From: Phan, Johnny

To: <u>Downtown West Project</u>

**Subject:** FW: Google- DW - Draft Development Agreement and Exhibits

**Date:** Tuesday, April 6, 2021 2:33:16 PM

Attachments: Redline \_DA with CITY comments 1-22-21 - Google - DW - Development Agreement DRAFT 2.12-c.pdf

EXHIBIT B Project Boundary-c.pdf

EXHIBIT D Schedule A AH site plan-c.pdf

EXHIBIT D Schedule B City"s AH Compliance Guidelines-c.pdf

EXHIBIT F2 Figures 1 - 5-c.pdf

Google - DW - Development Agreement DRAFT 2.12.21-c.docx Google - DW - Exhibits to Development Agreement 2.12.21-c.docx

From: Straka, Stephanie <SStraka@coblentzlaw.com>

Sent: Friday, February 12, 2021 8:35 PM

**To:** Phan, Johnny < Johnny. Phan@sanjoseca.gov> **Cc:** Miller, Gregg < gmiller@coblentzlaw.com>

Subject: Google- DW - Draft Development Agreement and Exhibits

#### [External Email]

### Hi Johnny,

Attached for your review are the Draft Development Agreement, a redline of the DA against the document that you sent to us on 1/22, and the DA Exhibits (some of which are attached separately as PDFs; a few will trail next week as noted in the document). The documents remain subject to Google review and comment.

Given the number of attachments, please confirm receipt. Thank you.

#### Stephanie

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

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City Comments 1/19/2021CPDB 2-12-21 Response to J. Phan Comments of 1/19/2021 and addition of new provisions and exhibits. Incorporation of All Provisions, including those "Pending Negotiations" As Noted.

Negotiation Period Privilege; CPRA Confidential Treatment Request; Not for Public Release – CPRA Exempt; Confidential and Proprietary Business-Siting Information

RECORDING REQUESTED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE

(Exempt from Recording Fees Pursuant to Government Code Section 27383)

AND WHEN RECORDED MAIL TO:

Johnny V. Phan Senior Deputy City Attorney Office of the City Attorney City of San José 200 East Santa Clara Street San José, CA 95113-1905

DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF SAN JOSE
AND GOOGLE LLC

[PJ1]:
According to
City Manual,
if lower case
"e" than its
"é" and if
all—
capitalized—
then its "E".

RELATIVE TO THE DEVELOPMENT OF PROPERTY LOCATED IN THE DIRIDON STATION AREA PLAN AREA

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```
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В
       Project Description and Site PlanBoundaries ¶
<del>C</del>¶
       Public Benefits ¶
                                                                                                     [PJ3]: Please
                                                                                                      send over
       C1
               Public Benefits Matrix¶
                                                                                                      comments and
                                                                                                      redline to
       <u>C2</u>
                                                                                                      Parkland-
               Community Benefits Schedule_
                                                                                                      Agreement.
                                                                                                      Not sure why
D
       Affordable Housing Plan Program
                                                                                                      we would need
                                                                                                      to a list of
                                                                                                     required
Е
       Parkland Agreement
                                                                                                     exceptions
                                                                                                     from Parkland
                                                                                                     <del>Dedication</del>
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                                                                                                     Ordinance.
                                                                                                     Let's
                                                                                                      discuss.
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       E3
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       E4
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       E5
1
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1
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       E8
               Bond Forms
       Privately-Owned Open Space ¶¶
<u>F1</u>¶
F
       Privately-Owned Open Space Diagram¶
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that will be
                                                                                                   recorded to
       1
                                                                                                   ensure public
                                                                                                   access runs
                                                                                                   with the
              Public Access Agreement
       F<del>2</del>1
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                                                                                                   Easement-
                                                                                                   would be
       1
                                                                                                   recorded and
                                                                                                   include legal
              -Privately-Owned Open Space Park Rules and Regulations ¶
                                                                                                   descriptions
                                                                                                   and plat map,
                                                                                                   rules and
       Rules Regarding Public Access and Private Events/Temporary Closures¶
                                                                                                   regulation,
       F3
              Code of Conduct for Public Use¶
                                                                                                   [PJ5]: Why
                                                                                                   does the
                                                                                                   Infrastructur
       Workforce, Learning, and Education Commitments¶
                                                                                                   e Plan need
                                                                                                   to be an
       Community Stabilization and Opportunity Pathways Fund¶
H
                                                                                                   exhibit?
                                                                                                   Let's
                                                                                                   discuss.
Ι
       Infrastructure Plan
                                                                                                   [PJ6]: Why
                                                                                                   does the
       G1 [Infrastructure Maintenance Exhibit]
                                                                                                   Standards and
                                                                                                   Guidelines-
                                                                                                   need to also
H-¶
                                                                                                   be an
                                                                                                   exhibit? It
                                                                                                   will be part
       Framework for City-Owned Electrical Microgrid at Google's Downtown West Design
Standards and Guidelines
                                                                                                   Permit and
IProject¶
                                                                                                   change things
                                                                                                   in there.
       Downtown West Parking Requirements¶
K
                                                                                                   [PJ7]: Why do
1
                                                                                                   we need to
       List of Approvals
                                                                                                   attach the
                                                                                                   MMRP? There
                                                                                                   will be a
       List of Applicable Impact Fees¶
JM
                                                                                                   separate
                                                                                                   Council-
                                                                                                   resolution
       MMRP
                                                                                                   attaching the
                                                                                                   MMRP. Let's
                                                                                                   discuss.
       -Transportation Demand Management Plan¶
                                                                                                   [PJ8]: Why
                                                                                                   does the TDM
M¶
                                                                                                   need to be an
                                                                                                   exhibit?
N
       Form of Notice of Completion and Termination
                                                                                                   Let's
                                                                                                   discuss.
NO.
       Form of Assignment and Assumption Agreement
PO
SCHEDULES¶
```

4847-6283-1828.1-4833-9756-1308.4 VI

[PJ4]: Is there an issue with a— Public Access "Easement"—

# Form of Notice of Termination Reimbursement Agreement

-Microgrid and District-Wide Utility Systems Agreements

# DEVELOPMENT AGREEMENT BY AND BETWEEN THE CITY OF SAN JOSÉ AND GOOGLE LLC

THIS DEVELOPMENT AGREEMENT, dated for reference purposes only as of this \_\_\_\_\_ day of \_\_\_\_\_\_, 2021 (the "Reference Date"), is by and between GOOGLE LLC, a Delaware limited liability company (herein, "Google" or "Developer"), and the CITY OF SAN JOSE, a municipal corporation (herein, "City"), pursuant to the authority of Sections 65864 through 65869.5 of the California Government Code (herein, "Development Agreement Statute") and pursuant to the City's powers as a charter city and Chapter 18.02 of the San José Municipal Code (herein, "Development Agreement Ordinance"). The City and Developer are also sometimes referred to individually as a "Party" and together as the "Parties". Capitalized terms not defined when introduced shall have the meanings given in Article 1.

## **RECITALS**

This Agreement is made with reference to the following facts:

- A. The City Council of the City adopted the *Envision San José 2040 General Plan* (""General Plan") in 2011 setting forth a vision and comprehensive road map to guide the City<sup>2</sup>'s continued growth through the year 2040.
- B. The General Plan includes land use policies to shape the transformation of strategically identified ""Growth Areas" into higher density, mixed-use, urban districts or "Urban Villages" which that can accommodate employment and housing growth and reduce environmental impacts of that growth by promoting transit use and walkability. The Diridon Station Area; is located generally within the San José Downtown, is identified as a "Growth Area" and "Urban Village" in the General Plan.

- C. The City Council of the City adopted the Diridon Station Area Plan (DSAP) in 2014 to establish a land use plan and policy framework that will guide future development and redevelopment toward land uses that support transit ridership and economic development, and create a world-class urban destination, among many other objectives.
- D. A. The Downtown West Mixed-Use Plan (herein, the "Project") is located in the General Plan Downtown Growth Area and within the boundaries of the DSAP, an area of the City that is anchored by public transportation. Additionally, the Project re-envisions a significant portion of the DSAP as a mixed-use area that integrates housing and increases open space, rather than solely maximizing office development.
- B.—In December 2018, Developer and City entered into a non-binding Memorandum of Understanding (herein, the "MOU") with the intention to "collaborate on development in and around the Diridon Station Area to aid implementation of the planned expansion of San José's Downtown, the Diridon Station Area Plan, and the General Plan." The MOU set forth a vision for new development to transform the current area through new construction and adaptive reuse of existing facilities to a vibrant, fully functional transit-oriented neighborhood that embodies a commitment to place-making, social equity, economic development, environmental sustainability, and financially viable private development.
- E. C. The goals established in the MOU and advanced by the Project include balancing the objectives of the City, Developer, and the community; capitalizing on transit synergy; optimizing density and the mix of land uses; preserving existing housing and creating new housing; creating broad job opportunities; and pursuing equitable development. Goals also address high-quality, human-scaled design; improvements to the public realm; enhanced sustainability, environmental stewardship, and innovation; improvements to existing transit

access and the minimization of parking; timely implementation; assurance that private developers will fund a fair share of amenities and other improvements and pay prevailing wages to construction workers in office/research and development buildings; and public involvement in discussions regarding public benefits. The MOU states that, should the Project be approved, the Developer would enter into a Development Agreement with the City to "memorialize community benefits and secure vested development rights aligned with any proposed development masterplan."

[PJ10]: Havenot review—
this—
Paragraph D—
for accuracy.
Will need to.
Is this—
language—
taken from—
the EIR?

D. The project area is described in Exhibit A and depicted in Exhibit B, and is G. generally bounded by Lenzen Avenue and the Union Pacific Railroad (UPRR) tracks to the north; North Montgomery Street, Los Gatos Creek, the Guadalupe River, South Autumn Street, and Royal Avenue to the east; Auzerais Avenue to the south; and Diridon Station and the Caltrain rail tracks to the west. Cahill Street fronts Diridon Station and runs generally parallel to the rail tracks in the Project's central area (herein the "Project Site" or "site"). The site is approximately [79]78 acres in size, approximately one mile long from north to south and generally less than 800 feet wide from east to west, although the site reaches nearly 1,500 feet from east to west at its widest, just south of West Santa Clara Street. The site excludes seven parcels owned by Caltrain, located north of West San Fernando Street and immediately across Cahill Street from Diridon Station. These parcels contain two Caltrain parking lots and a pair of one-way streets, separated by landscaping and walkways, that provide vehicular access to Diridon Station. Developer also is in discussions withand Valley Transportation Authority (VTA) regarding parcels owned by that entity, which primarily consist of rights-of-way, as wellas a portion of APN 259-38-133 have also entered into a Public-Private Partnership Agreement ("P3 Agreement"), dated October 2, 2020, in which VTA agreed to transfer its fee interest in

demonstrate a <del>legal or</del> eguitable. interest in <del>properties in</del> order for them to be included in the DA at Otherwise. they would added in the requisite ownership interest is established. Let's

[PJ11]: Google will

discuss.

approximately 6,871 square feet of land identified as APN 259-38-014 and 259-38-133 pursuant to the terms of the P3 Agreement. These VTA parcels are included within the Project Site for purposes of this Development Agreement. Certain other parcels owned by VTA (APNs, 261-34-002, -003, -004, -005, -006, -011, and -023) are within the project site analyzed in the environmental impact report (EIR) for the project, and are included in the Project2's Planned Development Zoning and General Development Plan, but are not within the Project Site for purposes of this Development Agreement.

E As reflected in Exhibit B, the Project Site for purposes of this Agreement also does not include certain property owned by the Pacific Gas and Electric Company (a portion of APN 261-35-002), certain property owned by the Peninsula Corridor Joint Powers Board (APN 261-34-020), or certain other property owned by VTA (APNs 259-38-139, 259-38-114, 259-38-134 [NOTE-working with VTA to include]), which properties are included in the Downtown West Planned Development Zoning and General Development Plan, the Downtown West Design Standards and Guidelines, and the Vesting Tentative Map for the Project.

The Project consists of the phased demolition of most of the existing buildings, and phased development of new buildings, in the Project Site.- The Project includes development of the following land uses, which are generally depicted in Exhibit B hereto: a maximum of 7.3 million gross square feet (gsf) of commercial office space; a maximum of 5,900 residential units; a maximum of 500,000 gsf of active uses (commercial retail/restaurant, arts, cultural, live entertainment, community spaces, institutional, childcare and education, maker spaces, non-profit, and small-format office space); a maximum of 300 hotel rooms; a maximum of 800 rooms of limited-term corporate accommodations (a non-residential use, akin to corporate suites, that would accommodate Google employees for up to 60 days); a maximum of 100,000 gsf of

[PJ12]: If—
non-residenti
al-use,—
paying TOT—
taxes?—

event and conference space; up to 4,800 publicly accessible commercial parking spaces and approximately to 2,360 unbundled parking spaces for residential use; a potential district systems." District Systems approach to delivery of on-site utilities, including designated, infrastructure zones with up to two on-site centralized utility plants totaling up to 130,000 gsf; one or more on-site logistics centers to serve the commercial on-site uses that would occupy a total of about 100,000 gsf; a total of approximately 15 acres of parks, plazas and open space, including areas for outdoor seating and commercial activity (such as retail, cafes, and restaurants), green spaces, landscaping, mid-block passages, riparian setbacks, and trails; and various improvements to the public realm to improve transit access and pedestrian and bicycle circulation and facilitate connectivity, both within the site and to and from surrounding neighborhoods. In total, the Project would provide upwards of scight hundred ninety million dollars (\$890,000,000) in infrastructure investments that include new and improved streets, utilities, open spaces, local transportation improvements, site development, and more.

[PJ13]: It'sa-single"DistrictSystem"
correct?
With all therequiredutilities apart of theone systemexcept Cityowned and
operatedelectrical?

[PJ14]: Have notcoordinated District -Utilityissues in the DA with <del>respective</del> City staff and their attorneys Will do so ir round and meetings continue on the issue

[PJ15]: Need-diagram to-attach to DA-showing the 15 acres.
Send proposed-diagram to-City for-review.

F This amount does not include certain discretionary infrastructure-related costs for Project Features that Google is incurring in excess of this amount, such as the costs of enhanced public realm finishes and District Systems.

I. On December 30, 2019, Governor Gavin Newsom certified the Project under the Jobs and Economic Improvement through Environmental Leadership Act of 2011 (Assembly Bill [AB] 900, as amended by Senate Bill 734, Senate Bill 7 [note: include upon adoption], and AB 246). As an environmental leadership development project, the Project must: (1) result in a minimum investment of one hundred million dollars (\$100,000,000) in California upon completion of construction; (2) create high-wage, highly skilled jobs that provide construction

jobs and permanent jobs for Californians, and help reduce unemployment; (3) not result in any net additional greenhouse gas (GHG) emissions; (4) comply with state requirements for commercial and organic waste recycling; and (5) have a binding commitment with the City, as set forth in the conditions of approval for the Downtown West Planned Development Permit and other Approvals, committing to implement and monitor mitigation measures required to comply with AB 900, as amended. ¶

Development Rezoning, including a General Development Plan; a Planned Development Permit, including adoption of the Downtown West Design Standards and Guidelines, Downtown West Improvement Standards, Conceptual Infrastructure Plan Sheets; Vesting Tentative Map(s)/Tentative Map(s)/Final Map(s); a Major Encroachment PermitAgreement, vacations of portions of existing City streets, and related entitlements from the City, including, but not limited, to this Development Agreement, and permits related to tree removal, demolition, grading, building,—I), and historic preservation (collectively, the "Approvals"). The list of/

[PJ16]: Whatsolid wastepermit orapproval? WealreadymentionedMajorEncroachmentPermit above.

Approvals is provided in Exhibit L hereto.

L. H. In order to strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Statute, which authorizes the City to enter into a development agreement with any person having a legal or

equitable interest in real property regarding the development of such property. Pursuant to Government Code Section 65865, the City adopted the Development Agreement Ordinance establishing procedures and requirements for entering into a development agreement pursuant to the Development Agreement Statute. The Parties are entering into this Agreement in accordance with the Development Agreement Statute and Development Agreement Ordinance.

M.\_ I. In addition to the significant housing, jobs, Downtown redevelopmenturban revitalization, and economic benefits to the City from the Project, the City has determined that, as a result of the development of the Project in accordance with this Agreement, additional clear benefits to the public will accrue that could not be otherwise obtained through application of existing City ordinances, regulations, and policies. Major additional public benefits Public Benefits to the City from the Project are set forth in Exhibit D Exhibits D, E, F, G, H, and I hereto, and include: a combination of mechanisms, such as land dedication, moderate income, inclusionary housing units, development fees, and other funding sources for affordable housing production and preservation, all of which will contribute significantly to the goal of achieving twenty-five (25) percent (25%) affordable housing overall within the boundaries of the DSAP; [PJ18]: Minimum of development of approximately fifteen (15) acres of new publicly accessible parks, open space and trails, including approximately \_\_\_\_\_four and eight tenths (4.8) acres to be improved and dedicated to the City, and approximately — ten and two tenths (10.2) acres of privately-owned, publicly accessible parks, —<u>seven (7)</u> acres of which will be <del>publicly</del> accessible subject to a recorded restrictive covenant; new bike and pedestrian infrastructure and enhanced access to public transit, as part of the Project's approximately [\$ \_\_\_\_\_eight\_ hundred ninety million dollar (\$890,000,000) investment in infrastructure improvements, not including additional infrastructure Project Features; <del>robust</del>

<del>Exhibit D is</del> <del>currently the</del> will need to <del>be undated.</del> Or is this intended to Exhibit C the community benefits schedule?

7

commitment commitments, including payment of prevailing wage and local hire goals; seed funding for a Community Stabilization and Opportunity Pathways Fund to include invest in education and workforce development, small business capacity building and incubation; and affordable housing preservation, homeless prevention, and homeless services; and a comprehensive Transportation Demand Management Plan, each as further described in this

Agreement.

[PJ19]: Whywouldn't the TDM Plan just be a part of the project approval?
Why does it need to be in the DA?

J.—It is the intent of the Parties that all acts referred to in this Agreement shall be accomplished in a way as to fully comply with the California Environmental Quality Act (California Public Resources Code Section 21000 et seq.; "CEQA"), the CEQA Guidelines (Title 14, California Code of Regulations, Section 15000 et seq.); "CEQA Guidelines"), the Development Agreement Statute, the Development Agreement Ordinance, the CitySan José Municipal Code, and all other applicable Laws in effect as of the Effective Date. This Agreement does not limit the City's obligation to comply with applicable environmental Laws, including CEQA, before taking any discretionary action regarding the Project, or the Developer's obligation to comply with all applicable Laws in connection with the development of the Project.

Q. K. The Final Environmental Impact Report ("FEIR") prepared for the Project and certified by the City Council on \_\_\_\_\_\_\_, 2021, together with the CEQA findings (the "CEQA Findings") and the Mitigation Monitoring and Reporting Program (""MMRP") adopted concurrently therewith (Exhibit K hereto), comply with CEQA, the CEQA Guidelines, and Title 21 of the City's Municipal Code. The FEIR thoroughly analyzes the Project and Project alternatives, and the Mitigation Measures were designed to mitigate significant impacts to the extent they are susceptible to feasible mitigation. The information in the FEIR and the CEQA Findings were considered by the City Council in connection with approval of this Agreement.

L. On \_\_\_\_\_\_\_, 2021, the Planning Commission held a public hearing on this Agreement and the Project, duly noticed and conducted under the Development Agreement Statute and Development Agreement Ordinance. Following the public hearing, the Planning Commission determined among other things that the FEIR thoroughly analyzes the Project, and the Mitigation Measures are designed to mitigate significant impacts to the extent they are susceptible to feasible mitigation, and further determined that the Project and this Agreement will, as a whole, be consistent with the objectives, policies, and general land uses and programs specified in the General Plan (together the "General Plan Consistency Findings"). The Planning Commission adopted Resolution No. XXX, recommending that the City Council adopt the CEQA findings, approve this Agreement, and approve the Project.

Q. M. On \_\_\_\_\_\_\_\_, 2021, the City Council, having received the Planning Commission's recommendations, held a public hearing on the FEIR, the Project, and this Agreement pursuant to the Development Agreement Statute and the Development Agreement Ordinance. Following the public hearing, the City Council adopted Resolution No. XXX, certifying the FEIR, making the CEQA Findings required by CEQA, adopting a Mitigation Monitoring and Reporting Program, and adopting a Statement of Overriding Considerations; adopted Resolution No. XXX approving an override of the Santa Clara County Airport Land Use Commission compatibilityinconsistency determination; [Note: Separate or single GP and SAP resolutions under discussion] adopted Resolution No. XXX, approving amendments to the General Plan-and; adopted Resolution No. XXX approving a Planned Development Rezoning, including a General Development Plan; adopted Resolution No. XXX, conditionally approving a Planned Vesting Tentative Map(s); adopted Resolution No. XXX, conditionally approving a Planned

[PJ20]: These would be <del>conditional</del> <del>approvals</del> <del>that would</del> effective unless and until the <del>Legislative</del> actions become final and take effect, to account for the delayed effectiveness of ordinances and the possibility of referenda <del>against any</del> of the <del>legislative</del> <del>actions. ¶</del>

Development Permit and adopting the Downtown West Design Standards and Guidelines and the Downtown West Improvement Standards; [Note: pending discussions with City] introduced Ordinance No. XXX approving an amendment to Title 20 of the City's Municipal Code; adopted Resolution Resolutions No. XXX and No. XXX, conditionally amending the boundaries for Historic Landmarks (San José Water Company Building at 374 West Santa Clara Street, and Southern Pacific Historic District); adopted Resolution No. XXX, conditionally approving an amendment to Historic Preservation permit (HP16-002); adopted Resolution No. XXX, conditionally approving a Major Encroachment Agreement; introduced Ordinance No. XXX conditionally approving a Construction Mitigation Impact Plan pursuant to San José Municipal Code Chapter 13.36the vacation of certain streets within the Project Site; and introduced Ordinance No. XXX, approving this Agreement. N. On , 2021, the City Council adopted Ordinance Nos. <u>R.</u> , approving a Planned Development Rezoning, adopted Ordinance No. approving an amendment to Title 20 of the City's Municipal Code, adopted Ordinance No. conditionally approving the vacation of certain streets within the Project Site, and adopted Ordinance No. , approving this Agreement, including the Parkland Agreement included herewith as Exhibit E, and authorizing the Director of PBCE to execute this Agreement on behalf

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

of the City (the "Enacting Ordinance"). The Enacting Ordinance took effect on ,

2021.

## **AGREEMENT**

#### 1. **DEFINITIONS**

In addition to the definitions set forth in the above preamble paragraph, Recitals, and elsewhere in this Agreement, the following definitions shall apply to this Agreement:

- 1.1 "Affiliate" or "Affiliates" shall mean anmeans any entity or person that controls or indirectly Controls through one or more intermediaries, is controlled Controlled by, or is under common control with Developer. For purposes of the foregoing, "control" means the ownership of more than fifty percent (50%) of the equity interest in such, another entity or a partner or managing or other member of the other entity.
- 1.2 "Affordable Housing Plan Program" shall mean the Affordable Housing Plan Program attached hereto as Exhibit D.
- 1.3 "Affordable Housing Unit" shall have the meaning set forth in the Affordable Housing PlanProgram.
- 1.4 "Agreement" shall mean this Development Agreement, the Exhibits which have been expressly incorporated herein, and any amendments thereto.
  - 1.5—"AMI" shall have the meaning set forth in the Affordable Housing Plan.
- 1.6 "Applicable Laws" shall have the meaning set forth in Section 5.2 (where "applicable" is not capitalized, "applicable Law" has its plain meaning and refers to Laws as otherwise defined herein).
- 1.7 "Approvals" shall mean the City approvals, entitlements, and permits [PJ22]: Arefor the Project listed on Exhibit L.

there initial approvals?

1.7 1.8 "Assembly Bill (AB) 900" shall mean the Jobs and Economic Improvement through Environmental Leadership Act of 2011, as amended effective January 1, and codified in Public Resources Code Section 21178 et. seq.

[PJ23]: Will

DA touch on
meeting AB
requirements?

1.8 1.9 "Assignment and Assumption Agreement" shall have the meaning set forth in Section 12.2.

1.9 1.10 "Building" or "Buildings" shall mean each of the existing, modified, and new buildings on the Project Site, and as described in the Project Description attached as Exhibit B. ¶

[PJ24]: Thesefees will notvest. Let'sdiscuss.

1.11—"Capacity Charges" means all water and sewer capacity and connection fees and charges payable to the City, as and when due in accordance with then applicable City requirements.

1.10 1.12 "CEQA" shall have the meaning set forth in Recital JN.

1.11 1.13 "CEQA Findings" shall have the meaning set forth in <u>Recital KQ</u>.

1.12 1.14 "CEQA Guidelines" shall have the meaning set forth in Recital JN. \[ \]

1.13 "Certificate of Occupancy" shall mean the permit issued by the City

Building Division authorizing the initial occupancy of one or more buildings and includes final inspections and temporary certificate of occupancy permits.

1.14 1.15 "City" shall mean the City as defined in the opening paragraph of this Agreement. Unless the context or text specifically provides otherwise, references to the City means the City acting by and through the Director of PBCE or, as necessary, the Planning Commission, or the City Council.

[PJ25]: What—
is—the—
purpose of—
this section?—
The only—
entity—
signing and—
consenting to—
the DA is the—
Gity.—

1.15 1.16 "City Agency" or "City Agencies" shall mean the City departments, agencies, boards, commissions, and bureaus that execute or consent to this Agreement, or are

controlled by persons or commissions that have executed or consented to this Agreement, that have subdivision or other permit, entitlement, or approval authority or jurisdiction over development of the Project, or any improvement located on or off the Project Site, including, without limitation, the City Manager, PBCE Department, Director of PBCE, Department of Parks, Recreation, and Neighborhood Services, Environmental Services Department, Housing Department, and Department of Public Works, together with any successor successors to the foregoing City agencies, departments, boards, or commissions.

[PJ26]: Noindividual
department,
commission,
or board have
the legal
authority to
approve or
consent to
this DA.

1.16 1.17-"City Attorney's Office" shall mean the Office of the City Attorney of the City San José.

1.17 1.18 "City Costs" shall mean the actual and reasonable costs incurred by a City Agency in preparing, adopting or amending this Agreement, in performing its obligations or defending its actions under this Agreement, or otherwise contemplated by this Agreement, as determined on a time and materials basis, including reasonable attorneys' fees and costs but excluding work, hearings, costs or other activities contemplated or covered by Processing Fees; provided, however, City Costs shall not include any costs incurred by a City Agency in connection with a City Default.

1.18 1.19 "City Council" or "Council" shall mean the City Council of the City of San José.

1.19 1.20 "City-Dedicated Open Space(s)" shall mean the parks and trail to be dedicated to the City and improved by Developer in conformance with the Parkland Agreement, and as set forth in Exhibit E hereto.

1.20 1.21 "City Parties" shall have the meaning set forth in Section 4.94.7.

## [PJ27]:

Similar to
the note
above, seems
odd to slice
defaults as
to a City
Agency —
seems like it
should just
be the City
as an entity.

## [PJ28]:

Verify thereis only onetrail andthat thisshould not be plural.

[PJ29]: City-Dedicated-Parks and-Trail will-need-to-comply with-the-Parkland-Agreement.—The-Parkland-Agreement-can-reference-the-appropriate-standards,—guidelines,—and—requirements.—

1.21 1.22 "City-Wide" shall mean all real property within the territorial limits, of the City of San José, not including any property owned or controlled by the United States or by the State of California and therefore not subject to City regulation.

1.22 1.23 "Commence Construction", "Commencement of Construction" and similar variations thereof shall mean groundbreaking in connection with the commencement of physical construction of the applicable Building foundation, but specifically excluding thesite work such as demolition, grading or partial demolition of existing structures.

1.24—"Commercially Reasonable" shall mean [PENDING NEGOTIATION] excavation.

1.23 1.25 "Community Benefits" shall have the meaning set forth in Section
4.1 mean those Public Benefits provided by the Project that exceed the Base Required Public Benefits and are not Project Features.

1.26—"Community Benefits Adjustment" [PENDING NEGOTIATION] shall mean an adjustment or modification to the total acreage, units, amount, configuration, completion or delivery schedule, or other elements of a Community Benefit necessitated by any subsequent proceedings initiated by the DISC Partner Agencies to acquire any portion of the Project Site in connection with DISC, if such acquisition results in a reduction in the development program as established by the Project Approvals.

1.24 1.27 "Complete" and any variation thereof shall mean, as applicable, that:

(i) with respect to Privately-Owned Open Space and Privately-Owned Improvements, the City Agencies or the Non-City Agencies with jurisdiction over any required permits for such Privately-Owned Open Space or Privately-Owned Improvements have issued any approvals required for the contemplated use or improvement; (ii) with respect to any Public Improvement,

in the context of processing fees that can he assessed against-Google. Because of this broad definition it could lead to amiguity if there is a fee that applies only to a specific area of the city (like the DSAP), which I think should be treated as generally | applicable to all in that geographic area. including Google, though not applications / fees in place now or envisioned. the fee <del>provisions</del> should be <del>tailored</del> accordingly [PJ31]: Depending on the context <del>definition,</del> <del>to make sure</del>

[PJ30]: This term is used

the context
of
definition,
to make sure
project is
moving
forward, we
need vertical
construction.
Foundation
may be

insufficient

the City Engineer determines the Public Improvement, or portion thereof, has been completed in accordance with related subdivision map conditions of approval and any applicable Public Improvement Agreement, excepting any minor omissions or defects which will not impact the public's safe experience and enjoyment of the Improvement, which omissions and defects are to be rectified at the earliest possible time following Completion; and (iii) with respect to any Final?

Building, a temporary certificate of occupancy (or its equivalent) Certificate of Occupancy has been issued. -With respect to any Public Improvement, Completion does not include acceptance of the Public Improvement by the City.

nned

1.25 1.28—"Conformance Review" shall mean the Downtown West Planned Development Zoning District/ Design Conformance Review process established by the General Development Plan, pursuant to which the Director of PBCE or Director of PW, as specified in the General Development Plan, reviews Conformance Review Applications for vertical improvements/Vertical Improvements, open space improvements, and horizontal improvements for conformance with the General Development Plan and Downtown West Planned Development Permit as a prerequisite to the issuance of permits to construct open space, vertical improvement, or horizontal improvements/Vertical Improvements, or Horizontal Improvements, as applicable.

1.26 1.29 "Conformance Review Application" shall mean a written request on a form approved by the Director of PBCE for a Conformance Review determination by the Director of PBCE for vertical orthat Vertical Improvements, open space improvements or horizontal improvements that and Park Improvements, or Horizontal Improvements for a particular area of the Project Site satisfies the applicable standards of the General Development Plan and Downtown West Planned Development Permit.

1. 27 "Connection Charges" means all water and sewer connection fees and charges payable to the City, as and when due in accordance with then applicable City requirements. City requirements that are applicable on a City-Wide basis or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner.

1.28 "Control" means (i) the direct or indirect ownership of more than fifty percent (50%) of the profits or capital of another entity; or (ii) the right to dictate the controlled entity's major decisions, subject to the rights of other owners; or (iii) the power to direct the day-to-day management or control of the entity, directly or indirectly and whether through ownership of voting securities, membership or partnership interests, or other interests, or by contract, or otherwise.

1.29 1.30 "Default" shall have the meaning set forth in Section 9.29.3.

1.30 1.31 "Developer" shall have the meaning set forth in the opening paragraph of this Agreement, and shall also include any and all authorized successor Transferees of all or any part of the Project Site during the Term.-

1.31 1.32 "Development Agreement Ordinance" shall mean Chapter 18.02 of the Municipal Code, as in effect as of the Effective Date.

1.32 1.33 "Development Agreement Statute" shall have the meaning set forth in Recital Hthe Preamble to this Agreement, as in effect as of the Effective Date.

[PJ33]: Thisdefinition isnot used in-DA2¶

1.34—"Development Considerations" shall mean general market conditions, the local housing, office and retail markets, capital markets, general market acceptability, market absorption and demand, availability of financing, interest rates, local tax burdens, access to capital, competition, and other similar factors.

1.33 1.35 "Director of PBCE" shall mean the Director of Planning, Building and Code Enforcement of the City of San José.

1.34 1.36 "Diridon Station Area Plan" or "DSAP" shall mean the Diridon Station Area Plan approved by Resolution No. 77096, as may be amended from time to time.

1.35 1.37 "Diridon Integrated Station Concept Plan" or "DISC" shall mean the plan by California High-Speed Rail Authority (CHSRA), Caltrain, Santa Clara Valley Transportation Authority (VTA), Metropolitan Transportation Commission (MTC), and the City\_(and any additional or successor agency(ies)) to expand and redevelop the San José Diridon Station, which Plan is under development, but not yet approved or issued in draft form, as of the Effective Date.

1.36 1.38-"DISC Partner Agencies;" or "DISC Partner Agency" in connection with DISC, shall mean any one or more of the following agencies: California High-Speed Rail Authority (CHSRA), Caltrain, Metropolitan Transportation Commission (MTC), Santa Clara Valley Transportation Authority (VTA), and the City (and any additional or successor

agency(ies)). ¶

1. 37 "District Systems" shall mean the "district system(s)" described in Exhibit

<u>I.</u>

1.38 1.39 "Downtown West Design Standards and Guidelines" shall mean that

certain Downtown West Design Standards and Guidelines, which are a component of the Downtown West Planned Development Permit, approved by the City Council by Resolution No.

\_\_\_\_\_\_ on \_\_\_\_\_\_, 2021, as same may be amended from time to time<del>, and included as Exhibit H hereto</del>.

official version is

<del>don't think</del> <del>we should</del>

- 1.39 1.40 "Downtown West Planned Development Permit" shall mean that certain planned development permit effectuating the Downtown West Planned Development Zoning District, which includes the Downtown West Design Standards and Guidelines—and, the Downtown West Improvement Standards and Conceptual Infrastructure Plan Sheets, and the Downtown West Conformance Review Implementation Guide, approved by City Council Resolution No. \_\_\_\_\_ on \_\_\_\_\_, 2021, as same may be amended from time to time.
- 1.40 1.41 "Downtown West Planned Development Zoning District" shall mean the planned development zoning district established pursuant to Zoning Code Sections 20.60 et seq. and 20.120.500 et seq. by City Council Ordinance No. \_\_\_\_\_\_, including its accompanying General Development Plan.
- 1. 41 "DSAP's Boundaries" means the geographic boundaries of the Diridon Station Area Plan, as in effect on the Effective Date of this Agreement.
  - 1. 42 "Effective Date" shall have the meaning set forth in <u>Section 2.1</u>.
  - 1. 43 "Enacting Ordinance" shall have the meaning set forth in <u>Recital <del>JR</del>.</u>
  - 1. 44 "Existing Standards" shall have the meaning set forth in <u>Section 5.2</u>.
- 1. 45 "Existing Uses," shall mean all existing lawful uses of the existing Buildings and improvements (and including, without limitation, pre-existing, non-conforming uses under the Zoning Code) on the Project Site as of the Effective Date, as the same may be modified by the Approvals and any Subsequent Approvals.
- 1.46 "Federal or State Law Exception" shall have the meaning set forth in Section 5.10.
  - 1. 47 "FEIR" shall have the meaning set forth in <u>Recital KR</u>.

- "Final Approval" shall mean [PENDING NEGOTIATION].that (i) all applicable appeal periods for the filing of any administrative or judicial appeal challenging the issuance or effectiveness of any of the Approvals, the Development Agreement or the FEIR shall have expired and no such appeal shall have been filed, or if such an administrative or judicial appeal is filed, the Approvals, the Development Agreement or the FEIR, as applicable, shall have been upheld by a final decision in each such appeal without adverse effect on the applicable Approval, the Development Agreement or the FEIR and the entry of a final judgment, order or ruling upholding the applicable Approval, the Development Agreement or the FEIR and (ii) if a referendum petition relating to any Approval or the Development Agreement is timely and duly circulated and filed, certified as valid and the City holds an election, the date the election results on the ballot measure are certified by the City Council in the manner provided by applicable City laws reflecting the approval by voters of the referended Approval or Development Agreement.
- "Final Map" shall mean a "Final Map" as defined in Section 19.08.160 of [PJ35]: the Subdivision Code.

Planning does

1.50 "First Certificate of Occupancy" shall mean the first certificate occupancy issued by the Department of Planning, Building, and Code Enforcement approval of final inspection for a newly constructed building. "Force Majeure" or "Force Majeure Event" shall mean an act of war or terrorism; insurrection; strikes, walkouts or other labor disturbances; riots or other civil commotion; floods; earthquakes; fires; inclement weather; casualties; acts of God; governmental restrictions imposed or mandated by governmental entities; enactment of conflicting laws by governmental entities; the general unavailability of construction materials for projects similar to the Project; and epidemics or pandemics that result in the suspension of development or construction activities. Neither the

inability of Developer to obtain construction financing for the Project nor the condition of, or changes in, the real estate market shall constitute a Force Majeure Event.

- 1.51 "Force Majeure" shall mean [PENDING NEGOTIATION] "Funding Mechanism" shall have the meaning set forth in Section 7.6.1.
- 1. 52 "Future Changes to Existing Standards" shall have the meaning set forth in Section 5.6.
  - 1. 53 "General Plan" has the meaning set forth in Recital —A.
- 1.54 "General Plan Consistency Findings" has the meaning set forth in Recital—P.-
- 1. 55 "Good Faith Efforts" and any variation thereof shall mean the efforts that a reasonable person would determine is a diligent and honest effort under the same or similar set of facts or circumstances.
- 1. 56 "Google Affiliate" shall mean (i) Alphabet, Inc.; (ii) any Affiliate of Google LLC or Alphabet, Inc.; (iii) companies spun-off from Google LLC or Alphabet, Inc. and any of their Affiliates; and (iv) any entities related to Google LLC or Alphabet, Inc. as a result of merger, acquisition or by operation of law.
- 1. 57 "Horizontal Improvement" shall mean (a) the initial construction of all Public Improvements and (b) the initial construction of Privately-Owned Improvements.

[PJ36]: Inclusionary

Housing Ordinance is

"impact fee" under the Mitigation

using terms like "impact

1.58 1.55—"Impact Fees" shall mean any fees, contributions, special taxes, exactions, impositions and dedications charged by the City in connection with the development of the Project, including but not limited to transportation and transit fees, housing (requirements (whether imposed as a fee, as a zoning requirement or otherwise, including affordable housing) requirements or fees, such as on-site inclusionary units, in-lieu fees and land transfers),

dedication or reservation requirements, and obligations for on-or off-site improvements that are in effect on the date on which the ordinance approving the Development this Agreement is [PJ37]: Let's effective. Impact Fees shall not include the Mitigation Measures, Processing Fees, taxes or special assessments or school district fees, and any fees, taxes, assessments impositions imposed by Non-City Agencies, all of which shall be due and payable by Developer as and when due in accordance with applicable Laws.

[PJ38]: See <del>comment above</del> on whether Infrastructur be discussed in the DA?

1.56 "Infrastructure" shall mean the facilities, both on- and off-site and in District Systems, described in the Infrastructure Plan included herewith as Exhibit GI, and including the electrical microgrid ("Microgrid") described in Exhibit J.¶

1.57—"Initial Approval" shall mean [PENDING NEGOTIATION].

"Infrastructure Plan" shall mean collectively the Infrastructure Plan, the 1.60 Infrastructure Costs Reimbursement Sheet, and the G1—Infrastructure Maintenance Exhibit | Matrix, all of which are included herewith as Exhibit I.

1.61 1.58 "Law(s)" shall mean the Constitution and laws of the United States of America, the Constitution and laws of the State of California, the charter and laws of the City of San José, and any codes, statutes, rules, regulations, or executive mandates thereunder, and any State or Federal court decision (including any order, injunction, or writ) thereunder. The term "Laws" shall refer to any or all Laws as the context may require.

1.62 "Lendlease Affiliate" shall mean any Affiliate of Lendlease Americas Holdings Inc., a Delaware corporation.

1.59 "Litigation Extension" shall have the meaning set forth in Section <u>11.5.1</u>.

1.64 1.60 "Losses" shall have the meaning set forth in Section 4.94.7.

[PJ39]: Cityneeds tocontinue toevaluate thissection.
What contextis Material
Change usedin the DA?

1.65 1.61 "Material Change" shall mean any modification that would Change used

materially alter the rights, benefits, or obligations of the City or Developer under this Agreement, that is not consistent with the Downtown West Planned Development Zoning District or the Downtown West Design Standards and Guidelines, or that (i) extends or reduces the Term, (ii) changes the permitted uses of the Project Site, except as permitted by, and approved in the manner set forth in the Downtown West Planned Development Zoning District and/or the

[PJ40]: Too

manner set forth in the Downtown West Planned Development Zoning District and/or the Downtown West Design Standards and Guidelines, (iii) decreases or increases the Community Benefits, except as permitted as a CommunityPublic Benefits Adjustment [SUBJECT TO NEGOTIATION OF CBPB ADJUSTMENT TERM], (iv) increases the maximum height, density, bulk, or overall square footage of the Project in each case by more than 10%, (viiv) decreases the parking ratios, except as permitted by the Approvals and this Agreement, or (viiivi) reduces or changes the Impact Fees. Notwithstanding the foregoing, and for clarity, deviations or modifications permitted underauthorized to be approved pursuant to procedures established by the General Development Plan-or, without requiring amendment to the General Development Plan, shall not constitute a Material Change. By way of example and without limitation, approval of allowable transfers and allowable conversions described on Sheet 3.03 of the General Development Plan and of minor modifications, exceptions, deferrals, amendments to the Planned Development Permit, including DWDSG, DISC process, each as described on Sheet 8.02 of the General Development Plan would not constitute Material Changes. Additionally, adjustments, deviations or modifications authorized to be approved pursuant to procedures established by the Planned Development Permit, and Non-Material Amendments authorized by the Downtown West DesignImprovement Standards and Guidelines Infrastructure Plan [CONFIRM FINAL] <u>LANGUAGE</u>] shall not constitute a Material Change. <u>The addition to this Development</u> Agreement of any land or legal parcels that are located within the Project's Planned Development Zoning and General Development Plan but which are not originally included in this Agreement but as to which Developer has a legal or equitable interest shall not constitute a Material Change.

1.62 "Mitigation Measures" shall mean the mitigation measures (as defined by CEQA) applicable to the Project as set forth in the MMRP or that are necessary to mitigate adverse environmental impacts identified through the CEQA process as part of a Subsequent Approval.

[PJ41]: Reference CEQA resolution with the approved

- 1.63 "MMRP" shall mean that certain mitigation monitoring and reporting program attached hereto as Exhibit K to the FEIR.
- 1.64 "Mortgage" shall mean a mortgage, deed of trust, or other lien on all or part of the Project Site to secure an obligation made by the applicable property owner.
- 1.65 "Mortgagee" shall mean a person or entity that obtains title to all or part of the Project Site as a result of foreclosure proceedings or conveyance or other action in lieu thereof, or other remedial action.
  - 1.66 "Municipal Code" shall mean the San José Municipal Code. 1.70
  - 1.67 "Non-City Agency" shall have the meaning set forth in Section 7.3. 1.71
  - 1.72 1.68 "Non-City Approval" shall have the meaning set forth in Section 7.3.
- 1.69 "Official Records" shall mean the official real estate records of the [PJ42]: In-1.73

context??

- City of San José, as maintained by the Santa Clara County Assessor-Recorder's Office.
- 1.74 1.70—"Parcel Map" shall mean a "Parcel Map" as defined in Section 19.08.320 of the Subdivision Code.
- 1.75 1.71 "Park Construction TCE" shall mean [PENDING NEGOTIATION] a temporary construction easement within a City-Dedicated Open Space granted by the City in

favor of Developer, following Acceptance of the Open Space by the City, for the purpose of allowing Developer to complete construction of an adjacent Building(s).¶

1.76 "Park Improvements" shall have the meaning set forth in the Parkland Agreement included herewith as Exhibit E.

1.77 1.72 "Parkland Fee" shall mean the fee established by the City Council pursuant to Chapters 14.25 or 19.38 of the San José Municipal Code.

1.78 1.73 "Party" and "Parties" shall have the meaning set forth in the opening paragraph of this Agreement.

1.79 1.74 "PBCE Department" shall mean the Planning, Building, and Code Enforcement Department of the City of San José.

1.80 1.75 "Planned Development Permit" means the Planned Development Permit approved by Resolution No. XXX.

1.81 1.76 "Planning Commission" means the Planning Commission of the City of San José.

1.82 1.77—"Privately-Owned Open Space" shall mean those parks and open spaces described in Exhibits F and F1E5.2, and in Section 4.24.1 hereto, and in the Downtown West Design Standards and Guidelines, that are not City-Dedicated Open Spaces.

1.83 1.78—"Privately-Owned Improvements" shall mean [PENDING-NEGOTIATION].those facilities and services that are privately-owned and privately-maintained, at no cost to the City (other than any public financing), for the public benefit and not dedicated to the City, including any Infrastructure that is not a Public Improvement. The Privately-Owned Improvements do not include City-Dedicated Open Space or any Public Improvements.

1.84 1.79—"Processing Fees" shall mean, as applicable, the (i) standard fee imposed by the City upon the submission of an application for a permit or approval, which is not an Impact Fee, in accordance with the City practice on a City-Wide basis or within the DSAP's Boundaries, for the same or similar permits or approvals and applied in an equitable and non-discriminatory manner and (ii) the City's standard hourly rate and standard charges for materials, in accordance with the City practice on a City-Wide basis or within the DSAP's Boundaries, to the same or similar work and applied in an equitable and non-discriminatory manner, for City staff who are processing the application.

1.85 1.80-"Project" shall mean the mixed use development project as described in Recital ED, Exhibit B, and the Approvals, together with Developer's rights and obligations under this Agreement.

1.86 1.81—"Project Description" shall refer to Exhibit B heretothe Project described in Recital H. In the event that the Director of PBCE approves a request by Developer to convert land uses pursuant to the General Development Plan, Exhibit Bthen Recital H and any other references to the Project Description herein shall be deemed to automatically incorporate such changes without requiring amendment of this Agreement.

1.87 1.82—"Project Documents" shall mean, individually or collectively as the context requires, the Project DescriptionBoundaries, Public Benefits Program and Site Plan, Community Benefits Schedule, Community Benefits Matrix, Infrastructure Plan, Parkland Agreement, Affordable Housing PlanProgram, Downtown West Design Standards and Guidelines, Downtown West Improvement Standards, Conceptual Infrastructure Plan Sheets, Downtown West Conformance Review Implementation Guide, Major Encroachment Agreement,

[PJ43]: Subsequent Review process is unique to Google project. we need to have clear <del>language that</del> when Google submit any <del>future</del> application to the City, it needs to pay the application fee (cost recovery amount for our time). There is no standard <del>practice</del> Citywide to compare for Google <del>project.</del> <del>This fee does</del> <del>You pay what</del> the time for

City to provide

[PJ44]: Whatabout all the-Cityapprovals?? Why limit toonly these??

Transportation Demand Management Plan, the Microgrid and District Wide Utility Systems

Agreements, and this Agreement.
¶

- 1.88 "Project Feature" shall mean features or elements of the Project that

  Developer has voluntarily agreed to construct or include and that provide a benefit to the public,

  but that are not Base Required Public Benefits, are not factored into the financial value provided

  to City by the Project, and that are required only to the extent set forth in this Agreement.
- 1.89 1.83 "Project Site" shall have the meaning set forth in Recital D, and as more particularly described in Exhibit A and depicted in Exhibit B.
- 1.90 1.84 "Public Health and Safety Exception" shall have the meaning set forth in Section 5.10.1.
- 1.91 1.85 "Public Benefit" shall mean [PENDING DISCUSSIONS], collectively, the (i) Community Benefits, (ii) Project Features, and (iii) elements of the Project required to satisfy state and/or City statutory or regulatory requirements, including, but not limited to, payment of fees, CEQA mitigation measures set forth in the MMRP, City-Dedicated Open Space, and the portion of the Affordable Housing Program that satisfies the requirements of the City's Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08) ("Base Required Public Benefits").¶
- 1. 92 "Public Benefits Adjustment" [PENDING NEGOTIATION] shall mean an adjustment or modification to the total acreage, units, amount, configuration, or Completion or delivery schedule, or other elements of a Public Benefit, as permitted by the Downtown West Planned Development Zoning District, General Development Plan, Downtown West Design Standards and Guidelines, or Downtown West Improvement Standards and Conceptual Infrastructure Plan Sheets, that is necessitated by (i) any subsequent proceedings initiated by any

of the DISC Partner Agencies to acquire any portion of the Project Site in connection with DISC if such acquisition results in a reduction in the development program as established by the Project Approvals—; and/or (ii) reconfiguration and/or redesign necessitated by the Developer being prohibited from building to the maximum heights reflected in the DWDSG as a result of City's adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights, if such reconfiguration and/or redesign results in a reduction in the development program as established by the Project Approvals.

1.93 1.86 "Public Improvement" shall mean the facilities, both on- and off-site, to be improved, constructed, and dedicated by Developer and, upon Completion in accordance with this the Public Improvement Agreement, accepted by the City. Public Improvements include the City-Dedicated Open Spaces, the public streets within the Project Site shown on Exhibit XXI and/or within the Local Transportation Analysis Report prepared by Fehr & Peers, dated September 2020, all Infrastructure and public utilities within such streets (such as electricity, water and sewer lines, but excluding any non-municipal utilities or Privately-Owned Infrastructure), including sidewalks, landscaping, bicycle lanes, street furniture, and paths and intersection improvements (such as curbs, medians, signaling, traffic controls devices, signage, and striping), and all improvements that Developer is required to complete within City-Dedicated [PJ47]: This

1.94 1.87 "Public Improvement Agreement" shall mean an agreement between the City and Developer for the completion of improvements required as a condition of subdivision map approval pursuant to Government Code Section 66462.

Open Spaces. The Public Improvements do not include Privately-Owned Open Space or any

Privately-Owned Improvements, including Privately-Owned Improvements within the public

right-of-way, if any.

[PJ45]: Not <del>sure if it</del> should all be lumped together. Dedicated parkland and <del>open space</del> <del>should be</del> treated <del>separately?</del> LTA are <del>oro iect</del> conditions that don't necessarily need to be in Generally iust in the <del>roject</del> resolution as condition of approval.

[PJ46]: Subdivision <del>Agreement</del> generally deals with <del>public</del> <del>improvements</del> andacceptance

requirements for general <del>improvements</del> constructed and accepted by City.

A<del>greement</del> will set

forth-

1.95 1.88 "Public Works" shall mean the San José Department of Public Works.

1. 96 1.89 "Public Works Director" shall mean the Director of Public Works.

1.97 | 1.90-"Qualified Developer" shall mean [PENDING NEGOTIATION] any entity, or such entity's project team, with experience developing similar residential, hotel, limited-term corporate accommodations, or retail projects, as applicable, within the seven (7) year period preceding the effective date of the Transfer.

1.98 "Reimbursement Agreement" shall mean a form of reimbursement agreement entered into between the Parties with respect to the payment of Processing Fees, which agreement shall be substantially in the form attached hereto at Schedule A to this Agreement.

1.99 1.91 "Subdivision Code" shall mean Title 19 of the San José Municipal Code.

1.100 1.92 "Subdivision Map Act" shall mean the California Subdivision Map Act, California Government Code § 66410 et seq.

DISCUSSIONS]-[PENDING DISCUSSIONS] shall mean any other land use approvals, entitlements, or permits from the City other than the Approvals, that are consistent with the Approvals and that are necessary or advisable for the implementation of the Project, including without limitation, demolition permits, grading permits, site permits, building permits, lot line adjustments, sewer and water connection permits, major and minor encroachment permits, street and sidewalk modifications, street improvement permits, permits to alter, certificates of occupancy, transit stop relocation permits, subdivision maps, improvement plans, lot mergers, lot

line adjustments, and re-subdivisions. A Subsequent Approval shall also include any amendment to the foregoing land use approvals, entitlements, or permits, or any amendment to the Approvals that are sought by Developer and approved by the City in accordance with the standards set forth in this Agreement.¶

1. 102 "Substantial Completion" shall mean that construction of the base building is sufficiently complete so as to be ready for the performance of tenant improvements.

1. 103 "Ten Year Development Obligation" shall mean (i) the Substantial Completion of the base building(s), and submission of permit application(s) for tenant improvements, by or on behalf of Google LLC or any Google Affiliate, for not less than two million (2,000,000) gross square feet of office development within the Project Site, or (ii) Developer's satisfaction, whether by payment or performance as applicable, of the Community Benefits associated with such 2,000,000 gross square feet of office development, as set forth on Exhibit C and Section 4.1 to this Agreement.

1.104 1.94 "Tentative Map" shall mean both a "Tentative Map" as defined in Section 19.08.460 of the Subdivision Code and a "Vesting Tentative Map" as defined in Section 19.13.020(A) of the Subdivision Code.

1. 105 1.95 "Term" shall have the meaning set forth in Section 2.2.

1.106 1.96 "Third-Party Challenge" has shall have the meaning set forth in Section 7.4.

1. 107 "Third Party Transferee" shall mean any entity that is not Google LLC, a

Google Affiliate or a Lendlease Affiliate.

1. 108 1.97 "Transfer" shall mean [PENDING NEGOTIATION]have the meaning set forth in Section 12. ¶

[PJ48]: What
is unique
about the TDM
that requires
it to be in
the DA?
There are TDM
as part of
the MMRP.
This TDM Plan
in addition
or one in the

1. 109 "Transferee" shall mean any party that is the transferee in a Transfer.

1.110 1.98 "Transportation Demand Management Plan" shall mean the transportation demand management plan set forth in Exhibit L. attached to the FEIR, as the same may be modified from time to time.

1.111 "Twenty Year Development Obligation" shall mean (i) the Substantial Completion of the base building(s), and submission of permit application(s) for tenant improvements, for not less than two million (2,000,000) gross square feet of office development within the Project Site, or (ii) Developer's satisfaction, whether by payment or performance as applicable, of the Community Benefits associated with such 2,000,000 gross square feet of office development, as set forth on Exhibit C to this Agreement. The amount of office development or Community Benefits under this Twenty Year Development Obligation shall be in addition to the amount of office development or Community Benefits required to satisfy the Ten Year Development Obligation.

1.112 "Vertical Improvement" shall mean a Building or other improvement to be developed under this Agreement that is not parks and open space or infrastructure, or any portion thereof that is a Horizontal Improvement.

<u>1.113</u> <u>1.99</u> "Vested Elements" shall have the meaning set forth in <u>Section 5.1</u>.

1.114 1.100 "Zoning Code" shall mean Title 20 of the San José Municipal Code.

## 2. EFFECTIVE DATE; TERM

2. 1 <u>Effective Date</u>. This Agreement shall take effect upon the later of (i) the full execution and delivery of this Agreement by the Parties, and (ii) the date the Enacting Ordinance is effective and operative and Final Approval has occurred ("Effective Date").

[PJ49]: Needto-Verifythat thisworks whendefinition of-Final-Approval isknownTerm. [PENDING NEGOTIATION]. The term of this Agreement shall commence upon the Effective Date and shall continue in full force and effect for thirty (30) years thereafter unless extended or earlier terminated as provided herein ("Term"); provided, however, that (i) the Term shall be extended for each day of a Litigation Extension. Force Majeure, or any other extension provided under this Agreement, and (ii) Developer shall have the right to terminate this Agreement with respect to a Development Parcel upon Completion of the Building within that Development Parcel and the Community Benefits for that Building, as set forth in Section 7.1. The City shall have the right to terminate this Agreement prior to the expiration of the Term as follows: (a) if, on or before the date that is the last day of the tenth (10<sup>th</sup>) year after the Effective Date (as such 10-year period may be extended by a Litigation Extension, Force Majeure, or any other extension provided under this Agreement) the Ten Year Development Obligation has not been satisfied; or (ii) if, on or before the date that is the last day of the twentieth (20th) year after the Effective Date (as such 20-year period may be extended by a Litigation Extension, Force Majeure, or any other extension provided under this Agreement) the Twenty Year Development Obligation has not been satisfied. If the City desires to exercise its right to terminate as a result of the failure of Developer to satisfy the Ten Year Development Obligation or the Twenty Year Development Obligation, then the City shall follow the procedures set forth in Section 11.2 below. The term of any Planned Development Permit or Subsequent Approval shall be for the longer of the Term (as it relates to the applicable parcel) or the term otherwise allowed under the Planned Development Permit or Subsequent Approval. The term of any Tentative Map approved in connection with the Project shall be for the longer of the Term (as it relates to the applicable parcel) or the term otherwise allowed under the Subdivision Map Act.

#### 3. GENERAL RIGHTS AND OBLIGATIONS; DEVELOPMENT PROCESS

3.1 Development of the Project. Developer shall have the vested right to [PJ50]: develop the Project in accordance with and subject to the provisions of this Agreement and the Approvals, and the City shall consider and process all Subsequent Approvals for development of the Project in accordance with and subject to the provisions of this Agreement and the Approvals. The Parties acknowledge that Developer has obtained all Approvals from the City required to commence construction of the Project, other than any required Subsequent Approvals, and that Developer may proceed in accordance with this Agreement with the construction and, upon completion Completion, use and occupancy of the Project as a matter of right, subject to the attainment of any required Subsequent Approvals and any Non-City Approvals. ¶

3.2 Commencement of Construction; Expiration; City's Early Termination Right¶. [PENDING NEGOTIATION].

[PJ51]: How Benefit and Public-Benefit??

Approvals as

3.3 Timing of Community Benefits, Public Benefits, and Infrastructure.

Because the Project will be built out over a number of years, the amount and timing of the CommunityPublic Benefits, including the Public Improvements, Affordable Housing Program, and City-Dedicated Open Spaces, and affordable housing, are allocated in accordance with the Community Benefits Schedule Space are to be provided as set forth in Exhibit C, the Affordable Housing Program included herewith as Exhibit CExhibit D, the City-Dedicated Open Space Dedication and Improvements Schedule included herewith as Exhibit E55.1, the Infrastructure <u>Plan included herewith as Exhibit I,</u> and as more particularly described in <u>Sections Section 4.1</u>, 4.2, and 4.3. For certain Project Features, such as the District Systems, timing requirements have been intentionally omitted, and these Features are otherwise subject to receipt of necessary

[PJ52]: Willit always be through the map process? No situation where its through the Subsequent Review Process?

permits or other conditions precedent, as noted or described in the applicable Exhibit. The scope and timing of Infrastructure that is associated with specific parcels or Buildings, as described in Exhibit GI, shall be reviewed and approved by the City through the Subdivision Mapper approval subdivision mapping process consistent with the applicable Laws. As more particularly described in Sections 4.1 and 4.3, requirements of the Community Benefits related to affordable housing, City Dedicated Open Space, and transportation demand management shall be delivered as set forth in the Affordable Housing Plan (Exhibit D), Parkland Agreement (Exhibit E), and Transportation Demand Management Plan (Exhibit L), respectively.

3.3 3.4 Changes to CommunityTiming of Public Benefits Schedule.

[PENDING NEGOTIATION] The Parties agree that many factors will determine the rate at which various residential and commercial uses within the Project can be developed and absorbed. Developer may request changes to the timing of Public Benefits as set forth in Exhibits C, D, E, I or Section 4.1 herein, at any time by submitting a written request to the Director of PBCE with a statement explaining the reasons for the proposed changes. The Director of PBCE shall consider only the following (collectively, the "Development Timing Goals") when considering Developer's request for changes to the Public Benefits Schedule:

- Rational Development. Public Benefits should be developed in an orderly manner and consistent with the Project Documents. Finished portions of the Project should be generally contiguous or adjacent to a completed street.
- Appropriate Development. Horizontal Improvements should be timed to coordinate with the needs of Vertical Improvements. Completed Infrastructure must provide continuous reliable access and utilities to then-existing visitors, residents, and businesses.

- Market Timing. The boundaries and mix of uses within the Conformance Review

  Application plans should be designed to minimize unsold inventory.
- Flexibility. Flexibility to respond to market conditions, cost, and availability of financing and economic feasibility should be provided.

In considering whether to approve Developer's requested changes, the Director of PBCE shall consider only whether the changes are consistent with all of the Development Timing Goals. The Director of PBCE shall approve such change if, after consulting with all affected City Agencies and the City Attorney, he or she reasonably determines that the modified timing for the specified Public Benefit(s) meets all of the Development Timing Goals. Any Material Change to the timing of a Public Benefit(s) that does not meet all of the Development Timing Goals, as reasonably determined by the Director of PBCE, will require the approval of the Planning Commission after consultation with the affected City Agencies.

3.4 3.5 Approval of Subdivision Maps. [TO DEVELOP MASTER ENCROACHMENT AND PIA LANGUAGE] Developer shall obtain approval of Tentative Maps, Final Maps and Parcel Maps as required by the Subdivision Map Act and the Subdivision Code to subdivide the Project Site for purposes of disposition and development as contemplated by this Agreement. Developer may pursue a single Tentative Map covering the entire Project site or multiple Tentative Maps. Approval of any Tentative Map shall be conditioned on Developer completingCompleting any required Public Improvements and Privately-Owned Open Spaces consistent with the terms and conditions printed on the face of said map and the Project Documents. Developer may pursue approval of Final Maps in phases that include only portions of the associated Tentative Map. The City agrees that, to the extent authorized by the Subdivision Map Act and the Subdivision Code, Final Maps shall be liberally construed for purposes of

[PJ53]: Whywould we just not follow the City's general practice?
What is the issue with State law and City's Subdivision ordinance?
Need to check with PW.

determining substantial compliance conformance with the associated Tentative Map as contemplated by Sections 19.16.130 and 19.16.140 of the Subdivision Code and Government Code Section 66474.166474.1.

3.6 Conformance Review. The Approvals and the Project Documents are intended to ensure that the urban, architectural, and landscape design of the Buildings, the Public Improvements, and the public realm at the Project Site will be of high quality and appropriate scale, include sufficient open space, and promote the public health, safety and general welfare. Conformance Review procedures applicable to **Buildings** Vertical Improvements, Privately-Owned Open Space, Privately-Owned Improvements, and certain Public Improvements and Horizontal Improvements, as indicated in the Downtown West Design Standards and Guidelines, shall be as set forth in the General Development Plan, the Downtown West Planned Development Permit (consisting of the Downtown West Design Standards and Guidelines and the Downtown West Improvement Standards, the Conceptual Infrastructure Plan Sheets and the Conformance Review Implementation Guide), the Master Encroachment Agreement, and in this Agreement and Exhibits hereto. The City shall review and approve or disapprove any Conformance Review Application in accordance with the requirements of this Agreement and the procedures specified in the General Development Plan and the Downtown West Planned Development Permit. In considering a Conformance Review Application and any Subsequent Approval for those aspects of the Conformance Review Application that meet the mandatory standards of the Downtown West Planned Development Zoning District and the Downtown West Design Standards and Guidelines Planned Development Permit, including a Building's proposed height, bulk, setbacks, streetwalls, location, size of uses, and amount of open space and parking, and the quantitative or objective requirements of other Project Documents (the "Objective

Requirements"), the City acknowledges and agrees that (i) it has exercised its discretion in approving the Downtown West Planned Development Zoning District and the Project Documents, and (ii) any proposed Conformance Review Application or Subsequent Approval that meets the Objective Requirements shall not be rejected by the City based on elements that conform to or are consistent with the Objective Requirements, so long as the proposed Building(s), Privately-Owned Open Space, Privately-Owned Improvements, and/or Public Improvement meet(s) the San José Building Codes.

Preempted
under State
and federal
law? Public
health and
safety
concern?
General carve

3.7 Timing for Completion of Public Improvements and Privately-Owned Improvements ... [PENDING NEGOTIATION] All Public Improvements that are required to serve a Building or Buildings (as identified in Exhibit C, E, I, and/or Section 4.1) (a) must be performed and Completed as specified in this Agreement, the applicable Exhibit to this Agreement, and/or in the Infrastructure Plan, or (b) if no such specifics are provided, then such Public Improvements shall be Completed on or before issuance of a Certificate of Occupancy for that Building or Buildings; provided, however, that upon Developer's request, the City shall allow the issuance of the Certificate of Occupancy for a Building or Buildings prior to Completion of the required Public Improvements if Developer and the City have entered into an agreement reasonably acceptable to the Public Works Director with respect to Public Improvements within Public Works jurisdiction and reasonably acceptable to the Developer with respect to the use of and liability for the applicable Public Improvements until Completed and accepted by the City Council. The Parties agree to work in Good Faith to enter into such agreements as may be needed to ensure that City's process for acceptance of Public Improvements is not delayed. Privately-Owned Improvements must be Completed as set forth in this Agreement, the Infrastructure Plan included as Exhibit I. and any associated Tentative Map conditions of approval. All applicable City Agencies have

reviewed and conditionally approved the Infrastructure Plan. Developer acknowledges and agrees that upon the occurrence of certain conditions, the City may decide not to issue Certificates of Occupancy, as more particularly described in Section 9.4.4.

4. **COMMUNITY BENEFITS;** PUBLIC **BENEFITS**; **DEVELOPER** OBLIGATIONS AND CONDITIONS TO DEVELOPER'S PERFORMANCE

"required

4.1 CommunityPublic Benefits Exceed Those Required by Existing Ordinances and Regulations. The Parties acknowledge and agree that the development of the [PJ55]: Project in accordance with this Agreement provides a number of public benefits Public Benefits Should this to the City beyond those required by or achievable through existing Laws, including, but not limited to, those set forth in this Article 4 (the "Community Benefits") Section 4. The City acknowledges and agrees that a number of the Community Public Benefits would not otherwise be achievable without the express agreement of Developer under this Agreement. Developer acknowledges and agrees that, as a result of the benefits to Developer under this Agreement, Developer has received good and valuable consideration for its provision of the Community Benefits, and that the City would not be willing to enter into this Agreement without the Developer's obligation to provide the Community Benefits. Payment or delivery of each of the Community Benefits is described in the Community Benefits Schedule attached as Exhibit C or [PJ56]: anguage. as described elsewhere in this Agreement and/or the Exhibits hereto. Upon Developer'Upon <u>Developer's</u> receipt of a building permit, the <u>CommunityPublic</u> Benefit obligations tied to <u>or</u> triggered by that Building shall survive the expiration or termination of this Agreement to the date of the completion Completion of the applicable Community Public Benefit. Time is of the essence with respect to the completion of the Community Benefits.

- 4. 1. 1 <u>CommunityBase Required Public Benefits</u>. <u>In satisfaction of City statutory and/or regulatory requirements</u>, Developer shall provide the following <u>CommunityBase Required Public</u> Benefits (<u>collectively</u>, the "Community Benefit Programs")in accordance with <u>Exhibit C, D, E, and I, as applicable</u>, and as set forth herein:—
- (a) the Affordable Housing PlanProgram benefits [PENDING-NEGOTIATIONS] in satisfaction of the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08), as further described in Exhibit D;-
- (b) the City-Dedicated Open Spaces [PENDING-NEGOTIATIONS] in satisfaction of Developer's Parkland Obligation, as further described in Exhibit E and Exhibit Hthe DWDSG;

(c)

those elements of the Infrastructure Plan (including all of

the Public Improvements and all of the Privately-Owned Improvements) [PENDING NEGOTIATIONS] as further described in Exhibit GI (not including the enhanced infrastructure, District Systems, and Microgrid elements described in Section 4.1.3(c)), which improvements shall satisfy Developer's Diridon Station Infrastructure Fee requirement in full.

<u>Unless indicated elsewhere in this Agreement,</u> Developer shall <u>completeComplete</u> each of the <u>CommunityBase Required Public</u> Benefits on or before the applicable dates provided in this Agreement (<u>including the Community Benefits Schedule</u> attached hereto as <u>Exhibit C</u> and the City Dedicated Open Space Dedication and Improvements <u>Schedule attached hereto as Exhibit E5</u>) and the <u>Approvals</u>, and <u>Exhibits hereto</u>, and the <u>Approvals</u>. Any payments or property received by the City as part of the Base Required Public <u>Benefits shall be used by the City as described in this Agreement and Exhibits hereto</u>. Promptly

following Developer's request, the City shall provide to Developer evidence of the use of the funds by the City consistent with the requirements of this Agreement.

A.1.2 Community Benefits Provided By Project. In addition to the Base Required Public Benefits described in Section 4.1.1, Developer agrees to provide the Community Benefits described in this Section 4.1.2. Developer acknowledges and agrees that, as a result of the benefits to Developer under this Agreement, Developer has received good and valuable consideration for its provision of the Community Benefits described herein, and that the City would not be willing to enter into this Agreement without the Developer's obligation to provide such Community Benefits:¶

(a) Limited Term Corporate Accommodations [PENDING]. PENDING NEGOTIATIONS] As an additional Community Benefit, Developer agrees to contribute to City the amount of Eighteen and 70/100 Dollars (\$18.70) per net square foot, excluding areas outside the usable accommodation such as lobby, storage areas, mechanical/utility rooms, common areas and corridors etc., of limited-term corporate accommodations, as such use is defined in the Downtown West Planned Development Zoning District and General Development Plan (the "Corporate Accommodations Contribution"), which Contribution shall be paid upon issuance of a Certificate of Occupancy for a building containing limited-term corporate accommodations. The Corporate Accommodations Contribution shall be used to fund affordable housing production in the DSAP. The Corporate Accommodations Contribution shall be vested for the term of this Agreement, subject to escalation based on the Engineering News Record Construction Cost Index. Pursuant to Section 5.8 of this Agreement, Developer shall not be subject to any new Impact Fee for limited-term corporate accommodations or similar use that City may adopt:

[Index]

- (b) Community Stabilization and Opportunity Pathways Fund¶.

  [PENDING NEGOTIATIONS] Developer and/or Google, as applicable, shall establish and provide funding for the Community Stabilization and Opportunity Pathways Fund, as described in Exhibit H;¶
- (c) the Affordable Housing Program benefits described in Exhibits C and D that exceed Developer's Base Required Public Benefit pursuant to the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08); and I
- (Contiguous parcels: 255 Autumn St., 260 & 240 N Montgomery St. San Jose, 95110, as shown on Exhibit [ ](Site Plan and Legal Description)) six (6) months after Final Approval, free and clear of any occupants, but in its otherwise as-is condition, as set forth in Exhibit C.¶
- 4.1.3 Project Features. In addition to the Base Required Public Benefits and the Community Benefits, Developer has opted to provide the following additional Project Features as a Public Benefit:¶
- NEGOTIATIONS]. In addition to the City-Dedicated Open Space described in Exhibit E hereto, and the Park Improvements to the City-Dedicated Open Space described therein, Developer is providing as a Project Feature certain Privately-Owned Open Space totaling approximately 10.2 acres, generally depicted on Exhibit E5.2 hereto and as described in the Downtown West Design Standards and Guidelines (referred to therein as "Project Sponsor-Owned Open Space"). The Privately-Owned Open Space will be publicly accessible via a public access agreement in substantially the same form as Exhibit F1, subject to the hours of operation and private events/temporary closures set forth in Exhibit F2, and the Code of Conduct for Public Use set

forth in Exhibit F3. The public right of access to the Privately-Owned Open Spaces is a Public Benefit that exceeds what would be required under the City's Parkland Dedication Ordinance.

The Privately-Owned Open Space categories, design, boundaries, and programming are set forth in the Downtown West Design Standards and Guidelines.

Completion of the Privately-Owned Open Spaces means that sign-off of final inspection has occurred; however, Completion does not include or require completed installation of park design elements, art, structures, or features not essential to the intended use of the park by the public, so long as final installation of such elements or features does not interfere with safe use of the park; nor does Completion include or require improvement of the fifty (50) feet of a Privately-Owned Open Spaces that fronts an incomplete vertical parcel (the "Temporary Construction Area") to allow for safe construction on that vertical parcel, so long as the Temporary Construction Area is relinquished and improved within six (6) months of issuance of a Certificate of Occupancy for the building located on the vertical parcel. Subject to Sections 3.3 and 11.5, Developer shall deliver the Completed Privately-Owned Open Spaces identified in Exhibit F, within thirty (30) months following issuance of a Certificate of Occupancy for the building parcels as indicated in the following schedule: ¶

- ☐ Creekside Walk at South Autumn Street (the later of D8, D9, D10, D11, D12 or D13)¶
- ☐ Gateway to San José (E1)¶
- □ Los Gatos Creek East (the later of E1 or E2)¶
- The Meander (F Office [excluding areas between F2/F4/150 South Montgomery, which are to be delivered within 30 months from the issuance of Certificate(s) of Occupancy for the final building of F2, F4 or 150 South Montgomery]); In the event F3 and/or F6 have not received a Certificate(s) of Occupancy within twenty-four (24) months following issuance of a Certificate of Occupancy for the office building on F1, the area of the Meander within fifty (50) feet of those buildings shall be Completed within six (6) months of issuance of Certificate of Occupancy for buildings on F3 and/or F6¶
- □ Los Gatos Creek Park 1 (G1)¶

- □ Los Gatos Creek Park 2 (H2)¶
- □ N. Montgomery Pocket Park (B1)¶
- Northend Park (A1) ¶
- Los Gatos Creek Riparian Setback adjacent to Los Gatos Creek Connector (later of H3 and H5)¶

Semi-Public Open Space adjacent to a City-Dedicated Open Space shall be Completed within thirty (30) months of issuance of a Certificate of Occupancy for the fronting Building.

addition to the public access agreement to be recorded for the Privately-Owned Open Spaces as described in Exhibit F1, approximately seven (7.0) acres, consisting of the following Privately-Owned Open Space typologies, shall be subject to a recorded restrictive covenant: Privately-Owned Public Park, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor (the "Covenant Privately-Owned Open Spaces"). The final acreage and/or boundaries of the Covenant Privately-Owned Open Spaces may be subject to adjustment pursuant to the provisions of the Downtown West Design Standards and Guidelines, and shall be verified as part of the final map process. The restrictive covenant shall require that the Covenant Privately-Owned Open Spaces remain as publicly accessible park space unless and until the City or other public agency requires that the use be changed; provided, however, that the open spaces shall be permitted to be reconfigured so long as the overall square footage of the Covenant Privately-Owned Open Spaces remains the same.

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

(iii) Penalty For Privately-Owned Public Open Space

Delay¶. In no event shall a delay in the Completion of any Privately-Owned Open Space

constitute a Default pursuant to this Agreement. For the Covenant Privately-Owned Open Space,

in the event Developer fails to Complete any Covenant Privately-Owned Open Space in

accordance with the Completion schedule set forth in Section 4.1.3(a)(i), Developer shall be required to pay a penalty fee to the City (the "Private Open Space Delay Penalty"). The Private Open Space Delay Penalty shall be based on the total square footage of the delayed Covenant Privately-Owned Open Space, and shall be paid for each month the Completion of that Covenant Privately-Owned Open Space is delayed beyond the thirtieth (30th) month following issuance of a Certificate of Occupancy for the corresponding building shown in Section 4.1.3(a)(i), as follows:¶

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

Pursuant to the terms of the Parkland Agreement, included as Exhibit E to this Agreement, the Parties acknowledge and understand that a delay in the Completion of any Covenant Privately-Owned Open Space could require that the City delay issuance of a building permit for any subsequent residential building until the Covenant Privately-Owned Open Space is Completed if development of the subsequent residential building would cause the cumulative

minimum square feet of open space for each residential unit to fall below fifty-two (52) square feet.¶

(b) Publicly Available Parking Spaces. [PENDING NEGOTIATIONS] Developer shall provide publicly available parking spaces within the Project in the manner and number set forth in Exhibit K.¶

Enhanced Infrastructure, District Systems, and Microgrid. Subject to receipt of necessary agency permits and approvals, the Project will include a District Systems approach to handle many of its utilities—such as electricity, thermal, wastewater, recycled water, and solid waste, as described in Exhibit I. The Project's Infrastructure Plan (Exhibit I) also includes enhanced right of way improvements, utility upgrades and relocation, undergrounded overhead power and communication lines, rehabilitation work to Los Gatos Creek, and replacement of the San Fernando Bridge as additional Project Features. In addition, if feasible, the Project will connect some or all buildings to an electric microgrid, as described in Exhibit J.

(d) 4.1.2 Workforce, Learning, and Education¶. [PENDING NEGOTIATIONS]¶

4.1.3 City Cooperation Regarding Trail Alignments Developer and/or Google, as applicable, will provide the additional Workforce, Learning, and Education benefits described in Exhibit G. [PENDING NEGOTIATIONS]

4.2—Privately Owned Open Space.¶ [PENDING NEGOTIATIONS].¶

4.2.1 <u>Delivery of Privately-Owned Open Space</u>¶. [PENDING

**NEGOTIATIONS** 

[PJ58]: "Deliver" not a defined term?

[PJ59]: Does provision" refer to this Section 4.2 or to the Agreement's Default provisions? Should-<mark>"default" be</mark> capitalizedin this <del>paragraph,</del> is the lower attempt to

[PJ60]: Have coordinated with PRNS.

it from other

-Access Parameters for Privately-Owned Public

**[PENDING NEGOTIATIONS]** 

4.2.3 Default and Privately Owned Public Open Space . If Developer fails to timely Deliver a Privately-Owned Open Space, the Director of PBCE shall give twenty (20) working days' prior written notice to Developer of default under the provision and of the City's intent to impose the Penalty Fee ("Notice Period"), which notice shall state in reasonable distinguish detail the nature of Developer's default and the manner in which Developer can cure the default. Defaults? During the Notice Period, Developer shall have the right to cure any such default; provided, however, if a default is of a nature which cannot reasonably be cured within the Notice Period,

Developer shall be deemed to have timely cured such default if Developer commences to cure the default within the Notice Period, and diligently prosecutes the same to completion within a reasonable time thereafter. Following the Notice Period, in the event of default for failure to timely Deliver a Privately-Owned Open Space, Developer shall [PENDING NEGOTIATIONS].¶

4.2.4 <u>Term of Privately-Owned Open Spaces</u>¶. [PENDING-

**NEGOTIATIONS** 

(e) AB 900; Environmental Leadership Project Features. As described in Recital I, the Project is an Environmental Leadership Project pursuant to AB 900. As such, Developer has committed to providing the following Project Features: the Project will be designed in pursuit of LEED for Neighborhood Development Gold Certification, with vertical office buildings designed to meet LEED Gold Certification; and the Project would offset emissions, resulting in a "Net Zero Emissions" project, in part through a combination of design measures intended to reduce energy consumption described in Exhibit I and in the FEIR.

switching to equipment utilizing lower emission energy sources, water use and vehicular movement efficiencies, and purchasing GHG emissions offsets.

4.2 4.3 Conditions to Performance of CommunityPublic Benefits. Developer's obligation to perform CommunityPublic Benefits is expressly conditioned upon the satisfaction of each and all of the following conditions precedent:

4.2.1 4.3.1 Final Approval has occurred for all Approvals;

4.2.2 4.3.2 The City and any applicable Non-City Agency(ies) shall have performed or granted all of their respective actions, approvals or authorizations and/or issued such permits or licenses required in order to permit Developer to Commence Construction of the Building(s) or Project component(s) to which the particular Public Benefit applies, and Final Approval shall have occurred for same except to the extent that such actions, approvals or authorizations, or permits or licenses have not been performed or granted due to the failure of Developer to timely initiate and then diligently and in Good Faith pursue such actions, approvals,

[PJ61]: I—
assume this—
will—be—
limited to—
those—
Subsequent—
Approvals—for—
the—part—of—
the—project—
to—be—
constructed,—which—would—
trigger—one—
or—more—
public—
benefit—
obligations.

4.2.3 4.3.3 Developer shall have obtained all Subsequent Approvals

necessary to Commence Construction of the applicable Building(s) or Project component(s) to which the Public Benefit applies, and Final Approval shall have occurred for same, except to the extent that such Subsequent Approvals have not been obtained or Final Approval has not occurred for same due to the failure of Developer to timely initiate and then diligently and in Good Faith pursue such Subsequent Approvals[LANGUAGE PENDING NEGOTIATIONS].

authorizations, or issuances [LANGUAGE PENDING NEGOTIATIONS]; and

Except as expressly set forth in any of the applicable Exhibits to this Agreement, whenever this Agreement requires completion of a Public Benefit at or before Completion of a

PJ62]: IsParkingwithin theInfrastructur
e Plan orseparatediscussion?
I think weneed aseparateparkingsection?

Building, the City may withhold a Certificate of Occupancy for that Building until the required

Public Benefit is Completed.

4.4—Publicly Available Parking Spaces. [PENDING NEGOTIATIONS]

4.3 4.5 No Additional CEQA Review Required; Reliance on FEIR for Future

<u>Discretionary Approvals</u>. The Parties acknowledge that the FEIR prepared for the Project complies with CEQA. The Parties further acknowledge that (a) the FEIR contains a thorough analysis of the Project and possible alternatives, (b) the MMRP has been adopted to eliminate or reduce to an acceptable level certain adverse environmental impacts of the Project, and (c) the City Council adopted CEQA Findings, including a statement of overriding considerations in connection with the Approvals, pursuant to CEQA Guidelines Section 15093, for those significant impacts that could not be mitigated to a less than significant level. For these reasons, the City shall rely on the FEIR, to the greatest extent possible in accordance with applicable Laws, in all future discretionary actions related to the Project; provided, however, that nothing shall prevent or limit the discretion of the City to conduct additional environmental review, at Developer2's expense, in connection with any Subsequent Approvals to the extent that such additional environmental review is required by applicable Laws, including CEQA. Developer acknowledges that if the City determines based on additional environmental review that the modified project will result in significant new effects or substantially increases the severity of effects than identified in the FEIR for the Project, City may require, and Developer shall comply at its expense with, all additional feasible mitigation measures necessary to mitigate such impacts.

4.3.1 4.5.1 Compliance with CEQA Mitigation Measures. Developer shall comply with all Mitigation Measures imposed as applicable on each Project component,

[PJ63]: Are—
there—
mitigations—
that would be
the—
obligation of
someone other
than the—
applicant?—
Which one?

except for any Mitigation Measures that are expressly identified as the responsibility of a different party of entity. Without limiting the foregoing, Developer shall be responsible for the completion of all Mitigation Measures identified as the responsibility of the "owner" or the "project sponsor" or the "project applicant". The Parties expressly acknowledge that the FEIR and the associated MMRP are intended to be used in connection with each of the Approvals and any Subsequent Approvals to the extent appropriate and permitted under applicable Law. Nothing in this Agreement shall limit the ability of the City to impose conditions on any new, discretionary permit resulting from [PENDING NEGOTIATIONS] a modification to the Project, as such conditions are determined by the City to be necessary to mitigate potentially significant adverse environmental impacts identified through the appropriate the project of the CEQA process and associated with [LANGUAGE PENDING NEGOTIATIONS] or otherwise to address significant environmental impacts as defined by CEQA created by a projectthat Project modification or a Subsequent Approval or permit; provided, however, any such conditions must be in accordance with applicable Law.

4.4 4.6-Nondiscrimination. In the performance of this Agreement, Developer agrees not to discriminate against any employee, City employee working with any Developer's contractor or subcontractor, applicant for employment with such contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with

members of such protected classes, or in retaliation for opposition to discrimination against such classes.

## 4.5 4.7 City Cost Recovery

4.5.1 4.7.1 Developer shall timely pay to the City all applicable Impact Fees with respect to the Project or the Project Site as set forth in Section 5.8.

4.5.2 4.7.2 Except as otherwise set forth in this Agreement and/or the Exhibits hereto, Developer shall timely pay to the City all applicable Processing Fees with respect to the processing or review of applications for the Approvals and Subsequent Approvals as set forth in Section 5.8, whether or not such fees are adopted or increased before or after the Effective Date of this Agreement.

4.5.3 4.7.3 Developer shall pay to the City all City Costs incurred in connection with the drafting and negotiation of this Agreement, and defending the Approvals as set forth in Section 7.4, and in processing and issuing any Subsequent Approvals or administering this Agreement (except for the costs that are covered by Processing Fees), within sixty (60) days following receipt of a written invoice complying with Section 4.5.4 from the City. [LANGUAGE RE: CITY COSTS WRT SUBSEQUENT APPROVALS PENDING NEGOTIATIONS] ¶

4.7.4 City shall provide Developer on a quarterly basis (or such alternative period as agreed to by the Parties) a reasonably detailed statement showing reasonable costs incurred by the PBCE Department, the City Agencies and the City Attorney's Office, including the hourly rates for each City staff member at that time, the total number of hours spent by each City staff member during the invoice period, any additional costs incurred by the City Agencies, and a brief non-confidential description of the work completed (provided, for the City

Recovery Fee are—
established—
on an annual—
basis by—
Council as—
part of the—
budget—
process.

Make sure—
City are—
fully—
recovering—
our time to—
review and—
process—
applications.
These fees do—
not vest.
So, we—need—
to—clear—on—
this issue.

[PJ64]: Cost

[PJ65]: <del>L</del> <del>suggest we</del> set up the <del>framework fo</del> Reimbursem Agreement prior to any <del>subsequent</del> approval application. <del>Similar to</del> the first Reimbursement Agreement for the Purchase <del>and Sale</del> Agreements and the existing <del>Reimbursement</del> Agreement for the current entitlement

process.

Attorney's Office, the billing statement will be reviewed and approved by City but the cover invoice forwarded to Developer will not include a description of the work). The City will use reasonable efforts to provide an accounting of time and costs from the City Attorney's Office and each City Agency in each invoice. If the City is unable to provide an accounting from one or more of such parties within the same calendar quarter in which the work was performed, then the City may linelude the necessary charges and accounting of time and costs in a supplemental or, future invoice. Developer's obligation to pay the City Costs shall survive the termination of this Agreement. Developer shall have no obligation to reimburse the City for any City Cost that is not invoiced to Developer within eighteen (18) months from the date the City Cost was incurred. The City will maintain records, in reasonable detail, with respect to any City Costs and upon written request of Developer, and to the extent not confidential or a description of work by or on behalf [PJ67]: This of the City Attorney's office, shall make such records available for inspection by Developer.

4.7.5—If Developer in good faith disputes any portion of an invoice, then within sixty (60) days following receipt of the invoice, Developer shall provide notice of the amount disputed and the reason for the dispute, and the Parties shall use good faith efforts to reconcile the dispute as soon as practicable. Developer shall have the right to withhold the good faith amount in dispute under any invoice until the dispute has been resolved. Developer shall have no right to withhold the disputed amount. If any dispute is not resolved within ninety (90) days following Developer's notice to the City of the dispute, Developer may pursue all remedies at law or in equity to recover the disputed amount.

4. 5. 4 The Parties shall enter into a Reimbursement Agreement with respect to the foregoing Processing Fees and City Costs pursuant to which Developer shall reimburse the City for Processing Fees and City Costs incurred in performing work in connection

[PJ66]: There is already a limitation on the Developer's obligations to pay costs not invoiced within a certain period of time a few <del>sentences</del> down. Further limiting the City's ability to invoice for costs to those <del>occurring in</del> the prior <del>quarter mav</del> be unduly restrictive. The 5M Agreement provided the City to invoice the developer for costs within 18 month.

> section should be <del>agreed upon</del> <del>in a separate</del> Reimbursement Agreement at appropriate time. It just depends on how the reimbursement structured. For example, the existing Reimbursement Agreement is structured for google to work with City to make sure City understands the amount of workrequired, if City has existing staff to review, if additional staff is needed, cost

to pay for new or existing

personnel. timing of review etc. Too much <del>unknown at</del>

with processing Subsequent Approvals required to implement the Project, including but not limited to any further environmental review, Conformance Review Applications, phased final subdivision maps, and grading and building permits, all on an expedited basis. The Reimbursement Agreement shall establish the City's commitment to process Subsequent Approvals on an expedited basis and the terms for Developer's reimbursement to the City for such Processing Fees and City Costs, and shall set forth (i) the scope of city costs eligible for reimbursement; (ii) a process for the parties to agree to an annual (or other applicable period based on the anticipated scope of the work) budget of City Costs based on anticipated schedule of reimbursable work, a reconciliation process for budget inconsistencies, and a process for periodically reducing or augmenting the budget where necessary; (iii) Developer's rights to review, approve, or challenge City Costs; (iv) Developer's rights to approve consultant scopes of work, expenses, and budgets; (v) the City's responsibility for tracking, maintaining, and reporting Processing Fees and City Costs incurred in relation to an approved budget; (vi) the process for Developer's payment of Processing Fees and City Costs; and (vii) any other related terms mutually agreed upon between the Parties. The Reimbursement Agreement shall be in a form substantially similar to the form attached hereto as Schedule A.

4.6 4.8 Prevailing Wages. Developer agreesacknowledges that Developer shall be required to pay prevailing wages to all persons performing labor in the construction of public improvements as on the Project Site to the extent required by California law, onincluding specifically the Project Site shall be paid not less than the highest prevailing rate of wages for the labor so performed California Labor Code, the California Public Resources Code, and the requirements of the Department of Industrial Relations, and as may be required by the Municipal Code. Developer shall include this requirement in any contract entered into by Developer for the

construction of any such public improvements. Upon request, Developer and its contractors will provide to City any workforce payroll records as needed to confirm compliance with this section Section. 4.9 Indemnification of City. Developer shall indemnify, reimburse, and hold harmless the City and its officers, agents and employees (the "City Parties") from and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, judgments, attorney fee awards, and claims ("Losses") arising or resulting directly or indirectly from (i) any third party claim arising from a default Default by Developer under this Agreement, (ii) Developer's failure to comply with any Approval, Subsequent Approval or Non-City Approval, (iii) the failure of any improvements constructed pursuant to the Approvals or Subsequent Approvals to comply with any Federal or State Laws, the Existing Standards or any permitted Future Changes to Existing Standards, (iv) any accident, bodily injury, death, personal injury, or loss of or damage to property occurring on a Project Site (or off-site, with regard to the Public Improvements) in connection with the construction by Developer or its agents or contractors of any improvements pursuant to the Approvals, Subsequent Approvals or this Agreement, (v) a Third-Party Challenge instituted against the City or any of the City Parties, (vi) any dispute between Developer, its contractors or subcontractors, or any combination thereof, relating to the construction of any part of the Project, and (vii) any dispute between Developer and any Transferee or any subsequent owner of any portion of the Project Site or development thereof relating to any assignment of this Agreement or the obligations that run with the land, or any dispute between Developer and any Transferee or other person relating to which party is responsible for performing certain obligations under this Agreement, each regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be

[PJ69]: Isn't prevailingwage required under AB 900? Its requiredfor the-Parkland-Agreement,

[PJ70]: Thissuggests that
there wouldbe thirdpartybeneficiaries
under the DA- which there
shouldn't bepursuant toSection14.16.

imposed on, the City or any of the City Parties, except to the extent that such indemnity is void or

otherwise unenforceable under applicable Law, and except to the extent such Loss is the result of the negligence or willful misconduct of any City Party. The foregoing indemnity shall include, without limitation, reasonable attorneys' fees and costs and the City's reasonable cost of investigating any claims against the City or the City Parties. All indemnifications set forth in this Agreement shall survive the expiration or termination of this Agreement, to the extent such indemnification obligation arose from an event occurring before the expiration or termination of [PJ71]: L this Agreement. To the extent the indemnifications relate to Developer's obligations that survive the expiration or termination of this Agreement, the indemnifications shall survive for the term of the applicable obligation plus four (4) years.

<del>continue to</del> discuss <del>internally</del> <del>indemnificati</del> on provision.

4. 6. 1 4.9.1 In order to ensure compliance with this Section 4.7, within twenty (20) days after notification by the City of the filing of any claim, action or proceeding to attack, set aside, void or annul this Agreement, any of the Project Approvals or the FEIR prepared and adopted for the Project, Developer shall deposit with the City cash or other security in the amount of one hundred thousand dollars (\$100,000), satisfactory in form to the City Attorney, guaranteeing indemnification or reimbursement to the City of all costs related to any action triggering the obligations of this Section. If the City is required to draw on that cash or security to indemnify or reimburse itself for such costs, Developer shall restore the deposit to its original amount within fifteen (15) days after notice from the City. Additionally, if at any time the City Attorney determines that an additional deposit or additional security up to an additional fifty thousand dollars (\$50,000.00) is necessary to secure the obligations of this Section, Developer shall provide such additional security within fifteen (15) days of notice from the City Attorney. The City shall promptly notify Developer of any claim, action or proceeding within the scope of this Section and the City shall cooperate fully in the defense of any such claim or action,

but shall have the right to resolve any challenge, in any manner, in its sole discretion, provided, however, however, Developer's consent shall be required if the resolution of the challenge shall require a payment by Developer or limit Developer's rights under this Agreement. The City shall invoice Developer for any City costs or fees for which Developer is responsible under Section 4.7 in the manner and subject to the provisions of Section 4.5, including pursuant to a Reimbursement Agreement.

### 5. VESTING AND CITY OBLIGATIONS

<u>Vested Rights.</u> -By granting the Approvals, the City has made a policy decision that the Project, as described in and as may be modified in accordance with the Approvals, is in the best interests of the City and promotes the public health, safety and welfare. Developer shall have the vested right to develop the Project as set forth in this Agreement, and authorized by the Approvals, including but not limited to, the Downtown West Planned Development Zoning District, and the General Development Plan, Downtown West Planned Development Permit, Vesting Tentative Map, including without limitation with the following vested elements: the land uses, height and bulk limits, including the maximum density, intensity and gross square footages, the permitted uses, the provisions for open space, vehicular access and parking, and Impact Fees (collectively, the "Vested Elements"). The Vested Elements are subject to and shall be governed by Applicable Laws. The expiration of any building permit or Approval shall not limit the Vested Elements, and Developer shall have the right to seek and obtain subsequent building permits or approvals, including Subsequent Approvals at any time during the Term, any of which shall be governed by Applicable Laws. Each Subsequent Approval, once granted, shall be deemed an Approval for purposes of this Section 5.1.

[PJ72]: Let's discuss.—
Still subject to local LTA.

5. 2 Existing Standards. The City shall process, consider, and review all Subsequent Approvals in accordance with (i) the Approvals, (ii) the San José General Plan, the Municipal Code (including the Subdivision Code), amendments to the Municipal Code set forth in City Council Ordinance No. \_\_\_ and all other applicable City policies, rules, and regulations, as each of the foregoing is in effect on the Effective Date ("Existing Standards"), as the same may be amended or updated in accordance with permitted Future Changes to Existing Standards as set forth in Section 5.6, and (iii) this Agreement (collectively, "Applicable Laws").

[PJ73]: Note to City - We <del>suggest that</del> copies of all applicable nolicies. rules, and regulations in effect on the Effective Date be compiled and kept so later on there is a resource showing what the Existing Standards

[PJ74]: <del>Let's</del> <del>discuss</del> <del>parking.</del>

[PJ75]: Seems redundant of the existing Section 5.9 (Limitation on City's Future Discretion)

5. 3 <u>Criteria for Subsequent Approvals</u>; <u>Limitation on City's Future Discretion</u>.

Developer shall be responsible for obtaining any required Subsequent Approvals. The City, in granting the Approvals and vesting the Project through this Agreement, is limiting its future discretion with respect to Subsequent Approvals to the extent that they are consistent with the Approvals and this Agreement. The City shall not disapprove applications for acknowledges and agrees that (i) Developer's commitment to provide the various benefits described in this Agreement is, in part, consideration for the City's agreement to limit its discretion with respect to Subsequent Approvals and to process Subsequent Approvals in a prompt and efficient manner, and (ii) the City's inability or refusal to process Subsequent Approvals in such manner and otherwise in accordance with this Agreement and the Approvals will cause Developer significant harm. Accordingly, in no event shall a City Agency deny, withhold or condition issuance Denial of a Subsequent Approval based upon an item or elementitems that is are consistent with the Approvals and this Agreement, and shall consider all such applications pursuant to the procedures set forth in the Approvals (including the Downtown West Planned Development Zoning District and its accompanying General Development Plan, the Downtown West Design Standards and Guidelines), as applicable, and in accordance with its customary practices (subject

to the requirements of this Agreement). Subject to the requirements of this Agreement, the City shall not impose any new condition for a Subsequent Approval that conflicts with the Approvals, except when such condition is necessary to bring the Subsequent Approval into compliance with Applicable Laws or if required as mitigation pursuant to CEQA. For any part of a Subsequent Approval request that has not been previously reviewed or considered by the applicable City Agency (such as additional details or plans), the City Agency shall exercise its discretion consistent with the Municipal Code and the Approvals and otherwise in accordance with the City's customary practice (but subject to the requirements of this Agreement).— City Agency discretion for certain Subsequent Approvals, including but not limited to Conformance Review Applications, shall be exercised consistent with the General Development Plan, Downtown West Planned Development Permit, and other Approvals as applicable. ¶

5.4—Denial of a Subsequent Approval Consequently, the City shall not use its

Agreement or otherwise to prevent or to delay development of the Project as contemplated in the Approvals and this Agreement. If the City denies any application for a Subsequent Approval, that implements the Project as contemplated by the Approvals, then such denial must be consistent with Applicable Laws, and the City must specify in writing the reasons for such denial and shall suggest, in a detailed writing, modifications required for approval of the application. Any such specified modifications shall be consistent with Applicable Laws and City staff shall promptly approve the application if it is subsequently resubmitted for City review and corrects or mitigates, to the City's reasonable satisfaction, the stated reasons for the earlier denial in a manner that is consistent and compliant with Applicable Laws, and if the application does not include significant new or additional information or materials that give

[PJ76]: Willneed tocoordinatesubsequentprocess with-Planning.

[PJ77]: These issues addressed on the Planning approvals?—
Make sense to be in the Planning approval in one place.

the City a reason to object to the application under the standards set forth in this Agreement or pursuant to Applicable Laws. Nothing in the foregoing shall impact or limit the City's discretion with respect to: (i) proposed Subsequent Approvals that seek a Material Change ISUBJECT TO DISCUSSIONS ON MATERIAL CHANGE LANGUAGE to the Approvals. or (ii) City approvals of subsequent tentative maps or vesting tentative maps, to the extent required by Law, not contemplated by the Approvals. Until such time as the City approves the application for Subsequent Approval, Developer shall have no obligation to provide any of the Public Benefits specifically associated with the development that is the subject of the Subsequent Approval. In addition, if, in Developer's reasonable, Good Faith opinion, the City has withheld, conditioned or delayed an approval in violation of this Section 5.3, Sections 7.2 or 7.2.1, or any other applicable provision of this Agreement, then Developer shall have the right to delay fulfilling any or all of the Public Benefits specifically associated with the development that is the subject of such approval by the number of days of delay in proceeding with such development caused by such withholding, conditioning or delaying approval by the City, as Developer reasonably determines in Good Faith. Any such delay in providing such benefits shall not constitute a default by Developer, and the City shall nevertheless continue to approve, process, inspect, and issue Certificates of Occupancy for such development notwithstanding Developer's election to delay the Public Benefits.¶

- 5.4 [Intentionally Omitted.]
- 5. 5 Exceptions from Parkland Dedication Ordinance. [PENDING NEGOTIATIONS] As described in the Parkland Agreement set forth in Exhibit E and the List of Required Exceptions from Parkland Dedication Ordinance set forth in Exhibit E2, certain exceptions from the Parkland Dedication Ordinance (San José Municipal Code Ch. 19.38) are

necessary in order to provide the City-Dedicated Open Spaces, Park Improvements, and private recreation improvements, including the high-quality design and improvements to the dedicated open spaces, all as defined and described in Exhibit E. The City acknowledges that the exceptions from the certain provisions of the Parkland Ordinance listed in Exhibit E2 are necessary, and agrees to grant the waivers or exceptions listed therein.

5. 6 Future Changes to Existing Standards. [PENDING NEGOTIATIONS AND AGREEMENT WRT GDP LANGUAGE] All future changes to Existing Standards and any other Laws, plans, or policies adopted by the City or adopted by voter initiative after the Effective Date ("Future Changes to Existing Standards") shall apply to the Project and the Project Site, except to the extent they conflict with this Agreement, or the terms and conditions of the Approvals. In the event of such a conflict, the terms of this Agreement and the Approvals shall prevail, subject to the terms of this Section 5.6.

[PJ78]: 5.6
addressed in
Planning
approvals2

- 5. 6. 1 Application of changes to Existing Standards at Developer's/
  Option [PENDING NEGOTIATION] Future Changes to Existing Standards shall be deemed to conflict with this Agreement and the Approvals if they:
- (a) limit or reduce the density or intensity of the Project, or any part thereof, or otherwise require any reduction in the square footage or number of proposed Buildings or change the location of proposed Buildings or change or reduce other improvements from that permitted under this Agreement for the Project, the Existing Standards, or the Approvals; ¶
- (b) limit or reduce the height or bulk of the Project, or any part thereof, or otherwise require any reduction in the height or bulk of individual proposed Buildings

or other improvements that are part of the Project from that permitted under this Agreement, the Existing Standards, or the Approvals;¶

- (c) limit, reduce or change the location of vehicular access or parking from that permitted under this Agreement, the Existing Standards, or the Approvals;
- (d) limit any land uses for the Project from that permitted under this Agreement, the Existing Standards, the Approvals, or the Existing Uses; ¶
  - (e) change or limit the Approvals or Existing Uses:
- (f) materially limit or control the rate, timing, phasing, or sequencing of the approval, development, or construction of all or any part of the Project in any manner, including the demolition of existing Buildings at the Project Site;¶
- (g) require the issuance of permits or approvals by the City other than those required under the Existing Standards, except as otherwise provided in Section 5.6.2:¶
- (h) limit or control the availability or the type or nature of public utilities, services, or facilities, or any privileges or rights to public utilities, services, or facilities for the Project as contemplated by the Approvals;¶
- (i) conflict with, or otherwise limit, control, or change the management, delivery, or governance of a Privately-Owned Open Space;¶
- (j) materially and adversely limit the processing or procuring of applications and approvals of Subsequent Approvals that are consistent with Approvals; or ¶
- (k) impose or increase any Impact Fees, as they apply to the Project, except as permitted under Section 5.6.2.¶

5.6.2 [PENDING NEGOTIATION] Pursuant to the Downtown West Planned Development Zoning District and General Development Plan, Developer may request to have a Future Change to Existing Standards that conflicts with this Agreement and the Approvals applied to the Project or the Project Site. Developer must make such a request in writing to the Director of PBCE, and the request shall identify the specific standard and state a rationale for the request. The Director of PBCE may approve the request in his or her sole reasonable discretion. The Director of PBCE's decision to approve or disapprove Developer's request is not subject to appeal. If the Director of PBCE approves Developer's request, the Future Change to Existing Standards shall be deemed to be an Existing Standard. Nothing in this Agreement shall preclude Developer from pursuing any challenge to the application by the City of any Future Changes to Existing Standards to all or part of the Project Site.¶

Developer must submit a variety of applications for Subsequent Approvals before Commencement of Construction. Developer shall be responsible for obtaining all Subsequent Approvals before the start of any construction to the extent required under Applicable Law. Notwithstanding anything in this Agreement to the contrary, when considering any such application for a Subsequent Approval, the City shall apply the applicable provisions, requirements, rules, or regulations that are contained in the California Building Standards Code, as amended by the City, including requirements of the San José Building Code, Public Works Code, Subdivision Code, Mechanical Code, Electrical Code, Plumbing Code, Fire Code, or other uniform construction codes applicable on a City-Wide basis or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner.

5.7 Filing of Subdivision Maps. Developer shall have the right, from time to time and at any time, to file subdivision-map-related applications (including phased final mapapplications but not limited to applications for tentative maps, vesting tentative maps, final maps or phased final maps, lot line adjustments, lot mergers, and certificates of compliance) with respect to some or all of the Project Site, to subdivide, reconfigure, or merge the parcels comprising the Project Site as may be necessary or desirable in order to develop a particular part of the Project as shown generally in Exhibit B. The specific boundaries of parcels shall be set by Developer in accordance with all applicable subdivision and development standards and approved by the City during the subdivision process. Nothing in this Agreement shall authorize Developer to subdivide or use any of the Project Site for purposes of sale, lease, or financing in any manner that conflicts with the Subdivision Map Act or with the Subdivision Code. Nothing in this Agreement shall prevent the City from enacting or adopting changes in the methods and procedures for processing subdivision and parcel maps so long as such changes do not conflict with the provisions of this Agreement, including any timing requirements set forth herein or in the Exhibits, or with the Approvals.

# 5.8 <u>Impact Fees</u>.

5. 8. 1 Generally. The Project shall be subject to only those Processing Fees and Impact Fees as set forth in this Section 5.8, and the City shall not impose any new Processing Fees or Impact Fees on the development of the Project or impose new conditions or requirements for the right to develop the Project (including required contributions of land, public amenities, or services) except as set forth in this Agreement. The Parties acknowledge that the provisions contained in this Section 5.8 are intended to implement the intent of the Parties that Developer have the right to develop the Project pursuant to specified and known criteria and

rules, and that the City receive the benefits which will be conferred as a result of such development without abridging the right of the City to act in accordance with its powers, duties and obligations, except as specifically provided in this Agreement.

5. 8. 2 <u>Applicable Impact Fees</u>. The Impact Fees that apply to the Project are those Impact Fees set forth in <u>Exhibit JM</u> hereto.

The Parties acknowledge that the Diridon Infrastructure Fee is otherwise an applicable Impact Fee. However, in-lieu of paying the fee, Developer will construct in-kind infrastructure improvements, as more particularly described in Exhibit GI.- The Parties acknowledge that the Parkland Dedication requirements of Chapter 19.38 of the San José Municipal Code, including payment of the Park Impact Parkland Fee, otherwise apply to the Project. Developer will satisfy this obligation as more specifically described in Exhibit E and the exhibits and schedules thereto, subject to the default provisions provided therein. To the extent any Parkland Fee is owed, it shall be the Parkland Fee in effect upon the Effective Date of this Agreement, which Fee is reflected in Exhibit E3, subject only to escalation based on the ——Engineering News Record Construction Cost Index. ¶5.8.3 ¶5.8.4 5.8.5 Processing Fees¶; Reimbursement Agreement. Processing Fees for the Project shall be limited to the Processing Fees in effect, on a City-Wide basis or within the DSAP's Boundaries, applicable to the same or similarly situated (i) uses or (ii). work that Developer is asking the City to undertake, and applied in an equitable and non-discriminatory manner, at the time that Developer applies for the Subsequent Approval for which such Processing Fee is payable in connection with the applicable portion of the Project. The Reimbursement Agreement to be entered into between City and Developer pursuant to Section 4.5.4 shall provide for Processing Fees paid by Developer to be credited against any

### [PJ80]: Should be Section 5.8.3?

[PJ81]:
Applicable
processing
fees may only
in the DSAP
area, and not
City Wide,
that we need
to make sure
are covered
here and
remain
applicable to
the project.
Further,
there is no
standard feeto cover this
project other
than hourly
fees.

Developer obligation to pay City Costs in connection with City processing of Subsequent

[PJ82]: As noted in <del>comment</del> Approvals. Limitation on City's Future Discretion[Intentionally Omitted.] ¶. In accordance with Google's newly added Section 5.3 annears largely redundant of this section.

Section 4.4, the City, in granting the Approvals and, as applicable, vesting the Project through this Agreement, is limiting its future discretion with respect to the Project and Subsequent Approvals to the extent that they are consistent with the Approvals and this Agreement. For elements included in a request for a Subsequent Approval that have not been reviewed or considered by the applicable City Agency previously (including but not limited to additional details or plans for a proposed Building), the City Agency shall exercise its discretion consistent with the provisions of the Downtown West Planned Development Zoning District and itsaccompanying General Development Plan, the Downtown West Design Standards and Guidelines, and the other Approvals, and otherwise in accordance with customary practice. In noevent shall a City Agency deny issuance of a Subsequent Approval based upon items that are consistent with the Approvals and this Agreement. Consequently, the City shall not use its discretionary authority to change the policy decisions reflected by the Approvals and this Agreement or otherwise to prevent or to delay development of the Project as contemplated in the Approvals and this Agreement. Nothing in the foregoing shall impact or limit the City's discretion with respect to: (i) proposed Subsequent Approvals that seek a Material Change [SUBJECT TO DISCUSSIONS ON MATERIAL CHANGE LANGUAGE] to the Approvals, or (ii) City Council approvals of subdivision maps, as required by Law, not contemplated by the Approvals.

#### 5. 10 Changes in Federal or State Laws.

5. 10. 1 City's Exceptions. Notwithstanding any provision in Agreement to the contrary, each Each City Agency having jurisdiction over the Project shall exercise its discretion under this Agreement in a manner that is consistent with the public health and safety and shall at all times retain its respective authority to take any action that is necessary to protect the physical health and safety of the public (the "Public Health and Safety Exception") or reasonably calculated and narrowly drawn to comply with applicable changes in Federal or [PJ83]: 1 State Law affecting the physical environment (the "Federal or State Law Exception"), including the authority to condition or deny a Subsequent Approval, or to adopt a new Law applicable to the Project, so long as such condition or denial or new regulation (i) is limited solely to addressing a specific and identifiable issue in each case required to protect the physical health and safety of the public, or (ii) is required to comply with a Federal or State Law and in each case is not for independent discretionary policy reasons that are inconsistent with the Approvals or this Agreement, and (iii) is applicable City-wide, or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner, and in the case of each of (i), (ii) and (iii) and in each case is not for independent discretionary policy reasons that are inconsistent with the Approvals or this Agreement or would be in conflict with the Approvals or this Agreement as set forth in Section 5.6.1. Developer retains the right to dispute any City reliance on the Public Health and Safety Exception or the Federal or State Law Exception.

city-wide" brings in ambiguity. and that the <del>requirement</del> similarly situated use <del>'equitable</del> non-discrimin <del>appropriate</del> protections.

5. 10. 2 Changes in Federal or State Laws. If Federal or State Laws issued, enacted, promulgated, adopted, passed, approved, made, implemented, amended, or interpreted after the Effective Date have gone into effect and (i) preclude or prevent compliance with one or more provisions of the Approvals or this Agreement, or (ii) materially and adversely affect Developer's or the City's rights, benefits, or obligations, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such Federal or State Law. In such event, this Agreement shall be modified only to the extent necessary or required to comply with such Law, subject to the provisions of <u>Section 5.10.4</u>, as applicable.

5. 10. 3 Changes to Development Agreement Statute or Development Agreement Ordinance. This Agreement has been entered into in reliance upon the provisions of the Development Agreement Statute and the Development Agreement Ordinance. No amendment of or addition to the Development Agreement Statute or Development Agreement Ordinance that would affect the interpretation or enforceability of this Agreement or increase the obligations or diminish the development rights of Developer hereunder, or increase the obligations or diminish the benefits to the City hereunder, shall be applicable to this Agreement unless such amendment or addition is specifically required by Law or is mandated by a court of competent jurisdiction. If such amendment or change is permissive rather than mandatory, this Agreement shall not be affected.

5. 10. 4 Termination of Agreement. If any of the modifications, amendments or additions described in Section 5.10.2 or Section 5.10.3 or any changes in Federal or State Laws described above would materially and adversely affect the construction, development, use, operation, or occupancy of the Project as currently contemplated by the Approvals, or any material portion thereof, such that the Project becomes economically infeasible as reasonably determined by Developer (a "Law Adverse to Developer"), then Developer shall notify the City and propose amendments or solutions that would maintain the benefit of the bargain (that is this Agreement) for both Parties. If any of the modifications, amendments, or additions described in Sections 5.10.2 or Section 5.10.3 or any changes in Federal or State Laws described thereunder would materially and adversely affect or limit the Community Benefits (a "Law Adverse to the City"), then the City shall notify Developer and propose amendments or

[PJ84]: Whatdoes economic infeasiblemean? solutions that would maintain the benefit of the bargain (that is this Agreement) for both Parties. Upon receipt of a notice under this Section 5.10.4, the Parties agree to meet and confer in good faith Good Faith for a period of not less than ninety (90) days in an attempt to resolve the issue. If the Parties cannot resolve the issue in ninety (90) days or such longer period as may be agreed to by the Parties, then the Parties shall mutually select a mediator at JAMS in San José for nonbinding mediation for a period of not less than thirty (30) days. If the Parties remain unable to resolve the issue following such mediation, then (i) Developer shall have the right to terminate this Agreement following a Law Adverse to Developer upon not less than thirty (30) days prior notice to the City, and (ii) the City shall have the right to terminate this Agreement following a Law Adverse to the City upon not less than thirty (30) days prior notice to Developer; provided, notwithstanding any such termination, Developer shall be required to complete Complete the Community Benefits for development commenced in connection with a particular new Building as set forth in Section 4.1. NOTE: DISC related issues to be addressed specifically in the Exhibits to the DA, e.g., reduced community benefits as a result of a DISC taking DISC-related law that inhibits development 4.]

[PJ85]: Let's
discuss
timeline and
process.

5. 11 No Action to Impede Approvals. Except and only as required under Section 5.10, the City shall take no action under this Agreement, nor impose any condition on the Project, that would conflict with this Agreement or the Approvals. An action taken or condition imposed shall be deemed to be in conflict with this Agreement or the Approvals if such actions or conditions result in the occurrence of one or more of the circumstances identified in Section 5.6.1.

5.12 <u>Criteria for Approving Subsequent Approvals</u>. The City shall not disapprove applications for Subsequent Approval based upon any item or element that is

consistent with this Agreement and the Approvals, and shall consider all such applications in accordance with its customary practices (subject to the requirements of this Agreement). The City may subject a Subsequent Approval to any condition that is necessary to bring the Subsequent Approval into compliance with Applicable Laws. The City shall in no event beobligated to approve an application for a Subsequent Approval that would effect a Material Change [PENDING DISCUSSION ON MATERIAL CHANGE LANGUAGE]. If the City denies any application for a Subsequent Approval that implements the Project as contemplated by the Approvals, the City must specify in writing the reasons for such denial and shall suggest modifications required for approval of the application. Any such specified modifications shall be consistent with Applicable Laws and City staff shall approve the application if it is subsequently resubmitted for City review and corrects or mitigates, to the City's reasonable satisfaction, the stated reasons for the earlier denial in a manner that is consistent and compliant with Applicable Laws and does not include new or additional information or materials that give the City a reason to object to the application under the standards set forth in this Agreement. The City agrees to rely on the FEIR, to the greatest extent possible, as more particularly described in Section 4.4. With respect to any Subsequent Approval, the City agrees to rely on the General Plan Consistency Findings to the greatest extent possible in accordance with applicable Laws; provided, however, that nothing shall prevent or limit the discretion of the City in connection with any Subsequent Approvals that, as a result of amendments to the Approvals, require new or revised General Plan consistency findings.

5.12 5.13 Estoppel Certificates. Developer may, at any time, and from time to time, deliver notice to the Director of PBCE requesting that the Director of PBCE certify to

Developer, a potential Transferee, or a potential lender to Developer, in writing that to the best of the Director of PBCE's knowledge:- (i) this Agreement is in full force and effect and a binding obligation of the Parties; (ii) this Agreement has not been amended or modified, and if so amended or modified, identifying the amendments or modifications and stating their date and providing a copy or referring to the recording information; (iii) Developer is not in Default in the performance of its obligations under this Agreement, or if in Default, to describe therein the nature and amount of any such Defaults; and (iv) the findings of the City with respect to the most recent annual review performed pursuant to <u>Section 8</u> of this Agreement. The Director of PBCE, [PJ86]: 45 acting on behalf of the City, shall execute and return such certificate within tenthirty (11030) days

after receipt of the request.

<u>5.13</u> <u>5.14</u> <u>Existing, Continuing Uses and Interim Uses.</u> The Parties acknowledge that the Existing Uses are lawfully authorized uses and may continue as such uses may be modified by the Project, provided that any modification thereof not a component of or contemplated by the Project is subject to the Zoning Code and the applicable provisions of <u>Section 5</u>. Developer may install interim or temporarylimited-term uses on the Project Site as provided for in the Downtown West Planned Development Zoning District, the accompanying General Development Plan, and/or the Downtown West Design Standards Guidelines Planned Development Permit.

[PJ87]: Need o further discuss this internally.

<u>5.14</u> <u>5.15</u> <u>Taxes</u>. Nothing in this Agreement limits the City's ability to impose new or increased taxes or special assessments, or any equivalent or substitute tax or assessment, provided (i) the City shall not institute on its own initiative proceedings for any new or increased special tax or special assessment for a land-secured financing district (including the special taxes under the Mello-Roos Community Facilities Act of 1982 (Government Code §§ 53311 et seq.) but not including business improvement districts or community benefit districts formed by a vote of the affected property owners) that includes the Project Site unless the new district is City Wide or Developer gives its express, prior written consent (which it may withhold in its sole discretion) to or specifically requests such proceedings, and (ii) no such tax or assessment shall be targeted or directed at the Project, including, without limitation, any tax or assessment targeted solely at all or any part of the Project Site, unless the new district is City Wide or Developer gives its express, prior written consent (which it may withhold in its sole discretion) to or specifically requests such proceedings. Nothing in the foregoing prevents the City from imposing any tax or assessment against the Project Site, or any portion thereof, that is enacted in accordance with Law and applies on a City-Wide basis to all the same or similarly-situated property on a City Wide basisuses in an equitable and non-discriminatory manner.

[PJ88]: Let's

# 6. NO DEVELOPMENT OBLIGATION

## [PENDING NEGOTIATION OF TERM AND MILESTONES] 1

Except as set forth in Section 2.2 and elsewhere herein, including with respect to the delivery of Public Benefits as set forth in Exhibit C, D, E, and I, there is no requirement under this Agreement that Developer initiate or complete development of the Project, or any portion thereof, or that development be initiated or completed within any period of time or in any particular order. The development of the Project is subject to numerous factors that are not within the control of Developer or the City, such as availability of financing, interest rates, access to capital, and such other factors. Except as expressly required by this Agreement and the Approvals, the City acknowledges that Developer may develop the Project in such order and at such rate and times as Developer deems appropriate within the exercise of its sole and subjective business judgment. In *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), the

California Supreme Court ruled that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development and controlling the parties' agreement. It is the intent of the Parties to avoid such a result by acknowledging and providing for the timing of development of the Project in the manner set forth herein. The City acknowledges that such a right is consistent with the intent, purpose and understanding of the Parties to this Agreement, and that without such a right, Developer's development of the Project would be subject to the uncertainties sought to be avoided by the Development Agreement Statute, Chapter 56 and this Agreement.

### 7. MUTUAL OBLIGATIONS

- 7.1 Notice of Completion, Revocation or Termination. Upon any early revocation or termination of this Agreement (as to all or any part of the Project Site) under the circumstances and in the manner permitted herein, the Parties agree to execute a written statement acknowledging such revocation or termination in the form attached as Exhibit ON, signed by the appropriate agents of the City and Developer, and record such instrument in the Official Records. In addition, upon Developer's request, when one or more Buildings have been completedCompleted, and all of the Community Benefits tied to those specific Buildings have also been completedCompleted, the City and Developer shall execute and record a noticeNotice of completionCompletion in the form attached as Exhibit MN for the applicable property on which the Buildings or other facilities or improvements are located.
- 7. 2 <u>General Agreement to Cooperate</u>. The As set forth in Section 5.3 above, in this Section 7.2 (including Section 7.2.1 below) and elsewhere in this Agreement, the Parties agree to cooperate with one another to expeditiously implement the Project in accordance with the Approvals, any Subsequent Approvals and this Agreement, and to undertake and complete all

actions or proceedings reasonably necessary or appropriate to ensure that the objectives of this Agreement, the Approvals and any Subsequent Approvals are implemented, including any stated review periods therein. Except for ordinary administrative costs of the City, nothing in this Agreement obligates the City to spend any sums of money or incur any costs other than City Costs or costs that Developer must reimburse through the payment of permitted Processing Fees. The Parties agree that the PBCE Department or Public Works Department, as appropriate (or such other department to whom the obligation is delegated by the Director of PBCE after notice to Developer), will act as the City's lead agency to facilitate coordinated City review of applications for the Project. As such, PBCE Department or Public Works Department (or such other designated department) staff will: (i) work with Developer to ensure that all such applications to the City are technically sufficient and constitute complete applications, and (ii) interface with City staff responsible for reviewing any application under this Agreement to facilitate an orderly, prompt and efficient review process that avoids delay and redundancies, and that is undertaken in the manner and within any timeframes set forth in this Agreement, the Approvals, and any Subsequent Approvals.-

7. 2. 1 Specific Actions by the City. The City actions and proceedings subject to this Agreement shall be through the PBCE Department, as well as affected City Agencies (and when required by applicable Law, the City Council), and shall include instituting and completing proceedings for temporary or permanent closing or occupancy, widening, modifying (including changes from vehicular to pedestrian use) or changing the grades of streets, alleys, sidewalks, and other rights-of-way, and other necessary modifications of the streets, the street layout, and other public or private rights-of-way in or near the Project Site, including streetscape improvements, encroachment permits, improvement permits, and any requirement to

abandon, remove, and relocate public utilities (and, when applicable, City utilities) within the public rights-of-way as identified in the Approvals and Subsequent Approvals. Except as set forth in Section 9.4.4 and upon receiving payments of all applicable Processing Fees then due, City Agencies shall process with due diligence all submissions and applications by Developer on all permits, approvals, construction, or occupancy permits for the Project subject to the acceptance of the same as complete., with costs covered by Developer.

7. 3 Non-City Approvals; Cooperation to Obtain Permits. The Parties acknowledge that certain portions of the Project may require the approval of Federal, State, and local governmental agencies that are independent of the City and not a Party to this Agreement ("Non-City Agencies"). The City will—reasonably cooperate with reasonable requests by Developer in connection with Developer's efforts to obtain permits, agreements, or entitlements from Non-City Agencies as may be necessary or desirable for the development, operation and use of the Project, including with respect to the study and development of the District Systems as contemplated by the MOU (each, a "Non-City Approval").

NEGOTIATIONS] City and Developer understand and agree that the proposed Los Gatos Creek Trail Multi-Use Trail segments included as part of the Project will enhance trail connectivity in the City of San José, and also will provide for the cohesive open space network envisioned by the Developer and City as part of the Project. To allow for Completion of the trail alignments, City specifically agrees to cooperate with Developer, and to lead such efforts as appropriate or necessary, to secure authorization, including an easement, joint use, or similar agreement, for trail alignments and under-crossings that may affect property owned by the Santa Clara Valley Water District.

7.3.2 Conditions of Cooperation to Obtain Permits. The City's

commitment to Developer under this AgreementSection 7.3 is subject to the following

[PJ89]: Cityneed to becost recoveryto review and cooperate.

conditions:

(a) Throughout the permit process for any Non-City Approval, Developer shall consult and coordinate with each affected City Agency in Developer's efforts to obtain the permits, agreements, or entitlements, and each such City Agency shall cooperate reasonably with Developer in Developer's efforts to obtain the same.

(b) [SUBJECT TO **NEGOTIATION** RE: **SPECIFIC** OBLIGATIONS WITH NON-CITY AGENCIES ANTICIPATED AS PART OF PROJECT IMPLEMENTATION Developer shall not agree to conditions or restrictions in any Non-City Approval that could create: (1) any obligations on the part of any City Agency that are in addition to any obligations under applicable Laws or other agreements with the applicable Non-City Agency, unless the City Agency agrees in writing, following the receipt of any necessary governmental approvals, to assume such obligations; or (2) any restrictions on City property that are in addition to any obligations under applicable Laws or other agreements with the applicable Non-City Agency, unless in each instance the City, including each affected City Agency, has previously approved in its sole discretion the conditions or restrictions in writing following the receipt of any necessary governmental approvals.

(c) The City shall cooperate with public utilities and communication service providers, including as necessary for the District Systems, to the extent that the cooperation efforts requested by Developer are consistent with the City's typical efforts in connection with other major development and construction projects in the City.

7.3.3 7.3.2 Costs. Developer shall bear all costs associated with

applying for and obtaining any necessary Non-City Approval. Developer, at no cost to the City, shall be solely responsible for complying with any Non-City Approval and any and all conditions or restrictions imposed on Developer or the Project as part of a Non-City Approval. Developer shall pay or otherwise discharge any fines, penalties, or corrective actions imposed as a result of Developer's failure to comply with any Non-City Approval.

7. 4 Cooperation in the Event of Third-Party Challenge. In the event any administrative, legal, or equitable action or proceeding is instituted by any party, other than the City or Developer, challenging the validity or performance of any provision of this Agreement, the Project, the Approvals or Subsequent Approvals, the adoption or certification of the FEIR or other actions taken pursuant to CEQA, or other approvals under Laws relating to the Project, any action taken by the City or Developer in furtherance of this Agreement, or any combination thereof relating to the Project or any portion thereof ("Third-Party Challenge"), the Parties shall cooperate in defending against such challenge. The City shall promptly notify Developer of any Third-Party Challenge instituted against the City and/or the Project. To the extent permitted by then-applicable law, City agrees to take actions consistent with AB 900 to facilitate expedited legal review of any Third Party Challenge related to a Subsequent Approval.

7. 4. 1 Developer shall assist and cooperate with the City at Developer's own expense in connection with any Third-Party Challenge. The City Attorney's Office may use its own legal staff or outside counsel in connection with defense of the Third-Party Challenge, at the City Attorney's sole discretion. Developer shall reimburse the City for its actual costs in defense of the action or proceeding, including but not limited to the time and expenses of the City Attorney's Office and any outside counsel retained in connection with the defense- and any

consultants; provided, however, Developer shall have the right to monthly invoices for all such costs. Any such invoices provided to Developer shall not include a description of the work or any other information that constitutes attorney work product or is protected from disclosure by the attorney-client privilege, as determined in the sole discretion of City pursuant to a Reimbursement Agreement.

7. 4. 2 To the extent that any such Third-Party Challenge results in the entry of a final judgment or order limiting Developer's right to proceed with the Project or any material portion thereof under this Agreement (whether the Project commenced or not), including the City's actions taken pursuant to CEQA, Developer may elect to terminate this Agreement. Upon any such termination (or, upon the entry of a judgment terminating this Agreement, if earlier), the City and Developer shall jointly seek to have the Third-Party Challenge dismissed.—Developer shall—fully indemnify the City for, and be responsible for payment of, any costs, damages, attorney fee awards, or combination thereof that any court of competent jurisdiction may award to the third party as a result of any Third-Party Challenge. ¶

7.4.3 The filing of any Third Party Challenge shall not delay or stop the development, processing, or construction of the Project, or the issuance of Subsequent Approvals unless the third party obtains a court order preventing the activity.

7. 5 Permits to Enter City Property. [FINAL LANGUAGE PENDING NEGOTIATIONS RE ENCROACHMENT]- Subject to the rights of any third party, the rights of the public, and the City's reasonable agreement on the scope of the proposed work and insurance and security requirements, each City Agency with jurisdiction shall grant permits to enter City-owned property on the City's standard form permit, including, without limitation, provisions regarding release, waivers, and indemnification in keeping with the City's standard practices, so

[PJ91]: Cityregulations /rules aren'talways viewed in terms of commercial reasonablenes

long as the same is consistent with Applicable Law, in order to permit Developer to enter.

City-owned property as necessary to construct the Project or comply with or implement the Approvals, Subsequent Approvals, or other requirements in this Agreement.

7.6 Infrastructure Reimbursement¶. The Project provides for the construction of significant new or upgraded infrastructure within the Project Site. Developer has provided a cost estimate of approximately one hundred seventy-four million dollars (\$174,000,000) for the upgraded infrastructure, which includes costs for improvements both included and not included in the existing Diridon Station Area Basic Infrastructure Fee per San José Municipal Code Chapter 14.35. The reimbursement amount will be based on the completed construction costs. Developer's cost estimate for infrastructure improvements includes, among other improvements, enhanced right-of-way improvements, utilities upgrades and relocation, and undergrounded power and communication lines, as further detailed in the Infrastructure Plan included as Exhibit I. ¶

7.6.1 The City recognizes that some of the new and/or upgraded infrastructure may be beneficial not only to development within the Project Site but also to existing and future development outside of the Project Site, including development within the broader DSAP's Boundaries and surrounding portions of the City. Therefore, the City will take actions reasonably necessary, and Developer will cooperate reasonably, to develop an updated or new infrastructure program, including preparation of appropriate infrastructure plans, technical (e.g., "nexus") studies and associated financial feasibility studies, that include the Project Site and which analyze the infrastructure improvements to be installed by Developer. Such an infrastructure program may include impact mitigation fees, community facilities districts, infrastructure facilities districts, or other similar programs or mechanisms for the funding of the

Mechanism(s), Developer would be eligible to receive a credit and/or reimbursement (including pursuant to Municipal Code Section 14.35 et seq.) for the costs of installing qualifying improvements within the Plan Area, and the City and Developer would then reasonably cooperate to enter into a reimbursement agreement, for such reimbursement and/or credit. To be eligible for such credit and/or reimbursement, all of the following would need to occur:

- (a) City Council approval of a Funding Mechanism(s) in accordance with State laws:
- (b) Construction of qualifying infrastructure subject to credit or reimbursement, which are supported by the appropriate technical (e.g., "nexus") studies and associated financial feasibility studies; ¶
- <u>(c)</u> <u>City Council approval of a reimbursement agreement</u>
  between the City and Developer setting forth the terms and conditions for reimbursement,
  consistent with the above conditions;
- (d) <u>City collects sufficient funding in the infrastructure</u>

  program(s) to provide reimbursement, subject to annual appropriation of the City Council; and ¶
  - (e) Compliance with applicable local, state, and federal laws.

The City agrees to work with Developer to secure additional infrastructure funding, including grants and/or reimbursement from available programs to provide infrastructure improvements in the Plan Area. For example, the City will work with Developer to implement the undergrounding of overhead electrical facilities by the Developer if legally permissible under the California Public Utilities Commission (CPUC) Electric Rule No. 20 program (https://www.pge.com/nots/rates/tariffs/tm2/pdf/ELEC 3860-E.pdf) and related CPUC

regulations and orders subject to CPUC and PG&E approval, as well as, San Jose Municipal Code, Chapters 15.20, 15.24 and/or 15.26. Any and all undergrounding of electric facilities in the Plan Area by the Developer or a third party such as PG&E, shall also comply with the City's undergrounding policies, including any electrical voltage level within the project area (currently set up to 115kV), and further including without limitation, the City's annual Fiscal Year Workplan for the Rule 20A and Rule 20B (In-Lieu Fee) Underground Utility Program and the Fiscal Year Rule 20B (In-Lieu Fee) Undergrounding Master Plan, as may be approved by the City Council. ¶

7. 6. 2 In addition, City and Developer shall work mutually towards the solution of modifying the existing North Montgomery Street at-grade railroad crossing to serve as the sole emergency vehicle access point to Block A. Such work shall include obtaining any necessary CPUC approval of changes to the crossing. New technologies would be introduced at that crossing, such as remotely controlled bollards/gates and integrated communications between building fire alarm systems and rail and/or mass notification systems. City and Developer shall work in coordination to implement the appropriate technologies and necessary upgrades to the crossing to achieve safe and reliable emergency vehicle access to Block A.¶

<u>7. 6. 3</u> <u>Cinnabar Storm Drain Reimbursement. With respect to Developer's work to upgrade the City-owned stormwater drainage within Cinnabar Street (the "Cinnabar Storm Drain Work" or "Work"), Developer shall not undertake such Work unless City agrees to reimburse Developer in full. Developer shall not proceed with the Work unless and until City has provided Developer with sufficient information to demonstrate that it has funding sources available to fully reimburse Developer for its costs associated therewith immediately</u>

upon Completion of the Work. Alternatively, City and Developer may agree that Developer is to be reimbursed through the form of credits toward connection fees.

7.7 7.6 Good Faith and Fair Dealing. The Parties shall cooperate with each other and act in goodGood faithFaith in complying with the provisions of this Agreement and implementing the Approvals and any Subsequent Approvals. In their course of performance under this Agreement, each Party shall refrain from doing anything that would render its performance under this Agreement impossible. The Parties shall cooperate and shall undertake such actions as may be reasonably necessary to implement the Project as contemplated by this Agreement, including such actions as may be necessary to satisfy or effectuate any applicable conditions precedent to the performance of the CommunityPublic Benefits.

7.8 7.7 Other Necessary Acts. Each Party shall use good faith effortsGood Faith Efforts to take such further actions as may be reasonably necessary to carry out this Agreement, the Approvals, and any Subsequent Approvals, in accordance with the terms of this Agreement (and subject to all applicable Laws) in order to provide and secure to each Party the full and complete enjoyment of its rights and privileges hereunder.

### 8. PERIODIC REVIEW OF DEVELOPER'S COMPLIANCE

8.1 <u>Annual Review.</u> Pursuant to Section 65865.1 of the Development Agreement Statute and the Development Agreement Ordinance, the PBCE Director shall set a hearing for review of Developer<sup>2</sup>'s compliance with this Agreement before the Planning Commission on an annual basis, and at any other time that the PBCE Director determines that there are reasonable grounds to believe the Developer may be in Default. The Director of PBCE may elect to forego an annual review if no significant construction work occurred on within the Project Site during that year, or if such review is otherwise not deemed necessary in the sole but

[PJ92]:
Followexisting City
process for
annual review
under Chapter
18.02—

[PJ93]: Let's

reasonable opinion of the Director. The City<sup>2</sup>'s failure to conduct or complete an annual review shall neither affect the validity or enforceability of this Agreement nor constitute a waiver of any right or remedy the City may have under the Agreement.

- 8. 2 <u>Review Procedure</u>. In conducting the required initial and annual reviews of Developer's compliance with this Agreement, the Director of PBCE shall follow the process set forth in the Development Agreement Ordinance and this <u>Section 8.2</u>.
- 8. 2. 1 Required Information from Developer. Upon request by the Director of PBCE, but not more than sixty (60) nor less than thirty (30) days before the Annual Review Date, Developer shall provide a letter to the Director of PBCE explaining, with appropriate backup documentation, Developer's compliance with this Agreement, including, but not limited to, compliance with the requirements regarding Community Benefits. The burden of proof, by substantial evidence, of compliance is upon Developer. The Director of PBCE shall post a copy of Developer's submittals on the Planning Department's website.
- 8. 2. 2 City Report. Within sixty (60) days after Developer submits such letter, the Director of PBCE shall review the information submitted by Developer and all other available evidence regarding Developer's compliance with this Agreement, and shall consult with applicable City Agencies as appropriate. All such available evidence including final staff reports shall, upon receipt by the City, be made available as soon as possible to Developer. The Within 60 days of Developer's submittal of its letter, the Director of PBCE shall notify Developer in writing whether Developer has complied with the terms of this Agreement (the "City Report"), and post the City Report on the Planning PBCE Department's website. If the Planning Commission, or the City Council in the event of referral thereto, finds Developer not in compliance with this Agreement, then the City may pursue available rights and remedies in

accordance with this Agreement and the Development Agreement Ordinance. The City's failure to initiate or to timely complete the annual review shall not be a Default and shall not be deemed to be a waiver of the right to do so at a later date. All costs incurred by the City under this Section shall be included in the City Costs.

[PJ94]: Let's Need to coordinate with Planning staff. Want to better understandfirst.

8. 2. 3 Effect on Transferees. FINAL LANGUAGE PENDING

**NEGOTIATION OF TRANSFER PROVISIONS** If Developer has effected a Transfer so that its interest in the Project Site, or a portion or portions thereof, has/have been divided between Developer and/or Transferees, then the annual review hereunder shall be conducted separately with respect to Developer and each Transferee, and the Planning Commission or City Council, as applicable, shall make its determinations and take its action separately with respect to Developer and each Transferee, as applicable, pursuant to the Development Agreement Ordinance. If the City Council terminates, modifies, or takes such other actions as may be specified in the [PJ95]: The Development Agreement Ordinance and this Agreement in connection with a determination that Developer or a Transferee has not complied with the terms and conditions of this Agreement, such action by the Director of PBCE, Planning Commission, or City Council shall be effective only as to the party to whom the determination is made and the portions of the Project Site in

Divided Review needs the context <del>and transfer</del>

8. 2. 4 <u>Default</u>. The rights and powers of the City under this <u>Section 8.2</u> are in addition to, and shall not limit, the rights of the City to terminate or take other action under this Agreement on account of the commission by Developer of an event of Default.

which such party has an interest.

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"No Third
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[PJ96]: This

# 9. ENFORCEMENT OF AGREEMENT; DEFAULT; REMEDIES

9.1 <u>Enforcement</u>. The only Parties to this Agreement are the City and Developer (and any successors and Transferees). This Agreement is not intended, and shall not be construed, to benefit or be enforceable by any other person or entity whatsoever.

9.2 Meet and Confer Process¶. Before sending a notice of default in accordance with Section 9.3, the Party that may assert that the other Party has failed to perform or fulfill its obligations under this Agreement shall first attempt to meet and confer with the other Party to discuss the alleged failure and shall permit such Party a reasonable period, but not less than forty-five (45) days, to respond to or cure such alleged failure; provided, however, the meet and confer process shall not be required (i) for any failure to pay amounts due and owing under this Agreement, or (ii) if a delay in sending a notice pursuant to Section 9.3 would impair, prejudice or otherwise adversely affect a Party or its rights under this Agreement. The Party asserting such failure shall request that such meeting and conference occur within ten (10) business days following the request and if, despite the Good Faith Efforts of the requesting Party, such meeting has not occurred within ten (10) business days of such request, such Party shall be deemed to have satisfied the requirements of this Section and may proceed in accordance with the issuance of a notice of default under Section 9.3.

9.3 9.2 Default. Except as otherwise set forth herein and/or in the Exhibits hereto, the following shall constitute a "Default" under this Agreement:- (i) the failure to make any payment when due where such failure continues beyond the date that is thirty (30) days following notice that such payment was not made when due; and (ii) the failure or unreasonable delay by a Party to perform or fulfill any other material term, provision, obligation, or covenant of this Agreement and the continuation of such failure for a period of sixty (60) days following

notice and demand for compliance. Notwithstanding the foregoing, if a failure can be cured but the cure cannot reasonably be completed within thirtysixty (3060) days, then it shall not be considered a Default if a cure is commenced within said 3060-day period and diligently prosecuted to completion thereafter. Any notice of default given by a Party shall specify the nature of the alleged failure and, where appropriate, the manner in which said failure satisfactorily may be cured (if at all). Notwithstanding any other provision in this Agreement to the contrary but subject to Article 12 below, if Developer conveys or transfers some but not all of the Project and there is more than one Party that assumes obligations of "Developer" under this Agreement, there shall be no cross-default between the separate Parties that assumed Developer obligations. Accordingly, if a Transferee Defaults, it shall not be a Default by any other Transferee or Party that owns a different portion of the Project Site. As an alternative to the Default procedure set forth herein, the City may elect to first hold a compliance review as set forth in the Development Agreement Ordinance. Further, in the event of noncompliance with a condition required under an administrative permit or any subsequent planned development permit issued for a conditional or special use, the PBCE Director may revoke, suspend or modify the administrative permit or subsequent planned development permit or otherwise enforce the requirements of the administrative permit and subsequent planned development permit pursuant to the remedies available to the City under the San Josè Municipal Code. A violation of an administrative permit or a subsequently issued planned development permit for a conditional or special use shall not, by itself, constitute a violation of the Downtown West PD Permit.

[PJ97]: Thisshould all be in theplanning approval inone-place?

9.4 9.3 Remedies.

9.4.1 9.3.1 Specific Performance. Subject to, and as limited by, the provisions of Section 9.4.3, 9.4.4 and 9.4.5, in the event of a Default, the remedies available to a

Party shall include specific performance of this Agreement in addition to any other remedy available at law or in equity.

9.4.2 9.3.2 Termination. Subject to the limitation set forth in Section 9.3, 9.4.4 and 9.4.5, in the event of a Default, the non-defaulting Party may elect to terminate this Agreement by sending a notice of termination to the other Party, which notice of termination shall state the Default. This Agreement will be considered terminated effective upon the date set forth in the notice of termination, which shall in no event be earlier than thirtysixty (3060) days following delivery of the notice.

9.4.3 9.3.3 <u>Limited Damages</u>. The Parties have determined that except as set forth in this Section 9.4.3, (i) monetary damages are generally inappropriate, (ii) it would be extremely difficult and impractical to fix or determine the actual damages suffered by a Party as a result of a Default hereunder, and (iii) equitable remedies and remedies at law not including damages but including specific performance, termination, and other injunctive or declaratory relief are particularly appropriate remedies for enforcement of this Agreement.— Consequently, Developer agrees that the City shall not be liable to Developer for damages under this Agreement, and the City agrees that Developer shall not be liable to the City for damages under this Agreement, and each covenants not to sue the other for or claim any damages under this Agreement and expressly waives its right to recover damages under this Agreement, except as follows: (1) either Party shall have the right to recover actual damages only (and not consequential, punitive or special damages, each of which is hereby expressly waived) for a Party's failure to pay sums to the other Party as and when due under this Agreement, (2) the City shall have the right to recover actual damages for Developer's failure to make any payment dueunder, including any indemnity inapplicable Public Benefits that are in the form of a cash

payment, under this Agreement, (3) for any CommunityPublic Benefit for which specific performance is determined by a court of competent jurisdiction not to be an available remedy (and the attached Exhibit does not include a liquidated damages remedy), except if and to the extent directly or indirectly resulting from action or inaction by or on behalf of City or any City Agencies, the City shall have the right to monetary damages according to proof against Developer equal to the costs that would have been incurred by Developer to completeComplete the CommunityPublic Benefit, and (4) the City shall have the right to administrative penalties or liquidated damages if and only to the extent expressly stated in an Exhibit or in Applicable Laws. For purposes of the foregoing, "actual damages" means the actual amount of the sum due and owing under this Agreement, with interest as provided by Law, together with such judgment collection activities as may be ordered by the judgment, and no additional sums.

[PJ98]: Thisgenerally may
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affordable
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[PJ99]: Why-wouldn't it-just go-through thenormal-process?

9.4.4 9.3.4 City Processing Certificates of Occupancy. [PENDING

NEGOTIATIONS] Certificates of Occupancy. [PENDING NEGOTIATIONS] The City shall not be required to process any requests for approval or take other actions under this Agreement during any period in which payments from Developer are past due, except as otherwise set forth in this Agreement, including the Exhibits and Schedules attached hereto. Except as otherwise set forth in this Agreement, including the Exhibits and Schedules attached hereto, the City shall have the right to withhold a Certificate of Occupancy for a Building until all of the Public Benefits and other obligations triggered by, or associated with that Building have been Completed or otherwise substantially satisfied; provided, however, if the City issues a Certificate of Occupancy before such obligations are Completed or substantially satisfied, then Developer shall promptly Complete such obligations following issuance.

9.5 9.4 Time Limits; Waiver; Remedies Cumulative. Failure by a Party to insist upon the strict or timely performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. No waiver by a Party of any condition or failure of performance, including a Default, shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from any omission by a Party to take any action with respect to such failure. No express written waiver shall affect any other condition, action or inaction, or cover any other period of time, other than as specified in such express waiver. One or more written waivers under any provision of this Agreement shall not be deemed to be a waiver of any subsequent condition, action or inaction, and the performance of the same or any other term or provision contained in this Agreement. Nothing in this Agreement shall limit or waive any other right or remedy available to a Party to seek injunctive relief or other expedited judicial and/or administrative relief to prevent irreparable harm. Except as expressly stated in this Agreement to the contrary, no right or remedy is intended to be exclusive of any other right or remedy; and each and every such right or remedy shall be cumulative.

9.6 9.5-Attorneys' Fees. -Should legal action be brought by either Party against the other for a Default under this Agreement or to enforce any provision herein, the prevailing Party in such action shall not be entitled to recover its attorneys' fees and costs from the other Party. Each Party to the legal action shall bear its own attorneys<sup>2</sup> fees and costs.

## 10. FINANCING; RIGHTS OF MORTGAGEES.

10. 1 Owner's Right to Mortgage. Nothing in this Agreement limits the right of Developer to mortgage or otherwise encumber all or any portion of the Project Site for the

benefit of any Mortgagee as security for one or more loans. Developer represents that there are no Mortgages on the Project Site as of the Effective Date.

Mortgagee Not Obligated to Construct. Notwithstanding any of the provisions of this Agreement, including, but not limited to, those which are or are intended to be covenants running with the land, a Mortgagee, including any Mortgagee who obtains title to the Project Site or any part thereof as a result of foreclosure proceedings, or conveyance or other action in lieu thereof, or other remedial action, shall in no way be obligated by the provisions of this Agreement to construct or complete the Project or any part thereof or to guarantee such construction or completion. The foregoing provisions shall not be applicable to any party who, after a foreclosure, conveyance or other action in lieu thereof, or other remedial action, obtains title to some or all of the Project Site from or through the Mortgagee, or any other purchaser at a foreclosure sale other than the Mortgagee itself, on which certain Community Public Benefits must be completed as set forth in Section 4.1. Nothing in this Section or any other Section or provision of this Agreement shall be deemed or construed to permit or authorize any Mortgagee or any other person or entity to devote the Project Site or any part thereof to any uses other than uses consistent with this Agreement and the Approvals, and nothing in this Section shall be deemed to give any Mortgagee or any other person or entity the right to construct any improvements under this Agreement (other than as needed to conserve or protect improvements or construction already made) unless or until such person or entity assumes Developer's obligations under this Agreement.

[PJ100]:
Let's discuss
this
mortgagee

10. 3 <u>Copy of Notice of Default and Notice of Failure to Cure to Mortgagee</u>.

Whenever the City shall deliver any notice or demand to the Developer with respect to any

breach or default by the Developer in its obligations under this Agreement, the City shall at the

same time forward a copy of such notice or demand to each Mortgagee having a Mortgage on the real property which is the subject of the breach or default who has previously made a written request to the City therefor, at the last address of such Mortgagee specified by such Mortgagee in such notice. In addition, if such breach or default remains uncured for the period permitted with respect thereto under this Agreement, the City shall deliver a notice of such failure to cure such breach or default to each such Mortgagee at such applicable address. A delay or failure by the City to provide such notice required by this Section shall extend, for the number of days until notice is given, the time allowed to the Mortgagee for cure. In accordance with Section 2924 of the California Civil Code, the City requests that a copy of any notice of default and a copy of any notice of sale under any Mortgage be mailed to the City at the address for notices under this Agreement.

10. 4 Mortgagee's Option to Cure Defaults. After receiving any notice of failure to cure referred to in Section 10.3, each Mortgagee shall have the right, at its option, to commence within the same period as the Developer to remedy or cause to be remedied any event of default, plus an additional period of: (a) thirty (30) days to cure a monetary event of default; and (b) sixty (60) days to cure a non-monetary event of default which is susceptible of cure by the Mortgagee without obtaining title to the applicable property. If an event of default is not cured within the applicable cure period, then the City nonetheless shall refrain from exercising any of its remedies with respect to the event of default if, within the Mortgagee's applicable cure period: (i) the Mortgagee notifies the City that it intends to proceed with due diligence to foreclose the Mortgage or otherwise obtain title to the subject property; and (ii) the Mortgagee commences foreclosure proceedings within sixty (60) days after giving such notice, and thereafter diligently pursues such foreclosure to completion; and (iii) after obtaining title, the

Mortgagee diligently proceeds to cure those events of default: (A) which are required to be cured by the Mortgagee and are susceptible of cure by the Mortgagee, and (B) of which the Mortgagee has been given notice by the City. Any such Mortgagee or Transferee of a Mortgagee who shall properly complete the improvements relating to the Project Site or applicable part thereof shall be entitled, upon written request made to the Agency, to a Certificate Notice of Completion.

anything to the contrary in this Agreement, no Mortgagee shall have any obligations or other liabilities under this Agreement unless and until it acquires title by any method to all or some portion of the Project Site (referred to hereafter as "Foreclosed Property"). A Mortgagee that acquires title by foreclosure to any Foreclosed Property shall take title subject to all of the terms and conditions of this Agreement, to the extent applicable to the Foreclosed Property, including any claims for payment or performance of obligations which are due as a condition to enjoying the benefits of this Agreement. Upon the occurrence and continuation of an uncured default by a Mortgagee or Transferee in the performance of any of the obligations to be performed by such Mortgagee or Transferee pursuant to this Agreement, the City shall be afforded all its remedies for such uncured default as provided in this Agreement.

10. 6 No Impairment of Mortgage. No default by the Developer under this Agreement shall invalidate or defeat the lien of any Mortgagee. Neither a breach of any obligation secured by any Mortgage or other lien against the mortgaged interest nor a foreclosure under any Mortgage or other lien, shall defeat, diminish, render invalid or unenforceable, or otherwise impair the Developer's rights or obligations or constitute a default under this Agreement.

[PJ101]:
City has—
concern with—
Section 10.
Let's—
discuss—

[PJ102]: We need to discuss the transfer/assi gnment issue First, there <del>is concern</del> others to take advantage of thesubsequent <del>review</del> process/stand ards and guidelines/fl exibility provided to Second, who can develop the project and bring the vision to the <del>are discrete</del> affordable housing, <del>parks,</del> district utility, etc

10. 7 <u>Cured Defaults</u>. Upon the curing of any event of default by Mortgagee within the time provided in this Article 10, the City's right to pursue any remedies with respect to the cured event of default shall terminate.

# 11. AMENDMENT; TERMINATION; EXTENSION OF TERM

11. 1 Amendment or Termination. This Agreement may only be amended with the mutual written consent of the City and Developer, provided following a Transfer, the City and Developer or any Transferee may amend this Agreement as it affects Developer or the Transferee and the portion of the Project Site owned by Developer or the Transferee without affecting other portions of the Project Site or other Transferees. Similarly, subject to any required environmental review, this Agreement may be amended to include any land or legal parcels that are located within the Project's Planned Development Zoning and General Development Plan, but which are not originally included in this Agreement, and in which Developer has a legal or equitable interest and to which Developer desires to have this Agreement apply, and any such amendment may approved and entered into by the Director of PBCE. Other than upon the expiration of the Term and except as provided in Sections 3.2, 5.10.4, 7.4.2, 9.3.29.3, and 11.2, this Agreement may only be terminated with the mutual written consent of the Parties.— The

11.2 <u>Early Termination Rights</u>¶. [PENDING NEGOTIATIONS] \_\_\_\_\_

procedure for an amendment shall be as specified in the Development Agreement Ordinance.

Development Obligations. If Developer fails to satisfy the Ten Year Development Obligation or the Twenty Year Development Obligation, then (i) the City may give Developer notice at any time prior to the date that is one hundred eighty (180) days following the last date by which Developer must satisfy (a) the Ten Year Development Obligation, in the case of a notice re the

failure to satisfy the Ten Year Development Obligation or (b) the Twenty Year Development Obligation, in the case of a notice re the failure to satisfy the Twenty Year Development Obligation. If the City fails to give the applicable notice prior to the expiration of the applicable 180-day period, then the City shall have waived its rights to give such notice and shall no longer have the right to terminate this Agreement as to the applicable development obligation. If the City gives a termination notice within the 180-day time period, then, by notice to the City given within fifteen (15) days after the City's delivery of the notice of failure, Developer shall have the right to request: (i) that the City meet and confer with Developer to discuss the alleged failure, in which case the Parties shall thereafter promptly meet and confer over a period of thirty (30) days and use Good Faith Efforts to address the alleged failure and whether termination of this Agreement can be averted or (ii) that the City hold a Director's hearing in accordance with Section 8 above (which hearing shall be scheduled as soon as reasonably possible but in no event sooner than thirty (30) days after Developer's request) in order to consider the alleged failure and whether termination of this Agreement can be averted. If Developer does not timely give such a notice, and Developer fails to satisfy the applicable development obligation within sixty (60) days after the City's timely delivery of the notice of failure, then this Agreement shall terminate effective as of the date immediately following the expiration of such 60-day period. If as a result of the meet and confer process or the Director's hearing, the Parties are able to avert a termination, then the Director of PBCE shall have the authority on behalf of the City to enter into any amendment(s) to this Development Agreement necessary to memorialize the Parties' agreement.

11. 3 <u>Termination and Vesting</u>. Any termination under this Agreement shall concurrently effect a termination of the Approvals with respect to the terminated portion of the

Project Site, except as to any Approval pertaining to a Building that has Commenced

Construction [PENDING FINAL DEFINITION OF TERM] in reliance thereon, and except as to
the General Plan amendments and adopted Downtown West Planned Development Zoning
District and accompanying General Development Plan. In the event of any termination of this

Agreement by Developer resulting from a Default by the City and except to the extent prevented
by such City Default, Developer's obligation to complete Complete the applicable Community

Benefits shall continue as to ... [PENDING NEGOTIATION OF CB SCHEDULE AND

TRIGGERS] any Building which has Commenced Construction, and all relevant and applicable
provisions of this Agreement shall be deemed to be in effect as such provisions are reasonably
necessary in the construction, interpretation, or enforcement of this Agreement as to any such
surviving obligations. The City's and Developer's rights and obligations under this Section 11.3

shall survive the termination of this Agreement.

as an Exhibit to this Agreement, and that is marked as "conceptual", shall by itself require an amendment to this Agreement. No issuance of a Subsequent Approval, or amendment of an Approval or Subsequent Approval, shall by itself require an amendment to this Agreement. No change to the Project that is permitted underauthorized to be approved pursuant to procedures described in the Downtown West Planned Development Zoning District or the Downtown West Design Standards and GuidelinesPlanned Development Permit shall—by itself require an amendment to this Agreement [PENDING FINAL GDP AND ZONING LANGUAGE]. Further, in the event a CommunityPublic Benefits Adjustment is required, such Adjustment shall not by itself require an amendment to this Agreement [PENDING NEGOTIATION]. Upon issuance or approval, any such matter shall be deemed to be incorporated automatically into the Project and

vested under this Agreement (subject to any conditions set forth in the amendment or Subsequent Approval). Notwithstanding the foregoing, if there is any direct conflict between the terms of this Agreement and a Subsequent Approval, or between this Agreement and any amendment to an Approval or Subsequent Approval, then the Parties shall concurrently amend this Agreement (subject to all necessary approvals in accordance with this Agreement) in order to ensure the terms of this Agreement are consistent with the proposed Subsequent Approval or the proposed amendment to an Approval or Subsequent Approval. The Director of PBCE, Director of Public Works, and the Planning Commission, as applicable, shall have the right to approve changes to the Project as described in the Exhibits, including the Downtown West Planned Development Zoning District and the Downtown West Design Standards and Guidelines Planned Development <u>Permit</u>, and in keeping with the City<sup>2</sup>'s customary practices, and any such changes shall not be deemed to conflict with or require an amendment to this Agreement or the Approvals so long as they do not constitute a Material Change [SUBJECT TO FINAL DISCUSSION ON THIS TERM]. If the Parties fail to amend this Agreement as set forth above when required, however, then the terms of this Agreement shall prevail over any Subsequent Approval or any amendment to an Approval or Subsequent Approval that conflicts with this Agreement.

[PJ104]:
Will not
comment on
this section
for now.

- 11.5 Extension Due to Legal Action or Referendum; Force Majeure; Rail Improvement Activity.
- 11. 5. 1 <u>Litigation and Referendum Extension</u>. If any litigation is filed challenging this Agreement, the FEIR, or an Approval having the direct or indirect effect of delaying this Agreement or any Approval (including but not limited to any CEQA determinations), including any challenge to the validity of this Agreement or any of its provisions, or if this Agreement or an Approval is suspended pending the outcome of an electoral

vote on a referendum, then the Term of this Agreement and all Approvals shall be extended for the number of days equal to the period starting from the commencement of the litigation or the suspension (or as to Approvals, the date of the initial grant of such Approval) to the end of such litigation or suspension (a "Litigation Extension"); provided, however, that if any litigation is filed challenging any Subsequent Approval which has the effect of delaying any Subsequent Approval, the term of this Agreement solely as it applies to the specific Subsequent Approval(s) shall receive a Litigation Extension. The Parties shall document the start and end of a Litigation Extension in writing within thirty (30) days from the applicable dates: provided, however, that with respect to any litigation to which the City is a party, there shall be no need for the Parties to document the start of such litigation.

11. 5. 2 Force Majeure. A Party²'s performance of its obligations under this Agreement shall be excused during, and extended for a period of time equal to, any period of delay caused by reason of Force Majeure. In Upon the eventrequest of Force Majeure, the Parties agree that (i) the time periods for any Party, an extension of time will be granted for the period of delay caused by a Force Majeure Event, as provided in this Section 11.5.2, and no Party shall be deemed to be in default under this Agreement where delays in performance or failure to perform are caused by a Force Majeure Event and authorized pursuant to this Section 11.5.2. Promptly after learning of the occurrence of a Force Majeure Event that actually causes or is reasonably anticipated (by the affected Party) to cause delay, the affected Party shall notify the other Party in writing of the occurrence of such Force Majeure Event, the manner in which such occurrence is likely to cause delay, and the anticipated length of delay in performance resulting from the Force Majeure Event. Upon the other Party's receipt of such notice, the Term of this Agreement then in

effect shall be extended by a period of time equal to the number of days during which performance of theis delayed due to the specified Force Majeure Event.

11. 5. 3 BART or Rail Improvement Activity. For development of the Project on the portion of the Project Site located north of Santa Clara Street, a Party's performance of its obligations impacted by the Force Majeure under this Agreement shall be strictly limited to the period of such delay, interruption or prevention and the delayed Party shall, to the extent commercially reasonable, act diligently and in good faith to remove the cause of the Force Majeure or otherwise complete the delayed obligation, and (ii) following the Force-Majeure, aexcused during, and extended for a period of time equal to, any period of delay caused by reason of construction staging or other activities related to an extension of the Bay Area Rapid Transit system by the Bay Area Rapid Transit ("BART") agency, or other rail or infrastructure improvements that are not part of the Project ("Rail Improvement Activity") where such Rail Improvement Activity requires use of, or otherwise impacts development upon the Project Site. Upon the request of any Party, an extension of time will be granted for the period of delay caused by Rail Improvement Activity, and no Party shall have all rights and remedies available be deemed to be in default under the Developmentthis Agreement, if the obligation is not completed within the time period as extended by the Force Majeure. If an eventwhich may lead to a Force Majeure occurs where delays in performance or failure to perform are caused by Rail Improvement Activity. Promptly after learning of the occurrence of Rail Improvement Activity that actually causes or is reasonably anticipated (by the affected Party) to <u>cause delay</u>, the <u>delayedaffected</u> Party shall notify the other Party in writing of <u>the occurrence of</u> such occurrence as soon as possible after becoming aware that such event may result in an Force-Majeure Rail Improvement Activity, and the manner in which such occurrence is likely to

substantially interfere with the ability of the delayed Party to perform undercause delay, and the anticipated length of delay in performance resulting from the Rail Improvement Activity. Upon the other Party's receipt of such notice, the Term of this Agreement then in effect shall be extended by a period of time equal to the number of days during which performance is delayed due to the specified Rail Improvement Activity.

Permitted Transfer of this Agreement. [PENDING NEGOTIATION] Subject to Section 12.5,

Developer shall have the right to sell, assign, convey, hypothecate, or otherwise transfer or alienate in whole or in part its right, duties, obligations, or interests under this Agreement to any person or entity at any time during the term of this Agreement (a "Transfer") without the consent of City; provided, however, that in no event shall the obligations or benefits conferred upon Developer under this Agreement be at any time so Transferred except through a transfer of the associated, concomitant portion of the Project Site to which that obligation or benefit relates. In the event of a transfer of a portion of the Project Site, Developer shall have the right to Transfer its rights, duties, obligations or interests under this Agreement that are identified as Transferred with the transferred real property and to retain all rights, duties, obligations or interests other than those Transferred with the transferred real property.

Assignment and Assumption Agreement¶. Subject to the provisions and conditions of this Subsection, upon the Transfer of any or all of the rights, duties, obligations or interests under this Agreement and receipt by City of an assignment and assumption agreement in substantially the form provided as Exhibit O and as provided for herein (each an "Assignment and Assumption Agreement"), Developer shall be released from those obligations under this Agreement and the Approvals that: (a) are specified in the Assignment and Assumption

Agreement as having been Transferred with the transferred real property and assumed by the Transferee, or (b) necessarily relate to the development or redevelopment of improvements located on the transferred real property owned by the Transferee, and (2) not otherwise specified in the Assignment and Assumption Agreement as having been retained by Developer. Upon providing such Assignment and Assumption Agreement to City, any Default by a Transferee of any rights, duties, obligations or interests so Transferred and assumed by the Transferee shall not thereby constitute a Default by Developer with respect to the rights, duties, obligations or interests not Transferred. Notwithstanding anything to the contrary in this Section 12, the Assignment and Assumption Agreement with respect to any Transfer of the legal parcel that is currently referred to as the "Social Heart Parcel" in the Parkland Agreement shall contain the express assignment and assumption of the bonding requirements with respect to such parcel that are set forth in the Parkland Agreement.

Assumption Agreement hereunder shall not affect the validity of a transfer by Developer of the portion of the Project Site so transferred to the Transferee. The parties to an assumption agreement shall address in detail whether and how each obligation and right set forth in this Agreement shall be divided, allocated, assigned or otherwise Transferred, in whole or in part, between Developer and a Transferee; if requested by Developer, City agrees to assist Developer (including attendance at meetings) in determining how each obligation and right set forth in this Agreement can be described and allocated in an Assignment and Assumption Agreement so as to avoid later confusion regarding what obligations and rights have and have not been Transferred. Where a transfer of a portion of the Project Site has been completed, then notwithstanding the foregoing, City shall have the right to require Developer or a Transferee (and Developer and said

Transferee shall be jointly and severally liable and obligated to City), to fulfill any duty or obligation under this Agreement and under the other Approvals or Vested Elements if Developer and a Transferee do not agree as to which party is responsible (between Developer or a Transferee) for fulfilling or performing a duty or obligation under an Assignment and Assumption Agreement. Where a transfer of a portion of the Project Site has been completed, then, notwithstanding the foregoing, City shall have the right to look to Developer (prior to the Transfer), and such Developer shall remain liable and obligated to City to fulfill any duty or obligation under this Agreement and under the other Approvals or Vested Elements if City has not received an Assignment and Assumption Agreement Transferring a particular duty or obligation under this Agreement or under the Approvals or Vested Elements in question.

Agreement pursuant to Section 12.2 hereof, any Impact Fees, Mitigation Measures, Processing Fees, taxes or special assessments or school district fees, and any other costs, burdens, obligations, mitigation measures, and exactions of any kind to implement development of the Project pursuant to this Agreement (which City may impose or require only consistent with this Agreement) (collectively, "Additional Conditions") imposed by City as a condition to the approval of any development permit application for such development submitted to City by any Transferee of any portion of the Project Site related to a portion of the Project Site owned or controlled by the Transferee shall be imposed entirely on such portion of the Project Site and shall not be imposed by City directly on other portions of the Project Site or the owners of such other portions; provided, however, that nothing in this Section precludes City from imposing upon the applicant for a development project those costs, burdens, obligations, mitigation

measures and exactions appropriate to such proposed development project and otherwise consistent with this Agreement.

#### 12.2 Notice of Transfer | PENDING NEGOTIATION |

Release of Liability. [PENDING NEGOTIATIONS]. Developer shall, in accordance with the notice provisions of Section 14.11 and at least ten (10) days prior to the anticipated effective date of a proposed Transfer of any portion of the Project Site, provide written notice to the Director of PBCE of the identity or identities and addresses of said Transferee(s), the anticipated effective date of the Transfer of the portion of the Project Site at issue, and the right, title, or interest in the portion of the Project Site that is the subject of the proposed Transfer. A Transferor, including without limitation Developer, shall provide City with written notice of the effective date of a Transfer of any right, title or interest in any portion of the Project Site within ten (10) days from such effective date. Notwithstanding the foregoing, failure to provide either notice required under this Section 12.3 shall, by itself, not affect: (a) the validity of the Transfer at issue nor (b) the ability of a Transferee to provide an Assignment and Assumption Agreement to City pursuant to the provisions of this Section.

Performance District Systems Transfers. The agreements between City and Developer with respect to the District Systems shall contain language governing Developer's right to transfer the District Systems, whether such transfer is a transfer of the rights and obligations to build the applicable District System's infrastructure or, once constructed, the rights and obligations to operate and maintain the applicable District System, consistent with the following, which will be reflected in enforceable covenants with respect to the District Systems that remain in effect so long as the District System(s) or any component thereof exists: (i) Developer may Transfer to (1) any Google Affiliate, Lendlease, and Lendlease

Affiliate, and (2) any Third Party Transferee if the Third Party Transferee is an owner or investor in the infrastructure sector, with appropriate operational and asset management capabilities, directly or via its operating partner. Any such Transfers shall not require City's consent but shall require prior notice to City consistent with Section 12.3 and transmittal to the City of the assignment and assumption agreement between the transferor and transferee that includes a description of the rights and obligations being Transferred; and (ii) with respect to any Transfer of operations and maintenance rights and obligations, such Transferee will have at least three (3) years technical experience and qualifications to operate the applicable District System safely and in accordance with applicable law and industry standards. P. PENDING NEGOTIATIONS

12. 4 Constructive NoticeCertain Limitations on Transfers of Office and Residential Development¶. [PENDING NEGOTIATIONS] ¶

12.6 Rights of Developer¶. [PENDING NEGOTIATIONS] ¶. Notwithstanding the foregoing:¶

the right to Transfer to a Third Party Transferee portions of the Project Site intended for development of office space under the Approvals without first obtaining the City's consent, which shall not be unreasonably withheld, conditioned or delayed, if such Transfer would be effective prior to the date on which Google LLC or any Google Affiliate has Commenced Construction of less than two million (2,000,000) gross square feet of office development in the Project Site; and (2) at no time may the aggregate amount of gross square feet of potential office development on the portions of the Project Site Transferred to a Third Party Transferee(s) exceed forty percent (40%) of the sum of (i) the amount of gross office square footage for which the Substantial Completion of the base building(s), and submission of permit application(s) for

tenant improvements, by or on behalf of Google LLC or any Google Affiliate, has occurred, and (ii) the amount of gross office square footage for which Commencement of Construction has then occurred but which has not then received a Certificate of Occupancy. For the purposes of illustration only, if such Substantial Completion of base building(s) and submittal of permit applications for tenant improvements, by or on behalf of Google LLC or any Google Affiliate, for two million (2,000,000) gross square feet of office development has occurred and Commencement of Construction has occurred on another one million (1,000,000) gross square feet of office development, then Transfers to Third Parties of portions of the Project Site intended for development of office space under the Approvals of up to one million two hundred thousand (1,200,000) gross square feet (i.e., 40% of 3,000,000) shall be allowed without City consent but otherwise subject to the provisions of this Article 12; and¶

12. 4. 2 with respect to residential, hotel, limited-term corporate accommodations, and retail development, City's consent shall not be required for any Transfer so long as such Transfer is to (1) Lendlease or any Lendlease Affiliate or (2) a Qualified Developer.

12.7 Non-Transfers to REITs and UPREITs. [PENDING NEGOTIATION]. The following shall not be considered a Transfer and shall not require the City's consent and shall not be subject to Section 12.5: (i) leases, subleases, licenses, ground leases, other occupancy agreements, or easements, or the granting of any mortgage or deed of trust or any foreclosure thereof or deed-in-lieu with respect thereto, (ii) any change, directly or indirectly, in the ownership interests of Google LLC or any Google Affiliate or any Transferee or any of their respective affiliates, (iii) joint ventures in which Google LLC or any Google Affiliate has major decision rights; and (iv) any transfer of land or improvements to the City or the City's designee or to non-profits in satisfaction of obligations under this Agreement or the Approvals, Notwithstanding the foregoing

provisions of this Section 12.6 and without the requirement to obtain City's consent, (i) if any such transaction includes the transfer of rights and obligations under this Agreement and (ii)

Developer and the transferee enter into an Assignment and Assumption Agreement as described herein above and provide a copy of such agreement to the City, then Developer may elect to have any of the transactions described in this Section 12.6 be treated as a "Transfer" under this Agreement and the transferee with respect thereto be a treated as a "Transferee".

- Reasonableness of Transfer Requirements. The parties agree that the restrictions and conditions on the right to assign any portion of the Project Site set forth in this Agreement are necessary and appropriate to assure the achievement of the objectives of the General Plan, the Approvals and this Agreement. Developer agrees to and accepts the restrictions herein set forth in this Section 12 as a material inducement to the City to enter into this Agreement.
- 12.6 <u>City Administration</u>¶. <u>City shall administer the provisions of this Section</u>
  12 through the Director.

#### 13. DEVELOPER REPRESENTATIONS AND WARRANTIES

13. 1 Interest of Developer; Due Organization and Standing. Developer represents that it is the legal or beneficial owner of the Project Sitehas an equitable interest in the land described at Exhibit A to this Agreement, with authority to enter into this Agreement on behalf of all fee owners of the Project Site. Developer is a Delaware limited liability company, duly organized and validly existing and in good standing under the Laws of the State of Delaware, and in full compliance with all applicable lawsLaws of the State of California. Developer has all requisite power to own its property and authority to conduct its business as presently conducted. Developer represents and warrants that there is no existing lien or

encumbrance recorded against the Project Site that, upon foreclosure or the exercise of remedies, would permit the beneficiary of the lien or encumbrance to eliminate or wipe out the obligations set forth in this Agreement that run with applicable land. -

- 13. 2 No Inability to Perform; Valid Execution. Developer represents and warrants that it is not a party to any other agreement that would conflict with Developer's obligations under this Agreement and it has no knowledge of any inability to perform its obligations under this Agreement. The execution and delivery of this Agreement and the agreements contemplated hereby by Developer have been duly and validly authorized by all necessary action. This Agreement will be a legal, valid, and binding obligation of Developer, enforceable against Developer in accordance with its terms.
- 13. 3 Conflict of Interest. Through its execution of this Agreement, Developer acknowledges that it is familiar with the provisions of Section 607 of the City's Charter, Title 12 of the City's Municipal Code, and Section 87100 *et seq.* and Section 1090 *et seq.* of the California Government Code, and certifies that it does not know of any facts which constitute a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the Term.

13. 5 No Bankruptcy. Developer represents and warrants to the City that Developer has neither filed nor is the subject of any filing of a petition under the federal bankruptcy law or any federal or state insolvency laws or Laws for composition of indebtedness or for the reorganization of debtors, and, to the best of Developer's knowledge, no such filing is threatened.

#### 14. MISCELLANEOUS PROVISIONS

- 14. 1 Entire Agreement. This Agreement, including the preamble paragraph, Recitals and Exhibits, and the agreements between the Parties specifically referenced in this Agreement, constitutes the entire agreement between the Parties with respect to the subject matter contained herein.
- 14. 2 <u>Incorporation of Exhibits</u>. Except for the Approvals which are listed solely for the convenience of the Parties, each Exhibit to this Agreement is incorporated herein and made a part hereof as if set forth in full. Each reference to an Exhibit in this Agreement shall mean that Exhibit as it may be updated or amended from time to time in accordance with the terms of this Agreement.
- Binding Covenants; Run With the Land. Pursuant to Section 65868 of the Development Agreement Statute, from and after recordation of this Agreement, all of the provisions, agreements, rights, powers, standards, terms, covenants, and obligations contained in this Agreement shall be binding upon the Parties and, subject to Section 12, their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, and all persons or entities acquiring the Project Site, any lot, parcel or any portion thereof, or any interest therein, whether by sale, operation of law, or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by merger, consolidation or otherwise) and assigns.

Subject to the provisions on Transfers set forth in <u>Section 12</u>, all provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants and benefits running with the land pursuant to applicable Law, including but not limited to California Civil Code Section 1468.

- 14. 4 Applicable Law and Venue. This Agreement has been executed and delivered in and shall be interpreted, construed, and enforced in accordance with the Laws of the State of California. All rights and obligations of the Parties under this Agreement are to be performed in the City of San José, and the County of Santa Clara shall be the venue for any legal action or proceeding that may be brought, or arise out of, in connection with or by reason of this Agreement.
- 14. 5 Construction of Agreement. The Parties have mutually negotiated the terms and conditions of this Agreement and its terms and provisions have been reviewed and revised by legal counsel for both the City and Developer. Accordingly, no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement. Language in this Agreement shall be construed as a whole and in accordance with its true meaning. The captions of the paragraphs and subparagraphs of this Agreement are for convenience only and shall not be considered or referred to in resolving questions of construction. Each reference in this Agreement to this Agreement or any of the Approvals shall be deemed to refer to this Agreement or the Approvals as amended from time to time pursuant to the provisions of this Agreement, whether or not the particular reference refers to such possible amendment. In the event of a conflict between the provisions of this Agreement and Chapter 56, the provisions of this Agreement will govern and control.

- 14. 6 Project Is a Private Undertaking; No Joint Venture or Partnership. The development proposed to be undertaken by Developer on the Project Site is a private development. The City has no interest in, responsibility for, or duty to third persons concerning any of said improvements. Developer shall exercise full dominion and control over the Project Site, subject only to the limitations and obligations of Developer contained in this Agreement.
- 14. 6. 1 Nothing contained in this Agreement, or in any document executed in connection with this Agreement, shall be construed as creating a joint venture or partnership between the City and Developer. Neither Party is acting as the agent of the other Party in any respect hereunder. Developer is not a state or governmental actor with respect to any activity conducted by Developer hereunder.
- 14. 7 <u>Recordation</u>. Pursuant to the Development Agreement Statute and Development Agreement Ordinance, the City Clerk shall have a copy of this Agreement recorded in the Official Records within ten (10) days after the mutual execution and delivery of this Agreement or any amendment thereto, with costs to be borne by Developer.
- 14. 8 <u>Obligations Not Dischargeable in Bankruptcy</u>. Developer's obligations under this Agreement are not dischargeable in bankruptcy.
- 14.9 <u>Survival</u>. Following expiration of the Term, this Agreement shall be deemed terminated and of no further force and effect except for any provision which, by its express terms, survive the expiration or termination of this Agreement.
- 14. 10 <u>Signature in Counterparts</u>. This Agreement may be executed in duplicate counterpart originals, each of which is deemed to be an original, and all of which when taken together shall constitute one and the same instrument.

Agreement shall be in writing and may be delivered personally or by registered mail, return receipt requested. Notice, whether given by personal delivery or registered mail, shall be deemed to have been given and received upon the actual receipt by any of the addressees designated below as the person to whom notices are to be sent. Either Party to this Agreement may at any

14.11 Notices. Any notice or communication required or authorized by this

time, upon notice to the other Party, designate any other person or address in substitution of the

person and address to which such notice or communication shall be given. Such notices or

communications shall be given to the Parties at their addresses set forth below:

To City:

Director of Planning, Building, and Code Enforcement Planning Department City of San José 200 East Santa Clara Street San José, CA 95113-1905

with a copy to:

City Attorney
Office of the City Attorney
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

City Manager Office of the City Manager City of San José 200 East Santa Clara Street San José, CA 95113-1905¶

To Developer:

Google LLC 1600 Amphitheatre Parkway Mountain View, Ca 94043

Attn: REWS Department / Downtown West SJ Project Executive

with a copy to:

Google LLC 1600 Amphitheatre Parkway Mountain View, Ca 94043 Attn: Legal Department / R/E Matters

Attn: Gregg Miller

Coblentz Patch Duffy & Bass LLP
One Montgomery Street, Suite 3000

San Francisco, CA 94104

Attn: Head of the Real Estate and Land Use Department

14. 12 <u>Severability</u>. Except as is otherwise specifically provided for in this Agreement with respect to any Laws which conflict with this Agreement, if any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect unless enforcement of the remaining portions of this Agreement would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

14.13 Public Records Act. Developer understands and agrees that under the

City's Open Government Ordinance (Municipal Code, Title 12, Chapter 12.21) and the California

Public Records Act (California Government Code Section 250 *et seq.*), this Agreement and any and all records, information, and materials submitted to the City hereunder are public records subject to public disclosure. To the extent that Developer in **good faith** Good Faith believes that

any financial materials reasonably requested by the City constitutes a trade secret or confidential

proprietary information protected from disclosure under the Public Records Act and other Laws,

Developer shall mark any such materials as such. When a City official or employee receives a [PJ106]:

request for information that has been so marked or designated, the City may request further

evidence or explanation from Developer. If the City determines, in its sole discretion, that the

It's City
Council
Resolution
and Policy as
well.

[P.T105]:

information does not constitute a trade secret or proprietary information protected from disclosure, the City shall notify Developer of that conclusion and that the information will be released by a specified date in order to provide Developer an opportunity to obtain a court order prohibiting disclosure.

- 14. 14 Non-Liability of City Officials and Others. Notwithstanding anything to the contrary in this Agreement, no individual board member, director, commissioner, officer, employee, official or agent of City or other City Parties shall be personally liable to Developer, its successors and assigns, in the event of any default by City, or for any amount which may become due to Developer, its successors and assigns, under this Agreement.
- 14. 15 Non-Liability of Developer Officers and Others. Notwithstanding anything to the contrary in this Agreement, no individual board member, director, officer, employee, official, partner, employee or agent of Developer or any Affiliate of Developer shall be personally liable to City, its successors and assigns, in the event of any default by Developer,- or for any amount which may become due to City, its successors and assign, under this Agreement.
- 14. 16 No Third Party Beneficiaries. There are no third party beneficiaries to this Agreement.
- 14. 17 <u>Number of Days</u>. Provisions in this Agreement relating to the number of days shall be calendar days, unless otherwise specified, provided that if the last day of any period to give notice, reply to a notice, or to undertake any other action occurs on a Saturday, Sunday, or a bank or City holiday, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding City working day.

#### [signatures follow on next page]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

CITY:	Approved as to form:	
CITY OF SAN JOSÉ, a municipal corporation	Nora Frimann, City Attorney	[PJ107]: Will need corporate resolution
By:Toni Taber, City Clerk	By: Johnny V. Phan Senior Deputy City Attorney	from Google establishing who has authority to execute on
Approved on, 2021 City Council Ordinance No		behalf of Google, LLC. Signatures— will need to— be notarized— for—
		recording.

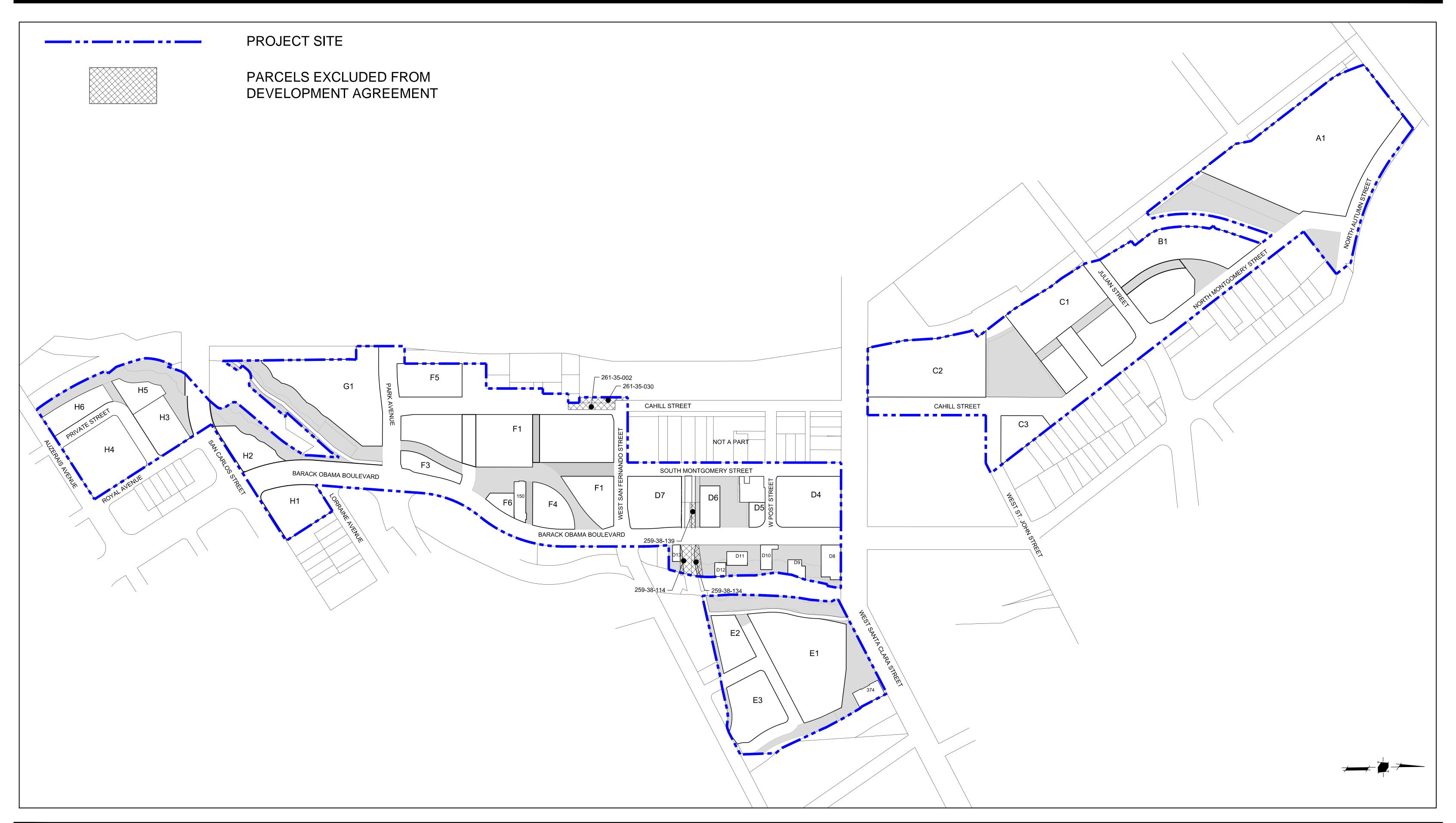
[Note: City will need a corporate resolution from Google establishing who has authority to execute on behalf of Google, LLC. Signatures will need to be notarized for recording.]

Document comparison by Workshare 10.0 on Friday, February 12, 2021 8:22:01 PM

Input:	
Document 1 ID	netdocuments://4835-5914-5945/1
Description	CPDB Revised DA Body 2-8-21
Document 2 ID	netdocuments://4833-9756-1308/4
Description	Google - DW - Development Agreement DRAFT 2.12.21
Rendering set	CPDB Set

Legend:		
<u>Insertion</u>		
<del>Deletion</del>		
Moved from		
Moved to		
Style change		
Format change		
Moved deletion		
Inserted cell		
Deleted cell		
Moved cell		
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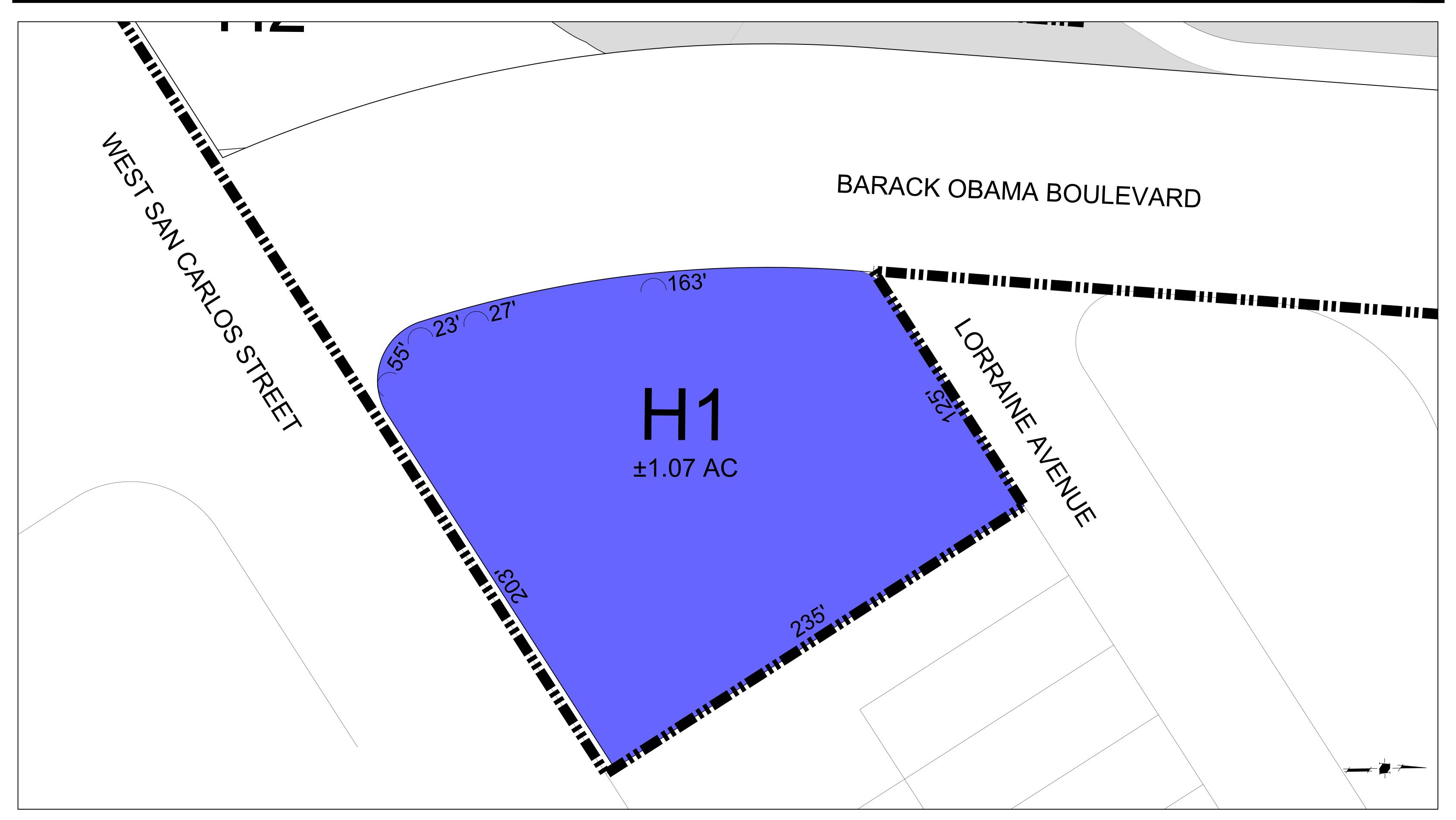
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Deletions	926
Moved from	26
Moved to	26
Style change	0
Format changed	0
Total changes	1947



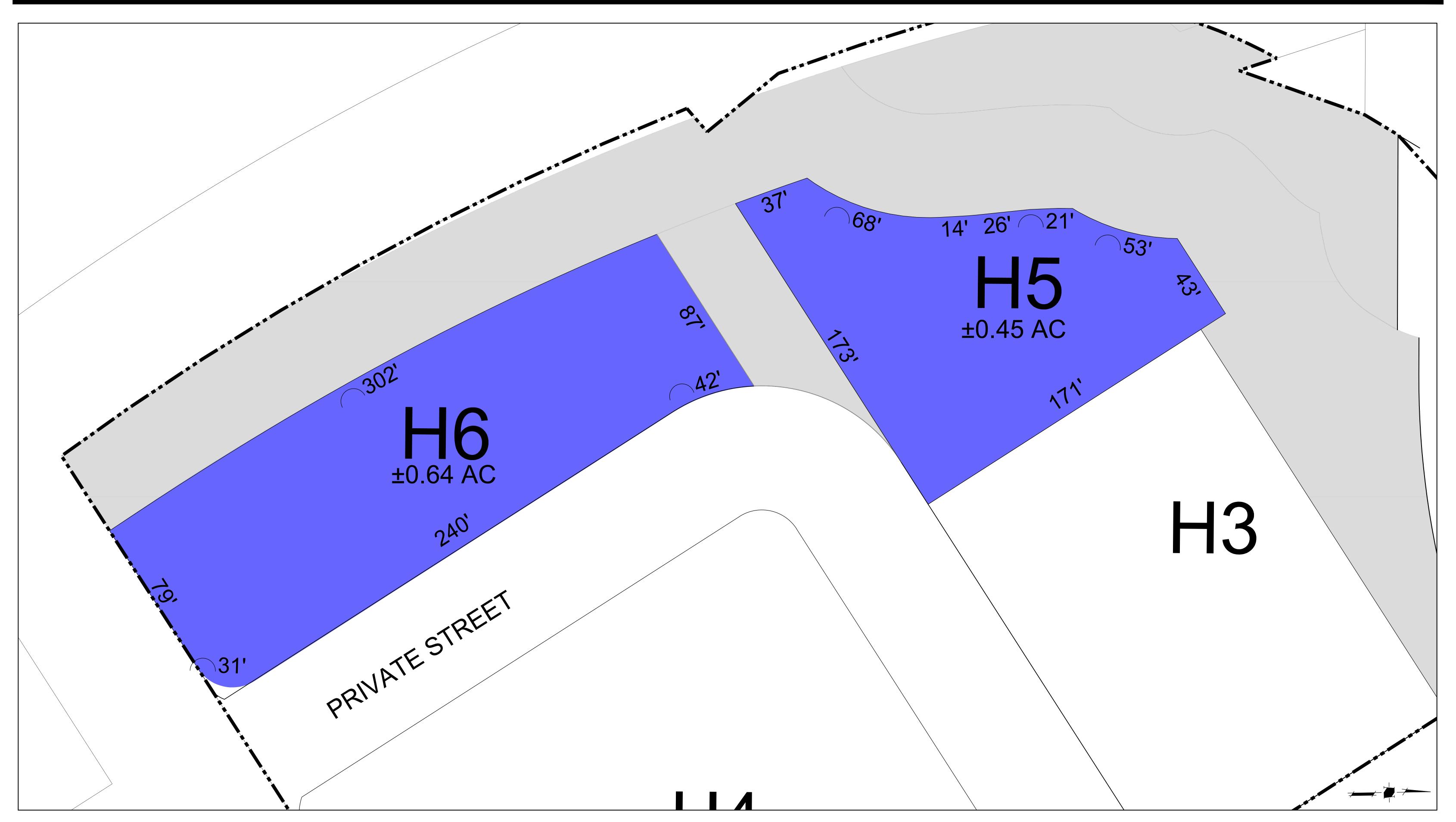














AFFORDABLE HOUSING SITES H5 & H6

# ATTACHMENT B-1 INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS: PROCEDURE FOR BUILD ON-SITE OPTION (PROVIDING RENTAL INCLUSIONARY UNITS)

#### I. Introduction

This attachment to the Guidelines provides more information on how Developers may satisfy their inclusionary housing obligation by building Rental Inclusionary Units (Inclusionary Rentals) on-site dispersed throughout their Residential Development and renting those units to eligible households. Definitions for capitalized terms may be found in the Guidelines and the Ordinance.

#### II. Build On-Site Obligation (San José Municipal Code - SJMC Sections 5.08.400, 5.08.410)

Developers who elect to build on-site must build (consistent with the standards as described in Part VII) and rent at least fifteen percent (15%) of the units in the Residential Development to income qualified renters. The equivalent of at least nine percent (9%) of the units in the Residential Development shall be made available for rent at an Affordable Rental Rate to households earning no more than 80 percent (80%) of the Area Median Income (AMI) adjusted for family size, as defined in California Health & Safety Code and as amended from time to time. The equivalent of at least six percent (6%) of the units in the Residential Development shall be made available for rent at an Affordable Rental Rate to households earning no more than 50 percent (50%) of the Area Median Income (AMI) adjusted for family size, as defined in California Health & Safety Code and as amended from time to time. The Income Limit and Affordable Housing Cost will be determined by the City for each inclusionary unit as described in section VIII below. The City of San José annually publishes AMI levels for the City and posts these on its website.

When computing the number of units required to satisfy the 15% on-site obligation, resulting fractions of one-half (1/2) or greater shall be rounded up to the next highest whole number, and fractions of less than one-half (1/2) shall be rounded down to the next lowest whole number.

#### **III. Build On-Site Incentives** (SJMC Section 5.08.450)

The Developer of a Residential Development providing all required Inclusionary Units upon the same site as the market rate units pursuant to SJMC Section 5.08.400 may, at the Developer's sole option and concurrently with the submittal of the Affordable Housing Compliance Plan, and the earlier of the zoning or Planning Permit application, submit a written request for a density bonus, waivers or incentives pursuant to California Government Code Section 65915 et seq. and SJMC Chapter 20.190, if the Residential Development includes the provision of Inclusionary Units within the Residential Development that meets the minimum thresholds for a density bonus pursuant to California Government Code Section 65915 et seq.

The Developer of a project providing Inclusionary Units on-site may request a density bonus based on those Inclusionary Units, consistent with Chapter 20.190, provided the units meet the Density Bonus requirements.

## IV. Affordable Housing Compliance Plan Application (SJMC Sections 5.08.120, 5.08.155, 5.08.320H, 5.08.420, 5.08.610)

As part of the application for First Approval<sup>1</sup> of any Residential Developments, Developers are required to submit a signed Affordable Housing Compliance Plan application to the City, and pay the application processing fee. If an Affordable Housing Compliance Plan was not submitted and approved at First Approval, it is due when a Developer applies for any other Planning Permit. Additionally, upon the expiration of any Planning Permit, and unless otherwise exempted, the Residential Development shall be subject to the requirements of the Ordinance, and shall not proceed until an Affordable Housing Compliance Plan application is approved in conjunction with any other required Planning Permit or amendment thereto.

Developers who elect the Build On-Site Compliance Option must provide the following information when submitting the Affordable Housing Compliance Plan application:

- 1) General information about the Developer and the Residential Development;
- 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the project;
- 3) Affirming that the Developer intends to build Inclusionary Rentals on-site consistent with the standards in Part VII;
- 4) Detailed information about the unit makeup of the Residential Development:
  - i. Total number of units,
  - ii. Total number of Inclusionary Rentals by income level of the units,
  - iii. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or Rental),
  - iv. Number of bedrooms and bathrooms,
  - v. Parcel map and/or site plan(s) indicating the proposed location and square footage of both the Inclusionary Units and the market rate units,
  - vi. Construction and completion schedule of all Inclusionary and market rate units, and
  - vii. Phasing of Inclusionary Rentals in relation to market rate rentals consistent with Part VI and VII of this chapter.
- 5) As part of the Affordable Housing Compliance Plan application process, Developers shall provide a marketing plan that includes the following:
  - i. Anticipated timeline for the rental of both market rate and Inclusionary Units, and
  - ii. The planned approach to offering the Inclusionary Rentals to the public in a non-discriminatory and equitable manner.
- 6) Any requested build on-site incentives as described in Part III of this chapter,
- 7) Whether the Developer or any affiliate owns, has an interest in, or controls any property contiguous to the project,

<sup>&</sup>lt;sup>1</sup> SJMC Section 5.08.185 - "First Approval" means the first of the following approvals to occur with respect to a Residential Development: development agreement, general plan amendment, specific or area plan adoption or amendment, zoning, rezoning, pre-zoning, annexation, planned development permit, tentative map, parcel map, conditional use permit, special use permit, or building permit.

- 8) A reliable financing mechanism for the ongoing administration and monitoring of the Inclusionary Rentals,
- 9) A description of the manner by which a capital reserve for repair, replacement and maintenance shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve, and
- 10) Any other information, including a detailed narrative that facilitates the Housing Department's ability to evaluate the project's compliance with the Ordinance and Guidelines.

Interested parties may obtain the Affordable Housing Compliance Plan application from the City of San José Housing Department website, currently available at: <a href="www.sjhousing.org/IHO">www.sjhousing.org/IHO</a> or by contacting the Housing Department by sending an email to: <a href="https://iHO@sanjoseca.gov">IHO@sanjoseca.gov</a>.

## V. Inclusionary Housing Agreement (SJMC Sections 5.08.195, 5.08.420, 5.08.460, 5.08.600, 5.08.610, 5.08.710)

The Inclusionary Housing Agreement is a covenant by the Developer for the benefit of the City of San José governing how the project's inclusionary housing obligation will be satisfied. The Inclusionary Housing Agreement may be comprised of more than one document. The City may require that the approved Affordable Housing Compliance Plan application, including all components required to satisfy the Developer's selected compliance option, be attached to the Inclusionary Housing Agreement.

Prior to the approval of any final or parcel map, or the issuance of any Building Permit for a project subject to the Ordinance, the City and Developer will execute an Inclusionary Housing Agreement. The Inclusionary Housing Agreement will then be recorded against the entire project, any Contiguous Property (as defined below) and any other property used for the purposes of memorializing the requirement to meet the obligations of the Ordinance.

The Inclusionary Housing Agreement shall contain a specific section or exhibit which applies only to the Contiguous Property under Common Ownership or Control ("CPCOC Property"). This anti-piecemealing section will list the number of residential units in the underlying project, and provided in the event that a Planning Permit is filed for residential development on any CPCOC Property it will subject to the Ordinance and will not be eligible for an exemption on the grounds of having less than 20 residential units. The requirements of the Ordinance imposed on the underlying project shall not be imposed on the CPCOC Property by the recording of the Inclusionary Housing Agreement against those parcels.

#### VI. Timing of Construction of Rental Inclusionary Units (SJMC Sections 5.08.460, 5.08.610)

On-site Inclusionary Rentals must be developed and made available for occupancy either prior to or concurrently with the market rate units. Construction must also be consistent with the phasing plan for Inclusionary Rentals in relation to market rate units. The City may not issue Building Permits for more than ninety percent (90%) of the market rate units within the Residential Development (or construction phase) until it has issued Building Permits or authorized occupancy for all the Inclusionary Rentals within that project.

If the Rental units are attached units without separate building permits, the foregoing Building Permit ratio requirement shall be applied consistent with the general intent of the Ordinance.

A marketing plan for the Inclusionary Rentals is required including a commitment to provide the Inclusionary Rentals to the public in a nondiscriminatory and equitable manner. Such a plan should provide for concurrent marketing and the rental of one (1) inclusionary unit for each six (6) market rate units.

#### VII. Standards for Rental Inclusionary Units (SJMC Section 5.08.470)

The Inclusionary Rentals shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. Square footage will be considered comparable if the total average square footage of Inclusionary Rentals is at least 85% of the total average square footage of the market rate units for each unit by bedroom type (for example, the average square footage for 1-bedroom Inclusionary Rentals must be at least 85% of the average square footage for 1-bedroom market rate units).

In addition, Inclusionary Rentals must be dispersed throughout the project site with the market rate units and not clustered together. When the Residential Development is comprised of attached townhouses, row houses or multi-family buildings the Inclusionary Rentals shall be located so as not to create a geographic concentration. There is a geographic concentration if the Inclusionary Rentals are clustered in: (a) one area of the Residential Development away from the Market Rate Units, (b) in a separate building from the market rate units, and/or (c) all on one floor or one side of a building.

Developers may choose to cluster Inclusionary Units in a wing of a building or separating the units in another building (although on the same parcel) due to the type of financing needed to support the project, such as tax credits. The Housing Department will work with the Developer to acknowledge and understand the requirements of their financing plan and how that will impact the compliance option they elect. However, if Inclusionary Units are clustered rather than integrated with market rate units, the development will be considered an off-site compliance option and subject to the provisions outlined in Attachment B-2 – Build Off-Site.

The quality of exterior design and overall quality of construction of the Inclusionary Rentals must be consistent with the exterior design of the market rate units. Inclusionary Rentals may have different interior finishes and features than the market rate units in the Residential Development, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and, to some extent, the quality of materials and the size of structures.

#### VIII.Inclusionary Rentals Household Income Limits (SJMC Sections 5.08.400.B, 5.08.600.A)

The Developer is responsible for verifying the income eligibility of Rental Inclusionary Unit tenants, based on the following methodology and definitions.

#### 1) Household Composition Definition

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Rental. New household members **cannot** be added to the application to income qualify for an Inclusionary Unit after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in care-takers.

To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria:

- i. All household members who are 18 years of age or more (adult household members) must be included on the application to rent the inclusionary unit; or
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member.

#### 2) Household Income Limits

To establish the eligibility of households who intend to occupy the Inclusionary Rental, limits are set on the amount of income that households (including all Eligible Household Members) can earn. These limits are based on the number of Eligible Household Members; the family size to be used for determining the Household Income Limit is the number of Eligible Household Members.

The Ordinance requires that on-site Rental Inclusionary Units be rented to Moderate Income households and Very Low Income households, as defined below:

- i. When Moderate Income Rental Inclusionary Units are provided on-site, Moderate Income Households are defined in the ordinance as households earning no more than 80% of AMI for the household's family size. Please refer to the income limits currently published at 25 Cal. Code Reg Section 6932 for the current AMI in Santa Clara County by family size, 80% of AMI is prorated from 100% of AMI based on family size.
- ii. The Household Income Limits for Very Low Income households are defined pursuant to Health & Safety Code Section 50105. Please refer to the 25 Cal. Code Reg Section 6932 for the current Very Low Income Household Income Limits in Santa Clara County by family size.

The City of San José annually publishes <u>AMI levels</u> for the City and posts these on its website.

#### 3) Household Income Definition

For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12.

In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level.

#### 4) Types of Income

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions;
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets);
- iii. Interest and dividends (including income from assets see Excluded Income section below);
- iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment;
- v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay;
- vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities;
- vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home;
- viii. All regular pay, special pay and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and
  - ix. Any earned income tax credit to the extent that it exceeds income tax liability.

#### 5) Excluded Income

- i. Casual, sporadic or irregular gifts;
- ii. Amounts that are specifically for, or in reimbursement of, medical expenses;
- iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses;

- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income;
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire;
- vi. Foster child care payments;
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program.
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973;
  - ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes;
  - x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program;
- xi. Payments received from the Job Training Partnership Act; and
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians.

#### 6) Determination of Income from Assets

To determine a Household's income eligibility for occupancy of an Inclusionary Rental, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the Housing Department website for current income limits.

When the total of the Household's assets exceed the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of:

- i. The actual annual income generated from the assets; or
- ii. 2.5% of all assets in excess of the Household Income Limit.

#### 7) Assets

Assets are defined as:

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds;
- ii. Marketable securities, stocks, bonds and other forms of capital investment;
- iii. Inheritance and lump sum insurance payments, already received;
- iv. Settlements for personal or property damage already received;
- v. Equity in real estate including residential and commercial property and unimproved land; and
- vi. Other personal property that is readily convertible into cash.

The following are not considered assets:

- i. Ordinary household effects including furniture, fixtures, and personal property;
- ii. Automobiles used for personal use; and
- iii. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service.

#### IX. Affordable Rental Rates for On-Site Rental Inclusionary Units (SJMC Section 5.08.400.A)

The Affordable Rental Rates for On-Site Rental Inclusionary Unit are as follows:

- 1) For Moderate Income Rental Inclusionary Units that are located upon the same site as the market rate Residential Development households, the Affordable Rental Rate is the product of 30 percent times 80 percent (80%) of the AMI for Santa Clara County adjusted for family size appropriate for the unit.
- 2) For Very Low Income Rental Inclusionary Units, the Affordable Rental Rate is the product of 30 percent (30%) times 50 percent (50%) of the AMI for Santa Clara County adjusted for family size appropriate for the unit.

The City of San José annually publishes AMI levels for the City and posts these on its website.

As defined in Health and Safety Code Section 50052.5 (h), the family size appropriate for the Rental Inclusionary Unit is determined by the number of bedrooms. The "family size" is equal to one person greater than the number of bedrooms in the unit. For the purpose of determining the Affordable Rental Rate, each Rental Inclusionary Unit shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons. These apply when there are no other pertinent federal statutes applicable to the Rental Inclusionary Units. However if federal statues apply (e.g. Tax Credit Allocation Committee - TCAC) the following occupancy guidelines may be used: 1.5 persons per bedroom. Owners may make an election to use the TCAC occupancy guidelines for an entire property.

Affordable Rental Rate includes all charges related to occupancy of the unit including utilities, parking fees, fees for use of common facilities and other fees and charges. If utilities are paid by tenants of the Rental Inclusionary Units, the rent for the Rental Inclusionary Units must be adjusted downward for tenant utility expenses, calculated in accordance with the utility allowances published by the Santa Clara Housing Authority annually.

In situations where there are multiple affordability restrictions/income or rent limits set by different funding requirements or jurisdictions, the Project must adhere to the strictest requirement so it can meet all of the layering restrictions.

#### **X.** Occupancy Conditions

The approved tenant(s) must occupy the Rental Inclusionary Unit as its principal residence during the entire term of the lease. If an additional occupant (roommate, family member, etc.) moves into the Rental Inclusionary Unit, he/she will be considered part of the existing

household. As a condition for lease or occupancy of a Rental Inclusionary Unit, tenant must be required to provide notice to the owner/property manager, prior to the move in date of a new household member, and the entire household (including the new occupant) will be reevaluated to determine eligibility, including household income requirements. If the tenant(s) fail to receive approval from the owner/property manager for any changes in occupancy or if the tenant(s) subleases the property or fails to provide the annual Tenant Income Certification, the tenant shall be in violation of its lease and will no longer qualify as a Rental Inclusionary Unit tenant.

If the owner/property manager suspects that there have been any changes to the occupancy of the Rental Inclusionary Unit, the owner/property manager shall make a reasonable effort to determine who is occupying the unit.

#### XI. Minimum Household Size

To be eligible for a Rental Inclusionary Unit, a household must be of a size at least equal to the number of bedrooms in the Rental Inclusionary Unit. For example, in order to rent a two-bedroom unit, a household must have at least two Eligible Household Members. Minimum household sizes for Rental Inclusionary units are as follows: one bedroom unit = one person, two bedroom unit = two persons, three bedroom unit = three persons, four bedroom unit = four persons. A household is comprised of all eligible individuals who are currently living together at the same address and will continue to be living together in the Rental Inclusionary Unit.

#### XII. Annual Rent Adjustments

The maximum Affordable Rental Rates will be adjusted annually based on the most recently published household income limits for Santa Clara County by family size. The City or its agent will notify the property owner/property manager of the new rental rates. If the owner chooses to raise rents, the tenant must be given a sixty (60) day notice before any rent increase.

#### XIII.Ongoing Compliance with Affordability Restrictions (SJMC Section 5.08.710)

The developer of each project containing Rental Inclusionary Units is required to submit an Annual Compliance Report and pay any City monitoring fees. The Annual Compliance Report (ACR) consists of the following three documents which may be obtained from the Department of Housing's website at <a href="http://www.sjhousing.org/">http://www.sjhousing.org/</a>.

- 1) Tenant Income Certification (TIC): Completed and signed by residents residing in the Inclusionary Rental. It is used to document family size, income and other financial information. Residents must be recertified annually to maintain eligibility at the inclusionary project.
- 2) Certified Rent Rolls: A report listing each affordable unit, the resident's name, rental rate, household income, the household size, and any other information regarding property tenancy. Rent Rolls should be electronically submitted in an excel spreadsheet provided by the Department of Housing. The Rent Roll form can be found here: <a href="http://www.sjhousing.org/">http://www.sjhousing.org/</a>. The City reserves the right to change the Rent Roll form at any time.

3) Certificate of Continuing Program Compliance: A signed statement attesting that the project is in compliance with the City of San José Inclusionary Housing Agreement. The Annual Certificate of Continuing Program Compliance can be found here: <a href="http://www.sjhousing.org/">http://www.sjhousing.org/</a>

#### XIV. Annual Tenant Income Certification (TIC) (SJMC Section 5.08.710)

Leases for Rental Inclusionary Units shall provide for submittal of signed TIC forms upon written request of the owner or property manager and if tenants fail to submit the form within thirty (30) days of receipt of a written request, then this is a violation of the lease and the lease shall automatically terminate. If the renter fails to comply after notice, the owner or property manager will institute eviction proceedings. If a Very Low Income inclusionary tenant's household income increases and exceeds the income limit for Very Low Income households but does not exceed the income limit for a Moderate Income household, then the tenant's rent will be increased to 30% of their actual certified income, and the tenant may remain in the unit. If a tenant's household income increases and exceeds the Moderate Income Limit, the tenant's rent will be increased to 30% of their actual certified income. If a tenant's household income increases and exceeds 140% of the Moderate Income Limit, the tenant will be given three months to locate alternate housing and vacate the inclusionary apartment unit. A three-month extension may be granted in cases of extreme hardship. The property may also offer the tenant a market rate unit.

#### XV. Terms of Tenancy

Rental Inclusionary Unit tenants will be subject to the same conditions of tenancy as other tenants occupying the same property, except for terms relating to occupancy, income eligibility, annual recertification, and limits on rents. The initial lease term for the Inclusionary Rental will be for one year.

#### XVI. Availability of New Units for Lease

A Rental Inclusionary Unit may not be leased until the City has approved the unit for occupancy.

#### XVII. Marketing /Leasing of Units

The Developer is responsible for marketing the Inclusionary Rentals and identifying qualified tenants that meet the income eligibility requirements of the Rental Inclusionary Units. Developer shall post the available Rental Inclusionary Units on the county-wide listing service site located at <a href="https://www.scchousingsearch.org">www.scchousingsearch.org</a> or such other site as may be requested by the City. In reviewing each candidate, the owner or property manager may apply the same tenant selection criteria, such as past performance in meeting financial obligations and credit references, as those applied to applicants for non-inclusionary units on the property, except for those standards relating to income eligibility.

The Inclusionary Rentals within a Residential Development will not be operated at less than ninety percent (90%) occupancy for more than six consecutive months unless market conditions otherwise dictate. Developer shall post each vacant Rental Inclusionary Unit as soon as possible

but not later than ten (10) days after notice of an impending vacancy and provide advanced notice of the opening of any wait list on the county-wide listing service site located at <a href="https://www.scchousingsearch.org">www.scchousingsearch.org</a> or such other site as may be requested by the City.

#### XVIII. Owner/Manager Certification

Prior to the rental of the first Rental Inclusionary Unit on a property, the owner/property manager will sign a certification of receipt of these Guidelines with a statement of intent to manage the Rental Inclusionary Units according to these procedures. Developers will also submit to the City for approval a management plan consistent with the City's standards for management of affordable units. Subsequent property owners/property manager may be asked to sign certifications of receipt of these Guidelines.

#### XVIX. Terms of Affordability Covenants

The deed restrictions applicable to Rental Inclusionary Units shall remain in effect for no less than the time periods set forth in California Health and Safety Code sections 33413(c)(1) and (2), which currently sets a minimum period of 55 years from the date of recordation of the Inclusionary Housing Agreement. Future owners of the property will abide by all of the administrative procedures and by the conditions in the recorded Inclusionary Housing Agreement for the entire 55 year period from date of recordation. Note that a longer time period may be required if the Residential Development receives a subsidy of any type and the subsidy program requires a longer term of affordability. Subsidies include, but are not limited to, loans, grants, mortgage financing, mortgage insurance, or rental subsidies.

Figure 1: Conceptual Reservable Event Zones for Los Gatos Creek Park

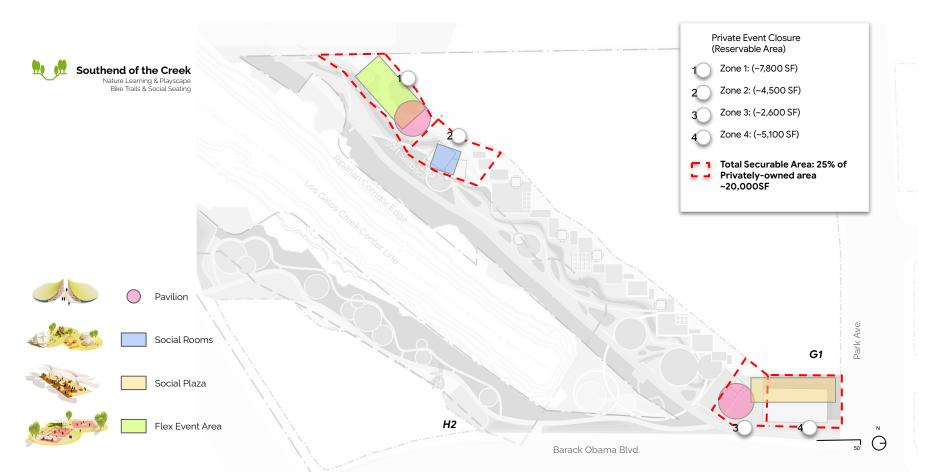


Figure 2: Conceptual Reservable Event Zones for the Meander

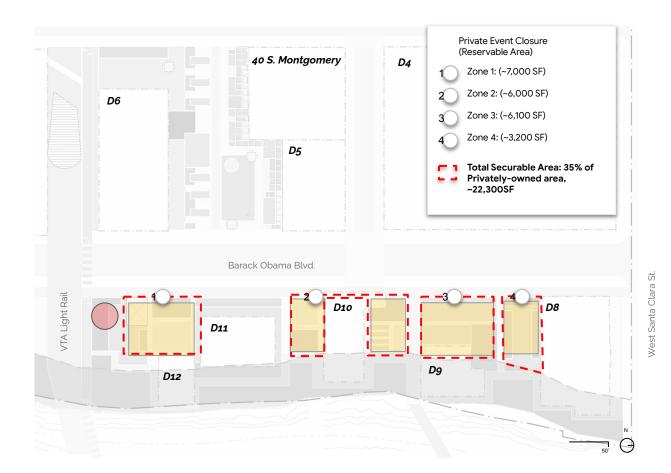


### Figure 3: Conceptual Reservable Event Zones for Creekside Walk



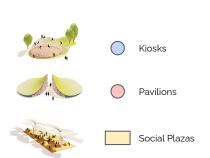
Programming
Performance Venue
Event Pavilion
Small PA Collaboration
Community Teaching
& Learning





## Figure 4: Conceptual Reservable Event Zones for Gateway to San José & Los Gatos Creek East





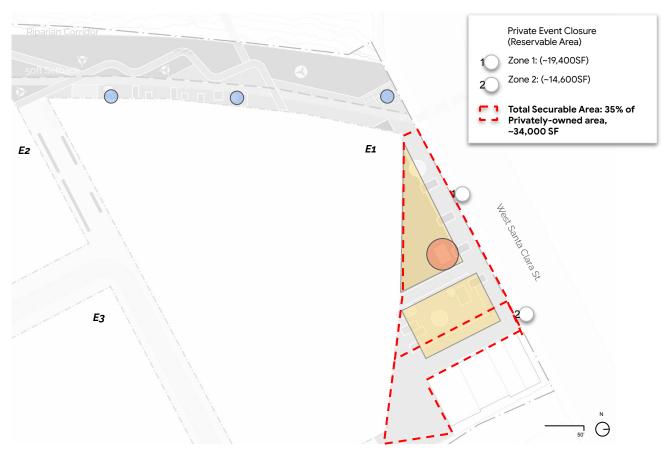
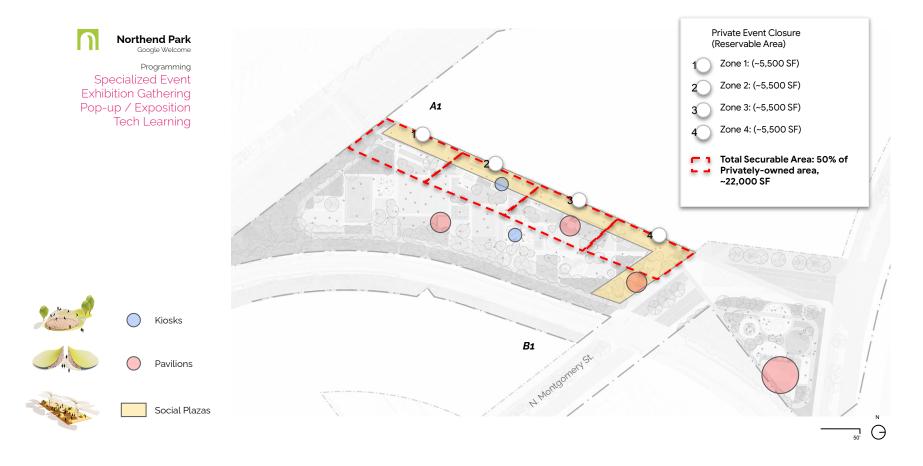


Figure 5: Conceptual Reservable Event Zones - Northend Park



CPDB 2-12-21 Response to J. Phan Comments of 1/19/2021 and addition of new provisions and exhibits. Incorporation of All Provisions, including those "Pending Negotiations" As Noted.

Negotiation Period Privilege; CPRA Confidential Treatment Request; Not for Public Release – CPRA Exempt; Confidential and Proprietary Business-Siting Information

RECORDING REQUESTED BY THE CITY COUNCIL OF THE CITY OF SAN JOSE

(Exempt from Recording Fees Pursuant to Government Code Section 27383)

AND WHEN RECORDED MAIL TO:

Johnny V. Phan Senior Deputy City Attorney Office of the City Attorney City of San José 200 East Santa Clara Street San José, CA 95113-1905

DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF SAN JOSE
AND GOOGLE LLC

RELATIVE TO THE DEVELOPMENT OF PROPERTY LOCATED IN THE DIRIDON STATION AREA PLAN AREA

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### **SCHEDULES**

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 $\mathbf{v}$ 

## DEVELOPMENT AGREEMENT BY AND BETWEEN THE CITY OF SAN JOSÉ AND GOOGLE LLC

THIS DEVELOPMENT AGREEMENT, dated for reference purposes only as of this \_\_\_\_\_ day of \_\_\_\_\_\_, 2021 (the "Reference Date"), is by and between GOOGLE LLC, a Delaware limited liability company (herein, "Google" or "Developer"), and the CITY OF SAN JOSE, a municipal corporation (herein, "City"), pursuant to the authority of Sections 65864 through 65869.5 of the California Government Code (herein, "Development Agreement Statute") and pursuant to the City's powers as a charter city and Chapter 18.02 of the San José Municipal Code (herein, "Development Agreement Ordinance"). The City and Developer are also sometimes referred to individually as a "Party" and together as the "Parties". Capitalized terms not defined when introduced shall have the meanings given in Article 1.

#### **RECITALS**

This Agreement is made with reference to the following facts:

- A. The City Council of the City adopted the *Envision San José 2040 General Plan* ("General Plan") in 2011 setting forth a vision and comprehensive road map to guide the City's continued growth through the year 2040.
- B. The General Plan includes land use policies to shape the transformation of strategically identified "Growth Areas" into higher density, mixed-use, urban districts that can accommodate employment and housing growth and reduce environmental impacts of that growth by promoting transit use and walkability. The Diridon Station Area is located generally within the Downtown Growth Area in the General Plan.

- C. The City Council of the City adopted the Diridon Station Area Plan (DSAP) in 2014 to establish a land use plan and policy framework that will guide future development and redevelopment toward land uses that support transit ridership and economic development, and create a world-class urban destination, among many other objectives.
- D. The Downtown West Mixed-Use Plan (herein, the "Project") is located in the General Plan Downtown Growth Area and within the boundaries of the DSAP, an area of the City that is anchored by public transportation. Additionally, the Project re-envisions a significant portion of the DSAP as a mixed-use area that integrates housing and increases open space, rather than solely maximizing office development.
- E. In December 2018, Developer and City entered into a non-binding Memorandum of Understanding (herein, the "MOU") with the intention to "collaborate on development in and around the Diridon Station Area to aid implementation of the planned expansion of San José's Downtown, the Diridon Station Area Plan, and the General Plan." The MOU set forth a vision for new development to transform the current area through new construction and adaptive reuse of existing facilities to a vibrant, fully functional transit-oriented neighborhood that embodies a commitment to place-making, social equity, economic development, environmental sustainability, and financially viable private development.
- F. The goals established in the MOU and advanced by the Project include balancing the objectives of the City, Developer, and the community; capitalizing on transit synergy; optimizing density and the mix of land uses; preserving existing housing and creating new housing; creating broad job opportunities; and pursuing equitable development. Goals also address high-quality, human-scaled design; improvements to the public realm; enhanced sustainability, environmental stewardship, and innovation; improvements to existing transit access and the

minimization of parking; timely implementation; assurance that private developers will fund a fair share of amenities and other improvements and pay prevailing wages to construction workers in office/research and development buildings; and public involvement in discussions regarding public benefits. The MOU states that, should the Project be approved, the Developer would enter into a Development Agreement with the City to "memorialize community benefits and secure vested development rights aligned with any proposed development masterplan."

G. The project area is described in Exhibit A and depicted in Exhibit B, and is generally bounded by Lenzen Avenue and the Union Pacific Railroad (UPRR) tracks to the north; North Montgomery Street, Los Gatos Creek, the Guadalupe River, South Autumn Street, and Royal Avenue to the east; Auzerais Avenue to the south; and Diridon Station and the Caltrain rail tracks to the west (herein the "Project Site" or "site"). The site is approximately 78 acres in size, approximately one mile long from north to south and generally less than 800 feet wide from east to west, although the site reaches nearly 1,500 feet from east to west at its widest, just south of West Santa Clara Street. The site excludes seven parcels owned by Caltrain, located north of West San Fernando Street and immediately across Cahill Street from Diridon Station. Developer and Valley Transportation Authority (VTA) have also entered into a Public-Private Partnership Agreement ("P3 Agreement"), dated October 2, 2020, in which VTA agreed to transfer its fee interest in approximately 6,871 square feet of land identified as APN 259-38-014 and 259-38-133 pursuant to the terms of the P3 Agreement. These VTA parcels are included within the Project Site for purposes of this Development Agreement. Certain other parcels owned by VTA (APNs 261-34-002, -003, -004, -005, -006, -011, and -023) are within the project site analyzed in the environmental impact report (EIR) for the project, and are included in the Project's Planned Development Zoning and General Development Plan, but are not within the Project Site for

purposes of this Development Agreement. As reflected in Exhibit B, the Project Site for purposes of this Agreement also does not include certain property owned by the Pacific Gas and Electric Company (a portion of APN 261-35-002), certain property owned by the Peninsula Corridor Joint Powers Board (APN 261-34-020), or certain other property owned by VTA (APNs 259-38-139, 259-38-114, 259-38-134 [NOTE-working with VTA to include]), which properties are included in the Downtown West Planned Development Zoning and General Development Plan, the Downtown West Design Standards and Guidelines, and the Vesting Tentative Map for the Project.

H. The Project consists of the phased demolition of most of the existing buildings, and phased development of new buildings, in the Project Site. The Project includes development of the following land uses: a maximum of 7.3 million gross square feet (gsf) of commercial office space; a maximum of 5,900 residential units; a maximum of 500,000 gsf of active uses (commercial retail/restaurant, arts, cultural, live entertainment, community spaces, institutional, childcare and education, maker spaces, non-profit, and small-format office space); a maximum of 300 hotel rooms; a maximum of 800 rooms of limited-term corporate accommodations (a non-residential use, akin to corporate suites, that would accommodate Google employees for up to 60 days); a maximum of 100,000 gsf of event and conference space; up to 4,800 publicly accessible commercial parking spaces and up to 2,360 unbundled parking spaces for residential use; a potential "District Systems" approach to delivery of on-site utilities, including designated infrastructure zones with up to two on-site centralized utility plants totaling up to 130,000 gsf; one or more on-site logistics centers to serve the commercial on-site uses that would occupy a total of about 100,000 gsf; a total of approximately 15 acres of parks, plazas and open space, including areas for outdoor seating and commercial activity (such as retail, cafes, and restaurants), green spaces, landscaping, mid-block passages, riparian setbacks, and trails; and various improvements

to the public realm to improve transit access and pedestrian and bicycle circulation and facilitate connectivity, both within the site and to and from surrounding neighborhoods. In total, the Project would provide upwards of eight hundred ninety million dollars (\$890,000,000) in infrastructure investments that include new and improved streets, utilities, open spaces, local transportation improvements, site development, and more. This amount does not include certain discretionary infrastructure-related costs for Project Features that Google is incurring in excess of this amount, such as the costs of enhanced public realm finishes and District Systems.

- I. On December 30, 2019, Governor Gavin Newsom certified the Project under the Jobs and Economic Improvement through Environmental Leadership Act of 2011 (Assembly Bill [AB] 900, as amended by Senate Bill 734, Senate Bill 7 [note: include upon adoption], and AB 246). As an environmental leadership development project, the Project must: (1) result in a minimum investment of one hundred million dollars (\$100,000,000) in California upon completion of construction; (2) create high-wage, highly skilled jobs that provide construction jobs and permanent jobs for Californians, and help reduce unemployment; (3) not result in any net additional greenhouse gas (GHG) emissions; (4) comply with state requirements for commercial and organic waste recycling; and (5) have a binding commitment with the City, as set forth in the conditions of approval for the Downtown West Planned Development Permit and other Approvals, committing to implement and monitor mitigation measures required to comply with AB 900, as amended.
- J. The Project requires an amendment to the General Plan and DSAP; Planned Development Rezoning, including a General Development Plan; a Planned Development Permit, including adoption of the Downtown West Design Standards and Guidelines, Downtown West Improvement Standards, Conceptual Infrastructure Plan Sheets; Vesting Tentative

Map(s)/Tentative Map(s)/Final Map(s); a Major Encroachment Agreement, vacations of portions of existing City streets, and related entitlements from the City, including, but not limited, to this Development Agreement, and permits related to tree removal, demolition, grading, building, and historic preservation (collectively, the "Approvals"). The list of Approvals is provided in Exhibit L hereto.

- K. The Project is anticipated to generate up to an annual average of 5,700 construction jobs during construction and, upon completion, approximately 115,000 net new permanent jobs, and an approximately nine million (\$9,000,000) annual net increase in general fund revenues to the City.
- L. In order to strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Statute, which authorizes the City to enter into a development agreement with any person having a legal or equitable interest in real property regarding the development of such property. Pursuant to Government Code Section 65865, the City adopted the Development Agreement Ordinance establishing procedures and requirements for entering into a development agreement pursuant to the Development Agreement Statute. The Parties are entering into this Agreement in accordance with the Development Agreement Statute and Development Agreement Ordinance.
- M. In addition to the significant housing, jobs, urban revitalization, and economic benefits to the City from the Project, the City has determined that, as a result of the development of the Project in accordance with this Agreement, additional clear benefits to the public will accrue that could not be otherwise obtained through application of existing City ordinances, regulations, and policies. Major additional Public Benefits to the City from the Project are set forth in

Exhibits D, E, F, G, H, and I hereto, and include: a combination of mechanisms, such as land dedication, moderate income inclusionary housing units, development fees, and other funding sources for affordable housing production and preservation, all of which will contribute significantly to the goal of achieving twenty-five percent (25%) affordable housing overall within the boundaries of the DSAP; development of approximately fifteen (15) acres of new publicly accessible parks, open space, and trails, including approximately four and eight tenths (4.8) acres to be improved and dedicated to the City, and approximately ten and two tenths (10.2) acres of privately-owned, publicly accessible parks, seven (7) acres of which will be subject to a recorded restrictive covenant; new bike and pedestrian infrastructure and enhanced access to public transit, as part of the Project's approximately eight hundred ninety million dollar (\$890,000,000) investment in infrastructure improvements, not including additional infrastructure Project Features; workforce commitments, including payment of prevailing wage and local hire goals; seed funding for a Community Stabilization and Opportunity Pathways Fund to invest in education and workforce development, small business capacity building and incubation, affordable housing preservation, homeless prevention, and homeless services, each as further described in this Agreement.

N. It is the intent of the Parties that all acts referred to in this Agreement shall be accomplished in a way as to fully comply with the California Environmental Quality Act (California Public Resources Code Section 21000 *et seq.*; "CEQA"), the CEQA Guidelines (Title 14, California Code of Regulations, Section 15000 *et seq.*; "CEQA Guidelines"), the Development Agreement Statute, the Development Agreement Ordinance, the San José Municipal Code, and all other applicable Laws in effect as of the Effective Date. This Agreement does not limit the City's obligation to comply with applicable environmental Laws, including CEQA, before taking any

discretionary action regarding the Project, or the Developer's obligation to comply with all applicable Laws in connection with the development of the Project.

- O. The Final Environmental Impact Report ("FEIR") prepared for the Project and certified by the City Council on \_\_\_\_\_\_\_, 2021, together with the CEQA findings (the "CEQA Findings") and the Mitigation Monitoring and Reporting Program ("MMRP")adopted concurrently therewith, comply with CEQA, the CEQA Guidelines, and Title 21 of the City's Municipal Code. The FEIR thoroughly analyzes the Project and Project alternatives, and the Mitigation Measures were designed to mitigate significant impacts to the extent they are susceptible to feasible mitigation. The information in the FEIR and the CEQA Findings were considered by the City Council in connection with approval of this Agreement.
- P. On \_\_\_\_\_\_\_\_, 2021, the Planning Commission held a public hearing on this Agreement and the Project, duly noticed and conducted under the Development Agreement Statute and Development Agreement Ordinance. Following the public hearing, the Planning Commission determined among other things that the FEIR thoroughly analyzes the Project, and the Mitigation Measures are designed to mitigate significant impacts to the extent they are susceptible to feasible mitigation, and further determined that the Project and this Agreement will, as a whole, be consistent with the objectives, policies, and general land uses and programs specified in the General Plan (together the "General Plan Consistency Findings"). The Planning Commission adopted Resolution No. XXX, recommending that the City Council adopt the CEQA findings, approve this Agreement, and approve the Project.
- Q. On \_\_\_\_\_\_\_, 2021, the City Council, having received the Planning Commission's recommendations, held a public hearing on the FEIR, the Project, and this Agreement pursuant to the Development Agreement Statute and the Development Agreement

Ordinance. Following the public hearing, the City Council adopted Resolution No. XXX, certifying the FEIR, making the CEQA Findings required by CEQA, adopting a Mitigation Monitoring and Reporting Program, and adopting a Statement of Overriding Considerations; adopted Resolution No. XXX approving an override of the Santa Clara County Airport Land Use Commission inconsistency determination; [Note: Separate or single GP and SAP resolutions under discussion] adopted Resolution No. XXX, approving amendments to the General Plan; adopted Resolution No. XXX approving amendments to the Diridon Station Area Plan; introduced Ordinance No. XXX, approving a Planned Development Rezoning, including a General Development Plan; adopted Resolution No. XXX, conditionally approving a Vesting Tentative Map(s); adopted Resolution No. XXX, conditionally approving a Planned Development Permit and adopting the Downtown West Design Standards and Guidelines and the Downtown West Improvement Standards; [Note: pending discussions with City] introduced Ordinance No. XXX approving an amendment to Title 20 of the City's Municipal Code; adopted Resolutions No. XXX and No. XXX, conditionally amending the boundaries for Historic Landmarks (San José Water Company Building at 374 West Santa Clara Street, and Southern Pacific Historic District); adopted Resolution No. XXX, conditionally approving an amendment to Historic Preservation Permit (HP16-002); adopted Resolution No. XXX, conditionally approving a Major Encroachment Agreement; introduced Ordinance No. XXX conditionally approving the vacation of certain streets within the Project Site; and introduced Ordinance No. XXX, approving this Agreement.

R. On \_\_\_\_\_\_\_, 2021, the City Council adopted Ordinance Nos. \_\_\_\_\_\_\_\_, approving a Planned Development Rezoning, adopted Ordinance No. \_\_\_\_\_ approving an amendment to Title 20 of the City's Municipal Code, adopted Ordinance No. \_\_\_\_\_ conditionally approving the vacation of certain streets within the Project Site, and adopted Ordinance No.

, approving this Agreement, including the Parkland Agreement i	ncluded herewith as
Exhibit E, and authorizing the Director of PBCE to execute this Agreement	on behalf of the City
(the "Enacting Ordinance"). The Enacting Ordinance took effect on	, 2021.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

#### <u>AGREEMENT</u>

#### 1. **DEFINITIONS**

In addition to the definitions set forth in the above preamble paragraph, Recitals, and elsewhere in this Agreement, the following definitions shall apply to this Agreement:

- 1.1 "Affiliate" or "Affiliates" means any entity that directly or indirectly Controls through one or more intermediaries, is Controlled by, or is under common Control with, another entity or a partner or managing or other member of the other entity.
- 1.2 "Affordable Housing Program" shall mean the Affordable Housing Program attached hereto as Exhibit D.
- 1.3 "Affordable Housing Unit" shall have the meaning set forth in the Affordable Housing Program.
- 1.4 "Agreement" shall mean this Development Agreement, the Exhibits which have been expressly incorporated herein, and any amendments thereto.
- 1.5 "Applicable Laws" shall have the meaning set forth in <u>Section 5.2</u> (where "applicable" is not capitalized, "applicable Law" has its plain meaning and refers to Laws as otherwise defined herein).
- 1.6 "Approvals" shall mean the City approvals, entitlements, and permits for the Project listed on  $\underline{\text{Exhibit L}}$ .

- 1.7 "Assembly Bill (AB) 900" shall mean the Jobs and Economic Improvement through Environmental Leadership Act of 2011, as amended effective January 1, 2018, and codified in Public Resources Code Section 21178 *et. seq.*
- 1.8 "Assignment and Assumption Agreement" shall have the meaning set forth in Section 12.2.
- 1.9 "Building" or "Buildings" shall mean each of the existing, modified, and new buildings on the Project Site, and as described in the Project Description attached as <u>Exhibit B</u>.
  - 1.10 "CEQA" shall have the meaning set forth in <u>Recital N</u>.
  - 1.11 "CEQA Findings" shall have the meaning set forth in <u>Recital O.</u>
  - 1.12 "CEQA Guidelines" shall have the meaning set forth in <u>Recital N</u>.
- 1.13 "Certificate of Occupancy" shall mean the permit issued by the City Building Division authorizing the initial occupancy of one or more buildings and includes final inspections and temporary certificate of occupancy permits.
- 1.14 "City" shall mean the City as defined in the opening paragraph of this Agreement. Unless the context or text specifically provides otherwise, references to the City means the City acting by and through the Director of PBCE or, as necessary, the Planning Commission, or the City Council.
- 1.15 "City Agency" or "City Agencies" shall mean the City departments, agencies, boards, commissions, and bureaus that have subdivision or other permit, entitlement, or approval authority or jurisdiction over development of the Project, or any improvement located on or off the Project Site, including, without limitation, the City Manager, PBCE Department, Director of PBCE, Department of Parks, Recreation, and Neighborhood Services, Environmental

Services Department, Housing Department, and Department of Public Works, together with any successors to the foregoing City agencies, departments, boards, or commissions.

- 1.16 "City Attorney's Office" shall mean the Office of the City Attorney of theCity San José.
- 1.17 "City Costs" shall mean the actual and reasonable costs incurred by a City Agency in preparing, adopting or amending this Agreement, in performing its obligations or defending its actions under this Agreement, or otherwise contemplated by this Agreement, as determined on a time and materials basis, including reasonable attorneys' fees and costs but excluding work, hearings, costs or other activities contemplated or covered by Processing Fees; provided, however, City Costs shall not include any costs incurred by a City Agency in connection with a City Default.
- 1.18 "City Council" or "Council" shall mean the City Council of the City of San José.
- 1.19 "City-Dedicated Open Space(s)" shall mean the parks and trail to be dedicated to the City and improved by Developer in conformance with the Parkland Agreement, and as set forth in <a href="Exhibit E">Exhibit E</a> hereto.
  - 1.20 "City Parties" shall have the meaning set forth in Section 4.7.
- 1.21 "City-Wide" shall mean all real property within the territorial limits of the City of San José, not including any property owned or controlled by the United States or by the State of California and therefore not subject to City regulation.
- 1.22 "Commence Construction", "Commencement of Construction" and similar variations thereof shall mean commencement of physical site work such as demolition, grading or excavation.

- 1.23 "Community Benefits" shall mean those Public Benefits provided by the Project that exceed the Base Required Public Benefits and are not Project Features.
- 1.24 "Complete" and any variation thereof shall mean, as applicable, that: (i) with respect to Privately-Owned Open Space and Privately-Owned Improvements, the City Agencies or the Non-City Agencies with jurisdiction over any required permits for such Privately-Owned Open Space or Privately-Owned Improvements have issued any approvals required for the contemplated use or improvement; (ii) with respect to any Public Improvement, the Public Improvement, or portion thereof, has been completed in accordance with related subdivision map conditions of approval and any applicable Public Improvement Agreement, excepting any minor omissions or defects which will not impact the public's safe experience and enjoyment of the Improvement, which omissions and defects are to be rectified at the earliest possible time following Completion; and (iii) with respect to any Building, a Certificate of Occupancy has been issued. With respect to any Public Improvement, Completion does not include acceptance of the Public Improvement by the City.
- 1.25 "Conformance Review" shall mean the Downtown West Planned Development Zoning / Design Conformance Review process established by the General Development Plan, pursuant to which the Director of PBCE or Director of PW, as specified in the General Development Plan, reviews Conformance Review Applications for Vertical Improvements, open space and Park Improvements, and Horizontal Improvements for conformance with the General Development Plan and Downtown West Planned Development Permit as a prerequisite to the issuance of permits to construct open space, Vertical Improvements, or Horizontal Improvements, as applicable.

- 1.26 "Conformance Review Application" shall mean a written request on a form approved by the Director of PBCE for a Conformance Review determination by the Director of PBCE that Vertical Improvements, open space and Park Improvements, or Horizontal Improvements for a particular area of the Project Site satisfies the applicable standards of the General Development Plan and Downtown West Planned Development Permit.
- 1.27 "Connection Charges" means all water and sewer connection fees and charges payable to the City, as and when due in accordance with City requirements that are applicable on a City-Wide basis or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner.
- 1.28 "Control" means (i) the direct or indirect ownership of more than fifty percent (50%) of the profits or capital of another entity; or (ii) the right to dictate the controlled entity's major decisions, subject to the rights of other owners; or (iii) the power to direct the day-to-day management or control of the entity, directly or indirectly and whether through ownership of voting securities, membership or partnership interests, or other interests, or by contract, or otherwise.
  - 1.29 "Default" shall have the meaning set forth in <u>Section 9.3</u>.
- 1.30 "Developer" shall have the meaning set forth in the opening paragraph of this Agreement, and shall also include any and all authorized successor Transferees of all or any part of the Project Site during the Term.
- 1.31 "Development Agreement Ordinance" shall mean Chapter 18.02 of the Municipal Code, as in effect as of the Effective Date.
- 1.32 "Development Agreement Statute" shall have the meaning set forth in the Preamble to this Agreement, as in effect as of the Effective Date.

- 1.33 "Director of PBCE" shall mean the Director of Planning, Building and Code Enforcement of the City of San José.
- 1.34 "Diridon Station Area Plan" or "DSAP" shall mean the Diridon Station Area Plan approved by Resolution No. 77096, as may be amended from time to time.
- 1.35 "Diridon Integrated Station Concept Plan" or "DISC" shall mean the plan by California High-Speed Rail Authority (CHSRA), Caltrain, Santa Clara Valley Transportation Authority (VTA), Metropolitan Transportation Commission (MTC), and the City (and any additional or successor agency(ies)) to expand and redevelop the San José Diridon Station, which Plan is under development, but not yet approved or issued in draft form, as of the Effective Date.
- 1.36 "DISC Partner Agencies" or "DISC Partner Agency" in connection with DISC, shall mean any one or more of the following agencies: California High-Speed Rail Authority (CHSRA), Caltrain, Metropolitan Transportation Commission (MTC), Santa Clara Valley Transportation Authority (VTA), and the City (and any additional or successor agency(ies)).
  - 1.37 "District Systems" shall mean the "district system(s)" described in Exhibit I.
- 1.39 "Downtown West Planned Development Permit" shall mean that certain planned development permit effectuating the Downtown West Planned Development Zoning District, which includes the Downtown West Design Standards and Guidelines, the Downtown West Improvement Standards and Conceptual Infrastructure Plan Sheets, and the Downtown West

- 1.40 "Downtown West Planned Development Zoning District" shall mean the planned development zoning district established pursuant to Zoning Code Sections 20.60 et seq. and 20.120.500 et seq. by City Council Ordinance No. \_\_\_\_\_\_\_, including its accompanying General Development Plan.
- 1.41 "DSAP's Boundaries" means the geographic boundaries of the Diridon Station Area Plan, as in effect on the Effective Date of this Agreement.
  - 1.42 "Effective Date" shall have the meaning set forth in <u>Section 2.1</u>.
  - 1.43 "Enacting Ordinance" shall have the meaning set forth in <u>Recital R</u>.
  - 1.44 "Existing Standards" shall have the meaning set forth in <u>Section 5.2</u>.
- 1.45 "Existing Uses," shall mean all existing lawful uses of the existing Buildings and improvements (and including, without limitation, pre-existing, non-conforming uses under the Zoning Code) on the Project Site as of the Effective Date, as the same may be modified by the Approvals and any Subsequent Approvals.
- 1.46 "Federal or State Law Exception" shall have the meaning set forth in Section 5.10.
  - 1.47 "FEIR" shall have the meaning set forth in <u>Recital R</u>.
- 1.48 "Final Approval" shall mean that (i) all applicable appeal periods for the filing of any administrative or judicial appeal challenging the issuance or effectiveness of any of the Approvals, the Development Agreement or the FEIR shall have expired and no such appeal shall have been filed, or if such an administrative or judicial appeal is filed, the Approvals, the Development Agreement or the FEIR, as applicable, shall have been upheld by a final decision in

each such appeal without adverse effect on the applicable Approval, the Development Agreement or the FEIR and the entry of a final judgment, order or ruling upholding the applicable Approval, the Development Agreement or the FEIR and (ii) if a referendum petition relating to any Approval or the Development Agreement is timely and duly circulated and filed, certified as valid and the City holds an election, the date the election results on the ballot measure are certified by the City Council in the manner provided by applicable City laws reflecting the approval by voters of the referended Approval or Development Agreement.

- 1.49 "Final Map" shall mean a "Final Map" as defined in Section 19.08.160 of the Subdivision Code.
  - 1.50 "Force Majeure" or "Force Majeure Event" shall mean an act of war or terrorism; insurrection; strikes, walkouts or other labor disturbances; riots or other civil commotion; floods; earthquakes; fires; inclement weather; casualties; acts of God; governmental restrictions imposed or mandated by governmental entities; enactment of conflicting laws by governmental entities; the general unavailability of construction materials for projects similar to the Project; and epidemics or pandemics that result in the suspension of development or construction activities. Neither the inability of Developer to obtain construction financing for the Project nor the condition of, or changes in, the real estate market shall constitute a Force Majeure Event.
    - 1.51 "Funding Mechanism" shall have the meaning set forth in <u>Section 7.6.1</u>.
- 1.52 "Future Changes to Existing Standards" shall have the meaning set forth in Section 5.6.
  - 1.53 "General Plan" has the meaning set forth in Recital A.
  - 1.54 "General Plan Consistency Findings" has the meaning set forth in Recital P.

- 1.55 "Good Faith Efforts" and any variation thereof shall mean the efforts that a reasonable person would determine is a diligent and honest effort under the same or similar set of facts or circumstances.
- 1.56 "Google Affiliate" shall mean (i) Alphabet, Inc.; (ii) any Affiliate of Google LLC or Alphabet, Inc.; (iii) companies spun-off from Google LLC or Alphabet, Inc. and any of their Affiliates; and (iv) any entities related to Google LLC or Alphabet, Inc. as a result of merger, acquisition or by operation of law.
- 1.57 "Horizontal Improvement" shall mean (a) the initial construction of all Public Improvements and (b) the initial construction of Privately-Owned Improvements.
- 1.58 "Impact Fees" shall mean any fees, contributions, special taxes, exactions, impositions and dedications charged by the City in connection with the development of the Project, including but not limited to transportation and transit fees, housing requirements (whether imposed as a fee, as a zoning requirement or otherwise, including affordable housing, such as on-site inclusionary units, in-lieu fees and land transfers), dedication or reservation requirements, and obligations for on-or off-site improvements that are in effect on the date on which the ordinance approving this Agreement is effective. Impact Fees shall not include the Mitigation Measures, Processing Fees, taxes or special assessments or school district fees, and any fees, taxes, assessments impositions imposed by Non-City Agencies, all of which shall be due and payable by Developer as and when due in accordance with applicable Laws.
- 1.59 "Infrastructure" shall mean the facilities, both on- and off-site and in District Systems, described in the Infrastructure Plan included herewith as Exhibit I, and including the electrical microgrid ("Microgrid") described in Exhibit J.

- 1.60 "Infrastructure Plan" shall mean collectively the Infrastructure Plan, the Infrastructure Costs Reimbursement Sheet, and the Infrastructure Maintenance Matrix, all of which are included herewith as <a href="Exhibit I">Exhibit I</a>.
- 1.61 "Law(s)" shall mean the Constitution and laws of the United States of America, the Constitution and laws of the State of California, the charter and laws of the City of San José, and any codes, statutes, rules, regulations, or executive mandates thereunder, and any State or Federal court decision (including any order, injunction, or writ) thereunder. The term "Laws" shall refer to any or all Laws as the context may require.
- 1.62 "Lendlease Affiliate" shall mean any Affiliate of Lendlease Americas Holdings Inc., a Delaware corporation.
  - 1.63 "Litigation Extension" shall have the meaning set forth in <u>Section 11.5.1</u>.
  - 1.64 "Losses" shall have the meaning set forth in <u>Section 4.7</u>.
- the rights, benefits, or obligations of the City or Developer under this Agreement that (i) extends or reduces the Term, (ii) changes the permitted uses of the Project Site, except as permitted by, and approved in the manner set forth in the Downtown West Planned Development Zoning District and/or the Downtown West Design Standards and Guidelines, (iii) decreases or increases the Community Benefits, except as permitted as a Public Benefits Adjustment [SUBJECT TO NEGOTIATION OF PB ADJUSTMENT TERM], (iv) increases the maximum density, or overall square footage of the Project in each case by more than 10%, (v) decreases the parking ratios, except as permitted by the Approvals and this Agreement, or (vi) reduces or changes the Impact Fees. Notwithstanding the foregoing, and for clarity, deviations or modifications authorized to be approved pursuant to procedures established by the General Development Plan, without requiring

amendment to the General Development Plan, shall not constitute a Material Change. By way of example and without limitation, approval of allowable transfers and allowable conversions described on Sheet 3.03 of the General Development Plan and of minor modifications, exceptions, deferrals, amendments to the Planned Development Permit, including DWDSG, DISC process, each as described on Sheet 8.02 of the General Development Plan would not constitute Material Changes. Additionally, adjustments, deviations or modifications authorized to be approved pursuant to procedures established by the Planned Development Permit, and Non-Material Amendments authorized by the Downtown West Improvement Standards and Infrastructure Plan [CONFIRM FINAL LANGUAGE] shall not constitute a Material Change. The addition to this Development Agreement of any land or legal parcels that are located within the Project's Planned Development Zoning and General Development Plan but which are not originally included in this Agreement but as to which Developer has a legal or equitable interest shall not constitute a Material Change.

- 1.66 "Mitigation Measures" shall mean the mitigation measures (as defined by CEQA) applicable to the Project as set forth in the MMRP or that are necessary to mitigate adverse environmental impacts identified through the CEQA process as part of a Subsequent Approval.
- 1.67 "MMRP" shall mean that certain mitigation monitoring and reporting program attached to the FEIR.
- 1.68 "Mortgage" shall mean a mortgage, deed of trust, or other lien on all or part of the Project Site to secure an obligation made by the applicable property owner.
- 1.69 "Mortgagee" shall mean a person or entity that obtains title to all or part of the Project Site as a result of foreclosure proceedings or conveyance or other action in lieu thereof, or other remedial action.

- 1.70 "Municipal Code" shall mean the San José Municipal Code.
- 1.71 "Non-City Agency" shall have the meaning set forth in <u>Section 7.3</u>.
- 1.72 "Non-City Approval" shall have the meaning set forth in Section 7.3.
- 1.73 "Official Records" shall mean the official real estate records of the City of San José, as maintained by the Santa Clara County Assessor-Recorder's Office.
- 1.74 "Parcel Map" shall mean a "Parcel Map" as defined in Section 19.08.320 of the Subdivision Code.
- 1.75 "Park Construction TCE" shall mean a temporary construction easement within a City-Dedicated Open Space granted by the City in favor of Developer, following Acceptance of the Open Space by the City, for the purpose of allowing Developer to complete construction of an adjacent Building(s).
- 1.76 "Park Improvements" shall have the meaning set forth in the Parkland Agreement included herewith as Exhibit E.
- 1.77 "Parkland Fee" shall mean the fee established by the City Council pursuant to Chapters 14.25 or 19.38 of the San José Municipal Code.
- 1.78 "Party" and "Parties" shall have the meaning set forth in the opening paragraph of this Agreement.
- 1.79 "PBCE Department" shall mean the Planning, Building, and Code Enforcement Department of the City of San José.
  - 1.80 "Planned Development Permit" means the Planned Development Permit approved by Resolution No. XXX.
  - 1.81 "Planning Commission" means the Planning Commission of the City of San José.

- 1.82 "Privately-Owned Open Space" shall mean those parks and open spaces described in Exhibits F and E5.2, and in Section 4.1 hereto, and in the Downtown West Design Standards and Guidelines, that are not City-Dedicated Open Spaces
- 1.83 "Privately-Owned Improvements" shall mean those facilities and services that are privately-owned and privately-maintained, at no cost to the City (other than any public financing), for the public benefit and not dedicated to the City, including any Infrastructure that is not a Public Improvement. The Privately-Owned Improvements do not include City-Dedicated Open Space or any Public Improvements.
- 1.84 "Processing Fees" shall mean, as applicable, the (i) standard fee imposed by the City upon the submission of an application for a permit or approval, which is not an Impact Fee, in accordance with the City practice on a City-Wide basis or within the DSAP's Boundaries, for the same or similar permits or approvals and applied in an equitable and non-discriminatory manner and (ii) the City's standard hourly rate and standard charges for materials, in accordance with the City practice on a City-Wide basis or within the DSAP's Boundaries, to the same or similar work and applied in an equitable and non-discriminatory manner, for City staff who are processing the application.
- 1.85 "Project" shall mean the mixed use development project as described in Recital D, Exhibit B, and the Approvals, together with Developer's rights and obligations under this Agreement.
- 1.86 "Project Description" shall refer to the Project described in <u>Recital H</u>. In the event that the Director of PBCE approves a request by Developer to convert land uses pursuant to the General Development Plan, then <u>Recital H</u> and any other references to the Project Description

herein shall be deemed to automatically incorporate such changes without requiring amendment of this Agreement.

- 1.87 "Project Documents" shall mean, individually or collectively as the context requires, the Project Boundaries, Public Benefits Program and Community Benefits Schedule, Infrastructure Plan, Parkland Agreement, Affordable Housing Program, Downtown West Design Standards and Guidelines, Downtown West Improvement Standards, Conceptual Infrastructure Plan Sheets, Downtown West Conformance Review Implementation Guide, Major Encroachment Agreement, Transportation Demand Management Plan,, and this Agreement.
- 1.88 "Project Feature" shall mean features or elements of the Project that Developer has voluntarily agreed to construct or include and that provide a benefit to the public, but that are not Base Required Public Benefits, are not factored into the financial value provided to City by the Project, and that are required only to the extent set forth in this Agreement.
- 1.89 "Project Site" shall have the meaning set forth in <u>Recital D</u>, and as more particularly described in Exhibit A and depicted in Exhibit B.
- 1.90 "Public Health and Safety Exception" shall have the meaning set forth in Section 5.10.1.
- 1.91 "Public Benefit" shall mean, collectively, the (i) Community Benefits, (ii) Project Features, and (iii) elements of the Project required to satisfy state and/or City statutory or regulatory requirements, including, but not limited to, payment of fees, CEQA mitigation measures set forth in the MMRP, City-Dedicated Open Space, and the portion of the Affordable Housing Program that satisfies the requirements of the City's Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08) ("Base Required Public Benefits").

- 1.92 "Public Benefits Adjustment" [PENDING NEGOTIATION] shall mean an adjustment or modification to the total acreage, units, amount, configuration, or Completion or delivery schedule, or other elements of a Public Benefit, as permitted by the Downtown West Planned Development Zoning District, General Development Plan, Downtown West Design Standards and Guidelines, or Downtown West Improvement Standards and Conceptual Infrastructure Plan Sheets, that is necessitated by (i) any subsequent proceedings initiated by any of the DISC Partner Agencies to acquire any portion of the Project Site in connection with DISC, if such acquisition results in a reduction in the development program as established by the Project Approvals; and/or (ii) reconfiguration and/or redesign necessitated by the Developer being prohibited from building to the maximum heights reflected in the DWDSG as a result of City's adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights, if such reconfiguration and/or redesign results in a reduction in the development program as established by the Project Approvals.
- 1.93 "Public Improvement" shall mean the facilities, both on- and off-site, to be improved, constructed, and dedicated by Developer and, upon completion in accordance with the Public Improvement Agreement, accepted by the City. Public Improvements include the public streets within the Project Site shown on <a href="Exhibit I">Exhibit I</a> and/or within the Local Transportation Analysis Report prepared by Fehr & Peers, dated September 2020, all Infrastructure and public utilities within such streets (such as electricity, water and sewer lines, but excluding any non-municipal utilities or Privately-Owned Infrastructure), including sidewalks, landscaping, bicycle lanes, street furniture, and paths and intersection improvements (such as curbs, medians, signaling, traffic controls devices, signage, and striping), and all improvements that Developer is required to complete within City-Dedicated Open Spaces. The Public Improvements do not include Privately-

Owned Open Space or any Privately-Owned Improvements, including Privately-Owned Improvements within the public right-of-way, if any.

- 1.94 "Public Improvement Agreement" shall mean an agreement between the City and Developer for the completion of improvements required as a condition of subdivision map approval pursuant to Government Code Section 66462
  - 1.95 "Public Works" shall mean the San José Department of Public Works.
  - 1.96 "Public Works Director" shall mean the Director of Public Works.
- 1.97 "Qualified Developer" shall mean any entity, or such entity's project team, with experience developing similar residential, hotel, limited-term corporate accommodations, or retail projects, as applicable, within the seven (7) year period preceding the effective date of the Transfer.
- 1.98 "Reimbursement Agreement" shall mean a form of reimbursement agreement entered into between the Parties with respect to the payment of Processing Fees, which agreement shall be substantially in the form attached hereto at <u>Schedule A</u> to this Agreement.
  - 1.99 "Subdivision Code" shall mean Title 19 of the San José Municipal Code.
- 1.100 "Subdivision Map Act" shall mean the California Subdivision Map Act, California Government Code § 66410 *et seq*.
- 1.101 "Subsequent Approval" [PENDING DISCUSSIONS] shall mean any other land use approvals, entitlements, or permits from the City other than the Approvals, that are consistent with the Approvals and that are necessary or advisable for the implementation of the Project, including without limitation, demolition permits, grading permits, site permits, building permits, lot line adjustments, sewer and water connection permits, major and minor encroachment permits, street and sidewalk modifications, street improvement permits, permits to alter,

certificates of occupancy, transit stop relocation permits, subdivision maps, improvement plans, lot mergers, lot line adjustments, and re-subdivisions. A Subsequent Approval shall also include any amendment to the foregoing land use approvals, entitlements, or permits, or any amendment to the Approvals that are sought by Developer and approved by the City in accordance with the standards set forth in this Agreement.

- 1.102 "Substantial Completion" shall mean that construction of the base building is sufficiently complete so as to be ready for the performance of tenant improvements.
- 1.103 "Ten Year Development Obligation" shall mean (i) the Substantial Completion of the base building(s), and submission of permit application(s) for tenant improvements, by or on behalf of Google LLC or any Google Affiliate, for not less than two million (2,000,000) gross square feet of office development within the Project Site, or (ii) Developer's satisfaction, whether by payment or performance as applicable, of the Community Benefits associated with such 2,000,000 gross square feet of office development, as set forth on Exhibit C and Section 4.1 to this Agreement.
- 1.104 "Tentative Map" shall mean both a "Tentative Map" as defined in Section 19.08.460 of the Subdivision Code and a "Vesting Tentative Map" as defined in Section 19.13.020(A) of the Subdivision Code.
  - 1.105 "Term" shall have the meaning set forth in <u>Section 2.2</u>.
  - 1.106 "Third-Party Challenge" shall have the meaning set forth in <u>Section 7.4</u>.
- 1.107 "Third Party Transferee" shall mean any entity that is not Google LLC, a Google Affiliate or a Lendlease Affiliate.
  - 1.108 "Transfer" shall have the meaning set forth in <u>Section 12</u>.
  - 1.109 "Transferee" shall mean any party that is the transferee in a Transfer.

- 1.110 "Transportation Demand Management Plan" shall mean the transportation demand management plan attached to the FEIR, as the same may be modified from time to time.
- 1.111 "Twenty Year Development Obligation" shall mean (i) the Substantial Completion of the base building(s), and submission of permit application(s) for tenant improvements, for not less than two million (2,000,000) gross square feet of office development within the Project Site, or (ii) Developer's satisfaction, whether by payment or performance as applicable, of the Community Benefits associated with such 2,000,000 gross square feet of office development, as set forth on Exhibit C to this Agreement. The amount of office development or Community Benefits under this Twenty Year Development Obligation shall be in addition to the amount of office development or Community Benefits required to satisfy the Ten Year Development Obligation.
- 1.112 "Vertical Improvement" shall mean a Building or other improvement to be developed under this Agreement that is not parks and open space or infrastructure, or any portion thereof that is a Horizontal Improvement.
  - 1.113 "Vested Elements" shall have the meaning set forth in <u>Section 5.1</u>.
  - 1.114 "Zoning Code" shall mean Title 20 of the San José Municipal Code.

#### 2. EFFECTIVE DATE; TERM

- 2.1 <u>Effective Date</u>. This Agreement shall take effect upon the later of (i) the full execution and delivery of this Agreement by the Parties, and (ii) the date the Enacting Ordinance is effective ("Effective Date").
- 2.2 <u>Term.</u> The term of this Agreement shall commence upon the Effective Date and shall continue in full force and effect for thirty (30) years thereafter unless extended or earlier terminated as provided herein ("Term"); provided, however, that (i) the Term shall be extended

for each day of a Litigation Extension, Force Majeure, or any other extension provided under this Agreement, and (ii) Developer shall have the right to terminate this Agreement with respect to a Development Parcel upon Completion of the Building within that Development Parcel and the Community Benefits for that Building, as set forth in Section 7.1. The City shall have the right to terminate this Agreement prior to the expiration of the Term as follows: (a) if, on or before the date that is the last day of the tenth (10<sup>th</sup>) year after the Effective Date (as such 10-year period may be extended by a Litigation Extension, Force Majeure, or any other extension provided under this Agreement) the Ten Year Development Obligation has not been satisfied; or (ii) if, on or before the date that is the last day of the twentieth (20<sup>th</sup>) year after the Effective Date (as such 20-year period may be extended by a Litigation Extension, Force Majeure, or any other extension provided under this Agreement) the Twenty Year Development Obligation has not been satisfied. If the City desires to exercise its right to terminate as a result of the failure of Developer to satisfy the Ten Year Development Obligation or the Twenty Year Development Obligation, then the City shall follow the procedures set forth in Section 11.2 below. The term of any Planned Development Permit or Subsequent Approval shall be for the longer of the Term (as it relates to the applicable parcel) or the term otherwise allowed under the Planned Development Permit or Subsequent Approval. The term of any Tentative Map approved in connection with the Project shall be for the longer of the Term (as it relates to the applicable parcel) or the term otherwise allowed under the Subdivision Map Act.

#### 3. GENERAL RIGHTS AND OBLIGATIONS; DEVELOPMENT PROCESS

3.1 <u>Development of the Project</u>. Developer shall have the vested right to develop the Project in accordance with and subject to the provisions of this Agreement and the Approvals, and the City shall consider and process all Subsequent Approvals for development of

the Project in accordance with and subject to the provisions of this Agreement and the Approvals. The Parties acknowledge that Developer has obtained all Approvals from the City required to commence construction of the Project, other than any required Subsequent Approvals, and that Developer may proceed in accordance with this Agreement with the construction and, upon Completion, use and occupancy of the Project as a matter of right, subject to the attainment of any required Subsequent Approvals and any Non-City Approvals.

- 3.2 <u>Timing of Public Benefits, and Infrastructure</u>. Because the Project will be built out over a number of years, the amount and timing of the Public Benefits, including the Public Improvements, Affordable Housing Program, and City-Dedicated Open Space are to be provided as set forth in <u>Exhibit C</u>, the Affordable Housing Program included herewith as <u>Exhibit D</u>, the City-Dedicated Open Space Dedication and Improvements Schedule included herewith as <u>Exhibit E5.1</u>, the Infrastructure Plan included herewith as <u>Exhibit I</u>, and as more particularly described in <u>Section 4.1</u>. For certain Project Features, such as the District Systems, timing requirements have been intentionally omitted, and these Features are otherwise subject to receipt of necessary permits or other conditions precedent, as noted or described in the applicable Exhibit. The scope and timing of Infrastructure that is associated with specific parcels or Buildings, as described in <u>Exhibit I</u>, shall be reviewed and approved by the City through the subdivision mapping process consistent with applicable Laws.
- 3.3 <u>Changes to Timing of Public Benefits</u>. [PENDING NEGOTIATION] The Parties agree that many factors will determine the rate at which various residential and commercial uses within the Project can be developed and absorbed. Developer may request changes to the timing of Public Benefits as set forth in <u>Exhibits C</u>, <u>D</u>, <u>E</u>, <u>I</u> or <u>Section 4.1</u> herein, at any time by submitting a written request to the Director of PBCE with a statement explaining the reasons for

the proposed changes. The Director of PBCE shall consider only the following (collectively, the "Development Timing Goals") when considering Developer's request for changes to the Public Benefits Schedule:

- Rational Development. Public Benefits should be developed in an orderly manner and
  consistent with the Project Documents. Finished portions of the Project should be
  generally contiguous or adjacent to a completed street.
- Appropriate Development. Horizontal Improvements should be timed to coordinate
  with the needs of Vertical Improvements. Completed Infrastructure must provide
  continuous reliable access and utilities to then-existing visitors, residents, and
  businesses.
- Market Timing. The boundaries and mix of uses within the Conformance Review
   Application plans should be designed to minimize unsold inventory.
- Flexibility. Flexibility to respond to market conditions, cost, and availability of financing and economic feasibility should be provided.

In considering whether to approve Developer's requested changes, the Director of PBCE shall consider only whether the changes are consistent with all of the Development Timing Goals. The Director of PBCE shall approve such change if, after consulting with all affected City Agencies and the City Attorney, he or she reasonably determines that the modified timing for the specified Public Benefit(s) meets all of the Development Timing Goals. Any Material Change to the timing of a Public Benefit(s) that does not meet all of the Development Timing Goals, as reasonably determined by the Director of PBCE, will require the approval of the Planning Commission after consultation with the affected City Agencies.

- 3.4 Approval of Subdivision Maps. OT **DEVELOP** MASTER ENCROACHMENT AND PIA LANGUAGE] Developer shall obtain approval of Tentative Maps, Final Maps and Parcel Maps as required by the Subdivision Map Act and the Subdivision Code to subdivide the Project Site for purposes of disposition and development as contemplated by this Agreement. Developer may pursue a single Tentative Map covering the entire Project site or multiple Tentative Maps. Approval of any Tentative Map shall be conditioned on Developer Completing any required Public Improvements and Privately-Owned Open Spaces consistent with the terms and conditions printed on the face of said map and the Project Documents. Developer may pursue approval of Final Maps in phases that include only portions of the associated Tentative Map. The City agrees that, to the extent authorized by the Subdivision Map Act and the Subdivision Code, Final Maps shall be liberally construed for purposes of determining substantial conformance with the associated Tentative Map as contemplated by Sections 19.16.130 and 19.16.140 of the Subdivision Code and Government Code Section 66474.1.
- 3.5 <u>Conformance Review.</u> The Approvals and the Project Documents are intended to ensure that the urban, architectural, and landscape design of the Buildings, the Public Improvements, and the public realm at the Project Site will be of high quality and appropriate scale, include sufficient open space, and promote the public health, safety and general welfare. The Conformance Review procedures applicable to Vertical Improvements, Privately-Owned Open Space, Privately-Owned Improvements, and certain Public Improvements and Horizontal Improvements, as indicated in the Downtown West Design Standards and Guidelines, shall be as set forth in the General Development Plan, the Downtown West Planned Development Permit (consisting of the Downtown West Design Standards and Guidelines, the Downtown West Improvement Standards, the Conceptual Infrastructure Plan Sheets and the Conformance Review

Implementation Guide), the Master Encroachment Agreement, and in this Agreement and Exhibits hereto. The City shall review and approve or disapprove any Conformance Review Application in accordance with the requirements of this Agreement and the procedures specified in the General Development Plan and the Downtown West Planned Development Permit. In considering a Conformance Review Application and any Subsequent Approval for those aspects of the Conformance Review Application that meet the mandatory standards of the Downtown West Planned Development Zoning District and the Downtown West Planned Development Permit, including a Building's proposed height, bulk, setbacks, streetwalls, location, size of uses, and amount of open space and parking, and the quantitative or objective requirements of other Project Documents (the "Objective Requirements"), the City acknowledges and agrees that (i) it has exercised its discretion in approving the Downtown West Planned Development Zoning District and the Project Documents, and (ii) any proposed Conformance Review Application or Subsequent Approval that meets the Objective Requirements shall not be rejected by the City based on elements that conform to or are consistent with the Objective Requirements, so long as the proposed Building(s), Privately-Owned Open Space, Privately-Owned Improvements, and/or Public Improvement meet(s) the San José Building Codes.

Improvements. [PENDING NEGOTIATION] All Public Improvements that are required to serve a Building or Buildings (as identified in Exhibit C, E, I, and/or Section 4.1) (a) must be performed and Completed as specified in this Agreement, the applicable Exhibit to this Agreement, and/or in the Infrastructure Plan, or (b) if no such specifics are provided, then such Public Improvements shall be Completed on or before issuance of a Certificate of Occupancy for that Building or Buildings; provided, however, that upon Developer's request, the City shall allow the issuance of

the Certificate of Occupancy for a Building or Buildings prior to Completion of the required Public Improvements if Developer and the City have entered into an agreement reasonably acceptable to the Public Works Director with respect to Public Improvements within Public Works jurisdiction and reasonably acceptable to the Developer with respect to the use of and liability for the applicable Public Improvements until Completed and accepted by the City Council. The Parties agree to work in Good Faith to enter into such agreements as may be needed to ensure that City's process for acceptance of Public Improvements is not delayed. Privately-Owned Improvements must be Completed as set forth in this Agreement, the Infrastructure Plan included as Exhibit I, and any associated Tentative Map conditions of approval. All applicable City Agencies have reviewed and conditionally approved the Infrastructure Plan. Developer acknowledges and agrees that upon the occurrence of certain conditions, the City may decide not to issue Certificates of Occupancy, as more particularly described in Section 9.4.4.

# 4. PUBLIC BENEFITS; DEVELOPER OBLIGATIONS AND CONDITIONS TO DEVELOPER'S PERFORMANCE

Regulations. The Parties acknowledge and agree that the development of the Project in accordance with this Agreement provides a number of Public Benefits to the City beyond those required by or achievable through existing Laws, including, but not limited to, those set forth in this Section 4. The City acknowledges and agrees that a number of the Public Benefits would not otherwise be achievable without the express agreement of Developer under this Agreement. Upon Developer's receipt of a building permit, the Public Benefit obligations tied to, or triggered by that Building shall survive the expiration or termination of this Agreement to the date of the Completion of the applicable Public Benefit.

- 4.1.1 <u>Base Required Public Benefits</u>. In satisfaction of City statutory and/or regulatory requirements, Developer shall provide the following Base Required Public Benefits in accordance with <u>Exhibit C</u>, <u>D</u>, <u>E</u>, and <u>I</u>, as applicable, and as set forth herein:
- (a) the Affordable Housing Program benefits in satisfaction of the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08), as further described in Exhibit D;
- (b) the City-Dedicated Open Spaces in satisfaction of Developer's Parkland Obligation, as further described in <a href="Exhibit E">Exhibit E</a> and the DWDSG;
- (c) those elements of the Infrastructure Plan (including all of the Public Improvements and all of the Privately-Owned Improvements) [PENDING NEGOTIATIONS] as further described in <a href="Exhibit I">Exhibit I</a> (not including the enhanced infrastructure, District Systems, and Microgrid elements described in <a href="Section 4.1.3(c)">Section 4.1.3(c)</a>), which improvements shall satisfy Developer's Diridon Station Infrastructure Fee requirement in full.

Unless indicated elsewhere in this Agreement, Developer shall Complete each of the Base Required Public Benefits on or before the applicable dates provided in this Agreement and Exhibits hereto, and the Approvals. Any payments or property received by the City as part of the Base Required Public Benefits shall be used by the City as described in this Agreement and Exhibits hereto. Promptly following Developer's request, the City shall provide to Developer evidence of the use of the funds by the City consistent with the requirements of this Agreement.

4.1.2 <u>Community Benefits Provided By Project</u>. In addition to the Base Required Public Benefits described in <u>Section 4.1.1</u>, Developer agrees to provide the Community Benefits described in this <u>Section 4.1.2</u>. Developer acknowledges and agrees that, as a result of the benefits to Developer under this Agreement, Developer has received good and valuable

consideration for its provision of the Community Benefits described herein, and that the City would not be willing to enter into this Agreement without the Developer's obligation to provide such Community Benefits:

- NEGOTIATIONS] As an additional Community Benefit, Developer agrees to contribute to City the amount of Eighteen and 70/100 Dollars (\$18.70) per net square foot, excluding areas outside the usable accommodation such as lobby, storage areas, mechanical/utility rooms, common areas and corridors etc., of limited-term corporate accommodations, as such use is defined in the Downtown West Planned Development Zoning District and General Development Plan (the "Corporate Accommodations Contribution"), which Contribution shall be paid upon issuance of a Certificate of Occupancy for a building containing limited-term corporate accommodations. The Corporate Accommodations Contribution shall be used to fund affordable housing production in the DSAP. The Corporate Accommodations Contribution shall be vested for the term of this Agreement, subject to escalation based on the Engineering News Record Construction Cost Index. Pursuant to Section 5.8 of this Agreement, Developer shall not be subject to any new Impact Fee for limited-term corporate accommodations or similar use that City may adopt;
- (b) Community Stabilization and Opportunity Pathways Fund. [PENDING NEGOTIATIONS] Developer and/or Google, as applicable, shall establish and provide funding for the Community Stabilization and Opportunity Pathways Fund, as described in Exhibit H;
- (c) the Affordable Housing Program benefits described in <u>Exhibits C</u> and <u>D</u> that exceed Developer's Base Required Public Benefit pursuant to the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08); and

- (d) Fee simple transfer to City of "Autumn Street Parcels" (Contiguous parcels: 255 Autumn St., 260 & 240 N Montgomery St. San Jose, 95110, as shown on <a href="Exhibit">Exhibit</a> [\_\_\_](Site Plan and Legal Description)) six (6) months after Final Approval, free and clear of any occupants, but in its otherwise as-is condition, as set forth in <a href="Exhibit C">Exhibit C</a>.
- 4.1.3 <u>Project Features</u>. In addition to the Base Required Public Benefits and the Community Benefits, Developer has opted to provide the following additional Project Features as a Public Benefit:
- (a) Privately-Owned [PENDING Open Space. NEGOTIATIONS]. In addition to the City-Dedicated Open Space described in Exhibit E hereto, and the Park Improvements to the City-Dedicated Open Space described therein, Developer is providing as a Project Feature certain Privately-Owned Open Space totaling approximately 10.2 acres, generally depicted on Exhibit E5.2 hereto and as described in the Downtown West Design Standards and Guidelines (referred to therein as "Project Sponsor-Owned Open Space"). The Privately-Owned Open Space will be publicly accessible via a public access agreement in substantially the same form as Exhibit F1, subject to the hours of operation and private events/temporary closures set forth in Exhibit F2, and the Code of Conduct for Public Use set forth in Exhibit F3. The public right of access to the Privately-Owned Open Spaces is a Public Benefit that exceeds what would be required under the City's Parkland Dedication Ordinance. The Privately-Owned Open Space categories, design, boundaries, and programming are set forth in the Downtown West Design Standards and Guidelines.
- (i) <u>Completion of Privately-Owned Open Space</u>.

  Completion of the Privately-Owned Open Spaces means that sign-off of final inspection has occurred; however, Completion does not include or require completed installation of park design

elements, art, structures, or features not essential to the intended use of the park by the public, so long as final installation of such elements or features does not interfere with safe use of the park; nor does Completion include or require improvement of the fifty (50) feet of a Privately-Owned Open Spaces that fronts an incomplete vertical parcel (the "Temporary Construction Area") to allow for safe construction on that vertical parcel, so long as the Temporary Construction Area is relinquished and improved within six (6) months of issuance of a Certificate of Occupancy for the building located on the vertical parcel. Subject to Sections 3.3 and 11.5, Developer shall deliver the Completed Privately-Owned Open Spaces identified in Exhibit F, within thirty (30) months following issuance of a Certificate of Occupancy for the building parcels as indicated in the following schedule:

- Creekside Walk at South Autumn Street (the later of D8, D9, D10, D11, D12 or D13)
- Gateway to San José (E1)
- Los Gatos Creek East (the later of E1 or E2)
- The Meander (F Office [excluding areas between F2/F4/150 South Montgomery, which are to be delivered within 30 months from the issuance of Certificate(s) of Occupancy for the final building of F2, F4 or 150 South Montgomery]); In the event F3 and/or F6 have not received a Certificate(s) of Occupancy within twenty-four (24) months following issuance of a Certificate of Occupancy for the office building on F1, the area of the Meander within fifty (50) feet of those buildings shall be Completed within six (6) months of issuance of Certificate of Occupancy for buildings on F3 and/or F6
- Los Gatos Creek Park 1 (G1)
- Los Gatos Creek Park 2 (H2)

- N. Montgomery Pocket Park (B1)
- Northend Park (A1)
- Los Gatos Creek Riparian Setback adjacent to Los Gatos Creek Connector (later of H3 and H5)

Semi-Public Open Space adjacent to a City-Dedicated Open Space shall be Completed within thirty (30) months of issuance of a Certificate of Occupancy for the fronting Building.

addition to the public access agreement to be recorded for the Privately-Owned Open Space. In addition to the public access agreement to be recorded for the Privately-Owned Open Spaces as described in <a href="Exhibit F1">Exhibit F1</a>, approximately seven (7.0) acres, consisting of the following Privately-Owned Open Space typologies, shall be subject to a recorded restrictive covenant: Privately-Owned Public Park, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor (the "Covenant Privately-Owned Open Space"). The final acreage and/or boundaries of the Covenant Privately-Owned Open Spaces may be subject to adjustment pursuant to the provisions of the Downtown West Design Standards and Guidelines, and shall be verified as part of the final map process. The restrictive covenant shall require that the Covenant Privately-Owned Open Spaces remain as publicly accessible park space unless and until the City or other public agency requires that the use be changed; provided, however, that the open spaces shall be permitted to be reconfigured so long as the overall square footage of the Covenant Privately-Owned Open Spaces remains the same.

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

## (iii) Penalty For Privately-Owned Public Open Space

<u>Delay</u>. In no event shall a delay in the Completion of any Privately-Owned Open Space constitute a Default pursuant to this Agreement. For the Covenant Privately-Owned Open Space, in the event Developer fails to Complete any Covenant Privately-Owned Open Space in accordance with the Completion schedule set forth in <u>Section 4.1.3(a)(i)</u>, Developer shall be required to pay a penalty fee to the City (the "Private Open Space Delay Penalty"). The Private Open Space Delay Penalty shall be based on the total square footage of the delayed Covenant Privately-Owned Open Space, and shall be paid for each month the Completion of that Covenant Privately-Owned Open Space is delayed beyond the thirtieth (30<sup>th</sup>) month following issuance of a Certificate of Occupancy for the corresponding building shown in <u>Section 4.1.3(a)(i)</u>, as follows:

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

Pursuant to the terms of the Parkland Agreement, included as <u>Exhibit E</u> to this Agreement, the Parties acknowledge and understand that a delay in the Completion of any Covenant Privately-

Owned Open Space could require that the City delay issuance of a building permit for any subsequent residential building until the Covenant Privately-Owned Open Space is Completed if development of the subsequent residential building would cause the cumulative minimum square feet of open space for each residential unit to fall below fifty-two (52) square feet.

- (b) <u>Publicly Available Parking Spaces</u>. [PENDING NEGOTIATIONS] Developer shall provide publicly available parking spaces within the Project in the manner and number set forth in Exhibit K.
- Subject to receipt of necessary agency permits and approvals, the Project will include a District Systems approach to handle many of its utilities—such as electricity, thermal, wastewater, recycled water, and solid waste, as described in <a href="Exhibit I">Exhibit I</a>. The Project's Infrastructure Plan (<a href="Exhibit I">Exhibit I</a>) also includes enhanced right of way improvements, utility upgrades and relocation, undergrounded overhead power and communication lines, rehabilitation work to Los Gatos Creek, and replacement of the San Fernando Bridge as additional Project Features. In addition, if feasible, the Project will connect some or all buildings to an electric microgrid, as described in <a href="Exhibit J">Exhibit J</a>.
- (d) <u>Workforce</u>, <u>Learning</u>, <u>and Education</u>. [PENDING NEGOTIATIONS] Developer and/or Google, as applicable, will provide the additional Workforce, Learning, and Education benefits described in Exhibit G.
- described in <u>Recital I</u>, the Project is an Environmental Leadership Project pursuant to AB 900. As such, Developer has committed to providing the following Project Features: the Project will be designed in pursuit of LEED for Neighborhood Development Gold Certification, with vertical office buildings designed to meet LEED Gold Certification; and the Project would offset

emissions, resulting in a "Net Zero Emissions" project, in part through a combination of design measures intended to reduce energy consumption described in Exhibit I and in the FEIR, switching to equipment utilizing lower emission energy sources, water use and vehicular movement efficiencies, and purchasing GHG emissions offsets.

- 4.2 <u>Conditions to Performance of Public Benefits</u>. Developer's obligation to perform Public Benefits is expressly conditioned upon the satisfaction of each and all of the following conditions precedent:
  - 4.2.1 Final Approval has occurred for all Approvals;
- 4.2.2 The City and any applicable Non-City Agency(ies) shall have performed or granted all of their respective actions, approvals or authorizations and/or issued such permits or licenses required in order to permit Developer to Commence Construction of the Building(s) or Project component(s) to which the particular Public Benefit applies, and Final Approval shall have occurred for same except to the extent that such actions, approvals or authorizations, or permits or licenses have not been performed or granted due to the failure of Developer to timely initiate and then diligently and in Good Faith pursue such actions, approvals, authorizations, or issuances [LANGUAGE PENDING NEGOTIATIONS]; and
- 4.2.3 Developer shall have obtained all Subsequent Approvals necessary to Commence Construction of the applicable Building(s) or Project component(s) to which the Public Benefit applies, and Final Approval shall have occurred for same, except to the extent that such Subsequent Approvals have not been obtained or Final Approval has not occurred for same due to the failure of Developer to timely initiate and then diligently and in Good Faith pursue such Subsequent Approvals[LANGUAGE PENDING NEGOTIATIONS].

Except as expressly set forth in any of the applicable Exhibits to this Agreement, whenever

this Agreement requires completion of a Public Benefit at or before Completion of a Building, the City may withhold a Certificate of Occupancy for that Building until the required Public Benefit is Completed.

Discretionary Approvals. The Parties acknowledge that the FEIR prepared for the Project complies with CEQA. The Parties further acknowledge that (a) the FEIR contains a thorough analysis of the Project and possible alternatives, (b) the MMRP has been adopted to eliminate or reduce to an acceptable level certain adverse environmental impacts of the Project, and (c) the City Council adopted CEQA Findings, including a statement of overriding considerations in connection with the Approvals, pursuant to CEQA Guidelines Section 15093, for those significant impacts that could not be mitigated to a less than significant level. For these reasons, the City shall rely on the FEIR, to the greatest extent possible in accordance with applicable Laws, in all future discretionary actions related to the Project; provided, however, that nothing shall prevent or limit the discretion of the City to conduct additional environmental review, at Developer's expense, in connection with any Subsequent Approvals to the extent that such additional environmental review is required by applicable Laws, including CEQA.

4.3.1 <u>Compliance with CEQA Mitigation Measures</u>. Developer shall comply with all Mitigation Measures imposed as applicable on each Project component, except for any Mitigation Measures that are expressly identified as the responsibility of a different party or entity. Without limiting the foregoing, Developer shall be responsible for the completion of all Mitigation Measures identified as the responsibility of the "owner" or the "project sponsor" or the "project applicant". The Parties expressly acknowledge that the FEIR and the associated MMRP are intended to be used in connection with each of the Approvals and any Subsequent Approvals

to the extent appropriate and permitted under applicable Law. Nothing in this Agreement shall limit the ability of the City to impose conditions on any new, discretionary permit resulting from a modification to the Project, as such conditions are determined by the City to be necessary to mitigate potentially significant adverse environmental impacts identified through any subsequently required CEQA process and associated with that Project modification or a Subsequent Approval or permit; provided, however, any such conditions must be in accordance with applicable Law.

4.4 <u>Nondiscrimination</u>. In the performance of this Agreement, Developer agrees not to discriminate against any employee, City employee working with any Developer's contractor or subcontractor, applicant for employment with such contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

### 4.5 City Cost Recovery

- 4.5.1 Developer shall timely pay to the City all applicable Impact Fees with respect to the Project or the Project Site as set forth in <u>Section 5.8</u>.
- 4.5.2 Except as otherwise set forth in this Agreement and/or the Exhibits hereto, Developer shall timely pay to the City all applicable Processing Fees with respect to the

processing or review of applications for the Approvals and Subsequent Approvals as set forth in Section 5.8.

4.5.3 Developer shall pay to the City all City Costs incurred in connection with the drafting and negotiation of this Agreement, and defending the Approvals as set forth in Section 7.4, and in processing and issuing any Subsequent Approvals or administering this Agreement (except for the costs that are covered by Processing Fees), within sixty (60) days following receipt of a written invoice complying with Section 4.5.4 from the City. [LANGUAGE RE: CITY COSTS WRT SUBSEQUENT APPROVALS PENDING NEGOTIATIONS]

4.5.4 The Parties shall enter into a Reimbursement Agreement with respect to the foregoing Processing Fees and City Costs pursuant to which Developer shall reimburse the City for Processing Fees and City Costs incurred in performing work in connection with processing Subsequent Approvals required to implement the Project, including but not limited to any further environmental review, Conformance Review Applications, phased final subdivision maps, and grading and building permits, all on an expedited basis. The Reimbursement Agreement shall establish the City's commitment to process Subsequent Approvals on an expedited basis and the terms for Developer's reimbursement to the City for such Processing Fees and City Costs, and shall set forth (i) the scope of city costs eligible for reimbursement; (ii) a process for the parties to agree to an annual (or other applicable period based on the anticipated scope of the work) budget of City Costs based on anticipated schedule of reimbursable work, a reconciliation process for budget inconsistencies, and a process for periodically reducing or augmenting the budget where necessary; (iii) Developer's rights to review, approve, or challenge City Costs; (iv) Developer's rights to approve consultant scopes of work, expenses, and budgets; (v) the City's responsibility for tracking, maintaining, and reporting Processing Fees and City Costs incurred in relation to an

approved budget; (vi) the process for Developer's payment of Processing Fees and City Costs; and (vii) any other related terms mutually agreed upon between the Parties. The Reimbursement Agreement shall be in a form substantially similar to the form attached hereto as <u>Schedule A</u>.

4.6 Prevailing Wages. Developer acknowledges that Developer shall be required to pay prevailing wages to all persons performing labor in the construction of public improvements on the Project Site to the extent required by California law, including specifically the California Labor Code, the California Public Resources Code, and the requirements of the Department of Industrial Relations, and as may be required by the Municipal Code. Developer shall include this requirement in any contract entered into by Developer for the construction of any such public improvements. Upon request, Developer and its contractors will provide to City any workforce payroll records as needed to confirm compliance with this Section. Indemnification of City. Developer shall indemnify, reimburse, and hold harmless the City and its officers, agents and employees (the "City Parties") from and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, judgments, attorney fee awards, and claims ("Losses") arising or resulting directly or indirectly from (i) any third party claim arising from a Default by Developer under this Agreement, (ii) Developer's failure to comply with any Approval, Subsequent Approval or Non-City Approval, (iii) the failure of any improvements constructed pursuant to the Approvals or Subsequent Approvals to comply with any Federal or State Laws, the Existing Standards or any permitted Future Changes to Existing Standards, (iv) any accident, bodily injury, death, personal injury, or loss of or damage to property occurring on a Project Site (or off-site, with regard to the Public Improvements) in connection with the construction by Developer or its agents or contractors of any improvements pursuant to the Approvals, Subsequent Approvals or this Agreement, (v) a Third-Party Challenge instituted against the City or any of the City Parties, (vi) any dispute

between Developer, its contractors or subcontractors, or any combination thereof, relating to the construction of any part of the Project, and (vii) any dispute between Developer and any Transferee or any subsequent owner of any portion of the Project Site or development thereof relating to any assignment of this Agreement or the obligations that run with the land, or any dispute between Developer and any Transferee or other person relating to which party is responsible for performing certain obligations under this Agreement, each regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on, the City or any of the City Parties, except to the extent that such indemnity is void or otherwise unenforceable under applicable Law, and except to the extent such Loss is the result of the negligence or willful misconduct of any City Party. The foregoing indemnity shall include, without limitation, reasonable attorneys' fees and costs and the City's reasonable cost of investigating any claims against the City or the City Parties. All indemnifications set forth in this Agreement shall survive the expiration or termination of this Agreement, to the extent such indemnification obligation arose from an event occurring before the expiration or termination of this Agreement. To the extent the indemnifications relate to Developer's obligations that survive the expiration or termination of this Agreement, the indemnifications shall survive for the term of the applicable obligation plus four (4) years.

4.7.1 The City shall promptly notify Developer of any claim, action or proceeding within the scope of this Section and the City shall cooperate fully in the defense of any such claim or action, but shall have the right to resolve any challenge, in any manner, in its sole discretion, provided, however, however, Developer's consent shall be required if the resolution of the challenge shall require a payment by Developer or limit Developer's rights under this Agreement. The City shall invoice Developer for any City costs or fees for which Developer is

responsible under <u>Section 4.7</u> in the manner and subject to the provisions of <u>Section 4.5</u>, including pursuant to a Reimbursement Agreement.

### 5. VESTING AND CITY OBLIGATIONS

- Vested Rights. By granting the Approvals, the City has made a policy 5.1 decision that the Project, as described in and as may be modified in accordance with the Approvals, is in the best interests of the City and promotes the public health, safety and welfare. Developer shall have the vested right to develop the Project as set forth in this Agreement, and authorized by the Approvals, including but not limited to, the Downtown West Planned Development Zoning District, and the General Development Plan, Downtown West Planned Development Permit, Vesting Tentative Map, including without limitation with the following vested elements: the land uses, height and bulk limits, including the maximum density, intensity and gross square footages, the permitted uses, the provisions for open space, and Impact Fees (collectively, the "Vested Elements"). The Vested Elements are subject to and shall be governed by Applicable Laws. The expiration of any building permit or Approval shall not limit the Vested Elements, and Developer shall have the right to seek and obtain subsequent building permits or approvals, including Subsequent Approvals at any time during the Term, any of which shall be governed by Applicable Laws. Each Subsequent Approval, once granted, shall be deemed an Approval for purposes of this Section 5.1.
- 5.2 <u>Existing Standards</u>. The City shall process, consider, and review all Subsequent Approvals in accordance with (i) the Approvals, (ii) the San José General Plan, the Municipal Code (including the Subdivision Code), amendments to the Municipal Code set forth in City Council Ordinance No. \_\_\_ and all other applicable City policies, rules, and regulations, as each of the foregoing is in effect on the Effective Date ("Existing Standards"), as the same may

be amended or updated in accordance with permitted Future Changes to Existing Standards as set forth in <u>Section 5.6</u>, and (iii) this Agreement (collectively, "Applicable Laws").

5.3 Criteria for Subsequent Approvals; Limitation on City's Future Discretion. Developer shall be responsible for obtaining any required Subsequent Approvals. The City, in granting the Approvals and vesting the Project through this Agreement, is limiting its future discretion with respect to Subsequent Approvals to the extent that they are consistent with the Approvals and this Agreement. The City acknowledges and agrees that (i) Developer's commitment to provide the various benefits described in this Agreement is, in part, consideration for the City's agreement to limit its discretion with respect to Subsequent Approvals and to process Subsequent Approvals in a prompt and efficient manner, and (ii) the City's inability or refusal to process Subsequent Approvals in such manner and otherwise in accordance with this Agreement and the Approvals will cause Developer significant harm. Accordingly, in no event shall a City Agency deny, withhold or condition issuance of a Subsequent Approval based upon items that are consistent with the Approvals and this Agreement, and shall consider all such applications pursuant to the procedures set forth in the Approvals (including the Downtown West Planned Development Zoning District and its accompanying General Development Plan, the Downtown West Design Standards and Guidelines), as applicable, and in accordance with its customary practices (subject to the requirements of this Agreement). Subject to the requirements of this Agreement, the City shall not impose any new condition for a Subsequent Approval that conflicts with the Approvals, except when such condition is necessary to bring the Subsequent Approval into compliance with Applicable Laws. For any part of a Subsequent Approval request that has not been previously reviewed or considered by the applicable City Agency (such as additional details or plans), the City Agency shall exercise its discretion consistent with the Approvals and otherwise in accordance with the City's customary practice (but subject to the requirements of this Agreement). City Agency discretion for certain Subsequent Approvals, including but not limited to Conformance Review Applications, shall be exercised consistent with the General Development Plan, Downtown West Planned Development Permit, and other Approvals as applicable. Consequently, the City shall not use its discretionary authority to change the policy decisions reflected by the Approvals and this Agreement or otherwise to prevent or to delay development of the Project as contemplated in the Approvals and this Agreement. If the City denies any application for a Subsequent Approval that implements the Project as contemplated by the Approvals, then such denial must be consistent with Applicable Laws and the City must specify in writing the reasons for such denial and shall suggest, in a detailed writing, modifications required for approval of the application. Any such specified modifications shall be consistent with Applicable Laws and City staff shall promptly approve the application if it is subsequently resubmitted for City review and corrects or mitigates, to the City's reasonable satisfaction, the stated reasons for the earlier denial in a manner that is consistent and compliant with Applicable Laws and does not include significant new or additional information or materials that give the City a reason to object to the application under the standards set forth in this Agreement. Nothing in the foregoing shall impact or limit the City's discretion with respect to: (i) proposed Subsequent Approvals that seek a Material Change [SUBJECT TO DISCUSSIONS ON MATERIAL CHANGE LANGUAGE] to the Approvals, or (ii) City approvals of subsequent tentative maps or vesting tentative maps, to the extent required by Law, not contemplated by the Approvals. Until such time as the City approves the application for Subsequent Approval, Developer shall have no obligation to provide any of the Public Benefits specifically associated with the development that is the subject of the Subsequent Approval. In addition, if, in Developer's reasonable, Good Faith opinion, the City has withheld,

conditioned or delayed an approval in violation of this Section 5.3, Sections 7.2 or 7.2.1, or any other applicable provision of this Agreement, then Developer shall have the right to delay fulfilling any or all of the Public Benefits specifically associated with the development that is the subject of such approval by the number of days of delay in proceeding with such development caused by such withholding, conditioning or delaying approval by the City, as Developer reasonably determines in Good Faith. Any such delay in providing such benefits shall not constitute a default by Developer, and the City shall nevertheless continue to approve, process, inspect, and issue Certificates of Occupancy for such development notwithstanding Developer's election to delay the Public Benefits.

# 5.4 [Intentionally Omitted.]

- NEGOTIATIONS] As described in the Parkland Agreement set forth in Exhibit E and the List of Required Exceptions from Parkland Dedication Ordinance set forth in Exhibit E2, certain exceptions from the Parkland Dedication Ordinance (San José Municipal Code Ch. 19.38) are necessary in order to provide the City-Dedicated Open Spaces, Park Improvements, and private recreation improvements, including the high-quality design and improvements to the dedicated open spaces, all as defined and described in Exhibit E. The City acknowledges that the exceptions from the certain provisions of the Parkland Ordinance listed in Exhibit E2 are necessary, and agrees to grant the waivers or exceptions listed therein.
- 5.6 Future Changes to Existing Standards. [PENDING NEGOTIATIONS AND AGREEMENT WRT GDP LANGUAGE] All future changes to Existing Standards and any other Laws, plans, or policies adopted by the City or adopted by voter initiative after the Effective Date ("Future Changes to Existing Standards") shall apply to the Project and the Project Site, except to

the extent they conflict with this Agreement, or the terms and conditions of the Approvals. In the event of such a conflict, the terms of this Agreement and the Approvals shall prevail, subject to the terms of this Section 5.6.

- 5.6.1 Future Changes to Existing Standards shall be deemed to conflict with this Agreement and the Approvals if they:
- (a) limit or reduce the density or intensity of the Project, or any part thereof, or otherwise require any reduction in the square footage or number of proposed Buildings or change the location of proposed Buildings or change or reduce other improvements from that permitted under this Agreement for the Project, the Existing Standards, or the Approvals;
- (b) limit or reduce the height or bulk of the Project, or any part thereof, or otherwise require any reduction in the height or bulk of individual proposed Buildings or other improvements that are part of the Project from that permitted under this Agreement, the Existing Standards, or the Approvals;
- (c) limit, reduce or change the location of vehicular access or parking from that permitted under this Agreement, the Existing Standards, or the Approvals;
- (d) limit any land uses for the Project from that permitted under this Agreement, the Existing Standards, the Approvals, or the Existing Uses;
  - (e) change or limit the Approvals or Existing Uses;
- (f) materially limit or control the rate, timing, phasing, or sequencing of the approval, development, or construction of all or any part of the Project in any manner, including the demolition of existing Buildings at the Project Site;
- (g) require the issuance of permits or approvals by the City other than those required under the Existing Standards, except as otherwise provided in <u>Section 5.6.2</u>;

- (h) limit or control the availability or the type or nature of public utilities, services, or facilities, or any privileges or rights to public utilities, services, or facilities for the Project as contemplated by the Approvals;
- (i) conflict with, or otherwise limit, control, or change the management, delivery, or governance of a Privately-Owned Open Space;
- (j) materially and adversely limit the processing or procuring of applications and approvals of Subsequent Approvals that are consistent with Approvals; or
- (k) impose or increase any Impact Fees, as they apply to the Project, except as permitted under <u>Section 5.6.2</u>.
- Planned Development Zoning District and General Development Plan, Developer may request to have a Future Change to Existing Standards that conflicts with this Agreement and the Approvals applied to the Project or the Project Site. Developer must make such a request in writing to the Director of PBCE, and the request shall identify the specific standard and state a rationale for the request. The Director of PBCE may approve the request in his or her sole reasonable discretion. The Director of PBCE's decision to approve or disapprove Developer's request is not subject to appeal. If the Director of PBCE approves Developer's request, the Future Change to Existing Standards shall be deemed to be an Existing Standard. Nothing in this Agreement shall preclude Developer from pursuing any challenge to the application by the City of any Future Changes to Existing Standards to all or part of the Project Site.
- 5.6.3 The Parties acknowledge that, for certain parts of the Project, Developer must submit a variety of applications for Subsequent Approvals before Commencement of Construction. Developer shall be responsible for obtaining all Subsequent Approvals before the

start of any construction to the extent required under Applicable Law. Notwithstanding anything in this Agreement to the contrary, when considering any such application for a Subsequent Approval, the City shall apply the applicable provisions, requirements, rules, or regulations that are contained in the California Building Standards Code, as amended by the City, including requirements of the San José Building Code, Public Works Code, Subdivision Code, Mechanical Code, Electrical Code, Plumbing Code, Fire Code, or other uniform construction codes applicable on a City-Wide basis or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner.

5.7 Filing of Subdivision Maps. Developer shall have the right, from time to time and at any time, to file subdivision-related applications (including but not limited to applications for tentative maps, vesting tentative maps, final maps or phased final maps, lot line adjustments, lot mergers, and certificates of compliance) with respect to some or all of the Project Site, to subdivide, reconfigure, or merge the parcels comprising the Project Site as may be necessary or desirable in order to develop a particular part of the Project as shown generally in Exhibit B. The specific boundaries of parcels shall be set by Developer in accordance with all applicable subdivision and development standards and approved by the City during the subdivision process. Nothing in this Agreement shall authorize Developer to subdivide or use any of the Project Site for purposes of sale, lease, or financing in any manner that conflicts with the Subdivision Map Act or with the Subdivision Code. Nothing in this Agreement shall prevent the City from enacting or adopting changes in the methods and procedures for processing subdivision and parcel maps so long as such changes do not conflict with the provisions of this Agreement, including any timing requirements set forth herein or in the Exhibits, or with the Approvals.

## 5.8 Impact Fees.

- 5.8.1 <u>Generally.</u> The Project shall be subject to only those Processing Fees and Impact Fees as set forth in this <u>Section 5.8</u>, and the City shall not impose any new Processing Fees or Impact Fees on the development of the Project or impose new conditions or requirements for the right to develop the Project (including required contributions of land, public amenities, or services) except as set forth in this Agreement. The Parties acknowledge that the provisions contained in this <u>Section 5.8</u> are intended to implement the intent of the Parties that Developer have the right to develop the Project pursuant to specified and known criteria and rules, and that the City receive the benefits which will be conferred as a result of such development without abridging the right of the City to act in accordance with its powers, duties and obligations, except as specifically provided in this Agreement.
- 5.8.2 <u>Applicable Impact Fees</u>. The Impact Fees that apply to the Project are those Impact Fees set forth in Exhibit M hereto.
- (a) The Parties acknowledge that the Diridon Infrastructure Fee is otherwise an applicable Impact Fee. However, in-lieu of paying the fee, Developer will construct in-kind infrastructure improvements, as more particularly described in <a href="Exhibit I">Exhibit I</a>. The Parties acknowledge that the Parkland Dedication requirements of Chapter 19.38 of the San José Municipal Code, including payment of the Parkland Fee, otherwise apply to the Project. Developer will satisfy this obligation as more specifically described in <a href="Exhibit E">Exhibit E</a> and the exhibits and schedules thereto, subject to the default provisions provided therein. To the extent any Parkland Fee is owed, it shall be the Parkland Fee in effect upon the Effective Date of this Agreement, which Fee is reflected in <a href="Exhibit E3">Exhibit E3</a>, subject only to escalation based on the Engineering News Record Construction Cost Index. Processing Fees; Reimbursement Agreement. Processing Fees for the

Project shall be limited to the Processing Fees in effect, on a City-Wide basis or within the DSAP's Boundaries, applicable to the same or similarly situated (i) uses or (ii) work that Developer is asking the City to undertake, and applied in an equitable and non-discriminatory manner, at the time that Developer applies for the Subsequent Approval for which such Processing Fee is payable in connection with the applicable portion of the Project. The Reimbursement Agreement to be entered into between City and Developer pursuant to Section 4.5.4 shall provide for Processing Fees paid by Developer to be credited against any Developer obligation to pay City Costs in connection with City processing of Subsequent Approvals. [Intentionally Omitted.]

### 5.10 Changes in Federal or State Laws.

5.10.1 City's Exceptions. Each City Agency having jurisdiction over the Project shall exercise its discretion under this Agreement in a manner that is consistent with the public health and safety and shall at all times retain its respective authority to take any action that is necessary to protect the physical health and safety of the public (the "Public Health and Safety Exception") or reasonably calculated and narrowly drawn to comply with applicable changes in Federal or State Law affecting the physical environment (the "Federal or State Law Exception"), including the authority to condition or deny a Subsequent Approval, or to adopt a new Law applicable to the Project, so long as such condition or denial or new regulation (i) is limited solely to addressing a specific and identifiable issue in each case required to protect the physical health and safety of the public, or (ii) is required to comply with a Federal or State Law, and (iii) is applicable City-wide, or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner, and in the case of each of (i), (ii) and (iii) is not for independent discretionary policy reasons that are inconsistent with the Approvals or this Agreement or would be in conflict with the Approvals or this Agreement as set forth in

<u>Section 5.6.1</u>. Developer retains the right to dispute any City reliance on the Public Health and Safety Exception or the Federal or State Law Exception.

5.10.2 <u>Changes in Federal or State Laws</u>. If Federal or State Laws issued, enacted, promulgated, adopted, passed, approved, made, implemented, amended, or interpreted after the Effective Date have gone into effect and (i) preclude or prevent compliance with one or more provisions of the Approvals or this Agreement, or (ii) materially and adversely affect Developer's or the City's rights, benefits, or obligations, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such Federal or State Law. In such event, this Agreement shall be modified only to the extent necessary or required to comply with such Law, subject to the provisions of Section 5.10.4, as applicable.

Agreement Ordinance. This Agreement has been entered into in reliance upon the provisions of the Development Agreement Statute and the Development Agreement Ordinance. No amendment of or addition to the Development Agreement Statute or Development Agreement Ordinance that would affect the interpretation or enforceability of this Agreement or increase the obligations or diminish the development rights of Developer hereunder, or increase the obligations or diminish the benefits to the City hereunder, shall be applicable to this Agreement unless such amendment or addition is specifically required by Law or is mandated by a court of competent jurisdiction. If such amendment or change is permissive rather than mandatory, this Agreement shall not be affected.

5.10.4 <u>Termination of Agreement</u>. If any of the modifications, amendments or additions described in <u>Section 5.10.2</u> or <u>Section 5.10.3</u> or any changes in Federal or State Laws described above would materially and adversely affect the construction,

development, use, operation, or occupancy of the Project as currently contemplated by the Approvals, or any material portion thereof, such that the Project becomes economically infeasible as reasonably determined by Developer (a "Law Adverse to Developer"), then Developer shall notify the City and propose amendments or solutions that would maintain the benefit of the bargain (that is this Agreement) for both Parties. If any of the modifications, amendments, or additions described in Sections 5.10.2 or Section 5.10.3 or any changes in Federal or State Laws described thereunder would materially and adversely affect or limit the Community Benefits (a "Law Adverse to the City"), then the City shall notify Developer and propose amendments or solutions that would maintain the benefit of the bargain (that is this Agreement) for both Parties. Upon receipt of a notice under this Section 5.10.4, the Parties agree to meet and confer in Good Faith for a period of not less than ninety (90) days in an attempt to resolve the issue. If the Parties cannot resolve the issue in ninety (90) days or such longer period as may be agreed to by the Parties, then the Parties shall mutually select a mediator at JAMS in San José for nonbinding mediation for a period of not less than thirty (30) days. If the Parties remain unable to resolve the issue following such mediation, then (i) Developer shall have the right to terminate this Agreement following a Law Adverse to Developer upon not less than thirty (30) days prior notice to the City, and (ii) the City shall have the right to terminate this Agreement following a Law Adverse to the City upon not less than thirty (30) days prior notice to Developer; provided, notwithstanding any such termination, Developer shall be required to Complete the Community Benefits for development commenced in connection with a particular new Building as set forth in <u>Section 4</u>.

5.11 <u>No Action to Impede Approvals</u>. Except and only as required under <u>Section 5.10</u>, the City shall take no action under this Agreement, nor impose any condition on the Project, that would conflict with this Agreement or the Approvals. An action taken or condition

imposed shall be deemed to be in conflict with this Agreement or the Approvals if such actions or conditions result in the occurrence of one or more of the circumstances identified in Section 5.6.1.

- 5.12 Estoppel Certificates. Developer may, at any time, and from time to time, deliver notice to the Director of PBCE requesting that the Director of PBCE certify to Developer, a potential Transferee, or a potential lender to Developer, in writing that to the best of the Director of PBCE's knowledge: (i) this Agreement is in full force and effect and a binding obligation of the Parties; (ii) this Agreement has not been amended or modified, and if so amended or modified, identifying the amendments or modifications and stating their date and providing a copy or referring to the recording information; (iii) Developer is not in Default in the performance of its obligations under this Agreement, or if in Default, to describe therein the nature and amount of any such Defaults; and (iv) the findings of the City with respect to the most recent annual review performed pursuant to Section 8 of this Agreement. The Director of PBCE, acting on behalf of the City, shall execute and return such certificate within thirty (30) days after receipt of the request.
- 5.13 Existing, Continuing Uses and Interim Uses. The Parties acknowledge that the Existing Uses are lawfully authorized uses and may continue as such uses may be modified by the Project, provided that any modification thereof not a component of or contemplated by the Project is subject to the Zoning Code and the applicable provisions of Section 5. Developer may install interim or limited-term uses on the Project Site as provided for in the Downtown West Planned Development Zoning District, the accompanying General Development Plan, and/or the Downtown West Planned Development Permit.
- 5.14 <u>Taxes</u>. Nothing in this Agreement limits the City's ability to impose new or increased taxes or special assessments, or any equivalent or substitute tax or assessment, provided (i) the City shall not institute on its own initiative proceedings for any new or increased special tax

or special assessment for a land-secured financing district (including the special taxes under the Mello-Roos Community Facilities Act of 1982 (Government Code §§ 53311 et seq.) but not including business improvement districts or community benefit districts formed by a vote of the affected property owners) that includes the Project Site unless Developer gives its express, prior written consent (which it may withhold in its sole discretion) to or specifically requests such proceedings, and (ii) no such tax or assessment shall be targeted or directed at the Project, including, without limitation, any tax or assessment targeted solely at all or any part of the Project Site, unless Developer gives its express, prior written consent (which it may withhold in its sole discretion) to or specifically requests such proceedings. Nothing in the foregoing prevents the City from imposing any tax or assessment against the Project Site, or any portion thereof, that is enacted in accordance with Law and applies on a City-Wide basis to the same or similarly situated uses in an equitable and non-discriminatory manner.

### 6. NO DEVELOPMENT OBLIGATION

Except as set forth in Section 2.2 and elsewhere herein, including with respect to the delivery of Public Benefits as set forth in Exhibit C, D, E, and I, there is no requirement under this Agreement that Developer initiate or complete development of the Project, or any portion thereof, or that development be initiated or completed within any period of time or in any particular order. The development of the Project is subject to numerous factors that are not within the control of Developer or the City, such as availability of financing, interest rates, access to capital, and such other factors. Except as expressly required by this Agreement and the Approvals, the City acknowledges that Developer may develop the Project in such order and at such rate and times as Developer deems appropriate within the exercise of its sole and subjective business judgment. In *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), the California Supreme Court

ruled that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development and controlling the parties' agreement. It is the intent of the Parties to avoid such a result by acknowledging and providing for the timing of development of the Project in the manner set forth herein. The City acknowledges that such a right is consistent with the intent, purpose and understanding of the Parties to this Agreement, and that without such a right, Developer's development of the Project would be subject to the uncertainties sought to be avoided by the Development Agreement Statute, Chapter 56 and this Agreement.

### 7. MUTUAL OBLIGATIONS

- 7.1 <u>Notice of Completion, Revocation or Termination.</u> Upon any early revocation or termination of this Agreement (as to all or any part of the Project Site) under the circumstances and in the manner permitted herein, the Parties agree to execute a written statement acknowledging such revocation or termination in the form attached as <u>Exhibit N</u>, signed by the appropriate agents of the City and Developer, and record such instrument in the Official Records. In addition, upon Developer's request, when one or more Buildings have been Completed, and all of the Community Benefits tied to those specific Buildings have also been Completed, the City and Developer shall execute and record a Notice of Completion in the form attached as <u>Exhibit N</u> for the applicable property on which the Buildings or other facilities or improvements are located.
- 7.2 <u>General Agreement to Cooperate</u>. As set forth in Section 5.3 above, in this <u>Section 7.2</u> (including <u>Section 7.2.1</u> below) and elsewhere in this Agreement, the Parties agree to cooperate with one another to expeditiously implement the Project in accordance with the Approvals, any Subsequent Approvals and this Agreement, and to undertake and complete all actions or proceedings reasonably necessary or appropriate to ensure that the objectives of this

Agreement, the Approvals and any Subsequent Approvals are implemented, including any stated review periods therein. Except for ordinary administrative costs of the City, nothing in this Agreement obligates the City to spend any sums of money or incur any costs other than City Costs or costs that Developer must reimburse through the payment of permitted Processing Fees. The Parties agree that the PBCE Department or Public Works Department, as appropriate (or such other department to whom the obligation is delegated by the Director of PBCE after notice to Developer), will act as the City's lead agency to facilitate coordinated City review of applications for the Project. As such, PBCE Department or Public Works Department (or such other designated department) staff will: (i) work with Developer to ensure that all such applications to the City are technically sufficient and constitute complete applications, and (ii) interface with City staff responsible for reviewing any application under this Agreement to facilitate an orderly, prompt and efficient review process that avoids delay and redundancies, and that is undertaken in the manner and within any timeframes set forth in this Agreement, the Approvals, and any Subsequent Approvals.

7.2.1 Specific Actions by the City. The City actions and proceedings subject to this Agreement shall be through the PBCE Department, as well as affected City Agencies (and when required by applicable Law, the City Council), and shall include instituting and completing proceedings for temporary or permanent closing or occupancy, widening, modifying (including changes from vehicular to pedestrian use) or changing the grades of streets, alleys, sidewalks, and other rights-of-way, and other necessary modifications of the streets, the street layout, and other public or private rights-of-way in or near the Project Site, including streetscape improvements, encroachment permits, improvement permits, and any requirement to abandon, remove, and relocate public utilities (and, when applicable, City utilities) within the public rights-

of-way as identified in the Approvals and Subsequent Approvals. Except as set forth in Section 9.4.4 and upon receiving payments of all applicable Processing Fees then due, City Agencies shall process with due diligence all submissions and applications by Developer on all permits, approvals, construction, or occupancy permits for the Project subject to the acceptance of the same as complete.

7.3 <u>Non-City Approvals; Cooperation to Obtain Permits</u>. The Parties acknowledge that certain portions of the Project may require the approval of Federal, State, and local governmental agencies that are independent of the City and not a Party to this Agreement ("Non-City Agencies"). The City will cooperate with reasonable requests by Developer in connection with Developer's efforts to obtain permits, agreements, or entitlements from Non-City Agencies as may be necessary or desirable for the development, operation and use of the Project, including with respect to the study and development of the District Systems as contemplated by the MOU (each, a "Non-City Approval").

7.3.1 <u>City Cooperation Regarding Trail Alignments.</u> [PENDING NEGOTIATIONS] City and Developer understand and agree that the proposed Los Gatos Creek Trail Multi-Use Trail segments included as part of the Project will enhance trail connectivity in the City of San José, and also will provide for the cohesive open space network envisioned by the Developer and City as part of the Project. To allow for Completion of the trail alignments, City specifically agrees to cooperate with Developer, and to lead such efforts as appropriate or necessary, to secure authorization, including an easement, joint use, or similar agreement, for trail alignments and under-crossings that may affect property owned by the Santa Clara Valley Water District.

- 7.3.2 <u>Conditions of Cooperation to Obtain Permits</u>. The City's commitment to Developer under this <u>Section 7.3</u> is subject to the following conditions:
- (a) Throughout the permit process for any Non-City Approval, Developer shall consult and coordinate with each affected City Agency in Developer's efforts to obtain the permits, agreements, or entitlements, and each such City Agency shall cooperate reasonably with Developer in Developer's efforts to obtain the same.
- [SUBJECT (b) TO **NEGOTIATION** RE: **SPECIFIC** OBLIGATIONS WITH NON-CITY AGENCIES ANTICIPATED AS PART OF PROJECT IMPLEMENTATION] Developer shall not agree to conditions or restrictions in any Non-City Approval that could create: (1) any obligations on the part of any City Agency that are in addition to any obligations under applicable Laws or other agreements with the applicable Non-City Agency, unless the City Agency agrees in writing, following the receipt of any necessary governmental approvals, to assume such obligations; or (2) any restrictions on City property that are in addition to any obligations under applicable Laws or other agreements with the applicable Non-City Agency, unless in each instance the City, including each affected City Agency, has previously approved in its sole discretion the conditions or restrictions in writing following the receipt of any necessary governmental approvals.
- (c) The City shall cooperate with public utilities and communication service providers, including as necessary for the District Systems, to the extent that the cooperation efforts requested by Developer are consistent with the City's typical efforts in connection with other major development and construction projects in the City.
- 7.3.3 <u>Costs.</u> Developer shall bear all costs associated with applying for and obtaining any necessary Non-City Approval. Developer, at no cost to the City, shall be solely

responsible for complying with any Non-City Approval and any and all conditions or restrictions imposed on Developer or the Project as part of a Non-City Approval. Developer shall pay or otherwise discharge any fines, penalties, or corrective actions imposed as a result of Developer's failure to comply with any Non-City Approval.

A Cooperation in the Event of Third-Party Challenge. In the event any administrative, legal, or equitable action or proceeding is instituted by any party, other than the City or Developer, challenging the validity or performance of any provision of this Agreement, the Project, the Approvals or Subsequent Approvals, the adoption or certification of the FEIR or other actions taken pursuant to CEQA, or other approvals under Laws relating to the Project, any action taken by the City or Developer in furtherance of this Agreement, or any combination thereof relating to the Project or any portion thereof ("Third-Party Challenge"), the Parties shall cooperate in defending against such challenge. The City shall promptly notify Developer of any Third-Party Challenge instituted against the City and/or the Project. To the extent permitted by then-applicable law, City agrees to take actions consistent with AB 900 to facilitate expedited legal review of any Third Party Challenge related to a Subsequent Approval.

7.4.1 Developer shall assist and cooperate with the City at Developer's own expense in connection with any Third-Party Challenge. The City Attorney's Office may use its own legal staff or outside counsel in connection with defense of the Third-Party Challenge, at the City Attorney's sole discretion. Developer shall reimburse the City for its actual costs in defense of the action or proceeding, including but not limited to the time and expenses of the City Attorney's Office and any outside counsel retained in connection with the defense and any consultants pursuant to a Reimbursement Agreement.

- 7.4.2 To the extent that any such Third-Party Challenge results in the entry of a final judgment or order limiting Developer's right to proceed with the Project or any material portion thereof under this Agreement (whether the Project commenced or not), including the City's actions taken pursuant to CEQA, Developer may elect to terminate this Agreement. Upon any such termination (or, upon the entry of a judgment terminating this Agreement, if earlier), the City and Developer shall jointly seek to have the Third-Party Challenge dismissed. Developer shall be responsible for payment of, any costs, damages, attorney fee awards, or combination thereof that any court of competent jurisdiction may award to the third party as a result of any Third-Party Challenge.
- 7.5 Permits to Enter City Property. [FINAL LANGUAGE PENDING NEGOTIATIONS RE ENCROACHMENT] Subject to the rights of any third party, the rights of the public, and the City's reasonable agreement on the scope of the proposed work and insurance and security requirements, each City Agency with jurisdiction shall grant permits to enter Cityowned property on the City's standard form permit, including, without limitation, provisions regarding release, waivers, and indemnification in keeping with the City's standard practices, so long as the same is consistent with Applicable Law, in order to permit Developer to enter Cityowned property as necessary to construct the Project or comply with or implement the Approvals, Subsequent Approvals, or other requirements in this Agreement.
- 7.6 <u>Infrastructure Reimbursement</u>. The Project provides for the construction of significant new or upgraded infrastructure within the Project Site. Developer has provided a cost estimate of approximately one hundred seventy-four million dollars (\$174,000,000) for the upgraded infrastructure, which includes costs for improvements both included and not included in the existing Diridon Station Area Basic Infrastructure Fee per San José Municipal Code Chapter

14.35. The reimbursement amount will be based on the completed construction costs. Developer's cost estimate for infrastructure improvements includes, among other improvements, enhanced right-of-way improvements, utilities upgrades and relocation, and undergrounded power and communication lines, as further detailed in the Infrastructure Plan included as <u>Exhibit I</u>.

7.6.1 The City recognizes that some of the new and/or upgraded infrastructure may be beneficial not only to development within the Project Site but also to existing and future development outside of the Project Site, including development within the broader DSAP's Boundaries and surrounding portions of the City. Therefore, the City will take actions reasonably necessary, and Developer will cooperate reasonably, to develop an updated or new infrastructure program, including preparation of appropriate infrastructure plans, technical (e.g., "nexus") studies and associated financial feasibility studies, that include the Project Site and which analyze the infrastructure improvements to be installed by Developer. Such an infrastructure program may include impact mitigation fees, community facilities districts, infrastructure facilities districts, or other similar programs or mechanisms for the funding of the cost of infrastructure improvements ("Funding Mechanism"). Upon adoption of a Funding Mechanism(s), Developer would be eligible to receive a credit and/or reimbursement (including pursuant to Municipal Code Section 14.35 et seq.) for the costs of installing qualifying improvements within the Plan Area, and the City and Developer would then reasonably cooperate to enter into a reimbursement agreement, for such reimbursement and/or credit. To be eligible for such credit and/or reimbursement, all of the following would need to occur:

(a) City Council approval of a Funding Mechanism(s) in accordance with State laws;

- (b) Construction of qualifying infrastructure subject to credit or reimbursement, which are supported by the appropriate technical (e.g., "nexus") studies and associated financial feasibility studies;
- (c) City Council approval of a reimbursement agreement between the City and Developer setting forth the terms and conditions for reimbursement, consistent with the above conditions;
- (d) City collects sufficient funding in the infrastructure program(s) to provide reimbursement, subject to annual appropriation of the City Council; and
  - (e) Compliance with applicable local, state, and federal laws.

The City agrees to work with Developer to secure additional infrastructure funding, including grants and/or reimbursement from available programs to provide infrastructure improvements in the Plan Area. For example, the City will work with Developer to implement the undergrounding of overhead electrical facilities by the Developer if legally permissible under the Commission (CPUC) Electric California Public Utilities Rule No. 20 program (https://www.pge.com/nots/rates/tariffs/tm2/pdf/ELEC 3860-E.pdf) related **CPUC** and regulations and orders subject to CPUC and PG&E approval, as well as, San Jose Municipal Code, Chapters 15.20, 15.24 and/or 15.26. Any and all undergrounding of electric facilities in the Plan Area by the Developer or a third party such as PG&E, shall also comply with the City's undergrounding policies, including any electrical voltage level within the project area (currently set up to 115kV), and further including without limitation, the City's annual Fiscal Year Workplan for the Rule 20A and Rule 20B (In-Lieu Fee) Underground Utility Program and the Fiscal Year Rule 20B (In-Lieu Fee) Undergrounding Master Plan, as may be approved by the City Council.

- 7.6.2 In addition, City and Developer shall work mutually towards the solution of modifying the existing North Montgomery Street at-grade railroad crossing to serve as the sole emergency vehicle access point to Block A. Such work shall include obtaining any necessary CPUC approval of changes to the crossing. New technologies would be introduced at that crossing, such as remotely controlled bollards/gates and integrated communications between building fire alarm systems and rail and/or mass notification systems. City and Developer shall work in coordination to implement the appropriate technologies and necessary upgrades to the crossing to achieve safe and reliable emergency vehicle access to Block A.
- 7.6.3 <u>Cinnabar Storm Drain Reimbursement</u>. With respect to Developer's work to upgrade the City-owned stormwater drainage within Cinnabar Street (the "Cinnabar Storm Drain Work" or "Work"), Developer shall not undertake such Work unless City agrees to reimburse Developer in full. Developer shall not proceed with the Work unless and until City has provided Developer with sufficient information to demonstrate that it has funding sources available to fully reimburse Developer for its costs associated therewith immediately upon Completion of the Work. Alternatively, City and Developer may agree that Developer is to be reimbursed through the form of credits toward connection fees.
- 7.7 Good Faith and Fair Dealing. The Parties shall cooperate with each other and act in Good Faith in complying with the provisions of this Agreement and implementing the Approvals and any Subsequent Approvals. In their course of performance under this Agreement, each Party shall refrain from doing anything that would render its performance under this Agreement impossible. The Parties shall cooperate and shall undertake such actions as may be reasonably necessary to implement the Project as contemplated by this Agreement, including such

actions as may be necessary to satisfy or effectuate any applicable conditions precedent to the performance of the Public Benefits.

7.8 Other Necessary Acts. Each Party shall use Good Faith Efforts to take such further actions as may be reasonably necessary to carry out this Agreement, the Approvals, and any Subsequent Approvals, in accordance with the terms of this Agreement (and subject to all applicable Laws) in order to provide and secure to each Party the full and complete enjoyment of its rights and privileges hereunder.

#### 8. PERIODIC REVIEW OF DEVELOPER'S COMPLIANCE

- Agreement Statute and the Development Agreement Ordinance, the PBCE Director shall set a hearing for review of Developer's compliance with this Agreement before the Planning Commission on an annual basis, and at any other time that the PBCE Director determines that there are reasonable grounds to believe the Developer may be in Default. The Director of PBCE may elect to forego an annual review if no significant construction work occurred within the Project Site during that year, or if such review is otherwise not deemed necessary in the sole but reasonable opinion of the Director. The City's failure to conduct or complete an annual review shall neither affect the validity or enforceability of this Agreement nor constitute a waiver of any right or remedy the City may have under the Agreement.
- 8.2 <u>Review Procedure</u>. In conducting the required initial and annual reviews of Developer's compliance with this Agreement, the Director of PBCE shall follow the process set forth in the Development Agreement Ordinance and this <u>Section 8.2</u>.
- 8.2.1 <u>Required Information from Developer</u>. Upon request by the Director of PBCE, but not more than sixty (60) nor less than thirty (30) days before the Annual

Review Date, Developer shall provide a letter to the Director of PBCE explaining, with appropriate backup documentation, Developer's compliance with this Agreement, including, but not limited to, compliance with the requirements regarding Community Benefits. The burden of proof, by substantial evidence, of compliance is upon Developer.

8.2.2 City Report. Within sixty (60) days after Developer submits such letter, the Director of PBCE shall review the information submitted by Developer and all other available evidence regarding Developer's compliance with this Agreement, and shall consult with applicable City Agencies as appropriate. All such available evidence including final staff reports shall, upon receipt by the City, be made available as soon as possible to Developer. Within 60 days of Developer's submittal of its letter, the Director of PBCE shall notify Developer in writing whether Developer has complied with the terms of this Agreement (the "City Report"), and post the City Report on the PBCE Department's website. If the Planning Commission, or the City Council in the event of referral thereto, finds Developer not in compliance with this Agreement, then the City may pursue available rights and remedies in accordance with this Agreement and the Development Agreement Ordinance. The City's failure to initiate or to timely complete the annual review shall not be a Default and shall not be deemed to be a waiver of the right to do so at a later date. All costs incurred by the City under this Section shall be included in the City Costs.

8.2.3 <u>Effect on Transferees</u>. If Developer has effected a Transfer so that its interest in the Project Site, or a portion or portions thereof, has/have been divided between Developer and/or Transferees, then the annual review hereunder shall be conducted separately with respect to Developer and each Transferee, and the Planning Commission or City Council, as applicable, shall make its determinations and take its action separately with respect to Developer and each Transferee, as applicable, pursuant to the Development Agreement Ordinance. If the City

Council terminates, modifies, or takes such other actions as may be specified in the Development Agreement Ordinance and this Agreement in connection with a determination that Developer or a Transferee has not complied with the terms and conditions of this Agreement, such action by the Director of PBCE, Planning Commission, or City Council shall be effective only as to the party to whom the determination is made and the portions of the Project Site in which such party has an interest.

8.2.4 <u>Default</u>. The rights and powers of the City under this <u>Section 8.2</u> are in addition to, and shall not limit, the rights of the City to terminate or take other action under this Agreement on account of the commission by Developer of an event of Default.

### 9. ENFORCEMENT OF AGREEMENT; DEFAULT; REMEDIES

- 9.1 <u>Enforcement</u>. The only Parties to this Agreement are the City and Developer (and any successors and Transferees). This Agreement is not intended, and shall not be construed, to benefit or be enforceable by any other person or entity whatsoever.
- 9.2 Meet and Confer Process. Before sending a notice of default in accordance with Section 9.3, the Party that may assert that the other Party has failed to perform or fulfill its obligations under this Agreement shall first attempt to meet and confer with the other Party to discuss the alleged failure and shall permit such Party a reasonable period, but not less than forty-five (45) days, to respond to or cure such alleged failure; provided, however, the meet and confer process shall not be required (i) for any failure to pay amounts due and owing under this Agreement, or (ii) if a delay in sending a notice pursuant to Section 9.3 would impair, prejudice or otherwise adversely affect a Party or its rights under this Agreement. The Party asserting such failure shall request that such meeting and conference occur within ten (10) business days following the request and if, despite the Good Faith Efforts of the requesting Party, such meeting

has not occurred within ten (10) business days of such request, such Party shall be deemed to have satisfied the requirements of this Section and may proceed in accordance with the issuance of a notice of default under Section 9.3.

9.3 Default. Except as otherwise set forth herein and/or in the Exhibits hereto, the following shall constitute a "Default" under this Agreement: (i) the failure to make any payment when due where such failure continues beyond the date that is thirty (30) days following notice that such payment was not made when due; and (ii) the failure to perform or fulfill any other material term, provision, obligation, or covenant of this Agreement and the continuation of such failure for a period of sixty (60) days following notice and demand for compliance. Notwithstanding the foregoing, if a failure can be cured but the cure cannot reasonably be completed within sixty (60) days, then it shall not be considered a Default if a cure is commenced within said 60-day period and diligently prosecuted to completion thereafter. Any notice of default given by a Party shall specify the nature of the alleged failure and, where appropriate, the manner in which said failure satisfactorily may be cured (if at all). Notwithstanding any other provision in this Agreement to the contrary but subject to Article 12 below, if Developer conveys or transfers some but not all of the Project and there is more than one Party that assumes obligations of "Developer" under this Agreement, there shall be no cross-default between the separate Parties that assumed Developer obligations. Accordingly, if a Transferee Defaults, it shall not be a Default by any other Transferee or Party that owns a different portion of the Project Site. As an alternative to the Default procedure set forth herein, the City may elect to first hold a compliance review as set forth in the Development Agreement Ordinance. Further, in the event of noncompliance with a condition required under an administrative permit or any subsequent planned development permit issued for a conditional or special use, the PBCE Director may revoke, suspend or modify

the administrative permit or subsequent planned development permit or otherwise enforce the requirements of the administrative permit and subsequent planned development permit pursuant to the remedies available to the City under the San Josè Municipal Code. A violation of an administrative permit or a subsequently issued planned development permit for a conditional or special use shall not, by itself, constitute a violation of the Downtown West PD Permit.

### 9.4 Remedies.

- 9.4.1 <u>Specific Performance</u>. Subject to, and as limited by, the provisions of <u>Section 9.4.3</u>, <u>9.4.4</u> and <u>9.4.5</u>, in the event of a Default, the remedies available to a Party shall include specific performance of this Agreement in addition to any other remedy available at law or in equity.
- 9.4.2 <u>Termination</u>. Subject to the limitation set forth in <u>Section 9.3, 9.4.4</u> and <u>9.4.5</u>, in the event of a Default, the non-defaulting Party may elect to terminate this Agreement by sending a notice of termination to the other Party, which notice of termination shall state the Default. This Agreement will be considered terminated effective upon the date set forth in the notice of termination, which shall in no event be earlier than sixty (60) days following delivery of the notice.
- 9.4.3 <u>Limited Damages</u>. The Parties have determined that except as set forth in this <u>Section 9.4.3</u>, (i) monetary damages are generally inappropriate, (ii) it would be extremely difficult and impractical to fix or determine the actual damages suffered by a Party as a result of a Default hereunder, and (iii) equitable remedies and remedies at law not including damages but including specific performance, termination, and other injunctive or declaratory relief are particularly appropriate remedies for enforcement of this Agreement. Consequently, Developer agrees that the City shall not be liable to Developer for damages under this Agreement, and the

City agrees that Developer shall not be liable to the City for damages under this Agreement, and each covenants not to sue the other for or claim any damages under this Agreement and expressly waives its right to recover damages under this Agreement, except as follows: (1) either Party shall have the right to recover actual damages only (and not consequential, punitive or special damages, each of which is hereby expressly waived) for a Party's failure to pay sums to the other Party as and when due under this Agreement, (2) the City shall have the right to recover actual damages for Developer's failure to make any payment due, including any applicable Public Benefits that are in the form of a cash payment, under this Agreement, (3) for any Public Benefit for which specific performance is determined by a court of competent jurisdiction not to be an available remedy (and the attached Exhibit does not include a liquidated damages remedy), except if and to the extent directly or indirectly resulting from action or inaction by or on behalf of City or any City Agencies, the City shall have the right to monetary damages according to proof against Developer equal to the costs that would have been incurred by Developer to Complete the Public Benefit, and (4) the City shall have the right to administrative penalties or liquidated damages if and only to the extent expressly stated in an Exhibit or in Applicable Laws. For purposes of the foregoing, "actual damages" means the actual amount of the sum due and owing under this Agreement, with interest as provided by Law, together with such judgment collection activities as may be ordered by the judgment, and no additional sums.

9.4.4 <u>City Processing/Certificates of Occupancy</u>. [PENDING NEGOTIATIONS] The City shall not be required to process any requests for approval or take other actions under this Agreement during any period in which payments from Developer are past due, except as otherwise set forth in this Agreement, including the Exhibits and Schedules attached hereto. Except as otherwise set forth in this Agreement, including the Exhibits and Schedules

attached hereto, the City shall have the right to withhold a Certificate of Occupancy for a Building until all of the Public Benefits and other obligations triggered by, or associated with that Building have been Completed or otherwise substantially satisfied; provided, however, if the City issues a Certificate of Occupancy before such obligations are Completed or substantially satisfied, then Developer shall promptly Complete such obligations following issuance.

- 9.5 Time Limits; Waiver; Remedies Cumulative. Failure by a Party to insist upon the strict or timely performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. No waiver by a Party of any condition or failure of performance, including a Default, shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from any omission by a Party to take any action with respect to such failure. No express written waiver shall affect any other condition, action or inaction, or cover any other period of time, other than as specified in such express waiver. One or more written waivers under any provision of this Agreement shall not be deemed to be a waiver of any subsequent condition, action or inaction, and the performance of the same or any other term or provision contained in this Agreement. Nothing in this Agreement shall limit or waive any other right or remedy available to a Party to seek injunctive relief or other expedited judicial and/or administrative relief to prevent irreparable harm. Except as expressly stated in this Agreement to the contrary, no right or remedy is intended to be exclusive of any other right or remedy; and each and every such right or remedy shall be cumulative.
- 9.6 <u>Attorneys' Fees</u>. Should legal action be brought by either Party against the other for a Default under this Agreement or to enforce any provision herein, the prevailing Party

in such action shall not be entitled to recover its attorneys' fees and costs from the other Party.

Each Party to the legal action shall bear its own attorneys' fees and costs.

### 10. FINANCING; RIGHTS OF MORTGAGEES.

- 10.1 Owner's Right to Mortgage. Nothing in this Agreement limits the right of Developer to mortgage or otherwise encumber all or any portion of the Project Site for the benefit of any Mortgagee as security for one or more loans. Developer represents that there are no Mortgages on the Project Site as of the Effective Date.
- Mortgagee Not Obligated to Construct. Notwithstanding any of the 10.2 provisions of this Agreement, including, but not limited to, those which are or are intended to be covenants running with the land, a Mortgagee, including any Mortgagee who obtains title to the Project Site or any part thereof as a result of foreclosure proceedings, or conveyance or other action in lieu thereof, or other remedial action, shall in no way be obligated by the provisions of this Agreement to construct or complete the Project or any part thereof or to guarantee such construction or completion. The foregoing provisions shall not be applicable to any party who, after a foreclosure, conveyance or other action in lieu thereof, or other remedial action, obtains title to some or all of the Project Site from or through the Mortgagee, or any other purchaser at a foreclosure sale other than the Mortgagee itself, on which certain Public Benefits must be Completed as set forth in Section 4.1. Nothing in this Section or any other Section or provision of this Agreement shall be deemed or construed to permit or authorize any Mortgagee or any other person or entity to devote the Project Site or any part thereof to any uses other than uses consistent with this Agreement and the Approvals, and nothing in this Section shall be deemed to give any Mortgagee or any other person or entity the right to construct any improvements under this

Agreement (other than as needed to conserve or protect improvements or construction already made) unless or until such person or entity assumes Developer's obligations under this Agreement.

Whenever the City shall deliver any notice or demand to the Developer with respect to any breach or default by the Developer in its obligations under this Agreement, the City shall at the same time forward a copy of such notice or demand to each Mortgagee having a Mortgage on the real property which is the subject of the breach or default who has previously made a written request to the City therefor, at the last address of such Mortgagee specified by such Mortgagee in such notice. In addition, if such breach or default remains uncured for the period permitted with respect thereto under this Agreement, the City shall deliver a notice of such failure to cure such breach or default to each such Mortgagee at such applicable address. A delay or failure by the City to provide such notice required by this Section shall extend, for the number of days until notice is given, the time allowed to the Mortgagee for cure. In accordance with Section 2924 of the California Civil Code, the City requests that a copy of any notice of default and a copy of any notice of sale under any Mortgage be mailed to the City at the address for notices under this Agreement.

Mortgagee's Option to Cure Defaults. After receiving any notice of failure to cure referred to in Section 10.3, each Mortgagee shall have the right, at its option, to commence within the same period as the Developer to remedy or cause to be remedied any event of default, plus an additional period of: (a) thirty (30) days to cure a monetary event of default; and (b) sixty (60) days to cure a non-monetary event of default which is susceptible of cure by the Mortgagee without obtaining title to the applicable property. If an event of default is not cured within the applicable cure period, then the City nonetheless shall refrain from exercising any of its remedies with respect to the event of default if, within the Mortgagee's applicable cure period: (i) the

Mortgagee notifies the City that it intends to proceed with due diligence to foreclose the Mortgage or otherwise obtain title to the subject property; and (ii) the Mortgagee commences foreclosure proceedings within sixty (60) days after giving such notice, and thereafter diligently pursues such foreclosure to completion; and (iii) after obtaining title, the Mortgagee diligently proceeds to cure those events of default: (A) which are required to be cured by the Mortgagee and are susceptible of cure by the Mortgagee, and (B) of which the Mortgagee has been given notice by the City. Any such Mortgagee or Transferee of a Mortgagee who shall properly Complete the improvements relating to the Project Site or applicable part thereof shall be entitled, upon written request made to the Agency, to a Notice of Completion.

anything to the contrary in this Agreement, no Mortgagee shall have any obligations or other liabilities under this Agreement unless and until it acquires title by any method to all or some portion of the Project Site (referred to hereafter as "Foreclosed Property"). A Mortgagee that acquires title by foreclosure to any Foreclosed Property shall take title subject to all of the terms and conditions of this Agreement, to the extent applicable to the Foreclosed Property, including any claims for payment or performance of obligations which are due as a condition to enjoying the benefits of this Agreement. Upon the occurrence and continuation of an uncured default by a Mortgagee or Transferee in the performance of any of the obligations to be performed by such Mortgagee or Transferee pursuant to this Agreement, the City shall be afforded all its remedies for such uncured default as provided in this Agreement.

10.6 <u>No Impairment of Mortgage</u>. No default by the Developer under this Agreement shall invalidate or defeat the lien of any Mortgagee. Neither a breach of any obligation secured by any Mortgage or other lien against the mortgaged interest nor a foreclosure under any

Mortgage or other lien, shall defeat, diminish, render invalid or unenforceable, or otherwise impair the Developer's rights or obligations or constitute a default under this Agreement.

10.7 <u>Cured Defaults</u>. Upon the curing of any event of default by Mortgagee within the time provided in this Article 10, the City's right to pursue any remedies with respect to the cured event of default shall terminate.

### 11. AMENDMENT; TERMINATION; EXTENSION OF TERM

- Amendment or Termination. This Agreement may only be amended with the mutual written consent of the City and Developer, provided following a Transfer, the City and Developer or any Transferee may amend this Agreement as it affects Developer or the Transferee and the portion of the Project Site owned by Developer or the Transferee without affecting other portions of the Project Site or other Transferees. Similarly, subject to any required environmental review, this Agreement may be amended to include any land or legal parcels that are located within the Project's Planned Development Zoning and General Development Plan, but which are not originally included in this Agreement, and in which Developer has a legal or equitable interest and to which Developer desires to have this Agreement apply, and any such amendment may approved and entered into by the Director of PBCE. Other than upon the expiration of the Term and except as provided in Sections 3.2, 5.10.4, 7.4.2, 9.3, and 11.2, this Agreement may only be terminated with the mutual written consent of the Parties. The procedure for an amendment shall be as specified in the Development Agreement Ordinance.
- 11.2 <u>City's Early Termination Rights for Failure to Satisfy Ten or Twenty Year</u>

  <u>Development Obligations</u>. If Developer fails to satisfy the Ten Year Development Obligation or the Twenty Year Development Obligation, then (i) the City may give Developer notice at any time prior to the date that is one hundred eighty (180) days following the last date by which Developer

must satisfy (a) the Ten Year Development Obligation, in the case of a notice re the failure to satisfy the Ten Year Development Obligation or (b) the Twenty Year Development Obligation, in the case of a notice re the failure to satisfy the Twenty Year Development Obligation. If the City fails to give the applicable notice prior to the expiration of the applicable 180-day period, then the City shall have waived its rights to give such notice and shall no longer have the right to terminate this Agreement as to the applicable development obligation. If the City gives a termination notice within the 180-day time period, then, by notice to the City given within fifteen (15) days after the City's delivery of the notice of failure, Developer shall have the right to request: (i) that the City meet and confer with Developer to discuss the alleged failure, in which case the Parties shall thereafter promptly meet and confer over a period of thirty (30) days and use Good Faith Efforts to address the alleged failure and whether termination of this Agreement can be averted or (ii) that the City hold a Director's hearing in accordance with Section 8 above (which hearing shall be scheduled as soon as reasonably possible but in no event sooner than thirty (30) days after Developer's request) in order to consider the alleged failure and whether termination of this Agreement can be averted. If Developer does not timely give such a notice, and Developer fails to satisfy the applicable development obligation within sixty (60) days after the City's timely delivery of the notice of failure, then this Agreement shall terminate effective as of the date immediately following the expiration of such 60-day period. If as a result of the meet and confer process or the Director's hearing, the Parties are able to avert a termination, then the Director of PBCE shall have the authority on behalf of the City to enter into any amendment(s) to this Development Agreement necessary to memorialize the Parties' agreement.

11.3 <u>Termination and Vesting</u>. Any termination under this Agreement shall concurrently effect a termination of the Approvals with respect to the terminated portion of the

Project Site, except as to any Approval pertaining to a Building that has Commenced Construction in reliance thereon, and except as to the General Plan amendments and adopted Downtown West Planned Development Zoning District and accompanying General Development Plan. In the event of any termination of this Agreement by Developer resulting from a Default by the City and except to the extent prevented by such City Default, Developer's obligation to Complete the applicable Community Benefits shall continue as to any Building which has Commenced Construction, and all relevant and applicable provisions of this Agreement shall be deemed to be in effect as such provisions are reasonably necessary in the construction, interpretation, or enforcement of this Agreement as to any such surviving obligations. The City's and Developer's rights and obligations under this Section 11.3 shall survive the termination of this Agreement.

11.4 Amendment Exemptions. No modification to a diagram or figure included as an Exhibit to this Agreement, and that is marked as "conceptual", shall by itself require an amendment to this Agreement. No issuance of a Subsequent Approval, or amendment of an Approval or Subsequent Approval, shall by itself require an amendment to this Agreement. No change to the Project that is authorized to be approved pursuant to procedures described in the Downtown West Planned Development Zoning District or the Downtown West Planned Development Permit shall require an amendment to this Agreement [PENDING FINAL GDP AND ZONING LANGUAGE]. Further, in the event a Public Benefits Adjustment is required, such Adjustment shall not by itself require an amendment to this Agreement [PENDING NEGOTIATION]. Upon issuance or approval, any such matter shall be deemed to be incorporated automatically into the Project and vested under this Agreement (subject to any conditions set forth in the amendment or Subsequent Approval). Notwithstanding the foregoing, if there is any direct conflict between the terms of this Agreement and a Subsequent Approval, or between this

Agreement and any amendment to an Approval or Subsequent Approval, then the Parties shall concurrently amend this Agreement (subject to all necessary approvals in accordance with this Agreement) in order to ensure the terms of this Agreement are consistent with the proposed Subsequent Approval or the proposed amendment to an Approval or Subsequent Approval. The Director of PBCE, Director of Public Works, and the Planning Commission, as applicable, shall have the right to approve changes to the Project as described in the Exhibits, including the Downtown West Planned Development Zoning District and the Downtown West Planned Development Permit, and in keeping with the City's customary practices, and any such changes shall not be deemed to conflict with or require an amendment to this Agreement or the Approvals so long as they do not constitute a Material Change [SUBJECT TO FINAL DISCUSSION ON THIS TERM]. If the Parties fail to amend this Agreement as set forth above when required, however, then the terms of this Agreement shall prevail over any Subsequent Approval or any amendment to an Approval or Subsequent Approval that conflicts with this Agreement.

11.5 <u>Extension Due to Legal Action or Referendum; Force Majeure; Rail</u>

Improvement Activity.

challenging this Agreement, the FEIR, or an Approval having the direct or indirect effect of delaying this Agreement or any Approval (including but not limited to any CEQA determinations), including any challenge to the validity of this Agreement or any of its provisions, or if this Agreement or an Approval is suspended pending the outcome of an electoral vote on a referendum, then the Term of this Agreement and all Approvals shall be extended for the number of days equal to the period starting from the commencement of the litigation or the suspension (or as to Approvals, the date of the initial grant of such Approval) to the end of such litigation or suspension

(a "Litigation Extension"); provided, however, that if any litigation is filed challenging any Subsequent Approval which has the effect of delaying any Subsequent Approval, the term of this Agreement solely as it applies to the specific Subsequent Approval(s) shall receive a Litigation Extension. The Parties shall document the start and end of a Litigation Extension in writing within thirty (30) days from the applicable dates; provided, however, that with respect to any litigation to which the City is a party, there shall be no need for the Parties to document the start of such litigation.

A Party's performance of its obligations under this Agreement shall be excused during, and extended for a period of time equal to, any period of delay caused by reason of Force Majeure. Upon the request of any Party, an extension of time will be granted for the period of delay caused by a Force Majeure Event, as provided in this Section 11.5.2, and no Party shall be deemed to be in default under this Agreement where delays in performance or failure to perform are caused by a Force Majeure Event and authorized pursuant to this Section 11.5.2. Promptly after learning of the occurrence of a Force Majeure Event that actually causes or is reasonably anticipated (by the affected Party) to cause delay, the affected Party shall notify the other Party in writing of the occurrence of such Force Majeure Event, the manner in which such occurrence is likely to cause delay, and the anticipated length of delay in performance resulting from the Force Majeure Event. Upon the other Party's receipt of such notice, the Term of this Agreement then in effect shall be extended by a period of time equal to the number of days during which performance is delayed due to the specified Force Majeure Event.

11.5.3 <u>BART or Rail Improvement Activity</u>. For development of the Project on the portion of the Project Site located north of Santa Clara Street, a Party's performance of its obligations under this Agreement shall be excused during, and extended for a period of time

equal to, any period of delay caused by reason of construction staging or other activities related to an extension of the Bay Area Rapid Transit system by the Bay Area Rapid Transit ("BART") agency, or other rail or infrastructure improvements that are not part of the Project ("Rail Improvement Activity") where such Rail Improvement Activity requires use of, or otherwise impacts development upon the Project Site. Upon the request of any Party, an extension of time will be granted for the period of delay caused by Rail Improvement Activity, and no Party shall be deemed to be in default under this Agreement where delays in performance or failure to perform are caused by Rail Improvement Activity. Promptly after learning of the occurrence of Rail Improvement Activity that actually causes or is reasonably anticipated (by the affected Party) to cause delay, the affected Party shall notify the other Party in writing of the occurrence of such Rail Improvement Activity, the manner in which such occurrence is likely to cause delay, and the anticipated length of delay in performance resulting from the Rail Improvement Activity. Upon the other Party's receipt of such notice, the Term of this Agreement then in effect shall be extended by a period of time equal to the number of days during which performance is delayed due to the specified Rail Improvement Activity.

#### 12. TRANSFER OR ASSIGNMENT

shall have the right to sell, assign, convey, hypothecate, or otherwise transfer or alienate in whole or in part its right, duties, obligations, or interests under this Agreement to any person or entity at any time during the term of this Agreement (a "Transfer") without the consent of City; provided, however, that in no event shall the obligations or benefits conferred upon Developer under this Agreement be at any time so Transferred except through a transfer of the associated, concomitant portion of the Project Site to which that obligation or benefit relates. In the event of a transfer of a

portion of the Project Site, Developer shall have the right to Transfer its rights, duties, obligations or interests under this Agreement that are identified as Transferred with the transferred real property and to retain all rights, duties, obligations or interests other than those Transferred with the transferred real property.

Assignment and Assumption Agreement. Subject to the provisions and 12.2 conditions of this Subsection, upon the Transfer of any or all of the rights, duties, obligations or interests under this Agreement and receipt by City of an assignment and assumption agreement in substantially the form provided as Exhibit O and as provided for herein (each an "Assignment and Assumption Agreement"), Developer shall be released from those obligations under this Agreement and the Approvals that: (a) are specified in the Assignment and Assumption Agreement as having been Transferred with the transferred real property and assumed by the Transferee, or (b) necessarily relate to the development or redevelopment of improvements located on the transferred real property owned by the Transferee, and (2) not otherwise specified in the Assignment and Assumption Agreement as having been retained by Developer. Upon providing such Assignment and Assumption Agreement to City, any Default by a Transferee of any rights, duties, obligations or interests so Transferred and assumed by the Transferee shall not thereby constitute a Default by Developer with respect to the rights, duties, obligations or interests not Transferred. Notwithstanding anything to the contrary in this Section 12, the Assignment and Assumption Agreement with respect to any Transfer of the legal parcel that is currently referred to as the "Social Heart Parcel" in the Parkland Agreement shall contain the express assignment and assumption of the bonding requirements with respect to such parcel that are set forth in the Parkland Agreement.

12.2.1 Failure by a Transferee to deliver a written Assignment and Assumption Agreement hereunder shall not affect the validity of a transfer by Developer of the portion of the Project Site so transferred to the Transferee. The parties to an assumption agreement shall address in detail whether and how each obligation and right set forth in this Agreement shall be divided, allocated, assigned or otherwise Transferred, in whole or in part, between Developer and a Transferee; if requested by Developer, City agrees to assist Developer (including attendance at meetings) in determining how each obligation and right set forth in this Agreement can be described and allocated in an Assignment and Assumption Agreement so as to avoid later confusion regarding what obligations and rights have and have not been Transferred. Where a transfer of a portion of the Project Site has been completed, then notwithstanding the foregoing, City shall have the right to require Developer or a Transferee (and Developer and said Transferee shall be jointly and severally liable and obligated to City), to fulfill any duty or obligation under this Agreement and under the other Approvals or Vested Elements if Developer and a Transferee do not agree as to which party is responsible (between Developer or a Transferee) for fulfilling or performing a duty or obligation under an Assignment and Assumption Agreement. Where a transfer of a portion of the Project Site has been completed, then, notwithstanding the foregoing, City shall have the right to look to Developer (prior to the Transfer), and such Developer shall remain liable and obligated to City to fulfill any duty or obligation under this Agreement and under the other Approvals or Vested Elements if City has not received an Assignment and Assumption Agreement Transferring a particular duty or obligation under this Agreement or under the Approvals or Vested Elements in question.

12.2.2 Provided that City has received an Assignment and Assumption Agreement pursuant to Section 12.2 hereof, any Impact Fees, Mitigation Measures, Processing

Fees, taxes or special assessments or school district fees, and any other costs, burdens, obligations, mitigation measures, and exactions of any kind to implement development of the Project pursuant to this Agreement (which City may impose or require only consistent with this Agreement) (collectively, "Additional Conditions") imposed by City as a condition to the approval of any development permit application for such development submitted to City by any Transferee of any portion of the Project Site related to a portion of the Project Site owned or controlled by the Transferee shall be imposed entirely on such portion of the Project Site and shall not be imposed by City directly on other portions of the Project Site or the owners of such other portions; provided, however, that nothing in this Section precludes City from imposing upon the applicant for a development project those costs, burdens, obligations, mitigation measures and exactions appropriate to such proposed development project and otherwise consistent with this Agreement.

12.3 Notice of Transfer. Developer shall, in accordance with the notice provisions of Section 14.11 and at least ten (10) days prior to the anticipated effective date of a proposed Transfer of any portion of the Project Site, provide written notice to the Director of PBCE of the identity or identities and addresses of said Transferee(s), the anticipated effective date of the Transfer of the portion of the Project Site at issue, and the right, title, or interest in the portion of the Project Site that is the subject of the proposed Transfer. A Transferor, including without limitation Developer, shall provide City with written notice of the effective date of a Transfer of any right, title or interest in any portion of the Project Site within ten (10) days from such effective date. Notwithstanding the foregoing, failure to provide either notice required under this Section 12.3 shall, by itself, not affect: (a) the validity of the Transfer at issue nor (b) the ability of a Transferee to provide an Assignment and Assumption Agreement to City pursuant to the provisions of this Section.

12.4 <u>District Systems Transfers</u>. The agreements between City and Developer with respect to the District Systems shall contain language governing Developer's right to transfer the District Systems, whether such transfer is a transfer of the rights and obligations to build the applicable District System's infrastructure or, once constructed, the rights and obligations to operate and maintain the applicable District System, consistent with the following, which will be reflected in enforceable covenants with respect to the District Systems that remain in effect so long as the District System(s) or any component thereof exists: (i) Developer may Transfer to (1) any Google Affiliate, Lendlease, and Lendlease Affiliate, and (2) any Third Party Transferee if the Third Party Transferee is an owner or investor in the infrastructure sector, with appropriate operational and asset management capabilities, directly or via its operating partner. Any such Transfers shall not require City's consent but shall require prior notice to City consistent with Section 12.3 and transmittal to the City of the assignment and assumption agreement between the transferor and transferee that includes a description of the rights and obligations being Transferred; and (ii) with respect to any Transfer of operations and maintenance rights and obligations, such Transferee will have at least three (3) years technical experience and qualifications to operate the applicable District System safely and in accordance with applicable law and industry standards.

12.5 <u>Certain Limitations on Transfers of Office and Residential Development.</u>

Notwithstanding the foregoing:

12.5.1 With respect to office development, (1) Developer shall not have the right to Transfer to a Third Party Transferee portions of the Project Site intended for development of office space under the Approvals without first obtaining the City's consent, which shall not be unreasonably withheld, conditioned or delayed, if such Transfer would be effective prior to the date on which Google LLC or any Google Affiliate has Commenced Construction of

less than two million (2,000,000) gross square feet of office development in the Project Site; and (2) at no time may the aggregate amount of gross square feet of potential office development on the portions of the Project Site Transferred to a Third Party Transferee(s) exceed forty percent (40%) of the sum of (i) the amount of gross office square footage for which the Substantial Completion of the base building(s), and submission of permit application(s) for tenant improvements, by or on behalf of Google LLC or any Google Affiliate, has occurred, and (ii) the amount of gross office square footage for which Commencement of Construction has then occurred but which has not then received a Certificate of Occupancy. For the purposes of illustration only, if such Substantial Completion of base building(s) and submittal of permit applications for tenant improvements, by or on behalf of Google LLC or any Google Affiliate, for two million (2,000,000) gross square feet of office development has occurred and Commencement of Construction has occurred on another one million (1,000,000) gross square feet of office development, then Transfers to Third Parties of portions of the Project Site intended for development of office space under the Approvals of up to one million two hundred thousand (1,200,000) gross square feet (i.e., 40% of 3,000,000) shall be allowed without City consent but otherwise subject to the provisions of this Article 12; and

12.5.2 with respect to residential, hotel, limited-term corporate accommodations, and retail development, City's consent shall not be required for any Transfer so long as such Transfer is to (1) Lendlease or any Lendlease Affiliate or (2) a Qualified Developer.

12.6 <u>Non-Transfers</u>. The following shall not be considered a Transfer and shall not require the City's consent and shall not be subject to <u>Section 12.5</u>: (i) leases, subleases, licenses, ground leases, other occupancy agreements, or easements, or the granting of any mortgage or deed of trust or any foreclosure thereof or deed-in-lieu with respect thereto, (ii) any change, directly or

indirectly, in the ownership interests of Google LLC or any Google Affiliate or any Transferee or any of their respective affiliates, (iii) joint ventures in which Google LLC or any Google Affiliate has major decision rights; and (iv) any transfer of land or improvements to the City or the City's designee or to non-profits in satisfaction of obligations under this Agreement or the Approvals. Notwithstanding the foregoing provisions of this Section 12.6 and without the requirement to obtain City's consent, (i) if any such transaction includes the transfer of rights and obligations under this Agreement and (ii) Developer and the transferee enter into an Assignment and Assumption Agreement as described herein above and provide a copy of such agreement to the City, then Developer may elect to have any of the transactions described in this Section 12.6 be treated as a "Transfer" under this Agreement and the transferee with respect thereto be a treated as a "Transferee".

- 12.7 Reasonableness of Transfer Requirements. The parties agree that the restrictions and conditions on the right to assign any portion of the Project Site set forth in this Agreement are necessary and appropriate to assure the achievement of the objectives of the General Plan, the Approvals and this Agreement. Developer agrees to and accepts the restrictions herein set forth in this Section 12 as a material inducement to the City to enter into this Agreement.
- 12.8 <u>City Administration</u>. City shall administer the provisions of this Section 12 through the Director.

#### 13. DEVELOPER REPRESENTATIONS AND WARRANTIES

13.1 <u>Interest of Developer; Due Organization and Standing.</u> Developer represents that it has an equitable interest in the land described at <u>Exhibit A</u> to this Agreement, with authority to enter into this Agreement on behalf of all fee owners of the Project Site. Developer is a Delaware limited liability company, duly organized and validly existing and in

good standing under the Laws of the State of Delaware, and in full compliance with all applicable Laws of the State of California. Developer has all requisite power to own its property and authority to conduct its business as presently conducted. Developer represents and warrants that there is no existing lien or encumbrance recorded against the Project Site that, upon foreclosure or the exercise of remedies, would permit the beneficiary of the lien or encumbrance to eliminate or wipe out the obligations set forth in this Agreement that run with applicable land.

- 13.2 <u>No Inability to Perform; Valid Execution.</u> Developer represents and warrants that it is not a party to any other agreement that would conflict with Developer's obligations under this Agreement and it has no knowledge of any inability to perform its obligations under this Agreement. The execution and delivery of this Agreement and the agreements contemplated hereby by Developer have been duly and validly authorized by all necessary action. This Agreement will be a legal, valid, and binding obligation of Developer, enforceable against Developer in accordance with its terms.
- 13.3 <u>Conflict of Interest</u>. Through its execution of this Agreement, Developer acknowledges that it is familiar with the provisions of Section 607 of the City's Charter, Title 12 of the City's Municipal Code, and Section 87100 *et seq.* and Section 1090 *et seq.* of the California Government Code, and certifies that it does not know of any facts which constitute a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the Term.
- 13.4 Other Documents. To the current, actual knowledge of

  [\_\_\_\_\_], after reasonable inquiry, no document furnished by Developer to the City

  with its application for this Agreement nor this Agreement contains any untrue statement of

material fact or omits a material fact necessary to make the statements contained therein, or herein, not misleading under the circumstances under which any such statement shall have been made.

13.5 <u>No Bankruptcy</u>. Developer represents and warrants to the City that Developer has neither filed nor is the subject of any filing of a petition under the federal bankruptcy law or any federal or state insolvency laws or Laws for composition of indebtedness or for the reorganization of debtors, and, to the best of Developer's knowledge, no such filing is threatened.

#### 14. MISCELLANEOUS PROVISIONS

- 14.1 <u>Entire Agreement</u>. This Agreement, including the preamble paragraph, Recitals and Exhibits, and the agreements between the Parties specifically referenced in this Agreement, constitutes the entire agreement between the Parties with respect to the subject matter contained herein.
- 14.2 <u>Incorporation of Exhibits</u>. Except for the Approvals which are listed solely for the convenience of the Parties, each Exhibit to this Agreement is incorporated herein and made a part hereof as if set forth in full. Each reference to an Exhibit in this Agreement shall mean that Exhibit as it may be updated or amended from time to time in accordance with the terms of this Agreement.
- Development Agreement Statute, from and after recordation of this Agreement, all of the provisions, agreements, rights, powers, standards, terms, covenants, and obligations contained in this Agreement shall be binding upon the Parties and, subject to Section 12, their respective heirs, successors (by merger, consolidation, or otherwise) and assigns, and all persons or entities acquiring the Project Site, any lot, parcel or any portion thereof, or any interest therein, whether by sale, operation of law, or in any manner whatsoever, and shall inure to the benefit of the Parties

and their respective heirs, successors (by merger, consolidation or otherwise) and assigns. Subject to the provisions on Transfers set forth in <u>Section 12</u>, all provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants and benefits running with the land pursuant to applicable Law, including but not limited to California Civil Code Section 1468.

- 14.4 <u>Applicable Law and Venue</u>. This Agreement has been executed and delivered in and shall be interpreted, construed, and enforced in accordance with the Laws of the State of California. All rights and obligations of the Parties under this Agreement are to be performed in the City of San José, and the County of Santa Clara shall be the venue for any legal action or proceeding that may be brought, or arise out of, in connection with or by reason of this Agreement.
- 14.5 Construction of Agreement. The Parties have mutually negotiated the terms and conditions of this Agreement and its terms and provisions have been reviewed and revised by legal counsel for both the City and Developer. Accordingly, no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement. Language in this Agreement shall be construed as a whole and in accordance with its true meaning. The captions of the paragraphs and subparagraphs of this Agreement are for convenience only and shall not be considered or referred to in resolving questions of construction. Each reference in this Agreement to this Agreement or any of the Approvals shall be deemed to refer to this Agreement or the Approvals as amended from time to time pursuant to the provisions of this Agreement, whether or not the particular reference refers to such possible amendment. In the event of a conflict between the provisions of this Agreement and Chapter 56, the provisions of this Agreement will govern and control.

- 14.6 <u>Project Is a Private Undertaking; No Joint Venture or Partnership.</u> The development proposed to be undertaken by Developer on the Project Site is a private development. The City has no interest in, responsibility for, or duty to third persons concerning any of said improvements. Developer shall exercise full dominion and control over the Project Site, subject only to the limitations and obligations of Developer contained in this Agreement.
- 14.6.1 Nothing contained in this Agreement, or in any document executed in connection with this Agreement, shall be construed as creating a joint venture or partnership between the City and Developer. Neither Party is acting as the agent of the other Party in any respect hereunder. Developer is not a state or governmental actor with respect to any activity conducted by Developer hereunder.
- 14.7 <u>Recordation</u>. Pursuant to the Development Agreement Statute and Development Agreement Ordinance, the City Clerk shall have a copy of this Agreement recorded in the Official Records within ten (10) days after the mutual execution and delivery of this Agreement or any amendment thereto, with costs to be borne by Developer.
- 14.8 <u>Obligations Not Dischargeable in Bankruptcy</u>. Developer's obligations under this Agreement are not dischargeable in bankruptcy.
- 14.9 <u>Survival</u>. Following expiration of the Term, this Agreement shall be deemed terminated and of no further force and effect except for any provision which, by its express terms, survive the expiration or termination of this Agreement.
- 14.10 <u>Signature in Counterparts</u>. This Agreement may be executed in duplicate counterpart originals, each of which is deemed to be an original, and all of which when taken together shall constitute one and the same instrument.

Agreement shall be in writing and may be delivered personally or by registered mail, return receipt requested. Notice, whether given by personal delivery or registered mail, shall be deemed to have been given and received upon the actual receipt by any of the addressees designated below as the person to whom notices are to be sent. Either Party to this Agreement may at any time, upon notice to the other Party, designate any other person or address in substitution of the person and address to which such notice or communication shall be given. Such notices or communications shall be given to the Parties at their addresses set forth below:

To City:

Director of Planning, Building, and Code Enforcement Planning Department City of San José 200 East Santa Clara Street San José, CA 95113-1905

with a copy to:

City Attorney Office of the City Attorney City of San José 200 East Santa Clara Street San José, CA 95113-1905

City Manager Office of the City Manager City of San José 200 East Santa Clara Street San José, CA 95113-1905

To Developer:

Google LLC 1600 Amphitheatre Parkway Mountain View, Ca 94043 Attn: REWS Department / Downtown West SJ Project Executive

with a copy to:

Google LLC

1600 Amphitheatre Parkway

Mountain View, Ca 94043

Attn: Legal Department / R/E Matters

Coblentz Patch Duffy & Bass LLP

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Attn: Head of the Real Estate and Land Use Department

14.12 Severability. Except as is otherwise specifically provided for in this

Agreement with respect to any Laws which conflict with this Agreement, if any term, provision,

covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid,

void, or unenforceable, the remaining provisions of this Agreement shall continue in full force and

effect unless enforcement of the remaining portions of this Agreement would be unreasonable or

grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

14.13 Public Records Act. Developer understands and agrees that under the City's

Open Government Ordinance (Municipal Code, Title 12, Chapter 12.21) and the California Public

Records Act (California Government Code Section 250 et seq.), this Agreement and any and all

records, information, and materials submitted to the City hereunder are public records subject to

public disclosure. To the extent that Developer in Good Faith believes that any financial materials

reasonably requested by the City constitutes a trade secret or confidential proprietary information

protected from disclosure under the Public Records Act and other Laws, Developer shall mark any

such materials as such. When a City official or employee receives a request for information that

has been so marked or designated, the City may request further evidence or explanation from

Developer. If the City determines, in its sole discretion, that the information does not constitute a

trade secret or proprietary information protected from disclosure, the City shall notify Developer

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of that conclusion and that the information will be released by a specified date in order to provide Developer an opportunity to obtain a court order prohibiting disclosure.

- 14.14 <u>Non-Liability of City Officials and Others</u>. Notwithstanding anything to the contrary in this Agreement, no individual board member, director, commissioner, officer, employee, official or agent of City or other City Parties shall be personally liable to Developer, its successors and assigns, in the event of any default by City, or for any amount which may become due to Developer, its successors and assigns, under this Agreement.
- 14.15 <u>Non-Liability of Developer Officers and Others</u>. Notwithstanding anything to the contrary in this Agreement, no individual board member, director, officer, employee, official, partner, employee or agent of Developer or any Affiliate of Developer shall be personally liable to City, its successors and assigns, in the event of any default by Developer, or for any amount which may become due to City, its successors and assign, under this Agreement.
- 14.16 <u>No Third Party Beneficiaries</u>. There are no third party beneficiaries to this Agreement.
- 14.17 <u>Number of Days.</u> Provisions in this Agreement relating to the number of days shall be calendar days, unless otherwise specified, provided that if the last day of any period to give notice, reply to a notice, or to undertake any other action occurs on a Saturday, Sunday, or a bank or City holiday, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding City working day.

## [signatures follow on next page]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year first above written.

CITY:	Approved as to form:
CITY OF SAN JOSÉ, a municipal corporation	Nora Frimann, City Attorney
By:Toni Taber, City Clerk	By:
Approved on, 2021 City Council Ordinance No.	

[Note: City will need a corporate resolution from Google establishing who has authority to execute on behalf of Google, LLC. Signatures will need to be notarized for recording.]

# NOTE: ALL EXHIBITS PENDING NEGOTIATION

## Exhibit A

Project Site Legal Descriptions [not included]

# Exhibit B

**Project Boundaries** [separate pdf]

# Exhibit C

# **Public Benefits**

# Exhibit C1

**Public Benefits Matrix** [not included]

# Exhibit C2

Community Benefits Schedule [not included]

12255.020 4851-5294-1788.3 Ex. C2-1

### Exhibit D

### **Affordable Housing Program**

### I. <u>Intro/Recitals</u>

The Downtown Mixed-Use Plan ("Project") provides for the development of a substantial amount of residential units to help address the City's housing crises related to both market rate and affordable housing. This Affordable Housing Program, which assumes 4,000 residential units, furthers Developer's and City's shared goal that development within the Diridon Station Area Plan ("DSAP") results in twenty-five percent (25%) of all residential units as affordable housing. Consistent with this goal, in October 2020, the City designated the Diridon Station Area as a prioritized growth area in the City-wide Affordable Housing Investment Plan for the development of affordable housing and use of affordable housing funds to encourage and assist in such development.

This Affordable Housing Program will enable the Project to provide financial and other commitments sufficient to (i) satisfy Developer's obligations under the City's adopted Inclusionary Housing Ordinance ("IHO") as set forth in San José Municipal Code Chapter 5.08 in effect on the Effective Date of the Development Agreement, a copy of which is attached hereto as <u>Schedule E</u>; and (ii) substantially further achievement of the twenty-five percent (25%) affordable housing goal within the DSAP.

This Affordable Housing Program is provided in order to satisfy and exceed the requirements under the IHO, and the IHO shall not apply to any development within the Project Site during the Term of the Development Agreement to which this Affordable Housing Program is attached, except where this Affordable Housing Program specifically refers to a provision of the IHO as a provision applicable to this Affordable Housing Program.

As set forth in this Affordable Housing Program, Developer will fulfill its obligations through land dedication, monetary contributions, and production of on-site moderate income (100% AMI) affordable residential units, and the City will fulfill its obligations through good faith efforts to direct affordable housing funds generated by the Project to affordable housing projects on the land Developer dedicates to the City pursuant to this Affordable Housing Program for that purpose.

Terms that are used but not defined in this Affordable Housing Program shall have the meanings given such terms in the body of the Development Agreement to which this Affordable Housing Program is attached.

### II. Summary of the Affordable Housing Program

This Affordable Housing Program is based on the development of 3,400 market rate and 100% AMI units at an average unit size of 637 rentable square feet and consists of the following elements, which are summarized here and discussed in more detail in Sections III and IV below:

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- 1. Developer's transfer of three parcels of real property, currently identified as Properties H1, H5 and H6, totaling approximately 2.16 acres, to the City (or its designee) for use in the production of affordable housing. See Schedule A for Site Plan.
- 2. Developer's production of a minimum of one hundred and seventy (170) inclusionary housing units at 100% of Area Median Income ("AMI"), which units must be provided within the market rate buildings at a rate of 5% of the total number of units, consistent with the IHO Mixed Compliance Option.
- 3. Developer's production of a minimum of an additional thirty (30) inclusionary housing units at 100% of AMI as a community benefit, which units must be provided within the market rate buildings at a rate of 0.88% (which, when added to the inclusionary units described in paragraph II.b above, results in 5.88% of the units being restricted units at 100% AMI).
- 4. Developer's payment of in-lieu fees (\$18.70 per rsf) for all residential developments in the Project area, with credit for the H1, H5 and H6 Properties that are transferred to the City (or its designee), including Developer's pre-payment of [\$773,000] in in-lieu fees, which Developer anticipates will be owed starting with 3,335<sup>th</sup> through 3,400<sup>th</sup> residential units, and which pre-payment Developer will make on or before one hundred twenty (120) days after Final Approvals for affordable housing production within the DSAP's Boundaries.
- 5. Developer's payment of fees on the Project's office development pursuant to the City's adopted Commercial Linkage Fee Ordinance set forth in San José Municipal Code Chapter 5.11.
- 6. Subject to City Council appropriation of funding, the City's commitment to (i) implement the affordable housing priorities for the DSAP that are anticipated to be set forth in the City's Affordable Housing Investment Plan, which reinforces that the DSAP is a priority area for the City's available affordable housing funds, and (ii) use Good Faith efforts to direct CLF generated from commercial development within the Project Site to the production of affordable housing on land transferred from Developer to the City for that use and then to affordable housing production within the DSAP's Boundaries.

### **III.** Inclusionary Housing Ordinance Compliance

#### A. Land Dedication.

Developer shall dedicate Properties H1, H5 and H6, consisting of a total of approximately 2.16 acres of real property to the City (or its designee). The City will use Good Faith efforts to deliver a minimum of 600 units, of which approximately 280 units will be allocated to the H1 Property and approximately 320 units will be allocated across the H5 and H6 Properties. The actual number of units to be constructed on the dedication sites will be determined through the City's affordable housing development process, including input from potential affordable housing partners; provided, however, that the City agrees to limit parking on those properties to a cumulative maximum of 150 stalls, per the Project's Planned Development Zoning and General Development Plan.

12255.020 4851-5294-1788.3 Ex. D-2

Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the eventual transfers of the H1, H5 and H6 Properties to City (the "H1 Transfer Agreement", "H5 Transfer Agreement" and "H6 Transfer Agreement", respectively, and collectively, the "Transfer Agreements"). [Note to City: The Transfer Agreements would not be attached to the Development Agreement as an Exhibit but would be kept on file with the City.]

If constructed, District Systems would be available to the H1, H5 and H6 Properties, and those developments would have the right to connect to the District Systems subject to any required regulatory approvals.

#### B. On-Site Inclusionary Units.

Developer shall provide on-site inclusionary units as part of the market rate residential development in the Project in compliance with this Section 3 and the IHO's "Mixed Compliance Option" as described herein and in the IHO attached at <u>Schedule E</u>. In all cases, these terms would fulfill IHO obligations for up to 3,400 market rate units, inclusive of the required 100% AMI inclusionary units. All inclusionary units will comply with the City's Guidelines for Implementation of the Inclusionary Housing Ordinance attached hereto at <u>Schedule B</u>.

- 1. <u>Inclusionary Units</u>. In fulfillment of its IHO obligations, Developer shall produce a minimum of 5% on-site inclusionary units at 100% AMI within the market rate buildings, subject to Developer's right to obtain approval for clustering, as set forth in <u>Section III.B.1(d)</u>, below. Assuming a total of 3,400 residential units across the Project, one hundred seventy (170) on-site inclusionary residential units within the Project area would be provided as deed-restricted units that are limited to occupancy by households with incomes equal to 100% of the AMI, as published annually by the City (hereafter "Restricted Units").
- a. As a Community Benefit, Developer shall provide, within the first three-thousand four hundred (3,400) residential units developed, an additional thirty (30) Restricted Units limited to occupancy by households with incomes equal to 100% of AMI. The additional 30 units will be provided on a prorata basis with the required 5%, the result is that the market rate buildings are anticipated to contain 5.88% Restricted Units.
- b. Each Restricted Unit shall be deed-restricted consistent with the City's standard affordable housing forms for occupancy by income qualified households for the term provided in the Inclusionary Housing Ordinance as of the Effective Date. [Note: City please provide City's template of the deed restriction, including language related to the term of the restriction, so it can be attached to this Exhibit.]
- c. The Restricted Units shall be integrated into market rate housing, in accordance with the dispersion requirements of the IHO, and shall not be concentrated in a single building, block, or geographic area of the Project. In the case of a high rise project, the Restricted Units, may be dispersed through the lowest 50% of the building as measured by floor (for example:

in a 20 story building, the lowest 50% is floors 1-10; for any fraction, the floor count is rounded up, e.g., if the building is 19 stories, then units would be provided in floors 1-10 stories).

- d. Notwithstanding the foregoing provisions of this <u>Section III. B.1</u>, the City may approve (i) a market rate building that clusters Restricted Units in a wing of a building or (ii) placing all of the units in another building (on the same parcel or otherwise in the vicinity of the applicable market rate building(s)) if Developer submits a proposal with a satisfactory explanation of clustering benefits through the Conformance Review Process.
- e. The Restricted Units shall consist of a mix of unit sizes that is substantially the same as the mix of unit sizes in each respective building (i) in which the Restricted Units are integrated or, (ii) in the case of clustering or location of the Restricted Units in a separate building, with respect to which the Restricted Units are built. The Restricted Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. The number of bedrooms in each unit and the average size of the units in each respective building shall be considered in determining whether the mix and size of Restricted Units is substantially the same as the overall mix and size of units in a building. Square footage will be considered comparable if the total average square footage of the Restricted Units is at least 85% of the total average square footage for 1-bedroom Restricted Units must be at least 85% of the average square footage for 1-bedroom Restricted Units must be at least 85% of the average square footage for 1-bedroom market rate units).
- f. The quality of the exterior design of any building consisting entirely of Restricted Units and overall quality of construction of the Restricted Units must be consistent with the exterior design of comparable buildings containing market rate units. Restricted Units may have different interior finishes and features than the market rate units in the market rate building, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and, to some extent, the quality of materials and the size of structures.

### C. <u>IHO Fees</u>

Provided that Developer restricts not less than 5% of the market rate units of a building as 100% AMI Restricted Units, then, unless City has previously approved a lower percentage of 100% AMI units per Section III.B.1.(d) above, Developer shall be obligated to pay an IHO in-lieu fee of \$18.70 per rentable square foot of each market rate residential unit and each Restricted Unit. All fees and credits under this Section II.C shall escalate in lockstep based on the City's methodology for escalating the IHO Fee (e.g., based on the change in the Engineering News Record (ENR) Construction Cost Index (CCI) per the Mixed Compliance Option of the IHO code) ("Annual Increases").

1. <u>IHO Fee Rate</u>. Should any market rate building fail to provide 5% of the units at 100% AMI, such building shall pay an in-lieu fee at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in <u>Section III.B.1(d)</u>) in which case the \$18.70 fee shall apply.

- 2. <u>Land Dedication (H1 Property) IHO Fee Credit</u>. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H1 Property to the City (or its designee) against any IHO Fees owed or that may come due. As of the Effective Date, the value of the credit for the H1 Property is \$[21,346,347]. The credit shall accrue for Developer's use as payment for the per unit IHO Fee, at the rate then in effect on the closing date of the transfer of the H1 Property to the City or its designee pursuant to the Transfer Agreement. [Example: \$21,346,347 at \$18.70/rsf equals 1,141,516 sf of credit for market rate rentable sf (including 100% AMI units) which is approximately 1,792 units]
- 3. <u>Land Dedication (H5 Property) IHO Fee Credit</u>. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H5 Property to the City (or its designee) against any IHO Fees owed or that may come due. As of the Effective Date, the value of the credit for the H5 Property is [\$7,647,054]. The credit shall accrue for Developer's use as payment for the per unit IHO Fee, at rate then in effect on the respective closing dates of the transfers of the H5 Property to the City or its designee pursuant to the respective Transfer Agreements. [Example: \$7,647,054 at \$18.70/rsf equals 408,933 sf of credit for market rate net rentable sf (including 100% AMI units) which is approximately 642 units]
- 4. <u>Land Dedication (H6 Property) IHO Fee Credit</u>. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H6 Property to the City (or its designee) against any IHO Fees owed or that may come due. As of the Effective Date, the value of the credit for the H6 Property is \$10,734,294]. The credit shall accrue for Developer's use as payment for the per unit IHO Fee, at the rate then in effect on the closing date of the transfer of the H6 Property to the City or its designee pursuant to the Transfer Agreement. [Example: \$10,734,294 at \$18.70/rsf equals 574,026 sf of credit for market rate rentable sf (including 100% AMI units) which is approximately 901 units]
- 5. <u>Land Dedication IHO Fee Credit and Prepayment Summary</u>. The table below provides a summary of how the Project proposes to satisfy and exceed the IHO Fee requirements by means of land dedication and payments, as set forth above in this Affordable Housing Program, assuming development of 3,400 residential units.

Affordable Land Dedication	Credits	Units
H1	\$21.3M	1,792
Н5	\$7.7M	642
Н6	\$10.7M	901
Total Credits	\$39.7M	3,335
Fee - Prepaid as Community Benefit	\$773k	65
Total IHO Requirement	\$40.5M	3,400

For any residential units in excess of 3,400, Developer will satisfy its obligations under the IHO through a combination of 5% inclusionary and payment of the IHO Fee applicable when 5% of the

units are on-site inclusionary affordable units (\$18.70/rsf), including as set forth in <u>Section 6</u> below.

6. <u>Unavailability or Insufficient Amount of IHO Fee Credits</u>. If Developer has not accrued any IHO Fee credits or the Developer is submitting for approval of 3,401<sup>st</sup> unit and beyond, Developer shall pay IHO Fees in the amount of (i) \$18.70 per rentable square foot for each residential unit with respect to any residential building in which Developer is including at least 5% of the units as affordable units, such as pursuant to <u>Section III.B.1</u> above or (ii) \$43.00 per rentable square foot for each residential unit with respect to any residential building in which Developer is not including at least 5% of the units as affordable units, unless the City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in <u>Section 3.B.1(c)</u>) in which case the \$18.70 rentable square foot fee shall apply.

### D. Process; Tracking and Reporting of Developer's Compliance

- Program are subject to Developer's proceeding with development, and such obligations shall be satisfied pro-rata on a building-by-building basis, as and when development proceeds, in accordance with this Affordable Housing Program and the other applicable provisions of the Development Agreement. As such, in order to track Developer's compliance with the Affordable Housing Program, Developer shall submit a data chart with each Vertical Conformance Review Application that contains information addressing the following: the total number of residential units proposed as part of each Vertical Conformance Review Application, including the number of market rate units and below-market rate units, including applicable AMI percentage; the location of the market rate units and below-market rate units; number of bedrooms; and the total cumulative number of market rate units and below-market rate units towards the 3,400 total. The Affordable Housing Program information required to be submitted with each Vertical Conformance Review Application is further described in the Downtown West Conformance Review Implementation Guide.
- 2. Affordability Restrictions. As a condition precedent to the City's issuance of a Building Permit for development of a residential building in which any inclusionary units are to be constructed, Developer shall record the affordability restrictions attached hereto as Schedule C (the "Affordability Restrictions") against the real property on which any affordable housing unit is to be constructed. The term of the Affordability Restrictions for rental units shall be per the IHO. The City may consent to subordinate the Affordability Restrictions but only in order to allow for the commitment of other affordable housing financing and pursuant to the City's Inclusionary Housing Policy in effect on the Effective Date a copy of which is attached hereto as Schedule E. Upon Developer's or owner's written request at any time following expiration, the City shall provide a release of the Affordability Restrictions in a form reasonably acceptable to the owner within thirty (30) days after such request. This obligation to provide a release shall survive the expiration or termination of the Development Agreement.

### IV. Other Fees and Fee Credits.

## A. Commercial Linkage Fee Provisions.

- 1. <u>Payment of CLF</u>. Developer shall pay the Commercial Linkage Fee in accordance with the adopted Commercial Linkage Fee Ordinance in effect on the Effective Date of the Development Agreement, subject to Annual Increases.
- Allocation of CLF. The City shall make good faith efforts to allocate Developer-2. paid CLF Fees to support the development of affordable housing on land that Developer dedicates for such purpose. Provided, however, if the City demonstrates the commitment of other funding sources for development of affordable housing on other parcels within the DSAP's Boundaries, then Developer-paid CLF shall be used to support affordable housing production within the DSAP's Boundaries. Good faith efforts shall include (i) the City's Housing Department making recommendations to the Mayor and City Council to provide any necessary annual budgetary approvals or authorizations that would allow such allocation of the Developer-paid CLF Fees, (ii) inclusion, in the CLF's administrative regulations or guidelines, of language promoting or supporting such allocation, and (iii) an agreement to commence pre-development activity with respect to the applicable Developer-dedicated site promptly following Developer's submittal of (x)an office building construction permit application that contains information about the total square footage of such building, and (y) information to the City regarding the expected timing of payment of the CLF for such office building. Such pre-development activity would include identifying potential qualified, experienced affordable housing developers for the Developer-dedicated affordable housing site and awarding a pre-development loan with anticipation of CLF funding for the additional gap loan required. The City's agreement to allocate CLF generated from development within the Project Area to the land dedication parcels shall not constitute use of City's funds to assist Developer since such funds will be used to accelerate production of affordable housing on the land dedication parcels following their transfer to the City. Nothing in this program shall preclude the City from providing financial assistance for additional affordable housing units beyond those required by this agreement. Once the 25% affordable goal for housing within the DSAP's Boundaries has been achieved (as reasonably determined by the Director of PBCE), the City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide.
- **B.** <u>Community Stabilization Fund.</u> Office Development in the Project Site will result in contributions to the Fund that the City can then make available to housing stabilization efforts, all as more specifically described in <u>Exhibit H</u> (Community Stabilization and Opportunity Pathways Fund) to the Development Agreement.

### V. <u>DISC Adjustments</u>

[Note: final wording of DISC language is under discussion.] City and Developer acknowledge and understand that the Project and the affordable housing commitments described herein are subject to any subsequent proceedings initiated by any of the DISC Partner Agencies (California High-Speed Rail Authority; VTA; Caltrain; MTC and the City) to acquire any portion of the Project Area, including any portion of City-dedicated open space and affordable housing parcels H5 and/or H6. Developer will not be required in such circumstances to provide alternate dedicated open space or affordable housing parcels. If any DISC Partner Agency initiates proceedings to acquire any portion of the Project Area for an approved alignment and expansion of the rail right-of-way, Developer may be unable to proceed in the manner described herein, a

Public Benefits Adjustment may be needed, and aspects of the Project may need to be reconfigured and/or redesigned. Reconfiguration and/or redesign also may be necessary in the event Developer is prohibited from building to the maximum heights reflected in the DWDSG as a result of City's adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights. Any reconfiguration or redesign, regardless of the cause, would have a negative impact on Developer's master planning efforts, lessening the amount of square footage for both commercial and residential uses, and potentially reducing the number of residential units or the amount of office space that may be developed within the Plan Area. Any such reconfiguration and/or reduction in development would result in a commensurate reduction in Developer's obligations under this Affordable Housing Plan.

### VI. Definitions

- 1. "Area Median Income" or "AMI" means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of San José in the event that such median income figures are no longer published periodically in the California Code of Regulations.
- 2. "Certificate of Occupancy" or "CofO" means the permit issued by the City Building Division authorizing the initial occupancy of one or more buildings and includes final inspections and temporary certificate of occupancy permits.
- 3. "Commercial Linkage Fee" or "CLF" means the commercial linkage fee adopted by the City Council as set forth in Chapter 5.11 of Title 5 of the San José Municipal Code in effect on the Effective Date of this Development Agreement.
- 4. "Public Benefits Adjustment" shall mean an adjustment or modification to the total acreage, units, amount, configuration, Completion or delivery schedule, or other elements of any obligation of Developer under this Affordable Housing Plan, as permitted by the Project Documents and Approvals, that is necessitated by (i) any subsequent proceedings initiated by the DISC Partner Agencies to acquire any portion of the Project Site in connection with DISC, if such acquisition results in a reduction in the development program as established by the Project Approvals; and/or (ii) reconfiguration and/or redesign necessitated by the Developer being prohibited from building to the maximum heights reflected in the DWDSG as a result of City's adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights, if such reconfiguration and/or redesign results in a reduction in the development program as established by the Project Approvals. [Note: final wording of DISC language is under discussion.]
- 5. "Fund" means the Community Stabilization and Opportunity Pathways Fund described in Exhibit H to the Development Agreement.
- 6. "H1 Property" means that property as generally shown on <u>Schedule A</u> attached to this Affordable Housing Plan.

- 7. "H5 Property" means that property as generally shown on <u>Schedule A</u> attached to this Affordable Housing Plan.
- 8. "H6 Property" means that property as generally shown on <u>Schedule A</u> attached to this Affordable Housing Plan.
- 9. "IHO Fee" means the in-lieu fee under the IHO at the applicable rate of either \$18.70 per rsf or \$43.00 per rsf.
- 10. "Inclusionary Housing Ordinance" or "IHO" means the City of San José Inclusionary Housing Ordinance as set forth in Chapter 5.08 of Title 5 of the San José Municipal Code in effect on the Effective Date.

[Note: schedules to be obtained/created and attached]

# Schedule A to Affordable Housing Program [separate pdf]

Project Site Plan Generally Depicting Location of H1, H5 and H6 Properties H1, H5 and H6 Site Maps

### **Schedule B to Affordable Housing Program**

City's Guidelines for Implementation of the Inclusionary Housing Ordinance

### Schedule C to Affordable Housing Program

City's Form of Affordability Restrictions for Deed

### **Schedule D to Affordable Housing Program**

Terms for Transfer of Parcels H1, H5 and H6 Pursuant to Transfer Agreements between Developer and City or City's Designated Affordable Housing Developer

## Schedule E to Affordable Housing Program

Copies of the (i) IHO and (ii) the City's Inclusionary Housing Policy, each as in effect on the Effective Date

# Exhibit E

# **Parkland Agreement**

# **Privately-Owned Open Space**

# Public Access Agreement [not included]

## Rules Regarding Public Access and Private Events/Temporary Closures

### 1. Hours of Operation

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

### 2. Private Events/Temporary Closures

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

- a. All private events require prior Developer/owner permission, and Developer/owner has the authority in its sole discretion to determine whether a private event is permitted, consistent with the rules and limitations for private events and/or temporary closures set forth in this Exhibit F2 and Exhibit F3.
- b. Notwithstanding the limitations regarding partial closures set forth below, each individual Privately-Owned Open Space may be closed in its entirety a maximum of six (6) times per year, not to exceed eight (8) hours in any month, except for reasonable maintenance and repair.
- c. No more than one entire Privately-Owned Open Space's reservable area may be reserved for a private event at any one time, except for five (5) days per year, when all Privately-Owned Open Space reservable areas may be reserved for no more than five (5) consecutive days, provided that prior notification to the general public via posted

- signage, and written notification to the City Department of Parks, Recreation & Neighborhood Services and other stakeholders.
- d. Private events in reservable open space shall be limited to no more than five (5) consecutive days in one location.
- e. Events shall be assigned specific venues within the Privately-Owned Open Space network appropriate to the size and nature of the event and that will impose the least impact to the level of service on the Privately-Owned Open Space or the public's use of the Open Space, as determined by Developer/owner in its sole discretion.
- f. Non-reservable event areas shall remain open and accessible to the public during private events, the private event shall maintain a clear public path of travel around the event and through the Privately-Owned Open Space, and a safe path of travel marked in accordance with ADA standards shall be maintained.
- g. Private events held during business hours between Monday to Thursday shall be encouraged to avoid high public use hours.
- h. Private events held during evenings, weekends, and holidays should be limited in order to avoid high public use hours, as determined by Developer/owner.
- i. Private events on weekends shall be limited to one weekend per month per Open Space. As much as possible, as determined by Developer/owner, the event should allow the public to hear, see, or otherwise appreciate the event.
- j. Unless otherwise approved by Developer/owner, event support structures and furnishings shall be located on hardscape areas and shall be selected and arranged with a high regard for the visual and aesthetic quality of the Privately-Owned Open Space.

- k. Events involving animal acts, petting zoos, carnival rides, hot air balloons, or helicopter landings to specified areas of the parks shall not be permitted.
- Vehicle access though the parks is prohibited, except that vehicle access through the
  parks for the limited purpose of setting up or dismantling furnishings, decor, or other
  items associated with a private event may be permitted with prior approval of
  Developer/owner.
- m. Special Events involving celebratory activities, such as music, dance, theater, or similar activities, are permitted with prior Developer/owner permission. Special Events are permitted pursuant to the requirements specified in the Downtown West Planned Development Zoning District and General Development Plan.
- n. Privately-Owned Open Spaces may be closed, at Developer/owner's sole discretion, on short-notice or at any time for security or safety needs, and for maintenance or repair.

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

- a. Los Gatos Creek Park: A maximum of twenty-five percent (25%) of Los Gatos Creek Park is reservable by the public for private event use for each event zone depicted on Figure 1 for fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Figure 1 for seventy-three (73) days per year (20%) from Sunrise to 12am.
- b. The Meander: A maximum of fifty-five percent (55%) of the total Privately-Owned Open Space within The Meander is reservable by the public for event use for each event zone depicted on <u>Figure 2</u> for fifty-four (54) days per year (15%) from Sunrise to 10

- pm. The same is reservable by Developer for private event use for each event zone depicted on Figure 2 for seventy-three (73) days per year (20%) from Sunrise to 12am.
- c. Creekside Walk at South Autumn Street: A maximum of thirty-five percent (35%) of the total Privately-Owned Open Space within Creekside Walk at South Autumn Street is reservable by the public for event use for each event zone up depicted on Figure 3 for fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Figure 3 for one hundred twenty-seven (127) days per year (35%) from Sunrise to 12am.
- d. The Gateway: A maximum of thirty-five percent (35%) of the total Privately-Owned Open Space within the Gateway is reservable by the public for event use for each event zone depicted on Figure 4 for fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Figure 4 for seventy-three (73) days per year (20%) from Sunrise to 12am.
- e. Northend Park: A maximum of fifty percent (50%) of the total Privately-Owned Open Space within Northend Park is reservable by the public for event use for each event zone depicted on Figure 5 for fifty-four (54) days per year (15%) from Sunrise to 10 pm. The same is reservable by Developer for private event use for each event zone depicted on Figure 5 for seventy-three (73) days per year (20%) from Sunrise to 12am.

# Figures 1 through 5 [separate pdf]

#### **Code of Conduct For Public Use**

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

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

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

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

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

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

#### Exhibit G

### Workforce, Learning, and Education Commitment

- **Section 1.** Google Participation with Community-Based Organizations. As part of Google's presence in Downtown San José, following issuance of a Certificate of Occupancy for the first commercial office Building in the Project, and as long as Google LLC or any Google Affiliate occupies commercial office space in the Project during the Term, Google shall use, or cause the Google Affiliate to use, Good Faith Efforts:
- a. to develop and promote opportunities for Google employees to volunteer their time with, and to serve as mentors on behalf of community-based organizations that serve San José students from underrepresented backgrounds; and
- b. to provide career exploration and skills development opportunities, such as onsite field trips, career days, and computer science workshops, to students from underserved communities and who have an interest in technology and technology-based careers

### Section 2 <u>Local and Minority Business Enterprises; Local Hire.</u>

2.1 <u>Project Construction</u>. For the construction of the commercial office buildings within the Project, Developer will use Good Faith Efforts to enter into, or cause the general contractor(s) to enter into, construction contracts with a combined value of three hundred million dollars (\$300,000,000) with contractors, subcontractors, suppliers, and/or consultants that qualify as a LBE, DBE, MBE, WBE, and/or LGBTBE, DOBE, and/or SD/VOB. To advance this goal, Developer will include in its construction contracts for each commercial office building a requirement that the general contractor shall use Good Faith Efforts to contract with subcontractors, suppliers, and other businesses that qualify as a LBE, DBE, MBE, WBE, LGBTBE, DOBE, and/or SD/VOB.

- 2.2 <u>Project Operation</u>. Following issuance of a Certificate of Occupancy for the first commercial office Building in the Project and as long as Google LLC or a Google Affiliate occupies commercial office space in the Project during the Term, Google shall use, or cause its affiliate company to use, Good Faith Efforts:
- a. to hire contractors, subcontractors, suppliers, and/or consultants that qualify as a LBEs, DBEs, MBEs, WBEs, LGBTBEs, DOBEs, and/or SD/VOBs for ongoing service contracts (e.g. maintenance, janitorial, landscaping, security etc.) related to Google's commercial office buildings; and
- b. Google, its vendors, Alphabet, and/or their affiliated companies to host two (2) times per year on a semi-annual basis, an informational session targeted to LBEs, DBE, MBEs, WBEs, LGBTBEs, DOBEs, and/or SD/VOBs interested in providing goods and services to Google's commercial office buildings.
- 2.3 <u>Local Hire Project Construction</u>. Developer will include in its construction contracts for all onsite construction activity a requirement that the contractor or subcontractor shall use Good Faith Efforts to achieve a goal that Local Residents comprise thirty percent (30%) of all new hires for employment opportunities under the applicable construction contract for construction trade positions and entry-level positions related to providing support to the construction industry. This obligation to use Good Faith Efforts shall not limit the ability of a contractor or subcontractor to assess qualifications of prospective workers, to require a contractor or subcontractor to employ a worker not qualified for the position in question, or to employ any particular worker.
- 2.4 <u>Local Hire Project Operation</u>. Following issuance of a temporary certificate of occupancy for the first commercial office Building in the Project and as long as Google LLC or a

Google Affiliate occupies commercial office space in the Project during the Term, Google shall use, or cause the Google Affiliate to use, Good Faith Efforts:

- a) to collaborate on an annual basis with the Community Stabilization and Opportunity Pathways Fund, and local workforce agencies such as work2future to analyze job types and projections for in-demand roles;
- b) to host four times per year on a quarterly basis, a career development workshop targeted at Economically Disadvantaged Communities and Underrepresented Workers that will focus on topics such as resume writing, interviewing skills, and job search, including employment with Google, its vendors, Alphabet, and their affiliated companies; and
- c) to encourage vendors that provide services to Google LLC or Google Affiliate occupied buildings to use their Good Faith Efforts to notify local workforce agencies such as work2future when the vendor is hiring for positions that service such buildings.

### **Section 3 Definitions.**

The following definitions apply to this Exhibit G (and any terms that are used but not defined in this Section 3 shall have the meanings given such terms in the body of the Development Agreement to which this Exhibit is attached):

- 3.1 "Disability Owned Business Enterprise (DOBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons with a disability.
- 3.2 "Disadvantaged Business Enterprise (DBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who is a socially and economically disadvantaged individual.

- 3.3 "Economically Disadvantaged Communities" shall mean communities in which the median household income is less than eighty percent (80%) of the county median income, as compared to the nine-county Bay Area region and the respective U.S. Department of Housing and Urban Development income threshold.
- 3.4 "Good Faith Efforts" shall mean the commercially reasonable efforts that a public company can reasonably justify in light of its obligations to shareholders. Good Faith Efforts shall not obligate Developer to undertake any work, expenditure, or program that Developer concludes, in its discretion, is not consistent with a reasonable balance between the objectives of this Workforce, Learning, and Education Commitment and the cost of any particular measure described herein. Good Faith Efforts shall in no event be interpreted to mean Developer is obligated to enter into any agreement pursuant to this Workforce, Learning, and Education Commitment on any particular terms.
- 3.5 "LGBT Business Enterprise (LGBTBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who identifies as a member of the Lesbian, Gay, Bisexual, and Transgender community.
- 3.6 "Local Business Enterprise (LBE)" shall have the same meaning as set forth in Chapter 4.12 of the City's Municipal Code.
- 3.7 "Local Resident" shall mean an individual who is domiciled, as defined by Section 349(b) of the California Election Code, as it may be amended, within Santa Clara County for at least seven (7) calendar days before commencing work on a Private Construction Project.

- 3.8 "Minority Business Enterprise (MBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who is a member of one or more ethnic minority group.
- 3.9 "Service-Disabled/Veteran Owned Business (SD/VOB)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who is a Service-Disabled Veteran or Service-Disabled Veterans, as defined in section 3(q) of the Small Business Act (15 U.S.C. 632(q)).
- 3.10 "Underrepresented Worker" shall mean an individual who meets any one of the following conditions at the time the individual begins work on a private construction project:
- (a) The individual is a risk of losing his/her home, the individual is homeless, or the individual is housed within the past twelve (12) months before which he/she was homeless;
  - (b) The individual is receiving public assistance;
- (c) The individual is participating in a reentry program or was formerly incarcerated;
  - (d) The individual has been continuously unemployed for the previous year;
- (e) The individual has a family or household income that falls below the current United States Department of Housing and Urban Development threshold for low income households in Santa Clara County;
  - (f) The individual has been emancipated from the foster care system;
  - (g) The individual is a veteran of the United States military;
  - (h) The individual is participating in a program for "at-risk" youth; or
  - (i) The individual is a survivor of labor trafficking.

3.11 "Woman Business Enterprise (WBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by one or more women.

#### **Exhibit H**

### Community Stabilization and Opportunity Pathways Fund

1.	Establishment of Fund; Initial Funding. The City would establish a fund to provide
financial supp	port to community stabilization efforts and education/jobs training opportunities
within the Cit	y (the "Fund"). Google would provide the initial funding and thereafter make regular
contributions	to the fund during the term of the Development Agreement. The City would also
seek funds fro	om other sources, such as other large businesses with a presence in the City. The City
would establis	sh the Fund prior to Google's first payment. [The City would secure the commitment
(in addition to	Google) of private, public, or philanthropic investor(s) to the Fund to contribute not
less than \$	collectively on or before]

- 2. <u>Contributions by Google LLC</u>. Google would make payments in the amount of \$22.12 per gross square foot of office development, excluding any related or similar prepayment amounts identified in <u>Exhibit C2</u> (subject to CPI escalation not to exceed three percent (3%) per year), with payment to be made at Certificate of Occupancy. The amount of the payment would be established at the time the building permit for construction of the office building is issued.
- 3. <u>Allocation of Funds</u>. The Fund would be established in such manner as to authorize the allocation of Fund monies to the following categories in the following percentages:
  - a. Community Stabilization (\_\_\_\_% allocation of total funds)
    - i. Affordable Housing Preservation
    - ii. Housing innovation research
    - iii. Homelessness prevention
    - iv. Homelessness services
    - v. Small business stabilization
  - b. Opportunity Pathways Fund ( % allocation of total funds)
    - i. Early childhood education
    - ii. Career Exploration
    - iii. College/post-secondary scholarships
    - iv. Adult upskilling
    - v. Small business and entrepreneurship

The Fund would provide for the review and adjustment every five (5) years of the percentage allocations following a financial and performance audit that evaluates how the recipients used the monies. Adjustments could be made within the categories but monies could not be directed to programs outside the categories or for other uses. In addition to making monetary contributions to the Fund, Google may explore with the City opportunities to work together in ways that are aligned with the Fund's objectives and Google's corporate social responsibility objectives.

4. <u>Fund Administration</u>. In addition to periodic reporting to the City and the [annual] financial and performance audits, the key aspects of the Fund's administration would be a third party fund manager and a community advisory board.

- a. <u>Third Party Fund Manager</u>. A third party fund manager would manage the Fund. Through an RFP/RFQ process, the City would select a qualified third party fund manager with experience managing funds that are both similar in amount of money under management and purpose as the Fund. The City would complete the selection process prior to the date on which Google must make its first payment to the Fund..] The fund manager would receive compensation in the form of a market-rate fund management fee that would also cover its overhead costs (e.g., staff and administrative costs) related to its management duties.
- b. <u>Community Advisory Board</u>. The Fund's charter would include the establishment of a community advisory board consisting of [nine (9)] members "Board"). The City Council would appoint a third of the members; the remaining members would be selected through a transparent process run by the third party Fund manager. A third of the members would be residents of the City of San Jose or have recent prior experience (such as working, teaching, running local non-profit organizations or as a former resident) within the City of San José; and a third of members would have recent prior experience and subject matter expertise in the Fund's priority areas (e.g., affordable housing, education, workforce development). The purpose of the Board would be to make recommendations on (i) grantees/recipients of Fund monies and (ii) use of fund monies for costs related to community engagement and consultant and technical assistance, in all cases consistent with the purpose of the Fund and its funding priorities. The details regarding selection and replacement of Board members, the Board's governance and duties, and stipends, if any, for Board members and reimbursement of Board expenses would be consistent with similar citizen advisory boards or technical advisory committees in San José and other Bay Area Cities.

# Exhibit I

# Infrastructure Plan (including Reimbursement Costs Sheet and Maintenance Matrix)

#### Exhibit J

### Framework for City-Owned Electrical Microgrid at Google's Downtown West Project

This Exhibit provides a framework for Developer and the City to follow to first confirm the viability of an electrical Microgrid as a key component of the Project, and then, subject to their respective approvals, enter into a contract addressing development, acquisition and operation of the Microgrid (the "Microgrid Contract").

### 1. Electric Microgrid Overview

- 1.1. Developer is developing district systems as a key tool to achieve the Project's environmental objectives and to increase the Project's resilience in the face of power and other system outages. One of the principal district systems is the electrical microgrid ("Microgrid"). The grid-tied Microgrid will be developed to supply electricity to the Project area. The Microgrid will be fed by a primary transmission level electricity supply 115kV from PG&E before transforming to 12kV or 21kV distribution supply via a dedicated Project substation. In the event of a failure of PG&E's primary supply, the system will be switched to island mode, meaning that it will operate in isolation from the PG&E network, and then utilize its embedded renewable energy systems, backup generation and storage to manage electrical supply to the Project.
- 1.2. Developer has several options with respect to the development and ownership of the Microgrid.
  - 1.2.1. The City has an interest in acquiring, owning and operating the system, and will provide distribution-level electricity supply to all buildings and future customers within the Project area.
    - a. Developer has funded a preliminary study and cost of service analysis by the City, to confirm the viability of the City-owned system. The results of this preliminary study indicate that the Project is \_\_\_\_\_.
    - b. Developer has made an application for interconnection to PG&E.
    - c. Both parties acknowledge that the City-owned system has potential mutual benefits, and have agreed to further develop the financial and legal basis for proceeding with the Microgrid following the issuance of Project entitlements, including negotiation of a Microgrid Contract.

### 2. Relationship to Project Approvals

2.1. The Microgrid is a component of the Project that was evaluated in the Project's Final Environmental Impact Report, and which is part of the Project's Infrastructure as reflected both in the Infrastructure Plan and in the Downtown West Planned Development Permit and its implementing components, including the Downtown West

- Improvement Standards, Conceptual Infrastructure Plan Sheets and the Downtown West Design Standards and Guidelines.
- 2.2. The City's proposed acquisition, ownership, operation, or other administration of the Microgrid, which may be effectuated through future City actions, approvals, and/or agreements with Developer or any of its successors or assigns under the Development Agreement, shall not require amendment to the Agreement, the Downtown West Planned Development Permit, or any other Approval.

### 3. Condition(s) Precedent

The City and Developer, prior to entering into the Microgrid Contract, shall satisfy the following conditions precedent:

- 3.1. City shall complete a Cost of Service Study regarding the Microgrid.
- 3.2. City shall make a determination to participate with the Developer in the acquisition, ownership, operation, or other administration of the Microgrid.
- 3.3. As soon as reasonably practicable and feasible, the City shall take all steps necessary under applicable state and local law to organize as an entity qualified to supply and transmit electrical energy service to meet the electrical loads of end-users within the Project, and to meet its other obligations under a prospective Microgrid Contract; City shall confirm completion of such steps in writing to Developer.
- 3.4. Developer shall confirm in writing to the City that it has the legal authority to meet its obligations under a prospective Microgrid Contract.
- 3.5. Developer shall secure a final facilities agreement with, and system impact study from PG&E.

### 4. Planning Activities

- 4.1. The PG&E Interconnection process includes the following:
  - 4.1.1. Developer must submit a Wholesale Transmission Interconnection Application to PG&E.
  - 4.1.2. Developer consults with the City on the Developer's decision whether to move forward with the System Impact Study and Facilities Study.
  - 4.1.3. The City participates in discussions between the Developer and PG&E related to the interconnection facilities required to connect the Microgrid to the PG&E transmission grid.
  - 4.1.4. The Developer will decide whether to enter into an Interconnection Agreement with PG&E. If the City and Developer determine to participate together in the ownership, operation, or other administration of the Microgrid, the

Interconnection Agreement will contemplate eventual transfer of Developer's rights and obligations in the Interconnection Agreement to the City.

- 4.2. The Microgrid design process would proceed as follows:
  - 4.2.1. Developer, in consultation with the City, shall be responsible for the design of the Microgrid, including development of a performance brief which establishes design standards and other details for the Microgrid, including materials and equipment to be employed ("Performance Brief").
  - 4.2.2. Developer shall provide the City the opportunity to review and comment on the Performance Brief before it is finalized.
  - 4.2.3. The Performance Brief will describe a Microgrid design and operation that comports with best utility practices and meets or exceeds all applicable safety requirements.

### 5. Development and Installation of the Microgrid

- 5.1. Developer's and the City's responsibilities with respect to development and installation of the Microgrid shall be governed by the Microgrid Contract between Developer and the City.
- 5.2. Developer shall be responsible for development and installation of the Microgrid.
- 5.3. Developer shall ensure development and installation of the Microgrid complies with the Interconnection Agreement and the Performance Brief.

### 6. Ownership, Operation, and Maintenance of the Microgrid

- 6.1. Ownership, operation, and maintenance of the Microgrid assets shall be governed by the Microgrid Contract between Developer and the City.
- 6.2. Within [insert] days of Developer's completion of the Microgrid, the City shall purchase from Developer those portions of the Microgrid necessary to transmit and deliver electricity from the Microgrid's point of common coupling with the PG&E grid to end-users within the Project, including distribution infrastructure, the substation, and Microgrid controller (the "Distribution Facilities").
- 6.3. The purchase price for the Distribution Facilities shall be set forth in the Microgrid Contract, and generally based on [the fair market value of the Distribution Facilities as determined by a nationally recognized independent appraiser selected by the parties // OR // the value of the Distribution Facilities established by the Cost of Service Study] [PENDING DISCUSSIONS]; provided, however, that the purchase price shall not be less than the cost to construct the improvements.
- 6.4. Other than the Distribution Facilities, Developer shall retain ownership of the generation assets, energy storage systems and any other behind-the-meter components

("Developer Facilities"). Developer may, within its discretion, transfer behind-themeter components to its tenants or other Project end-users.

# 7. Project Operation and Maintenance

- 7.1. Operation and maintenance of the Microgrid shall be governed by the Microgrid Contract between Developer and the City.
- 7.2. The City shall be responsible for the operation and maintenance of the Distribution Facilities. Developer shall be responsible for the operation and maintenance of the Developer Facilities.
- 7.3. The City shall obtain the necessary leases, easements, and licenses from the Developer to operate and maintain the Distribution Facilities on Developer-owned land.
- 7.4. In the event Developer determines to alter the configuration of the Microgrid,, the City shall work with the Developer in good faith to allow for such reconfiguration.

### 8. Energy Services

- 8.1. The City's provision of energy services shall be governed by the Microgrid Contract with the Developer.
- 8.2. To meet the aggregate load of the Project, the City shall provide, deliver, and sell electric energy to Developer and all end-users within the Project, subject to the terms of a tariff that would govern the terms and conditions for distribution of electric service within the Project.
- 8.3. The rates and other terms for City's electric service shall be based on the Cost of Service Study, provided, however, in all cases rates shall be consistent with any rate schedule, limits or mechanisms established by any governing state or federal agency, or, in the absence of an applicable control, rates shall not exceed rates for comparable service from other utility providers available to San José residents and commercial owners.
- 8.4. End-users within the Project will have a customer relationship with the City, and the City will be responsible for billing end-users for energy services.

### Exhibit K

### **Downtown West Parking Requirement**

### **Downtown West Parking Requirements**

Developer and the City anticipate the replacement of approximately 2,850 existing surface parking spaces on property that will be redeveloped as part of the Downtown West project, and the development of up to 1,950 additional spaces (for a total of up to 4,800 publicly-available parking spaces) to ensure the long-term sustainability of the SAP Center. This does not include up to 2,360 residential parking spaces. Terms that are used but not defined in this Exhibit shall have the meanings given such terms in the body of the Development Agreement to which this Exhibit is attached.

- 1. Overall Requirements: Over the course of the development of the Project, Developer shall be required to provide publicly accessible off-street parking spaces serving new office development at a cumulative ratio between 0.5 and 0.645 spaces for each 1,000 square feet of Floor Area (which shall mean eighty-five percent (85%) of the total gross floor area) of such office buildings (the "Required Parking Ratio"). At the point of full build out, the required ratio shall be 0.645 spaces.
  - a. Once 4,000 parking spaces are operational and in compliance with these terms, the Required Parking Ratio will no longer apply.
  - b. Developer may construct up to 4,800 publicly available parking spaces at its discretion; this parking would be reviewed as part of the Conformance Review process.
  - c. The Required Parking Ratio represents a reduction from standard City parking requirements, which would require as many as 15,500 spaces at Downtown Commercial parking ratios (2.5 spaces per 1,000 square feet of Floor Area), or 6,600 spaces with application of available standard parking reductions (1.06 spaces per 1,000 square feet of Floor Area). The Required Parking Ratio of .645 spaces per 1,000 square feet of Floor Area is warranted given the area's rich transit and mixed-use environment, sustainability and air quality imperatives, traffic reduction and City's multimodal goals, and transportation demand management requirements.
  - d. The Required Parking Ratio is critical to serve the needs of the Project, as well as to replace parking currently utilized by transit riders and SAP Center patrons. With this in mind, the commercial parking will be publicly-available and priced to allow for maximum efficiency to support the SAP Center, as well as the multimodal goals of the City and Project.
    - i. The project targets 85% of the commercial parking spaces to be available for SAP event use after 6:30 pm on event days.
  - e. If, over the course of the Development Agreement, some parking is found to be no longer warranted, the Director of PBCE may, in its sole discretion, reduce the Required Parking Ratio and/or overall amount without requiring an amendment to the Development Agreement or to this Exhibit.

- f. The parking requirement must be satisfied in part through at least 2,850 spaces within the Project Site; including existing parking spaces, 2,850 spaces must be maintained within the Project Site.
- g. Beyond the 2,850 replacement parking spaces, Developer may deliver the remaining required parking either within the 1/3-mile radius of the SAP Center or through an Alternative Parking Arrangement.
  - Alternative Parking Arrangement: If Developer determines that it will not provide any number of the remaining required parking spaces within the Project Site, then, in order to meet the Required Parking Ratio, the City shall have the right to designate additional land owned by the City and within ½ of a mile of the Project Site (the "Additional Parking Property") for Developer to build additional parking spaces; Developer would then be required to build additional spaces on the Additional Parking Property, subject to obtaining appropriate environmental clearance and any discretionary approvals; provided, however, in no event would Developer be required to build parking spaces on the Additional Parking Property that, when aggregated with the spaces located within the Project boundary, would exceed the Required Parking Ratio or 4,000 total spaces, as described above.
- h. DOT to review the design of parking facilities as part of the Subsequent Review and future Focused LTA processes and make recommendations designed to facilitate access, egress, and safety.
- 2. <u>Phasing:</u> The requirements below are to ensure that enough parking exists, at any given specific time, for the continued operational needs of the SAP Center, as well as the multimodal goals of the City and Project.
  - a. Compliance with this requirement shall be evaluated during the Conformance Review process for each office building, and verified prior to issuance of Building Permits for each office building.
    - Proposed parking spaces included as part of a previously approved Conformance Determination shall be counted to determine whether the Required Parking Ratio will be satisfied upon construction of the office building that is the subject of a Conformance Review. Surface parking spaces in the Project also shall be counted during the Conformance Review process to determine whether the Required Parking Ratio will be satisfied. For clarity, this means that, to determine whether the Required Parking Ratio will be satisfied, each Conformance Review for an office building shall account for (i) surface parking spaces in the Project, (ii) proposed parking spaces included in a previously approved Conformance Determination that have not yet been constructed, (iii) parking spaces already constructed as part of the Project, and (iv) the parking spaces included in the subject Conformance Review application. In the event a proposed office building or buildings would result in the elimination of existing surface parking spaces, the Conformance Review Application for that building shall not be denied for the temporary failure to satisfy the

Required Parking Ratio during construction of the building or buildings if the Project would continue to provide a ratio of 0.5 spaces [TO BE CONFIRMED] for each 1,000 square feet of Floor Area, and so long as the Required Parking Ratio is satisfied upon issuance of a Certificate of Occupancy for that office building or buildings.

- b. If the Project will result in a temporary failure to satisfy the Required Parking Ratio, as described in Section 2.a.i, that exceeds five (5) years, Developer shall develop and obtain agreement from the City for one or more interim parking management strategies as part of the Parking Delivery Plan during construction.
- c. To the extent the Option agreement for Lots A/B/C is exercised prior to 2040, the Developer must be in compliance with the Required Parking Ratio, subject to Section 2(a)(i), prior to beginning vertical development on Lots A/B/C. To the extent the AMA is terminated earlier than 2040 or at its scheduled expiration in 2040, section 1d.i. shall no longer apply.

### Exhibit L

### **List of Approvals**

- 1. Certification of Environmental Impact Report for Downtown West Mixed-Use Project
- 2. Overruling the Airport Land Use Commission's Inconsistency Determination
- 3. Amendment to Envision San Jose 2040 General Plan
- 4. Amendment to Diridon Station Area Plan
- Rezone to Planned Development Zoning District and approval of Downtown West
   General Development Plan
- 6. Amendment of Title 20 of the City of San Jose Municipal Code
- 7. Approval of Downtown West Planned Development Permit, including the Downtown West Design Standards and Guidelines, the Downtown West Infrastructure Standards, the Conceptual Civil Infrastructure Plan Sheets, and Conformance Review Implementation Guide
- 8. Development Agreement for Downtown West Mixed-Use Plan
- 9. Approval of Parkland Agreement
- 10. Vesting Tentative Map for Downtown West
- 11. Master Encroachment Agreement for Downtown West
- 12. Construction Impact Mitigation Plan (Framework)
- 13. Amendment of Historic Preservation Permit
- 14. Landmark Designation Approval for Adjustment to San Jose Water Building
- 15. Landmark Designation Approval for Adjustment to Southern Pacific Depot
- Street Vacation for Portions of North Montgomery Street, Delmas Avenue, and South Montgomery Street

#### Exhibit M

### **List of Applicable Impact Fees**

- 1. Commercial Linkage Fee (as described in Section IV.A of <u>Exhibit D</u> above); [TO BE DEVELOPED: description of initial per square foot CLF, escalation and timing of calculation and payment]
- 2. Affordable Housing In-Lieu Fee (see Affordable Housing Program at Exhibit D above);
- 3. School Impact Fee on residential development;
- 4. Construction Taxes on commercial and residential development pursuant to San Jose Municipal Code Chapter Chapters 4.46, 4.47, 4.54, 4.64; and
- 5. Sanitary Sewer Connection Fee pursuant to San Jose Municipal Code Chapter 15.16, subject to capacity which will be confirmed through the subsequent approval process.

The following Impact Fees are applicable to the Project, but Developer shall satisfy the obligations through actual construction or other methods, as indicated:

- Diridon Station Infrastructure Fee shall be satisfied in full through construction of in-kind infrastructure, as described in <u>Exhibit I</u>;
- Parkland Dedication requirements pursuant to Chapter 19.38 shall be satisfied in full through a combination of methods as described in <a href="Exhibit E">Exhibit E</a>.

# Exhibit N

# Form of Notice of Completion and Termination

RECORDING REQUESTED BY AN WHEN RECORDED RETURN TO:	ID
[address]	_
Attn:	
	(Space above this line reserved for Recorder's use only)
"Notice") dated for reference purposes only by and between the CITY OF SAN JOSE, a p State of California (the "City"), acting by an	BUILDING AND COMMUNITY BENEFITS (this as of this day of, 20, is made political subdivision and municipal corporation of the nd through its Department of Planning, Building and, a] ("Developer") [substitute
of, 20 and recorded in th , as Document Number	red into that certain Development Agreement dated as e Official Records of the County of Santa Clara on (Book No, Reel No) ed terms used in this Notice that are not defined shall velopment Agreement.
have been completed and all of the associated	velopment Agreement, when one or more Buildings d Community Benefits tied to those specific Buildings, upon Developer's request, to execute and record a cable Building.
described in the attached <u>Exhibit A</u> (the "At Community Benefits tied to that Buildin	uilding known as, located on the property ffected Property"), together with all of the associated ag, have been completed in accordance with the an interest in the Affected Property have the right to
CITY:	Approved as to form:
CITY OF SAN JOSE, a municipal corporation	[], City Attorney
By: Director of Planning, Building and Code Enforcement	By: Deputy City Attorney

# Exhibit A

[attach legal description of Affected Property]

### **Exhibit O**

### Form of Assignment and Assumption Agreement

RECORDING REQUESTED BY			
CITY CLERK OF THE CITY OF SAN JOSE			
(Exempt from Recording Fees			
Pursuant to Government Code			
Section 27383)			
AND WHEN RECORDED MAIL TO:			
[] City Clerk, City of San José			
City Clerk, City of San José			
200 E. Santa Clara Street, 14th Floor			
San José, CA 95113			
ASSIGNMENT AN	D ASSUMPTIO	ON AGREEMENT	
RELATIVE TO DEVELOP	MENT AGREE	MENT FOR []	
THIS ASSIGNMENT AND ASSUMPTI			S
entered into this day of ("Assignor") and	, 20, b	by and between, a	
(" <b>Assignor</b> ") and		, a	
("Assignee").			
	RECITALS		
A. political subdivision and municipal corpo	, a	and the City of San José, a	
into that certain Development Agreement 20 for reference purposes, with respect property is more particularly described in	t (the " <b>Developm</b> t to certain real pr the Developmen	nent Agreement") dated as of property owned by Assignor, as such nt Agreement (the " <b>Project Site</b> "). Th	_, ie
Development Agreement was recorded in as Document No		cords of the County of Santa Clara on	
[add recital to document any previous tro information]	ınsfer of the Trar	nsferred Property, with recording	
D The Development Assess	- ant muarridae 41- a	t sylvingt to the terms and magniness	4

B. The Development Agreement provides that, subject to the terms and requirements set forth therein, including, without limitation, Section 12 (Transfer or Assignment) Developer (Assignor) has the right to: (i) Transfer all or a portion of the Project Site, (ii) assign all of its rights, title, interest and obligations under the Development Agreement to a Transferee with respect to the portions of the Project Site transferred to the Transferee, and (iii) upon the execution and delivery of an approved Assignment and Assumption Agreement, to be released from any prospective liability or obligation under the Development Agreement.

- C. Assignor intends to convey certain real property as more particularly identified and described on <u>Exhibit A</u> attached hereto (hereafter the "**Transferred Property**") to Assignee. The Transferred Property is subject to the Development Agreement.
- D. Assignor desires to assign and Assignee desires to assume Assignor's right, title, interest, burdens and obligations under the Development Agreement with respect to and as related to the Transferred Property, as more particularly described below.

#### ASSIGNMENT AND ASSUMPTION

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee hereby agree as follows:

- 1. <u>Defined Terms</u>. Initially capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Development Agreement.
- 2. <u>Assignment of Development Agreement</u>. Assignor hereby assigns to Assignee, effective as of Assignor's conveyance of the Transferred Property to Assignee, all of the rights, title, interest, burdens and obligations of Assignor under the Development Agreement with respect to the Transferred Property, including any Community Benefits that are tied to Buildings on the Transferred Property [all as more specifically set forth on <u>Schedule A</u> to this Agreement](the "Assigned and Assumed Obligations"). Assignor retains all the rights, title, interest, burdens and obligations under the Development Agreement with respect to (i) the Transferred Property that are not Assumed and Assigned Obligations and (ii) all other portions of the Project Site owned by Assignor.
- 3. <u>Assumption of Development Agreement</u>. Assignee hereby assumes, effective as of Assignor's conveyance of the Transferred Property to Assignee, and all of the Assigned and Assumed Obligations with respect to the Transferred Property, including its associated Community Benefits, and agrees to observe and fully perform, and to be subject to, all of the Assumed and Assigned Obligations. The parties intend that, upon the execution of this Assignment and conveyance of the Transferred Property to Assignee, Assignee shall become the "Developer" under the Development Agreement with respect to the Transferred Property and the Assigned and Assumed Obligations.
- 4. <u>Reaffirmation of Indemnifications</u>. Assignee hereby consents to and expressly reaffirms any and all indemnifications of the City set forth in the Development Agreement, including without limitation Section \_\_\_\_ of the Development Agreement.
- 5. <u>Housing Obligations</u>. Assignee has read and understands the obligations set forth in Exhibit D (Affordable Housing Program) of the Development Agreement as they relate to the Transferred Property. Without limiting the foregoing, Assignee agrees (1) to the terms and provisions of such Exhibit D, including the indemnities, waivers and releases set forth therein, and (2) that the Development Agreement falls within the express exception to the Costa-Hawkins Act, Section 1954.52(b) because it is a contract with a public entity in consideration for contributions and other forms of assistance specified in Chapter 4.3 (commencing with Section 65919 of Division 1 of Title 7 of the California Government Code). Assignee understands that

the City would not have been willing to enter into the Development Agreement without the provisions of such Exhibit D.

- 6. <u>Assignee's Covenants</u>. Assignee hereby covenants and agrees that: (a) Assignee shall not challenge the enforceability of any provision or requirement of the Development Agreement; (b) Assignee shall not sue the City in connection with any and all disputes between Assignor and Assignee arising from this Assignment or the Development Agreement, including any failure to complete all or any part of the Project by any party; and (c) Assignee shall indemnify the City and its officers, agents and employees from, and if requested, shall defend them against any and all Losses resulting directly or indirectly from any dispute between Assignor and Assignee arising from this Assignment or the Development Agreement.
- 7. <u>Binding on Successors</u>. All of the covenants, terms and conditions set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

8.	Notices.	The notice address for Assignee under S	Section	of the Development
Agreement s	hall be:	_		
		Attn:		
With	copy to:			
	F J			
		Attn:		

- 8. <u>Counterparts</u>. This Assignment may be executed in as many counterparts as may be deemed necessary and convenient, and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same instrument.
- 9. <u>Governing Law</u>. This Assignment and the legal relations of the parties hereto shall be governed by and construed and enforced in accordance with the laws of the State of California, without regard to its principles of conflicts of law.

IN WITNESS HEREOF, the parties hereto have executed this Assignment as of the day and year first above written.

### **ASSIGNOR:**

[insert signature block]

### **ASSIGNEE:**

[insert signature block]

Schedule A to Assignment & Assumption Agreement - Detailed List of Assigned and

**Assumed Obligations**