

RD:EAK
11/25/2018

**FIRST AMENDMENT TO THE
SECOND AMENDED AND RESTATED ARENA MANAGEMENT AGREEMENT**

THIS FIRST AMENDMENT TO THE SECOND AMENDED AND RESTATED ARENA MANAGEMENT AGREEMENT ("First Amendment") is executed as of December 4, 2018 ("Execution Date"), by and between CITY OF SAN JOSE, a municipal corporation ("City"), and SAN JOSE ARENA MANAGEMENT, LLC, a Delaware limited liability company ("Manager").

RECITALS

- A. City and Manager (collectively, the "Parties" and individually, a "Party") are parties to that certain Second Amended and Restated San Jose Arena Management Agreement dated as of August 15, 2018 (the "AMA") for the management and operation of a regional multi-purpose sports and entertainment arena and related facilities ("Arena Facilities") owned by City and located in downtown San Jose, California.
- B. The Arena Facilities include certain On-Site Parking Facilities, including approximately 228 parking spaces situated at 8 S. Montgomery Street across W. Santa Clara Street from the Arena. This property, also known as "Lot D," is used for public parking, with priority for Arena Event-related parking.
- C. City and Google LLC ("Google") are parties to a Purchase and Sale Agreement dated concurrently herewith, for the sale by City to Google of several properties formerly owned by the Successor Agency to the Redevelopment Agency of the City of San Jose, including Lot D.
- D. Effective as of the close of escrow under the Purchase and Sale Agreement, and as a condition to such closing, Manager and Google are entering into a Parking Lease (the "Lot D Lease") as described in Section 18.2.2 of the AMA. Pursuant to the Lot D Lease, Manager will continue to use Lot D for parking until construction work on Lot D (for either BART or another project) is ready to commence.
- E. As a condition of the Lot D Lease, and in order to complete the sale of Lot D to Google, City must provide a minimum of 228 new parking spaces within close proximity to the Arena, in order to replace the parking spaces that will be eliminated for the development of Lot D. Such replacement parking will help ensure the continued vitality of the City-owned Arena, recognizing that the Arena is a major anchor for both downtown San Jose and the Diridon Station Area.
- F. The Parties now wish to enter into this First Amendment in order to set forth the terms and conditions under which City has agreed to provide such public parking.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing Recitals, and in further consideration of the terms, covenants and conditions herein contained, the Parties mutually agree as follows:

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T-2844/1575883
First Amendment to Second Amended and
Restated Arena Management Agreement

SECTION 1. GENERAL EFFECT OF FIRST AMENDMENT.

1.1 Recitals. The foregoing Recitals are hereby restated by reference and incorporated herein as terms and conditions of this First Amendment.

1.2 Closing Date. This First Amendment shall be valid and binding as of the Execution Date set forth above, but the terms and conditions hereof shall not become effective or commence until the date that City conveys Lot D to Google and the Lot D Lease becomes effective (the "Closing Date").

1.3 Defined Terms.

1.3.1 Definitions. In the AMA, as amended by this First Amendment, the following terms shall have the meanings given below:

- (a) "Delmas East" means the parcels designated as APN 259-38-128 and -142, located on the east side of Delmas Avenue in San Jose, California, and depicted on the map attached hereto as Exhibit A. Currently, the use of Delmas East is controlled by Google, and Google has the right to acquire title to Delmas East.
- (b) "Delmas West" means the parcels designated as APN 259-38-036, -039, -040, -041, -042, -109, -110, -145, -146, and -148, located on the west side of Delmas Avenue, and depicted on Exhibit A. Currently, the use of Delmas West is controlled by Google, and Google has the right to acquire title to Delmas West.
- (c) "Delmas West Parking" means all parking spaces located on Delmas West as of the Closing Date. Currently there are approximately 324 parking spaces on Delmas West.
- (d) "Force Majeure Event" shall have the meaning given in Section 37.1 of the AMA. In addition, for purposes of this First Amendment only, the term "Force Majeure Event" shall include any Project Challenge.
- (e) "Lot E" means the parcels designated as APN 259-29-001, -002, -003, -004, -005, -026, -027, -028, -029, and -091, located on the west side of N. Autumn Street in San Jose, California, and depicted on the map attached hereto as Exhibit B. Title to the parcels comprising Lot E is held by a number of parties, including City, Manager, and others. Lot E is the subject of the Settlement Agreement described below.
- (f) "Milligan" means the parcels designated as APN 259-29-032, -033, -071, -072, and -102, and a portion of APN 259-29-101, located on the east side of N. Autumn Street, and depicted on Exhibit B. Title to substantially all of the parcels comprising Milligan is currently held by the City.
- (g) "Project Challenge" means any effort by a third party to hinder, impede, delay, or otherwise challenge City's right to perform its obligations described in Section 3 below, which challenge is exerted through litigation, arbitration or other process of law.

- (g) **"Settlement Agreement"** means the Settlement Agreement and Release made by and between City, Sharks Sports & Entertainment LLC, and two Trammell Crow entities, dated December 1, 2016.

1.3.2 **Other Capitalized Terms.** Capitalized terms used in this First Amendment that are not defined herein shall have the definitions given in the AMA.

SECTION 2. REPLACEMENT PARKING ON DELMAS WEST.

2.1 Additional Approved Location for Replacement Parking.

2.1.1 **Manager's Consent.** Manager agrees that, pursuant to Section 18.2.2(c) of the AMA, Manager will allow Google to locate Replacement Parking on Delmas West, subject to the satisfaction of the condition precedent described in Section 2.2.1 below.

2.1.2 Amendments to Replacement Parking Requirements.

- (a) Manager acknowledges that the parking spaces on Delmas West are currently existing (not new), and therefore the provisions of subsection 18.2.2(c)(iii) of the AMA shall not apply to Replacement Parking on Delmas West.
- (b) Further, Manager agrees that the parking lot improvements currently existing on Delmas West are adequate to satisfy the specific requirements set forth in subsection 18.2.2(c)(ii) of the AMA regarding paving, striping, lighting and other features.

2.2 **Covenant to Keep Delmas West Parking Open.** Currently, Google causes the Delmas West Parking to be operated as a public parking lot, including for Arena Events. As of the Closing Date, there is no legal requirement for Google to keep Delmas West Parking open for public parking.

2.2.1 **Operating Covenant In Lot D Lease.** As a condition precedent to Manager's agreement to allow Google to locate Replacement Parking on Delmas West, the Lot D Lease must include a covenant from Google that Google will keep all of the Delmas West Parking open (not just the 228 Replacement Parking spaces) for public parking, commencing on the Closing Date and continuing until Google obtains a grading permit for its development project on Delmas West; provided, however, that notwithstanding the issuance of any such grading permit, Google will, at a minimum, keep the Delmas West Parking open until the earlier of the following:

- (a) City's completion of its obligation to build-out new parking lots containing at least 408 Available Parking Spaces (180 spaces required under the Settlement Agreement and 228 incremental spaces required under this First Amendment) pursuant to the terms and conditions of Section 3 below; OR
- (b) Provided that the City is otherwise in compliance with its off-site parking obligations under Section 19 of the AMA, when:
 - (i) BART service to the Diridon Station area is operational; OR

- (ii) Google has constructed at least 500 Available Parking Spaces as part of its development project on Delmas East; provided, however, that if the 500 spaces are shared spaces (i.e., not exclusively reserved for Arena customers) they must be designed such that all 500 vehicles can safely exit from the parking structure onto the public streets within a period of 30 minutes.

2.2.2 Amendments to Lot D Lease Requirements.

- (a) With respect to the lease or operating agreement for the Delmas West Parking, the provisions of subsections 18.2.2 (d) and (e) of the AMA shall be superseded by the provisions described in Section 2.2.1 above.
- (b) Except as expressly set forth in this First Amendment, all other provisions of Section 18.2.2 of the AMA relating to the Lot D Lease or Replacement Parking shall remain unchanged and in full force and effect.

SECTION 3. CONSTRUCTION OF NEW PARKING SPACES BY CITY

3.1 Acquisition and Improvement of Surface Parking. City hereby covenants, promises and agrees that it will, at its sole cost and expense, acquire ownership or control over all parcels comprising Lot E and Milligan, and complete construction of surface parking lots on those properties, in accordance with the following provisions:

3.1.1 Best Efforts; Eminent Domain. City will use best efforts to purchase and/or ground lease all parcels within Lot E or Milligan that it does not currently own or control, as soon as is reasonably possible following the Closing Date.

- (a) To the extent it has not already done so, City shall promptly obtain appraisals, make purchase offers, and diligently pursue completion of purchase negotiations with the owners of the applicable parcels. If City is unable to acquire the parcels through such efforts, City staff will promptly seek to obtain the City Council's approval to use the power of eminent domain to complete such acquisitions, and to diligently prosecute such actions to completion.
- (b) Nothing herein shall be construed to mean that City will agree or has agreed to exercise its power of eminent domain, which shall remain in the sole discretion of the City Council and may be exercised only after the City has adopted a Resolution of Necessity and complied with all other legal requirements.

3.1.2 Number of Parking Spaces. Each parking lot will contain the maximum number of parking spaces that can reasonably be constructed on each parcel, which the Parties estimate to be approximately 267 parking spaces on Lot E and approximately 297 parking spaces on Milligan, including accessible parking spaces as required by Applicable Construction Codes. Unless otherwise mutually agreed by the Parties, the parking lot layout for Lot E shall conform to the conceptual plan attached hereto as Exhibit C, and the parking lot layout for Milligan shall conform to the conceptual plan attached hereto as Exhibit D.

- (a) The parking spaces described above include the 180 parking spaces that City agreed to construct pursuant to the Settlement Agreement.

- (b) City will ensure a minimum of 408 new parking spaces will be available, which is the sum of the 180 parking spaces required under the Settlement Agreement, and the 228 parking spaces now located on Lot D.
- 3.1.3 **Level of Improvements.** City shall improve each parking lot with asphalt paving, striping, lighting and other features as mutually approved by City and Manager based on the Applicable Parking Standard, and shall provide access and circulation as reasonably approved by Manager. City shall also include Accessible Parking Spaces and related signage as required by Applicable Construction Codes.
- 3.2 **Time for Performance.** City covenants, promises and agrees that it shall complete the acquisition and improvement of the new parking lots on Lot E and Milligan as described above within no later than 30 months following the Closing Date, subject only to Force Majeure Events that result in delays that City cannot reasonably avoid, as described below.
- 3.2.1 **Schedule of Performance.** Attached to this First Amendment as **Exhibit E** is a Schedule of Performance, which describes the actions that City shall take in order to complete its obligations under this Section 3. City shall take all actions, pay all sums of money (subject to City Council appropriation of funds), and exert all efforts necessary to accomplish each task by the applicable date set forth in the Schedule of Performance.
- (a) City shall keep Manager apprised as to the status of all work to be undertaken by or on behalf of City as described in the Schedule of Performance. At Manager's request, City shall promptly give Manager a progress update advising Manager of the status of all work being undertaken pursuant to this provision.
- (b) If City falls behind (or is projected to fall behind) in meeting the Schedule of Performance deadlines, City shall meet and confer with Manager at Manager's request, to discuss ways that City may be able to make up time through commercially reasonable measures.
- 3.3 **Force Majeure Event.** Consistent with Section 37.2 of the AMA, the deadlines under the Schedule of Performance shall be extended to the extent that any Force Majeure Event causes a delay that City cannot overcome by taking commercially reasonable measures.
- 3.3.1 **Notice of Delay.** City shall notify Manager within ten days of the occurrence of any Force Majeure Event that causes a delay in City's performance. Such notice shall specify the nature of the Force Majeure Event, and the actions that City plans to take, if any, to make up time lost as a result thereof.
- (a) The extension of City's performance obligations shall not exceed the length of any delay caused by the Force Majeure Event, which delay cannot be overcome through commercially reasonable measures.
- (b) Notwithstanding the foregoing, in the case of a Project Challenge (including without limitation under CEQA), City shall not be required to agree to settle the case based on any mitigation measures or other settlement terms that City deems to be extraordinary.
- 3.3.2 **Alternative Locations.** If, as a result of any Project Challenge or inability to remove or relocate historic structure(s), City reasonably determines that it is not feasible to acquire

and/or construct new parking lots on Lot E and Milligan containing at least 408 new parking spaces, City shall notify Manager of the situation and its reasons for such determination.

- (a) The Parties shall meet and confer to discuss whether City could fulfill its obligations under this Section 3 by constructing new parking spaces in one or more alternate locations; provided, however, that any alternate location shall be subject to Manager's approval in its sole discretion unless the alternate location has already been approved by Manager pursuant to Attachment No. 12 to the AMA.
- (b) If Manager agrees with City to an alternate location for the new parking spaces, the applicable provisions of this Section 3 shall apply to the alternate location.

3.3.3 Minimum Off-Site Parking Requirements. Nothing in this First Amendment shall modify City's Minimum Off-Site Parking Requirements under Section 19 of the AMA. However, all parking spaces that constitute Available Parking Spaces within the new parking lots constructed by City shall count toward the Minimum Off-Site Parking Requirements.

3.3.4 Settlement Agreement. Except as expressly provided in this First Amendment, the Settlement Agreement shall remain unmodified and in full force and effect.

3.4 Operation of New Parking Spaces by Manager.

3.4.1 Operating Agreement with Manager. Pursuant to a separate operating agreement, Manager shall operate each of the new parking lots constructed by City as an Off-Site Parking Facility.

- (a) Operating revenues will first be applied to pay for Manager's operating expenses for the parking lot, including a reasonable share of management and overhead. Manager shall submit operating budget to City annually for review and approval, which approval will not be unreasonably withheld. The net revenues from such operation shall be paid to City.

3.4.2 Priority for Arena Parking. Each of the new parking lots will be used exclusively for parking, with priority for Arena Event-related parking.

3.4.3 Termination of Operating Agreement. City may terminate the operating agreement with Manager as to any or all parking spaces constructed by City, or cease use of the same for public parking (with priority for Arena Event-related parking), only upon the occurrence of either of the following, and only so long as the City is then in compliance with the Minimum Off-Site Parking Requirements pursuant to Section 19 of the AMA:

- (a) BART Service to the Diridon Station area is operational; OR
- (b) There are at least 500 new Available Parking Spaces located on Delmas East, provided that if such 500 new spaces are shared spaces (i.e., not exclusively reserved for Arena customers) they must be designed such that all 500 vehicles can safely exit from the parking lot(s) onto the public streets within a period of 30 minutes;

provided, however, that notwithstanding the satisfaction of the above conditions, the development and use of Lot E shall continue to be subject to the Settlement Agreement.

SECTION 4. MISCELLANEOUS PROVISIONS

- 4.1 **Authority.** The persons who have executed this First Amendment represent and warrant that they are duly authorized to execute this First Amendment in their individual or representative capacity.
- 4.2 **Joint Drafting.** This First Amendment is the result of the joint efforts and negotiations of the Parties hereto, and no single Party is the author or drafter hereof. The Parties assume joint responsibility for the form and position of each and all of the contents of this First Amendment and they agree that this First Amendment shall be interpreted as though each of the Parties participated in the composition of this First Amendment and each and every part thereof.
- 4.3 **References to "this Agreement."** All references in the AMA to "this Agreement" shall hereafter mean and refer to the AMA, as amended by this First Amendment.
- 4.4 **Interpretation.** In the event of any conflict or inconsistency between the terms of this First Amendment and the terms of the AMA, the terms of this First Amendment shall control. Except as expressly provided in this First Amendment, the AMA, and each provision thereof, shall remain unmodified and in full force and effect, and constitute a legally valid and binding contract enforceable in accordance with its terms.

[Signatures on following page.]

RD:EAK
11/25/2018


**SIGNATURES TO FIRST AMENDMENT TO
SECOND AMENDED AND RESTATED ARENA MANAGEMENT AGREEMENT**

IN WITNESS WHEREOF, the Parties have entered into this First Amendment as of the day and year inserted on the first page of this Amendment as the "Execution Date."

"City"

APPROVED AS TO FORM:

CITY OF SAN JOSE,
a California municipal corporation


12/17/18

ELIZABETH KLOTZ
Sr. Deputy City Attorney

By 

DAVID SYKES
City Manager

"Manager"

APPROVED AS TO FORM:

SAN JOSE ARENA MANAGEMENT, LLC
a Delaware limited liability company

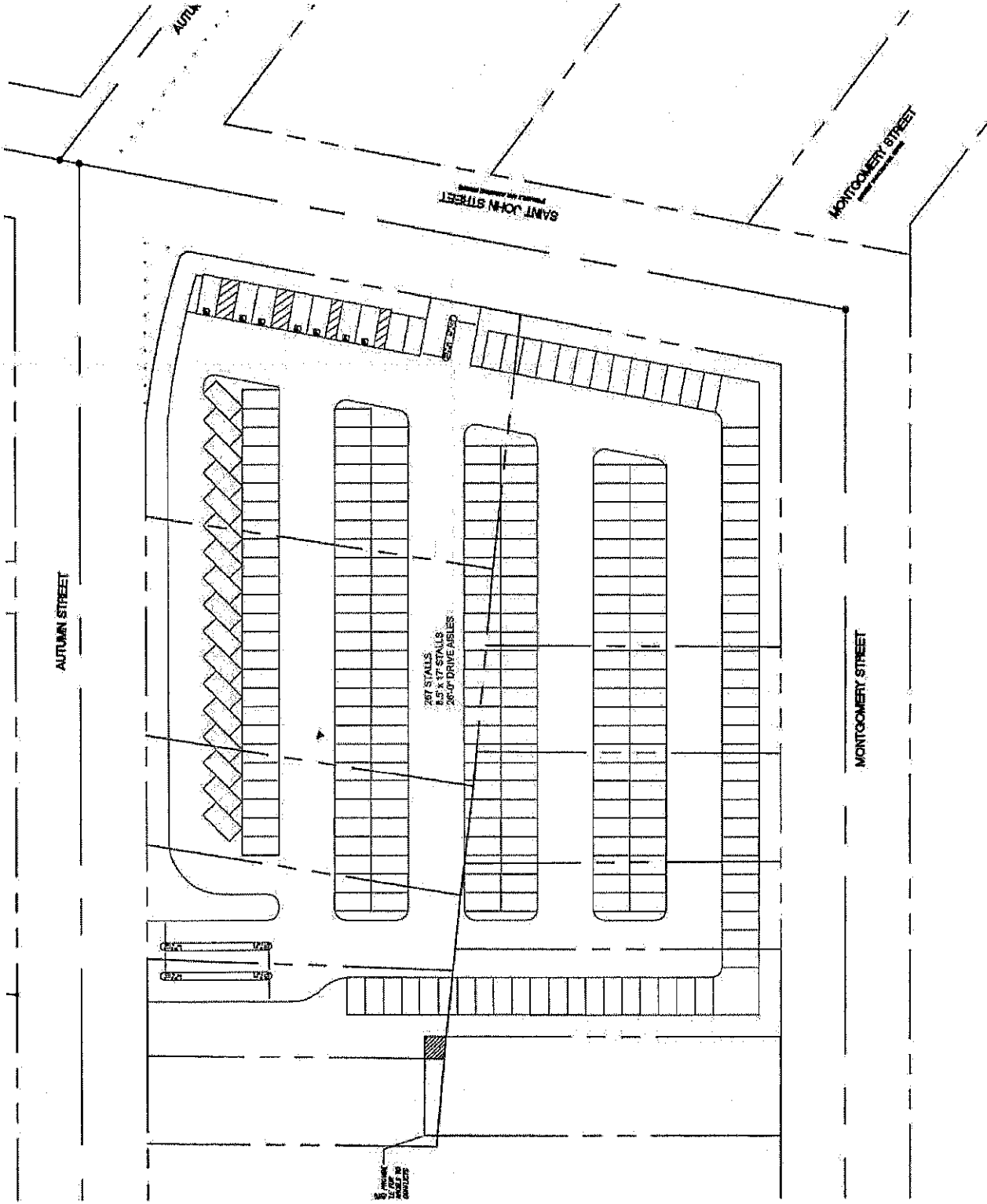


LUCY A. DEFRUMENTO
LMA Law, LLP

By 

JOHN TORTORA
President

Exhibit C to First Amendment



DATE ISSUED: 11.28.18

CLIENT NAME: SAP CENTER

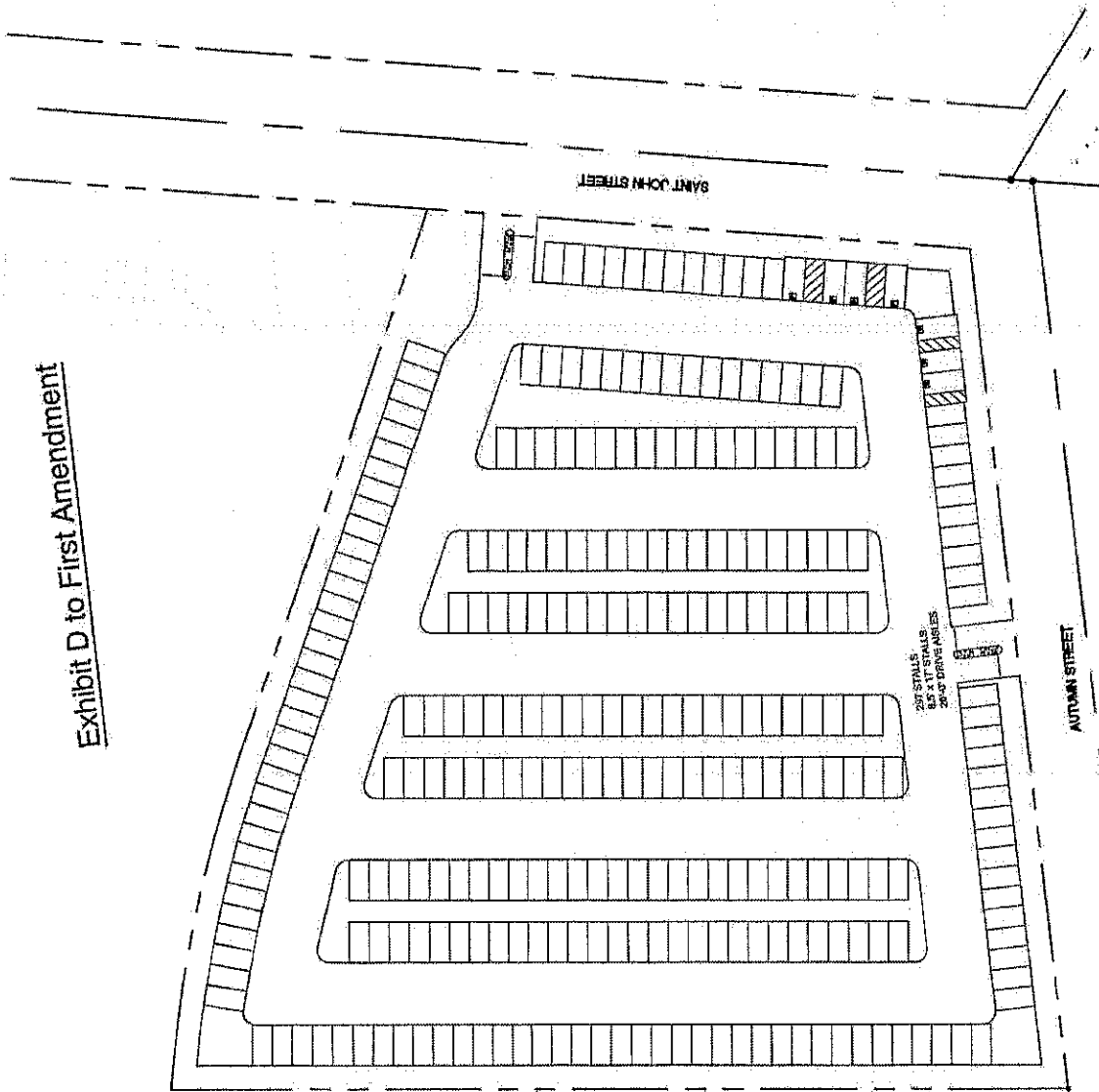
SHEET NAME: SAP LOT E LAYOUT

PROJECT NUMBER: 2005-05098

WATRY DESIGN, INC.
Architects - Engineers - Planning - Foresters



Exhibit D to First Amendment



DATE: 11.28.18

CURT WARE
SAP CENTER

SAP MILLIGAN LOT LAYOUT

PROJECT NAME:

PROJECT NUMBER: 2005-05098

WATRY DESIGN, INC.
Architect • Engineer • Planning • Consultant



Exhibit E

Schedule of Performance

Task	Estimated Time and Commencement/Completion Dates
1. <u>Acquisition or Control of Properties.</u> City shall acquire ownership or control over all parcels comprising Lot E and Milligan.	15 months Commence: December 31, 2018 Complete: March 31, 2020
2. <u>Schematic Design.</u> City shall prepare schematic design documents for improvements to parking lots, and confer with Manager as needed to obtain approval.	2 months Commence: December 31, 2018 Complete: February 28, 2019
3. <u>Construction Documents.</u> City shall prepare plans for demolition and parking lot construction, and confer with Manager as needed to obtain approval.	4 months Commence: February 28, 2019 65% Complete: May 31, 2019 100% Complete: June 30, 2019
4. <u>Environmental Review; Plan Review and Permitting.</u> City shall complete CEQA review, and concurrently complete plan review and permitting (can't go to bid until the CEQA is completed).	10 months following 65% completion of plans (Includes time for scoping, writing and circulation) Commence: May 31, 2019 Complete: March 31, 2020
5. <u>Construction Bid and Award.</u> If required, City shall issue Request for Proposals and Award project.	3 months Commence: March 31, 2020 Complete: June 30, 2020
6. <u>Demolition and Site Preparation.</u> City shall move or demolish existing structures and prep the site for construction.	2 months Commence: June 30, 2020 Complete: August 31, 2020
7. <u>Construction of Parking Lot.</u> City shall construct the parking lots.	6 months Commence: August 31, 2020 Complete: February 28, 2021
8. <u>Contingency Time.</u> Contingency for unknown conditions.	4 months Final Project Complete: June 30, 2021

NOTES:

1. This Schedule of Performance is subject to the provisions of the First Amendment to which it is attached; in the event of any inconsistency, the provisions of the First Amendment shall control.
2. The scheduled tasks will apply independently for Lot E and Milligan; City will complete each task as quickly as reasonably possible on each parking lot independent of the other parking lot.