

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Preliminary Draft - Open Space and Public Access Agreement and Easement
Date: Tuesday, April 6, 2021 2:38:37 PM
Attachments: [Draft Open Space and Public Access Agreement and Easement \(003\).doc](#)

From: Phan, Johnny
Sent: Wednesday, February 24, 2021 3:09 PM
To: Miller, J. Gregg <gmler@coblenzlaw.com>
Subject: Preliminary Draft - Open Space and Public Access Agreement and Easement

Hi Gregg – Attached is an Open Space and Public Access Agreement and Easement template that can be used for the Privately Owned Publicly Accessible Open Space. The template is a good starting point but will need to be revised to address certain open questions and unique circumstances of each site. Thanks. Johnny

Johnny V. Phan

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<p>RECORDING REQUESTED BY, AND WHEN RECORDED RETURN TO:</p> <p>City of San José 200 E. Santa Clara Street, 16th Floor San José, California 95113 Attn: _____</p> <p>with a copy to:</p> <p>Google, LLC 1600 Amphitheatre Parkway Mountain View, CA 94043 Attn: _____</p>	
A.P.N. (s): _____	THE AREA ABOVE IS RESERVED FOR RECORDER'S USE

Exempt from recording fees pursuant to Government Code § 27383.

Exempt from documentary transfer taxes pursuant to Revenue Taxation Code § 11922 (conveyance to a governmental entity).

[CHECK W/TITLE COMPANY ON FORM/FORMAT]

[Form Of] OPEN SPACE AND PUBLIC ACCESS EASEMENT AGREEMENT

This OPEN SPACE AND PUBLIC ACCESS EASEMENT AGREEMENT (the “Agreement”) is entered into as of _____, 2021 (the “Effective Date”), by and between GOOGLE, LLC, a Delaware limited liability company (“Grantor”) and the CITY OF SAN JOSÉ, a California municipal corporation (“Grantee”).

R E C I T A L S

A. Grantor is the owner of the land described on Exhibit “A” and the improvements thereon (collectively, the “Grantor Parcel”).

B. Grantor and Grantee have entered into a Development Agreement dated _____, 2021 (the “Development Agreement”) in connection with a proposed development (“Development”) on land owned by Grantor, including the Grantor Parcel. The Development Agreement was recorded in the Official Records of Santa Clara County on _____, 202__ as Document No. _____.

C. The Development Agreement requires that Grantor enter into this Agreement with Grantee relating to the Privately Owned Public Accessible Open Space, as defined in the Development Agreement. The purpose of this Agreement is to ensure public access in perpetuity to Grantor Parcel consistent with the Development Agreement and this Agreement.

NOW, THEREFORE, in consideration of the Development Agreement, the mutual covenants and terms contained herein and other consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Grant of Easement. Grantor hereby grants to Grantee, a perpetual, exclusive easement (the “Easement”) in gross in and over the Grantor Parcel (hereinafter referred to as the “Easement Area”).

2. Purpose of Easement; Open Space and Public Access; No Improvements. The purpose of the Easement shall be for *[open space and ecological preservation, and access to and use by the public of the Easement Area - details for each easement will be incorporated in this section]*.

Except for the maintenance and repairs required of Grantor under this Agreement, and improvements required by applicable law or changes in laws or in the Development Agreement, Grantor shall not make any improvements to, or alter, the Easement Area, without prior written authorization from Grantee.

Grantor shall install and maintain signage, subject to Grantee approval, informing the public: (i) that the Easement Area is open for public use, (ii) the Public Access Hours as defined in Section 3 below, and (iii) other relevant information regarding public use of the Easement Area as further described in the Development Agreement.

[Optional language if ancillary commercial uses allowed: Ancillary commercial uses such as kiosks, rotating vendor space, and food truck access are allowed, subject to Grantee approval, provided that the total area dedicated to such commercial uses shall not exceed 10% of Easement Area, unless otherwise approved for certain temporary festivals or events.]

3. Hours. The Easement Area shall remain open to the public on a daily basis from sunrise to the later of (i) one hour after sundown or (ii) 9:00 P.M. (the “Public Access Hours”).

The streets, pedestrian or bicycle ways, trails that connect civic destinations (such as connections to the station, all portions of the Los Gatos Creek Trail), vacated rights of way, “generally-accessible mid-block passages” and “limited access mid-block passages” as set forth in Exhibit “B” shall be open 24 hours per day. Portions of the Easement Area may be closed to the public from time to time as reasonably required for maintenance and repairs and to the extent necessitated by emergencies declared by the City of San Jose. The Easement Area shall not individually be closed for public access during Public Access Hours more than six (6) times per year, nor for more than eight (8) hours in any one month.]

4. Maintenance and Repairs. Grantor shall, at its sole cost and expense, keep the Easement Area and all improvements thereon in good condition and repair at all times for public use, consistent with the standards set forth in Exhibit "C".

5. Nondiscrimination. Grantor shall not discriminate against any person from accessing the Easement Area on the basis of the fact or perception of a person's economic status social standing, race, ethnicity, 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.

6. Compliance With Laws. Grantor shall, at its costs and expense, make any improvements to the Easement Area required by laws or changes in laws.

7. Property Taxes; Liens. Grantor or its successors and assigns shall pay, prior to delinquency, all property taxes, special taxes and assessments assessed against the Easement Area, and shall keep the Easement Area free of all deeds of trust and other liens [except for deeds of trust securing financing for the Development, which must be subordinated to this Agreement and the Easement by a written subordination agreement recorded against the Easement Area that is acceptable to Grantee].

8. Grantee's Remedies. If Grantee determines that Grantor is in violation of the terms of this Agreement or the Easement, Grantee shall give written notice to Grantor of such violation. If Grantor fails to cure the violation within fifteen (15) days after said written notice is given, or said cure reasonably requires more than fifteen (15) days to complete and Grantor fails to begin to cure within the fifteen (15) day period or fails to continue diligently to complete the cure, then Grantee may bring an action at law or in equity in a court of competent jurisdiction to enforce compliance by Grantor with the terms of this Agreement or the Easement, to recover any damages to which Grantee may be entitled for violation by Grantor of the terms of this Agreement or the Easement, or may cure the violation in which event Grantor shall reimburse Grantee for the costs incurred by Grantee in connection with the violation and cure within ten (10) days after written demand with evidence of such costs.

Notwithstanding the foregoing, without notice or the expiration of any cure period, Grantee may enjoin the violation, ex parte, by temporary or permanent injunction without the necessity of proving either actual damages or the inadequacy of otherwise available legal remedies, or for other equitable relief.

9. Miscellaneous.

(a) Notices. Any notice to be given under or in connection with this Agreement shall be in writing and shall be deemed to have been given upon: (i) one (1) business day after being deposited with Federal Express or another reliable overnight courier service for next day delivery, or (ii) two (2) business days after being deposited in the United States mail, registered or certified mail, postage prepaid, return receipt required, and addressed as follows (or

to such other address of which a party notifies the other with a notice given pursuant to this Section):

If to Grantor: Google, LLC
1600 Amphitheatre Parkway
Mountain View, CA 94043
Attn: _____

If to Grantee: City of San José
200 E. Santa Clara Street, 16th Floor
San José, California 95113
Attn: _____

With Copy to: Johnny V. Phan
Chief Deputy City Attorney
Office of the City Attorney
City of San José
200 East Santa Clara Street
San José, CA 95113-1905
johnny.phan@sanjoseca.gov

(b) Runs With Land; Binds Successors-in-Interest. This Agreement and the Easement encumbers and binds the Easement Area and binds all successors to any portion of or interest in the Easement Area.

(c) Entire Agreement. This Agreement is the entire agreement between the parties with respect to its subject matter and supersedes all prior and contemporaneous oral and written agreements and discussions, except the Development Agreement.

(d) Amendment; Termination. This Agreement may be amended or terminated only by an agreement in writing signed by all of the parties. Amendment or termination of this Agreement shall not require an amendment to the Development Agreement.

(e) Neutral Construction: Each of the parties cooperated in the drafting and preparation of this Agreement with the assistance of legal counsel. Accordingly, none of the provisions of the Agreement shall be construed against the other party as the drafter.

(f) Governing Law. This Agreement shall be governed by and interpreted under the laws of the State of California.

(g) Severability. If any provision of this Agreement shall for any reason be held to be invalid, illegal or unenforceable by any court of competent jurisdiction, the validity of the other provisions of this Agreement shall in no way be affected thereby.

(h) Counterparts. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same instrument.

(i) Further Acts. Each of the parties shall execute such other and further documents and do such further acts as may be reasonably required to effectuate the intent of the parties and carry out the terms of this Agreement (including, without limitation, obtaining and delivering to Grantee prior to the recordation of this Agreement reasonable subordination agreements from the holders of any liens encumbering the Easement Area that are or might be senior to this Agreement or the Easement as of the date of the recordation of this Agreement).

(j) Time of Essence. Time is of the essence of every provision hereof in which time is a factor.

(h) No Third Party Beneficiaries.

(i) To the fullest extent by law, Grantor shall defend, indemnify and hold Grantee harmless from and against any and all claims, liabilities, losses, damages, costs and expenses (including without limitation attorneys' fees and court costs) arising from or relating to the existence of the Easement, public use of the Easement Area, or (excluding sole negligence acts by Grantee) anything occurring on the Easement Area.

(j) [Insurance Requirements, with City named as additional insured.]

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

GRANTOR:

GOOGLE LLC,
a Delaware limited liability company

By: _____
Print Name: _____
Title: _____

GRANTEE:

CITY OF SAN JOSÉ,
a municipal corporation

By: _____
Print Name: _____
Title: _____

ATTEST:

City Clerk

Approved as to form:

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Santa Clara)

On _____, before me, _____,
(insert name and title of the officer)

Notary Public, personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature_____ (Seal)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of Santa Clara)

On _____, before me, _____,
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Notary Public, personally appeared _____,
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subscribed to the within instrument and acknowledged to me that he/she/they executed the same
in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that
the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

EXHIBIT “A”

**LEGAL DESCRIPTION AND DIAGRAM/DEPICTION OF THE GRANTOR
PARCEL/EASEMENT AREA**

EXHIBIT “B”

Access and Rights-of-Way Diagram

EXHIBIT “C”

Maintenance Standards

EXHIBIT “D”

CERTIFICATE OF ACCEPTANCE
(California Government Code Section 27281)

This is to certify that the interest in real property conveyed by that certain Open Space Easement Agreement dated _____, 202__, from GOOGLE LLC to the CITY OF SAN JOSE, a California municipal corporation (the "City"), which is a governmental agency, is hereby accepted by the undersigned officer on behalf of the City pursuant to the authority conferred [by resolution of the City, Resolution Number _____, adopted on _____, 202__][at the meeting of the City council held on _____, 202__]and that the City consents to recordation thereof by its duly authorized officer.

Dated: _____, 202__

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.
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State of California)
County of Santa Clara)

On _____, before me, _____,
(insert name and title of the officer)

Notary Public, personally appeared _____,
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)