

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Downtown West - DA
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Attachments: [Google - DW - DA provision re Private OS + Rules Exhibits-c.docx](#)

From: Straka, Stephanie <SStraka@coblentzlaw.com>
Sent: Wednesday, January 27, 2021 5:45 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: Downtown West - DA

[External Email]

Hi Johnny,

Please see the attached which contains draft language for the body of the DA regarding privately-owned open space, as well as two draft exhibits regarding the same. Thanks.

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DA LANGUAGE RE: POPOS

1. Privately-Owned Open Space

In addition to the City-Dedicated Open Space described in Exhibit E hereto, and the Park Improvements to the City-Dedicated Open Space described in Exhibit E4, Developer is providing as a public benefit certain Privately-Owned Open Space totaling approximately 10.2 acres, generally depicted on Exhibit F1 hereto and as described in the Downtown West Design Standards and Guidelines (referred to therein as "Project Sponsor-Owned Open Space"). The Privately-Owned Open Space will be publicly accessible via a public access agreement in substantially the same form as Exhibit F2, subject to the hours of operation and private events/temporary closures set forth in Exhibit F3, and the Code of Conduct for Public Use set forth in Exhibit F4. The public right of access to the Privately-Owned Open Spaces is a public benefit that exceeds what would be required under the City's Parkland Dedication Ordinance. The Privately-Owned Open Space categories, design, boundaries, and programming are set forth in the Downtown West Design Standards and Guidelines.

1.1 Completion of Privately-Owned Open Spaces

Completion of the Privately-Owned Open Spaces means that sign-off of final inspection has occurred; however, Completion does not include or require completed installation of park design elements, art, structures, or features not essential to the intended use of the park by the public, so long as final installation of such elements or features does not interfere with safe use of the park; nor does completion include or require improvement of the fifty (50) feet of a Privately-Owned Open Spaces that fronts an incomplete vertical parcel (the "Temporary Construction Area") to allow for safe construction on that vertical parcel, so long as the Temporary Construction Area is relinquished and improved within six (6) months of issuance

of a certificate of occupancy for the building located on the vertical parcel. Subject to Sections 3.4 and 11.5, Developer shall deliver the completed Privately-Owned Open Spaces identified in Exhibit F1, within thirty (30) months following issuance of a temporary certificate of occupancy for the building parcels as indicated in the following schedule:

- Creekside Walk at South Autumn Street (the later of D8-D13)
- Gateway to San José (E1)
- Los Gatos Creek East (the later of E1 or E2)
- The Meander (F Office [excluding areas between F2/F4/150 South Montgomery, which are to be delivered within 30 months from the issuance of temporary certificate(s) of occupancy for the final building of F2, F4 or 150 South Montgomerys]); In the event F3 and/or F6 have not received temporary certificate of occupancy within twenty-four (24) months following issuance of a temporary certificate of occupancy for the office building on F1, the area of the Meander within fifty (50) feet of those buildings would be completed within six (6) months of issuance of temporary certificate of occupancy for buildings on F3 and/or F6
- Los Gatos Creek Park 1 (G1)
- Los Gatos Creek Park 2 (H2)
- N. Montgomery Pocket Park (B1)
- Northend Park (A1)

1.2 Term of Privately-Owned Open Space

In addition to the public access agreement to be recorded for the Privately-Owned Open Spaces as described in Exhibit F2, approximately seven (7.0) acres, consisting of the following

Privately-Owned Open Space typologies, shall be subject to a recorded restrictive covenant:

Privately-Owned Public Park, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor (the “Covenant Privately-Owned Open Space”). The final acreage and/or boundaries of the Covenant Privately-Owned Open Spaces may be subject to adjustment pursuant to the provisions of the Downtown West Design Standards and Guidelines, and shall be verified as part of the final map process. The restrictive covenant shall require that the Covenant Privately-Owned Open Spaces remain as publicly accessible park space unless and until the City or other public agency requires that the use be changed; provided, however, that the open spaces shall be permitted to be reconfigured so long as the overall square footage of the Covenant Privately-Owned Open Spaces remains the same.

Any Privately-Owned Open Space that is not subject to the restrictive covenant shall remain publicly accessible open space for the life of the Project, consisting of the types of spaces, configurations, with the type of amenities/improvements, and complying with the applicable regulations set forth in the Project Approvals, including the DWDSG and this Agreement.

1.3 Penalty for Privately-Owned Open Space Delay

In no event shall a delay in the completion of any Privately-Owned Open Space constitute a Default pursuant to this Agreement. For the Covenant Privately-Owned Open Space, in the event Developer fails to complete any Covenant Privately-Owned Open Space in accordance with the completion schedule set forth in Section 1.1, Developer shall be required to pay a penalty fee to the City (the “Private Open Space Delay Penalty”). The Private Open Space Delay Penalty shall be based on the total square footage of the delayed Covenant Privately-Owned Open Space, and shall be paid for each month the completion of that Covenant Privately-Owned

Open Space is delayed beyond the thirtieth (30th) month following issuance of a temporary certificate of occupancy for the corresponding building shown in Section 1.1, as follows:

- Months 31 to 36: Private Open Space Delay Penalty of fifty cents (\$0.50) per square foot of the delayed Covenant Privately-Owned Open Space
- Months 37 to 42: Private Open Space Delay Penalty of one dollar (\$1.00) per square foot of the delayed Covenant Privately-Owned Open Space
- After Month 42: Private Open Space Delay Penalty of ten dollars (\$10.00) per square foot of the delayed Covenant Privately-Owned Open Space; provided, however, that the total Private Open Space Delay Penalty shall not exceed the total value of the delayed Covenant Privately-Owned Open Space, which total value shall be determined by multiplying the total acreage of that Covenant Privately-Owned Open Space by one hundred ninety-five dollars (\$195) (total acreage x \$195 = total value).

Pursuant to the terms of the Parkland Agreement, included as Exhibit E to this Agreement, the Parties acknowledge and understand that a delay in the completion of any Covenant Privately-Owned Open Space could require that the City delay issuance of a building permit for any subsequent residential building until the Covenant Privately-Owned Open Space is completed if development of the subsequent residential building would cause the cumulative minimum square feet of open space for each residential unit to fall below fifty-two (52) square feet.

EXHIBIT F3

Rules Regarding Public Access and Private Events/Temporary Closures

1. Hours of Operation

Except as set forth in Section 2 herein, each of the Privately-Owned Open Spaces shall be open to the general public every day from Sunrise until midnight (12:00 a.m.), except that The Meander shall be open to the general public every day from Sunrise until 10:00 p.m.

2. Private Events/Temporary Closures

Excluding semi-public open space (as defined in the DWDSG) under lease by a business, and controlled mid-block passages (as defined in the DWDSG), all spaces are publicly accessible, subject to the following limitations:

- a. All private events require prior Developer/owner permission, and Developer/owner has the authority in its sole discretion to determine whether a private event is permitted, consistent with the rules and limitations for private events and/or temporary closures set forth in this Exhibit F3 and Exhibit F4.
- b. Notwithstanding the limitations regarding partial closures set forth below, each individual Privately-Owned Open Space may be closed in its entirety a maximum of six (6) times per year, not to exceed eight (8) hours in any month, except for reasonable maintenance and repair.
- c. No more than one entire Privately-Owned Open Space's reservable area may be reserved for a private event at any one time, except for one (1) time per year, when all Privately-Owned Open Space reservable areas may be reserved for no more than five (5) consecutive days, provided that prior notification to the general public via

posted signage, and written notification to the City Department of Parks, Recreation & Neighborhood Services and other stakeholders.

- d. Private events in reservable open space shall be limited to no more than five (5) consecutive days in one location.
- e. Events shall be assigned specific venues within the Privately-Owned Open Space network appropriate to the size and nature of the event and that will impose the least impact to the level of service on the Privately-Owned Open Space or the public's use of the Open Space, as determined by Developer/owner in its sole discretion.
- f. Non-reservable event areas shall remain open and accessible to the public during private events, the private event shall maintain a clear public path of travel around the event and through the Privately-Owned Open Space, and a safe path of travel marked in accordance with ADA standards shall be maintained.
- g. Private events held during business hours between Monday to Thursday shall be encouraged to avoid high public use hours.
- h. Private events held during evenings, weekends, and holidays should be limited in order to avoid high public use hours, as determined by Developer/owner. Events held during such times should be open to the public to the greatest extent possible, as determined by Developer/owner.
- i. Private events on weekends shall be limited to one weekend per month per Open Space. As much as possible, as determined by Developer/owner, the event should allow the public to hear, see, or otherwise enjoy the event.

- j. Unless otherwise approved by Developer/owner, event support structures and furnishings shall be located on hardscape areas and shall be selected and arranged with a high regard for the visual and aesthetic quality of the Privately-Owned Open Space.
- k. Events involving animal acts, petting zoos, carnival rides, hot air balloons, or helicopter landings to specified areas of the parks shall not be permitted.
- l. Vehicle access through the parks is prohibited, except that vehicle access through the parks for the limited purpose of setting up or dismantling furnishings, decor, or other items associated with a private event may be permitted with prior approval of Developer/owner.
- m. Events involving celebratory activities, such as music, dance, theater, or similar activities, are permitted with prior Developer/owner permission. [WORK IN PROGRESS - TO BE CONFORMED TO GDP AND DISCUSSIONS: The event sponsor shall be responsible for obtaining any required permits from the City, including, for example, for noise amplification].
- n. Privately-Owned Open Spaces may be closed, at Developer/owner's sole discretion, on short-notice or at any time for security or safety needs, and for maintenance or repair.

Each of the following Privately-Owned Open Spaces may be partially closed for private events as described below (by percentage of total open space, and duration), subject to the rules and conditions above:

- a. Los Gatos Creek Park: A maximum of twenty-five percent (25%) of Los Gatos Creek Park is reservable by the public for private event use for each event zone

depicted on Exhibit [redacted] for fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Exhibit [redacted] for seventy-three (73) days per year (20%) from Sunrise to 12am.

- b. The Meander: A maximum of fifty percent (50%) of the total Privately-Owned Open Space within The Meander is reservable by the public for event use for each event zone depicted on Exhibit [redacted] for fifty-four (54) days per year (15%) from Sunrise to 10 pm. The same is reservable by Developer for private event use for each event zone depicted on Exhibit [redacted] for seventy-three (73) days per year (20%) from Sunrise to 12am.
- c. Creekside Walk at South Autumn Street: A maximum of thirty-five percent (35%) of the total Privately-Owned Open Space within Creekside Walk at South Autumn Street is reservable by the public for event use for each event zone up depicted on Exhibit [redacted] for fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Exhibit [redacted] for one hundred twenty-seven (127) days per year (35%) from Sunrise to 12am.
- d. The Gateway: A maximum of thirty-five percent (35%) of the total Privately-Owned Open Space within the Gateway is reservable by the public for event use for each event zone up depicted on Exhibit [redacted] for fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Exhibit [redacted] for seventy-three (73) days per year (20%) from Sunrise to 12am.

- e. Northend Park: A maximum of fifty percent (50%) of the total Privately-Owned Open Space within Northend Park is reservable by the public for event use for each event zone depicted on Exhibit [redacted] for fifty-four (54) days per year (15%) from Sunrise to 10 pm. The same is reservable by Developer for private event use for each event zone depicted on Exhibit [redacted] for seventy-three (73) days per year (20%) from Sunrise to 12am.

EXHIBIT F4

Code of Conduct For Public Use

Public use and enjoyment of the Privately-Owned Open Space is subject to the following rules and code of conduct:

The public is welcome to access the Privately-Owned Open Spaces for the following general uses:

- to enjoy the park during the hours of operation ("park hours")
- to enjoy open spaces during park hours, other than those times reserved for private events or necessary closing
- to engage in commercial activity and revenue generating activities with permission of the Developer/owner
- to enjoy and participate in public, community curated events that do not require payment, which will happen a minimum 6 times annually
- to enjoy the gardens, naturalized areas, and landscaping without entering flowerbeds or damaging vegetation
- to sit on a park chair or one seat on a bench designed for sharing
- to deposit waste in trash or recycling receptacles
- to walk dogs on a leash so long as the person walking the dog cleans up after the dog and deposits waste into appropriate receptacles
- to take souvenir photos; commercial photography by Developer/owner permission only
- to apply for private events, requiring an application to the Developer/owner: ie., corporate events, protests, or other special events

The following activities are prohibited within the Privately-Owned Open Spaces:

- Engaging in commercial activity, except by permission of the Developer/owner of the Privately-Owned Open Space
- Vehicles, including parking at any time without specific authorization
- Blocking of entry and exit doors, building entrances, and access to or from stairs, ramps, escalators and elevators, including sitting on any stair or escalator handrails
- Performing, entertaining, large gatherings, or exhibiting, except by permission and/or permit
- Amplified sound, except by permission and/or permit
- Feeding or tampering with wildlife
- Use of illegal drugs
- Use of alcohol, outside of designated areas
- Riding or operating motorized devices, except by persons with a mobility impairment
- Carrying, concealing, or using weapons, including, but not limited to firearms, knives, or any similar object(s), or fireworks
- Defacing, graffitiing, damaging, vandalizing, or destroying any property
- Littering or unauthorized dumping
- Immediate solicitation of money or contributions

- Visitors must be fully clothed, and may not wear clothing that is likely to provoke a disturbance, that uses or displays obscenities, “fighting words,” sexually explicit language, pornography, or material or images defined as obscene under applicable law
- Fighting, or use of threatening comments or gestures, obscene language or gestures, or racial, religious, or ethnic slurs
- Yelling or creating noise of sufficient volume (including by sound amplification devices) that disrupts or interferes with the site or its normal business operations, or those of nearby businesses or buildings
- Dogs off-leash, except in designated areas where posted
- Outdoor fires
- Use of powered model airplanes, boats, cars, rockets, or drones
- Distribution of food or clothing, except by permission and/or permit
- Skateboarding, rollerblading, or other similar activity, or any activity that impedes, obstructs, or interferes with the free flow of pedestrian or vehicular traffic, or on park structures, furniture, or hard courts, except in designated areas
- Organized sports, except in designated areas
- Camping (which includes any overnight sleeping or parking) in any open spaces including but not limited to plazas, mid-block passages, green spaces, or naturalized areas
- Golf or Practice of Golf
- Tampering with pest/bait stations
- Violation of any federal, state or local law or ordinance
- Use of temporary play equipment such as “Air Jumpers” , “Bounce Houses” or “Inflatable Houses,” except by permission
- Sale of products and services, or distribution of commercial advertising or promotional material of any kind, other than in connection with the site's business or those of tenants or other businesses at or adjacent to the site
- Photographing, video recording for commercial purposes without prior consent of the Site's management, or recording activity of any kind