

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - DW - Parkland Exhibit E5 and DA Exhibit k
Date: Tuesday, April 6, 2021 2:54:55 PM
Attachments: [Parkland Agreement EXHIBIT E5 Design and Construction Requirements-c.docx](#)
[Redline Parkland Agreement EXHIBIT E1 City 2.20 - Google E5 3.10.21-c.pdf](#)
[DA - Exhibit K Parking Google 3-10-21-c.docx](#)
[Redline DA - Exhibit K Parking 3-8-21 City - DA - Exhibit K Parking Google 3-10-21-c.pdf](#)

From: Straka, Stephanie <SStraka@coblentzlaw.com>
Sent: Wednesday, March 10, 2021 8:58 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: Google - DW - Parkland Exhibit E5 and DA Exhibit k

[External Email]

Johnny, the following documents are attached for review. Thanks.

- Parkland Agreement Exhibit E5 (former E1) (clean and redline)
- Exhibit K Parking (clean and redline)

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Google Draft 3/10/21

EXHIBIT E5

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

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

1. Downtown West Improvement Standards, dated _____, 20__ (“DWIS”), approved by the City Council on _____, 2021.
2. City's Standard Specifications and Standard Details, dated July 1992 (“City’s Specifications”), and on file with City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to “Developer” shall be deemed to mean “Developer.”
3. City’s Turnkey Park Standards for Park Design & Construction, dated 2001 (“Turnkey Standards”), as may be amended from time to time, and on file with City’s Department of Public Works, Architectural Division. Future amendments to the Turnkey Standards shall apply only to plans for Parkland Improvements for which ninety percent (90%) specifications that are submitted for City review and approval after eighteen (18) months of the effective date of the amendments of the Turnkey Standards. For clarity, if 90% specifications are submitted seventeen (17) months after the effective date of the amendment or sooner, the amendment would not apply.
4. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the above guidelines, as they may be amended from time to time, shall be applicable to this agreement.
5. The Downtown West Planned Development Zoning District and accompanying General Development Plan, dated _____, 20__, adopted by the City Council on _____, 2021.
6. The Downtown West Design Standards and Guidelines, dated _____, 20__, adopted by

the City Council on , 2021.

7. City shall review the Park Improvements Plans, including materials, infrastructure, and design elements, for consistency with the conceptual design of Turnkey Park Improvements as described and depicted in the Downtown West Design Standards and Guidelines, and the specifications and guidelines outlined above and throughout this Agreement. Pursuant to the Open Space Improvement Conformance Review Process set forth in the General Development Plan for the Downtown West Planned Development Zoning District, the Plans shall be refined to the satisfaction of the Director of Parks, Recreation, and Neighborhood Services (“Director of PRNS”) and the Director of Public Works (“Director of PW”) as necessary in order to demonstrate consistency; provided, however, that such refinements shall remain consistent with the Park Improvements Value set forth in Exhibit E1.

B. Application Of Plans And Specifications.

1. City’s Specifications, Turnkey Standards, Downtown West Planned Development District, and the Downtown West Design Standards and Guidelines shall be collectively referred to as the “Park Improvements Specifications.” The Park Improvements shall be constructed in accordance with the Park Improvements Specifications.

2. In the event of a conflict between the Turnkey Standards and the City’s Specifications, the Turnkey Standards shall prevail.

3. The provisions of the Development Agreement, including this Agreement, and the Downtown West Planned Development District, Downtown West Design Standards and Guidelines, and Downtown West Improvement Standards supersede anything to the contrary in the City’s Specifications, Public Works Standard Specifications, or the Turnkey Standards (collectively “City Standards”), unless the City reasonably determines that a deviation from one or more City Standards will impact public safety or maintenance of the Park Improvement in which case the City Standard or Standards shall apply.

C. Project Plans Approval Process.

1. In accordance with the Design Outside Date Schedule set forth in the Parkland Agreement, Developer shall submit Park Improvements Plans at thirty-five percent (35%) as part of its Open Space Improvement Conformance Review application for the Park Improvements. The submittal of sixty-five percent (65%) and ninety-five percent (95%) Park Improvements Plans shall occur following the Open Space Improvement Conformance Review process set forth in the General Development Plan. The preparation, submittal, and review of the Park Improvements Plans shall be in accordance with this Agreement.

2. The Park Improvements Plans shall be submitted in a timely manner in order to insure that Developer completes the Park Improvements on or before the completion date specified in this Agreement. Developer shall not construct any Park Improvements unless and until the City's Director of PW has approved the Park Improvements Plans and issued a Notice to Proceed in writing. The approval process for the 65% and 95% Park Improvements Plans is more particularly set forth in the Turnkey Standards. City's Director of PW shall complete its review of each submittal and provide any comments to Developer within forty-five (45) days of submittal. City's Director of PW shall approve or disapprove Developer's bid submittal within thirty (30) days of submittal.

3. Prior to acceptance of the Park Improvements Plans and/or proceeding with construction of the Park Improvements, the Developer shall provide the City with copies of all soil surveys along with recommended soil amendments. The City may, at its reasonable discretion, require inspection of the City-Dedicated Open Space for construction debris before construction may commence.

4. City's approval of the Park Improvements Plans shall not release Developer of the responsibility for the correction of mistakes, errors, or omissions contained in the Park Improvements Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Park Improvements Plans were developed or approved. If during the course of construction of the Park Improvements, the Director of PW determines in the Director of PW's reasonable discretion that the public safety requires modification of, or the departure from, the Plans, the Director of PW shall have the authority to require such modification or departure and to specify the manner in which the same may be made. The Parties acknowledge that the Park Improvements Plans, once approved by the Director of PW, shall be final and that, except as expressly provided in this subsection or elsewhere in the Parkland Agreement and/or Development Agreement, no revisions to the Park Improvements Plans shall be permitted unless approved by the Director of PW.

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

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

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

B. Prevailing Wage Requirement.

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

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

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

4. Indemnity. Developer shall comply with Section 4.8 of the Development Agreement regarding indemnification of City.

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

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

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

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

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

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

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

a. For each day after thirty (30) calendar days that Developer fails to completely respond to a request by City to provide records as required under Section 2(B), of this Exhibit E4, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and

b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.

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

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

Developer Initial:

City Initial:

D. Conduct Of Work.

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

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

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

E. Access For Inspection.

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

2. Representatives.

a. Prior to commencement of work on the Park Improvements, Developer shall designate in writing an authorized representative who shall have the authority to represent

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

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

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

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

F. Acceptance of Park Improvements.

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

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

2. Developer shall provide a grant deed for the property on which the Park Improvements have been completed to the City and City will process acceptance documentation (Notice of Completion and Acceptance) within ten (10) business days of the date of City's final inspection or

the date upon which the Developer returns to City the appropriate signed acceptance documentation, whichever is later, provided that:

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

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

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

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

G. City-Dedicated Open Space.

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

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

b. A Grant Deed for the City-Dedicated Open Space containing the legal description of the City-Dedicated Open Space, as approved by City Surveyor, properly executed and acknowledged, subject only to the exceptions to title set forth in Exhibit E7. Title to the City-Dedicated Open Space shall be vested in City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Developer, subject only to those exceptions set forth in Exhibit E7 ("Permitted Exceptions"), which Permitted Exceptions shall not impact or otherwise count against the credit value of the affected City-Dedicated Open Space except as indicated in Exhibit E7 and the Parkland Agreement. The Grant Deed, subject to approval of City, for the City-Dedicated Open Space shall be delivered to the City's Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

c. Developer shall also cause to be provided to City, concurrently with the conveyance of each City-Dedicated Open Space to City, a C.L.T.A. owner's form policy of title insurance issued for the specific City-Dedicated Open Space by a reputable title company currently doing business with City, with City named as the insured, in an amount as determined by the City consistent with the terms of the Development Agreement and Parkland Agreement, insuring the title of City to the City-Dedicated Open Space is subject to only the Permitted Exceptions.

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

is set forth in Section 3(A)(2) of this Exhibit. The scope of the Hazardous Materials Report shall, at minimum, contain the elements set forth below in Section 4.

e. Subject to Section 3 and the disclosures and obligations set forth therein, in the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous Materials on any of the City-Dedicated Open Space in excess of generally accepted environmental screening limits for park land uses (e.g. Environmental Screening Limits and California Human Health Screening Limits) or in violation of any hazardous materials/waste laws, the Director shall have the right to require Developer, as a condition of acceptance, to remediate or mitigate the condition to the extent required for the park to be used as designed and intended, including without limitation, removal of the Hazardous Materials in the top soil. The type of remediation or mitigation required for the City-Dedicated Open Space shall be at no cost to the City and be subject to the review and approval of the Director

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

2. The top 24 inches of soils within softscape areas on site shall be provided to the City free and clear of all construction debris and shall be amended in accordance with recommendations from the soil reports and agricultural soil surveys, or as otherwise directed by the City's Director or Designees. Additional amendments including, but not limited to, mycorrhizal inoculum or organic fertilizers may be required by the City or provided at the Developers discretion in consultation with the City.

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

H. Compliance With Laws/Permits.

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

specifications, or contract for the work in relation to any such law, ordinance, regulation, order, or decree, Developer shall promptly report the same to the Director.

2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses, and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review. Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. Consistent with the terms of the Development Agreement, City agrees to cooperate with Developer in its efforts to obtain any such governmental reviews and approvals, licenses, and/or permits. City also shall consider any Subsequent Approvals required for the construction of the Park Improvements in a manner consistent with the Development Agreement. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 6 of this Agreement.

SECTION 3. ENVIRONMENTAL CONDITIONS FOR CITY AND DEVELOPER WARRANTIES.

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

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

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

Title 22 of the California Code of Regulations, Division 4, Chapter 30, as the same shall be amended from time to time, or any other materials requiring remediation under federal, state or local laws, ordinances, rules, regulations or policies.

3. Neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any monitoring, reporting, or restrictions relative to its use as a park or open space by any governmental authority with jurisdiction over the City-Dedicated Open Space, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board, that is not the responsibility of a third party or the City as the prior occupant of the City-Dedicated Open Space (e.g., if the City or a third party is responsible for same, this condition shall be deemed satisfied).

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

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

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

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

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

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

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

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

SECTION 4. HAZARDOUS MATERIALS REPORT.

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

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

- a. The historical usage of the City-Dedicated Open Space and adjacent parcels dating back to the City-Dedicated Open Space’s first developed use (including any agricultural use) or 1940, whichever is earlier.
- b. Results of the site visits pertaining to the current condition of the City-Dedicated Open Space, including without limitation, any observed storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, or evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space.
- c. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the City-Dedicated Open Space.

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

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

4. **Phase II ESA (if necessary).** If any Phase I ESA Update recommends Phase II investigations, then Developer shall engage an environmental consultant to undertake those

recommended Phase II investigations. The following tasks serve only as preliminary guidelines for potential Phase II investigation that may be recommended by the Phase I ESA Update, the results of which are subject to City's review and approval. It is possible that no Phase II investigation will be necessary for any of the City-Dedicated Property.

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

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

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

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

SECTION 5. INSURANCE REQUIREMENTS.

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

A. Minimum Scope of Insurance.

Coverage shall be at least as broad as:

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

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

B. Minimum Limits of Insurance.

Developer shall maintain limits no less than:

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

6. Pollution Liability: Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

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

D. Provisions Of Policies.

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

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

2. Workers' Compensation and Employers Liability Coverages shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.
3. Builders' Risk policies shall contain the following provisions:
 - a. City shall be named as loss payee.
 - b. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.
4. All Coverages.

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

E. Duration.

1. Commercial General Liability (including, without limitation, products and completed operations coverage), Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after completion of the work under this Agreement.
2. If any of such coverages are written on a claims-made basis, the following requirements apply:
 - a. The policy retroactive date must precede the date the work commenced under this Agreement.
 - b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Developer must purchase an extended reporting period equal to or greater than five (5) years after completion of the work under this Agreement.

F. Acceptability of Insurers.

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

G. Verification of Coverages.

Developer shall furnish City (in the manner provided below) with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and

endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

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

The City of San Jose – Finance
Risk Management
200 East Santa Clara Street, 13th Floor Tower
San Jose, CA 95113-1905

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

CityGoogle Draft 23/2010/21

EXHIBIT E45

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

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

[A1]: What are the DWIS that Council will approve? How is that different from DWDSG?

1. Downtown West Improvement Standards, dated _____, 20____ (“DWIS”), approved by the City Council on _____, 2021.

2. City's Standard Specifications and Standard Details, dated July 1992 (“City’s Specifications”), ~~as may be amended from time to time,~~ and on file with City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to “Developer” shall be deemed to mean “Developer.”

3. City’s Turnkey Park Standards for Park Design & Construction, dated 2001 (“Turnkey Standards”), as may be amended from time to time, and on file with City’s Department of Public Works, Architectural Division, ~~the current version of which is included as Attachment A hereto.~~ Future amendments to the Turnkey Standards shall apply only to plans for Parkland Improvements for ~~with which~~ ninety percent (90%) specifications that are submitted for City review and approval after eighteen (18) months of the effective date of the amendments of the Turnkey Standards. For clarity, if 90% specifications are submitted seventeen (17) months after the effective date of the amendment or sooner, the amendment would not apply.

4. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the above guidelines, as they may be amended from time to time, shall be applicable to this agreement. ~~The current version of this document is on file with City’s Department of Public Works, Architectural Division and included as Attachment B hereto.~~

5. The Downtown West Planned Development Zoning District and accompanying General Development Plan, dated _____, 20____, adopted by the City Council on _____, 2021.

6. The Downtown West Design Standards and Guidelines, dated _____, 20____, adopted by the City Council on _____, 2021.

~~7.~~ 7. City shall review the Park Improvements Plans, including materials, infrastructure, and design elements, for consistency with the conceptual design of Turnkey Park Improvements as described and depicted in the Downtown West Design Standards and Guidelines, and the specifications and guidelines outlined above and throughout this Agreement. Pursuant to the Open Space Improvement Conformance Review Process set forth in the General Development Plan for the Downtown West Planned Development Zoning District, the Plans shall be refined to the

~~Ex E4-1~~

~~12255.019-4818-9379-2968.1-727225~~ satisfaction of the Director of Parks, Recreation, and Neighborhood Services (“Director of PRNS”) and the Director of Public Works (“Director of PW”) as necessary in order to demonstrate consistency; provided, however, that such refinements shall remain consistent with the Park Improvements Value set forth in Exhibit E1.

B. Application Of Plans And Specifications.

1. City’s Specifications, Turnkey Standards, Downtown West Planned Development District, and the Downtown West Design Standards and Guidelines shall be collectively referred to as the “Park Improvements Specifications.” The Park Improvements shall be constructed in accordance with the Park Improvements Specifications.

2. In the event of a conflict between the Turnkey Standards and the City’s Specifications, the Turnkey Standards shall prevail.

3. The provisions of the Development Agreement, including this Agreement, and the Downtown West Planned Development District, Downtown West Design Standards and Guidelines, and Downtown West Improvement Standards supersede anything to the contrary in the City’s Specifications, Public Works Standard Specifications, or the Turnkey Standards (collectively “City Standards”), unless the City reasonably determines that a deviation from one or more City Standards will impact public safety or maintenance of the Park Improvement in which case the City Standard or Standards shall apply.

C. Project Plans Approval Process.

1. In accordance with the Design Outside Date Schedule set forth in the Parkland Agreement, Developer shall submit Park Improvements Plans at thirty-five percent (35%) as part of its Open Space Improvement Conformance Review application for the Park Improvements. The submittal of sixty-five percent (65%) and ninety-five percent (95%) Park Improvements Plans shall occur following the Open Space Improvement Conformance Review process set forth in the General Development Plan. The preparation, submittal, and review of the Park Improvements Plans shall be in accordance with this Agreement.

2. The Park Improvements Plans shall be submitted in a timely manner in order to insure that Developer completes the Park Improvements on or before the completion date specified in this Agreement. Developer shall not construct any Park Improvements unless and until the City's Director of PW has approved the Park Improvements Plans and issued a Notice to Proceed in writing. The approval process for the 65% and 95% Park Improvements Plans is more particularly set forth in the Turnkey Standards. City's Director of PW shall complete its review of each submittal and provide any comments to Developer within forty-five (45) days of submittal. City's Director of PW shall approve or disapprove Developer's bid submittal within thirty (30) days of submittal.

3. ~~3.~~—Prior to acceptance of the Park Improvements Plans and/or proceeding with construction of the Park Improvements, the Developer shall provide the City with copies of all soil surveys along with recommended soil amendments. The City may, at its ~~sole~~reasonable discretion, require inspection of the City-Dedicated Open Space for construction debris before construction may commence.¶

4. City's approval of the Park Improvements Plans shall not release Developer of the responsibility for the correction of mistakes, errors, or omissions contained in the Park Improvements Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Park Improvements Plans were developed or approved. If during the course of construction of the Park Improvements, the Director of PW determines in the Director of PW's reasonable discretion that the public safety requires modification of, or the departure from, the Plans, the Director of PW shall have the authority to require such modification or departure and to specify the manner in which the same may be made. The Parties acknowledge that the Park Improvements Plans, once approved by the Director of PW, shall be final and that, except as expressly provided in this subsection or elsewhere in the Parkland Agreement and/or Development Agreement, no revisions to the Park Improvements Plans shall be permitted unless approved by the Director of PW.

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

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

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

B. Prevailing Wage Requirement.

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

2. Contractors and Subcontractors. Developer shall expressly require compliance with the Prevailing Wage Requirement in all agreements it enters into with contractors and subcontractors

for construction work on the Park Improvements. Developer acknowledges and agrees that it is responsible for compliance by its contractors and subcontractors of the Prevailing Wage Requirement.

3. Reporting Obligations. Notwithstanding anything to the contrary contained herein, Developer is not obligated to submit to City copies of payroll records for construction contractors, subcontractors, or other construction workers, or any other records required to be maintained pursuant to the Prevailing Wage Requirement, until City requests such records as a result of receiving a claim that a violation of the Prevailing Wage Requirement has occurred. Developer shall provide to City, at no cost to City, a copy of any and all such records within ~~ten~~^{thirty} (10³⁰) calendar days of City's Office of Equality Assurance request for such records. In responding to a request by the Office of Equality Assurance, Developer agrees that it is responsible for submitting the records of any and all of its construction contractors and subcontractors.

4. Indemnity. Developer shall ~~indemnify and defend the City for any claims, costs or expenses which City incurs as a result of Developer's failure to pay, or cause to be paid, prevailing wages~~ comply with Section 4.8 of the Development Agreement regarding indemnification of City.

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

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

- a. It protects City job opportunities and stimulates City's economy by reducing the incentive to recruit and pay a substandard wage to labor from distant, cheap-labor areas.
- b. It benefits the public through the superior efficiency of well-paid employees, whereas the payment of inadequate compensation tends to negatively affect the quality of services to City by fostering high turnover and instability in the workplace.
- c. Pay workers a wage that enables them not to live in poverty is beneficial to the health and welfare of all citizens of San José because it increases the ability of such workers to attain sustenance, decreases the amount of poverty and reduces the amount of taxpayer funded social services in San José.
- d. It increases competition by promoting a more level playing field among contractors with regard to the wages paid to workers.

2. Remedies. City and Developer recognize that Developer's breach of the Prevailing Wage Requirement set forth above will cause damage to the City by undermining City's goals in

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

a. For each day after ~~ten~~thirty (~~10~~30) calendar days that Developer fails to completely respond to a request by City to provide records as required under Section 2(B), of this Exhibit E4, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and

b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.

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

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

Developer Initial:

City Initial:

D. Conduct Of Work.

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

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

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

E. Access For Inspection.

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

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

2. Representatives.

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

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

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

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

F. Acceptance of Park Improvements.

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

1. City agrees to inspect and prepare a punchlist for the Park Improvements within ten (10) business days of notification by Developer that the Developer considers the construction of the Park Improvements to be substantially complete as defined by City standard specifications. City

further agrees to perform its final inspection within ten (10) business days of notification by Developer that all punchlist work has been completed.

2. Developer shall provide a grant deed for the property on which the Park Improvements have been completed to the City and City will process acceptance documentation (Notice of Completion and Acceptance) within ten (10) business days of the date of City's final inspection or the date upon which the Developer returns to City the appropriate signed acceptance documentation, whichever is later, provided that:¶

a. City finds that all punchlist work has been satisfactorily completed, which determination shall not be unreasonably withheld; and

b. Developer has performed and satisfied any and all terms, conditions, and obligations required under this Agreement prior to acceptance of the Park Improvements, including but not limited to, the requirements for dedication of the City-Dedicated Open Spaces as outlined in Section 2(G) of this Exhibit; and

c. Developer has provided the Director of PW with three (3) sets of the Plans ("record plans") corresponding copies of any and all warranties, and the like (such warranties shall be in the name of the City), and corresponding copies of any and all operating manuals for equipment installed as part of the Park Improvements. The aforementioned documents shall also be provided by Developer in an appropriate electronic format (.dwg, .pdf, etc.) as requested by the Director of Public Works or Parks, Recreation, and Neighborhood Services.

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

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

a. If a City-Dedicated Open Space is affected by a Park Construction Right of Entry, but Developer has otherwise satisfied all obligations set forth in this Agreement that are

[A2]: This is addressed in Parkland Agreement.

required for City's acceptance of that City-Dedicated Open Space and the Park Improvements thereon, the Director of PW shall process a Notice of Acceptance for that portion of the City-Dedicated Open Space and Park Improvements that are outside of the scope or boundaries of the Park Construction TCE.

¶
¶

G. City-Dedicated Open Space.

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

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

b. A Grant Deed for the City-Dedicated Open Space containing the legal description of the City-Dedicated Open Space, as approved by City Surveyor, properly executed and acknowledged, subject only to the exceptions to title set forth in Exhibit E7. Title to the City-Dedicated Open Space shall be vested in City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Developer, subject only to those exceptions set forth in Exhibit E7 ("Permitted Exceptions"), which Permitted Exceptions shall not impact or otherwise count against the credit value of the affected City-Dedicated Open Space except as indicated in Exhibit E7 and the Parkland Agreement. The Grant Deed, subject to approval of City, for the City-Dedicated Open Space shall be delivered to the City's Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

c. Developer shall also cause to be provided to City, concurrently with the conveyance of each City-Dedicated Open Space to City, a C.L.T.A. owner's form policy of title insurance issued for the specific City-Dedicated Open Space by a reputable title company currently doing business with City, with City ~~redacted~~ named as the insured, in an amount as determined by the City consistent with the terms of the Development Agreement and Parkland Agreement, ~~redacted~~ insuring the title of City to the ~~redacted~~ City-Dedicated Open Space is subject to only the Permitted Exceptions.

d. Any and all reports related to the condition of the City-Dedicated Open Space and the lands adjacent to the City-Dedicated Open Space caused to be performed by the

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

e. Subject to Section 3 and the disclosures and obligations set forth therein, in the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous Materials on any of the City-Dedicated Open Space in excess of generally accepted environmental screening limits for park land uses (e.g. Environmental Screening Limits and California Human Health Screening Limits) or in violation of any hazardous materials/waste laws, the Director shall have the right to require Developer, as a condition of acceptance, to remediate or mitigate the condition to the extent required for the park to be used as designed and intended, including without limitation, removal of the Hazardous Materials in the top soil. The type of remediation or mitigation required for the City-Dedicated Open Space shall be at no cost to the City and be subject to the review and approval of the Director

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

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

2. The top ~~24~~ inches of soils within softscape areas on site shall be provided to the City free and clear of all construction debris and shall be amended in accordance with recommendations from the soil reports and agricultural soil surveys, or as otherwise directed by the City's Director or Designees. Additional amendments including, but not limited to, mycorrhizal inoculum or organic fertilizers may be required by the City or provided at the Developers discretion in consultation with the City.

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

H. Compliance With Laws/Permits. ¶

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

2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses, and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review. Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. Consistent with the terms of the Development Agreement, City agrees to cooperate with Developer in its efforts to obtain any such governmental reviews and approvals, licenses, and/or permits. City also shall consider any Subsequent Approvals required for the construction of the Park Improvements in a manner consistent with the Development Agreement. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 6 of this Agreement.

SECTION 3. ENVIRONMENTAL CONDITIONS FOR CITY AND DEVELOPER WARRANTIES.

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

- ~~1. Neither the Site nor the Developer is in violation of any environmental law, and neither the Site nor the Developer are subject to any existing, pending, or threatened investigation by any federal, state, or local governmental authority under or in connection with the environmental laws relating to the Park Site.~~

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

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

~~4. Developer has not caused or permitted the release of, and has no knowledge of the release or presence of, any Hazardous Substance on the City Dedicated Open Space or the property on which the Park Improvements are to be constructed, or the migration of any Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the City Dedicated Open Space.~~

~~5. Developer's prior and present use of the City Dedicated Open Space has not resulted in the release of any Hazardous Substance on, under, about, or adjacent to the City Dedicated Open Space.~~

3. ~~4.~~ Neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any monitoring, reporting, or restrictions relative to its use as a park or open space by any governmental authority with jurisdiction over the City-Dedicated Open Space, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board, that is not the responsibility of a third party or the City as the prior occupant of the City-Dedicated Open Space (e.g., if the City or a third party is responsible for same, this condition shall be deemed satisfied).

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

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

1. Developer has not caused the migration of any Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space.
2. Developer's prior and present use of the City-Dedicated Open Space has not resulted in the release of any Hazardous Substance in violation of environmental law on, under, about, or adjacent to the City-Dedicated Open Space.

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

1. Any new proceeding or new investigation by any federal, state or local governmental authority with respect to the presence of any Hazardous Substance on the City-Dedicated Open Space or the migration thereof from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space; and
2. Any claims made or threatened by any third party against Developer, City or the City-Dedicated Open Space relating to any loss or injury resulting from any Hazardous Substance; and
3. Developer's discovery of any occurrence or condition on any property adjoining or in the vicinity of the City-Dedicated Open Space that could cause the City-Dedicated Open Space or any part thereof to be subject to any restrictions on its ownership, occupancy, use for the purpose for which it is intended, transferability or suit under any environmental law.¶

SECTION 4. HAZARDOUS MATERIALS REPORT.

[A3]: Revise.
Use standard
language. Need
Updated Phase
I when Google
go through
dedication
process for each
park site.

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

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

- a. The historical usage of the City-Dedicated Open Space and adjacent parcels dating back to the City-Dedicated Open Space’s first developed use (including any agricultural use) or 1940, whichever is earlier.
- b. Results of the site visits pertaining to the current condition of the City-Dedicated Open Space, including without limitation, any observed storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, or evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space.
- c. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the City-Dedicated Open Space.

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

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

[A4]: Use standard City language for Phase I and Phase 2 but revise to indicate the process is the same for each park site. No park credit for any Phase I or Phase 2.

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

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

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

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

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

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

SECTION 5. INSURANCE REQUIREMENTS.¶

~~[PENDING INTERNAL GOOGLE ATTORNEY-REVIEW]¶~~

~~SECTION 5. INSURANCE REQUIREMENTS.¶~~

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

A. Minimum Scope of Insurance.¶

[A5]:
Additional insurance will be required for underground garage and Social Heart site because of long-term maintenance and repair issues of underground parking that may impact Social Heart park.

Coverage shall be at least as broad as:[¶]

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

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

B. Minimum Limits of Insurance.[¶]

Developer shall maintain limits no less than:[¶]

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

5. Builders' Risk: Completed value of Project; and
6. Pollution Liability: Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

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

D. Provisions Of Policies.

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

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

- e. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.
- 2. Workers' Compensation and Employers Liability Coverages shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.
- 3. Builders' Risk policies shall contain the following provisions:
 - a. City shall be named as loss payee.
 - b. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.
- 4. All Coverages.

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

E. Duration.

- 1. Commercial General Liability (including, without limitation, products and completed operations coverage), Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after completion of the work under this Agreement.
- 2. If any of such coverages are written on a claims-made basis, the following requirements apply:
 - a. The policy retroactive date must precede the date the work commenced under this Agreement.
 - b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Developer must purchase an extended reporting period equal to or greater than five (5) years after completion of the work under this Agreement.

F. Acceptability of Insurers.


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

G. Verification of Coverages.

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

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

The City of San Jose – Finance
Risk Management
200 East Santa Clara Street, 13th Floor Tower
San Jose, CA 95113-1905

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

Attachment A¶

**City's
Turnkey Park
Standards for
Park Design
&
Construction¶**

Ex-
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t-A

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~~12255.019-~~
~~4818-9379-2968.1~~
~~7272254~~

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Attachment
B¶

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

E8-1

12255.020 ~~4824~~4846-2053-7312.1-1625-5456.1

Document comparison by Workshare 10.0 on Wednesday, March 10, 2021
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Document 2 ID	netdocuments://4846-1625-5456/1
Description	Parkland Agreement EXHIBIT E5_ Design and Construction Requirements
Rendering set	CPDB Set

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Padding cell	

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Deletions	86
Moved from	1
Moved to	1
Style change	0
Format changed	0
Total changes	140

Google Draft 3/10/21

Exhibit K

Downtown West Parking Requirement

Downtown West Parking Requirements

Developer and the City anticipate the replacement of approximately 2,850 existing available surface parking spaces on property that will be redeveloped as part of the Downtown West project, and the development of at least 1,150 additional spaces (for a total of at least 4,000 publicly-available parking spaces) at full buildout of office space within the Downtown West project to ensure the long-term sustainability of the SAP Center. This does not include up to 2,360 residential parking spaces. Terms that are used but not defined in this Exhibit shall have the meanings given such terms in the body of the Development Agreement to which this Exhibit is attached. For purposes of this Exhibit K, a publicly accessible parking space is "Available" if it is unoccupied and accessible to SAP Center customers on weekends and after 6:30 PM on weekdays, on SAP Center event days.

1. **Overall Requirements:** Over the course of the development of the Project, Developer shall be required to provide publicly accessible off-street parking spaces serving new office development at a cumulative ratio between 0.5 and 0.645 spaces for each 1,000 square feet of Floor Area (which shall mean eighty-five percent (85%) of the total gross floor area) of such office buildings (the "Required Parking Ratio"). At the point of full build out of office space within the Downtown West project, the Required Parking Ratio shall be 0.645 spaces.
 - a. Once 4,000 publicly available parking spaces are operational and in compliance with these terms, the Required Parking Ratio will no longer apply provided the 4,000 publicly available spaces shall be maintained as described herein.
 - b. Developer may construct up to 4,800 publicly available parking spaces at its discretion; this parking would be reviewed as part of the Conformance Review process.
 - c. The Required Parking Ratio represents a reduction from standard City parking requirements, which would require as many as 15,500 spaces at Downtown Commercial parking ratios (2.5 spaces per 1,000 square feet of Floor Area), or 6,600 spaces with application of available standard parking reductions (1.06 spaces per 1,000 square feet of Floor Area). The Required Parking Ratio of 0.645 spaces per 1,000 square feet of Floor Area is warranted given the area's rich transit and mixed-use environment, sustainability and air quality imperatives, traffic reduction and City's multimodal goals, the fact that this parking is available to the public, and transportation demand management requirements.
 - d. The Required Parking Ratio is critical to serve the needs of the Project, as well as to replace parking currently utilized by transit riders and SAP Center patrons. With this in mind, the commercial parking spaces will be publicly-available and priced to allow for maximum efficiency to support the SAP Center, as well as the multimodal goals of the City and Project.

- i. At 4,000 publicly available commercial parking spaces, the project targets 85% of such spaces to be Available for SAP Center event use.
 - e. If, over the course of the Development Agreement, some parking is found to be no longer warranted, the Director of PBCE may, in its sole discretion, reduce the Required Parking Ratio and/or overall amount without requiring an amendment to the Development Agreement or to this Exhibit.
 - f. The parking requirement must be satisfied in part through at least 2,850 publicly available commercial spaces within the Project Site; including existing parking spaces, 2,850 publicly available commercial parking spaces must be maintained within the Project Site at all times and through all phases of Project development.
 - g. As an option to satisfy the requirement for the 2,851 to 4,000 publicly available parking spaces set forth above, Developer may deliver this parking either within the 1/3-mile radius of the SAP Center or through an Alternative Parking Arrangement.
 - i. Alternative Parking Arrangement: If Developer determines that it will not provide any number of the remaining required parking spaces within the Project Site, then, in order to meet the Required Parking Ratio, the City shall have the right to designate additional land owned by the City and within $\frac{1}{3}$ of a mile of the Project Site (the "Additional Parking Property") for Developer to build additional parking spaces; Developer would then be required to build additional spaces on the Additional Parking Property, subject to obtaining appropriate environmental clearance and any discretionary approvals; provided, however, in no event would Developer be required to build parking spaces on the Additional Parking Property that, when aggregated with the publicly available spaces located within the Project boundary, would exceed the Required Parking Ratio or 4,000 total spaces, as described above.
 - h. The City's Department of Transportation will review the design of parking facilities as part of a Vertical Conformance Review Application and may require one or more future Focused Local Transportation Analysis (Focused LTAs) to provide building-specific analysis as defined in the Conformance Review Implementation Guide.
2. Phasing: The requirements below are to ensure that sufficient parking exists, at any given specific time, for the continued operational needs of the SAP Center, as well as the multimodal goals of the City and Project.
- a. Compliance with this requirement shall be evaluated during the Conformance Review process for each office Building, and verified prior to issuance of Building Permits for each office Building.
 - i. Proposed parking spaces included as part of a previously approved Conformance Determination shall be counted to determine whether the Required Parking Ratio will be satisfied upon construction of the office building that is the subject of a Conformance Review. Surface parking spaces in the Project also shall be counted during the Conformance Review

process to determine whether the Required Parking Ratio will be satisfied. For clarity, this means that, to determine whether the Required Parking Ratio will be satisfied, each Conformance Review for an office building shall account for (i) surface parking spaces in the Project, (ii) proposed parking spaces included in a previously approved Conformance Determination that have not yet been constructed, (iii) parking spaces already constructed as part of the Project, and (iv) the parking spaces included in the subject Conformance Review application. In the event a proposed office building or buildings would result in the elimination of existing surface parking spaces, the Conformance Review Application for that building shall not be denied for the temporary failure to satisfy the Required Parking Ratio during construction of the building or buildings if the Project would continue to provide a ratio of 0.5 spaces for each 1,000 square feet of Floor Area, and so long as the Required Parking Ratio is satisfied upon issuance of a Certificate of Occupancy for that office building or buildings.

- ii. During the Conformance Review process, the Project will be required to confirm that at least 2,850 Available parking spaces will be maintained in aggregate within the Project boundary and within one-third ($\frac{1}{3}$)-mile radius of the SAP Center.
- b. If the Project will result in a temporary failure to satisfy the Required Parking Ratio, as described in Section 2.a.i, for a single period that exceeds five (5) years, Developer shall develop and obtain agreement from the City for one or more interim parking management strategies as part of the Parking Delivery Plan during construction.
- c. To the extent the Option Agreement for Lots A/B/C is exercised prior to 2040, the Developer must be in compliance with the Required Parking Ratio, subject to Section 2(a)(i), prior to beginning vertical development on Lots A/B/C. To the extent the AMA is terminated earlier than 2040 or at its scheduled expiration in 2040, Section 1d.i. and Section 2a.ii shall no longer apply.

Exhibit K

Downtown West Parking Requirement

Downtown West Parking Requirements

Developer and the City anticipate the replacement of approximately 2,850 existing available surface parking spaces on property that will be redeveloped as part of the Downtown West project, and the development of at least 1,150 additional spaces (for a total of at least 4,000 publicly-available parking spaces) at full buildout of ~~commercial~~ office space within the Downtown West project to ensure the long-term sustainability of the SAP Center. This does not include up to 2,360 residential parking spaces. Terms that are used but not defined in this Exhibit shall have the meanings given such terms in the body of the Development Agreement to which this Exhibit is attached. For purposes of this Exhibit K, a publicly accessible parking space is "Available" if it is unoccupied and accessible to SAP Center customers on weekends and after 6:30 PM on weekdays, on SAP Center event days.

1. Overall Requirements: Over the course of the development of the Project, Developer shall be required to provide publicly accessible off-street parking spaces serving new office development at a cumulative ratio between 0.5 and 0.645 spaces for each 1,000 square feet of Floor Area (which shall mean eighty-five percent (85%) of the total gross floor area) of such office buildings (the "Required Parking Ratio"). At the point of full build out of ~~commercial~~ office space within the Downtown West project, the Required Parking Ratio shall be 0.645 spaces.
 - a. Once 4,000 publicly available parking spaces are operational and in compliance with these terms, the Required Parking Ratio will no longer apply ~~provide~~ provided the 4,000 publicly available spaces shall be maintained as described herein.
 - b. Developer may construct up to 4,800 publicly available parking spaces at its discretion; this parking would be reviewed as part of the Conformance Review process.
 - c. The Required Parking Ratio represents a reduction from standard City parking requirements, which would require as many as 15,500 spaces at Downtown Commercial parking ratios (2.5 spaces per 1,000 square feet of Floor Area), or 6,600 spaces with application of available standard parking reductions (1.06 spaces per 1,000 square feet of Floor Area). The Required Parking Ratio of 0.645 spaces per 1,000 square feet of Floor Area is warranted given the area's rich transit and mixed-use environment, sustainability and air quality imperatives, traffic reduction and City's multimodal goals, the fact that this parking is available to the public, and transportation demand management requirements.
 - d. The Required Parking Ratio is critical to serve the needs of the Project, as well as to replace parking currently utilized by transit riders and SAP Center patrons. With this in mind, the commercial parking spaces will be publicly-available and

priced to allow for maximum efficiency to support the SAP Center, as well as the multimodal goals of the City and Project.

- i. At 4,000 publicly available commercial parking spaces, the project targets 85% of such spaces to be Available for SAP Center event use.
 - e. If, over the course of the Development Agreement, some parking is found to be no longer warranted, the Director of PBCE may, in its sole discretion, reduce the Required Parking Ratio and/or overall amount without requiring an amendment to the Development Agreement or to this Exhibit.
 - f. The parking requirement must be satisfied in part through at least 2,850 publicly available commercial spaces within the Project Site; including existing parking spaces, 2,850 publicly available commercial parking spaces must be maintained within the Project Site at all times and through all phases of Project development.
 - g. As an option to satisfy the requirement for the 2,851 to 4,000 publicly available parking spaces set forth above, Developer may deliver this parking either within the 1/3-mile radius of the SAP Center or through an Alternative Parking Arrangement.
 - i. Alternative Parking Arrangement: If Developer determines that it will not provide any number of the remaining required parking spaces within the Project Site, then, in order to meet the Required Parking Ratio, the City shall have the right to designate additional land owned by the City and within 1/3 of a mile of the Project Site (the "Additional Parking Property") for Developer to build additional parking spaces; Developer would then be required to build additional spaces on the Additional Parking Property, subject to obtaining appropriate environmental clearance and any discretionary approvals; provided, however, in no event would Developer be required to build parking spaces on the Additional Parking Property that, when aggregated with the publicly available spaces located within the Project boundary, would exceed the Required Parking Ratio or 4,000 total spaces, as described above.
 - h. The City's Department of Transportation will review the design of parking facilities as part of a Vertical Conformance Review Application and may require one or more future Focused Local Transportation Analysis (Focused LTAs) to provide building-specific analysis as defined in the Conformance Review Implementation Guide.
2. Phasing: The requirements below are to ensure that sufficient parking exists, at any given specific time, for the continued operational needs of the SAP Center, as well as the multimodal goals of the City and Project.
 - a. Compliance with this requirement shall be evaluated during the Conformance Review process for each office Building, and verified prior to issuance of Building Permits for each office Building.
 - i. Proposed parking spaces included as part of a previously approved Conformance Determination shall be counted to determine whether the

Required Parking Ratio will be satisfied upon construction of the office building that is the subject of a Conformance Review. Surface parking spaces in the Project also shall be counted during the Conformance Review process to determine whether the Required Parking Ratio will be satisfied. For clarity, this means that, to determine whether the Required Parking Ratio will be satisfied, each Conformance Review for an office building shall account for (i) surface parking spaces in the Project, (ii) proposed parking spaces included in a previously approved Conformance Determination that have not yet been constructed, (iii) parking spaces already constructed as part of the Project, and (iv) the parking spaces included in the subject Conformance Review application. In the event a proposed office building or buildings would result in the elimination of existing surface parking spaces, the Conformance Review Application for that building shall not be denied for the temporary failure to satisfy the Required Parking Ratio during construction of the building or buildings if the Project would continue to provide a ratio of 0.5 spaces for each 1,000 square feet of Floor Area, and so long as the Required Parking Ratio is satisfied upon issuance of a Certificate of Occupancy for that office building or buildings.

- ii. During the Conformance Review process, the Project will be required to confirm that at least 2,850 Available parking spaces will be maintained in aggregate within the Project boundary and within one-third (1/3)-mile radius of the SAP Center.
- b. If the Project will result in a temporary failure to satisfy the Required Parking Ratio, as described in Section 2.a.i, for a single period that exceeds five (5) years, Developer shall develop and obtain agreement from the City for one or more interim parking management strategies as part of the Parking Delivery Plan during construction.
- c. To the extent the Option Agreement for Lots A/B/C is exercised prior to 2040, the Developer must be in compliance with the Required Parking Ratio, subject to Section 2(a)(i), prior to beginning vertical development on Lots A/B/C. To the extent the AMA is terminated earlier than 2040 or at its scheduled expiration in 2040, Section 1d.i. and Section 2a.ii shall no longer apply.

[A1]: Think this is a little confusing.— Please clarify.—

[A2]: Do we need to say "for a period... that exceeds 5- years"? Is it in aggregate, or individual? Does that align with the AMA?

Document comparison by Workshare 10.0 on Wednesday, March 10, 2021
8:19:32 PM

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