

**FREEWAY MAINTENANCE AGREEMENT
BETWEEN THE STATE OF CALIFORNIA
AND
CITY OF SAN JOSE
FOR STATE HIGHWAY 101
IN THE CITY OF SAN JOSE FROM SOUTH OF STORY ROAD TO NORTH OF
CAPITOL EXPRESSWAY**

This Freeway Maintenance Agreement (hereinafter "AGREEMENT"), entered into this 15th day of June, 2010, is made and entered into by and between the State of California, acting by and through the Department of Transportation, hereinafter referred to as "STATE" and the City of San José, a municipal corporation of the State of California, hereinafter referred to as "CITY". Hereinafter, STATE and CITY may be collectively referred to as "PARTIES."

RECITALS:

WHEREAS, on October 8, 2009, Cooperative Agreement No. 4-2264 was executed between STATE and the Santa Clara Valley Transportation Authority, not a party to this AGREEMENT, to construct one additional lane in the southbound direction from south of the Story Road interchange to north of the Capital Expressway interchange, modify the U.S. 101/Tully Road interchange to a partial cloverleaf, and rebuild the existing Tully Road overcrossing (hereinafter "PROJECT"). Exhibit A, Sheet 1 depicts the area of U.S. 101 and Tully Road Interchange within the scope of this AGREEMENT; and

WHEREAS, the PARTIES hereto mutually desire to clarify the division of maintenance responsibility for the PROJECT upon its completion, as defined in Section 27 of the California Streets and Highways Code for the areas depicted in Exhibit A, Sheets 1 to 5.

NOW THEREFORE, THE PARTIES MUTUALLY AGREE AS FOLLOWS:

1. This AGREEMENT shall supersede the existing Freeway Maintenance Agreement for the same PROJECT site between STATE and CITY dated January 7, 1963 and amended on September 20, 1965, and shall become effective:
 - A. No earlier than the date the PROJECT is completed and accepted by STATE in accordance with the construction contract, and
 - B. Following written notification by STATE and determination by CITY that work has been completed in accordance with the plans and specifications. CITY will notify STATE within 5 days of the date of notification of any necessary corrective action to meet the requirements of the plans and specifications. City will accept responsibility and obligations for those improvements upon completion of corrective action by STATE, or pursuant to a mutual agreement of CITY and STATE regarding a schedule of corrective action.

2. CITY agrees to continue their control and maintenance of each of the affected relocated or reconstructed CITY streets and roads as shown on the shaded area on the plan maps attached hereto as Sheets 2 and 3 of Exhibit A, and made a part hereof by this reference.
3. Unless otherwise noted, STATE agrees to continue control and maintenance of those portions of the freeway adopted as a part of US101 Freeway proper as highlighted in the darkened areas shown on Sheet 1 of Exhibit A, with the exception of the areas highlighted in Sheets 2 and 3 of Exhibit A, and made part hereof by this reference.

4. TERM

The term of this AGREEMENT is from the date the PROJECT is completed and accepted as described in Section 1 to end of the useful life of the completed PROJECT.

5. EXHIBIT A

A. Exhibit A, consist of five separate pages that delineate the areas within STATE right of way, which are the responsibility of CITY to maintain in accordance with this AGREEMENT and California Streets and Highway Code Section 27. CITY shall be responsible to maintain all facilities as described in this AGREEMENT located with the shaded are of Exhibit A, Sheets 2 and 3. STATE owns all facility within its right-of-way. CITY will operate and maintain STATE facility within STATE right-of-way in accordance with this AGREEMENT. CITY maintenance obligation under this AGREEMENT shall not include any construction, reconstruction, structural repairs, or capital improvements to any STATE facility as further set forth in California Streets and Highways Code Section 27.

B. When a planned future improvement has been constructed and/or a minor revision has been effected within the limits of the freeway herein described, which will affect the PARTIES' division of maintenance responsibility as described herein, the STATE will provide an updated and revised Exhibit A, which when executed by both PARTIES, pursuant to Section 13 of this AGREEMENT, shall be made a part hereof by this reference and supersede the attached original Exhibit A.

C. In the event jurisdictional boundaries of the PARTIES should change and Exhibit A is amended to reflect those changes, the PARTIES agree to accept their then respective operational and maintenance responsibilities and associated costs.

D. CITY must obtain the necessary Encroachment Permits from STATE'S District 4 Encroachment Permit Office prior to entering areas reserved for freeway use to perform CITY maintenance responsibilities. This permit will be issued at no cost to CITY.

6. VEHICULAR OVERCROSSING

A. STATE will maintain, repair, and replace as necessary, at STATE'S expense, all STATE facility and the entire structure of any vehicular overcrossings below the deck surface except as hereinafter provided.

- B. CITY will maintain, at CITY's expense, the top of the deck surface and shall perform such work as may be necessary to ensure an impervious and/or otherwise suitable surface together with any surface treatment thereon, the lighting installations, as well as all traffic service facilities (traffic signals, controller cabinets, service cabinets, pull boxes, sidewalks, signs, pavement markings, and bridge rails) that may be required for the benefit or control of traffic using that overcrossing. CITY will also provide weed abatement, graffiti removal, and sweeping and litter removal. Areas and facilities to be maintained by CITY pursuant to this Section are depicted in the shaded are of Exhibit A, Sheets 2 and 3.
- C. At such locations as shall be determined by STATE to be appropriate, screening shall be installed and maintained by STATE, at STATE's expense, on freeway overcrossings on which pedestrians are allowed, in order to prevent objects from being dropped or thrown upon vehicles passing underneath.
- D. CITY will maintain, at CITY expense the Tully Road overcrossing roadway approaches including roadway surface, sidewalks, bike lanes, signing, striping, delineation, traffic signals, and lighting, and provide reasonable inspections and timely repair of the features subject to its control within the areas as shaded in Exhibit A, Sheets 2 and 3.

7. SOUNDWALLS AND RETAINING WALLS

STATE will maintain, at STATE's expense, the structural adequacy of the sound walls on both sides of U.S. 101 within the PROJECT limits and the retaining wall at the U.S. 101 northbound off-ramp to Tully Road. City will, at CITY's expense, clean and paint the sound walls and retaining wall to keep CITY's side reasonably free of debris, dirt and graffiti. CITY will not be responsible for the walls' sides facing the freeway.

8. LANDSCAPED AREAS ADJACENT TO OVERCROSSING STRUCTURE

CITY will maintain, at CITY's expense, any plantings or other types of roadside development lying outside of the area reserved for exclusive freeway use, unless otherwise specified, that is located within the shaded area depicted in Exhibit A, Sheets 2 and 3.

9. INTERCHANGE OPERATION

It is the responsibility of the STATE to provide efficient operation of freeway interchanges including ramp connections to local streets and roads. Timing of traffic signals shall be the responsibility of STATE with the exception of site specific locations as agreed to by CITY and STATE. CITY shall operate and maintain the two (2) traffic signals located at the intersections of Tully Road and State Highway Route 101 on and off ramps. The first traffic signal will be on the west side of the overcrossing and will control the south bound ramp movements of State Highway 101, and the second traffic signal on the east side of the overcrossing will control the north bound ramp movements of State Highway 101. For each location, CITY shall install a STATE standard Model 332 foundation and CITY's choice of cabinet and controller. CITY will assume maintenance and operation responsibilities of the traffic signal, cabinet, and controller. CITY will furnish records of proposed subsequent timing changes to the STATE and will wait for STATE approval

before implementation. If in the future and upon thirty (30) days written notice, STATE requires assuming responsibility for maintenance and operation of the traffic signal, cabinet and controller at this site specific intersection, CITY agrees to install STATE standard model 332 cabinets, and STATE will install its standard controller.

The maintenance and energy costs of safety lighting, traffic signals or other necessary electrically operated traffic control devices at ramp connections to CITY streets shall be shared between STATE and CITY on a pro rata basis in the same ratio as the number of legs in the intersection under each jurisdiction bears to the total number of legs.

10. NO THIRD PARTY BENEFICIARY

This AGREEMENT shall not be construed or deemed to be an agreement for the benefit of any third party or parties and no third party or parties shall have any claim or right of action hereunder for any cause whatsoever.

11. INDEMNIFICATION AND HOLD HARMLESS

- A. Neither CITY nor any officer or employee thereof is responsible for any injury, damage or liability occurring by reason of anything done or omitted to be done by STATE, under or in connection with any work, authority or jurisdiction conferred upon STATE arising under this Agreement. It is understood and agreed that STATE shall fully defend, indemnify and save harmless CITY and all of its officers and employees from all claims, suits or actions of every name, kind and description brought forth under, including, but not limited to, tortious, contractual, inverse condemnation and other theories or assertions of liability occurring by reason of anything done or omitted to be done by STATE under this Agreement.
- B. Neither STATE nor any officer or employee thereof is responsible for any injury, damage or liability occurring by reason of anything done or omitted to be done by CITY under or in connection with any work, authority or jurisdiction conferred upon CITY and arising under this Agreement. It is understood and agreed that CITY shall fully defend, indemnify and save harmless STATE and all of its officers and employees from all claims, suits or actions of every name, kind and description brought forth under, including, but not limited to, tortious, contractual, inverse condemnation or other theories or assertions of liability occurring by reason of anything done or omitted to be done by CITY under this Agreement.
- C. With the exception that this Section 11(C) shall not be construed to require indemnification by the City to a greater extent than permitted by law, CITY shall also defend, indemnify and hold harmless STATE, its officers, directors, agents and employees against all claims, losses, or liability ("Claims") to the extent arising out of (i) the specific design of the width of the street lanes for the 101/Tully Road Overcrossing, and (ii) the specific design of the width of the shoulders for the dedicated right turn lanes on the 101/Tully Road Overcrossing eastbound to northbound US 101 loop on-ramp and to southbound Alvin Avenue, as depicted in the shaded areas in Exhibit A, Sheets 4 and 5, to the extent that at the time such claim arises such design widths are inconsistent with then current Caltrans Highway Design

Manual guidelines or other Caltrans design standards. The indemnity obligations in this Section 11(C) is specific only to the design of the width of the street lanes and shoulders for the 101/Tully Road Overcrossing within the areas as shaded in orange shown on Exhibit A, Sheets 4 and 5 of this AGREEMENT, and does not extend to any other improvements or facilities located within the PROJECT, such as the design of the highway, interchange, bridge rails, guard rails, or ramps.

D. The parties obligation to defend, indemnify and hold harmless of the other party, it's officers, directors, agents and employees arising out of Section 11(A), Section 11(B), and Section 11(C) above for personal injury claims includes bodily injury, sickness or disease, emotional injury or death to persons, including but not limited to the public, any employees or agents of the other party and damage to property of anyone, including loss of use thereof.

12. BINDING FUTURE PARTIES

The parties acknowledge that they are aware that both are public entities and, as such, are precluded by the California State Constitution and other laws entering into obligations which financially bind future governing bodies, and that, therefore, nothing in this Agreement shall constitute an obligation of future legislative bodies of either the STATE or the CITY to appropriate funds for the purposes of this Agreement, nor shall STATE's or CITY's failure to appropriate funds be considered a default hereunder.

13. AMENDMENTS

No alteration or violation of the terms of this AGREEMENT shall be valid unless made in writing and signed by the parties hereto. Any amendments must be approved by CITY's City Council.

14. NOTICES

Any notice which is required to be given hereunder, or which either the CITY or STATE may desire to give to the other, shall be in writing and may be personally delivered or mailed by registered or certified United States mail, postage prepared, to the following addresses:

| | |
|-----------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| To CITY: | Kevin O'Connor Deputy Director of Transportation City of San José 1404 Mabury Road San Jose, CA 95133 |
| To STATE: | NADER ESHGHIPOUR Deputy District Director of Maintenance State Department of Transportation District 4 111 Grand Avenue P.O. Box 23660 Oakland, CA 94623-0660 |

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

15. SEVERABILITY CLAUSE

In case any one or more of the provisions contained herein shall, for any reason, be held invalid, illegal, or unenforceable in any respect, it shall not affect the validity of the other provisions which shall remain in full force and effect.

16. CAPTIONS

The captions of the various sections, paragraphs and subparagraphs of this AGREEMENT are for convenience only and shall not be considered nor referred to for resolving questions of interpretation of this AGREEMENT.

17. STATUTES AND GOVERNING LAW

This AGREEMENT shall be governed and construed in accordance with the statutes and laws of the State of California.

18. 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.

19. WAIVER

Waiver of any term, condition or covenant, or breach of any term, condition or covenant by either party shall not be construed as a waiver of any other term, condition or covenant or breach of any other term, condition or covenant.

20. ENTIRE AGREEMENT

This AGREEMENT contains the entire AGREEMENT between CITY and STATE. Any prior agreements, promises, negotiations, or representations not expressly set forth in this AGREEMENT are of no force or effect.

21. COUNTERPARTS

This AGREEMENT may be executed in counterparts and will be binding as executed.

22. OTHER AGREEMENTS

This AGREEMENT shall not prevent either party from entering into similar agreements with others.

23. INSURANCE

CITY shall carry General Liability and Umbrella or Excess Liability Insurance covering all operations and obligations by or on behalf of the CITY with respect to the US 101/Tully Road Interchange providing insurance for bodily injury liability and property damage liability as follows:

The limits of liability shall be at least:

- (a) \$2,000,000 for each occurrence (combined single limit for bodily injury and property damage)
- (b) \$2,000,000 aggregate for products-completed operations
- (c) \$4,000,000 general aggregate
- (d) \$4,000,000 umbrella or excess policy

The umbrella or excess policy shall contain a clause stating that it takes effect (drops down) in the event the primary limits are impaired or exhausted. STATE, including its officers, directors, agents and employees shall be named as additional insureds under the General Liability and Umbrella Policies with respect to liability arising out of, in whole or in part, or in connection with the City of San Jose's maintenance and design obligations as set forth in this AGREEMENT. The policies shall state that the insurance afforded the additional insureds shall apply as primary insurance and that any other insurance or self-insurance maintained by Caltrans will be excess only and shall not be called upon to contribute with this insurance.

Authority to Self-Insure. The requirements of this section may be satisfied by the provision of similar coverage through self-insurance program and such self-insurance shall be certified in writing with an "Affidavit of Insurance" upon request by the other party.

The PARTIES acknowledge and accept the terms and conditions of this AGREEMENT as evidenced by the following signatures of their duly authorized representatives. It is intent of the PARTIES that this AGREEMENT shall become operative on the effective date.

IN WITNESS WHEREOF, the PARTIES hereto have set their hands and seals the day and year first above written.

CITY OF SAN JOSE

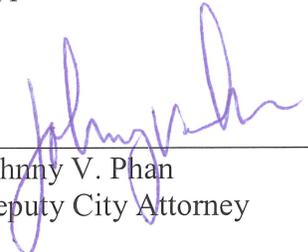
STATE OF CALIFORNIA
DEPARTMENT OF TRANSPORTATION

By: 
Nadine Nader
Assistant to the City Manager

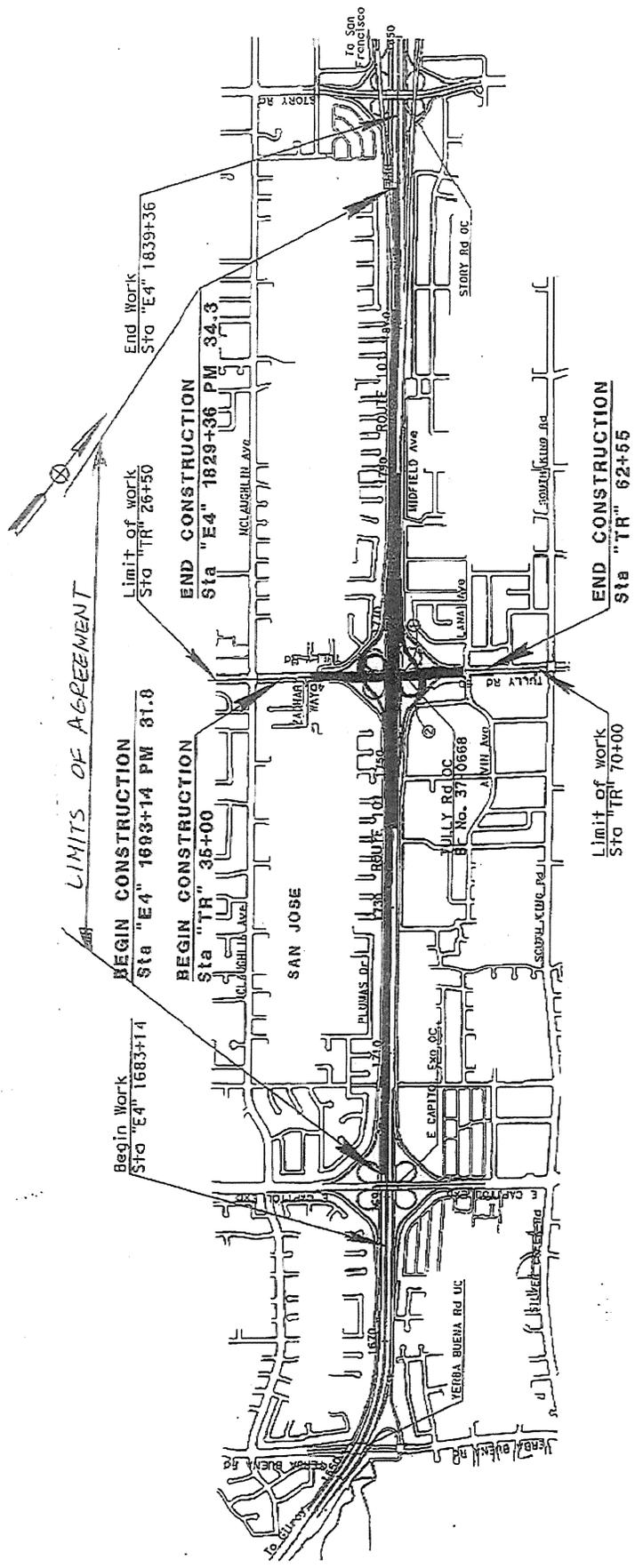
CINDY MCKIM
Acting Director of Transportation

Approved as to form:

By:  4/15/10
NADER ESHGHIPOUR Date
District 4 - Deputy District Director
Maintenance


Johnny V. Phan
Deputy City Attorney

BY 
Legal Attorney
Department of Transportation



NO SCALE

EXHIBIT A (Sheet 1 of 5)
LOCATION MAP

FREeway MAINTENANCE AGREEMENT
WITH THE CITY OF SAN JOSE
04-SCL-101-PM 31.8 - 34.3

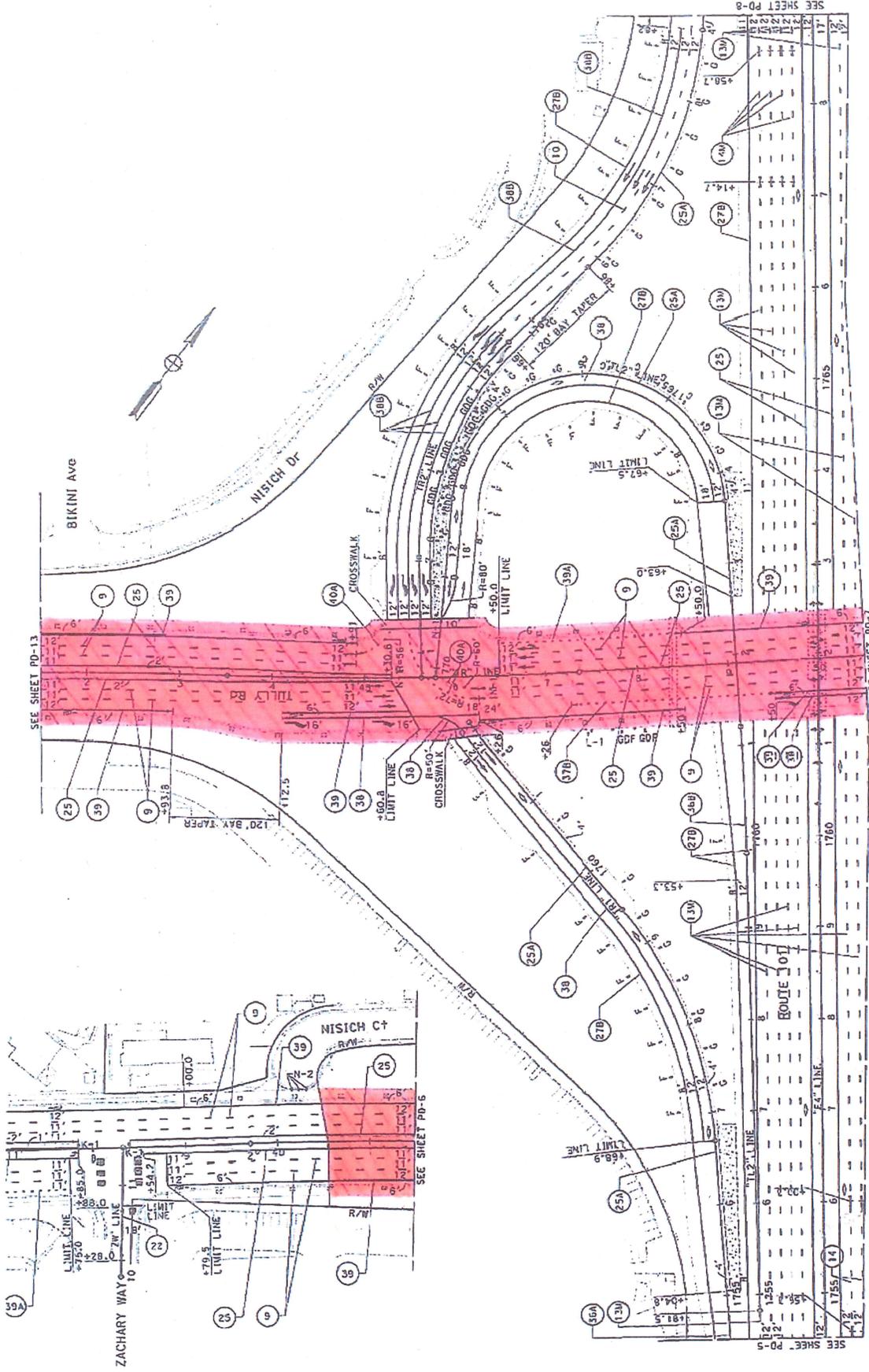
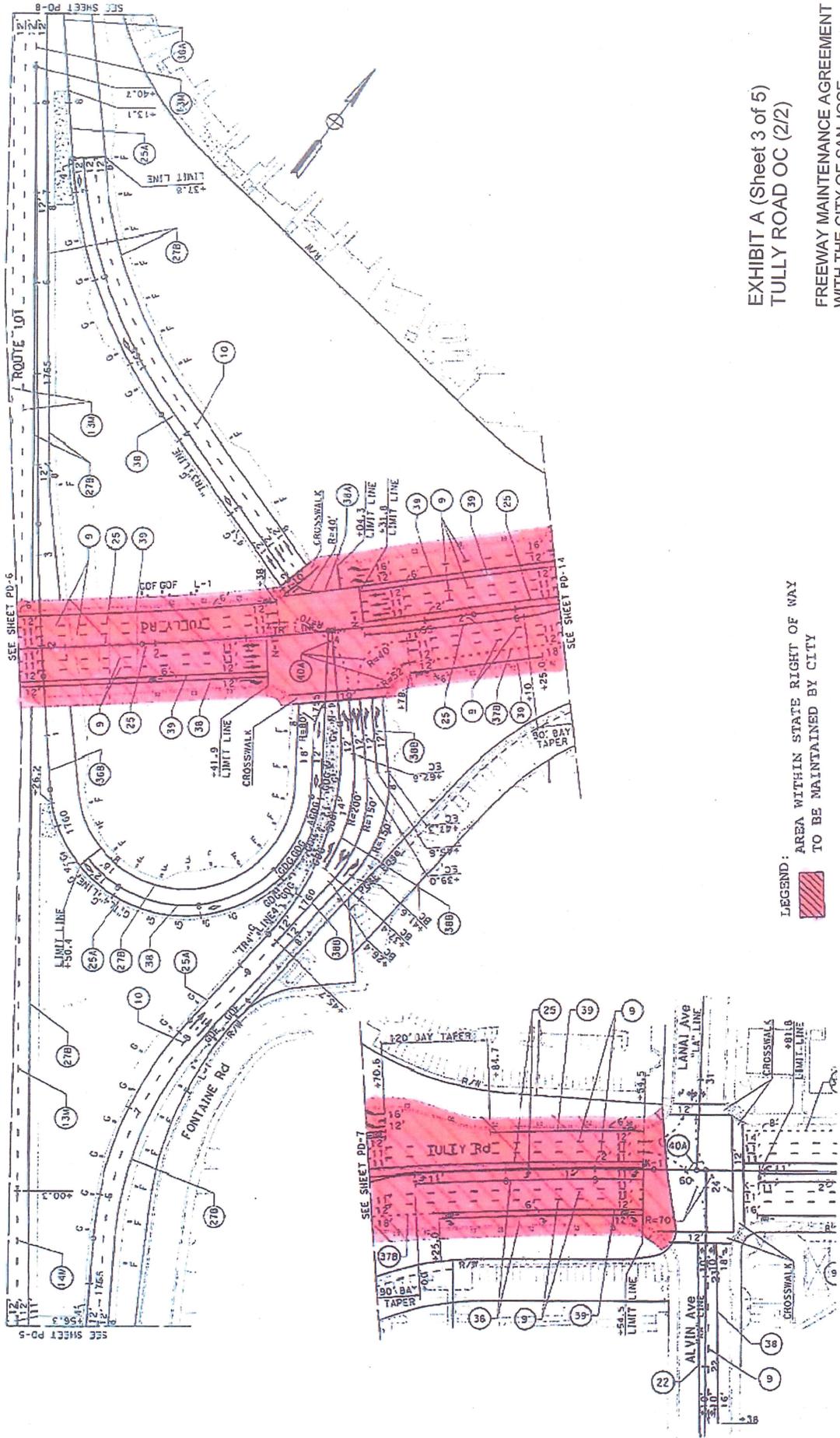


EXHIBIT A (Sheet 2 of 5)
 TULLY ROAD OC (1/2)
 FREEWAY MAINTENANCE AGREEMENT
 WITH THE CITY OF SAN JOSE
 04-SCL-101-PM 31.8 - 34.3

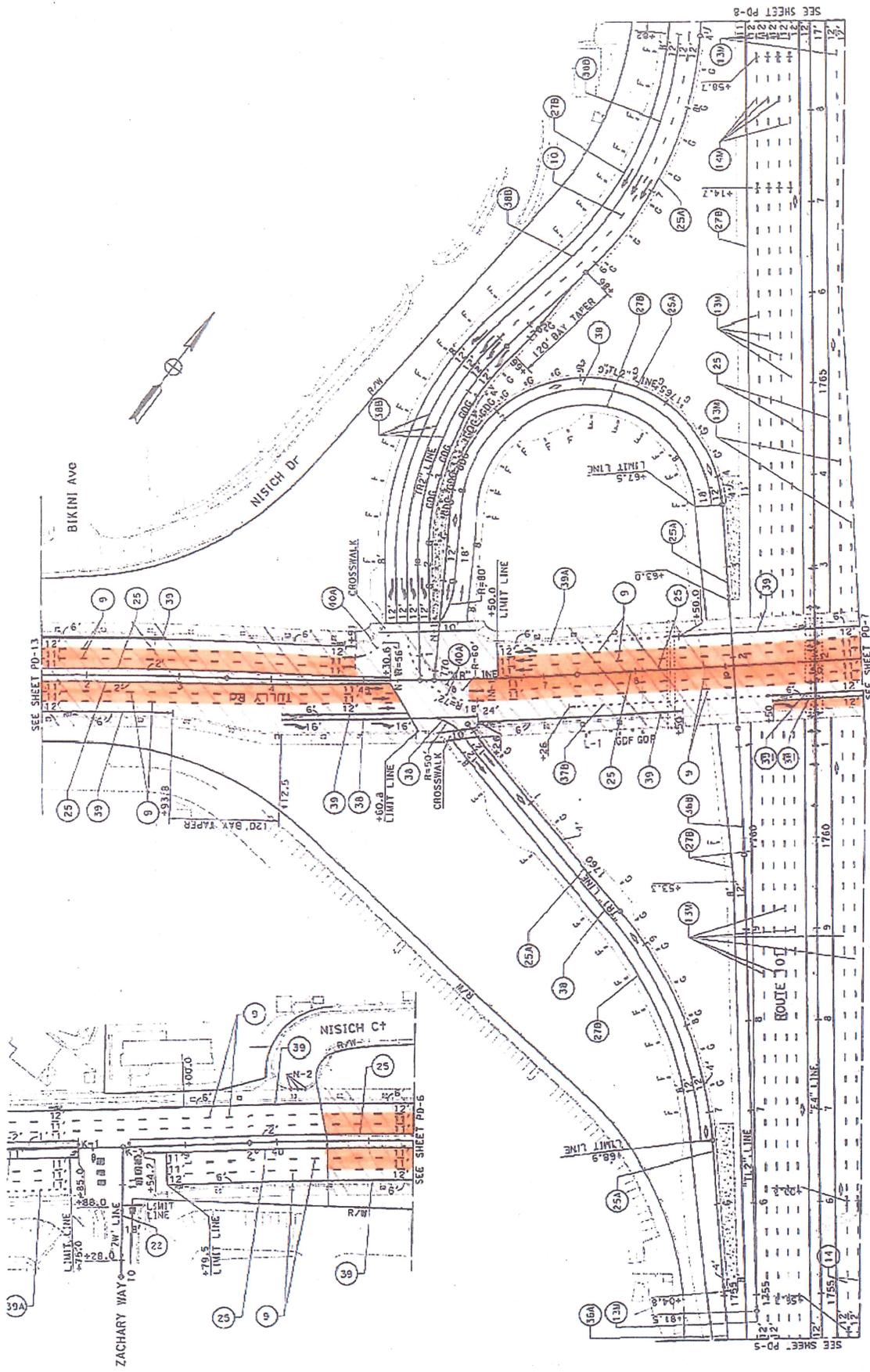
LEGEND:
 AREA WITHIN STATE RIGHT OF WAY
 TO BE MAINTAINED BY CITY



LEGEND:
 AREA WITHIN STATE RIGHT OF WAY
 TO BE MAINTAINED BY CITY

EXHIBIT A (Sheet 3 of 5)
 TULLY ROAD OC (2/2)

FREeway MAINTENANCE AGREEMENT
 WITH THE CITY OF SAN JOSE
 04-SCL-101-PM 31.8 - 34.3

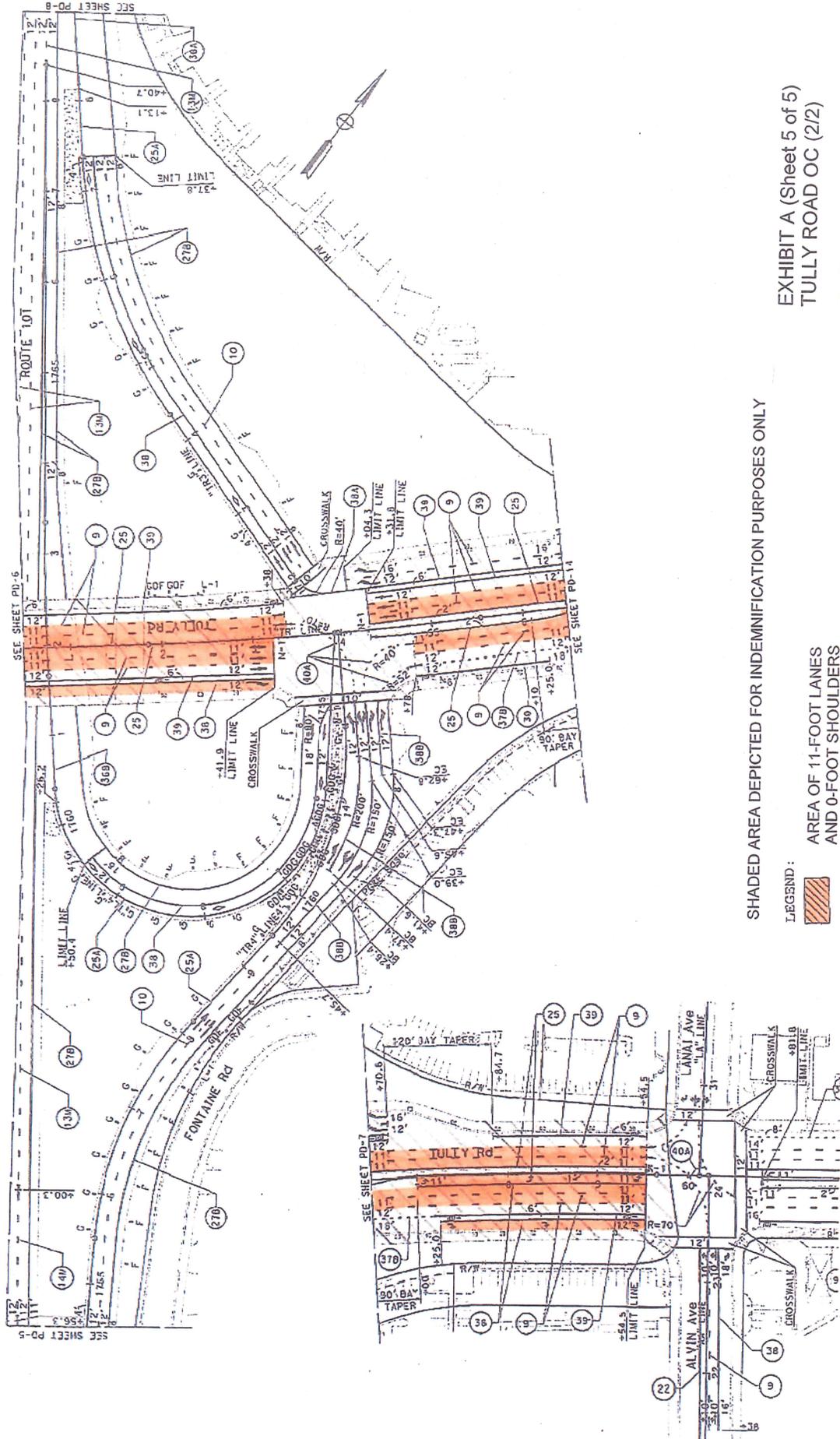


SHADED AREA DEPICTED FOR INDEMNIFICATION PURPOSES ONLY.

LEGEND:
 AREA OF 11-FOOT LANES AND 0-FOOT SHOULDERS

EXHIBIT A (Sheet 4 of 5)
 TULLY ROAD OC (1/2)

FREeway MAINTENANCE AGREEMENT
 WITH THE CITY OF SAN JOSE
 04-SCL-101-PM 31.8 - 34.3



SHADED AREA DEPICTED FOR INDEMNIFICATION PURPOSES ONLY

LEGEND:
 AREA OF 11-FOOT LANES AND 0-FOOT SHOULDERS

EXHIBIT A (Sheet 5 of 5)
 TULLY ROAD OC (2/2)
 FREEWAY MAINTENANCE AGREEMENT
 WITH THE CITY OF SAN JOSE
 04-SCL-101-PM 31.8 - 34.3

RESOLUTION NO. 75372

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AUTHORIZING THE CITY MANAGER TO NEGOTIATE AND EXECUTE A FREEWAY MAINTENANCE AGREEMENT WITH THE CALIFORNIA DEPARTMENT OF TRANSPORTATION FOR STATE HIGHWAY 101 IN THE CITY OF SAN JOSE FROM SOUTH OF STORY ROAD TO NORTH OF CAPITOL EXPRESSWAY INCLUDING THE 101/TULLY ROAD INTERCHANGE

WHEREAS, as part of the Proposition 1B/Corridor Mobility Improvement Account (“CMIA”) program, the Santa Clara Valley Transportation Authority (“VTA”), in conjunction with the City of San José (“City”) and California Department of Transportation (“Caltrans”), has developed a highway and interchange improvement project to relieve severe traffic congestion along State Highway 101 (“Hwy 101”) and at the Tully Road interchange (the “Project”); and

WHEREAS, the freeway maintenance agreement is a standard agreement that establishes the responsibilities between the State and the City for the operation and maintenance of improvements within the State’s right-of-way; and

WHEREAS, the Project is within the state-right-of-way and Caltrans’ *Highway Design Manual* (“HDM”) applies and requires 12-foot lanes and 8-foot shoulders on the Tully Road overcrossing; however, VTA and City design standards provides the flexibility for 11-foot lanes and 0-foot shoulders with wider sidewalks to encourage pedestrian use of the Tully Road overcrossing; and

WHEREAS, VTA designed the Tully Road overcrossing pursuant to VTA and City design standards of 11-foot lanes and 0-foot shoulders; and

WHEREAS, Caltrans will only support advancement of the Project if the City agrees to extend its indemnification of Caltrans to those two design features, 11-foot lanes and 0-foot shoulders, that are not in compliance with Caltrans' HDM; and

WHEREAS, the City desires to negotiate and execute an agreement with the California Department of Transportation for operation and maintenance of State Highway 101 in the City of San José from South of Story Road to North of Capitol Expressway including the 101/Tully Road interchange;

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

The City Manager is hereby authorized to negotiate and execute a freeway maintenance agreement with the California Department of Transportation for State Highway 101 in the City of San José from South of Story Road to North of Capitol Expressway including the 101/ Tully Road interchange.

ADOPTED this 18th day of May, 2010, by the following vote:

AYES: CAMPOS, CHIRCO, CHU, CONSTANT, HERRERA,
KALRA, LICCARDO, NGUYEN, OLIVERIO, PYLE; REED.

NOES: NONE.

ABSENT: NONE.

DISQUALIFIED: NONE.



CHUCK REED
Mayor

ATTEST 

LEE PRICE, MMC
City Clerk

The foregoing instrument is
a correct copy of the original
on file in this office.
Attest:
LEE PRICE
City Clerk
City of San Jose
County of Santa Clara, State of California
By , Deputy
Date _____