

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: Preliminary Draft DA Exhibit F1 - Declaration of Public Access  
**Date:** Tuesday, April 6, 2021 3:11:58 PM  
**Attachments:** [DA Exhibit F1 - Declaration of Public Access.doc](#)

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**From:** Phan, Johnny  
**Sent:** Saturday, March 27, 2021 12:31 PM  
**To:** Miller, J. Gregg <[gmliller@coblentzlaw.com](mailto:gmliller@coblentzlaw.com)>; Straka, Stephanie <[SStraka@coblentzlaw.com](mailto:SStraka@coblentzlaw.com)>  
**Subject:** Preliminary Draft DA Exhibit F1 - Declaration of Public Access

## Johnny V. Phan

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**NOTICE TO RECIPIENT:** This communication is intended **only** for the person to whom it is addressed, and may be protected by law. If you receive this in error, any review, use, dissemination, distribution, or copying is strictly prohibited. Please notify us immediately of the error and delete this communication and any attached documents from your system. Thank you for your cooperation.

**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>	
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]

**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 time and 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(a) 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 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 description and amendment, record such amendment in the Official Records of the County of Santa Clara.

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

Declarant acknowledges and agrees that 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, meaning that the change would reduce the hours of operation or 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 five percent (5%) 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.

[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]*, 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 entire City Council.

**[OPTIONAL LANGUAGE FOR THE MEANDER]** In the event that there is a risk of development of block F1, block F2, block F3 or block F6 threatening the safety of public use of the Meander, and there is no feasible alternative to avoid that threat, Declarant shall meet and confer with the Director of PRNS regarding the need for a temporary construction easement. The City will not unreasonably withhold authorization of a temporary construction easement over a portion of the Meander; however, the area of any such temporary construction easement or easements shall be the least impactful to public use of the Meander as feasible, and for the shortest duration necessary to protect public safety.

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. With regard to accessing or using the Covenant Privately-Owned Publicly Accessible Open Space, Declarant shall not discriminate against any person 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 sole cost 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 on behalf 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 Declarant's violation 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 Council, 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. 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.

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

(f) 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.

(g) 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.

(h) 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).


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

(j) 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 sole negligent or willful acts by City) anything occurring on the subject Covenant Privately-Owned Publicly Accessible Open Space.

(k) [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**

**EXHIBIT “B”**

**EXHIBIT F2 TO DEVELOPMENT AGREEMENT**