

MITIGATION AGREEMENT

between the

CALIFORNIA DEPARTMENT OF GENERAL SERVICES

and the

CALIFORNIA DEPARTMENT OF FISH AND GAME

This Mitigation Agreement ("Agreement") is made and entered into by and between the California Department of General Services ("DGS") and the California Department of Fish and Game ("DFG"), collectively "the Parties."

The purpose of this Agreement is to mitigate adverse impacts to the Western burrowing owl (*Speotyto cuniculara*) caused by the development of the Agnews Developmental Center West Campus site ("Agnews West Campus") in Santa Clara, California. Western burrowing owl ("Ow.") is a State designated Species of Special Concern.

**RECITALS**

A. WHEREAS, DGS proposes a General Plan Amendment to provide for the development of a one million square foot research and development campus, as well as approximately 150,000 square feet of commercial space and 2000 units of housing and public amenities, on a 331 acre site northeast of the intersection of Montague Expressway and Lafayette Street within the City of Santa Clara ("project").

B. WHEREAS approximately 158 acres of the site has been identified as burrowing owl habitat;

C. WHEREAS the Parties intend the mitigation measures set forth in this Agreement to offset impacts to Owls and Owl habitat on the site;

D. WHEREAS, DFG is trustee for the fish and wildlife resources of the State of California and has jurisdiction over the conservation and protection of fish, wildlife, and native plants, and the habitat necessary for biologically sustainable populations thereof pursuant to California Fish and Game Code Section 1802;

E. WHEREAS, the eventual development of the entire site will result in permanent impacts to 158 acres of Owl habitat on the project site;

F. WHEREAS the eventual development of the entire site will avoid take of individual Owls consistent with Fish and Game Code Sections 3503, 3503.5, 3513 and 3800;

G. WHEREAS, DFG desires, consistent with the policies of California Fish and Game Code Section 1802, that there is permanent protection for Owls and their habitat to assure the conservation, restoration, and long-term survival of this species; and

H. WHEREAS, DGS agrees to undertake the mitigation measures set forth in this Agreement to offset the adverse impacts to Owls caused by the eventual development of the entire site;

NOW THEREFORE, the Parties agree as follows:

1. At least thirty (30) days before initiating ground disturbing activities, excluding work at the Martinson Day Care site, DGS shall designate a representative responsible for communications with DFG and for overseeing compliance with this Agreement and will notify DFG in writing of that designation.
2. DGS shall notify DFG fourteen (14) days before initiating ground disturbing activities.
3. DGS agrees to fund the acquisition and preservation of 19.5 acres of suitable Owl habitat ("habitat management lands" or "HM lands") and to transfer to DFG either fee title to the HM lands or a conservation easement acceptable to DFG. The amount of HM land required is based on existing conditions of the project site at this time. Currently, three (3) burrowing owls reside on the site. DFG guidelines recommend that 6.5 acres of Owl habitat be set aside for every burrowing owl pair or single Owl impacted by development. DFG and DGS shall work cooperatively to identify and preserve the HM land. The fee title of the HM lands or a conservation easement may be transferred to a non-profit corporation or public entity under terms approved by DFG. DGS agrees to obtain DFG's approval of the HM lands for their biological suitability prior to any transfer.
  - a. The HM lands must have existing Owl habitat throughout the site or must be made suitable for Owls through appropriate management methods. DGS agrees to demonstrate that the HM lands are suitable for Owl mitigation by providing survey information which shows Owl habitat distribution throughout the site. The total acreage of HM lands protected through this Agreement may be larger than the 19.5 acres required, because if there are areas on the HM lands that are not suitable for Owl foraging or nesting, these areas will not count towards the mitigation requirement. Any HM lands protected for the purposes of this Agreement must include areas on-site where Owls can breed successfully. If foraging habitat exists on the HM lands and the only potential nesting burrows are located outside of the HM lands boundary, DFG and DGS

will ensure that breeding habitat is created, through the placement of artificial burrows, on the HM lands. DGS agrees to provide DFG a recent preliminary title report and Level I environmental report for the HM lands. All documents conveying HM lands and all conditions of title are subject to the approval of DFG, DGS and, if applicable, the Fish and Game Commission.

b. DGS agrees to acquire and preserve the HM lands within 24 months of the Parties' execution of this Agreement unless the entitlements for development of the entire site are not obtained within a year from the date of execution of this agreement, in which case DGS will be provided a mutually agreed upon extension. This deadline for the acquisition and preservation of HM lands, including any extension agreed to by the Parties, is hereafter referred to as the "Acquisition Deadline". This requirement will mitigate impacts to Owls caused by grading and development activities on the Agnews West Campus.

c. If DGS fails to complete the acquisition and preservation of the HM lands by the Acquisition Deadline or fails to complete other duties identified in this Agreement within the time periods specified, DFG, at its option, may demand that DGS cure its breach forthwith. If DGS has failed to complete the acquisition and transfer duties detailed in this Agreement within the time periods specified, DFG's remedies include, but are not limited to, drawing upon the security to complete the required acquisition, protection and enhancement of HM lands.

4. Initial protection and enhancement measures on the HM lands, which may include fencing, trash clean-up, Owl breeding habitat creation, and any necessary habitat restoration, may be required. These activities shall be the responsibility of DGS. Alternatively, DGS may fund DFG's initial protection and enhancement activities on the HM lands by providing to DFG a check in the amount of \$10,000. Any unobligated funds shall be returned to DGS upon completion of all items and conditions of this Agreement.

5. DGS agrees to provide DFG with a check in the amount of \$10,000 to establish an endowment for the long-term management of the HM lands. DGS shall transfer these funds to DFG upon DFG's approval of the biological suitability, exceptions and conditions of title, and acquisition by DFG, or DGS, or an agent approved by DFG of HM Lands as provided herein. Such funding shall be used as principal for a permanent capital endowment. Interest from this amount shall be available for operations, management and protection of the HM lands acquired pursuant to this Agreement. Operation, management and protection activities may include reasonable administrative overhead, biological monitoring, improvements to carrying capacity, law enforcement measures, and any other action designed to protect or improve the habitat values of the HM lands. Money received by DFG pursuant to this provision shall be deposited in a special account established pursuant to Government Code Section 16370. DFG may pool the endowment with other endowments for the operation, management and protection of HM lands for local populations of the Owl.

6. DGS agrees to reimburse DFG for reasonable expenses incurred as a result of the approval and implementation of this Agreement, including costs of title and documentation re-

view, expenses incurred from other state agency reviews and overhead. The Parties estimate that this Agreement will create an additional cost to DFG of up to \$3,000.00.

7. DGS may proceed with activities that adversely affect Owls before fully performing its duties and obligations in this Agreement if DGS secures its performance by depositing the sums described below ("Security") prior to modification of Owl habitat on the project site (except for work to the Martinson Day Care Center site) and within 15 business days after the close of escrow with Sun Microsystems. The Security shall designate DFG as beneficiary and shall be in an amount sufficient to fund the performance of DGS' unperformed duty or obligation, as such costs are estimated below. If DGS has not fulfilled its obligations under this agreement by the Acquisition Deadline, DGS shall pay DFG the estimated cost of performing any unperformed obligation as set forth below. In the event that DGS does not pay such a sum to DFG after 10 days' written notice of such an amount being due, DFG may draw on any Security provided pursuant to this Agreement and use such funds to acquire, protect, enhance and manage HM lands. DGS agrees to secure its performance of duties outlined in this Agreement with Security in the amount of \$257,000, including (1) \$10,000 for initial protection and enhancement of the HM lands (2) \$237,000 for the acquisition and preservation of habitat lands (19.5 acres multiplied by \$12,154 per acre), and (3) \$10,000 for the ongoing preservation and management of such habitat lands (19.5 acres multiplied by \$513 per acre).

8. The parties estimate that DGS's costs for the acquisition and transfer of suitable HM lands will be \$237,000 (\$12,154/acre). Notwithstanding the above estimate, in the event that acquisition costs exceed the projected amount, DGS shall provide such additional funding by using its best efforts to obtain an appropriation and authorization to make such payment through the State's normal budget process. Additionally, DFG and DGS may agree to modify this Agreement to provide for alternate effective Owl mitigation measures acceptable to DFG. In the event that acquisition costs are less than estimated, DGS's funding obligations shall be reduced to actual acquisition costs. Upon timely request and upon presentation of documentary evidence of full compliance with the terms and the conditions of this Agreement, DFG shall effectuate a cancellation of the Security.

9. DFG, its designee or successor shall hold title to and protect all HM lands conveyed in fee title under this Agreement solely for the purposes of conservation, protection, restoration, and enhancement of Owls. This covenant shall run with the land and no use of such land shall be permitted by DFG or any subsequent title holder or assignee which is in conflict with the stated conservation purposes of this Agreement. DFG, its designee or successor may allow some wetland creation and/or limited grazing on the HM lands if said uses do not conflict in any way with the conservation goals for Owls.

10. DFG, its designee or successor shall record on each deed a statement that the HM lands described in the deed of record have been conveyed to DFG, its designee or successor for purposes of conservation, protection, restoration and enhancement of Owls. Such statement shall be substantially as provided in Exhibit 1.

11. In the event DGS defaults on any of its material obligations under this Agreement, DFG shall have all rights with respect to any security and all remedies available at law or in equity, including specific performance injunction, and without limitation all rights of a secured party pursuant to the California Uniform Commercial Code.

12. All notices and other communications required or permitted under this Agreement shall be in writing and addressed to the parties at the following addresses, or at substitute addresses subsequently provided to any of the parties:

DGS            Mr. Ron Small, Staff Counsel  
                  Office of Legal Services  
                  Department of General Services  
                  1325 J Street, #1911  
                  Sacramento, CA 95814

DFG            General Counsel  
                  Legal Affairs Division  
                  Department of Fish and Game  
                  1416 Ninth Street, Twelfth Floor  
                  Sacramento, CA 95814  
                  (916) 654-3821

and:          Mr. Carl Wilcox  
                  Region 3  
                  California Department of Fish and Game  
                  P.O. Box 47  
                  Yountville, CA 94599  
                  (707) 944-5525

13. Any sale or assignment of this Agreement or any of the rights or obligations thereunder is void absent the written consent of the Parties; provided, however, that no consent shall be required for assignment or pledge made by DGS (a) to any company that shall succeed by purchase, merger or consolidation to the properties of the DGS; or (b) as security for a debt under the provision of any mortgage, deed of trust, indenture, bank credit agreement, or similar instrument.

14. This Agreement comprises the entire agreement and understanding between the Parties concerning the eventual development of the entire Agnews West Campus. In the event that the City of Santa Clara, or any other public entity with jurisdiction, requires additional mitigation for the loss of Owl habitat than is provided for in this Agreement, then DGS will have the right to cancel this Agreement and DFG shall return any unexpended portion of the Security it is holding, or an amount proportionate to the on-site Owl habitat not yet affected by development, whichever

amount is less. This Agreement supersedes all prior and contemporaneous agreements, representation or understandings, whether oral or written.

15. This Agreement shall be governed by the laws of the State of California. Actual or threatened breach of this Agreement may be prohibited or restrained by a court of competent jurisdiction.

16. This Agreement is solely for the benefit of the People of the State of California, by and through DFG, or its designated representative and DGS.

17. From time to time, the Parties shall by mutual agreement execute such instruments and other documents, and take such other actions, as may be reasonably necessary to carry out the terms of this Agreement. This Agreement cannot be amended or modified in any way except by a written instrument duly executed by the Parties. In any action requiring the agreement or approval of either of the Parties, such agreement or approval shall not be unreasonably denied or withheld.

18. This Agreement shall terminate upon completion of all terms and conditions. In the event this Agreement terminates by law or judicial action prior to the full performance of the management duties and obligations, title to any Security provided by DGS shall inure DFG by operation of law on the date of the termination.

19. It is acknowledged that the purpose of this Agreement is to set forth the obligations and rights of the Parties hereto with respect to the eventual development of the entire Agnews West Campus site and to provide for the conservation of Owl and the mitigation and compensatory measures required in connection with the loss of Owl habitat in the course of otherwise lawful use of lands on the site. Accordingly, no further mitigation or compensation for the conservation of Owl habitat will be required of DGS for impacts within the Agnews West Campus site. However, during the grading and/or construction activities on the site, all precautions will be taken to avoid potential take of burrowing owls. No construction activities will be allowed within 250 feet of any active nest burrow during the nesting season (February to August).

20. This Agreement shall be immediately effective upon execution by the Parties

21. This Agreement includes and incorporates the following:

**EXHIBIT 1, CERTIFICATE OF PUBLIC PURPOSE**

**IN WITNESS WHEREOF, THE PARTIES HERETO HAVE EXECUTED THIS AGREEMENT TO BE IN EFFECT AS OF THE DATE LAST WRITTEN BELOW:**

DEPARTMENT OF GENERAL SERVICES:

By: Eugene C. Spindler Date: 4/2/98  
Mr. Eugene Spindler, Deputy Director, Real Estate Services Division

CALIFORNIA DEPARTMENT OF FISH AND GAME:

By: Brian Hunter Date: 4-6-98  
Mr. Brian Hunter, Regional Manager, Region 3

APPROVED AS TO LEGAL FORM:

Ann S. Malcolm  
Ann S. Malcolm, Acting General Counsel

**EXHIBIT 1**

**CERTIFICATE OF PUBLIC PURPOSE**

This is to certify that the interest in real property conveyed by the deed or grant of the following property

\_\_\_\_\_, dated \_\_\_\_\_, from \_\_\_\_\_, to the California Department of Fish and Game (the "Department"), grantee, a governmental agency (under section 27281 of the Government Code), is hereby accepted by the undersigned officer on behalf of the Department, pursuant to authority conferred upon him by resolution of the \_\_\_\_\_ on \_\_\_\_\_.

The public purpose of this real property conveyance and the recordation hereof is being accomplished pursuant to the terms and conditions of the Mitigation Agreement ("Agreement") entered into on \_\_\_\_\_, by and between the Department of General Services and the Department.

The Agreement, among other terms and conditions not relevant here, provides at paragraph 9:

"DFG, its designee or successor shall hold title to and protect all HM lands conveyed in fee title under this Agreement solely for the purposes of conservation, protection, restoration, and enhancement of Owls. This covenant shall run with the land and no use of such land shall be permitted by DFG or any subsequent title holder or assignee which is in conflict with the stated conservation purposes of this Agreement. DFG, its designee or successor may allow some wetland creation and/or limited grazing on the HM lands if said uses do not conflict in any way with the conservation goals for Owls."

A copy of this Agreement in its entirety may be obtained by interested parties by sending a request to the Director of the Department at the address below.

DEPARTMENT OF FISH AND GAME  
OF THE STATE OF CALIFORNIA  
1416 Ninth Street  
Sacramento, California 95814

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Authorized Representative  
Date: \_\_\_\_\_