

# FUNDING AGREEMENT AT CONSTITUTION DRIVE

City Manager's Office  
701 Laurel St., Menlo Park, CA 94025  
tel 650-330-6620



002688

This Funding Agreement is made and entered into as of the 12 day of June 2019 ("Effective Date") and is by and between the CITY OF MENLO PARK, a political subdivision of the State of California (the "City") and Bohannon MG2, LLC, a Delaware limited liability company ("Bohannon"). The City and Bohannon are sometimes referred to herein individually as a "Party", and jointly as the "Parties".

## RECITALS

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

WHEREAS, on December 7<sup>th</sup>, 2010, the City conditionally approved the Project. On May 4<sup>th</sup>, 2015 the City's Planning Commission approved certain changes to the Project which were found to be substantially consistent with the original Project.

WHEREAS, Bohannon has obtained an encroachment permit from the City for construction-related uses of the Southbound portion of Constitution Drive in the vicinity of the Constitution Phase with conditions for Bohannon to retrofit damaged public infrastructure during Project construction to, or above, existing conditions at its expense (the "Bohannon Work").

WHEREAS, the Southbound portion of Constitution Drive has been exacerbated as a result of construction activities associated with the Constitution Phase in addition to other factors such as aging and increased traffic loading.

WHEREAS, the City acknowledges that Constitution Drive was in poor condition prior to Bohannon's construction, and has a shared interest in reconstructing and resurfacing Constitution Drive to match the integrity of the adjacent Constitution Drive Northbound lane to meet its projected usage (the "City Work"). The City further acknowledges that absent this Agreement, the City would be solely responsible to undertake all work required and costs incurred doing the City Work. Collectively, the Bohannon Work and City Work are referred to below as the "Work".

WHEREAS, the City further acknowledges that the reimbursement cost incurred by the City under this Agreement will be substantially less than the cost that would have been incurred by the City if it were to undertake the City Work under separate contract.

NOW, THEREFORE, in consideration of the mutual covenants and promises of the Parties herein contained, the Parties agree as follows:

## CONDITIONS OF AGREEMENT

1. Bohannon's Obligations: Bohannon agrees to furnish all the labor, material, equipment, and inspection services necessary to complete, within thirty days from the date of this Agreement, the Work, which Work is generally shown in Exhibit A to this Agreement, all according to the plans and specifications of the City Engineer. Bohannon further agrees that, in performing the Work, it shall, at its sole cost and expense: (i) employ a contractor and subcontractor(s) that are licensed by the State of California and have obtained all necessary building and other governmental permits and licenses required in connection with the Work; and (ii) perform the Work in accordance with the Plans and Specifications and with all applicable building codes, ordinances, laws, and regulations of the City and the State of California in effect at the time the permits for the Work are issued, in a manner consistent with the terms and conditions of this Agreement, and in accordance with sound engineering and construction practices.
2. City Work Reimbursement to Bohannon: Exhibit B sets forth the proposed roadway section and estimated costs of the Work. Bohannon and the City agree that Bohannon shall be entitled to a reimbursement from the City of all actual costs incurred by Bohannon in performing the Work in excess of the \$123,770 estimated cost of the Bohannon Work. The costs to be reimbursed to Bohannon results in a saving to the City if it were to perform the City Work instead of Bohannon. Such reimbursement by City to Bohannon results in a saving to the City of the additional cost that would have been incurred by the City had it undertaken the City Work as a separate public works project. The City further acknowledges that the estimated cost of the City's reimbursement obligations is approximately \$245,381 plus a \$40,000 contingency.
3. Payment of Funds: Upon completion of the Work, Bohannon shall provide the City with an invoice for the costs incurred by Bohannon for its performance of the Work. Within thirty days of its receipt of such invoice from Bohannon, the City shall reimburse Bohannon for the costs reflected on such invoice, provided that the City shall be entitled to a credit of \$123,770 which represents Bohannon's contribution to the Work.
4. Required Approvals; Compliance with Laws: Prior to commencement of the Work, Bohannon or its designee will obtain all applicable local, state, and federal approvals and permits for the Work. In addition, Bohannon must comply with all applicable federal, state, and local laws and regulations applicable to the Work.
5. Access to Records and Record Retention: At all reasonable times, Bohannon will permit, upon request, City access and use of all reports, designs, drawings, plans, specifications, schedules, and other materials prepared, or in the process of being prepared, for the Work by Bohannon or any contractor or consultant of Bohannon. Bohannon will retain all records pertaining to the Work for at least three years after completion of the Work.
6. Term: This Agreement, and the obligations herein, shall become effective commencing on the Effective Date and shall terminate upon the completion of the Work and confirmation of City's full payment to Bohannon of the amount due Bohannon pursuant to Section 2 above. This Agreement may also be terminated at any time upon written mutual agreement of the Parties.
7. Indemnification: Bohannon shall indemnify, hold harmless, and defend the City, its authorized or subsidiary agencies, and their officers, officials, agents, employees, and servants (collectively, the "City Indemnitees") from and against any and all claims, demands, suits, damages, liabilities, losses, accidents, casualties, occurrences, payments or actions of every name, kind, and description, including attorney fees claimed, which might arise or be asserted against the City Indemnitees based on injuries to or death of any person or damage to property resulting from the performance of any work that Bohannon is required to perform under this Agreement. The duty of Bohannon to indemnify and hold harmless, as set forth herein, shall include the duty to defend Indemnitees that is covered by this indemnity. The City shall promptly notify Bohannon and Bohannon shall defend, at its own expense, any suit based on such claim. If any judgement is entered, or any claims are made, against the City Indemnitees that is covered by this indemnity, Bohannon shall pay for all costs and expenses in connection herewith. This section shall not

apply to any claims, demands, suits, damages, liabilities, losses, accidents, casualties, occurrences, payments or actions, including attorney fees claimed, which arise due to the negligence or willful misconduct of the City Indemnitees or breach of this Agreement by the City.

8. Insurance: Bohannon agrees to maintain comprehensive public liability and property damage insurance naming the City, its officers, agents, and employees as additional insured 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.

9. Notices: Any notice to either Party shall be in writing and given by delivering the notice in person or by sending the notice by registered or certified mail or express mail, return receipt requested with postage prepaid, to the Party's mailing address. The respective mailing addresses of the Parties are, until changed, the following:

To Bohannon: Bohannon MG2, LLC  
Sixty 31st Avenue  
San Mateo, California 94403-3404  
Attn: Robert Webster

To the City: City of Menlo Park  
701 Laurel Street  
Menlo Park, CA 94025-3409  
Attn: Public Works Director

With a Copy to: City of Menlo Park  
1100 Alma Street, Suite 210  
Menlo Park, CA 94025  
Attn: City Attorney

Either Party may change its mailing address at any time by giving ten (10) days' notice of such change in the manner proved in this paragraph. All notices shall be deemed given, received, made or communicated on the date personal delivery is effected or, if mailed, on the delivery date or attempted delivery date shown on the return receipt.

10. 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. Consent to one action does not imply consent to any future action.

11. 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, that each Party shall have the right to assign this Agreement to an affiliated entity of that Party, without the prior approval or consent of the other Party.

12. 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.

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

14. Modifications: This Agreement may only be modified in a writing executed by both Parties.
15. 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.
16. 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.
17. 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.
18. 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.
19. Counterparts: This Agreement may be executed in counterparts.
20. Entire Agreement: This Agreement constitutes the entire agreement between the Parties pertaining to its subject matter and supercedes any prior or contemporaneous written or oral agreements between the parties on the same subject.
21. Recitals: This Recitals are incorporated by referenced into the terms of this Agreement.

Attachments: Exhibit A      Site Plan  
                  Exhibit B      Cost Estimate

[SIGNATURES APPEAR ON NEXT PAGE]

**SIGNATURES**

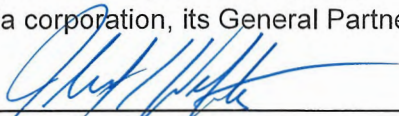
IN WITNESS WHEREOF, the Parties have hereunder subscribed their names the day and year indicated below.

**PARTY:**

Bohannon MG2, LLC,  
a Delaware limited liability company

By: Menlo Gateway, LP,  
A California limited partnership,  
its sole member

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



Robert L. Webster, President

5/31/19

Date

**APPROVED AS TO FORM:**

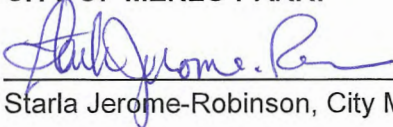


William L. McClure, City Attorney

6/12/19

Date

**CITY OF MENLO PARK:**

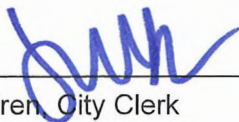


Starla Jerome-Robinson, City Manager

6/12/19

Date

**ATTEST:**



Judi A. Herren, City Clerk

6/13/19

Date

**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

**CIVIL CODE § 1189**

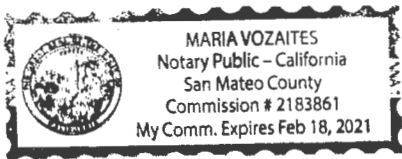
A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California )  
County of San Mateo )  
On May 31, 2019 before me, Maria Vozaites, Notary Public,  
Date Here Insert Name and Title of the Officer  
personally appeared Robert L. Webster  
Name(s) of Signer(s)

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.



Signature Maria Vozaites  
Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

Though this section is optional, completing this information can deter alteration of the document or fraudulent reattachment of this form to an unintended document.

**Description of Attached Document**

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

Corporate Officer — Title(s): \_\_\_\_\_

Partner —  Limited  General

Individual  Attorney in Fact

Trustee  Guardian or Conservator

Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

Corporate Officer — Title(s): \_\_\_\_\_

Partner —  Limited  General

Individual  Attorney in Fact

Trustee  Guardian or Conservator

Other: \_\_\_\_\_

Signer Is Representing: \_\_\_\_\_





**EXHIBIT A - SITE PLAN  
NTS**

## EXHIBIT B

### **South Constitution Drive - Full Depth Reclamation with Asphalt of Roadway Section:**

Per RFI 510 and Cornerstone recommendation, .4 inches of AC over an 18" full depth reclamation with an 8% cement ratio is to be implemented in the Constitution Frontage roadway in lieu of grind 1.4' AB and replace in kind. This recommendation is derived from Cornerstone's Recommendation Letter dated November 15, 2018 which was included in RFI 510 response to meet a Traffic Rating of 7.4.

#### Schedule:

Start Thursday June 6<sup>th</sup> noon and complete Monday morning June 10<sup>th</sup>.

Schedule is proposed as follows:

- Thursday Night – Grind and FDR (full road closure)
- Friday – Cure
- Saturday – Cure
- Sunday Night – Pave full lift on South and top lift on North (full road closure)
- Monday Morning – open for traffic

Total Area of FDR +/- 22,546 sqft

Costs Associated:

City of Menlo Park's portion of cost for .4'ac (1/2) over 18" FDR 8% cement: - \$245,381

Contingency - Cornerstone Testing/Inspections, unforeseen conditions, etc.: \$40,000.00

City of Menlo Park's cost for .4'ac (1/2) over 18" FDR 8% cement with Contingency: - **\$285,381**

Exclusions that may require additional funds due to City requirements or unforeseen conditions:

- Potential class II soil
- OT inspections for CoMP, Cornerstone and other agencies if required.
- Additional costs for trench plates and labor to maintain access to jobsite and neighbors
- Contingency should be carried for unknowns and potential issues with neighbors / public traffic
- Potential curb and gutter replacement (need to define scope)
- TCP requirements such as message boards or detour signage



South Constitution Drive - Full Depth Reclamation with Asphalt of Road Section:		City of Menlo Park	Bohannon Development
Additional Grind: 50/50 Split	\$ 34,516	\$ 17,258	\$ 17,258
FDR 18" 8% Cement:	\$ 136,224	\$ 136,224	
Offhaul additional Swell due to Cement:	\$ 10,448	\$ 10,448	
½ of additional 3" of Asphalt - \$89,157 - 50/50 Split	\$ 89,157	\$ 44,579	\$ 44,579
Base Scope Grind – Disposal of Petromat	\$ 5,876		\$ 5,876
Added Potholing for FDR:	\$ 8,859	\$ 8,859	
Subdynamics Utility Scanning:	\$ 4,000	\$ 4,000	
Subtotal:	\$ 289,080	\$ 221,368	\$ 67,713
Preston Pipelines: Mark-up - 5%	\$ 14,454	\$ 11,068	\$ 3,386
Subtotal:	\$ 303,534	\$ 232,436	\$ 71,098
Preston Pipeline - Traffic Control for Additional Grind and Pothole Work	\$ 4,057	\$ 4,057	
Subtotal:	\$ 307,591	\$ 236,493	\$ 71,098
Total with Webcor Mark-up (OCIP -.375%, Liability 1.10%, Fee 2.25%):			
Webcor OCIP - .375%	\$ 1,153	\$ 887	\$ 267
General Liability - 1.10%	\$ 3,384	\$ 2,601	\$ 782
Fee 2.25%	\$ 7,023	\$ 5,400	\$ 1,623
Total :	\$ 319,151	\$ 245,381	\$ 73,770
2" Grinding/Overlay/T-cut - Base Contract with Webcor Builders	\$ 50,000		\$ 50,000
<b>Total Cost of the South Side of Constitution with 5" of Asphalt and 18" of FDR</b>	<b>\$ 369,151</b>	<b>\$ 245,381</b>	<b>\$ 123,770</b>