

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - DW - Exhibit F1
Date: Tuesday, April 6, 2021 3:05:27 PM
Attachments: [Google - DW - DA Exhibit F1 - Declaration of Public Access-c.doc](#)
[Redline CITY FORM Draft Open Space and Public Access Agreement and Easement \(003\) \(003\) - Google - DW - DA Exhibit F1 - Declaration of Public Access-c.pdf](#)

From: Straka, Stephanie <SStraka@coblentzlaw.com>
Sent: Wednesday, March 24, 2021 5:56 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: FW: Google - DW - Exhibit F1

[External Email]

Johnny, resending F1. Please pass along to Nicolle and co.

Stephanie R. Straka | Special Counsel
Coblentz Patch Duffy & Bass LLP
Direct 415-772-5750 | Cell 951-333-5572 | Office 415-391-4800

This transmittal is intended solely for use by its addressee, and may contain confidential or legally privileged information. If you receive this transmittal in error, please email a reply to the sender and delete the transmittal and any attachments.

From: Straka, Stephanie
Sent: Wednesday, March 10, 2021 6:54 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Miller, Gregg <gmiller@coblentzlaw.com>
Subject: Google - DW - Exhibits

Johnny, The following documents are attached with redlines against the last City documents received (and against the City's form for F1). Thanks.

- Exhibit F1 – Declaration of Public Access Covenants and Restrictions (clean and redline)
- Exhibit M – Applicable Fees (clean and redline)
- Exhibit O – Form of Assignment and Assumption Agreement (clean and redline)

Stephanie R. Straka | Special Counsel
Coblentz Patch Duffy & Bass LLP
One Montgomery Street, Suite 3000

San Francisco, CA 94104

Direct 415-772-5750 | Cell 951-333-5572 | Office 415-391-4800

sstraka@coblentzlaw.com

www.coblentzlaw.com

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This message is from outside the City email system. Do not open links or attachments from untrusted sources.

Exhibit F1

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

Exempt from recording fees pursuant to Government Code § 27383.

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

[CHECK W/TITLE COMPANY ON FORM/FORMAT]

DECLARATION OF PUBLIC ACCESS COVENANTS AND RESTRICTIONS

This Declaration of Public Access Covenants and Restrictions (“Declaration”) is entered into as of _____, 2021 (the “Effective Date”), by and between GOOGLE LLC, a Delaware limited liability company (“Declarant”), and the CITY OF SAN JOSE, a California municipal corporation (“City”).

RECITALS

A. Declarant is the owner of the land described in Exhibit “A” and the improvements thereon (the “Covenant Privately-Owned Publicly Accessible Open Space”).

B. Declarant and City have entered into a Development Agreement dated _____, 2021 (the “Development Agreement”) in connection with development

of the Project, as defined in the Development Agreement, including development of the Covenant Privately-Owned Publicly Accessible Open Space. The Development Agreement was recorded in the Official Records of Santa Clara County on _____, 202__ as Document No. _____.

C. Declarant will develop certain Covenant Privately-Owned Publicly Accessible Open Spaces in accordance with the terms and conditions of the Development Agreement, consisting of the Privately-owned Public Parks, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor open space categories (as defined and described in the Downtown West Design Standards and Guidelines). Approximately seven (7) total acres of such open space will be subject to certain covenants and restrictions, the same as those set forth in this Declaration. A declaration similar to this Declaration is to be separately recorded for each such Covenant Privately-Owned Publicly Accessible Open Space. The purpose of this Declaration is to ensure public access to *[insert name given to the subject Covenant Privately-Owned Publicly Accessible Open Space]*, which Covenant Privately-Owned Publicly Accessible Open Space is more specifically described in Exhibit “A” in accordance with the terms and conditions below.

D. Capitalized terms used in this Declaration and not defined herein shall have the meaning ascribed to them in the Development Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the Development Agreement, the mutual covenants and terms contained herein and other consideration, the receipt and sufficiency of which is hereby acknowledged, Declarant declares as follows on behalf of itself and all future owners of any affected portion of the Project Site:

1. Recording. This Declaration shall be recorded in the Official Records of Santa Clara County against the Covenant Privately-Owned Publicly Accessible Open Space described in Exhibit A prior to issuance of a Temporary Certificate of Occupancy for *[insert name of the Building or development parcel that corresponds to the subject Covenant Privately-Owned Publicly Accessible Open Space]*.

2. Timing. Declarant shall Complete the Covenant Privately-Owned Accessible Open Space in the manner described in the Development Agreement, the Downtown West Planned Development Zoning, and the Downtown West Design Standards and Guidelines, including in compliance with the schedule set forth in Section 4.1.3 of the Development Agreement, which schedule associates each Covenant Privately-Owned Accessible Open Space with development of certain Buildings or development parcels.

3. Legal Description. Following Completion of the Covenant Privately-Owned Accessible Open Space, Declarant shall have the right to prepare a final legal description of such Space and an amendment to this Declaration in which the modified legal description stating the precise location or boundaries of the Covenant Privately-Owned Accessible Open Space are described in the legal description or shown on a site plan or map, and, subject to the City’s review and approval of such amendment, record such amendment in the Official Records of the City and County of Santa Clara.

4. City Regulatory Approvals. Prior to commencing the construction, operation, or maintenance of the Covenant Privately-Owned Accessible Open Space, Declarant shall obtain all City approvals Declarant is required to obtain from City for such activities in its regulatory capacity, if any.

5. Purpose of Declaration; Open Space and Public Access. The purpose of the Declaration shall be for access to and use by the public of the Covenant Privately-Owned Publicly Accessible Open Space, subject to the hours of operation and scope of permitted park use set forth in Exhibit F2 to the Development Agreement, which Exhibit is attached hereto as Attachment A, and subject to the terms of this Declaration.

[SUBJECT TO NEGOTIATION OF DA PROVISION ON THIS POINT] Declarant acknowledges and agrees that, except as required for maintenance and repair, or to protect the public health and safety, as determined by Developer in its reasonable judgment, the provisions set forth in Exhibit F2 may not be changed or modified with respect to the Covenant Privately-Owned Publicly Accessible Open Space if such change or modification would be more restrictive, or would restrict or eliminate a permissible use, without prior approval by the Director of PRNS; provided, however, that a permanent decrease in the hours of operation for the Covenant Privately-Owned Publicly Accessible Open Space by ten percent (10%) or more shall require a public hearing by the City Council and approval by a majority vote. Any such change or modification for which the required approval is not obtained shall be of no force or effect.

[SUBJECT TO NEGOTIATION OF DA PROVISION ON THIS POINT] The Covenant Privately-Owned Publicly Accessible Open Space shall be maintained and open for public use pursuant the terms of this Declaration until either: (i) the end of the useful life of the [insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space and that triggered its Completion], as set forth in Section 4.1.3 of the Development Agreement, or (ii) the City Council approves or authorizes an alternate use of the specific Covenant Privately-Owned Publicly Accessible Open Space, which approval or authorization shall require a minimum two-thirds affirmative vote of the City Council.

6. Maintenance and Repairs. Declarant shall, at its sole cost and expense, keep the Covenant Privately-Owned Publicly Accessible Open Space and all improvements thereon in good condition and repair at all times for public use, consistent with the standards set forth in the Project Approvals and the Development Agreement.

7. Nondiscrimination. Declarant shall not discriminate against any person from accessing or using the Covenant Privately-Owned Publicly Accessible Open Space on the basis of fact or perception of a person's economic status social standing, race, ethnicity, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discriminate against such classes.

8. Compliance With Laws. Declarant shall, at its costs and expense, make any improvements to the Covenant Privately-Owned Publicly Accessible Open Space required by laws or changes in laws.

9. Property Taxes; Liens. Declarant or its successors and assigns shall pay, prior to delinquency, all property taxes, special taxes and/or assessments assessed against the Covenant Privately-Owned Open Space, and shall keep the Covenant Privately-Owned Open Space free of all deeds of trust and other liens, except for deeds of trust securing financing for the *[insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space]* or the Covenant Privately-Owned Open Space (each, an “Encumbrance”), which must be subordinated to this Declaration by a written subordination agreement recorded against the Covenant Privately-Owned Publicly Accessible Open Space that is reasonably acceptable to City. Notwithstanding the foregoing, no breach of or default under this Declaration shall defeat, render invalid, diminish or impair any such Encumbrance or the rights of the beneficiary thereunder (each, a “Lender”), but all of the terms and conditions contained in this Declaration shall be binding upon and effective against and shall run to the benefit of any such Lender or other party who acquires title to or possession of the Covenant Privately-Owned Publicly Accessible Open Space.

10. Lender Notice and Cure Rights. As long as any Encumbrance shall remain unsatisfied of record, City shall give to the applicable Lender a copy of each Default Notice (as defined in Section 11 below) that City gives to Declarant if that Lender has given to the City a written request for Default Notices. Copies of such Default Notices shall be given to any requesting Lender at the address that requesting Lender last furnished to City.

Each Lender shall have the right, but not the obligation, to do any act or thing required of Declarant hereunder, and to do any act or thing which may be necessary and proper to be done in the performance and observance of the agreements, covenants and conditions hereof; provided, however, that no such action shall constitute an assumption by such Lender of the obligations of Declarant under this Declaration. In the case of any Default Notice given by the City to Declarant, the Lender shall have the applicable cure period provided to Declarant for remedying the default described in that Default Notice or causing it to be remedied and, if prior to the expiration of the applicable cure period, a Lender gives City written notice that it intends to undertake the curing of such default or to cause the same to be cured, and then proceeds with all due diligence to do so, Lender shall have, in each case, an additional period of thirty (30) days (or, except for a default relating to the payment of money, such longer period as reasonably necessary as long as Lender commences cure within such thirty (30) day period and diligently proceeds to completion) after the later to occur of (i) the expiration of the applicable cure period, or (ii) the date that the City has served such Default Notice upon Lender, and the City shall accept such performance by or at the instance of the Lender as if the same had been made by Declarant. Notwithstanding anything to the contrary herein, in no event shall the additional cure period provided to the Lender exceed six (6) months beyond the cure period applicable to Declarant.

11. City’s Remedies. If City determines that Declarant is in violation of the terms of this Declaration, City shall give written notice to Declarant of such violation (“Default Notice”). If Declarant fails to cure the violation within fifteen (15) days after said Default Notice is given,

or said cure reasonably requires more than fifteen (15) days to complete and Declarant fails to begin to cure within the fifteen (15) day period or fails to continue diligently to complete the cure, then City may bring an action at law or in equity in a court of competent jurisdiction to enforce compliance by Declarant with the terms of this Declaration, to recover any damages to which City may be entitled for violation by City of the terms of this Declaration, or may cure the violation in which event Declarant shall reimburse City for the costs incurred by City in connection with the violation and cure within thirty (30) days after written demand with evidence of such costs.

12. No Waiver. No waiver by City of any violation under this Declaration shall be effective or binding unless and to the extent expressly made in writing by City, and no such waiver may be implied from any failure by City to take action with respect to such violation. No express written waiver of any violation shall constitute a waiver of any subsequent violation in the performance of the same or any other provision of this Declaration.

13. Miscellaneous.

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

If to Declarant:

Google LLC
1600 Amphitheatre Parkway
Mountain View, CA 94043
Attn: REWS Dept. / DevCo Project Executive - San Jose

With a Copy to:

Google LLC
1600 Amphitheatre Parkway
Mountain View, CA 94043
Attn: Legal Department / RE Matters

If to City:

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

With Copy to:

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

(b) Runs With Land; Binds Successors-in-Interest. This Declaration binds the Covenant Privately-Owned Publicly Accessible Open Space and binds all successors to any portion of or interest in the subject Covenant Privately-Owned Publicly Accessible Open Space.

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

(d) Amendment; Termination. Subject to the provisions of Section 5 above, this Declaration may be amended or terminated only by an agreement in writing signed by all of the parties. Amendment or termination of this Declaration shall not require an amendment to the Development Agreement.

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

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

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

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

(i) Further Acts. Each of the parties shall execute such other and further documents and do such further acts as may be reasonably required to effectuate the intent of the parties and carry out the terms of this Declaration (including, without limitation, obtaining and delivering to City prior to the recordation of this Declaration reasonable subordination agreements from any Lender that is the beneficiary under an Encumbrance that is or might be senior to this Declaration as of the date of the recordation of this Declaration).

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

(k) To the fullest extent by law, Declarant shall defend, indemnify and hold City harmless from and against any and all claims, liabilities, losses, damages, costs and expenses (including without limitation attorneys' fees and court costs) arising from or relating to the Declaration, public use of the subject Covenant Privately-Owned Publicly Accessible Open Space, or (excluding negligent or willful acts by City) anything occurring on the subject Covenant Privately-Owned Publicly Accessible Open Space.

(l) [Insurance Requirements, with City named as additional insured.] [CITY HAS ASKED FOR CITY STANDARD INSURANCE REQUIREMENTS; CITY PLEASE PROVIDE]

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

DECLARANT:

GOOGLE LLC,
a Delaware limited liability company

By: _____
Print Name: _____
Title: _____

CITY:

CITY OF SAN JOSÉ,
a municipal corporation

By: _____
Print Name: _____
Title: _____

ATTEST:

City Clerk

Approved as to form:

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

State of California)
County of Santa Clara)

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

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

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

State of California)
County of Santa Clara)

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

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

EXHIBIT “A”

**LEGAL DESCRIPTION AND DIAGRAM/DEPICTION OF THE COVENANT
PRIVATELY-OWNED PUBLICLY ACCESSIBLE OPEN SPACE**

CPDB Draft 3/10/21

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

Exhibit F1

RECORDING REQUESTED BY, AND WHEN
RECORDED RETURN TO:

City of San José

200 E. Santa Clara Street, 16th Floor

San José, California 95113

Attn: _____

with a copy to:

Google, LLC

1600 Amphitheatre Parkway

Mountain View, CA 94043

Attn: _____

Legal Department / RE Matters

¶
¶

A.P.N. (s): _____

THE AREA ABOVE IS RESERVED FOR RECORDER'S
USE

¶

¶

¶

Exempt from recording fees pursuant to Government Code § 27383. ¶

¶

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

¶

[CHECK W/TITLE COMPANY ON FORM/FORMAT]¶

~~[Form Off] OPEN SPACE AND~~¶

DECLARATION OF PUBLIC ACCESS EASEMENT AGREEMENT¶

COVENANTS AND RESTRICTIONS¶

This ~~OPEN SPACE AND PUBLIC ACCESS EASEMENT AGREEMENT~~ Declaration of Public Access Covenants and Restrictions (~~the~~—“Agreement Declaration”) is entered into as of _____, 2021 (the “Effective Date”), by and between GOOGLE, LLC, a Delaware limited liability company (“Grantor Declarant”), and the CITY OF SAN JOSE, JOSE, a California municipal corporation (“Grantee City”).¶

[A1]: Add third-party-beneficiary?

¶

RECITALS¶

¶

A. Grantor Declarant is the owner of the land described ~~on~~ in Exhibit “A” and the improvements thereon (~~collectively,~~ the “~~Grantor Parcel~~ Covenant Privately-Owned Publicly Accessible Open Space”).¶

¶

¶

12255.020 4841-1940-3487.1-12091-0004\2472201v3.doc 4840-9102-1023.4 12255.020 4840-9102-1023.3.¶

¶

¶
¶

B. ~~Grantor~~Declarant and ~~Grantee~~City have entered into a Development Agreement dated _____, 2021 (the "Development Agreement") in connection with ~~a proposed~~ development ("~~Development~~") ~~on land owned by Grantor of the Project, as defined in the Development Agreement,~~ including development of the ~~Grantor-Parcel~~Covenant Privately-Owned Publicly Accessible Open Space. The Development Agreement was recorded in the Official Records of Santa Clara County on _____, 202__ as Document No. _____.

¶

C. ~~The~~Declarant will develop certain Covenant Privately-Owned Publicly Accessible Open Spaces in accordance with the terms and conditions of the Development Agreement ~~requires that Grantor enter into this Agreement with Grantee relating to, consisting of the~~ Privately-~~Owned~~owned Public Parks, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor open space categories (as defined and described in the Downtown West Design Standards and Guidelines). Approximately seven (7) total acres of such open space will be subject to certain covenants and restrictions, the same as those set forth in this Declaration. A declaration similar to this Declaration is to be separately recorded for each such Covenant Privately-Owned Publicly Accessible Open Space, ~~as defined in the Development Agreement.~~ The purpose of this AgreementDeclaration is to ensure public access ~~in perpetuity to Grantor-Parcel~~ consistent[insert name given to the subject Covenant Privately-Owned Publicly Accessible Open Space], which Covenant Privately-Owned Publicly Accessible Open Space is more specifically described in Exhibit "A" in accordance with the terms and conditions below.

D. Capitalized terms used in this Declaration and not defined herein shall have the meaning ascribed to them in the Development Agreement ~~and this Agreement.~~

¶

AGREEMENT

NOW, THEREFORE, in consideration of the Development Agreement, the mutual covenants and terms contained herein and other consideration, the receipt and sufficiency of which is hereby acknowledged, ~~the parties hereto agree~~Declarant declares as follows on behalf of itself and all future owners of any affected portion of the Project Site:

i.

~~Grant of Easement. Grantor hereby grants to Grantee, a perpetual, exclusive easement (the "Easement") in gross in and over the Grantor Parcel (hereinafter referred to as the "Easement Area").~~ Recording. This Declaration shall be recorded in the Official Records of Santa Clara County against the Covenant Privately-Owned Publicly Accessible Open Space described in Exhibit A prior to issuance of a Temporary Certificate of Occupancy for [insert name of the Building or development parcel that corresponds to the subject Covenant Privately-Owned Publicly Accessible Open Space].

¶

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¶

¶
¶

2. Timing. Declarant shall Complete the Covenant Privately-Owned Accessible Open Space in the manner described in the Development Agreement, the Downtown West Planned Development Zoning, and the Downtown West Design Standards and Guidelines, including in compliance with the schedule set forth in Section 4.1.3 of the Development Agreement, which schedule associates each Covenant Privately-Owned Accessible Open Space with development of certain Buildings or development parcels.¶

3. Legal Description. Following Completion of the Covenant Privately-Owned Accessible Open Space, Declarant shall have the right to prepare a final legal description of such Space and an amendment to this Declaration in which the modified legal description stating the precise location or boundaries of the Covenant Privately-Owned Accessible Open Space are described in the legal description or shown on a site plan or map, and, subject to the City's review and approval of such amendment, record such amendment in the Official Records of the City and County of Santa Clara.¶

4. City Regulatory Approvals. Prior to commencing the construction, operation, or maintenance of the Covenant Privately-Owned Accessible Open Space, Declarant shall obtain all City approvals Declarant is required to obtain from City for such activities in its regulatory capacity, if any.

5. ~~2. Purpose of Easement~~Declaration; Open Space and Public Access; ~~No Improvements.~~ The purpose of the ~~Easement~~Declaration shall be for ~~open space and ecological preservation, and~~ access to and use by the public of the ~~Easement Area—details for each easement will be incorporated in~~Covenant Privately-Owned Publicly Accessible Open Space, subject to the hours of operation and scope of permitted park use set forth in Exhibit F2 to the Development Agreement, which Exhibit is attached hereto as Attachment A, and subject to the terms of this ~~section~~Declaration. ¶

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

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

¶

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

¶
12255.020 4841-1940-3487.1-12091-0004\2472201v3.doc4840-9102-1023.4 12255.020 4840-9102-1023.3
¶

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

[A2]: Subject to change.

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

[A3]: Modify per agreed-upon language in Development Agreement.

[SUBJECT TO NEGOTIATION OF DA PROVISION ON THIS POINT] Declarant acknowledges and agrees that, except as required for maintenance and repair, or to protect the public health and safety, as determined by Developer in its reasonable judgment, the provisions set forth in Exhibit F2 may not be changed or modified with respect to the Covenant Privately-Owned Publicly Accessible Open Space if such change or modification would be more restrictive, or would restrict or eliminate a permissible use, without prior approval by the Director of PRNS; provided, however, that a permanent decrease in the hours of operation for the Covenant Privately-Owned Publicly Accessible Open Space by ten percent (10%) or more shall require a public hearing by the City Council and approval by a majority vote. Any such change or modification for which the required approval is not obtained shall be of no force or effect.

[SUBJECT TO NEGOTIATION OF DA PROVISION ON THIS POINT] The Covenant Privately-Owned Publicly Accessible Open Space shall be maintained and open for public use pursuant the terms of this Declaration until either: (i) the end of the useful life of the [insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space and that triggered its Completion], as set forth in Section 4.1.3 of the Development Agreement, or (ii) the City Council approves or authorizes an alternate use of the specific Covenant Privately-Owned Publicly Accessible Open Space, which approval or authorization shall require a minimum two-thirds affirmative vote of the City Council.

6. ~~4.~~ Maintenance and Repairs. ~~Grantor~~ Declarant shall, at its sole cost and expense, keep the ~~Easement Area~~ Covenant Privately-Owned Publicly Accessible Open Space and all improvements thereon in good condition and repair at all times for public use, consistent with the standards set forth in ~~Exhibit "C"~~ the Project Approvals and the Development Agreement.

7. ~~5.~~ Nondiscrimination. ~~Grantor~~ Declarant shall not discriminate against any person from accessing or using the ~~Easement Area~~ Covenant Privately-Owned Publicly Accessible Open Space on the basis of ~~the~~ fact or perception of a person's economic status social standing, race, ethnicity, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired

¶

12255.020 4841-1940-3487.1-12091-0004\2472201v3.doc 4840-9102-1023.4 12255.020 4840-9102-1023.3

¶

¶
¶

Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to ~~discrimination~~discriminate against such classes.

8. ~~6.~~ Compliance With Laws. ~~Grantor~~Declarant shall, at its costs and expense, make any improvements to the ~~Easement-Area~~Covenant Privately-Owned Publicly Accessible Open Space required by laws or changes in laws.

9. ~~7.~~ Property Taxes; Liens. ~~Grantor-Declarant~~ or its successors and assigns shall pay, prior to delinquency, all property taxes, special taxes and/or assessments assessed against the ~~Easement-Area~~Covenant Privately-Owned Open Space, and shall keep the ~~Easement-Area~~Covenant Privately-Owned Open Space free of all deeds of trust and other liens, ~~except for~~ deeds of trust securing financing for the ~~Development~~[insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space] or the Covenant Privately-Owned Open Space (each, an "Encumbrance"), which must be subordinated to this ~~Agreement and the Easement~~Declaration by a written subordination agreement recorded against the ~~Easement-Area~~Covenant Privately-Owned Publicly Accessible Open Space that is reasonably acceptable to ~~Grantee~~City. Notwithstanding the foregoing, no breach of or default under this Declaration shall defeat, render invalid, diminish or impair any such Encumbrance or the rights of the beneficiary thereunder (each, a "Lender"), but all of the terms and conditions contained in this Declaration shall be binding upon and effective against and shall run to the benefit of any such Lender or other party who acquires title to or possession of the Covenant Privately-Owned Publicly Accessible Open Space. ¶

10. Lender Notice and Cure Rights. As long as any Encumbrance shall remain unsatisfied of record, City shall give to the applicable Lender a copy of each Default Notice (as defined in Section 11 below) that City gives to Declarant if that Lender has given to the City a written request for Default Notices. Copies of such Default Notices shall be given to any requesting Lender at the address that requesting Lender last furnished to City. ¶

Each Lender shall have the right, but not the obligation, to do any act or thing required of Declarant hereunder, and to do any act or thing which may be necessary and proper to be done in the performance and observance of the agreements, covenants and conditions hereof; provided, however, that no such action shall constitute an assumption by such Lender of the obligations of Declarant under this Declaration. In the case of any Default Notice given by the City to Declarant, the Lender shall have the applicable cure period provided to Declarant for remedying the default described in that Default Notice or causing it to be remedied and, if prior to the expiration of the applicable cure period, a Lender gives City written notice that it intends to undertake the curing of such default or to cause the same to be cured, and then proceeds with all due diligence to do so, Lender shall have, in each case, an additional period of thirty (30) days (or, except for a default relating to the payment of money, such longer period as reasonably necessary as long as Lender commences cure within such thirty (30) day period and diligently proceeds to completion) after the later to occur of (i) the expiration of the applicable cure period, or (ii) the date that the City has served such Default Notice upon Lender, and the City shall

¶

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¶

accept such performance by or at the instance of the Lender as if the same had been made by Declarant. Notwithstanding anything to the contrary herein, in no event shall the additional cure period provided to the Lender exceed six (6) months beyond the cure period applicable to Declarant.

11. ~~8.~~ GranteeCity's Remedies. If GranteeCity determines that GrantorDeclarant is in violation of the terms of this ~~Agreement or the Easement~~ GranteeDeclaration, City shall give written notice to GrantorDeclarant of such violation ("Default Notice"). If GrantorDeclarant fails to cure the violation within fifteen (15) days after said ~~written notice~~ Default Notice is given, or said cure reasonably requires more than fifteen (15) days to complete and GrantorDeclarant fails to begin to cure within the fifteen (15) day period or fails to continue diligently to complete the cure, then GranteeCity may bring an action at law or in equity in a court of competent jurisdiction to enforce compliance by GrantorDeclarant with the terms of this ~~Agreement or the Easement~~ Declaration, to recover any damages to which GranteeCity may be entitled for violation by GranteeCity of the terms of this ~~Agreement or the Easement~~ Declaration, or may cure the violation in which event GrantorDeclarant shall reimburse GranteeCity for the costs incurred by GranteeCity in connection with the violation and cure within ~~tenthirty~~ (1030) days after written demand with evidence of such costs. ¶

[A4]: Need to discuss other enforcement--

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

12. No Waiver. No waiver by City of any violation under this Declaration shall be effective or binding unless and to the extent expressly made in writing by City, and no such waiver may be implied from any failure by City to take action with respect to such violation. No express written waiver of any violation shall constitute a waiver of any subsequent violation in the performance of the same or any other provision of this Declaration.

13. ~~9.~~ Miscellaneous.
(a)

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

¶
If to GrantorDeclarant: ¶
¶
Google, LLC¶

¶
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¶

1600 Amphitheatre Parkway

Mountain View, CA 94043

Attn: REWS Dept. / DevCo Project Executive - San Jose

With a Copy to:

Google LLC

1600 Amphitheatre Parkway

Mountain View, CA 94043

Attn: Legal Department / RE Matters

If to ~~Grantee~~City:

City of San José

-200 E. Santa Clara Street, 16th Floor

San José, California 95113

Attn: _____

With Copy to:

Johnny V. Phan

Chief Deputy City Attorney

Office of the City Attorney

City of San José

200 East Santa Clara Street

San José, CA 95113-1905

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johnny.phan@sanjoseca.gov

(b)

Runs With Land; Binds Successors-in-Interest. This ~~Agreement and the Easement encumbers and~~Declaration binds the ~~Easement Area~~Covenant Privately-Owned Publicly Accessible Open Space and binds all successors to any portion of or interest in the ~~Easement Area~~subject Covenant Privately-Owned Publicly Accessible Open Space.

(c)

Entire Agreement. This ~~Agreement~~Declaration is the entire agreement between the ~~parties~~City and Declarant with respect to its subject matter and supersedes all prior and contemporaneous oral and written agreements and discussions, except the Development Agreement and the Project Approvals.

(d)

Amendment; Termination. ~~This Agreement~~Subject to the provisions of Section 5 above, this Declaration may be amended or terminated only by an agreement in writing signed by all of the parties. Amendment or termination of this ~~Agreement~~Declaration shall not require an amendment to the Development Agreement. _

(e)

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

(f)

Governing Law. This ~~Agreement~~Declaration shall be governed by and interpreted under the laws of the State of California.

(g)

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

(h)

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

(i)

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

(j)

Time of Essence. Time is of the essence of every provision hereof in which time is a factor. ¶



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[A5]: Need further discussion.

(h) ~~No Third Party Beneficiaries.~~

~~(i)~~

(k) To the fullest extent by law, ~~Grantor~~Declarant shall defend, indemnify and hold GranteeCity harmless from and against any and all claims, liabilities, losses, damages, costs and expenses (including without limitation attorneys' fees and court costs) arising from or relating to the ~~existence of the Easement Declaration~~, public use of the ~~Easement Area~~subject Covenant Privately-Owned Publicly Accessible Open Space, or (excluding ~~sole negligence~~negligent or willful acts by GranteeCity) anything occurring on the ~~Easement Area~~subject Covenant Privately-Owned Publicly Accessible Open Space.

[A6]: Need to provide standard City insurance requirements.

(l) ~~(i)~~ [Insurance Requirements, with City named as additional insured.]

[CITY HAS ASKED FOR CITY STANDARD INSURANCE REQUIREMENTS; CITY PLEASE PROVIDE]

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

GRANTOR

DECLARANT

GOOGLE LLC,
a Delaware limited liability company

By: _____
Print Name: _____
Title: _____

GRANTEE

CITY

CITY OF SAN JOSÉ,
a municipal corporation

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By: _____

Print Name: _____

Title: _____



ATTEST: 











City Clerk

Approved as to form:



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A notary public
or other officer
completing this
certificate

State of California

County of Santa Clara

On _____, before me,

(insert name and title of the officer)

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

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¶
¶

A notary public
or other officer
completing this
certificate
verifies only the

¶
¶
¶
¶
¶

State of California

)

¶

County of Santa Clara

)

¶

On _____, before me,

,

¶

(insert name and title of the officer)

¶

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

¶

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

¶

WITNESS my hand and official seal.

¶

Signature _____ (Seal) ¶¶¶¶¶¶¶¶¶¶

¶

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¶

¶

EXHIBIT "A"¶

¶

**LEGAL DESCRIPTION AND DIAGRAM/DEPICTION OF THE ~~GRANTOR~~
~~PARCEL/EASEMENT AREA~~ COVENANT PRIVATELY-OWNED PUBLICLY
ACCESSIBLE OPEN SPACE**¶

¶

¶

¶

¶

¶

DRAFT

EXHIBIT "B"

Access and Rights-of-Way Diagram

EXHIBIT "C"
Maintenance Standards

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EXHIBIT "D"

¶

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CERTIFICATE OF ACCEPTANCE
(California Government Code Section 27281)¶

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

~~Dated: _____, 202__¶~~

_____¶

¶

¶

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

→¶

→¶

On _____, before _____ me,

¶

(insert name and title of the officer)¶

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

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

~~WITNESS my hand and official seal.¶~~

Signature _____ (Seal)¶

¶



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5:38:47 PM

Input:	
Document 1 ID	netdocuments://4841-1940-3487/1
Description	CITY FORM Draft Open Space and Public Access Agreement and Easement (003) (003)
Document 2 ID	netdocuments://4840-9102-1023/4
Description	Google - DW - DA Exhibit F1 - Declaration of Public Access
Rendering set	CPDB Set

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	291
Deletions	290
Moved from	2
Moved to	2
Style change	0
Format changed	0
Total changes	585