

Board of Trustees Agenda Item

Board Meeting Date: November 5, 2012

Title of Item: Memorandum of Agreement between U.S. Department of Veterans Affairs (VA) and the District for Building Demolition at Onizuka Air Force Station. Estimated cost \$0 (cost incurred will be reimbursed by VA).

Background and Analysis:

In the process of subdividing the lands of the Onizuka Air Force Station for the closure and reuse of that base, the Air Force drew parcel boundary lines such that some existing buildings lie on more than one parcel. Building 1001, a single-story structure that will be owned jointly by the District and the U. S. Department of Veterans Affairs (VA) is one of the buildings. Similar building conditions exist at the property line shared with the City of Sunnyvale, so it is anticipated that an agreement similar to the attached will be made with the City of Sunnyvale in the future. Completion of an agreement defining the demolition of the jointly-owned building is a condition of the VA's acceptance of its parcel from the Air Force, so the VA initiated preparation of this agreement.

Both the District and the VA desire to demolish Building 1001. About 90% of the structure lies on the District's parcel and it is not practical to demolish only portions of the building. The District expects to begin demolition work on the site before the VA, so this Memorandum of Agreement provides for the building's complete removal by the District's contractors. The proportionate costs of demolition design, project management, demolition, related consultants, and Measure C overhead will be reimbursed to the District by the VA, at a cost not to exceed \$500,000. The District's estimated cost for the work is \$360,000.

Recommendation: Charles Allen, Executive Director of Facilities, Operations and Construction Management recommends that the Board approve the Memorandum of Agreement with the U.S. Department of Veterans Affairs.

Submitted by:	Charles Allen x6150
Additional contact names:	Art Heinrich x6295
Is backup provided?	Yes

**MEMORANDUM OF AGREEMENT
BETWEEN
U.S. DEPARTMENT OF VETERANS AFFAIRS
AND THE
FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT**

THIS MEMORANDUM OF AGREEMENT (hereinafter referred to as the "Agreement") regarding certain activities to be undertaken at Onizuka Air Force Station ("OAFS") in Sunnyvale, California, is entered into on this ____ day of _____, 2012 ("Effective Date"), by and between **FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT** ("District"), and **THE UNITED STATES OF AMERICA, ACTING BY AND THROUGH THE DEPARTMENT OF VETERANS AFFAIRS** ("VA"). The District and VA are each sometimes referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, as required by Base Realignment and Closure law, the U.S. Air Force ("USAF") is required to deactivate and excess certain properties, including OAFS, and USAF elected to subdivide OAFS into four (4) smaller parcels for conveyance to four (4) entities as depicted in the map attached hereto and incorporated herein as "Exhibit A" ("Map");

WHEREAS, Parcel "B" on the Map represents the land to be transferred to VA by USAF, and Parcel "C" on the Map represents the land to be transferred to the District by USAF;

WHEREAS, VA and USAF have entered into a Sharing Agreement, dated September 22, 2011 ("Sharing Agreement"), as amended, pursuant to which VA is required to provide basic upkeep/maintenance and security services for the entire OAFS until USAF transfers control of each portion thereof, and pursuant to the Sharing Agreement, VA is not required to provide any services to portions of OAFS that have been transferred;

WHEREAS, USAF drew the boundary lines for the parcels to be transferred, in a location such that a portion of Building 1001, as shown on the Map, extends into Parcel B while the majority of Building 1001 lies within Parcel C;

WHEREAS, Building 1002 on the Map is located fully on Parcel B but is connected to Building 1001 by a structure housing a lobby space;

WHEREAS, Building 1034 is also located fully on Parcel B and is connected by a stair/walkway structure that is supported by both Building 1001 and Building 1002 buildings, such stair/walkway structure also providing access to Building 1034's second story;

WHEREAS, VA and the District desire to demolish and remove Building 1001 completely once they have assumed control of their respective parcels, and both parties agree that it is not practicable nor feasible to demolish the portions that lie on their respective parcels independently of one another;

WHEREAS, VA and the District anticipate that VA will receive control of Parcel B before the District receives control of Parcel C, and VA and the District agree that demolition of Building 1001 should occur as soon as possible after the District receives control of Parcel C; and

WHEREAS, VA and the District have negotiated a Term Sheet, the final version of which serves as the basis for this Agreement;

NOW, THEREFORE, in consideration of the foregoing premises and the respective representations, agreements, covenants and conditions herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

AGREEMENTS

ARTICLE 1.

The District hereby agrees to:

A. Contract for and manage, at minimum, the demolition activities described in the scope of work attached to this Agreement as “Exhibit B”

B. Manage and conduct the remediation of any discovered hazards in 1001 (such as asbestos and lead paint), including but not limited to development of hazardous materials surveys and abatement specifications;

1. Should the District discover hazardous materials other than asbestos and/or lead paint, the District shall notify VA before proceeding with its removal or abatement of such materials;

2. If removal of such hazardous materials are likely to cause the cost of the District’s Work to exceed the VA’s Proportionate Share (as defined below), the District shall not proceed with related demolition activities unless the work and additional funding are authorized by VA;

C. Remove 1001 in its entirety and seal the opening in Building 1002 resulting from removal of the lobby that connects Building 1002 to Building 1001;

D. Disconnect utilities on Parcel C that serve all buildings on Parcel B;

E. Once field demolition is complete, erect and maintain a fence that delineates the property boundary between Parcel B and Parcel C;

F. Remove the stair/walkway structure commonly supported by 1001 and Building 1034;

G. During the time the revocable license is in effect, provide security services for the portion of Parcel B that lies within the demolition construction fencing (all of the foregoing, the "District's Work"); and

H. Perform the District's Work in accordance with all applicable laws, codes, ordinances, and permitting requirements, including any and all environmental preservation or abatement or historic preservation requirements.

ARTICLE 2. VA hereby agrees:

A. Should VA not receive control of Parcel C, VA shall attempt to amend the Sharing Agreement or request that USAF issue a permit or other instrument to provide VA the right to engage in the demolition activities contemplated in this Agreement.

B. Once the District receives control of Parcel C, and upon District request, VA will grant to the District and its contractors a revocable license in the form attached to this Agreement as "Exhibit C" that allows the District and its contractors to enter Parcel B to undertake the District's Work.

C. VA shall assign a local representative to act as its agent for acceptance of the District's Work as it is completed and communicate VA's approval of any proposed changes to the District's Work; provided, however, that only a VA Contracting Officer with the proper warrant shall be authorized to make any such acceptance decisions or otherwise legally bind VA.

ARTICLE 3. The District and VA hereby mutually agree:

A. VA shall reimburse the District for VA's Proportionate Share (as defined below) of demolition costs in an amount not to exceed Five Hundred Thousand Dollars (\$500,000), which demolition costs (the "Demolition Costs") shall include but not limited to:

1. Design and management costs: architect and project manager costs, consultants, contractor pre-construction costs, and District Bond Measure C overhead; and

2. Field demolition costs: contractor and subcontractor direct costs, construction services, contractor's overhead, and profit.

The District shall support its estimated Demolition Costs by submitting documentation to VA, including, but not limited to a scope of work and a cost estimate produced by the District's contractor or prospective contractor.

B. VA shall conduct an independent government estimate of the Demolition Costs and confirm them as reasonable. The District shall not finalize any contract for the District's Work that includes VA's share of costs, without first receiving prior written approval from VA that it agrees to the estimate of costs included, therein. The final VA-approved amount shall constitute VA's "Proportionate Share" of the field demolition costs, not to exceed Five Hundred Thousand Dollars (\$500,000).

C. Should the District, at any time during the completion of the District's Work, reasonably anticipate that VA's Proportionate Share (as defined below) of the Demolition Costs will exceed Five Hundred Thousand Dollars (\$500,000), the District shall submit a revised cost estimate and supporting documentation to VA for its review. The District shall not expend any funds described in the revised cost estimate until VA has approved of such increased costs in writing.

D. As the District progresses with the District's Work, it shall submit "invoices" to VA for VA's Proportionate Share of the District's Work that has been completed, with backup documentation evidencing the same. These "invoices" shall certify completion of the work at the following stages of field demolition: 25%, 50%, 75%, and 100%. VA shall submit payments to the District for these "invoices" upon VA's confirmation and certification that the work described is complete. Both parties agree that such payments shall be reimbursements to the District for actual funds expended and shall be subject to and in accordance with applicable Federal law, including but not limited to, the Anti-Deficiency Act (31 U.S.C. Sections 1341 and 1501), and the Prompt Payment Act (31 U.S.C. Sections 3901, et seq.).

E. The District's Work shall be completed within one hundred eighty (180) calendar days of the date on which the District acquires control of Parcel C or of the date the District receives a revocable license from VA to conduct the District's Work, whichever is later, which completion date may be extended at VA's discretion, upon the District's request.

F. Upon notification by the District that the District's Work is complete, VA shall conduct an inspection with District personnel. Within ten (10) days of such inspection, VA shall confirm VA's acceptance of the District's Work, or shall communicate any issues preventing acceptance, in writing. Until the District's Work has been accepted as satisfactory by VA, VA and the District shall cooperate to resolve issues preventing acceptance.

G. To the extent a revocable license exists for the purposes of the District's Work, it shall be mutually terminated once VA accepts the District's Work. Provision of security for Parcel B shall revert to VA upon withdrawal of the revocable license.

ARTICLE 4. District's Representations. The District hereby represents to VA on and as of the Effective Date of this Agreement, the District has full capacity, right, power and authority to execute, deliver and perform this Agreement and all documents to be executed by the District pursuant hereto, and all required action and approvals therefore have been duly taken and obtained. The individuals signing this Agreement and all other documents executed or to be executed pursuant hereto on behalf of the District shall be duly authorized to sign the same on the District's behalf and to bind the District thereto. This Agreement and all documents to be executed pursuant hereto by the District are and shall be binding upon and enforceable against the District in accordance with their respective terms.

ARTICLE 5. VA's Representations. VA hereby represents to the District on and as of the Effective Date of this Agreement, VA has full capacity, right, power and authority to execute, deliver and perform this Agreement and all documents to be executed by VA pursuant hereto, and all required action and approvals therefore have been duly taken and obtained. The individuals signing this Agreement and all other documents executed or to be executed pursuant hereto on behalf of VA shall be duly authorized to sign the same on VA's behalf and to bind VA thereto. This Agreement and all documents to be executed pursuant hereto by VA are and shall be binding upon and enforceable against VA in accordance with their respective terms.

ARTICLE 6. Notices. Notices shall be deemed sufficient under this Agreement and made in writing and submitted to the following addresses (or to any new or substitute address hereinafter specified, in a writing theretofore delivered in accordance with the notice procedure set forth herein by the intended recipient of such notice):

If to District: Charles Allen, Executive Director
Foothill – De Anza Community College District
12345 El Monte Road
Los Altos Hills, CA 94002
650-949-6295

With a copy to: John Shupe
Lynch and Shupe, LLP
700 Airport Blvd. #410
Burlingame, CA 94010

If to VA: U.S. Department of Veterans Affairs
Attn: Director, Real Property Service (003C1E)
810 Vermont Avenue
Washington, DC 20420

With a copy to: U.S. Department of Veterans Affairs
Office of General Counsel (025A)
Attn: Cameron Gore, Esq.

810 Vermont Avenue
Washington, DC 20420
Cameron.Gore@va.gov

With a copy to: U.S. Department of Veterans Affairs
VISN 21
Attn: Larry G. Janes, Capital Asset Manager
201 Walnut Avenue
Mare Island, CA 94592
Larry.Janes@va.gov

With a copy to: U.S. Department of Veterans Affairs
VA Palo Alto Health Care System
Attn: Jason Nietupski, Director of Planning and Development
3801 Miranda Avenue
Palo Alto, CA 94304
Jason.Nietupski@va.gov

ARTICLE 7. Modification; Waivers. This Agreement contains the entire agreement and understanding of the Parties, and may not be amended, modified or discharged nor may any of its terms be waived except by an instrument in writing signed by the Parties. A waiver of a specific provision shall not be deemed a waiver of any subsequent provision. The Parties hereto shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not contained herein.

ARTICLE 8. Interpretation. The headings and captions herein are inserted for convenient reference only and the same shall not limit or construe the paragraphs or sections to which they apply or otherwise affect the interpretation hereof.

(a) The terms “hereby,” “hereof,” “hereto,” “herein,” “hereunder” and any similar terms shall refer to this Agreement, and the term “hereafter” shall mean after, and the term “heretofore” shall mean before, the date of this Agreement.

(b) Words of the masculine, feminine or neuter gender shall mean and include the correlative words of other genders, and words importing the singular number shall mean and include the plural number and vice versa.

(c) Words importing persons shall include firms, associations, partnerships (including limited partnerships), trusts, corporations and other legal entities, including public bodies, as well as natural persons.

(d) The terms “include,” “including” and similar terms shall be construed as if followed by the phrase “without being limited to.”

(e) Whenever under the terms of this Agreement the time for performance of a covenant or condition falls upon a Saturday, Sunday or holiday

observed by the performing party, such time for performance shall be extended to the next business day. Otherwise all references herein to “days” shall mean calendar days.

(f) If any term or provision of this Agreement or the application thereof to any person or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each such term and provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

(g) Time is of the essence for this Agreement.

ARTICLE 9. Further Assurances. The District and VA shall, upon the reasonable request of the other Party, execute, cause to be executed, acknowledged or delivered any and all such further instruments and documents as may be necessary or proper, in order to carry out the intent and purpose of this Agreement.

ARTICLE 10. Miscellaneous.

(a) Counterparts. This Agreement may be executed in multiple counterparts and/or with the signatures of the Parties set forth on different signature sheets and all such counterparts, when taken together, shall be deemed one original.

(b) Disputes. Any provision in this Agreement that purports to assign liability or require expenditure of funds to the Government shall be governed by applicable Federal law, including but not limited to, the provisions of the Contract Disputes Act of 1978, 41 USC 601-613, the Anti-Deficiency Act, 31 USC 1341 and 1501, and the Federal Tort Claims Act, 28 USC 2671, et seq.

(c) The District represents, and it is a condition of this Agreement, that no member of or delegate to Congress, or resident commissioner, shall be admitted to or share any part of this Agreement, or to any benefits that may arise therefrom. This provision shall not be construed to extend to any agreement if made with a corporation for its general benefit.

(d) Governing Law and Parties in Interest. This Agreement shall at all times be subject to and governed by the laws of the United States of America and shall bind and inure to the benefit of the parties hereto and their respective heirs, executors, administrators, successors, and permitted assigns. Provided, that where the law of a State is deemed applicable it shall be the law of California.

(e) Jurisdiction and Venue. This Agreement shall governed by Federal law. Provided, that where the law of a State is deemed applicable it shall be the law of California.

ARTICLE 11. Attachments. This Agreement shall include the following Attachments:

Exhibit A: Map

Exhibit B: Demolition Scope of Work

Exhibit C: Revocable License

ARTICLE 12. Termination and Expiration. This Agreement shall automatically expire upon written notice from VA to the District that the demolition relating to 1001 has been successfully completed, or upon thirty (30) days advance written notice from either party to the other party.

<<Remainder of this page left intentionally blank.>>

IN WITNESS WHEREOF, the Parties, intending to be legally bound, have caused their duly authorized representative to execute and deliver this Agreement as of the date first above written.

FOOTHILL – DE ANZA COMMUNITY COLLEGE DISTRICT

Name:

Title:

State of California

County of _____)

On _____ before _____ me,
_____, (insert name and title of the officer)
personally _____ appeared

_____, 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 _____ (Seal)

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS

Glenn D. Haggstrom
Principal Executive Director
Office of Acquisition, Logistics, and Construction

EXHIBIT A

MAP

Onizuka Building Locations

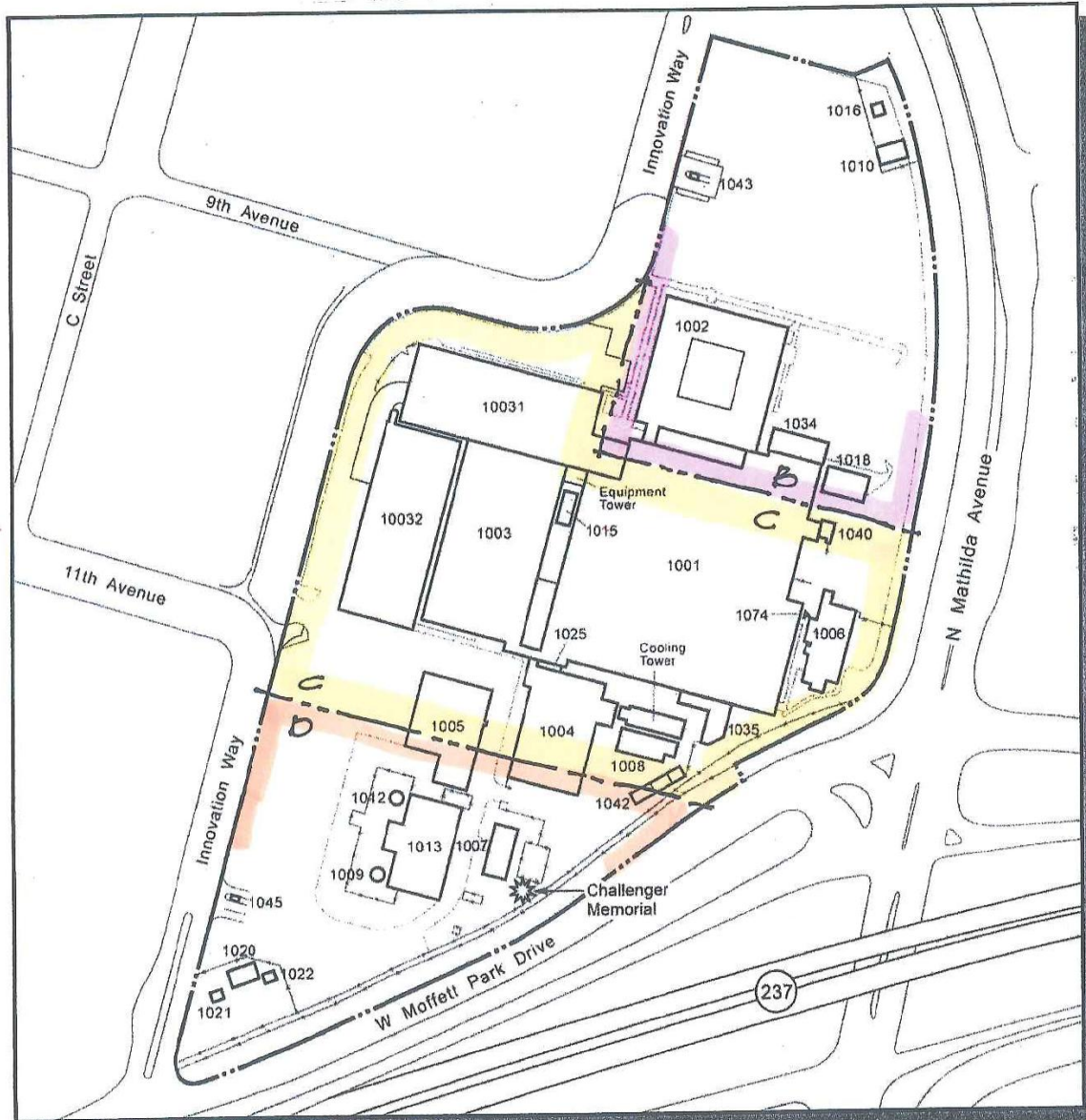


EXHIBIT B

Demolition Scope of Work

The District's field demolition scope of work shall include:

SITE DEMOLITION

- Field Engineering: Establish and protect survey monuments; confirm property line locations; mark utilities to remain/remove/abandon;
- Improvements to remain: all structures and improvements on VA property except those described to be removed in this Scope of Work, including but not limited to: surrounding fences and walls; Innovation Way right-of-way and sidewalk; paving not affected by demolition; buildings/improvements to be repurposed; storm drains; water supplies and hydrants needed during construction when possible;
- Electrical: Terminate power to entire Onizuka AFS site at north vault & install temporary 12kv transformer for construction power; reconnect street lights; remove unused traffic signals; power supply to VA's Parcel B will be terminated by the District's Work and responsibility for providing an alternative power source, if required, shall be VA's;
- Other Utilities: Protect utilities to remain; terminate other active utilities at property line or as indicated; pull back underground electrical as found. Utilities supplying service to buildings on VA's Parcel B will be terminated by the District's Work and responsibility for providing alternative service, if required, shall be VA's;
- Temporary Facilities: Temporary fence and storm drainage control at FHDA property line after field demolition is complete; new vehicle and pedestrian gate for FHDA site; construction signage; field offices for demolition and construction; minimal site lighting; temporary power as needed for construction and temporary facilities;
- Related Work: Produce and maintain accurate as-built documents; separate costs (including change order work) and invoicing for work not on District property; meet with City, VA, utility providers, SamTrans, Juniper Networks and other related entities affected by the work; track recycling and reuse for LEED certification; SWPPP for District's parcel; clear and maintain existing storm drains on District's parcel C.

1001 DEMOLITION

- Selected salvage: Remove artwork, selected interior and exterior construction and protect for future use by District;
- Remove all of 1001 on both VA and District property including lobby structure connecting 1001 to Building 1002 and electrical substation on VA's property;
- Remove overhead utilities connecting 1001 to Building 1002 and terminate at edge of Building 1002 roof;
- Construct a temporary wall at Building 1002 where an opening is created by removal of the lobby as a weather barrier: wood stud construction with painted plywood exterior surface

without openings. The resulting construction may not meet building codes for an occupied building, but it is the understanding of the District that Building 1002 will not be occupied by VA and is slated for demolition;

- Remove steel stair/walkway structure spanning between and supported by 1001 and Building 1034, and cover resulting openings in Building 1034 for weather enclosure. Removal of stair/walkway structure will likely prevent stair access to upper levels of Building 1034;
- Fill foundation voids on VA property with clean uncompacted soil sloped to drain toward VA property.

EXHIBIT C

FORM OF REVOCABLE LICENSE

DEPARTMENT OF VETERANS AFFAIRS ("VA")

REVOCABLE LICENSE TO

FOOTHILL-DE ANZA COMMUNITY COLLEGE DISTRICT ("DISTRICT")

FOR ENTRY ONTO AND USE OF PROPERTY CONTROLLED BY VA, FORMERLY A PORTION OF THE ONIZUKA AIR FORCE STATION ("OAFS"),

SUNNYVALE, CALIFORNIA

VA, hereinafter referred to as the "Grantor" hereby grants to the District, hereinafter referred to as the "Grantee" a revocable license ("License") for Grantee's entry onto and use of the property identified as Parcel B in Exhibit "A" attached hereto and made a part hereof, as set forth in that certain Memorandum of Agreement between VA and the District dated _____, 2012 ("Agreement"), over, across, in and upon such land, hereinafter referred to as the "Premises."

THIS LICENSE is granted subject to the following conditions.

1. This License is hereby granted for a term of up to one (1) year, beginning upon execution by the Grantor, and shall be revocable upon written notice from Grantor to Grantee.
2. All correspondence and notices to be given pursuant to this License shall be addressed, if to the Grantor, to Medical Center Director, Department of Veterans Affairs, VA Palo Alto Health Care System, 3801 Miranda Avenue, Palo Alto, California 94304, and if to the Grantee, Director, Foothill College Bond Funded Projects, Foothill – De Anza Community College District, 12345 El Monte Road, Los Altos Hills, California 94002, or as may from time to time otherwise be directed by the parties. Notice shall be deemed to have been duly given if and when enclosed in a properly sealed envelope or wrapper addressed as aforesaid, and deposited, postage prepaid, in a post office regularly maintained by the United States Postal Service, private courier, or delivery service.
3. The use and occupation of the Premises shall be without cost or expense to the Grantor, and under the general supervision and subject to the approval of the Medical Center Director or her duly authorized representative, and to such rules and regulations as may be prescribed from time to time by the Director. The terms or duration of this License may be modified by VA should the agreed upon services outlined in the Agreement require such modification.

4. The Grantee acknowledges that it has inspected the Premises, knows its condition, and understands that the same is granted without any representations or warranties whatsoever, and without any obligation on the part of the Grantor.

5. Except for the activities permitted under the Agreement, any interference with the use of or damage to property under control of the Grantor, incident to the exercise of the privileges herein granted, shall be promptly corrected to the original state, by the Grantee, to meet the reasonable satisfaction of the Director.

6. Upon the date of expiration of this License or its relinquishment by the Grantee, the Grantee shall vacate the Premises and remove its property therefrom. If, however, this License is revoked, the Grantee shall vacate the Premises and remove its property therefrom within such time as mutually agreed by the parties.

7. During the term of this License, the Grantee shall comply with all applicable Federal, state, county and municipal laws, ordinances and regulations wherein the Premises are located.

8. Except as specifically provided in the Agreement, it is understood that the requirements of this License pertaining to maintenance, repair, protection, and restoration of the premises shall be effective only insofar as they do not conflict with any agreement, pertaining to such matters made between local representatives of the Grantor and Grantee in accordance with existing regulations.

9. This revocable license shall be interpreted and subject to applicable Federal, State, and local law. Where State law is applicable, it shall be the law of California.

IN WITNESS whereof, I have hereunto set my hand this ____ day of _____, 2012.

U.S. DEPARTMENT OF VETERANS AFFAIRS

By: Elizabeth Joyce Freeman
Title: Director, Palo Alto Health Care System (VAPAHCS)

THIS PERMIT is also executed by the Grantee this ____ day of _____, 2012.

FOOTHILL – DE ANZA COMMUNITY COLLEGE DISTRICT

Name:
Title: