

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - Diridon/DW- Major Encroachment Agreement Draft
Date: Tuesday, April 6, 2021 2:20:35 PM
Attachments: [Master Encroachment Agreement \(1-21-21\)-c.docx](#)

From: Miller, Gregg <gmler@coblentzlaw.com>
Sent: Thursday, January 21, 2021 8:32 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Subject: Google - Diridon/DW- Major Encroachment Agreement Draft

[External Email]

Johnny: attached is our draft of the Major Encroachment Agreement. Thanks,

Gregg Miller

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**MASTER ENCROACHMENT AGREEMENT
BETWEEN
THE CITY OF SAN JOSE
AND
GOOGLE LLC**

This Master Encroachment Agreement (“Agreement”) is made and entered into by and between the City of San Jose, a municipal corporation of the State of California (“City”) and Google LLC, a Delaware limited liability company and its successors in interest (“Permittee”), as of [_____, ____] (“Effective Date”). City and Permittee are also referred to individually as a “Party” and together as the “Parties.”

RECITALS

WHEREAS, Permittee is the owner of certain real property in the City of San Jose, County of Santa Clara, State of California, (hereafter, the “Real Property”), which is more particularly described in Exhibit A attached hereto and incorporated herein by reference; and

WHEREAS, the Real Property is bounded by or subject to certain public right-of-ways or other public easements owned or controlled by the City that have been expressly or impliedly dedicated to the public (“Public Property”); and

WHEREAS, the City Council has approved the Downtown West Mixed-Use Plan (“Project”), including the Development Agreement by and between the City and Permittee Relative to the Development of Property Located in the Downtown Station Area, approved by Ordinance No. _____ and dated _____ for reference purposes (“Development Agreement”); amendments to the City’s General Plan; Planned Development Rezoning; a General Development Plan; a Planned Development Permit, including adoption of Downtown West Design Standards and Guidelines; and related entitlements from the City (collectively the “Project Approvals”); and

WHEREAS, the Project boundary is identified as that area identified in the Project site map attached hereto as Exhibit B (“Downtown West Project Area”); and

WHEREAS, Permittee has prepared conceptual diagrams and associated figures showing the anticipated locations of encroachments upon Public Property as Exhibit C hereto (“Master Encroachment Diagrams”), which encroachment locations shall be finalized concurrent with phased final map and tract improvement plan processing; and

WHEREAS, the City Council adopted Resolution No. [___] authorizing the execution of this Master Encroachment Agreement and delegating to the Director of Public Works (“Director”) the authority to authorize certain Major Encroachments and Minor Encroachments as those terms are defined under Section 13.37.100 of the San Jose Municipal Code, a true copy of which is attached hereto as Exhibit D and incorporated herein by reference (“Resolution”); and

WHEREAS, Pursuant to the Development Agreement Permittee is obligated to deliver a significant public benefit program in exchange for the vested right to develop the Project subject to the terms of that agreement; and

WHEREAS, the Project as contemplated by the Project Approvals incorporates the use of private infrastructure corridors located partially within public right-of-ways an essential component of district systems to deliver electricity, thermal, sanitary sewer, recycled water or automated waste collection services (hereafter “District Systems”) to Project residents and businesses; and

WHEREAS, the Parties intend, pursuant to the Resolution, that this Master Encroachment Agreement will provide a single uniform process for the issuance of permits for Major Encroachments and Minor Encroachments (“Encroachment Permits”) to Permittee for encroachments upon Public Property described in the Master Encroachment Diagram and avoid the need for multiple encroachment agreements under Title 13 of the City of San Jose Municipal Code;

NOW, THEREFORE, in consideration of the mutual promises and covenants set forth herein, and subject to all of the terms, conditions and restrictions set forth in this Agreement and the Resolution, the City and Permittee, for itself and all successive owners of the Real Property, intending to be bound thereby for the benefit of the Public Property, the Real Property and the Project, do hereby agree as follows:

1. Incorporation of Recitals. The recitals are true and correct and are incorporated herein as if repeated in their entirety.

2. Subject Premises. This Agreement shall apply to the Real Property and such other real property in which Permittee in the future acquires an ownership or leasehold interest within the Downtown West Project Area (together, the “Subject Premises”).

3. Procedures for Issuance of Encroachment Permits.

(a) Pre-Application Procedures. Prior to the submittal of any Application (as defined in Subsection 3(b)), and concurrent with the submittal of preliminary tract improvement plans as otherwise required prior to City’s approval of phased final maps and final tract improvement plans, Permittee shall submit a preliminary draft location map, plan view, and elevation showing the dimensions and location of the proposed encroachment and its relationship to adjoining properties, Public Property, and any structures, utilities or improvements (collectively “Preliminary Application Materials”) to the Director for review and comment. Permittee shall submit Preliminary Application Materials developed at each of the thirty-five percent (35%), sixty-five percent (65%) and ninety-five percent (95%) levels. For each submittal, the Director will review the Preliminary Application Materials for consistency with the Master Encroachment Diagram and the preliminary tract improvement plans under concurrent review by the Director. The Director will provide comments on the Preliminary Application Materials within thirty (30) days of receipt of the thirty-five percent (35%) level Preliminary Application Materials and within twenty-six (26) days of receipt of the sixty-five

(65%) and ninety-five percent (95%) level Preliminary Application Materials, respectively.

(b) Application. Permittee shall submit a letter to the Director to commence the process for issuance of each Encroachment Permit authorized under this Agreement (“Application”). Such Application shall reflect the following information: (i) a brief description of the nature of the proposed encroachment; (ii) consistency with the Master Encroachment Diagram; (iii) confirmation that the encroachment concerns an area that is within an area subject to an approved final map or parcel map or for which there is a pending application for such a map; (iv) consistency with previously-approved or pending tract improvement plans; (v) a location map, plan view, and elevations showing the dimensions and exact location of the proposed encroachment and its relationship to adjoining properties, Public Property and any structures, utilities or other improvements, each at one-hundred percent (100%) design level; (vi) evidence of consent of any public agencies, utilities, and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment; (vii) payment of applicable fees; and (viii) evidence that Permittee will have the ability to construct, maintain and repair the proposed Encroachment.

(c) Director’s Review. The Director shall, in accordance with the Resolution, be solely responsible for reviewing all applications for Encroachment Permits under this Agreement. Within thirty (30) days of receipt of an Application, the Director shall make a determination that the Application contains all information required under Section 3(b) of this Agreement or inform Permittee in writing of such missing information or documentation required to complete the Application. Upon its determination of completeness, the Director shall within thirty (30) days either approve, conditionally approve, or deny such Application. The Director shall approve any Application for an Encroachment Permit that meets all conditions of the “Encroachment Permit Checklist” attached hereto as Exhibit E. The Director shall conditionally approve any Application for an Encroachment Permit where a condition may reasonably be imposed to ensure satisfaction of any provision of the Encroachment Permit Checklist that is not satisfied as of the date of the conditional approval. Encroachment Permits approved and issued upon such Director’s review is final and not appealable to the City Council, except that Permittee shall have the right within thirty (30) days of receipt of any conditional approval to appeal any condition of approval to the City Council.

(d) Denial and Appeals. If the conditions of the Encroachment Permit Checklist are not met, the Director shall deny the Application, in writing, which writing shall include a description of the reasons for which the Application is denied. Permittee shall have the right within thirty (30) days of receipt of such denial to appeal the Director’s decision to the City Council.

(e) Alternative Procedures. The procedures for issuance of Encroachment Permits by the Director provided under this Agreement shall not be interpreted to prevent Permittee, at its election, from pursuing Encroachments Permits under the procedures and subject to the standards set forth at Title 13 of the City of San Jose Municipal Code.

4. Nature of Encroachments.

(a) License. Every Encroachment Permit issued by the Director shall be in the form of a license revocable in accordance with the terms of this Agreement. No Encroachment Permit shall be deemed to have any value in any proceeding greater than Permittee's cost to obtain such Encroachment Permit.

(b) Exclusive Ownership and Use of Permittee's Improvements.

Notwithstanding any other provision of this Agreement, all infrastructure and improvements constructed and maintained pursuant to any Encroachment Permit issued pursuant to this Agreement shall be solely and exclusively the property of Permittee. Such property of Permittee shall include, without limitation, all electric lines, recycled water pipes, sanitary sewer overflow pipes, pneumatic pipes, fiber optic cabling, thermal piping and fixtures, and all other associated conveyances, casings, safety devices, system controls, enclosures, and other structures or improvements identified by Permittee in plans approved by the Director and incorporated under any Encroachment Permit issued pursuant to this Agreement. This Agreement shall not be construed to create any express or implied public dedication of such improvements or any right of the City or any member of the public to the use and enjoyment thereof. The City shall have no authority to grant any third party any right or privilege to use any portion of such improvements without the express written consent of Permittee.

5. Conformance with Agreement. Permittee acknowledges and agrees that the design, construction, maintenance, repair, occupancy, use and/or removal of any Encroachment shall be in conformance with this Agreement and the Project Approvals, as applicable. Each Encroachment Permit issued by the City Engineer shall be deemed to incorporate each condition contained in this Agreement. The City grants Permittee no rights that are not described in this Agreement or in an Encroachment Permit duly issued pursuant hereto.

6. Revocation. The City reserves the right to revoke any Encroachment Permit pursuant to Municipal Code Section 13.37.310 and as further described in this Section 6. Revocation of any Encroachment Permit shall require a majority vote of the City Council following notice and a public hearing. Revocation shall be effective one-hundred eighty (180) days after the City provides written notice of the City Council's determination, provided, however, that the City Council may authorize an extension of the effective date of the revocation in its discretion. An Encroachment Permit may be revoked if any of the events occur as described in Subsections (a) - (d) of this Section 6, provided that the City implements all required procedures prior to the City Council's determination to revoke the subject Encroachment Permit.

(a) Revocation to Facilitate Alternative Public Use. An Encroachment Permit may be revoked if the City determines to use the Public Property for a Public Purpose, or, if it determines that the Encroachment conflicts with a current or prospective Public Use. For purposes of this Agreement, the terms "Public Purpose" and "Public Use" shall refer to subgrade transit projects with any such project's proponent being the City, a regional governmental entity, the state, or a federal agency (each a "Project Proponent"), and a project promoted by a Project Proponent for a Public Purpose or Public Use within the Public Property shall be referred to as a

“Public Project.” A Public Project shall be deemed to conflict with an Encroachment if the City determines, based on substantial evidence, that the Public Project cannot be constructed or operated with the Encroachment in place, including after potential modification to, or rerouting of, the Encroachment within the affected right-of-way segment. For any Public Project where the City is a Project Proponent or otherwise has a role in approving the Public Project, the City will meet and confer with Permittee as reasonably necessary to evaluate alternative routing for the subject Encroachment, and, if the Encroachment concerns District Systems, to evaluate requirements for both interim and alternative permanent service so as to ensure continuity of services provided by the District Systems to residents and businesses both during and after the removal of the Encroachment. The City shall use best efforts to ensure that any alternative routing of District Systems and the delivery of associated services is evaluated in any relevant environmental analyses prepared for the Public Project. If any Encroachment Permit is revoked due to a conflict under this Subsection 6(a), the City will, subject to compliance the California Environmental Quality Act (Cal. Pub. Resources Code Section 21000 et seq.), issue an Encroachment Permit pursuant to the procedures described in Title 13.37.310, and which will be subject to the terms of this Agreement, as necessary to facilitate any rerouted District Systems.

(b) Public Nuisance. The City may revoke an Encroachment Permit if the Encroachment is deemed to be a public nuisance. For purposes of this Agreement, the term “public nuisance” shall mean the maintenance or use of property in a manner that jeopardizes or endangers the health, safety or welfare of persons on the premises or in the surrounding area.

(c) Encroachment Deemed Unlawful. The City may revoke an Encroachment Permit if the Encroachment is declared unlawful by a court of competent jurisdiction.

(d) Permittee in Default. The City may revoke an Encroachment Permit if Permittee has been issued a Notice of Default and has not timely commenced its right cure to such alleged Default under Section 8 of this Agreement.

7. Removal and Restoration. After revocation of an Encroachment Permit becomes effective, Permittee shall remove the Encroachment and restore the Subject Premises to a physical condition substantially the same as existed prior to construction of the Encroachment; provided, however, that Permittee shall have the option to abandon any improvements in place without any obligation to restore Public Property when the grounds for revocation arise under Subsection 6(a). Where required under this Section 7, no later than one-hundred eighty (180) days of the effective date of the revocation and prior to commencing any removal or restoration work, Permittee shall submit to the City plans for the removal and restoration work, which shall be subject to the City's approval. Permittee shall commence removal and restoration within thirty (30) days after the City's approval of such plans and shall complete removal and restoration within one hundred eighty (180) days after the City's approval of the plans, or such longer period of time for commencement or completion as reasonably determined by the City.

8. Default. Permittee shall be in default under an Encroachment Permit if it breaches or fails to timely observe and perform any obligation under such Encroachment Permit, including Permittee's obligations arising under this Agreement that are incorporated into such Encroachment Permit, and fails to timely cure such breach or failure in accordance with this Agreement (“Default”). For the avoidance of doubt, Default by Permittee under any

Encroachment Permit issued pursuant hereto shall not thereby be considered to be a Default of this Agreement or any other Encroachment Permit. The Director shall notify Permittee in writing of the nature of any breach or failure to perform ("Notice of Default"). Permittee shall have thirty (30) days from receipt of the Notice of Default to notify the Director in writing of any objections to the Director's finding of a breach ("Notice of Objection"). The Director and Permittee shall meet and confer within thirty (30) days of receipt of such Notice of Objection by the Director to attempt in good faith to resolve whether a breach of this Agreement has occurred. If no resolution is reached, or if no Notice of Objection is timely delivered, Permittee shall, within ninety (90) days thereafter, (i) commence, (ii) diligently proceed using commercially reasonable efforts and (iii) carry out to completion, all actions necessary to correct the breach or failure to perform and prevent its recurrence. If the Director determines, in his/her reasonable discretion, in writing that such breach or failure to perform is incapable of cure within ninety (90) days, the Director shall specify in writing the number of days in which Permittee shall complete its cure, and Permittee shall continue to diligently proceed to cure using commercially reasonable efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. So long as Permittee has commenced and is using commercially reasonable efforts to carry out to completion all actions necessary to correct the breach or failure to perform, the City shall have no right to revoke the Encroachment Permit under Section 6 or exercise self-cure remedies under Section 10 of this Agreement. Prior to determining that Permittee is in Default, the Director shall make himself/herself or a designee available to meet and confer with Permittee to resolve the issues identified in the Notice of Default and any failure to cure within the applicable cure period. If Permittee does not cure the Default or fails to perform to the City's reasonable satisfaction, the Director may (i) remedy the Default or (ii) recommend the initiation of revocation procedures as described in Section 6 to the City Council as applied to the Encroachment Permit at issue. Permittee shall be responsible to reimburse the City for costs actually and reasonably incurred to remedy the Default within sixty (60) days of the City's invoice therefore. In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled to specific performance of Permittee's obligations under this Agreement and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.

9. Maintenance and Repair of Encroachments. Permittee shall maintain and repair each Encroachment in accordance with this Agreement so that it is in a safe condition and good working order for the intended purpose and such that the Encroachment remains in a similar condition to that which was originally constructed, except where a higher standard is required by applicable law. All replacements, restorations, and repairs of such Encroachments shall be at least equal in quality to the original within the reasonable judgment of the Director, except that such replacements, restorations, and repairs shall comply with all requirements of applicable law and City standards and specifications in effect at the time of the replacement, restoration or repair. To the extent Permittee's obligations under this Section require Permittee to conduct below-grade maintenance, restorations or repairs, Permittee shall further be responsible for backfilling and restoration of Public Property to substantially the same physical condition as existed prior thereto. For the avoidance of doubt, nothing in this Agreement shall be interpreted to require Permittee to perform or fund the restoration or repair of Public Property subject to this Encroachment Agreement where the need for such restoration or repair arises from work performed by the City or authorized by the City to be performed by a third party.

10. City's Right to Enter and Cure. Subject to the Parties' rights of indemnification under Section 16 of this Agreement, the City may repair an Encroachment if the City determines that the Encroachment presents a dangerous condition or threat of danger to life or property, and Permittee fails to eliminate the condition or threat in accordance with this Section. The City shall provide Permittee with written notice of the dangerous condition or threat of danger to life or property, and Permittee shall make any necessary modifications or repairs to eliminate the dangerous condition or threat of danger to life or property within thirty (30) days after the City's written notice, or longer period specified by the City in its written notice depending on the nature of the modifications or repairs and the imminence of the threat, except that in cases of emergency as reasonably determined by the City, the City shall only be required to provide Permittee with one (1) day telephonic and e-mail notice. Permittee shall reimburse the City for expenses actually and reasonably incurred within sixty (60) days of the City's invoice therefore.

11. Work Schedules. Except for routine maintenance and repairs that do not require a building or other permit or approval from the City, Permittee shall notify the City at least seventy-two (72) hours prior to starting any work authorized or required by an Encroachment Permit to arrange a schedule acceptable to the City. Permittee shall upon completion of any work under and an Encroachment Permit, notify the Director in writing. No work shall be deemed complete until such notification is received, and the work is approved by the Director in writing.

12. City Access and Inspection. The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over any Encroachments at all times without notice to Permittee, including portions covered by structures, furnishings, materials or equipment, for any lawful purpose for which the Public Property may be used. Permittee shall grant the City and its agents, representatives, officers and employees, upon reasonable notice but in no event more than three (3) days, which notice shall not be required in the case of emergencies, access to an Encroachment for any purpose allowed under this Agreement or applicable law. If the City's access to a Major Encroachment is through the Subject Property, such access shall be in accordance with Permittee's reasonable security or building management processes.

13. Public Utilities and Facilities. Permittee's design, construction, maintenance, repair, occupancy, use and removal of each Major Encroachment shall not interfere with or impede the City's continued operation, maintenance or improvement of the Public Property in the manner in which it is operated, maintained, and improved at the time of issuance of such Major Encroachment Permit. Consistent with Section 3(b) of this Agreement, prior to the issuance of any Encroachment Permit, Permittee shall verify and identify in each Encroachment Permit Application the location of all existing utilities and facilities that may be affected by work pursuant to a Permit. Permittee shall assume all responsibility for loss or damage to such utilities or facilities caused by Permittee or its contractors, agents, employees or invitees, and shall immediately notify the Director of any such loss or damage of which Permittee has actual knowledge.

14. Permittee Responsibility for Encroachments. Permittee shall be solely responsible for the design, construction, maintenance, repair, occupancy, and use of each Encroachment,

and, except as otherwise provided under this Agreement, the City shall not be liable for its review, approval, inspection, maintenance, repair, or restoration of any aspect or portion of any Encroachment.

15. Risk of Loss. The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, "City Indemnitees") shall not be liable to Permittee for any injury to persons or property arising out of, pertaining to or relating to any Major Encroachment, except, in each case, to the extent such personal injury or property damage arises from or relates to the negligence or willful misconduct of any City Indemnatee. Permittee acknowledges that it bears the full risk of loss or damage to each Encroachment and the Subject Premises and hereby waives any right to make or prosecute any claims or demands against the City Indemnitees for any such loss or damage, except, in each case, to the extent that such injury, claims, losses or damages arise from or relate to the negligence or willful misconduct of any City Indemnatee. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises or any portion of the Public Property and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.

16. Indemnity/Hold Harmless. To the fullest extent permitted by law, Permittee shall indemnify and hold harmless the City Indemnitees from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively "Claims"), whether or not the Claims involve a third party, to the extent such Claims arise out of, relate to or result from: (i) any act or omission of Permittee, its independent contractors, agents, officers, employees or invitees ("Permittee's Agents"), pursuant to or in connection with any Encroachment Permit or while in or about such Encroachment or Real Property for any reason; (ii) the design, construction, maintenance, repair, occupancy, use and removal of any Encroachment by Permittee or its Agents; and/or (iii) any breach of this Agreement or violation of applicable law by Permittee or Permittee's Agents; provided, however, that Permittee shall have no obligation to indemnify or hold harmless any City Indemnatee for any Claims, including both third-party Claims and direct Claims of Permittee or its Agents, to the extent arising from or relating to the negligence or willful misconduct of any City Indemnatee. The foregoing obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligations arise at the time such Claim is tendered to Permittee by the City and continues at all times thereafter. Permittee's indemnity obligations in this section are not intended to limit the defenses or immunities available to the City that may be applicable to the Claim at issue, and Permittee shall be entitled to rely on such defenses or immunities if Permittee assumes the City's defense of such Claims pursuant to this Agreement.

17. Insurance.¹ Permittee shall, at Permittee's sole cost and expense and for the full term of this Agreement, obtain and maintain at least all of the minimum insurance requirements described in Exhibit F attached hereto and incorporated herein by reference. Said Insurance shall

¹ **Note to Draft:** Subject to Google review of City's minimum insurance requirements.

name the City as additional insured by endorsement and shall be filed with and approved by the City's Risk Manager.

18. Liens. Permittee shall not allow or permit to be enforced against the City any mechanic, laborer, materialmen, contractor, subcontractor, or any other liens, claims or demands arising from any work performed under any Encroachment Permit. Permittee shall discharge or pay all of said liens, claims and demands before any action is brought to enforce the same against the City or the Subject Premises.

19. Sale or Transfer of Subject Premises. At least sixty (60) days prior to the closing of any sale or transfer of ownership of the Subject Premises or any portion thereof associated with a particular Encroachment Permit, Permittee shall cause its successors, assigns and transferees to submit a written statement to the City evidencing the sale or transfer, agreeing to the terms and conditions of this Agreement and providing updated contact information for purposes of notices under the Agreement, if the obligations under this Agreement or any Permit are assigned.

20. Assignment. This Agreement, each Encroachment Permit, and any and all rights and obligations arising thereunder may not be assigned, conveyed, or otherwise transferred to any other person unless approved in writing by the Director; provided, however, that Permittee may without the City's approval assign this Agreement or any of its rights or obligations hereunder, in whole or in part, to (i) any fee owner of adjacent real property, (ii) a homeowners association or commercial association holding any real property interest in the Subject Premises, or (iii) any party to whom Permittee has assigned, in accordance with the terms and conditions of the Development Agreement, its rights under the Development Agreement. For the purposes of this Section, "Affiliate" means an entity or person that is directly or indirectly controlling, controlled by, or under common control with Permittee. For the purposes of this definition, "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity or a person, whether through the ownership of voting securities, by contract, or otherwise, and the terms "controlling" and "controlled" have the meanings correlative to the foregoing.

21. Notices. Unless otherwise specified in this Agreement, all notices required or provided for under this Agreement or any Encroachment Permit issued hereunder shall be in writing and delivered in person or sent by mail, postage prepaid and addressed as provided in this section, with a copy to Permittee by electronic mail. A notice shall be effective on the date it is delivered in person, or if mailed, on the date of deposit in the United States Mail. Any changes to the notice addresses must be delivered in accordance with this section. Notices shall be addressed as follows:

If to City:

[City of San Jose
200 East Santa Clara Street, 5th Floor San Jose, CA 95113
Attn: Director of Public Works
Attn: Insert Name and Email]

With a copy to:

[City Attorney
200 East Santa Clara Street, 16th Floor San Jose, CA 95113
Attn: Insert Name and Email]

If to Permittee:

[Google LLC
Address, Attn: General Counsel
Attn: Insert Name and Email]

With a copy to:

[Google LLC
Address Attn: Director of Real Estate
Attn: Insert name and Email]

With a copy to:

[Google LLC
Address, Attn: _____
Attn: Insert name and Email]

22. Compliance with Law. Permittee agrees to comply with all applicable laws, ordinances and regulations in its design, construction, maintenance, repair, occupancy and use of each Encroachment issued by the Direct under this Agreement.

23. Recording. Each Encroachment Permit shall be recorded against such parcels of the Subject Premises to the extent required under Section 13.37.310.F of the City of San Jose Municipal Code, and this Agreement shall be incorporated by reference into each Encroachment Permit and recorded against such parcels concurrently therewith. This Agreement shall be binding upon all successors and assigns of Permittee.

24. Severability. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

25. Survival. The term of this Agreement shall commence upon the Effective Date and shall remain in full force and effect until it expires in accordance with its terms, provided that the provisions under Sections 13-16, 18 and 31 shall survive the expiration of this Agreement for a period equal to the statute of limitations applicable to the underlying obligation or claim.

26. Headings. The headings used in this Agreement are for convenience only and shall not be used in the interpretation of this Agreement.

27. Days. All references to days in this Agreement shall mean calendar days, unless specified otherwise.

28. Time is of the Essence. Time is of the essence in performing each and all obligations under this Agreement.

29. Amendment. This Agreement may be amended only by a written instrument executed by Permittee, approved by the City Council and recorded on title to the Subject Premises; provided, however, that the Director of Public Works may approve Minor Amendments hereto. For the purposes of this Agreement, a “Minor Amendment” shall mean any amendment to this Agreement that does not increase the City’s liability hereunder (including, e.g., where Permittee increases its insurance coverage or pledges security, or takes other risk mitigation measures that fully offset any increased liability to the City. The term “Minor Amendment” shall specifically be deemed to include modifications to the Master Encroachment Diagram to reflect relocated Encroachments in order to reconcile said diagram with approved or pending subdivision maps, improvement plans or building permits.

30. Choice of Law. This Agreement shall be construed according to the laws of the State of California.

31. Disputes. Permittee and the City shall use reasonable best efforts to resolve any dispute arising under this Agreement informally. Any dispute arising under this Agreement that cannot be resolved by the Parties shall be adjudicated in California State Court in and for the County of Santa Clara, or in the Federal Court in and for the Northern District of California, as appropriate.

32. No Precedent. The terms and conditions in this Agreement shall not be construed to establish a precedent or policy for any subsequent City authorizations for encroachments.

33. Force Majeure. If either Party is delayed, interrupted, or prevented from performing any of its obligations under this Agreement or any Encroachment Permit issued hereunder, including, but not limited to, failing to commence or complete the cure of any default, due to Force Majeure, as defined in the Development Agreement², then, provided written notice of such event and the effect on the Party’s performance is provided to the other Party within thirty (30) days of the occurrence of the event, the time for performance of the affected obligations of that Party shall be extended for a period equivalent to the period of such delay, interruption or prevention. The Parties agree that (i) the time periods for performance of the delayed Party’s obligations impacted by the Force Majeure shall be strictly limited to the period of such delay, interruption or prevention, and the delayed Party shall, to the extent commercially reasonable, act diligently and in good faith to remove the cause of the Force Majeure or otherwise complete the delayed obligation, and (ii) following the termination of the Force Majeure, a Party shall have all rights and remedies available under this Agreement or the applicable Encroachment Permit, if the obligation is not completed within the time period as extended by the Force Majeure.

² Note to reviewers: As of the date of this draft Force Majeure terms are still being discussed as part of the DA.

IN WITNESS WHEREOF, this Agreement is executed by the parties as of the date first written above

APPROVED AS TO FORM:

City of San Jose, a municipal corporation

[Sr.] Deputy Attorney

By:

Name:

Title:

PERMITTEE*

Print Name of Permittee and Type of Entity

By

Name:

Title:

By

Name:

Title:

- Proof of authorization for Permittee's signatories is required to be submitted concurrently with this Agreement. All Permittee signatures must be accompanied by an attached notary acknowledgement.

EXHIBIT A
DESCRIPTION OF
THE REAL PROPERTY
INSERT DESCRIPTION

EXHIBIT B
SITE MAP
OF THE DOWNTOWN WEST PROJECT AREA

EXHIBIT C

CONCEPTUAL MASTER ENCROACHMENT PLANS

EXHIBIT D

**RESOLUTION/ORDINANCE AUTHORIZING DELEGATION OF AUTHORITY
TO DIRECTOR TO ISSUE ENCROACHMENT PERMITS**

EXHIBIT E

ENCROACHMENT PERMIT CHECKLIST

EXHIBIT F

CITY INSURANCE REQUIREMENTS