

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding (“MOU”) is entered into effective _____, 2018 (the “Effective Date”), by and between the City of Foster City, a municipal corporation (the “City”) and the San Mateo-Foster City School District, a public school district (the “District”). City and District may hereinafter be referred to individually as a “Party” to the MOU, or collectively as “Parties” to the MOU.

RECITALS

WHEREAS, the District is proposing to acquire a new elementary school with a maximum capacity of 600 students (the “Project”) on a 6-acre site located at 1050 Shell Boulevard in the City (the “Property”); and

WHEREAS, the Property is currently owned by Chang Income Property Partnership, LP, a Delaware limited partnership, Charter Square Shopping Center Series (R35) (the “Owner”) and will remain so until the Property is improved with the Project; and

WHEREAS, the District prepared an environmental impact report (“EIR”) for the Project pursuant to the California Environmental Quality Act (“CEQA”); and

WHEREAS, the City raised concerns with the adequacy of the EIR, particularly in connection with its analysis of traffic, air quality, noise, land use, utilities, and related matters; and

WHEREAS, the District responded in its Response to Comments that some of the City’s concerns were pertinent to CEQA and would be addressed in the Final EIR, while others were considered by the District not to be pertinent to CEQA;

WHEREAS, on January 11, 2018, the District Board of Trustees (“Board”) adopted Resolution No. 7/17-18 certifying the EIR and approving the Project; and

WHEREAS, the City contends that the District did not adequately respond to or address its concerns with the Project in connection with its action to certify the EIR and approve the Project (the “Dispute”); and

WHEREAS, the Parties have entered into this MOU in order to resolve the Dispute.

NOW, THEREFORE, for good and valuable consideration, receipt of which is hereby acknowledged, the Parties agree as follows:

TERMS OF THE AGREEMENT

1. **Right of First Refusal.** Prior to entering into a contract with any third party for sale of the Property, the District shall offer the City the right of first refusal to purchase the Property under the same terms as those proposed by the District or offered by a third party, as applicable. The City shall have the statutory period provided under the Naylor Act (Education Code §§ 17485 et seq.) then in effect to accept or reject in writing the terms of any proposed offer to purchase the Property. The rights and obligations set forth in this section shall be subject to the District’s

compliance with the requirements for selling surplus school property as set forth in applicable laws, including the California Education Code. The District shall also re-offer to the City the right of first refusal to purchase the Property prior to modifying or amending the terms of purchase of the Property as previously offered to City, or entering into a new contract with any third party for sale of the Property, in either event at a price that is less than ninety-five (95) percent of the price or on other terms materially more favorable to the purchaser for the Property as offered for sale to the City. The City shall have ninety (90) days to accept or reject in writing the terms of any revised offer to purchase the Property. A memorandum recognizing this right of first refusal shall be recorded concurrent with the District's acquisition of the Property.

2. Traffic Signal (Shell/Beach Park). The Parties agree to share equally in the cost of installing a four-way traffic signal at the intersection of Shell Boulevard/Beach Park Boulevard. To the extent feasible and subject to the District's prompt payment of its share of the cost of the signal, the City shall strive to install the signal prior to Project occupancy. Prior to the award of any contract for the design or construction of the signal, the District shall pay City fifty (50) percent of the contract cost. In addition, the District shall pay City its fifty (50) percent share of any additional costs related to the signal within thirty (30) days from written notice of such costs from the City. Sample specifications of a three-way traffic signal are attached hereto as Exhibit A. The Parties shall undertake commercially reasonable good faith efforts to minimize, to the extent practicable, the cost of the signal.

3. Traffic Monitoring. At ninety-five (95) percent occupancy of the school or five (5) years from its opening, whichever occurs first, and at any time when the school population is increased above the maximum student capacity (600) assumed in the Project EIR, the District shall, as part of a Safe Routes to School Study, perform an analysis that includes: (1) the trip generation associated with the school during representative AM, midday, and PM peak hours, (2) an analysis of whether the length of on-site pick-up and drop-off lanes are adequate to accommodate pick-up and drop-off queues, and (3) whether the traffic signal warrants are met pursuant to the Manual of Uniform Traffic Signal Control at the intersection of Shell Boulevard/Catamaran Street. The District shall submit said traffic report to the City's Community Development Director for his or her review no later than ninety (90) days after meeting one of the above-defined benchmarks.

If the trip counts are higher or the queue lengths are longer than those projected in the EIR, the District shall prepare a Transportation Demand Management ("TDM") Program which identifies discrete measures that the District will implement to reduce trips and/or queue lengths to at or below the trip counts and/or queue lengths projected in the EIR. Measures in the TDM Program may include, but shall not be limited to, staggering start times, initiating a carpool program, and offering staff incentives to take alternative transportation. If the signal warrants are met at the Shell/Catamaran intersection, the Parties shall meet and confer in good faith to identify any additional measures that should be included in the TDM Program to address this issue.

The District shall submit any proposed TDM Program to the City's Community Development Director for his or her review within thirty (30) days from submittal of the traffic report. The District shall implement the measures in any such TDM Program within thirty (30) days from submittal of the TDM Program to the City's Community Development Director.

4. Conditions Imposed on City Permits. The Parties agree that City approval of the following permits is needed in connection with the Project: a demolition permit, a grading permit, and an encroachment permit (collectively referred to herein as the “Permits”). The Parties agree that the following standard conditions shall be imposed on the Permits, as applicable:

a. *Hydrology and Water Quality*

i. A complete storm drainage study of the Project must be submitted showing the amount of runoff, and existing and proposed drainage structure capacities. All needed improvements associated with increased flows attributable to the Project shall be installed by District at its sole cost. No overloading of the existing system will be permitted. A hydrology/hydraulic analysis shall be completed on the existing storm drain system to verify it is adequately sized to handle the run-off from the Project.

ii. If the storm drainage study determines that the City’s storm drain system or storm drain pumping capacity requires expansion or modification as a result of the Project, the District shall pay for all necessary improvement costs required to accommodate the Project. The timing and amount of payment shall be as coordinated with the City.

iii. If damage to the City’s storm drain system adjacent to the Property occurs during project construction, City staff shall have the right to enter and inspect the Property to determine whether the damage is being caused by Project construction activities and direct the District to take measures to remediate and prevent such damage.

b. *Utilities and Services Systems*

i. Prior to placement of any construction trailers and/or initiation of any demolition or construction activities, the developer/contractor shall submit to the City site plans showing proposed haul routes and placement of the construction trailers (site logistics plan) and shall agree to abide by all standard conditions of approval required by the Community Development Director.

ii. Emergency Preparedness and Response Procedures shall be developed by the Project contractor(s) for emergency notification in the event of an accidental spill or other hazardous materials emergency during Project site preparation and development activities. These procedures shall include evacuation procedures, spill containment procedures, required personal protective equipment, as appropriate, in responding to the emergency. The contractor(s) shall submit these procedures to the City prior to demolition or development activities.

iii. Prior to issuance of City permit(s), a pre-construction condition survey to determine the PCI (Pavement Condition Index) of the pavement/roadway adjacent to the Project and along the approved construction haul routes shall be performed by an engineering firm approved by the City Engineer. The survey shall be paid for by the District and shall establish a baseline PCI for the streets affected during construction. Any damages or deterioration to the pavement attributable to the Project shall be repaired by the District to City standards and to the satisfaction of the Public Works Director.

iv. Prior to initiating grading or any construction activities and prior to occupancy of the Project, the existing storm drain pipe lines on the Project site and downstream thereof to the nearest lagoon outlet shall be televised to determine their pre- and post-Project conditions. District shall submit a map illustrating the route to be televised for approval of the City Engineer prior to the survey.

v. The existing storm drain inlets from the Project site shall be cleaned and protected as necessary during the Project.

vi. All sidewalks, curb cuts, curb and gutters, and driveways along the Property's Shell Boulevard and Beach Park Boulevard frontages shall be removed and replaced to meet ADA requirements at District's actual cost. As of the signing of this Agreement, those costs are estimated to be approximately \$260,000.

vii. Site design shall be conducted to drain runoff on-site to storm drain facilities that meet NPDES Regional Permit requirements. Site shall not drain away from the Project.

viii. All existing water and sewer infrastructure on the Property shall be retired and replaced with a new water and sewer infrastructure. Any retired infrastructure shall be capped at the property line and clearly shown as abandoned on the plans.

ix. Prior to issuance of City permit(s), a sewer study shall be prepared to determine whether the City's existing sewer infrastructure is sufficient to handle sewage flows from the proposed Project and any infrastructure the study indicates must be replaced or upgraded as a result of increased flows attributable to the Project shall be replaced or upgraded.

x. To properly evaluate necessary improvements, a complete water system capacity study of the on- and off-site water system which services the proposed Project shall be prepared by a registered civil engineer approved by the City Engineer, and retained by the Project developer prior to approval of a building permit. The study shall include: a map showing the Project location, utility drawings for the Project area (pdf and CAD files), a Project description (type of development, number of units, land use, acreage, etc.), and a system demand analysis (including average daily demand, maximum daily demand, peak hour demand, and fire flow requirements), specific to the proposed development. The study shall include a detailed water pipe hydraulic flow analysis to determine whether the existing water distribution system is properly sized to meet the projected new water demands on the Project site. All needed construction improvements to upsize the existing water distribution system to meet the demands of the new Project shall be constructed by the applicant at the applicant's sole cost.

xi. All City-owned water systems and on-site water mains shall be looped with two points of connection and meet the requirements of the State Department of Health Services, the City Public Works Department, and the City Fire Marshal.

c. *Safety*

i. Prior to commencement of any site work or the introduction of any earth moving equipment or building materials onto the site, the District shall ensure that a temporary six (6) foot tall chain-link fence (no portion of which contains barbed wire) with a dark green vinyl or

canvas interior liner on the exterior of the fence be installed around the area of the intended site work. The gate to the fence shall be locked at all times that the fenced area is left unattended by the owner or resident, the contractor or subcontractors. All construction materials and equipment, including temporary or portable equipment, such as generators, storage containers or facilities, shall be stored within the interior of the fenced area when construction activities are not occurring. If placed anywhere on site, portable toilets shall be placed within the interior of the fenced area at all times.

d. *Noise*

i. Construction activities shall generally be limited to the hours of 8 am to 5 pm on weekdays provided that construction activities on Saturdays between the hours of 9 am and 5 pm may be permitted if deemed necessary by the District and the Project developer to adhere to the Project schedule and residents within 300 feet of the Property boundaries are notified at least 24 hours in advance.

Non-construction activities may take place between the hours of 7 am and 8 am on weekdays and 9 am and 4 pm on Saturdays but shall be limited to quiet activities and shall not include the use of engine-driven machinery except in the case where construction work is deemed necessary as provided above.

No actual construction activities may take place before 8 am on weekdays and before 9 am on Saturdays, except when post-tension slab foundations are being poured and notice is provided to residents within 300 feet of the Property boundaries at least 24 hours in advance. Forklifts shall be allowed to operate onsite between the hours of 5 pm and 6:30 pm on weekdays. No construction activity of any kind shall be allowed on Sundays or Federal holidays.

e. *Restoration of Site*

i. As a condition of approval on the demolition permit, the City shall require: (1) restoration of the Property if construction of the Project has not commenced within one hundred eighty (180) days from issuance of the demolition permit or if construction of the Project is discontinued for a consecutive period of ninety (90) days (either scenario referred to herein as a "Restoration Trigger Event"), (2) District provision of a bond to the City as described below, and (3) District delivery to the City of a right-of-entry or alternative legal instrument from the Owner as also described below. As used herein, "restoration of the Property" shall consist of re-grading the Property to an elevation consistent with surrounding properties; implementing a landscaping and maintenance plan designed to enhance the aesthetic appearance of the Property to consist solely of installation of HydroSeed or similar product or mulch; and implementing a security plan with features designed to safeguard the Property. Any such restoration work or plans shall be approved by, and completed to the satisfaction of, the City's Community Development Director and shall be at the District's sole cost. The District shall provide the City with bonds to guarantee the performance of said restoration work, in an amount determined to be sufficient by the City's Community Development Director. The District shall provide the City a right-of-entry, or alternative legal instrument, from the Owner in form and substance deemed acceptable by the City Attorney so as to allow the City to enter the Property to complete the restoration work if it is not completed within ninety (90) days from the date of a Restoration Trigger Event.

5. Releases. Except for the District's obligations undertaken in this MOU, the City hereby releases and forever discharges the District, its board members, elected and appointed officials, employees, attorneys, insurers, agents, successors, assignees, and representatives from and against any and all claims, actions, suits, losses, rights, damages, costs, fees, expenses, accounts, demands, obligations, liabilities, and causes of action of every character, nature, kind or description whatsoever, known or unknown, foreseen or unforeseen, and suspected or unsuspected, arising out of or relating to the EIR certified by the District Board for the Project on January 11, 2018 and other actions taken by the District Board on January 11, 2018 to approve the Project.

Except for the City's obligations undertaken in this MOU, the District hereby releases and forever discharges the City, its councilmembers, elected and appointed officials, employees, attorneys, insurers, agents, successors, assignees, and representatives from and against any and all claims, actions, suits, losses, rights, damages, costs, fees, expenses, accounts, demands, obligations, liabilities, and causes of action of every character, nature, kind or description whatsoever, known or unknown, foreseen or unforeseen, and suspected or unsuspected, arising out of or relating to the EIR certified by the District Board for the Project on January 11, 2018 and other actions taken by the District Board on January 11, 2018 to approve the Project.

6. Abandonment of Potential Actions and Proceedings. In consideration of the District's promises and agreements made in this MOU, the City agrees not to file or pursue any claims, suits, writs, or any other form of legal action whatsoever against the District to enforce any charge, claim, or cause of action released pursuant to this MOU. In consideration of the City's promises and agreements made in this MOU, the District agrees not to file or pursue any claims, suits, writs, or any other form of legal action whatsoever against the City to enforce any charge, claim, or cause of action released pursuant to this MOU.

7. No Admission. Nothing in this MOU constitutes an admission of any fact, claim, or allegation of liability, fault or responsibility on the part of any Party hereto. The Parties each understand that liability for the events complained of is disputed by the Parties herein released, and that any consideration provided pursuant to this MOU is regarded by the Parties hereto as provided to avoid the expense, inconvenience, and uncertainty of litigation.

8. Full and Final Agreement of the Parties. This MOU constitutes the complete and sole agreement of the Parties hereto, and correctly and fully states the rights, duties, and obligations of each Party as of the Effective Date of the MOU. Any prior agreements, promises, negotiations, or representations between the Parties not expressly stated in the MOU are not binding.

9. No Reliance. The Parties represent and warrant that, in executing and entering into this MOU, they are not relying on and have not relied upon any representation, promise, or statement made by anyone which is not recited, contained, or embodied in this MOU.

10. Construction of this MOU. The language of this MOU shall be construed as a whole according to its fair meaning and not strictly for or against any Party hereto. The Parties acknowledge that this MOU was jointly negotiated and reviewed and approved by them and their respective attorneys of record. The MOU shall not be construed by any court of law or equity against any Party solely by virtue of any Party's or Parties' attorneys having drafted this MOU.

11. Enforcement. In the event of any dispute concerning a Party's performance or non-performance of its obligations under this MOU, the Parties agree to meet and confer in good faith in an attempt to resolve the dispute. If those efforts or any other agreed-upon formal mediation efforts are not successful, the Parties shall have all remedies at law or equity to enforce the MOU, including specific performance. In the event of litigation, the prevailing party in any lawsuit or court proceeding, arbitration, or other dispute resolution process based upon this MOU shall be entitled to recover all its reasonable attorneys' fees and costs incurred in the enforcement or interpretation of this MOU, whether incurred for litigation or otherwise.

12. Governing Law and Venue. This MOU, the resolution of any disputes, and all of the rights and duties of the Parties hereto arising from or relating in any way to the subject matter of this MOU shall be governed, construed, and enforced in accordance with the laws of the State of California, without regard to its conflict of law provisions or the actual state or country of residence of any Party. The Parties to this MOU agree, under advice of counsel, that any dispute or other legal action related to or arising out of this MOU, including any arbitration or legal proceedings, shall be brought in Superior Court of California, San Mateo County, unless the Parties to this MOU mutually agree in writing to another venue. The Parties to this MOU agree to submit to the personal jurisdiction of the Superior Court of California, San Mateo County, for the purpose of litigating all such claims or disputes.

13. No Waiver of Terms or Conditions. Failure to insist on compliance with any term or condition contained in this MOU shall not be deemed a waiver of that term or condition, nor shall any waiver or relinquishment of any right or power contained in this MOU at any one or more times be deemed a waiver or relinquishment of any right or power at any other time or times.

14. Modification and Amendment. This MOU may not be modified or amended in any way, except by mutual written agreement executed by all Parties to this MOU.

15. Further Assurances. Each Party agrees to take such further actions and to execute such further documents, instruments, and agreements as may be reasonably requested by the other Party to further confirm and effect the consummation of the transactions contemplated by this MOU.

16. Representation by Counsel. The Parties respectively acknowledge that they have been represented by counsel of their choice throughout the negotiations that preceded the execution of this MOU and that they have read this MOU, have had the opportunity to review this MOU with counsel and are fully aware of and understand all of its terms and the legal consequences thereof. Each Party further represents and declares that it signs the MOU freely and voluntarily.

17. Authority of Signatories. By their signatures below, each of the persons executing this MOU represents that he or she is empowered and authorized to do so on his, her, or its own principal's behalf and to bind the Party on whose behalf the execution is made. No further consents or approvals are required for City or District.

18. Counterparts. This MOU may be executed in multiple counterparts, which together constitute one valid original document. Facsimile, e-mail, or other electronic signatures of or on behalf of the undersigned Parties will have the same force and effect as original signatures.

19. Section Descriptions. The use of headings in this MOU is only for ease of reference. The headings have no effect and are not to be considered part or terms of this MOU.

20. Severability. The provisions of this MOU are severable, and if any part of it is found to be unenforceable, the other parts and paragraphs shall remain in full force and effect without being impaired or invalidated in any way.

21. Voidability. No duty of performance under this Agreement shall survive the abandonment of the Project by the District prior to demolition or the giving of a written notice by the District to the City that the District intends to abandon the Project, other than the provisions of Paragraph 4.e and Paragraph 5.

DATED: _____, 2018

CITY OF FOSTER CITY

By: _____

Its: _____

DATED: _____, 2018

SAN MATEO-FOSTER CITY SCHOOL
DISTRICT

By: _____

Its: _____

APPROVED AS TO FORM
AND CONTENT:

**AARONSON, DICKERSON, COHN
& LANZONE**

By: _____

Jean Savaree
City Attorney, City of Foster City

**COUNTY OF SAN MATEO, OFFICE
OF THE COUNTY COUNSEL**

By: _____

Tim Fox
District Counsel, San Mateo-Foster
City School District