

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Preliminary Draft of Google Encroachment with CAO Comments
Date: Tuesday, April 6, 2021 2:31:55 PM
Attachments: [1785920_3.docx](#)
[1785972_2.docx](#)

From: Phan, Johnny
Sent: Friday, February 12, 2021 2:49 PM
To: Miller, J. Gregg <gmliller@coblentzlaw.com>; GColli@perkinscoie.com
Cc: Hill, Egan <Egan.Hill@sanjoseca.gov>
Subject: Preliminary Draft of Google Encroachment with CAO Comments

Hi Gregg – Attached please see our comments. Please set up a meeting with myself and Egan Hill to discuss further. Thanks. Johnny

Johnny V. Phan

Senior Deputy City Attorney
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City of San Jose
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**RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:**

City of San José
Department of Public Works
200 E. Santa Clara St., 5th Floor
Attention: Director of Public Works
File No.:

RECORDED WITHOUT FEE
PER GOVERNMENT CODE
SECTIONS 6103 AND 27383

SPACE ABOVE RESERVED FOR RECORDER'S USE

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

This Encroachment Agreement ("Agreement") is made and entered into by and between the City of San José, a municipal corporation of the State of California ("City") and Google LLC, a Delaware limited liability company and its successors in interest ("Permittee"), as of **DATE** ("Effective Date").

RECITALS

WHEREAS, the Permittee is the owner of certain real property in the City of San José, County of Santa Clara, State of California, described as **DESCRIPTION** ("Property") which is more particularly described in Exhibit A attached hereto and incorporated herein by reference; and

WHEREAS, the Property is bounded by or subject to those certain public rights-of-way or other public easements owned or controlled by the City that have been expressly or impliedly dedicated to the public, commonly known as **PUBLIC PROPERTY NAME** ("Public Property"); and

WHEREAS, the Permittee has requested that the City authorize the Permittee to design, construct, maintain, repair, occupy and use DESCRIBE ENCROACHMENT ("Encroachment"), which is intended to reside within portions of PUBLIC PROPERTY NAME (the "Subject Premises"), as more particularly described in Exhibit A attached hereto and incorporated herein by reference and as set forth in the Plans (as defined below); and

WHEREAS, the City's Director of Public Works has approved plans and specifications for the design and construction of the Encroachment, which are on file with the City and are incorporated herein by reference, subject to the additional conditions and terms contained in that approval (collectively, "Plans"); and

WHEREAS, the City Council adopted a resolution authorizing the Encroachment, subject to the conditions set forth therein, a true copy of which is attached hereto as Exhibit B and incorporated herein by reference ("Authorization"); and

WHEREAS, this Agreement, including the Plans and any conditions contained therein, and the Authorization together constitute a revocable permit from the City allowing the Permittee to maintain the Encroachment, subject to the terms and conditions set forth therein (collectively "Permit");

NOW, THEREFORE, in consideration of the City's granting revocable permission for the Encroachment, and subject to all of the terms, conditions and restrictions set forth in this Agreement and the Authorization, the City and Permittee, for itself and all successive owners of the Property, intending to be bound thereby for the benefit of the Public Property, do hereby agree as follows:

1. Incorporation of Recitals. The recitals are true and correct and are incorporated herein as if repeated in their entirety.
2. Revocable License. The Encroachment shall be allowed only as a revocable license, and the City shall not be estopped from ordering removal of the Encroachment or demanding compliance with any of Permittee's obligations under the Permit. The Permit shall not be construed to create any property right in the Subject Premises that the Permittee did not possess prior to receiving the Permit. The Permit shall have no value in any proceeding

greater than the Permittee's cost to obtain the Permit. The Permittee shall be solely responsible for all costs of complying with its obligations under the Permit.

3. Term of Permit and Agreement. The term of the Permit shall commence upon the Effective Date and continue for the life of the Encroachment, except if earlier revoked or terminated by the City pursuant to this Agreement. The term of this Agreement shall commence upon the Effective Date and expire upon the City's recordation of a notice of acceptance in accordance with Section 7.
4. Conformance with Permit. The Permittee acknowledges and agrees that the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment shall be in strict conformance with the Plans and the Permit. The Permit has been granted upon each and every condition contained therein and shall be strictly construed against the Permittee. The City grants the Permittee no rights that are not explicitly written in the Permit. The enumeration of the City's rights in the Permit shall not be considered exclusive or as limiting the rights generally reserved to the City under applicable law. Each of the obligations and conditions in the Permit is a material and essential condition to the granting of the Permit.
5. Revocation. The City Council may revoke the Authorization for the Major Encroachment if: (i) the City or a regional, County, State or Federal governmental agency determines to use the Subject Premises for a public purpose; (ii) the City determines that the Major Encroachment constitutes a public nuisance under state or federal law; or (iii) the Major Encroachment is declared unlawful under state or federal law by a court of competent jurisdiction. The City's revocation shall be effective one hundred eighty (180) days after the City Council's adoption of a resolution revoking the Permit, except if the City Council should provide a longer period of time in its resolution of revocation. For purposes of the Permit, the following shall not constitute a "public purpose" that would merit revocation of the Permit: (1) subsequent encroachments proposed by private property development projects, whether below, at or above-grade; (2) at-grade street projects such as light-rail transit infrastructure or street realignment, repaving or regrading; or (3) subsequent private or quasi-public subsurface utility infrastructure. If the City determines to use the Subject Premises for a City project, the City will give the Permittee at least one (1) calendar year advance written notice of any proposed City Council action, including any

action to revoke the Authorization, that would require any material modification to, or removal in whole or in part of, the Encroachment ("Notice of Public Purpose"). The Notice of Public Purpose will specify, to the extent this information is available to the City at the time of the notice, the nature of the proposed public purpose and the anticipated nature of the conflict with the Encroachment. During this 1-year notice period, upon written request of the Permittee, the Director of Public Works or a designee will be available to meet and confer with the Permittee regarding the proposed action, including potential alternatives that would not require material modification or removal of the Encroachment ("Meet and Confer"). The foregoing 1-year notice period shall not apply to any City actions that only plan or consider public uses of the Subject Premises nor shall it apply to actions or plans by any governmental entities other than the City. In the event that the Director of Public Works receives actual knowledge of a planned public purpose for the Subject Premises that would require any material modification to, or removal in whole or in part of, the Encroachment, the Director of Public Works shall provide a Notice of Public Purpose to Permittee and Meet and Confer at the Permittee's request. In addition, upon written request of the Permittee, not to exceed one meeting every twelve (12) months, the Director of Public Works or a designee will meet with the Permittee to discuss any City public works projects planned or under consideration or construction that may impact the Encroachment.

6. Termination. The City may terminate the Permit in the event of a Default under this Agreement. The termination shall be effective immediately upon the City's written notice to the Permittee.
7. Removal and Restoration. After revocation or termination of the Permit, the Permittee shall remove the Encroachment and restore the Subject Premises to a condition that is safely usable by the City and public, in compliance with City standards and specifications, and satisfactory to the City's Director of Public Works, all without liability or expense to the City. Prior to commencing any removal or restoration work, the Permittee shall submit to the City plans for the removal and restoration work, which shall be subject to the City's approval. All removal and restoration work shall be performed under the City's direction. The Permittee shall commence removal and restoration within ten (10) days after the City's approval of the plans and shall complete removal and restoration within one hundred eighty (180) days, or such longer period of time as

determined by the Director of Public Works, after the City's approval of the removal and restoration plans. The Permittee's obligations under this section shall not be deemed to have been satisfied until the City records a notice on the Property accepting the Permittee's removal and restoration work. If the Permit has been terminated, the Permittee shall have no opportunity to cure any failure to comply with the foregoing removal and restoration requirements.

8. Default. Permittee shall be in default under the Permit if it breaches or fails to timely observe and perform any obligation under the Permit and fails to timely cure such breach or failure in accordance with this Agreement ("Default"). For the avoidance of doubt, a Default under the Permit shall not thereby automatically be considered a Default under any other encroachment permit issued to Permittee. The Director of Public Works shall notify the Permittee in writing of any breach or failure to perform. Except where a different time period is provided in this Agreement for a particular obligation, the Permittee shall, within thirty (30) days of the Director of Public Works' notice, commence, diligently proceed using best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. If the Director of Public Works determines in writing that such breach or failure to perform is incapable of cure within thirty (30) days, the Director shall specify in writing the number of days in which Permittee shall complete its cure, and Permittee shall continue to diligently proceed to cure using its best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. Cure periods in excess of ninety (90) days from the date of the Director's notice shall require City Council approval. If the Permittee does not cure the breach or failure to perform to the City's satisfaction within the foregoing cure periods, the Permittee shall be in Default, and the Permittee hereby grants to the City any consent or right necessary for the City to remedy the Default. The Permittee shall be responsible for all of the City's costs to remedy the Default and shall reimburse the City for its costs within sixty (60) days of the City's invoice therefore. In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled to specific performance of Permittee's obligations under this Agreement and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.
9. Maintenance and Repair of Encroachment. The Permittee shall maintain and repair the

Encroachment to the City's satisfaction so that it is in a safe condition and good working order for the intended purpose and in a similar condition to that which was originally constructed, except where a higher standard is required by applicable law. All replacements, restorations and repairs shall be at least equal in quality to the original, except that such replacements, restorations, and repairs shall comply with all requirements of applicable law and City standards and specifications in effect at the time of the replacement, restoration or repair. The City also shall have the right, but not the obligation, to stop or direct maintenance or repairs of the Encroachment to protect the public health or safety. Additional maintenance and repair requirements are set forth in Exhibit C attached hereto and incorporated herein by reference. For the avoidance of doubt, this Agreement does not obligate the Permittee to perform routine maintenance and repair of the Public Property.

10. City's Right to Enter and Cure. Notwithstanding anything to the contrary in this Agreement, the City may repair or remove the Encroachment at the Permittee's expense if the City determines that it represents a dangerous condition or threat of danger to life or property. The Permittee shall make any necessary modifications or repairs within ten (10) days after the City's written notice, or such longer period as specified in the City's written notice, except that in cases of emergency as determined by the City, the City shall only be required to provide Permittee with one (1) day telephone and/or email notice. Where the necessary modifications or repairs cannot be completed within ten (10) days, the Permittee shall commence the modifications or repairs within ten (10) days and thereafter diligently proceed using best efforts and carry out to completion all actions necessary to eliminate the dangerous condition or threat of danger to life or property. For the avoidance of doubt, all modifications and repairs shall be performed pursuant to City-approved plans and be subject to the City's inspection and approval. The Permittee shall have no right to cure its failure to comply with the obligations in this section.
11. Right-of-Way Work. In accordance with the San José Municipal Code, Permittee shall obtain a Right-of-Way Work Permit prior to performing any work within Public Property, excluding routine maintenance and repair activities within the Encroachment. In addition, except for routine maintenance and repairs to the Encroachment that do not require a building or other permit or approval from the City, Permittee shall notify the City at least

seventy-two (72) hours prior to starting any work authorized or required by the Permit to arrange a schedule acceptable to the City. Permittee shall upon completion of any work under the Permit, notify the Director of Public Works in writing. No work shall be deemed complete until such notification is received and the work is approved by the Director of Public Works in writing.

12. City Access and Inspection. The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over the Subject Premises at all times without notice to the Permittee, including portions covered by structures, furnishings, materials or equipment, for any lawful purpose for which the Subject Premises may be used. Permittee shall grant the City and its agents, representatives, officers and employees, upon reasonable notice but in no event more than three (3) days, which notice shall not be required in the case of emergencies, access to the Encroachment for any purpose allowed under this Agreement or applicable law. If the City's access to a Major Encroachment is through the Property, such access shall be in accordance with Permittee's reasonable security or building management processes.
13. Public Utilities and Facilities. The Permittee's design, construction, maintenance, repair, occupancy, use and removal of the Encroachment shall not interfere with, impede or make more costly the City's operation, maintenance or improvement of the Public Property. The Permittee shall verify the location of all public and quasi-public utilities and facilities that may be affected by work pursuant to the Permit. The Permittee shall assume all responsibility for loss or damage to such utilities or facilities caused directly or indirectly by Permittee or its contractors, agents, employees or invitees, and shall immediately notify the Director of Public Works of any such loss or damage. Any repairs or restoration to public utilities or facilities shall be performed under the direction of the Director of Public Works. The Permittee shall complete such repairs and restoration within ten (10) days after written demand from the City. If the Permittee fails to complete repairs or restoration within the 10-day period, the Permittee shall have no right to cure, and the City may perform such repairs or restoration and the Permittee shall reimburse the City for its costs within fifteen (15) days of the City's invoice therefore. If the design, construction, maintenance, repair, occupancy, use or removal of the Encroachment requires the removal, relocation, or repair of utilities or facilities, Permittee shall

coordinate its work with the owner(s) of such utilities or facilities in advance of its performance of the work and shall pay the owner(s) for all costs incurred due to the Permittee's performance under this Agreement.

14. Permittee Responsibility for Encroachment. The Permittee shall be solely responsible for the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment, and the City shall not be liable for its review, approval, inspection, maintenance, repair, restoration or removal of any aspect or portion of the Encroachment.
15. Risk of Loss. The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, "City Indemnitees") shall not be liable for any injury to persons or property arising out of, pertaining to or relating to the Encroachment. The Permittee acknowledges that it bears the full risk of loss or damage to the Encroachment and the Property and hereby waives any right to make or prosecute any claims or demands against the City Indemnitees for any loss or damage arising from or relating to the Encroachment. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises or any portion of the Public Property and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.
16. Indemnity/Hold Harmless. To the fullest extent permitted by law, Permittee shall indemnify, hold harmless and defend the City Indemnitees from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively "Claims"), whether or not the Claims involve a third party, which arise out of, relate to or result from: (i) any act or omission of the Permittee, its independent contractors, agents, officers, employees or invitees pursuant to or in connection with the Permit or while in or about the Encroachment or Property for any reason; (ii) the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment; and/or (iii) any breach of this Agreement or violation of applicable law by the Permittee, its independent contractors, agents, officers, employees or invitees, in each case whether or not caused by the negligence of the City Indemnitees, except for Claims resulting from the City's sole negligence. The foregoing

obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligations arise at the time such claim is tendered to Permittee by the City and continues at all times thereafter.

17. Insurance. Permittee shall, at Permittee's sole cost and expense and for the full term of this Agreement, obtain and maintain at least all of the minimum insurance requirements described in Exhibit D attached hereto and incorporated herein by reference. Said insurance shall name the City as additional insured by endorsement and shall be filed with and approved by the City's Risk Manager.
18. Liens. Permittee shall not allow or permit to be enforced against the City any mechanic, laborer, materialmen, contractor, subcontractor, or any other liens, claims or demands arising from any work performed under this Permit. Permittee shall discharge or pay all of said liens, claims and demands before any action is brought to enforce the same against the City or the Subject Premises.
19. Sale or Transfer of Property. The Permittee shall notify potential successor owners of the Property of the Encroachment's existence and the obligations under the Permit. At least sixty (60) days prior to the closing of any sale or transfer of the Property, the Permittee shall cause its successors, assigns and transferees to submit a written statement to the City evidencing the sale or transfer, agreeing to the terms and conditions of the Permit and providing updated contact information for purposes of notices under the Agreement.
20. Assignment. The Permit, and any and all rights and obligations arising thereunder may not be assigned, conveyed or otherwise transferred to any other person unless approved in writing by the City Council; provided, however, that Permittee may without the City's pre-approval assign the Permit to an Affiliate (as defined below). For the purposes of this Section, "Affiliate" means an entity or person that is directly or indirectly controlling, controlled by, or under common control with Permittee. For the purposes of this definition, "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity or a person, whether through the ownership of voting securities, by contract, or otherwise, and the terms

“controlling” and “controlled” have the meanings correlative to the foregoing.

21. Exclusive Ownership and Use of Permittee’s Improvements. Notwithstanding any other provision of this Agreement, all infrastructure and improvements constructed and maintained pursuant to any Permit shall be the Permittee’s sole and exclusive property. Such property of Permittee shall include, without limitation, all electric lines, recycled water pipes, sanitary sewer overflow pipes, pneumatic pipes, fiber optic cabling, thermal piping and fixtures, and all other associated conveyances, casings, safety devices, system controls, enclosures, and other structures or improvements identified in the Plans. This Agreement shall not be construed to create any express or implied public dedication of such improvements or any right of the City or any member of the public to the use and enjoyment thereof. No third party shall have any right or privilege to use any portion of such improvements without the express written consent of Permittee.
22. Notices. Unless otherwise specified in this Agreement, all notices required or provided for under this Agreement shall be in writing and delivered in person or sent by mail, postage prepaid and addressed as provided in this section. A notice shall be effective on the date it is delivered in person, or if mailed, on the date of deposit in the United States Mail. Any changes to the notice addresses must be delivered in accordance with this section. Notices shall be addressed as follows:

If to City:

City of San José
200 East Santa Clara Street, 5th Floor
San Jose, CA 95113
Attn: Director of Public Works

With a copy to:

City Attorney
200 East Santa Clara Street, 16th Floor
San Jose, CA 95113

If to Permittee:

Google LLC
ADDRESS
Attn: General Counsel
Attn: Insert Name and Email

With a copy to:
Google LLC
Address
Attn: Director of Real Estate
Attn: Insert name and Email

With a copy to:
Google LLC
Address
Attn: _____
Attn: Insert name and Email

23. Compliance with Law. Permittee agrees to comply with all applicable laws, ordinances and regulations in its design, construction, maintenance, repair, occupancy, use and removal of the Encroachment.
24. Agreement Binding on Successor Owners. The Permittee consents to the City's recordation of the Permit against title to the Property. The Permit shall be binding upon all successor owners of the Property. Other than by virtue of the sale or transfer of the Property, Permittee shall not assign this Agreement in whole or in part.
25. Severability. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.
26. Survival. All provisions of this Agreement shall survive revocation or termination of the Permit. The provisions under Sections 13-16, 18, 29 and 31-32 shall survive the expiration of this Agreement for a period equal to the statute of limitations applicable to the underlying claim or obligation.
27. Headings. The headings used in this Agreement are for convenience only and shall not be used in the interpretation of this Agreement.
28. Days. All references to days in this Agreement shall mean calendar days, unless specified otherwise.

29. Time is of the Essence. Time is of the essence in performing each and all obligations under this Agreement.
30. Amendment. This Agreement may be amended only by a written instrument executed by the Permittee, approved by the City Council and recorded on title to the Property.
31. Choice of Law. This Agreement shall be construed according to the laws of the State of California.
32. Venue. Any dispute arising under this Agreement shall be adjudicated in California State Court in and for the County of Santa Clara, or in the Federal Court in and for the Northern District of California, as appropriate.
33. No Precedent. The terms and conditions in this Agreement shall not be construed to establish a precedent or policy for any subsequent City authorizations for encroachments.

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

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

[Sr.] Deputy City Attorney

By: _____
Name:
Title:

PERMITTEE*

Print Name of Permittee and Type of Entity

By _____
Name:
Title:

By _____
Name:
Title:

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

EXHIBIT A
**DESCRIPTION OF
SUBJECT PREMISES**

INSERT DESCRIPTION

EXHIBIT A

**MAP SHOWING THE
SUBJECT PREMISES**

EXHIBIT A
DESCRIPTION
OF THE PROPERTY

All that certain real property situate in the City of San José, County of Santa Clara, State of California **DESCRIPTION** filed for record on **DATE** in the official records of the County of Santa Clara in **BOOK #, PAGE #**.

EXHIBIT B

AUTHORIZATION FOR ENCROACHMENT

EXHIBIT C

ADDITIONAL MAINTENANCE/REPAIR REQUIREMENTS

Permittee's maintenance and repair of the Encroachment shall include all of the following requirements, in addition to any additional requirements necessary to comply with applicable law:

- A. All work shall be coordinated through the **ENTER RESPONSIBLE CITY DEPARTMENT/DIVISION**.
- B. All graffiti shall be removed from the Encroachment within five (5) business days of occurrence.
- C. All cosmetic damage (i.e., non-structural, damage posing no harm or threat of harm to life or property) to the Encroachment shall be repaired within ten (10) business days of occurrence.
- D. All structural damage to the Encroachment shall be repaired within thirty (30) days of occurrence, unless the damage represents a dangerous condition or threat of danger to life or property, in which case the Permittee shall repair the Encroachment in accordance with Section 10 of the Agreement.
- E. **INSERT ADDITIONAL REQUIREMENTS**
- F. **INSERT ADDITIONAL REQUIREMENTS**
- G. **INSERT ADDITIONAL REQUIREMENTS**
- H. **INSERT ADDITIONAL REQUIREMENTS**
- I. **INSERT ADDITIONAL REQUIREMENTS**
- J. **INSERT ADDITIONAL REQUIREMENTS**

EXHIBIT D

INSURANCE REQUIREMENTS

[TO BE DETERMINED BY CITY RISK MANAGER]

Council Authorization – Proposed Terms and Conditions

- A. **The** Major Encroachment shall be operated only for utility infrastructure purposes to act as a corridor for utility systems serving the Permittee's real property. Utility infrastructure purposes includes routine maintenance and repair of the utility infrastructure contained therein consistent with the Major Encroachment Agreement. The Major Encroachment may not be used for any other purpose without City Council's prior consent.
- B. **As** a condition precedent to the issuance of each Permit, the Permittee shall provide the City with a maintenance and removal bond in a form approved by the City Attorney in an amount equal to the estimated cost to remove the portion of the Utilidor covered by the Permit and restore the public property in accordance with the Major Encroachment Agreement.
- C. Each Permit shall be conditioned on the Utilidor improvements and all of the real property served by the Utilidor being under common ownership (including corporate affiliates of such common owner). A subsequent sale or transfer of any property individually to a third party shall constitute a basis for the City to terminate the Permit unless the City pre-approves a transfer of the Permit to such separate owner(s). If the City approves a transfer to the separate owner(s), the City may require a revised Permit as a condition of its approval.
- D. Each portion of the Utilidor crossing dedicated public property shall be issued its own Permit. The Permit for each portion of the Utilidor shall be recorded on all real properties served by the Utilidor.
- E. **The** Director shall issue Permits in compliance with the following:
 - 1. Procedure for Permit Issuance.
 - i. **Pre**-Application Procedure. Prior to the submittal of any Application (as defined below) and concurrent with the

submittal of preliminary tract improvement plans as required by the City prior to City's approval of phased final maps and final tract improvement plans, Permittee shall submit a preliminary draft location map, plan view, and elevation showing the dimensions and location of the proposed encroachment and its relationship to adjoining properties, Public Property, and any structures, utilities or improvements and any additional information requested by the Director (collectively "Preliminary Application Materials") to the Director for review and comment. Permittee shall submit Preliminary Application Materials developed at each of the thirty-five percent (35%), sixty-five percent (65%) and ninety-five percent (95%) levels. For each submittal, the Director will review the Preliminary Application Materials for consistency with the Master Encroachment Diagram and the preliminary tract improvement plans under concurrent review by the Director. The Director will provide comments on the Preliminary Application Materials in accordance with the Public Works Standard Review Timelines.

- ii. Application Procedure. Permittee shall submit a letter to the Director to commence the process for issuance of each Encroachment Permit authorized under this Agreement ("Application"). Such Application shall include the following information: (i) a detailed written description of the nature of the proposed encroachment; (ii) a showing that the proposed Encroachment is consistent with the Master Encroachment Diagram, showing in detail any deviations from the Master Encroachment Diagram; (iii) confirmation that the

encroachment concerns an area that is within an area subject to an approved final map or parcel map or for which there is a pending application for such a map; (iv) consistency with previously-approved or pending tract improvement plans; (v) a location map, plan view, and elevations showing the dimensions and exact location of the proposed Encroachment and its relationship to adjoining properties, Public Property and any structures, utilities or other improvements, each at one-hundred percent (100%) design level; and (vi) evidence of consent of any public agencies, utilities, and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment. In addition to the foregoing information, the Permittee shall provide additional information requested by the Director in connection with the Director's review of the Application. The Application shall be accompanied by the Permittee's payment of applicable fees.

- iii. Director's Review. Upon the Director's determination of the Application's completeness, the Director shall review the Application and shall either approve, conditionally approve or deny such Application. The Director shall approve an Application for an Encroachment Permit that meets all conditions of the "Encroachment Permit Checklist" attached hereto as Exhibit A.
- iv. Conditional Approval. The Director shall conditionally approve any Application for an Encroachment Permit where the Director determines that a condition should be imposed to ensure satisfaction of any provision of the Encroachment Permit Checklist or the Encroachment

Agreement or as required to protect the public health, safety or welfare. If the Director conditionally approves a Permit, the Permittee may within thirty (30) days of receipt of any conditional approval appeal the condition(s) to the City Council. The Permittee's failure to so appeal shall render the condition final and non-appealable. The City Council's determination on appeal shall be final.

v. Denial and Appeals. If the Director determines the conditions of the Encroachment Permit Checklist are not met, the Director shall deny the Application in writing, which writing shall include a description of the reasons for which the Application is denied. Permittee may within thirty (30) days of receipt of such denial appeal the Director's decision to the City Council. The Permittee's failure to so appeal shall render the condition final and non-appealable. The City Council's determination on appeal shall be final.

vi. Alternative Procedures. The procedures for issuance of Encroachment Permits by the Director provided under this Agreement shall not be interpreted to prevent the Permittee, at its election, from pursuing an Encroachment Permit under the procedures set forth in Title 13 of the San José Municipal Code.

F. The term of this Authorization shall correspond to the term of the Development Agreement; provided, however, that this Authorization is conditional upon the Permittee's proposed locations for the Utilidor being available at the time the Permittee obtains a Permit for each portion of the Utilidor. If the proposed location conflicts with existing improvements or infrastructure, the Permittee shall be required at its cost to either: (1) negotiate with the owner of the improvements or

infrastructure that conflict with the proposed Utilidor location to resolve the conflict, or (2) re-apply to the City Council to amend the Master Encroachment Diagram to allow an alternative location for that portion of the Utilidor.