

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - DW - Parkland Agreement revised sections
Date: Tuesday, April 6, 2021 2:55:38 PM
Attachments: [Responses to 3 9 21 City Comments to Parkland Agreement-c.docx](#)

From: Straka, Stephanie <SStraka@coblentzlaw.com>
Sent: Saturday, March 13, 2021 5:45 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: Google - DW - Parkland Agreement revised sections

[External Email]

Johnny,

Please see the attached proposed revisions to the Parkland Agreement in response to Thomas's issues list. Hopefully we can discuss this during our meeting on Monday. Thanks.

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Responses to 3/11/21 City Comments to Parkland Agreement

DISC

(to replace Section 2(A))

- A. City and Developer acknowledge and understand that the Project and the Parkland Dedication Obligation described herein may be subject to subsequent proceedings initiated by any of the DISC Partner Agencies (California High-Speed Rail Authority; Valley Transportation Agency; Caltrain; Metropolitan Transportation Commission (MTC)) to acquire one or more portions of the Plan Area, potentially including one or more portions of the proposed City-Dedicated Open Space proximate to an existing rail line. If any DISC Partner Agency initiates proceedings to acquire any portion of the Plan Area for an approved alignment and expansion of the high speed rail right-of-way or other rail right-of-way, Developer may be unable to proceed in the manner described in this Agreement. In the event that a DISC Partner Agency initiates acquisition of one or more portions of the proposed City-Dedicated Open Space, City and Developer shall proceed in the following manner.
- a. If a DISC Partner Agency initiates acquisition of all or a portion of a City-Dedicated Open Space prior to Developer's initiation of design for that City-Dedicated Open Space as described in Section 4(A), the Parties agree and understand that Developer shall be compensated by the condemning authority for the land acquired based on its fair market value as defined in California Code of Civil Procedure Section 1263.320. In the event of such an acquisition, and that acquisition results in a reduction in the size of a City-Dedicated Open Space as reflected in Exhibit E2, Developer shall pay to the City an amount equal to the fair market value received for the acquired land from the DISC Partner Agency(ies) promptly after such value is received by Developer, and that value shall then be available for use as credit toward the Project's Parkland Obligation for residential units constructed, or otherwise utilized as set forth in Section 2(D) upon termination or expiration of the Development Agreement. Any amounts paid to the City in the manner described in this paragraph shall not be subject to

the limitations described in Section 3(F) regarding payment of Parkland Fees and use of Private Recreation Improvements credits. Upon payment by Developer as described in this paragraph, any security(ies) provided by Developer for the acquired land shall be released. For the portion of the City-Dedicated Open Space that is not acquired by the DISC Partner Agency(ies), Developer shall construct Park Improvements and dedicate that remaining portion in accordance with this Agreement. Any required payment of Parkland Fees for the Park Improvements Value associated with the acquired portion of the City-Dedicated Open Space shall be paid upon issuance of a building permit for the Building associated with the subject City-Dedicated Open Space in Exhibit E3.1, and such Parkland Fees shall be calculated based on the amount of acquired, or lost acreage, multiplied by one hundred ninety-five dollars (\$195).

- b. At least six (6) months prior to initiating design of a City-Dedicated Open Space, Developer shall consult with Parks, Recreation and Neighborhood Services Department and Department of Transportation staff regarding the status of the DISC. At the time Developer initiates design of a City-Dedicated Open Space as described in Section 4(A), or any time thereafter but prior to City's issuance of a Notice of Acceptance and recordation of the grant deed for that City-Dedicated Open Space, if Developer and/or City reasonably determines that any portion of the Open Space is reasonably likely to be acquired by a DISC Partner Agency(ies), City and Developer shall meet and confer to reach agreement regarding the manner in which Developer is to satisfy its Parkland Obligation with respect to the subject City-Dedicated Open Space. Such agreement shall be consistent with the intent of this Parkland Agreement, and with the following principles:

1. Developer and City shall remain in a financially neutral position, meaning that Developer shall not be required to incur higher costs or expenses than it otherwise would incur under this Agreement, or to pay amounts in excess of its Parkland Obligation; and Developer shall not

be relieved of satisfying the Parkland Dedication Obligation for residential units constructed as part of the Project;

2. Both the Project and DISC are to be effectively delivered and accommodated to the extent feasible;
 3. Existing and future development within the Project Site boundary shall not be unduly impacted by DISC project construction activity, and the impacts of such construction on Project operations are to otherwise be minimized by allowing Developer to install temporary improvements, visual screening techniques, and/or other measures as determined and agreed upon by City and Developer, so long as such measures are consistent with the Project Approvals, including the DWDSG.
- c. If a DISC Partner Agency initiates acquisition of all or a portion of a City-Dedicated Open Space after City's acceptance of that City-Dedicated Open Space, Developer shall have no obligation to provide replacement open space area or to pay additional Parkland Fees.

Revisions to Section 2(G): Prior to commencement of construction of a City-Dedicated Open Space, Developer shall again consult with City Parks, Recreation and Neighborhood Services Department and City Department of Transportation staff regarding the status of the DISC. If Developer and City determine that any portion of the Open Space is reasonably likely to require use by a DISC Agency(ies) for construction staging or similar disruptive construction activity, Developer shall remain obligated to dedicate the land to the City, and the City shall accept such land, in accordance with the terms of this Agreement, including Exhibit E5 hereto; provided, however, that City and Developer shall meet and confer to mutually determine whether Developer shall delay commencement of construction of the Park Improvements, including demolition and grading activity, , until the DISC Agency activity within the Open Space has ceased, or whether Developer shall instead provide the Park Improvements Value to the City so that the City may itself complete the Park Improvements. If the Parties determine that Developer shall delay commencement of construction and Completion of the Park Improvements, Developer's obligation to construct the Park Improvements within the affected portion of the City-Dedicated Open Space

shall survive the termination or expiration of the Development Agreement. If City and Developer reasonably determine that use of all or a portion of a City-Dedicated Open Space by a DISC Agency(ies) would delay Completion of construction of the Park Improvements thereon by more than one year beyond the date on which the Development Agreement has terminated or expired, notwithstanding Section 3(F) of this Agreement, at its option Developer shall be permitted to provide the City with the remaining Park Improvements Value for the affected City-Dedicated Open Space, and the City shall accept the offer of dedication for the subject City-Dedicated Open Space, or portion thereof, and use the Park Improvements Value to construct the Park Improvements. If this occurs, the City shall release any security associated with such Park Improvements upon receipt of the funds and dedication of the land for Open Space.

Transfers

Social Heart Transfer Language to be added to DA: Prior to construction of the Social Heart and subterranean garage (the “Garage”), any Transferee for such parcel shall meet the following qualifications and/or requirements:

- [FINANCIAL QUALIFICATIONS]
- [INSURANCE REQUIREMENTS]

Following Completion of construction of the Social Heart City-Dedicated Open Space and the Garage, a reciprocal easement agreement (“REA”) between the City and Owner of the Garage shall be promptly executed following City’s issuance of a Notice of Acceptance for the Social Heart City-Dedicated Open Space and recordation of the grant deed. Such REA shall contain provisions requiring that any Transferee of the Garage meet the same qualifications and requirements set forth above.

Offers of Dedication:

Revisions to Section 2(C):

Subject to Section 2(A), in satisfaction of its Parkland Dedication Obligation for development of four thousand (4,000) residential units Developer affirms its commitment to dedicate to City a

minimum of four and eight-tenths (4.8) acres of real property located on Lots A, B, E, F, H, I, P, Q, R, and airspace parcel of Lot 20 (“City-Dedicated Open Space”) as identified on the Tentative Map for the Project, and as described in the Downtown West Design Standards and Guidelines. An offer of dedication for each City-Dedicated Open Space shall be made upon the final map that contains the subject City-Dedicated Open Space, and shall occur upon approval of the final map that contains the Building or development parcel that corresponds with the trigger for that City-Dedicated Open Space as reflected in Exhibits E3.1 and E3.2. The offers for dedication shall be substantially in the form as set forth in Exhibit E4, and shall be recorded in the Official Records, as defined in the Development Agreement. City shall accept an offer of dedication by grant deed only after issuance of a Notice of Acceptance of the Park Improvements thereon. If the construction and Completion of the City-Dedicated Open Space is not triggered pursuant to Exhibits E3.1 and E3.2 prior to the expiration or termination of the Development Agreement, and Developer has not otherwise Completed the City-Dedicated Open Space, in which case credits would be provided and administered as set forth in Section 2(D), upon the termination or expiration of the Development Agreement the offer of dedication for such City-Dedicated Open Space shall also terminate and be void, and City shall promptly execute and record a notice terminating or vacating the offer of dedication. Developer shall be responsible for all costs incurred in the conveyance of the City-Dedicated Open Space to City in accordance with the requirements and specifications set forth in this Agreement and the Development Agreement.

Securities: Revisions to Section 5(A) -

A. Type and Amounts.

1. Performance Security. To assure the Developer’s faithful performance to the City of this Agreement to Complete the Park Improvements in an amount of one hundred percent (100%) of the Park Improvements cost for the City-Dedicated Open Space(s) included in the final map (hereinafter “Performance Security”), as such cost is reflected in the construction contract for the subject City-Dedicated Open Space, which shall be furnished by Developer to the City prior to the issuance of a building permit for the superstructure for the Building that triggers the City-Dedicated Open Space obligation as set forth in Exhibits E3.1 and E3.2; and

2. Payment Security. To secure Developer's payment to any contractor, subcontractor, person renting or supplying equipment, or furnishing labor and materials for completion of the Park Improvements included in the final map, in the additional amount of one hundred percent (100%) of the Park Improvements cost as such cost is reflected in the construction contract for the subject City-Dedicated Open Space (hereinafter "Payment Security"), which shall be furnished by Developer to the City prior to the issuance of a building permit for the superstructure for the Building that triggers the City-Dedicated Open Space obligation as set forth in Exhibits E3.1 and E3.2; and
3. Warranty Security. To warranty the Developer's work to the City with respect to Park Improvements included in the final map, for a period of one (1) year following recordation of the Notice of Acceptance against any defective work or labor done or defective materials furnished in the additional amount of twenty-five percent (25%) of the Park Improvements cost as such cost is reflected in the construction contract for the subject City-Dedicated Open Space (hereinafter "Warranty Security"). The Warranty Security shall be furnished by Developer to the City prior to issuance of the Notice of Acceptance.

Clarification regarding security for City-Dedicated Open Space upon Transfer:

New Section 5(B)(6): Upon a Transfer that includes the Transfer of Developer's obligations with respect to a City-Dedicated Open Space that has not yet been Completed, (i) Transferee shall provide security in accordance with the requirements of this Agreement, or (ii) if Developer has previously provided security in accordance with this Agreement for the subject City-Dedicated Open Space, Transferee shall promptly provide new security, which security shall replace the security provided by Developer for the subject City-Dedicated Open Space. If Transferee provides security as required by (ii), above, upon Director of PW's acceptance of the new security from Transferee, the former security provided by Developer/Transferor shall be released by the City.

POPOS Transfers - Revisions to DA Section 4.1.3(a)(iv):

Transfer of Privately-Owned Publicly Accessible Open Space. Any Privately-Owned Publicly Accessible Open Space shall only be Transferred together with the adjacent Building or Buildings that trigger delivery of the subject Open Space, and, in addition to complying with all applicable

requirements of this Agreement, Transferee shall expressly be required to comply with the Completion requirements set forth herein, including payment of the Private Open Space Delay Penalty Fee, if owed, and shall continuously provide the subject Privately-Owned Publicly Accessible Open Space, including the amenities/improvements thereon, in compliance with the applicable regulations set forth in the Project Approvals, including the DWDSG and this Agreement.

Park Dedication and Relationship to Residential Development

New Section 2(D):

In the event Developer Completes and dedicates a City-Dedicated Open Space, and the credit value for the improved City-Dedicated Open Space exceeds the Parkland Dedication Obligation for the Project upon the termination or expiration of the Development Agreement, Developer shall receive credit for the City Dedicated-Open Space, including the Park Improvements Value, and such credits shall be applied toward the Project's Parkland Dedication Obligation as residential units are constructed. Upon the termination or expiration of the Development Agreement, if any credits for land dedication and/or Park Improvements Value remain available and are not utilized to satisfy the Project's Parkland Dedication Obligation, such credits may be used by Developer, or by another developer(s) if transferred by Developer to that other developer(s), to satisfy the obligations under the City's Parkland Dedication Ordinance for new residential development within the Downtown Station Area Plan (DSAP) Area, with such credits provided at a ratio of one-to-one unit basis.

Timing of Conformance Review and Fee

Revisions to Section 2(I)

Developer shall be responsible for all costs incurred for planning, design, construction, and supervision of the construction of all Park Improvements, including without limitation, the Review Fees. All such costs are included in, and are part of the Park Improvements Value, however Park Improvements Value shall not include costs for maintenance incurred by Developer in connection with the Park Improvements, and shall not include any costs associated with any environmental remediation activities, maintenance, insurance or any improvements that may be required by surrounding private developments or outside agencies. Developer and City agree that the Park

Improvements Value shall not be less than the values set forth in Exhibit E1. The Review Fees shall be in amount equal to seventeen and one-half percent (17.5%) of the direct costs, which Review Fees are reflected in Exhibit E1, which direct costs and Review Fee shall both escalate by the California Construction Cost Index. Twenty percent (20%) of the Review Fees for each City-Dedicated Open Space shall be paid upon submittal of the Vertical Conformance Review application for the Building associated the subject City-Dedicated Open Space in Exhibit E3.1; and the remaining eighty percent (80%) of the Review Fees for each City-Dedicated Open Space shall be paid upon submittal of the Open Space Conformance Review application for the subject City-Dedicated Open Space. Developer shall cause all labor and material incorporated in the Park Improvements to be furnished in accordance with the requirements and specifications set forth in this Agreement.

Revisions to Section 3(C)

The Design Outside Date Schedule referenced in Section 4(B) sets forth the dates by which the Conformance Review application and 35% Park Improvements Plans for each City-Dedicated Open Space shall be submitted in the manner described in the General Development Plan for the Downtown West Planned Development Zoning District. The Design Outside Date Schedule shall be as follows:

- a. Los Gatos Creek Trail (Blocks E): within six (6) months of Conformance Determination approval for Block E1;
- b. Los Gatos Creek Trail (Block G): within six (6) months of Conformance Determination approval for block G1;
- c. Los Gatos Creek Park: within six (6) months of Conformance Determination approval for block G1;
- d. Los Gatos Creek Trail Connector 1: within six (6) months of Conformance Determination approval for 1st residential building of H3;
- e. Social Heart: within six (6) months of the earlier of Temporary Certificate of Occupancy for the twelve hundred fiftieth (1,250th) unit or Conformance

Determination approval for Block D4;

- f. Northend Park: within six (6) months of Conformance Determination Approval for the first building on Block A1;
- g. Los Gatos Creek Connector 2: within six (6) months of Conformance Determination approval for the first (1st) residential building of Block H6;
- h. St. John Triangle: within six (6) months of Conformance Determination approval for the first (1st) building of Block C1 or C2.

Park Improvements Valuation

Additions to Exhibit E1

As set forth in the DWDSG, the Publicly-Dedicated Parks shall include the programmatic elements listed for each Park below, which elements are factored into the Park Improvement Values. An amendment to the DWDSG shall not require an amendment to this Exhibit, and such amendment as it affects the information contained herein shall be automatically incorporated.

Los Gatos Creek Connector

The City-dedicated portion of Los Gatos Creek Connector shall include the following programmatic elements: walking path, nature play, and planting strategy as described in the DWDSG. One of the following two elements must also be included: entry plaza or neighborhood amenity.

Los Gatos Creek Park

The City-dedicated portion of Los Gatos Creek Park shall include the following programmatic elements: entry plaza, program deck, walking path, and planting strategies of riparian planting and understory planting as described in the DWDSG. Four of the following seven programmatic elements must also be included: outdoor program area, neighborhood amenity, nature play, art, serviced pavilion structure, kiosk, or creek overlook / viewing platform.

Social Heart

The Social Heart shall include the following programmatic elements: Enhance views and experience to the Southern Pacific Depot, Downtown to Diridon Station Shared-Use Path, Program deck, Outdoor program area, Planting strategy, Programmatic element requirements. Four of the following six programmatic elements must also be included: anchor plaza; flexible lawn; event, rotating vendor, or food truck access; kiosk; art; and water feature.

St. John Triangle

St. John Triangle shall include the following programmatic elements: Anchor plaza, Flexible lawn, a Secondary flexible lawn shall also be permitted to allow for additional programming, Program deck, Canopy structures, Outdoor performance area, Planting strategy as required by DWDSG. Three of the following six programmatic elements must also be included: informal recreation, neighborhood amenity, art, unserviced pavilion structures, kiosk, and tree grove.

Northend Park

The City-dedicated portion of Northend Park shall include the following programmatic elements: flexible lawn, outdoor program area, informal recreation, tree grove, and planting strategy - re-oaking as required by DWDSG. Four of the following six programmatic elements must also be included: program deck, makerspace, art, serviced pavilion structures, kiosk, and ecological demonstration.

Los Gatos Creek Trail (E/G)

The Trail will be designed in accordance with Table 4.1 of the 2018 City of San Jose Trail Network Toolkit, including those recommendations for width, slope and drainage.

Addition to Exhibit E1, new footnote 1.

1 Review Fees are as follows, subject to escalation based on the California Construction Cost Index: LGC Connector, \$598,928; LGC Park, \$389,146; Social Heart, \$765,946; St. John Triangle, \$1,542,601; Northend Park, \$554,182; Los Gatos Creek Trail (E), \$188,990; and Los Gatos Creek Trail (G), \$287,846.

Replacement Exhibit E7

Exhibit E7

Parkland Dedication Tracking and Verification Table

Note: City-Dedicated Open Space (CDOS) sizes as of the Effective Date of this Agreement are listed in the table below. When a CDOS receives approval of Conformance Review, the size will be filled in in column D. The Actual CDOS Size (column D) is calculated by measuring the final land area, subject to any exclusions set forth in the Agreements. Column B lists expected acreages stated in Exhibit E2. Column C lists unit equivalents stated in Exhibit E1. For the purposes of Column F, an Average Unit Equivalent/Acre (AC) has been calculated equal to 833 ⅓ units and will be applied to the adjustment to determine the Final Park Credit value per CDOS. This was derived by dividing 4,000 units by 4.8 acres. Subject to the other requirements, limitations, and/or exclusions of this Agreement, if the Actual CDOS Size (column D) is less than the Land Expected (column B if in acres), one or more other CDOS areas shall be increased in size such that a minimum of 4.8 acres of CDOS are provided in the Project for the development of 4,000 residential units, subject to the requirements, allowances, and limitations set forth in the Parkland

Agreement, including Section 2(A). In the event that Developer pays Parkland Fees pursuant to Section 2(A), such fees shall be calculated based on the amount of acquired, or lost acreage, multiplied by one hundred ninety-five dollars (\$195).

A. CDOS Name	B. Expected CDOS Size (AC)	C. Estimated Total Residential Unit Equivalent Per Expected Park	D. Actual CDOS Size (AC)	E. Adjustment (Column D - Column B)	F. Final Park Credit (Column E x Average Unit Equivalent/AC + Column C)
Los Gatos Creek Connector	0.91	615			
Los Gatos Creek Park	0.37	348			
Trail on G in Los Gatos Creek Park	0.28	258			
Social Heart	0.57	617			
Trail on E in Los Gatos Creek East	0.25	187			
St. John Triangle	1.53	1,396			
Northend Park	0.89	579			
Total	4.80	4,000			

RESOLVED ITEMS:

1. Definition of “Complete”: Agree to delete sentence from definition that excludes Notice of Acceptance from “Completion” with implementation of the following edit to Exhibit E5, (Section 2(F)(2)(a)) [sent to City 3/10/21]: City finds that all punchlist work has been satisfactorily completed, which determination shall not be unreasonably withheld.

2. Section 2(E) revisions re: park design elements or features: Subject to approval by the Directors of PRNS and PW, Completion of Park Improvements upon any City-Dedicated Open Space for purposes of determining compliance with Exhibit E3.1, and issuance of a Notice of Acceptance for such Park Improvements by Director of PW as outlined in Exhibit E5 of this Agreement shall not include or require the completed installation of art and other non-functional, sculptural or ornamental features, or kiosks/pavilions or other optional structures, that are not essential to the intended use of the park by the public (“Park Art and Optional Structures”), so long as (i) final installation of such Park Art and Optional Structures will not interfere with the safe use of the park by the public, and (ii) Developer provides the Park Art and Optional Structures Security as described in this Agreement so that the City may utilize the Security to complete the installation or construction of the Park Art and Optional Structures following City’s acceptance of the Park Improvements, which City shall complete within twelve (12) months of Developer providing the Security; provided however, that City shall release all other bonds and securities as indicated in Exhibit E5. Alternatively, City may elect to extend the Delivery trigger reflected in Exhibit E3.1 by twelve (12) months to allow Developer to install or construct the Park Art and Optional Structures.

Corresponding edits to Section 5-Securities:

Section 5.A.5. Park Art and Optional Structures Security. To allow for City to install or construct any remaining art and other non-functional, sculptural or ornamental features, or kiosks/pavilions or other optional structures following Completion of a City-Dedicated Open Space, Developer shall post a bond or other form of security acceptable to the Director of PW, and in an amount equal to the cost of the remaining Park Art and Optional Structures. The Park Art and Optional Structures Security shall be furnished by Developer to the City prior to the final Notice of Acceptance for a Park Improvement within the subject City-Dedicated Open Space.

Section 5.C.5. Park Art and Optional Structures Security. City shall release the Park Art and Optional Structures Security upon its completed installation or construction of the remaining Park Art and Optional Structures.

3. Section 3(E): Pursuant to the terms of the Development Agreement, the Parkland Fee in effect upon the Effective Date of the Development Agreement, which Fee is reflected in

Exhibit E8, is vested for the term of the Development Agreement, subject to escalation based on the California Construction Cost Index, which is a subset of the Engineering News Record Construction Cost Index. Upon such escalation of the Parkland Fee, the land value of any City-Dedicated Open Space dedicated thereafter, and the Park Improvements Value for any Park Improvements constructed thereafter shall escalate by a commensurate amount using the California Construction Cost Index.

4. Social Heart BART Language; Section 3(J): Notwithstanding the Completion timing requirements set forth in Section 3(I), in Exhibits E3.1 and E3.2, or elsewhere in Development Agreement and other Exhibits thereto, if the Completion requirement for the Social Heart is triggered by issuance of a Temporary Certificate of Occupancy for the 1,500th residential unit developed in the Project (rather than for issuance of a Temporary Certificate of Occupancy for a Building on Block D4), the Completion date for the Social Heart (inclusive of the subterranean garage) shall be extended to provide Developer twenty-four (24) months to Complete the Social Heart from the date on which the VTA's BART Silicon Valley Phase II Extension Project ("BART Project") is completed, if due to active or reasonably imminent construction staging or other construction-related activity on or in the vicinity of the Social Heart, the BART Project prevents, delays, or otherwise interferes with Developer's timely construction and Completion of the Social Heart and/or the subterranean garage.