

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: DW - Parkland Agreement Exhibit
Date: Tuesday, April 6, 2021 2:23:21 PM
Attachments: [Google - DW - Parkland Agreement Exhibit E1 with insurance-c.pdf](#)
[REDLINE DW - Parkland Agreement EXHIBIT E1 with insurance vs City Exhibit C.pdf-c.pdf](#)

From: Straka, Stephanie <SStraka@coblentzlaw.com>
Sent: Friday, January 29, 2021 3:51 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: RE: DW - Parkland Agreement Exhibit

[External Email]

Johnny,

I am resending Exhibit E1/C with the insurance provisions, clean and a redline against the City form attached. The document is otherwise the same as yesterday's transmittal. Thanks.

Stephanie R. Straka | Special Counsel
Coblentz Patch Duffy & Bass LLP
Direct 415-772-5750 | Office 415-391-4800

This transmittal is intended solely for use by its addressee, and may contain confidential or legally privileged information. If you receive this transmittal in error, please email a reply to the sender and delete the transmittal and any attachments.

From: Straka, Stephanie
Sent: Thursday, January 28, 2021 5:12 PM
To: Johnny.Phan@sanjoseca.gov
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: DW - Parkland Agreement Exhibit

Johnny,

Please see the attached exhibit to the Parkland Agreement. This is Exhibit E1 to the Google Agreement, based on the City's Exhibit C to its Parkland Agreement Form. Redline to the City form also attached. Thanks.

Stephanie R. Straka | Special Counsel

Coblentz Patch Duffy & Bass LLP

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Direct 415-772-5750 | Office 415-391-4800

sstraka@coblentzlaw.com

www.coblentzlaw.com

This transmittal is intended solely for use by its addressee, and may contain confidential or legally privileged information. If you receive this transmittal in error, please email a reply to the sender and delete the transmittal and any attachments.

This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Google Draft 1/28/21

EXHIBIT E1

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

The design for the Park Improvements must be consistent with the Park Improvements as described and depicted in the Downtown West Design Standards and Guidelines and as otherwise described in the Parkland Agreement. Further, Developer shall design and construct the Park Improvements in accordance with the following:

1. Downtown West Improvement Standards, dated _____, 20__ (“DWIS”), approved by the City Council on _____, 2021.
2. City's Standard Specifications and Standard Details, dated July 1992 (“City’s Specifications”), as may be amended from time to time, and on file with City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to “Developer” shall be deemed to mean “Developer.”
3. City’s Turnkey Park Standards for Park Design & Construction, dated 2001 (“Turnkey Standards”), on file with City’s Department of Public Works, Architectural Division and included as Attachment A hereto.
4. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the above guidelines, shall be applicable to this agreement. This document is on file with City’s Department of Public Works, Architectural Division and included as Attachment B hereto.
5. The Downtown West Planned Development Zoning District and accompanying General Development Plan, dated _____, 20__, adopted by the City Council on _____, 2021.
6. The Downtown West Design Standards and Guidelines, dated _____, 20__, adopted by the City Council on _____, 2021.
7. City shall review the Park Improvements Plans, including materials, infrastructure, and design elements, for consistency with the conceptual design of Turnkey Park Improvements as described and depicted in the Downtown West Design Standards and Guidelines, and the specifications and guidelines outlined above and throughout this Agreement. Pursuant to the Open Space Improvement Conformance Review Process set forth in the General Development Plan for the Downtown West Planned Development Zoning District, the Plans shall be refined to the

satisfaction of the Director of Parks, Recreation, and Neighborhood Services (“Director of PRNS”) and the Director of Public Works (“Director of PW”) as necessary in order to demonstrate consistency; provided, however, that such refinements shall remain consistent with the Park Improvements Value set forth in Exhibit E4.

B. Application Of Plans And Specifications.

1. City’s Specifications, Turnkey Standards, Downtown West Planned Development District, and the Downtown West Design Standards and Guidelines shall be collectively referred to as the “Park Improvements Specifications.” The Park Improvements shall be constructed in accordance with the Park Improvements Specifications.
2. In the event of a conflict between the Turnkey Standards and the City’s Specifications, the Turnkey Standards shall prevail.
3. The provisions of the Development Agreement, including this Agreement, and the Downtown West Planned Development District, Downtown West Design Standards and Guidelines, and Downtown West Improvement Standards supersede anything to the contrary in the City’s Specifications, Public Works Standard Specifications, or the Turnkey Standards.

C. Project Plans Approval Process.

1. In accordance with the Design Outside Date Schedule set forth in the Parkland Agreement, Developer shall submit Park Improvements Plans at thirty-five percent (35%) as part of its Open Space Improvement Conformance Review application for the Park Improvements. The submittal of sixty-five percent (65%) and ninety-five percent (95%) Park Improvements Plans shall occur following the Open Space Improvement Conformance Review process set forth in the General Development Plan. The preparation, submittal, and review of the Park Improvements Plans shall be in accordance with this Agreement.
2. The Park Improvements Plans shall be submitted in a timely manner in order to insure that Developer completes the Park Improvements on or before the completion date specified in this Agreement. Developer shall not construct any Park Improvements unless and until the City’s Director of PW has approved the Park Improvements Plans in writing. The approval process for the Park Improvements Plans is more particularly set forth in the Turnkey Standards. City’s Director of PW shall complete its review of each submittal and provide any comments to Developer within forty-five (45) days of submittal. City’s Director of PW shall approve or disapprove Developer’s bid submittal within thirty (30) days of submittal.
3. Prior to acceptance of the Park Improvements Plans and/or proceeding with construction of the Park Improvements, the Developer shall provide the City with copies of all soil surveys along with recommended soil amendments. The City may, at its sole discretion and cost, require inspection of the City-Dedicated Open Space for construction debris before construction may commence.

4. City's approval of the Park Improvements Plans shall not release Developer of the responsibility for the correction of mistakes, errors, or omissions contained in the Park Improvements Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Park Improvements Plans were developed or approved. The Parties acknowledge that the Park Improvements Plans, once approved by the Director of PW, shall be final and that, except as expressly provided in this subsection or elsewhere in the Parkland Agreement and/or Development Agreement, no revisions to the Park Improvements Plans shall be permitted unless approved by the Director of PW.

5. For reference and public information purposes, Developer will provide the City with a tentative schedule of construction prior to the commencement of development for any of the Park Improvements. Such schedule may be amended at the Developer's discretion provided that all Improvements are completed by the completion dates specified in this Agreement. At the City's request the Developer shall provide the City with an updated schedule that reflects amended milestones and anticipated completion dates.

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

Developer may hire and contract with one or more contractor or subcontractor, licensed to perform such work in the State of California.

B. Prevailing Wage Requirement.

1. General Requirement. For all construction work on the Park Improvements, Developer agrees to comply with the prevailing wage requirements set forth in Sections 7-1.01A(2) through 7-1.01A(3) of the City of San Jose, Department of Public Works, Standard Specifications, dated July 1992 ("Prevailing Wage Requirement"), as may be amended from time to time. The Prevailing Wage Requirement is incorporated into this Agreement by reference as though set forth herein in their entirety. Developer acknowledges that it has reviewed the Prevailing Wage Requirement and is familiar with its requirements.

2. Contractors and Subcontractors. Developer shall expressly require compliance with the Prevailing Wage Requirement in all agreements it enters into with contractors and subcontractors for construction work on the Park Improvements. Developer acknowledges and agrees that it is responsible for compliance by its contractors and subcontractors of the Prevailing Wage Requirement.

3. Reporting Obligations. Notwithstanding anything to the contrary contained herein, Developer is not obligated to submit to City copies of payroll records for construction contractors, subcontractors, or other construction workers, or any other records required to be maintained pursuant to the Prevailing Wage Requirement, until City requests such records as a result of receiving a claim that a violation of the Prevailing Wage Requirement has occurred. Developer shall provide to City, at no cost to City, a copy of any and all such records within thirty (30) calendar days of City's Office of Equality Assurance request for such records. In responding to a

request by the Office of Equality Assurance, Developer agrees that it is responsible for submitting the records of any and all of its construction contractors and subcontractors.

4. Indemnity. Developer shall indemnify the City for any claims, costs or expenses which City incurs as a result of Developer's failure to pay, or cause to be paid, prevailing wages.

C. Remedies for Developer's Breach of Prevailing Wage Requirements.

1. General. Developer acknowledges City has determined that the Prevailing Wage Requirement promotes each of the following (collectively "Goals"):

a. It protects City job opportunities and stimulates City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.

b. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to City by fostering high turnover and instability in the workplace.

c. Pay workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.

d. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. Remedies. City and Developer recognize that Developer's breach of the Prevailing Wage Requirement set forth above will cause damage to the City by undermining City's goals in assuring timely payment of prevailing wages, and will cause City additional expenses in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the worker paid less than the prevailing wage. Developer and City agree that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. City and Developer further recognize the delays, expense and difficulty involved in proving City's actual losses in a legal proceeding, and mutually agree that making a precise determination of the amount of City's damages as a result of Developer's breach of the Wage Provision would be impracticable and/or extremely difficult. Accordingly, City and Developer agree that:

a. For each day after thirty (30) calendar days that Developer fails to completely respond to a request by City to provide records as required under Section 2(B), of this Exhibit E1, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and

b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of

three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.

3. Audit Rights. All records or documents required to be kept pursuant to this Agreement to verify compliance with the Prevailing Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Developer's address indicated for receipt of notices in this Agreement.

4. Remedies Cumulative. The remedies set forth in this provision of the Agreement are cumulative and in addition to any other remedies set forth in the Prevailing Wage Requirements or otherwise permitted by law.

Developer Initial: _____

City Initial: _____

D. Conduct Of Work.

1. Appearance. Developer shall maintain a neat and clean appearance to the work at the City-Dedicated Open Space. When practicable, broken concrete and debris developed during clearing and grubbing shall be disposed of concurrently with its removal. If stockpiling of disposable material is necessary, the material shall be retained in an area not readily visible to the public in a manner meeting the reasonable satisfaction of the Director of PW.

2. Condition. Developer shall maintain the City-Dedicated Open Space in a neat, clean, and good condition prior to City's acceptance of the Park Improvements. Developer shall not dispose or cause the disposal of any Hazardous Substances on any of the City-Dedicated Open Space. Additionally, Developer shall take reasonable precautions to prevent the disposal of Hazardous Substances by third parties on any of the Site. The term "Hazardous Substances" is defined in Section 3(A)(2) of this Exhibit.

3. Emergencies. In an emergency affecting the safety of persons or property, Developer shall act reasonably to prevent threatened damage, injury, or loss. Developer shall immediately notify the City by telephone at the telephone number as directed by City's Director of PW and in writing of such actions.

E. Access For Inspection.

1. Access. The Director of PW and the Director of PW's designated representatives, including without limitation, staff from other City departments, shall at all times during the progress of work on the Park Improvements have free access to such improvements for inspection purposes and shall act in accordance with the site specific safety procedures. If the Director of PW determines that all or any portion of the work done on the Park Improvements is not in compliance with the Plans, the Director of PW shall notify Developer in writing of the same and Developer shall promptly cure such defect to the Director of PW's reasonable satisfaction. Such notifications shall

be made to the Developer and his on-site representatives to not unduly interfere with ongoing construction work.

2. Representatives.

a. Prior to commencement of work on the Park Improvements, Developer shall designate in writing an authorized representative who shall have the authority to represent and act for Developer. When work is not in progress and during periods when work is suspended, arrangements acceptable to the Director of PW shall be made for any emergency work which may be required. In addition, Developer shall provide Director of PW with the names and telephone numbers of at least two (2) individuals in charge of or responsible for the work who can be reached personally in case of emergency twenty-four (24) hours a day, seven (7) days a week.

b. The Director of PW shall also designate one or more authorized representative who shall have the authority to represent the Director of PW. Developer's authorized representative shall be present at the site of the work at such reasonable times as designated by the Director of PW. Prior to commencement of the work, the Parties shall mutually agree to an inspection schedule, which schedule may be adjusted from time to time by mutual agreement.

c. Whenever the Developer or its authorized representative is not present on any particular part of the work where it becomes necessary to give direction for safety reasons, the Director of PW shall have the right to give such orders which shall be received and obeyed by the superintendent or foreman who may have charge of the particular work in reference to which the orders are given. Any order given by the Director of PW will on request of the Developer be given or confirmed by the Director of PW in writing.

d. City's rights under this Agreement shall not make the Developer an agent of the City, and the liability of the Developer for all damages to persons or to public or private property arising from Developer's execution of the work, shall not be lessened because of the exercise by City of its rights.

F. Acceptance of Park Improvements.

The Park Improvements shall be completed in accordance with the provisions of this Agreement to the satisfaction of the Director of PW.

1. City shall inspect and prepare a punchlist for the Park Improvements within ten (10) business days of notification by Developer that the Developer considers the construction of the Park Improvements to be complete. City shall perform its final inspection within ten (10) business days of notification by Developer that all punchlist work has been completed.

2. City shall process acceptance documentation (Notice of Acceptance) within ten (10) business days of the date of City's final inspection or the date upon which the Developer returns to City the appropriate signed acceptance documentation, whichever is later, provided that:

- a. City finds that all punchlist work has been satisfactorily completed; and
- b. Developer has performed and satisfied any and all terms, conditions, and obligations required under this Agreement prior to acceptance of the Park Improvements, including but not limited to, the requirements for dedication of the City-Dedicated Open Spaces as outlined in Section 2(G) of this Exhibit; and
- c. Developer has provided the Director of PW with three (3) sets of the Plans (“record plans”) corresponding copies of any and all warranties, and the like (such warranties shall be in the name of the City), and corresponding copies of any and all operating manuals for equipment installed as part of the Park Improvements. The aforementioned documents shall also be provided by Developer in an appropriate electronic format (.dwg, .pdf, etc.) as requested by the Director of Public Works or Parks, Recreation, and Neighborhood Services.

3. The Parties acknowledge that City's restrictions on the installation of landscaping because of future drought conditions may delay Developer's installation of the landscaping contemplated by this Agreement. If, due to drought restrictions water restrictions are in place, or recycled water also is not available, and Developer, therefore, is unable to install the landscaping in time to be inspected by the Director for the purposes of accepting the completed Park Improvements, Developer shall post a bond or other form of security as set forth in Section 6(A)(4) of this Agreement, and the delay in the installation of such landscaping shall not preclude acceptance of the affected City-Dedicated Open Space and Park Improvements thereon.

4. If Developer satisfies all obligations set forth in this Agreement that are required for City's acceptance of the City-Dedicated Open Space and/or the Park Improvements thereon, and City fails to process a Notice of Acceptance in the manner and within the time specified herein, any and all maintenance costs thereafter incurred by Developer shall be counted toward Developer's Parkland Obligation for any residential units that Developer subsequently constructs.

5. At the discretion of the Director of PW, City may accept a designated portion of a City-Dedicated Open Space and/or the Park Improvements thereon. Acceptance of a designated portion will be as provided by Section 7-1.166 of the City's Specifications.

- a. Pursuant to Section 2(D) of this Agreement, acceptance of a City-Dedicated Open Space and the Park Improvements thereon shall 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 the safe use of the park by the public.

- b. If a City-Dedicated Open Space is affected by a Park Construction TCE, but Developer has otherwise satisfied all obligations set forth in this Agreement that are required for City's acceptance of that City-Dedicated Open Space and the Park Improvements thereon, the Director of PW shall process a Notice of Acceptance for that

portion of the City-Dedicated Open Space and Park Improvements that are outside of the scope or boundaries of the Park Construction TCE.

G. City-Dedicated Open Space.

1. Developer shall provide each of the following to the Director of PW, subject to the approval of the Director of PW, prior to City's acceptance of the City-Dedicated Open Space and Park Improvements:

a. A preliminary report for the City-Dedicated Open Space by a reputable title company currently doing business for City's Real Estate Division. Developer shall coordinate with City's Real Estate Division and provide a preliminary title report at least ninety (90) days prior to execution of this Agreement and an updated title report at least ninety (90) days prior to the anticipated completion of the Park Improvements.

b. A Grant Deed for the City-Dedicated Open Space containing the legal description of the City-Dedicated Open Space, as approved by City Surveyor, properly executed and acknowledged, subject only to the exceptions to title set forth in Exhibit E2. Title to the City-Dedicated Open Space shall be vested in City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Developer, subject only to those exceptions set forth in Exhibit E2 ("Permitted Exceptions"), which Permitted Exceptions shall not impact or otherwise count against the credit value of the affected City-Dedicated Open Space except as indicated in Exhibit E2 and the Parkland Agreement. The Grant Deed, subject to approval of City, for the City-Dedicated Open Space shall be delivered to the City's Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

c. Developer shall also cause to be provided to City, concurrently with the conveyance of the City-Dedicated Open Space to City, a C.L.T.A. owner's form policy of title insurance issued by a reputable title company currently doing business with City, with City named as the insured, in the amount of \$ _____ insuring the title of City to the City-Dedicated Open Space is subject to only the Permitted Exceptions.

d. Any and all reports related to the condition of the City-Dedicated Open Space and the lands adjacent to the City-Dedicated Open Space caused to be performed by the Developer or in the Developer's possession or control. Developer shall also provide to City, at the Developer's sole cost, a report, prepared or updated no earlier than twelve (12) months before the proposed acceptance of the Park Improvements by a qualified consultant analyzing the condition of the City-Dedicated Open Space with respect to the presence of Hazardous Materials on or adjacent to the City-Dedicated Open Space ("Hazardous Materials Report"). The definition of Hazardous Materials for purposes of this Agreement is set forth in Section 3(A)(2) of this Exhibit. The scope of the Hazardous Materials Report shall, at minimum, contain the elements set forth below in Section 4.

e. Subject to Section 3 and the disclosures and obligations set forth therein, in the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous

Materials on any of the City-Dedicated Open Space in excess of generally accepted environmental screening limits for park land uses (e.g. Environmental Screening Limits and California Human Health Screening Limits) or in violation of any hazardous materials/waste laws, the Director shall have the right to require Developer, as a condition of acceptance, to remediate or mitigate the condition to the extent required for the park to be used as designed and intended, including without limitation, removal of the Hazardous Materials in the top soil. The type of remediation or mitigation required for the City-Dedicated Open Space shall be at no cost to the City and be subject to the review and approval of the Director

f. The Environmental Warranty specified in Section 3 of this Exhibit.

g. Documents evidencing the authority of the signatory(ies) to execute any agreement or other legal binding documents on behalf of Developer.

2. The top __ inches of soils on site shall be provided to the City free and clear of all construction debris and shall be amended in accordance with recommendations from the soil reports and agricultural soil surveys, or as otherwise directed by the City's Director or Designees. Additional amendments including, but not limited to, mycorrhizal inoculum or organic fertilizers may be required by the City or provided at the Developers discretion in consultation with the City.

3. Upon the Director of PW's acceptance of the City-Dedicated Open Space and Park Improvements, Developer shall have no further obligations in connection with the City-Dedicated Open Space except for the terms, conditions, or obligations of this Agreement that explicitly survives acceptance or termination.

H. Compliance With Laws/Permits.

1. Developer shall keep fully informed of all existing and future local, state, and federal laws and county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work on the Park Improvements, or the materials used in the Park Improvements, or which in any way affect the conduct of the work on the Park Improvements, and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. In the performance of any work pursuant to this Agreement, Developer shall at all times observe and comply with, and shall cause all Developer's employees, agents, representatives, contractors and subcontractors to observe and comply with all such existing and future laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work. If any discrepancy or inconsistency is discovered in the plans, drawings, specifications, or contract for the work in relation to any such law, ordinance, regulation, order, or decree, Developer shall promptly report the same to the Director.

2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses, and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review.

Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. Consistent with the terms of the Development Agreement, City agrees to cooperate with Developer in its efforts to obtain any such governmental reviews and approvals, licenses, and/or permits. City also shall consider any Subsequent Approvals required for the construction of the Park Improvements in a manner consistent with the Development Agreement. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 7 of this Agreement.

SECTION 3. ENVIRONMENTAL CONDITIONS FOR CITY AND DEVELOPER WARRANTIES.

A. As a condition to the City's acceptance of the Park Improvements and dedication of the City-Dedicated Open Space, the following conditions shall be satisfied:

1. Any violation of any environmental law on the Site that was caused by or the legal responsibility of Developer and that affects the use or occupancy of the City-Dedicated Open Space for its intended use shall have been corrected or, if not capable of being corrected by such date, shall remain the responsibility of Developer to address post transfer.

2. Neither the Site nor Developer shall be subject to any existing, pending, or threatened investigation by any federal, state, or local governmental authority under or in connection with the environmental laws relating to the City-Dedicated Open Space for which Developer or the future Owner is responsible which was not caused by the City as a prior owner or occupant of the City-Dedicated Open Space (e.g., if the City or a third party is responsible for same, this condition shall be deemed satisfied).

3. Neither Developer nor any other person with Developer's permission to be upon the Site shall use, generate, manufacture, produce, or release, on, under, or about the City-Dedicated Open Space, any Hazardous Substance except in compliance with all applicable environmental laws. For the purposes of this Agreement, the term "Hazardous Substances" or "Hazardous Materials" shall mean any substance or material which is capable of posing a risk of injury to health, safety or property, including all those materials and substances designated as hazardous or toxic by any federal, state or local law, ordinance, rule, regulation or policy, including but not limited to, all of those materials and substances defined as "Toxic Materials" in Sections 66680 through 66685 of Title 22 of the California Code of Regulations, Division 4, Chapter 30, as the same shall be amended from time to time, or any other materials requiring remediation under federal, state or local laws, ordinances, rules, regulations or policies.

4. Neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any monitoring, reporting, or restrictions relative to its use as a park or open space by any governmental authority with jurisdiction over the City-

Dedicated Open Space, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board, that is not the responsibility of a third party or the City as the prior occupant of the City-Dedicated Open Space (e.g., if the City or a third party is responsible for same, this condition shall be deemed satisfied).

5. Subject to Section 2(G)(1)(b) of this Exhibit, and Exhibit E2 to the Agreement, neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any burden, easements, covenants or land use restrictions recorded against any part of the Park Improvements or City-Dedicated Open Space that would prohibit the use of the Park Improvements or the City-Dedicated Open Space for their intended use as designed.

B. By executing this Agreement, Developer represents and warrants that:

1. As of the date of this Agreement, Developer has not caused or permitted the release of, and except as disclosed in environmental reports or summaries made available to the City prior to the date of this Agreement, has no knowledge of the release or presence of, any Hazardous Substance in violation of environmental law on the City-Dedicated Open Space or the property on which the Park Improvements are to be constructed that would preclude the use of the City-Dedicated Open Space or the Park Improvements for their intended purposes.

2. Developer has not caused the migration of any Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space.

3. Developer's prior and present use of the City-Dedicated Open Space has not resulted in the release of any Hazardous Substance in violation of environmental law on, under, about, or adjacent to the City-Dedicated Open Space.

C. Developer shall give prompt written notice to City of:

1. Any new proceeding or new investigation by any federal, state or local governmental authority with respect to the presence of any Hazardous Substance on the City-Dedicated Open Space or the migration thereof from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space; and

2. Any claims made or threatened by any third party against Developer, City or the City-Dedicated Open Space relating to any loss or injury resulting from any Hazardous Substance; and

3. Developer's discovery of any occurrence or condition on any property adjoining or in the vicinity of the City-Dedicated Open Space that could cause the City-Dedicated Open Space or any part thereof to be subject to any restrictions on its ownership, occupancy, use for the purpose for which it is intended, transferability or suit under any environmental law.

SECTION 4. HAZARDOUS MATERIALS REPORT.

A. Scope of Hazardous Materials Report. The Hazardous Materials Report shall be in two phases, Phase I Environmental Site Assessment (“ESA”) and, if appropriate, Phase II ESA.

1. **Existing Phase I Reports.** Several Phase I ESAs have been conducted by Developer and provided to the City which reports were prepared utilizing standards of All Appropriate Inquiry and ASTM 1527-13 (the “Existing Phase I Reports” and individually an “Existing Phase I Report”). The Existing Phase I Reports in general provide the information identified below regarding the condition of the City-Dedicated Open Space with respect to the presence or likely presence of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, including the past, current, or possible release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space. The City agrees to rely on the Existing Phase I Reports if they meet the time elements of the ASTM 1527-13 standard. The Existing Phase I Reports include the following information:

a. The historical usage of the City-Dedicated Open Space and adjacent parcels dating back to the City-Dedicated Open Space’s first developed use (including any agricultural use) or 1940, whichever is earlier.

b. Results of the site visits pertaining to the current condition of the City-Dedicated Open Space, including without limitation, any observed storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, or evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space.

c. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the City-Dedicated Open Space.

2. **Phase I Updates.** For any Existing Phase I Report that is beyond the time elements of the ASTM E1527-13 standard, Developer shall cause to be prepared a Phase I ESA update that meets the ASTM E1527-13 standard (“Phase I ESA Update”) and deliver same to the City.

3. **Existing Phase II ESA.** Based on the Existing Phase I Reports, one or more Phase II investigations were undertaken by Developer. The reports of the Phase II investigations include any chemical analysis which have been completed during the survey along with chain of custody documentation and soil borings, if performed (“Existing Phase II Reports”). The City agrees to rely on the Existing Phase II Reports.

4. **Phase II ESA (if necessary).** If any Phase I ESA Update recommends Phase II investigations, then the City may undertake those recommended Phase II investigations. The following tasks serve only as preliminary guidelines for potential Phase II investigation that may be recommended by the Phase I ESA Update, the results of which are subject to City's review and

approval. It is possible that no Phase II investigation will be necessary for any of the City-Dedicated Property.

a. Soil and Groundwater Sampling and Analysis. Depending on the results of the Phase I ESA Update, it may be necessary to sample and analyze the soil and/or groundwater on-site. If such analysis is necessary, a sampling and analysis plan shall be prepared and approved by City and Developer that shall define a sufficient number of samples to be collected and analyzed to allow for an adequate characterization of the environmental condition of the Site as recommended by the Phase I ESA Update consultant. Soil and/or groundwater samples shall be analyzed for petroleum hydrocarbons, selected metals, and volatile organic compounds, or any other potential contaminant of concern as identified in the Phase I ESA Update.

Soil and/or groundwater samples shall be collected utilizing typical professional protocols and submitted to an EPA certified laboratory for analysis.

b. Report Preparation. A written report shall be prepared presenting the results of the Phase II investigation. The report shall include results from any chemical analysis completed during the investigation, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring wells completed, and recommendations for any further investigation and remediation/source control necessary on the site.

c. Report on any Remediation Work. A written report shall be prepared presenting the results of any remediation work resulting from a Phase II investigation. The report shall include results from any chemical analysis completed during the survey, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring wells completed, and that any recommendations for any further investigation and remediation/source control necessary on the City-Dedicated Open Space have been completed.

SECTION 5. INSURANCE REQUIREMENTS.

Developer and/or its contractors and consultants shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the Development hereunder by the Developer, its agents, representative employees, contractors, or subcontractors.

A. Minimum Scope of Insurance.

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and

2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall also be included for all owned, non-owned and hired autos; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions insurance for all professional services; and
5. Builder's Risk insurance providing coverage for "all risks" of loss; and
6. Contractor's Pollution Liability insurance, including coverage for all operations, completed operations and professional services (without exclusion for asbestos or lead).

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager in writing.

B. Minimum Limits of Insurance.

Developer shall maintain limits no less than:

1. Commercial General Liability. Five Million Dollars (\$5,000,000) per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability. One Million Dollars (\$1,000,000) combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability. Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of One Million Dollars (\$1,000,000) per accident; coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officers, employees, agents, and contractors; and
4. Professional Liability Errors and Omissions. One Million Dollars (\$1,000,000) per claim/One Million Dollars (\$1,000,000) aggregate limit; and
5. Builders' Risk. Completed value of Project; and
6. Contractor's Pollution Liability. Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager in writing. At the option of City, either, the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officials, employees, agents, and contractors, or Developer shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by City.

D. Provisions Of Policies.

The insurance policies are to contain, or be endorsed to contain, the following provisions:

1. Regarding Commercial General Liability, Automobile Liability and Pollution Liability Coverages.
 - a. City, its officials, employees, agents, and contractors are to be covered as an additional insured as respects: liability arising out of activities performed by, or on behalf of, the Developer; products and completed operations of the Developer; premises owned, leased or used by the Developer; or automobiles owned, leased, hired or borrowed by Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors; and
 - b. The Developer's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officials, employees, agents and contractors shall be excess of the Developer's insurance and shall not contribute with it; and
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City and the City, its officials, employees, agents and contractors; and
 - d. Coverage shall state that Developer's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability; and
 - e. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.
2. Workers' Compensation and Employers Liability Coverages shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.
3. Builders' Risk policies shall contain the following provisions:
 - a. City shall be named as loss payee.

b. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.

4. All Coverages.

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to the City's Risk Manager, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Duration.

1. Commercial General Liability (including, without limitation, products and completed operations coverage), Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of Five (5) years after completion of the work under this Agreement.

2. If any of such coverages are written on a claims-made basis, the following requirements apply:

a. The policy retroactive date must precede the date the work commenced under this Agreement.

b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Developer must purchase an extended reporting period equal to or greater than Five (5) years after completion of the work under this Agreement.

F. Acceptability of Insurers.

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

G. Verification of Coverages.

Developer shall furnish City (in the manner provided below) with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: Riskmgt@sanjoseca.gov, or mailed to the following postal address or any subsequent email or postal address as may be directed in writing by the City's Risk Manager:

The City of San Jose – Human Resources
Risk Management
200 East Santa Clara Street, 2nd Floor Wing
San Jose, CA 95113-1905

H. Developer or its contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

Attachment A

City's Turnkey Park Standards for Park Design & Construction

Attachment B

Public Works Standard Specifications- Section 329100 Planting Preparation
(soil specifications, survey requirements, and resulting soil amendment procedures)

Google Draft 1/28/21

EXHIBIT E1

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

The design for the Park Improvements must be consistent with the Park Improvements as described and depicted in the Downtown West Design Standards and Guidelines and as otherwise described in the Parkland Agreement. Further, Developer shall design and construct the Park Improvements in accordance with the following:

1. Downtown West Improvement Standards, dated _____, 20__ (“DWIS”), approved by the City Council on _____, 2021.
2. City's Standard Specifications and Standard Details, dated July 1992 (“City’s Specifications”), as may be amended from time to time, and on file with City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to “Developer” shall be deemed to mean “Developer.”
3. City’s Turnkey Park Standards for Park Design & Construction, dated 2001 (“Turnkey Standards”), on file with City’s Department of Public Works, Architectural Division and included as Attachment A hereto.
4. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the above guidelines, shall be applicable to this agreement. This document is on file with City’s Department of Public Works, Architectural Division and included as Attachment B hereto.
5. The Downtown West Planned Development Zoning District and accompanying General Development Plan, dated _____, 20__, adopted by the City Council on _____, 2021.
6. The Downtown West Design Standards and Guidelines, dated _____, 20__, adopted by the City Council on _____, 2021.
7. City shall review the Park Improvements Plans, including materials, infrastructure, and design elements, for consistency with the conceptual design of Turnkey Park Improvements as described and depicted in the Downtown West Design Standards and Guidelines, and the specifications and guidelines outlined above and throughout this Agreement. Pursuant to the Open Space Improvement Conformance Review Process set forth in the General Development Plan for the Downtown West Planned Development Zoning District, the Plans shall be refined to the

satisfaction of the Director of Parks, Recreation, and Neighborhood Services (“Director of PRNS”) and the Director of Public Works (“Director of PW”) as necessary in order to demonstrate consistency; provided, however, that such refinements shall remain consistent with the Park Improvements Value set forth in Exhibit E4.

B. Application Of Plans And Specifications.

1. City’s Specifications, Turnkey Standards, Downtown West Planned Development District, and the Downtown West Design Standards and Guidelines shall be collectively referred to as the “Park Improvements Specifications.” The Park Improvements shall be constructed in accordance with the Park Improvements Specifications.
2. In the event of a conflict between the Turnkey Standards and the City’s Specifications, the Turnkey Standards shall prevail.
3. The provisions of the Development Agreement, including this Agreement, and the Downtown West Planned Development District, Downtown West Design Standards and Guidelines, and Downtown West Improvement Standards supersede anything to the contrary in the City’s Specifications, Public Works Standard Specifications, or the Turnkey Standards.

C. Project Plans Approval Process.

1. In accordance with the Design Outside Date Schedule set forth in the Parkland Agreement, Developer shall submit Park Improvements Plans at thirty-five percent (35%) as part of its Open Space Improvement Conformance Review application for the Park Improvements. The submittal of sixty-five percent (65%) and ninety-five percent (95%) Park Improvements Plans shall occur following the Open Space Improvement Conformance Review process set forth in the General Development Plan. The preparation, submittal, and review of the Park Improvements Plans shall be in accordance with this Agreement.
2. The Park Improvements Plans shall be submitted in a timely manner in order to insure that Developer completes the Park Improvements on or before the completion date specified in this Agreement. Developer shall not construct any Park Improvements unless and until the City’s Director of PW has approved the Park Improvements Plans in writing. The approval process for the Park Improvements Plans is more particularly set forth in the Turnkey Standards. City’s Director of PW shall complete its review of each submittal and provide any comments to Developer within forty-five (45) days of submittal. City’s Director of PW shall approve or disapprove Developer’s bid submittal within thirty (30) days of submittal.
3. Prior to acceptance of the Park Improvements Plans and/or proceeding with construction of the Park Improvements, the Developer shall provide the City with copies of all soil surveys along with recommended soil amendments. The City may, at its sole discretion and cost, require inspection of the City-Dedicated Open Space for construction debris before construction may commence.

4. City's approval of the Park Improvements Plans shall not release Developer of the responsibility for the correction of mistakes, errors, or omissions contained in the Park Improvements Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Park Improvements Plans were developed or approved. The Parties acknowledge that the Park Improvements Plans, once approved by the Director of PW, shall be final and that, except as expressly provided in this subsection or elsewhere in the Parkland Agreement and/or Development Agreement, no revisions to the Park Improvements Plans shall be permitted unless approved by the Director of PW.

5. For reference and public information purposes, Developer will provide the City with a tentative schedule of construction prior to the commencement of development for any of the Park Improvements. Such schedule may be amended at the Developer's discretion provided that all Improvements are completed by the completion dates specified in this Agreement. At the City's request the Developer shall provide the City with an updated schedule that reflects amended milestones and anticipated completion dates.

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

Developer may hire and contract with one or more contractor or subcontractor, licensed to perform such work in the State of California.

B. Prevailing Wage Requirement.

1. General Requirement. For all construction work on the Park Improvements, Developer agrees to comply with the prevailing wage requirements set forth in Sections 7-1.01A(2) through 7-1.01A(3) of the City of San Jose, Department of Public Works, Standard Specifications, dated July 1992 ("Prevailing Wage Requirement"), as may be amended from time to time. The Prevailing Wage Requirement is incorporated into this Agreement by reference as though set forth herein in their entirety. Developer acknowledges that it has reviewed the Prevailing Wage Requirement and is familiar with its requirements.

2. Contractors and Subcontractors. Developer shall expressly require compliance with the Prevailing Wage Requirement in all agreements it enters into with contractors and subcontractors for construction work on the Park Improvements. Developer acknowledges and agrees that it is responsible for compliance by its contractors and subcontractors of the Prevailing Wage Requirement.

3. Reporting Obligations. Notwithstanding anything to the contrary contained herein, Developer is not obligated to submit to City copies of payroll records for construction contractors, subcontractors, or other construction workers, or any other records required to be maintained pursuant to the Prevailing Wage Requirement, until City requests such records as a result of receiving a claim that a violation of the Prevailing Wage Requirement has occurred. Developer shall provide to City, at no cost to City, a copy of any and all such records within thirty (30) calendar days of City's Office of Equality Assurance request for such records. In responding to a

request by the Office of Equality Assurance, Developer agrees that it is responsible for submitting the records of any and all of its construction contractors and subcontractors.

4. Indemnity. Developer shall indemnify the City for any claims, costs or expenses which City incurs as a result of Developer's failure to pay, or cause to be paid, prevailing wages.

C. Remedies for Developer's Breach of Prevailing Wage Requirements.

1. General. Developer acknowledges City has determined that the Prevailing Wage Requirement promotes each of the following (collectively "Goals"):

a. It protects City job opportunities and stimulates City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.

b. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to City by fostering high turnover and instability in the workplace.

c. Pay workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San Jose because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San Jose.

d. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. Remedies. City and Developer recognize that Developer's breach of the Prevailing Wage Requirement set forth above will cause damage to the City by undermining City's goals in assuring timely payment of prevailing wages, and will cause City additional expenses in obtaining compliance and conducting audits, and that such damage would not be remedied by Developer's payment of restitution to the worker paid less than the prevailing wage. Developer and City agree that such damage would increase the greater the number of employees not paid the applicable prevailing wage and the longer the amount of time over which such wages were not paid. City and Developer further recognize the delays, expense and difficulty involved in proving City's actual losses in a legal proceeding, and mutually agree that making a precise determination of the amount of City's damages as a result of Developer's breach of the Wage Provision would be impracticable and/or extremely difficult. Accordingly, City and Developer agree that:

a. For each day after thirty (30) calendar days that Developer fails to completely respond to a request by City to provide records as required under Section 2(B), of this Exhibit E1, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and

b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of

three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.

3. Audit Rights. All records or documents required to be kept pursuant to this Agreement to verify compliance with the Prevailing Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Developer's address indicated for receipt of notices in this Agreement.

4. Remedies Cumulative. The remedies set forth in this provision of the Agreement are cumulative and in addition to any other remedies set forth in the Prevailing Wage Requirements or otherwise permitted by law.

Developer Initial: _____

City Initial: _____

D. Conduct Of Work.

1. Appearance. Developer shall maintain a neat and clean appearance to the work at the City-Dedicated Open Space. When practicable, broken concrete and debris developed during clearing and grubbing shall be disposed of concurrently with its removal. If stockpiling of disposable material is necessary, the material shall be retained in an area not readily visible to the public in a manner meeting the reasonable satisfaction of the Director of PW.

2. Condition. Developer shall maintain the City-Dedicated Open Space in a neat, clean, and good condition prior to City's acceptance of the Park Improvements. Developer shall not dispose or cause the disposal of any Hazardous Substances on any of the City-Dedicated Open Space. Additionally, Developer shall take reasonable precautions to prevent the disposal of Hazardous Substances by third parties on any of the Site. The term "Hazardous Substances" is defined in Section 3(A)(2) of this Exhibit.

3. Emergencies. In an emergency affecting the safety of persons or property, Developer shall act reasonably to prevent threatened damage, injury, or loss. Developer shall immediately notify the City by telephone at the telephone number as directed by City's Director of PW and in writing of such actions.

E. Access For Inspection.

1. Access. The Director of PW and the Director of PW's designated representatives, including without limitation, staff from other City departments, shall at all times during the progress of work on the Park Improvements have free access to such improvements for inspection purposes and shall act in accordance with the site specific safety procedures. If the Director of PW determines that all or any portion of the work done on the Park Improvements is not in compliance with the Plans, the Director of PW shall notify Developer in writing of the same and Developer shall promptly cure such defect to the Director of PW's reasonable satisfaction. Such notifications shall

be made to the Developer and his on-site representatives to not unduly interfere with ongoing construction work.

2. Representatives.

a. Prior to commencement of work on the Park Improvements, Developer shall designate in writing an authorized representative who shall have the authority to represent and act for Developer. When work is not in progress and during periods when work is suspended, arrangements acceptable to the Director of PW shall be made for any emergency work which may be required. In addition, Developer shall provide Director of PW with the names and telephone numbers of at least two (2) individuals in charge of or responsible for the work who can be reached personally in case of emergency twenty-four (24) hours a day, seven (7) days a week.

b. The Director of PW shall also designate one or more authorized representative who shall have the authority to represent the Director of PW. Developer's authorized representative shall be present at the site of the work at such reasonable times as designated by the Director of PW. Prior to commencement of the work, the Parties shall mutually agree to an inspection schedule, which schedule may be adjusted from time to time by mutual agreement.

c. Whenever the Developer or its authorized representative is not present on any particular part of the work where it becomes necessary to give direction for safety reasons, the Director of PW shall have the right to give such orders which shall be received and obeyed by the superintendent or foreman who may have charge of the particular work in reference to which the orders are given. Any order given by the Director of PW will on request of the Developer be given or confirmed by the Director of PW in writing.

d. City's rights under this Agreement shall not make the Developer an agent of the City, and the liability of the Developer for all damages to persons or to public or private property arising from Developer's execution of the work, shall not be lessened because of the exercise by City of its rights.

F. Acceptance of Park Improvements.

The Park Improvements shall be completed in accordance with the provisions of this Agreement to the satisfaction of the Director of PW.

1. City shall inspect and prepare a punchlist for the Park Improvements within ten (10) business days of notification by Developer that the Developer considers the construction of the Park Improvements to be complete. City shall perform its final inspection within ten (10) business days of notification by Developer that all punchlist work has been completed.

2. City shall process acceptance documentation (Notice of Acceptance) within ten (10) business days of the date of City's final inspection or the date upon which the Developer returns to City the appropriate signed acceptance documentation, whichever is later, provided that:

- a. City finds that all punchlist work has been satisfactorily completed; and
- b. Developer has performed and satisfied any and all terms, conditions, and obligations required under this Agreement prior to acceptance of the Park Improvements, including but not limited to, the requirements for dedication of the City-Dedicated Open Spaces as outlined in Section 2(G) of this Exhibit; and
- c. Developer has provided the Director of PW with three (3) sets of the Plans (“record plans”) corresponding copies of any and all warranties, and the like (such warranties shall be in the name of the City), and corresponding copies of any and all operating manuals for equipment installed as part of the Park Improvements. The aforementioned documents shall also be provided by Developer in an appropriate electronic format (.dwg, .pdf, etc.) as requested by the Director of Public Works or Parks, Recreation, and Neighborhood Services.

3. The Parties acknowledge that City's restrictions on the installation of landscaping because of future drought conditions may delay Developer's installation of the landscaping contemplated by this Agreement. If, due to drought restrictions water restrictions are in place, or recycled water also is not available, and Developer, therefore, is unable to install the landscaping in time to be inspected by the Director for the purposes of accepting the completed Park Improvements, Developer shall post a bond or other form of security as set forth in Section 6(A)(4) of this Agreement, and the delay in the installation of such landscaping shall not preclude acceptance of the affected City-Dedicated Open Space and Park Improvements thereon.

4. If Developer satisfies all obligations set forth in this Agreement that are required for City's acceptance of the City-Dedicated Open Space and/or the Park Improvements thereon, and City fails to process a Notice of Acceptance in the manner and within the time specified herein, any and all maintenance costs thereafter incurred by Developer shall be counted toward Developer's Parkland Obligation for any residential units that Developer subsequently constructs.

5. At the discretion of the Director of PW, City may accept a designated portion of a City-Dedicated Open Space and/or the Park Improvements thereon. Acceptance of a designated portion will be as provided by Section 7-1.166 of the City's Specifications.

- a. Pursuant to Section 2(D) of this Agreement, acceptance of a City-Dedicated Open Space and the Park Improvements thereon shall 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 the safe use of the park by the public.

- b. If a City-Dedicated Open Space is affected by a Park Construction TCE, but Developer has otherwise satisfied all obligations set forth in this Agreement that are required for City's acceptance of that City-Dedicated Open Space and the Park Improvements thereon, the Director of PW shall process a Notice of Acceptance for that

portion of the City-Dedicated Open Space and Park Improvements that are outside of the scope or boundaries of the Park Construction TCE.

G. City-Dedicated Open Space.

1. Developer shall provide each of the following to the Director of PW, subject to the approval of the Director of PW, prior to City's acceptance of the City-Dedicated Open Space and Park Improvements:

a. A preliminary report for the City-Dedicated Open Space by a reputable title company currently doing business for City's Real Estate Division. Developer shall coordinate with City's Real Estate Division and provide a preliminary title report at least ninety (90) days prior to execution of this Agreement and an updated title report at least ninety (90) days prior to the anticipated completion of the Park Improvements.

b. A Grant Deed for the City-Dedicated Open Space containing the legal description of the City-Dedicated Open Space, as approved by City Surveyor, properly executed and acknowledged, subject only to the exceptions to title set forth in Exhibit E2. Title to the City-Dedicated Open Space shall be vested in City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Developer, subject only to those exceptions set forth in Exhibit E2 ("Permitted Exceptions"), which Permitted Exceptions shall not impact or otherwise count against the credit value of the affected City-Dedicated Open Space except as indicated in Exhibit E2 and the Parkland Agreement. The Grant Deed, subject to approval of City, for the City-Dedicated Open Space shall be delivered to the City's Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

c. Developer shall also cause to be provided to City, concurrently with the conveyance of the City-Dedicated Open Space to City, a C.L.T.A. owner's form policy of title insurance issued by a reputable title company currently doing business with City, with City named as the insured, in the amount of \$ [REDACTED] insuring the title of City to the City-Dedicated Open Space is subject to only the Permitted Exceptions.

d. Any and all reports related to the condition of the City-Dedicated Open Space and the lands adjacent to the City-Dedicated Open Space caused to be performed by the Developer or in the Developer's possession or control. Developer shall also provide to City, at the Developer's sole cost, a report, prepared or updated no earlier than twelve (12) months before the proposed acceptance of the Park Improvements by a qualified consultant analyzing the condition of the City-Dedicated Open Space with respect to the presence of Hazardous Materials on or adjacent to the City-Dedicated Open Space ("Hazardous Materials Report"). The definition of Hazardous Materials for purposes of this Agreement is set forth in Section 3(A)(2) of this Exhibit. The scope of the Hazardous Materials Report shall, at minimum, contain the elements set forth below in Section 4.

e. Subject to Section 3 and the disclosures and obligations set forth therein, in the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous

Materials on any of the City-Dedicated Open Space in excess of generally accepted environmental screening limits for park land uses (e.g. Environmental Screening Limits and California Human Health Screening Limits) or in violation of any hazardous materials/waste laws, the Director shall have the right to require Developer, as a condition of acceptance, to remediate or mitigate the condition to the extent required for the park to be used as designed and intended, including without limitation, removal of the Hazardous Materials in the top soil. The type of remediation or mitigation required for the City-Dedicated Open Space shall be at no cost to the City and be subject to the review and approval of the Director

f. The Environmental Warranty specified in Section 3 of this Exhibit.

g. Documents evidencing the authority of the signatory(ies) to execute any agreement or other legal binding documents on behalf of Developer.

2. The top __ inches of soils on site shall be provided to the City free and clear of all construction debris and shall be amended in accordance with recommendations from the soil reports and agricultural soil surveys, or as otherwise directed by the City's Director or Designees. Additional amendments including, but not limited to, mycorrhizal inoculum or organic fertilizers may be required by the City or provided at the Developers discretion in consultation with the City.

3. Upon the Director of PW's acceptance of the City-Dedicated Open Space and Park Improvements, Developer shall have no further obligations in connection with the City-Dedicated Open Space except for the terms, conditions, or obligations of this Agreement that explicitly survives acceptance or termination.

H. Compliance With Laws/Permits.

1. Developer shall keep fully informed of all existing and future local, state, and federal laws and county and municipal ordinances and regulations which in any manner affect those engaged or employed in the work on the Park Improvements, or the materials used in the Park Improvements, or which in any way affect the conduct of the work on the Park Improvements, and of all such orders and decrees of bodies or tribunals having any jurisdiction or authority over the same. In the performance of any work pursuant to this Agreement, Developer shall at all times observe and comply with, and shall cause all Developer's employees, agents, representatives, contractors and subcontractors to observe and comply with all such existing and future laws, ordinances, regulations, orders and decrees of bodies or tribunals having any jurisdiction or authority over the work. If any discrepancy or inconsistency is discovered in the plans, drawings, specifications, or contract for the work in relation to any such law, ordinance, regulation, order, or decree, Developer shall promptly report the same to the Director.

2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses, and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review.

Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. Consistent with the terms of the Development Agreement, City agrees to cooperate with Developer in its efforts to obtain any such governmental reviews and approvals, licenses, and/or permits. City also shall consider any Subsequent Approvals required for the construction of the Park Improvements in a manner consistent with the Development Agreement. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 7 of this Agreement.

SECTION 3. ENVIRONMENTAL CONDITIONS FOR CITY AND DEVELOPER WARRANTIES.

A. As a condition to the City's acceptance of the Park Improvements and dedication of the City-Dedicated Open Space, the following conditions shall be satisfied:

1. Any violation of any environmental law on the Site that was caused by or the legal responsibility of Developer and that affects the use or occupancy of the City-Dedicated Open Space for its intended use shall have been corrected or, if not capable of being corrected by such date, shall remain the responsibility of Developer to address post transfer.

2. Neither the Site nor Developer shall be subject to any existing, pending, or threatened investigation by any federal, state, or local governmental authority under or in connection with the environmental laws relating to the City-Dedicated Open Space for which Developer or the future Owner is responsible which was not caused by the City as a prior owner or occupant of the City-Dedicated Open Space (e.g., if the City or a third party is responsible for same, this condition shall be deemed satisfied).

3. Neither Developer nor any other person with Developer's permission to be upon the Site shall use, generate, manufacture, produce, or release, on, under, or about the City-Dedicated Open Space, any Hazardous Substance except in compliance with all applicable environmental laws. For the purposes of this Agreement, the term "Hazardous Substances" or "Hazardous Materials" shall mean any substance or material which is capable of posing a risk of injury to health, safety or property, including all those materials and substances designated as hazardous or toxic by any federal, state or local law, ordinance, rule, regulation or policy, including but not limited to, all of those materials and substances defined as "Toxic Materials" in Sections 66680 through 66685 of Title 22 of the California Code of Regulations, Division 4, Chapter 30, as the same shall be amended from time to time, or any other materials requiring remediation under federal, state or local laws, ordinances, rules, regulations or policies.

4. Neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any monitoring, reporting, or restrictions relative to its use as a park or open space by any governmental authority with jurisdiction over the City-

Dedicated Open Space, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board, that is not the responsibility of a third party or the City as the prior occupant of the City-Dedicated Open Space (e.g., if the City or a third party is responsible for same, this condition shall be deemed satisfied).

5. Subject to Section 2(G)(1)(b) of this Exhibit, and Exhibit E2 to the Agreement, neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any burden, easements, covenants or land use restrictions recorded against any part of the Park Improvements or City-Dedicated Open Space that would prohibit the use of the Park Improvements or the City-Dedicated Open Space for their intended use as designed.

B. By executing this Agreement, Developer represents and warrants that:

1. As of the date of this Agreement, Developer has not caused or permitted the release of, and except as disclosed in environmental reports or summaries made available to the City prior to the date of this Agreement, has no knowledge of the release or presence of, any Hazardous Substance in violation of environmental law on the City-Dedicated Open Space or the property on which the Park Improvements are to be constructed that would preclude the use of the City-Dedicated Open Space or the Park Improvements for their intended purposes.

2. Developer has not caused the migration of any Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space.

3. Developer's prior and present use of the City-Dedicated Open Space has not resulted in the release of any Hazardous Substance in violation of environmental law on, under, about, or adjacent to the City-Dedicated Open Space.

C. Developer shall give prompt written notice to City of:

1. Any new proceeding or new investigation by any federal, state or local governmental authority with respect to the presence of any Hazardous Substance on the City-Dedicated Open Space or the migration thereof from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space; and

2. Any claims made or threatened by any third party against Developer, City or the City-Dedicated Open Space relating to any loss or injury resulting from any Hazardous Substance; and

3. Developer's discovery of any occurrence or condition on any property adjoining or in the vicinity of the City-Dedicated Open Space that could cause the City-Dedicated Open Space or any part thereof to be subject to any restrictions on its ownership, occupancy, use for the purpose for which it is intended, transferability or suit under any environmental law.

SECTION 4. HAZARDOUS MATERIALS REPORT.

A. **Scope of Hazardous Materials Report.** The Hazardous Materials Report shall be in two phases, Phase I Environmental Site Assessment (“ESA”) and, if appropriate, Phase II ESA.

1. **Existing Phase I Reports.** Several Phase I ESAs have been conducted by Developer and provided to the City which reports were prepared utilizing standards of All Appropriate Inquiry and ASTM 1527-13 (the “Existing Phase I Reports” and individually an “Existing Phase I Report”). The Existing Phase I Reports in general provide the information identified below regarding the condition of the City-Dedicated Open Space with respect to the presence or likely presence of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, including the past, current, or possible release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space. The City agrees to rely on the Existing Phase I Reports if they meet the time elements of the ASTM 1527-13 standard. The Existing Phase I Reports include the following information:

a. The historical usage of the City-Dedicated Open Space and adjacent parcels dating back to the City-Dedicated Open Space’s first developed use (including any agricultural use) or 1940, whichever is earlier.

b. Results of the site visits pertaining to the current condition of the City-Dedicated Open Space, including without limitation, any observed storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, or evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space.

c. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the City-Dedicated Open Space.

2. **Phase I Updates.** For any Existing Phase I Report that is beyond the time elements of the ASTM E1527-13 standard, Developer shall cause to be prepared a Phase I ESA update that meets the ASTM E1527-13 standard (“Phase I ESA Update”) and deliver same to the City.

3. **Existing Phase II ESA.** Based on the Existing Phase I Reports, one or more Phase II investigations were undertaken by Developer. The reports of the Phase II investigations include any chemical analysis which have been completed during the survey along with chain of custody documentation and soil borings, if performed (“Existing Phase II Reports”). The City agrees to rely on the Existing Phase II Reports.

4. **Phase II ESA (if necessary).** If any Phase I ESA Update recommends Phase II investigations, then the City may undertake those recommended Phase II investigations. The following tasks serve only as preliminary guidelines for potential Phase II investigation that may be recommended by the Phase I ESA Update, the results of which are subject to City's review and

approval. It is possible that no Phase II investigation will be necessary for any of the City-Dedicated Property.

a. Soil and Groundwater Sampling and Analysis. Depending on the results of the Phase I ESA Update, it may be necessary to sample and analyze the soil and/or groundwater on-site. If such analysis is necessary, a sampling and analysis plan shall be prepared and approved by City and Developer that shall define a sufficient number of samples to be collected and analyzed to allow for an adequate characterization of the environmental condition of the Site as recommended by the Phase I ESA Update consultant. Soil and/or groundwater samples shall be analyzed for petroleum hydrocarbons, selected metals, and volatile organic compounds, or any other potential contaminant of concern as identified in the Phase I ESA Update.

Soil and/or groundwater samples shall be collected utilizing typical professional protocols and submitted to an EPA certified laboratory for analysis.

b. Report Preparation. A written report shall be prepared presenting the results of the Phase II investigation. The report shall include results from any chemical analysis completed during the investigation, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring wells completed, and recommendations for any further investigation and remediation/source control necessary on the site.

c. Report on any Remediation Work. A written report shall be prepared presenting the results of any remediation work resulting from a Phase II investigation. The report shall include results from any chemical analysis completed during the survey, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring wells completed, and that any recommendations for any further investigation and remediation/source control necessary on the City-Dedicated Open Space have been completed.

SECTION 5. INSURANCE REQUIREMENTS.

Developer and/or its contractors and consultants shall procure and maintain for the duration of the Agreement insurance against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the Development hereunder by the Developer, its agents, representative employees, contractors, or subcontractors.

A. Minimum Scope of Insurance.

Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001; and

2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall also be included for all owned, non-owned and hired autos; and
3. Workers' Compensation insurance as required by the California Labor Code and Employers Liability insurance; and
4. Professional Liability Errors and Omissions insurance for all professional services; and
5. Builder's Risk insurance providing coverage for "all risks" of loss; and
6. Contractor's Pollution Liability insurance, including coverage for all operations, completed operations and professional services (without exclusion for asbestos or lead).

There shall be no endorsement reducing the scope of coverage required above unless approved by the City's Risk Manager in writing.

B. Minimum Limits of Insurance.

Developer shall maintain limits no less than:

1. Commercial General Liability. Five Million Dollars (\$5,000,000) per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and
2. Automobile Liability. One Million Dollars (\$1,000,000) combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability. Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of One Million Dollars (\$1,000,000) per accident; coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officers, employees, agents, and contractors; and
4. Professional Liability Errors and Omissions. One Million Dollars (\$1,000,000) per claim/One Million Dollars (\$1,000,000) aggregate limit; and
5. Builders' Risk. Completed value of Project; and
6. Contractor's Pollution Liability. Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

Any deductibles or self-insured retentions must be declared to, and approved by City's Risk Manager in writing. At the option of City, either, the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects City, its officials, employees, agents, and contractors, or Developer shall procure a bond guaranteeing payment of losses and related investigations, claim administration and defense expenses in an amount specified by City.

D. Provisions Of Policies.

The insurance policies are to contain, or be endorsed to contain, the following provisions:

1. Regarding Commercial General Liability, Automobile Liability and Pollution Liability Coverages.
 - a. City, its officials, employees, agents, and contractors are to be covered as an additional insured as respects: liability arising out of activities performed by, or on behalf of, the Developer; products and completed operations of the Developer; premises owned, leased or used by the Developer; or automobiles owned, leased, hired or borrowed by Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors; and
 - b. The Developer's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officials, employees, agents and contractors shall be excess of the Developer's insurance and shall not contribute with it; and
 - c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City and the City, its officials, employees, agents and contractors; and
 - d. Coverage shall state that Developer's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability; and
 - e. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.
2. Workers' Compensation and Employers Liability Coverages shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.
3. Builders' Risk policies shall contain the following provisions:
 - a. City shall be named as loss payee.

b. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.

4. All Coverages.

Each insurance policy required by this Agreement shall be endorsed to state that coverage shall not be suspended, voided, cancelled, or reduced in limits except after thirty (30) days' prior written notice has been given to the City's Risk Manager, except that ten (10) days' prior written notice shall apply in the event of cancellation for non-payment of premium.

E. Duration.

1. Commercial General Liability (including, without limitation, products and completed operations coverage), Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of Five (5) years after completion of the work under this Agreement.

2. If any of such coverages are written on a claims-made basis, the following requirements apply:

a. The policy retroactive date must precede the date the work commenced under this Agreement.

b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Developer must purchase an extended reporting period equal to or greater than Five (5) years after completion of the work under this Agreement.

F. Acceptability of Insurers.

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

G. Verification of Coverages.

Developer shall furnish City (in the manner provided below) with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

Proof of insurance shall be either emailed in pdf format to: Riskmgt@sanjoseca.gov, or mailed to the following postal address or any subsequent email or postal address as may be directed in writing by the City's Risk Manager:

The City of San Jose – Human Resources
Risk Management
200 East Santa Clara Street, 2nd Floor Wing
San Jose, CA 95113-1905

H. Developer or its contractors shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.

Attachment A

City's Turnkey Park Standards for Park Design & Construction

Attachment B

Public Works Standard Specifications- Section 329100 Planting Preparation
(soil specifications, survey requirements, and resulting soil amendment procedures)