

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: Preliminary Drafts - Google - DW - Development Agreement DRAFT 2.26.21  
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**Attachments:** [Google - DW - Development Agreement DRAFT 2.26.21.docx](#)

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**From:** Phan, Johnny  
**Sent:** Friday, February 26, 2021 10:55 PM  
**To:** Miller, J. Gregg <[gmler@coblenzlaw.com](mailto:gmler@coblenzlaw.com)>  
**Subject:** Preliminary Drafts - Google - DW - Development Agreement DRAFT 2.26.21

Hi Gregg – Attached are comments and redline changes to the remaining body of the DA (starting from Section 3). The formatting and numbering are a little messed up but we can correct them in the next draft. Comments and changes are all still subject to additional City review. Let's connect this weekend to discuss. Thanks. Johnny

## **Johnny V. Phan**

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## 1. GENERAL RIGHTS AND OBLIGATIONS; DEVELOPMENT PROCESS

1.1 Development of the Project. 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.

Timing of Public Benefits, and Infrastructure 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 Exhibit C, the Affordable Housing Program included herewith as Exhibit D, the City-Dedicated Open Space Dedication and Improvements Schedule included herewith as Exhibit E5.1, the Infrastructure Plan included herewith as Exhibit I, and as more particularly described in Section 4.1. 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 or as may be required in the Project's conditions of approval. The scope and timing of Infrastructure that is associated with specific parcels or Buildings, as described in Exhibit I, shall be reviewed and approved by the City through the earlier of the subdivision mapping process consistent with applicable Laws, or Conformance Review process.

1.2 Approval of Subdivision Maps. [TO DEVELOP MAJOR 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 which terms and conditions shall be consistent with the requirements of this Development Agreement, the Approvals, Subsequent Approvals, and any conditions imposed on any such Approvals and Subsequent Approvals. Developer may pursue approval of Final Maps in phases that include only portions of the associated Tentative Map..

Conformance ReviewThe 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 Publicly Accessible Open Space, Privately-Owned Improvements, and 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 and the Conditions of Approval as it relates to the District Systems. 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 including all applicable conditions of approval (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, including all applicable conditions of approval 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, Public Works Standards Specifications and Details and approved addenda, and all other applicable laws, standards and specifications.

1.3 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, in the Public Improvement Agreement and/or in the Infrastructure Plan, as applicable, 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 may allow the issuance of a Temporary 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 Public Works Director. The Parties agree to work in Good Faith to enter into such agreements as may be needed to ensure that Developer provides Public Improvements in a timely manner and that City's process for acceptance of Public Improvements is not unduly 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.

#### 1.4 Diridon Integrated Station Concept (DISC) Plan Implementation

As articulated in the MOU, Google and the DISC Partner Agencies have a shared interest in a world-class rail and transit hub at Diridon Station and surrounding transit-oriented development; the Downtown West and DISC efforts are mutually beneficial. As such, Google and the City shall work in Good Faith to support the DISC program of projects through ongoing coordination and collaboration, with reasonable accommodations made to allow each effort to proceed in the most efficient way possible when feasible without harming the outcomes or commitments of the other

effort. The aim of this provision includes to effectively deliver both Downtown West and DISC and to minimize the impact and cost of construction for all parties and the surrounding community, including affordable housing and parks developed as a part of the Project. To this end, Google, the City, and other DISC partner agencies will document the parameters of the collaboration and coordination efforts, which is expected to include clarity regarding anticipated right-of-way needs to enable the expanded Station and how new parks/open space developed near the rail right-of-way would be considered under state and federal regulations (e.g., the United States Department of Transportation's Section 4(f) provision).

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

### **2.1 Public Benefits Exceed Those Required by Existing Ordinances and 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.

2.1.1 In satisfaction of City statutory and/or regulatory requirements, Developer shall, provide the following in accordance with Exhibit C, D, E, and I, 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) and Commercial Linkage Fee requirements, as further described in Exhibit D;

(b) the City-Dedicated Open Spaces in satisfaction of Developer's Parkland Obligation, as further described in Exhibit E 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 Exhibit I (not including the enhanced infrastructure, District Systems, and Microgrid elements described in Section 4.1.3(c)), which improvements are expected to satisfy Developer's Diridon Station Infrastructure Fee requirement in full.

Unless indicated elsewhere in this Agreement, Developer shall Complete each of the foregoing on or before the applicable dates provided in this Agreement and Exhibits hereto, and the Approvals; if no deadline is provided in this Agreement and Exhibits hereto or the Approvals, the normal deadline pursuant to City rules, standards, and/or practice shall apply. Any payments or property received by the City as part of the foregoing shall be used by the City as described in this Agreement and Exhibits hereto. This section 4.1.1 shall not be construed to limit Developer's obligations to comply with all applicable statutory and regulatory requirements whether listed in this section 4.1.1 or not.

2.1.2 Community Benefits Provided By Project. 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, among other things, such Community Benefits:

(a) 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;

(b) the Affordable Housing Program benefits described in Exhibits C and D that exceed Developer's obligations pursuant to the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08); and

(c) 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 Exhibit [ ](Site Plan and Legal Description)) six (6) months after Final Approval, free and clear of any occupants and leases, but in its otherwise as-is condition, as set forth in Exhibit C.

2.1.3 Project Features. In addition to the Community Benefits, Developer has opted to provide the following additional Project Features as a Public Benefit:

(a) Privately-Owned Publicly Accessible Open Space [PENDING 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 Publicly Accessible Open Space totaling approximately 10.2 acres (7 acres of which will be subject to Easement Agreements as described herein), 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" and as Privately-Owned Publicly Accessible Open Space herein ). Prior to issuance of a



temporary certificate of occupancy for any building on the building parcel corresponding to a Privately-Owned Publicly Accessible Open Space, as provided by the schedule in Section 4.1.3(a)(i) below, Developer shall execute and record an open space and public access easement in favor of the City, in form and substance satisfactory to the City Attorney and substantially in the form attached hereto as Exhibit F2 (“Easement Agreement”), however no Easement Agreement shall be required for any midblock passage or semi-public open space area. Each Easement Agreement shall ensure the Privately-Owned Publicly Accessible Open Space is maintained and open for public use per the terms of the Easement Agreement until either: 1) the life of the building that triggers the specific Privately-Owned Publicly Accessible Open Space, or 2) the City Council approves or authorizes an alternate use of the specific Privately-Owned Publicly Accessible Open Space area, which approval or authorization shall require a minimum two-thirds affirmative vote of the entire City Council. The Easement Agreement shall set forth the categories, boundaries, and limitations on use of the Private-Owned Publicly Accessible Open Space, all in accordance with the DWDSG; the hours of operation and private events/temporary closures set forth in Exhibit F3; and the Code of Conduct for Public Use set forth in Exhibit F4. The public right of access to the Privately-Owned Publicly Accessible Open Spaces is a Public Benefit that exceeds what would be required under the City's Parkland Dedication Ordinance, however they cannot be used to satisfy Developer’s Parkland Dedication Obligations. The Privately-Owned Publicly Accessible Open Space categories, design, boundaries, and programming are set forth DWDSG.

(i) Completion of Privately-Owned Publicly Accessible Open Space. Completion of the Privately-Owned Publicly Accessible Open Spaces means that City sign-off of final inspection has occurred; however, completion does not include or require completed installation of 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 open spaces; nor does Completion include or require improvement of the fifty (50) feet of a Privately-Owned Publicly Accessible 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 Temporary 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 E, 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]);
- N. Montgomery Pocket Park (B1)
- 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 trigger Building As defined in ZZZ

The following Privately Owned Open Spaces shall be delivered within twelve (12) months following issuance of a temporary certificate of occupancy for the building parcels to match adjacent City-dedicated parks as indicated in the following schedule and as referenced in Exhibit F:

- Los Gatos Creek Park (G1)
- Northend Park (A1)

(i) Term of Privately-Owned Publicly Accessible Open Space; Right of First Offer. Approximately seven (7) acres of [REDACTED] of Publicly Accessible Open Space, including the [REDACTED] Creekside Walk at South Autumn Street, Gateway Plaza, Los Gatos Creek East, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor, shall be subject to an Easement Agreement as described herein). The final acreage and/or boundaries of the Privately-Owned Publicly Accessible Open Spaces may be subject to adjustment pursuant to the provisions of the [REDACTED] DWDSG. While acreage of each individual space may be adjusted, at completion of the Project (Or end of DA term) the total acreage of Privately Owned Publicly Accessible Open Space shall be no less than 10.2 acres. Any Easement Agreement shall require that the Privately-Owned Publicly Accessible Open Space remain in place for the term set forth in Section 4.1.3 (a) above; provided, however, that the Privately-Owned Publicly Accessible Open Spaces shall be permitted to be reconfigured with approval by the Director of PRNS so long as the overall square footage of the Permanent Privately-Owned Publicly Accessible Open Spaces remains the same, **and an Easement Agreement (or Agreements) is recorded for the reconfigured open spaces consistent with the requirements of Section 4.1.3 (a) above.**

Any Privately-Owned Publicly Accessible Open Space shall only be transferred together with that adjacent building or buildings that triggered the open space requirement, and shall continuously provide the types of spaces and configurations, with the type of amenities/improvements, in compliance with the applicable regulations set forth in the Project Approvals, including the DWDSG and this Agreement.

At the end of the term of each specific Easement Agreement for the Creekside Walk at South Autumn Street and the Los Gatos East, and the Los Gatos Creek East, City shall have the right of first offer from Developer or Owner to buy the property at a fair market price established through an appraisal process mutually agreeable to the parties.

(ii) Fee For Privately-Owned Public Open Space Delay

. For the Permanent Privately-Owned Open Space, in the event Developer fails to Complete any Permanent 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 fee to the City (the "Private Open Space Delay Fee"). The Private Open Space Delay Fee 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 Permanent Privately-Owned Open Space is delayed beyond the thirtieth (30<sup>th</sup>) month following issuance of the earlier of Temporary Certificate of Occupancy or 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 Fee of fifty cents (\$0.50) per square foot of the delayed Permanent Privately-Owned Open Space;
- Months 37 to 42: Private Open Space Delay Fee of one dollar (\$1.00) per square foot of the delayed Permanent Privately-Owned Open Space;

- Month 42 to 60: Private Open Space Delay Fee of ten dollars (\$10.00) per square foot per month of the delayed Permanent Privately-Owned Open Space;
- Month 61: Failure to deliver a POPO after 60 months shall constitute a default under the terms of the Development Agreement.

Pursuant to the terms of the Parkland Agreement, included as Exhibit E to this Agreement, the Parties acknowledge and understand that City shall have the right to withhold building permits and certificates of occupancy for any one or more residential buildings at any time that the cumulative open space completed (as a combination of City-Dedicated Open Space and Privately Owned Publicly Accessible Open Spaces) is less than fifty-two (52) square feet.

(c) 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.

(d) 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. Workforce, Learning, and Education. Developer and/or Google, as applicable, will provide the additional Workforce, Learning, and Education benefits described in Exhibit G.

(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.

## 2.2 Conditions to Performance of Public Benefits

. Developer's obligation to perform Public Benefits is expressly conditioned upon the satisfaction of each and all of the following conditions precedent:

2.2.1 Final Approval has occurred for all Approvals;

2.2.2 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

2.2.3 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, and in addition to any other remedy, 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.

2.3 No Additional CEQA Review Required; Reliance on FEIR for Future 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. Developer acknowledges that if the City determines, based on additional required environmental review, that the modified project will result in significant new effects or substantially increases the severity of effects beyond those identified in the FEIR for the

Project, City may require, and Developer shall comply at its expense with all additional mitigation measures required to mitigate such impacts. Compliance with CEQA Mitigation Measures. 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.

2.4 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.

2.5 City Cost Recovery

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

2.5.2 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.

2.5.3 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]

2.5.4 The Parties shall enter into a Reimbursement Agreement with respect to the 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 or challenge City Costs; (iv) the City's responsibility for tracking, maintaining, and reporting Processing Fees and City Costs incurred in relation to an approved budget; (v) the process for Developer's payment of Processing Fees and City Costs; and (vi) 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.

2.6 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 or City rules, regulations, or policies. 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 shall provide to City any workforce payroll records as needed to confirm compliance with this Section. 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 the requirement to pay prevailing wages. Indemnification of City. To the fullest extent by law, 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, Subsequent Approvals, or this Agreement, 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, including but not limited to disputes related to prevailing wage requirements, 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 sole 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.

2.7.1 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, 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.

### **3. VESTING AND CITY OBLIGATIONS**

3.1 Vested Rights By granting the Approvals, the City has made a policy decision that the Project, as described herein 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, the General Development Plan, the Downtown West Planned Development Permit, the Vesting Tentative Map for Downtown West, and 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.

3.2 Existing StandardsThe 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").

3.3 Criteria for Subsequent Approvals; Limitation on City's Future DiscretionDeveloper 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. . 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. 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; (iii) City's ability to address any public health or safety concerns or compliance with applicable State or Federal Laws. 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.

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3.4 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 5.4.

3.4.1 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 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 Publicly Accessible Open Space as set forth in this Agreement;

(j) materially and adversely limit the processing or procuring of applications and approvals of Subsequent Approvals that are consistent with Approvals; or

(k) impose, increase or decrease any Impact Fees, as they apply to the Project, except as permitted under Section 5.6.2.

3.4.2 [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 discretion; provided, however, that if the application of such Future Change to Existing Standards would constitute a Material Change, the application of such Future Change to Existing Standards shall require the approval of the City Council. The Director of PBCE's or the City Council's decision, as applicable, to approve or disapprove Developer's request is not subject to appeal. If Developer's request is approved, 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.

3.4.3 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 then-applicable provisions, requirements, rules, or regulations that are contained in the California Building Standards Code, as amended by the City, including, without limitation, the requirements of the City's Building Code, Housing Code, Mechanical Code, Electrical Code, Plumbing Code, Fire Code, and 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.

3.5 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.

### 3.6 Impact Fees; Processing Fees

3.6.1 Generally. The Project shall be subject to only those Processing Fees and Impact Fees as set forth in this Section 5.6, 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 5.6 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.

3.6.2 Applicable Impact Fees. 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 may construct the in-kind infrastructure improvements as more particularly described in Exhibit I.

(b) 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 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 for the San Francisco area.

3.6.3 Processing Fees. Processing Fees for the Project shall be limited to the Processing Fees in effect 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.

3.7 [Intentionally Omitted.]

3.8 Public Health and Safety; Changes in Federal or State Laws

3.8.1 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 reasonably necessary to protect the physical health and safety of the public, abate public

nuisance, (the "Public Health and Safety Exception"), or that is 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. Developer retains the right to dispute any City reliance on the Public Health and Safety Exception or the Federal or State Law Exception.

3.8.2 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 Section 5.8.4, as applicable.

3.8.3 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.

3.8.4 Termination of Agreement. If any of the modifications, amendments or additions described in Section 5.8.2 or Section 5.8.3 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 5.8.2 or Section 5.8.3 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 5.8.4, 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 any particular new Building as set forth in Section 4.

3.9 No Action to Impede Approvals. Except and only as required under Section 5.8, 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 5.4.1.

3.10 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 forty-five (45) days after receipt of the request.

3.11 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 temporary uses on the Project Site as provided for in and consistent with the requirements of the Downtown West Planned Development Zoning District, the accompanying General Development Plan, and/or the Downtown West Planned Development Permit.

3.12 Taxes. 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 property or uses in an equitable and non-discriminatory manner.

#### **4. NO DEVELOPMENT OBLIGATION**

Except as set forth in this Agreement and the Approvals, including, without limitation, the Ten Year and Twenty Year Development Obligations and other requirements set forth in Section 2.2, the timing of delivery of Public Benefits as set forth in Exhibit C, D, E, and I, and the timing or phasing requirements forth in the FEIR and MMRP, 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, the Development Agreement Ordinance and this Agreement.



## 5. MUTUAL OBLIGATIONS

5.1 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, if requested in writing by the other Party, a written statement acknowledging such revocation or termination in the form attached as Exhibit N, 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, Public Benefits, and other obligations and requirements 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 Exhibit N for the applicable property on which the Buildings, other facilities or improvements, or any combination thereof, are located.

5.2 General Agreement to Cooperate. 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, [REDACTED] prompt and efficient review process that avoids delay and redundancies, and that is undertaken in the manner [REDACTED], the Approvals, and any Subsequent Approvals.

5.2.1 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, upon application by Developer, instituting and completing proceedings for the 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; provided, however, that any delays in City's processing of such submission and applications attributable to a delay or or failure by any Non-City Agency to

perform or grant any required action, approval, or authorization, shall not be deemed to be breach by City of this section.

5.3 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 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").

5.3.1 City Cooperation Regarding Trail Alignments. [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 in Developer's efforts 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.

5.3.2 Conditions of Cooperation to Obtain Permits. The City's commitment to Developer under this Section 7.3 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.

(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, in its sole discretion and 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 and in writing, the conditions or restrictions 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.

5.3.3 Costs. Developer shall bear all costs associated with applying for and obtaining any necessary Non-City Approval, including reimbursement of City for any City Costs incurred in performing work in connection with this Section 7.3 that is beyond the City's typical efforts in connection with other major development and construction projects in the City. 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.

5.4 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 reasonable actions consistent with AB 900 to facilitate expedited legal review of any Third Party Challenge related to a Subsequent Approval.

5.4.1 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.

5.4.2 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 may 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.

5.5 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 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 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.

5.6 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 pursuant to San José Municipal Code Chapter 14.35. Developer's cost estimate for infrastructure improvements includes, among other

improvements, enhanced right-of-way improvements, utilities upgrades and relocation, as further detailed in the Infrastructure Plan included as Exhibit I.

5.6.1 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 for which a nexus was identified, 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 collection of 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 California Public Utilities Commission (CPUC) Electric Rule No. 20 program ([https://www.pge.com/nots/rates/tariffs/tm2/pdf/ELEC\\_3860-E.pdf](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.

5.6.2 In addition, City and Developer shall work together 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.

5.7 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.

5.8 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.

## **6. PERIODIC REVIEW OF DEVELOPER'S COMPLIANCE**

6.1 Annual Review. 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'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.

6.2 Review Procedure. In conducting the required annual reviews of Developer's compliance with this Agreement, or any other periodic reviews determined to be appropriate by the Director of PBCE, the Director of PBCE shall follow the process set forth in Section 18.02.300 of the Development Agreement Ordinance and this Section 8.2.

6.2.1 Required Information from Developer. Upon request by the Director of PBCE, but not more than sixty (60) days nor less than thirty (30) days before the date the annual or periodic review is to commence, 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 and any information Developer is obligated to report pursuant to Exhibit G. In addition, upon written request of the Director of PBCE, Developer shall furnish such additional documents or other information as requested by the Director of PBCE. The burden of proof, by substantial evidence, of compliance is upon Developer.

6.2.2 Compliance Hearing. 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 schedule a compliance hearing before the Planning Commission. 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.

6.2.3 Effect on Transferees. If Developer has effected a Transfer so that its interest in the Project Site and Community Benefit obligations, 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.

6.2.4 Default. The rights and powers of the City under this Section 8.2 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.

## 7. ENFORCEMENT OF AGREEMENT; DEFAULT; REMEDIES

7.1 Enforcement. 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.

7.2 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 twenty (20) business days following the request and if, despite the Good Faith Efforts of the requesting Party, such meeting has not occurred within twenty (20) 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.

7.3 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 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 José 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.

#### 7.4 Remedies.

7.4.1 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.

7.4.2 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 sixty (60) days following delivery of the notice.

7.4.3 Limited Damages. 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 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), , 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.

7.4.4 City Processing/Certificates of Occupancy. [PENDING NEGOTIATIONS] The City shall not be required to process any requests for approval, including any Conformance Reviews or Subsequent Approvals, 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. Notwithstanding anything to the contrary 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.

7.5 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.

7.6 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' fees and costs.

**8. MORTGAGE PROTECTION. Note: The following changes are also proposed for the definitions sections:**

"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 Developer that is an obligation to repay funds to be used by Developer to improve the applicable property so encumbered in a manner consistent with this Agreement, but shall not include any mortgage, deed of trust or other lien that is also secured by real property that is not part of the Project Site or which secures an obligation to repay funds used to acquire or improve real property that is not part of the Project Site, or which is cross-defaulted with any obligation relating to or secured by real property that is not part of the Project Site.



"Mortgagee" shall mean a person or entity that is not an Affiliate of Developer and that is the holder of, and beneficiary or mortgagee under, a Mortgage.

"Foreclosure Transferee" shall mean any purchaser at a foreclosure sale under a Mortgage and any person or entity which acquires title to all or any portion of the Project Site in lieu of the foreclosure of a Mortgage, except for Developer or an Affiliate of Developer.

10.1. Mortgage Protection. This Agreement shall be superior and senior to any lien placed upon the Project Site or any portion thereof after the date of recording of this Agreement, including the lien of any deed of trust or mortgage. Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of any Mortgagee or Mortgage Transferee who acquires title or possession to the Project Site, or any portion thereof.

10.2. Mortgagee Not Obligated; Exception for Community Benefits. Notwithstanding the provisions of Section 10.1 above, no Mortgagee or Mortgage Transferee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion, on the Project Site or applicable portion thereof, except that Community Benefits must nevertheless be completed as set forth in Section 4.1; provided, however, that a Mortgagee or Mortgage Transferee shall not be entitled to devote the Project Site to any use except as permitted by this Agreement, nor to construct any improvements thereon or institute any uses other than those uses or improvements provided for or authorized by this Agreement, or otherwise allowed under the Vested Elements and Approvals. Additionally, notwithstanding that title to or possession of all or any portion of the Project Site shall have been acquired by a Mortgagee or Foreclosure Transferee, a failure to meet any construction deadlines under this Agreement as to any portion of the Project Site shall not relieve Developer of the consequences under this Agreement of, or liability under this Agreement for, the failure of such improvements to be completed.

10.3. Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any notice of default given Developer hereunder and specifying the address for service thereof and enclosing a copy of its Mortgage, then City agrees to use its best efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an event of default, and if City makes a determination of noncompliance hereunder, City shall likewise use its best efforts to serve notice of such noncompliance on such Mortgagee concurrently with service thereon on Developer. Each Mortgagee shall have the right during the same period available to Developer to cure or

remedy, or to commence to cure or remedy, the event of default claimed or the areas of noncompliance set forth in City's notice. If a Mortgagee shall be required to obtain possession in order to cure any default, the time to cure shall be tolled so long as the Mortgagee is diligently attempting to obtain possession, including by appointment of a receiver or foreclosure, and provides City upon written request from time to time of reasonable evidence of such diligent efforts.



## **9. AMENDMENT; TERMINATION; EXTENSION OF TERM**

9.1 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, and 9.3, 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.

9.2 Termination and Vesting. 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 Public 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.

9.3 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. Still wondering about further describing material change. If there are changes to Parks or DOT – any coordination with them?

9.4 Extension Due to Legal Action or Referendum; Force Majeure; Rail Improvement Activity.

9.4.1 Litigation and Referendum Extension. 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.

9.4.2 Force Majeure. **Upon the request of any party hereto, an extension of time will be granted for the period of delay caused by a Force Majeure Event, as provided in this Section 11.4.2, 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 11.4.2.** Promptly after learning of the occurrence of a Force Majeure Event that actually causes 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 substantially interfere with the ability of the delayed Party to perform under this Agreement, 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, **provided that 1) the delay authorized for any one Force Majeure Event shall not exceed one (1) year, and 2) the cumulative period of delays for any one party authorized as a result of all Force Majeure Events shall not exceed three (3) years.**

9.4.3 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 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 (“BART”) by the Santa Clara Valley Transportation Agency (“VTA”), 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.

## **10. TRANSFER OR ASSIGNMENT**

10.1 Permitted Transfer of this Agreement; Restriction on Transfer of District-Wide Utility System.

. Subject to Sections 12.2 and 12.5 and contingent upon an Assignment and Assumption Agreement meeting the criteria set forth herein, Developer shall have the right to sell, assign, convey, hypothecate, or otherwise transfer or alienate in whole or in part its rights, 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; however, if an obligation relating to a portion of the Project Site is not Transferred together with the applicable portion of the Project Site itself, and the obligation is a condition to development of the portion transferred, satisfaction of the obligation shall continue to be a condition to development of the portion transferred. The foregoing notwithstanding, Developer shall not have the right to Transfer any property, facilities, rights, duties, obligations, or interests in any District-Wide Utility System or any portions thereof, including any utilidor.

10.2 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, or a substantially similar form acceptable in good faith to City (each an "Assignment and Assumption Agreement"), Developer may assign 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 (c) are 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 , **but any obligations that are conditions to development on the applicable portion of the Project Site and any conditions to development on said portion shall remain conditions to development on said portion.** 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.

10.2.1 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, except that the Assignment and Assumption Agreement shall only be effective and Transferee shall only obtain any rights for the transferred property pursuant to the terms of this Agreement at such time as the City has received a fully executed copy of the Assignment and Assumption Agreement. The parties to an Assignment and Assumption Agreement shall use Good Faith efforts to coordinate with City (including City's attendance at meetings) to 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 so as to avoid later confusion regarding what obligations and rights have and have not been Transferred. Developer shall reimburse City for the City Costs of coordination with the Developer and each potential Transferee, whether or not the coordination results in a transfer. Where a transfer of a portion of the Project Site has been completed,



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 where 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 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 where 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.

10.2.2 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 , 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 or authorized to be 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 a Transferee that applies or authorizes an application for a development project those costs, burdens, obligations, mitigation measures, conditions of approval, and exactions appropriate to such proposed development project

and otherwise consistent with this Agreement. Further, in the event of any Transfer pursuant to Section 12 hereof, all fees, costs, burdens, obligations, exactions, or other requirements of any kind transferred to Transferee shall be completed prior to the issuance of any temporary certificate of occupancy for the Project Site Transferred.

10.3 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 (a) the identity or identities and addresses for notices of said Transferee(s), (b) the anticipated effective date of the Transfer of the portion of the Project Site at issue, and, (c) the right, title, or interest in the portion of the Project Site that is the subject of the proposed Transfer. Additionally, a Transferor, including without limitation Developer, shall provide City with written notice of the actual effective date of a Transfer of any right, title or interest in any portion of the Project Site within ten (10) days after such effective date. Subject to Section 12.2 hereof, notwithstanding the foregoing, failure to provide either notice required under this Section 12.3 shall not, by itself, 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.

10.4 District Systems Transfers. Subject to the Conditions of Approvals set forth in the Approvals, 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. Any such transfers shall be 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:

- (a) Developer may Transfer to (i) any Google Affiliate, and (ii) any Third Party Transferee if the Third Party Transferee is an owner or investor in the infrastructure sector, with sufficient creditworthiness, appropriate operational and asset management capabilities including but not limited to a minimum of seven (7) years of experience with the utility system or systems to be transferred, directly or via its operating partner, as shown by reasonable evidence delivered, and subject to City's prior approval; and,
- (b) A Transfers shall not require City's consent, except when required pursuant to the prior paragraph, and shall require prior notice to City provided that assignment of permits or other regulatory obligations under federal, state or local laws must be in compliance with these laws, and 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,
- (c) With respect to any Transfer of operations and maintenance rights and obligations, such Transferee shall have at least seven (7) years technical experience and qualifications in safely operating the same utility for similarly situated communities and in accordance with applicable law and industry standards, as shown by reasonable evidence delivered to City. Transfers and assignment of Major Encroachment Permits applicable to the District System shall be governed by the terms of the Major Encroachment Agreement.

#### 10.5 Certain Limitations on Transfers of Office and Residential Development.

Notwithstanding the foregoing:

10.5.1 With respect to office development, (1) Developer shall not have the right to Transfer to a Third Party Transferee portions of the Project Site designated for development of office space under the General Plan and DSAP land use maps without first obtaining the City's written consent, if such Transfer would be effective prior to the date on which Google LLC or any Google Affiliate has completed Construction and obtained at least a Temporary Certificate of Occupancy (TCO) for two million (2,000,000) or more 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(ies) Transferee(s) exceed forty percent (40%) of the sum of (i) the amount of gross office square footage for which Google LLC or any Google Affiliate has then received a TCO and (ii) the amount of gross office square footage for which Commencement of Construction has then occurred but which has not then received a TCO. For the purposes of illustration only, if Google LLC or any Google Affiliate, has then received a TCO for two million (2,000,000) gross square feet of office development 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

10.5.2 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.

10.6 Non-Transfers Subject to the terms and conditions, herein, the following shall not be considered a Transfer and shall not require the City's consent: (i) leases, subleases,

licenses, other agreements related to occupancy of completed structures; easements; or the granting of any mortgage or deed of trust or any foreclosure thereof or deed-in-lieu encumbering such lease, sublease, license, or other agreements related to occupancy of completed structures, or easements, (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, provided that Google LLC or a Google Affiliate controls at least 51% of the ownership interests, (iii) joint ventures in which Google LLC or any Google Affiliate controls at least 51% of the decision making authority; and (iv) any transfer of land or improvements to the City or the City's designee or to non-profits approved by City in satisfaction of obligations under this Agreement or the Approvals.

10.7 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 and are reasonable. Developer agrees to and accepts the restrictions herein set forth in this Section 12 as being a material inducement to the City to enter into this Agreement.

10.8 City Administration. City shall administer the provisions of this Section 12 through the City Manager.

## **11. DEVELOPER REPRESENTATIONS AND WARRANTIES**

11.1 Interest of Developer; Due Organization and Standing. Developer represents that it has 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

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.

11.2 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.

11.3 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.

11.4 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.

11.5 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.

## **12. MISCELLANEOUS PROVISIONS**

12.1 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.

12.2 Incorporation of Exhibits. 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.

12.3 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 Section 12, 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.

12.4 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.

12.5 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 the Development Agreement Ordinance, the provisions of this Agreement will govern and control.

12.6 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.

12.6.1 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.

12.7 Recordation. 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.

12.8 Obligations Not Dischargeable in Bankruptcy. Developer's obligations under this Agreement are not dischargeable in bankruptcy.

12.9 Survival. 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.

12.10 Signature in Counterparts. 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.

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


Director of Economic Development  
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

12.12 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.

12.13 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

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.

12.14 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.

12.15 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.

12.16 No Third Party Beneficiaries. There are no third party beneficiaries to this Agreement.



12.17 Number of Days. 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:

CITY OF SAN JOSÉ,  
a municipal corporation

Approved as to form:

Nora Frimann, City Attorney

By: \_\_\_\_\_  
Toni Taber, City Clerk

By: Johnny V. Phan  
Chief Deputy City Attorney

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.]

