

REGULAR

NUMBER: 38.775

TITLE: AN ORDINANCE OF THE CITY MILPITAS APPROVING THE FIRST AMENDMENT TO THE DEVELOPMENT AGREEMENT BETWEEN THE CITY OF MILPITAS AND THE RICHARD T PEERY SEPARATE PROPERTY TRUST AND THE ARRILLAGA FAMILY TRUST dba PEERY/ARRILLAGA ("P&A")

HISTORY: This Ordinance was introduced (first reading) by the City Council at its meeting of October 16, 2007, upon motion by Councilmember Gomez, and was adopted (second reading) by the City Council at its meeting of _____, 2007 upon motion by Councilmember _____. The Ordinance was duly passed and ordered published in accordance with law by the following vote:

AYES:

NOES:

ABSTAIN:

ABSENT:

ATTEST:

APPROVED:

Mary Lavelle, City Clerk

Jose S. Esteves, Mayor

APPROVED AS TO FORM:

Michael J. Ogaz, City Attorney

SECTION 1. RECITALS

WHEREAS, the City and P&A entered into that certain *Development Agreement between the City of Milpitas and The Richard T. Peery Separate Property Trust and the Arrillaga Family Trust*, effective November 18, 1997. The Original Development Agreement relates to certain real property located in the City of Milpitas, County of Santa Clara, State of California (the "Property"); and

WHEREAS, on May 7, 1998, P&A and Cisco entered into that certain Purchase and Sale Agreement and Escrow Instructions (the "Purchase Agreement"), whereby Cisco acquired from P&A fee title to that portion of the Property commonly known as "Site A" and "Site D" as depicted on Exhibit B of the Original Development Agreement. Pursuant to Section 9.6 of the Purchase Agreement, P&A assigned to Cisco, and Cisco assumed from P&A, certain rights and obligations pursuant to the Original Development Agreement with respect to Sites A and D (the "Partial Assignment"). Pursuant to Section 12.1 of the Original Development Agreement, P&A and Cisco notified City of the Partial Assignment in a letter submitted to the City on May 9, 1998.

WHEREAS, on April 19, 2007, and affiliate of P&A and Cisco entered into (i) five leases, all titled "Lease Agreement" (collectively, the "Lease"), whereby Cisco leased from the P&A affiliate that portion of the Property commonly known as "Site B" and (ii) a Right of First Refusal to Lease and/or Purchase and/or Option to Lease the A&P Milpitas Property, whereby Cisco obtained a right of first refusal to lease certain land adjacent to the Property commonly known as the "Future Quantum Site." The Future Quantum Site and Site B are depicted on Exhibit B of the Original Development Agreement.

WHEREAS, Sites A, B and D have been developed in accordance with the Original Development Agreement. P&A has submitted an application to the City to develop the Future Quantum Site. Cisco intends to apply to the City for entitlements to permit densification of development on Site A, and P&A may apply to the City for entitlements to permit densification of development on Site B and/or the Future Quantum Site (the "Proposed Development"). The complexity, magnitude and long-term nature of the Proposed Development would be difficult to undertake if City had not determined, through this First Amendment, to inject a sufficient degree of certainty into the land use regulatory process to justify the substantial financial investment associated with the Proposed Development. As a result of the execution of this First Amendment, parties can be assured that the Proposed Development, if approved by the City, can proceed without disruption caused by a change in City planning and development policies and requirements, which assurance will thereby reduce the actual and perceived risk of planning, financing and proceeding with construction of the Proposed Development; and

WHEREAS, City is desirous of advancing the socioeconomic interests of the City and its residents by promoting productive use of Sites A, B, D and the Future Quantum Site and encouraging quality development and economic growth, thereby enhancing employment opportunities for residents and expanding the City's property tax base; and

WHEREAS, the City Council finds that the amendment to the original Development Agreement is consistent pursuant to Government Code Section 65864 et. seq. and City Council Resolution No. 6642 regarding Development Agreements; and

WHEREAS, the Planning Division completed an environmental assessment of the project in accordance with CEQA and determined that the project is exempt from CEQA per Section 15061 (b)(3) and that filing a Notice of Exemption is warranted; and

WHEREAS, the Planning Commission held a duly noticed public hearing on October 10, 2007 and heard evidence prepared by staff and comments by the public.

ORDAINING CLAUSE:

NOW THEREFORE THE CITY COUNCIL OF THE CITY OF MILPITAS DOES ORDAIN AS FOLLOWS:

1. The first amendment to the development agreement is consistent with the General Plan and Zoning Ordinance at the time the original development agreement was enacted.

2. The first amendment to the development agreement will result in a project which would be significantly superior in terms of its overall effect on the environment and community than would otherwise result without such a development agreement in that the public policy benefits conferred by this First Amendment to the Development Agreement upon City and the general public are substantial, and justify approving this First Amendment to the Development Agreement as a legislative act embodying the current and prospective exercise of City's legislative discretion, in furtherance of the public health, safety and welfare.

3. The first amendment to the development agreement is beneficial to health, safety and general welfare of the community in that the proposal on a whole would produce employment and increase the City's tax base.

4. The first amendment to the development agreement will promote the orderly development of property in the surrounding area in that the applicant would pursue a project that is consistent with the goals, policies and objectives of the General Plan and of the Milpitas Business Park. The project will also ensure that adequate infrastructure is developed to keep pace with the development.

5. The City Council of the City of Milpitas does hereby approve the first amendment to the original Development Agreement between the City of Milpitas and the Richard T Peery separate property trust and the Arrillaga Family Trust dba Peery/Arrillaga ("P&A") attached hereto as Exhibit 1.

SECTION 2. SEVERABILITY

In the event any section or portion of this ordinance shall be determined invalid or unconstitutional, such section or portion shall be deemed severable and all other sections or portions hereof shall remain in full force and effect.

SECTION 3. PUBLICATION AND EFFECTIVE DATE

This Ordinance shall take effect thirty (30) days after adoption, and prior to the expiration of 15 days from the passage thereof shall be published at least once in a newspaper of general circulation, published and circulated in the City of Milpitas, County of Santa Clara, thenceforth and thereafter the same shall be in full force and effect.

**RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:**

City Clerk
City of Milpitas
455 E. Calaveras Boulevard
Milpitas, California 95035

Recorded for the Benefit of
the City of Milpitas
Pursuant to Government Code Section 6103

FOR RECORDER'S USE ONLY

DRAFT

**FIRST AMENDMENT TO THE DEVELOPMENT
AGREEMENT BETWEEN**

THE CITY OF MILPITAS
a municipal corporation

AND

**The Richard T. Peery Separate Property Trust and the Arrillaga
Family Trust, dba PEERY/ARRILLAGA**

FIRST AMENDMENT TO DEVELOPMENT AGREEMENT

This First Amendment to the Development Agreement between the City of Milpitas and The Richard T. Peery Separate Property Trust and the Arrillaga Family Trust ("First Amendment") is entered into as of _____ (the "First Amendment Effective Date"), by and among the CITY of MILPITAS ("City"), a California municipal corporation, and The Richard T. Peery Separate Property Trust, Richard T. Peery, Trustee, and the Arrillaga Family Trust, John Arrillaga, Trustee, dba PEERY/ARRILLAGA ("P&A"), and CISCO SYSTEMS INC., ("Cisco"), a California corporation. P&A and Cisco shall be referred to collectively herein as "Owner".

RECITALS

This First Amendment is entered upon the basis of the following facts, understandings and intentions of the City, P&A and Cisco:

A. City and P&A entered into that certain *Development Agreement between the City of Milpitas and The Richard T. Peery Separate Property Trust and the Arrillaga Family Trust*, effective November 18, 1997 (the "Original Development Agreement") and as recorded on June 4, 1998 as Instrument No. 14218363. The Original Development Agreement relates to certain real property located in the City of Milpitas, County of Santa Clara, State of California (the "Property"). The Property is more particularly described in Exhibit A of the Development Agreement.

B. On May 7, 1998, P&A and Cisco entered into that certain Purchase and Sale Agreement and Escrow Instructions (the "Purchase Agreement"), whereby Cisco acquired from P&A fee title to that portion of the Property commonly known as "Site A" and "Site D" as depicted on Exhibit B of the Original Development Agreement. Pursuant to Section 9.6 of the Purchase Agreement, P&A assigned to Cisco, and Cisco assumed from P&A, certain rights and obligations pursuant to the Original Development Agreement with respect to Sites A and D (the "Partial Assignment"). Pursuant to Section 12.1 of the Original Development Agreement, P&A and Cisco notified City of the Partial Assignment in a letter submitted to the City on May 9, 1998.

C. On April 19, 2007, and affiliate of P&A and Cisco entered into (i) five leases, all titled "Lease Agreement" (collectively, the "Lease"), whereby Cisco leased from the P&A affiliate that portion of the Property commonly known as "Site B" and (ii) a Right of First Refusal to Lease and/or Purchase and/or Option to Lease the A&P Milpitas Property, whereby Cisco obtained a right of first refusal to lease certain land adjacent to the Property commonly known as the "Future Quantum Site." The Future Quantum Site and Site B are depicted on Exhibit B of the Original Development Agreement.

D. Sites A, B and D have been developed in accordance with the Original Development Agreement. P&A has submitted an application to the City to develop the Future Quantum Site. Cisco intends to apply to the City for entitlements to permit densification of development on Site A, and P&A may apply to the City for entitlements to permit densification of

development on Site B and/or the Future Quantum Site (the “Proposed Development”). The complexity, magnitude and long-term nature of the Proposed Development would be difficult for Owner to undertake if City had not determined, through this First Amendment, to inject a sufficient degree of certainty into the land use regulatory process to justify the substantial financial investment associated with the Proposed Development. As a result of the execution of this First Amendment, the parties can be assured that the Proposed Development, if approved by the City, can proceed without disruption caused by a change in City planning and development policies and requirements, which assurance will thereby reduce the actual and perceived risk of planning, financing, and proceeding with construction of the Proposed Development.

E. City is desirous of advancing the socioeconomic interests of the City and its residents by the promoting productive use of Sites A, B, D and the Future Quantum Site and encouraging quality development and economic growth, thereby enhancing employment opportunities for residents and expanding the City’s property tax base.

F. For the forgoing reasons, based upon the facts summarized herein and elsewhere in the record of City deliberation hereon, City hereby finds and determines that the public policy benefits conferred by this First Amendment upon City and the general public are substantial, and justify approving this First Amendment as a legislative act embodying the current and prospective exercise of City’s legislative discretion, in furtherance of the public health safety and welfare.

G. On October 10, 2007, at a duly noticed public hearing, the City Planning Commission recommended approval of this First Amendment pursuant to Resolution No. 508. On October 16, 2007, at a duly noticed public hearing, the City Council found this First Amendment to be consistent with the City’s General Plan, and introduced Ordinance No. 38.775. On November 6, 2007, the City Council adopted Ordinance No. 38.775, approving this First Amendment and authorizing its execution.

H. The Original Development Agreement, as amended by this First Amendment, shall be hereinafter collectively referred to as the “Development Agreement”.

NOW THEREFORE, pursuant to Section 10 of the Development Agreement, and the authority contained in Government Code section 65864 et seq. and City Resolution No. 6642, and in consideration of the mutual covenants and promises of the parties, the parties agree as follows:

AGREEMENT

1. Definitions. All capitalized terms used herein shall have the definitions given in the Original Development Agreement unless otherwise expressly stated herein.

2. First Amendment. The following amendments to the Original Development Agreement shall be effective as of the First Amendment Effective Date:

a. Amended Section 3 (Term). *Section 3 of the Original Development Agreement is hereby deleted in its entirety and replaced with the following:*

3. Term. The term ("Term") of this Agreement shall commence on the Effective Date and shall expire upon the tenth (10th) anniversary of the Effective Date; provided that, with respect to the property commonly known as Site A, Site B and Site D, as described in Exhibit A and as depicted on Exhibit B of the Original Development Agreement, this Agreement shall expire upon the tenth (10th) anniversary of the First Amendment Effective Date. Notwithstanding any other provision in this Agreement, Section 1.9 of this Agreement shall expire upon the tenth (10th) anniversary of the Effective Date.

3. Effect of Amendment. Except as expressly modified by this First Amendment, the Original Development Agreement shall continue in full force and effect according to its terms, and the City, P&A and Cisco hereby ratify and affirm all of their respective rights and obligations under the Original Development Agreement. In the event of any conflict between this First Amendment and the Original Development Agreement, this First Amendment shall govern.

4. Construction. The City, P&A and Cisco have been represented by counsel in the preparation of this First Amendment and no presumption or rule that ambiguity shall be construed against the drafter shall apply to the interpretation or enforcement hereof.

5. Authority. The persons signing below represent that they have the authority to bind their respective party and that all necessary approvals have been obtained.

6. Counterparts. This First Amendment may be executed in one or more counterparts, and all of the counterparts shall constitute but one and the same agreement, notwithstanding that all parties hereto are not signatory to the same or original counterpart.

IN WITNESS WHEREOF, the parties hereto have executed one or more copies of this First Amendment as of the date first set forth above.

ATTESTED:

By: _____
Mary Lavelle, City Clerk

"CITY"

City of Milpitas

A California municipal corporation

APPROVED AS TO FORM:

By: _____
Michael J. Ogaz, City Attorney

By: _____
Thomas C. Williams, City Manager

“CISCO”

Cisco Systems, Inc.

A _____ Corporation.

By: _____

Name: _____

Title: _____

[Signatures continue on following page.]

“P&A”

**The Richard T. Peery Separate Property Trust and
the John Arrillaga Family Trust,
dba PEERY/ARRILLAGA**

By: _____
Name: _____
Title: _____

By: _____
Name: _____
Title: _____

STATE OF _____)
) ss.:
COUNTY OF _____)

On _____ before me, _____,
Notary Public, personally appeared _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the
person(s) whose name(s) is 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.

WITNESS my hand and official seal.

Signature of Notary

(SEAL)

STATE OF _____)
) ss.:
COUNTY OF _____)

On _____ before me, _____,
Notary Public, personally appeared _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the
person(s) whose name(s) is 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.

WITNESS my hand and official seal.

Signature of Notary

(SEAL)

STATE OF _____)
) ss.:
COUNTY OF _____)

On _____ before me, _____,
Notary Public, personally appeared _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the
person(s) whose name(s) is subscribed to the within instrument and acknowledged to me that
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signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s)
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WITNESS my hand and official seal.

Signature of Notary

(SEAL)

STATE OF _____)
) ss.:
COUNTY OF _____)

On _____ before me, _____,
Notary Public, personally appeared _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the
person(s) whose name(s) is 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
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acted, executed the instrument.

WITNESS my hand and official seal.

Signature of Notary

(SEAL)