against Bohannon’s overall funding contribution identified in Section 1 of this MOU. Prior to the issuance of any credit for such expenses, Bohannon shall provide City with copies of all invoices, as well as design and planning documents prepared by SWA and Thuillot Associates for the City’s review and approval to determine that they qualify for a credit.
6. **Term.** The term of this MOU shall commence on the Effective Date and shall terminate following the later of the completion of the Capital Improvements and the Landscaping Improvements, provided final inspection and approval by the applicable governmental authorities has occurred.

7. **Miscellaneous Provisions.**

   A. **Governing Law.** The rights and obligations of the Parties hereunder shall be governed by, construed and enforced in accordance with the laws of the State of California.

   B. **Amendment.** This MOU may be amended only by a subsequent writing signed by the Parties.

   C. **Substantially Consistent Modifications.** This MOU is intended to document the understanding of the Parties with respect to Sections 5.2 and 5.3 of the Development Agreement. To the extent that the terms of this MOU are different than the terms of the Development Agreement, the terms of this MOU shall control. Otherwise, the Development Agreement remains in full force and effect. The Parties also agree that to the extent this MOU constitutes a change to the “Project Approvals” as defined in the Development Agreement, then the Parties agree that it shall constitute a “Substantially Consistent Modification” to the Project Approvals as those terms are defined in the Development Agreement.

   D. **Counterparts.** This MOU may be executed in any number of counterparts, each of which shall be deemed an original; however all such counterparts shall constitute but one and the same instrument with the Effective Date hereof being the date set forth above.

   E. **Assignment.** Neither Party will assign or transfer any interest in this MOU without the prior written consent of the other Party which shall not be unreasonably withheld or delayed.

   (Signatures on following page)
IN WITNESS WHEREOF, the Parties hereto have caused this MOU to be executed as of the Effective Date set forth above.

BOHANNON

MENLO GATEWAY, LP
a California limited partnership

By: Bohannon Development Company,
a California corporation, its General Partner

By:

Name: Robert L. Webster
Title: President and CEO

CITY

CITY OF MENLO PARK, a municipal corporation

Alex D. McIntyre, City Manager

ATTEST:

By:

Name: [Signatory Name], City Clerk

APPROVED AS TO FORM:

William L. McClure, City Attorney
EXHIBIT A