

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: Preliminary Draft Exhibit E/E5  
**Date:** Tuesday, April 6, 2021 3:16:34 PM  
**Attachments:** [Exhibit E5 - Current.docx](#)  
[Exhibit E Parkland Agreement.docx](#)

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**Sent:** Sunday, March 28, 2021 4:57 PM  
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**Subject:** Preliminary Draft Exhibit E/E5

Parkland Agreement and Exhibit E5.

## Johnny V. Phan

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City Draft 3/27/21

## EXHIBIT E5

### DESIGN AND CONSTRUCTION REQUIREMENTS

#### SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

##### A. Plans And Specifications.

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

1. Downtown West Improvement Standards, dated \_\_\_\_\_, 20\_\_ (“**DWIS**”), approved by the City Council on \_\_\_\_\_, 2021.
2. City's Standard Specifications and Standard Details, dated July 1992 (“**City’s Specifications**”), and on file with City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to “Developer” shall be deemed to mean “Developer.”
3. City’s Turnkey Park Standards for Park Design & Construction, dated 2001 (“**Turnkey Standards**”), as may be amended from time to time, and on file with City’s Department of Public Works, Architectural Division; provided, however, that with respect to Hazardous Substances, Hazardous Materials and remediation of the City-Dedicated Open Space or Park Improvements, the terms and conditions of this Agreement and related exhibits shall apply in the event of a conflict with the Turnkey Standards, including, without limitation the provisions of Sections 2.2.G and 2.6.C.1 of the Turnkey Standards. Future amendments to the Turnkey Standards shall apply only to plans for Parkland Improvements for which ninety-five percent (95%) plans and specifications that are submitted for City review and approval after eighteen (18) months of the effective date of the amendments of the Turnkey Standards; provided, however, that with respect to Hazardous Substances, Hazardous Materials and remediation of the City-Dedicated Open Space or Park Improvements, the terms and conditions of this Agreement and related exhibits shall apply in the event of a conflict with the Turnkey Standards, including, without limitation the provisions of Sections 2.2.G and 2.6.C.1 of the Turnkey Standards. For clarity, if 95% plans and specifications are submitted seventeen (17) months after the effective date of the amendment or sooner, the amendment would not apply.

4. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the above guidelines, as they may be amended from time to time, shall be applicable to this agreement.

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

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

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

**B. Application Of Plans And Specifications.**

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

2. In the event of a conflict between the Turnkey Standards and the City’s Specifications, the Turnkey Standards shall prevail, as and to the extent applicable as provided in this Agreement.

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

**C. Project Plans Approval Process.**

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

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

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

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

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

request the Developer shall provide the City with an updated schedule that reflects amended milestones and anticipated completion dates.

## **SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.**

### **A. Developer Selection.**

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

### **B. Prevailing Wage Requirement.**

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

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

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

4. Indemnity. Developer shall comply with Section 5.10 of the Development Agreement regarding indemnification of City.

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

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

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

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

- a. For each day after thirty (30) calendar days that Developer fails to completely respond to a request by City to provide records as required under Section 2(B), of this Exhibit E5, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and
- b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.

3. Audit Rights. All records or documents required to be kept pursuant to this Agreement to verify compliance with the Prevailing Wage Requirement shall be made available for audit at no

cost to City, at any time during regular business hours, upon written request by City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Developer's address indicated for receipt of notices in this Agreement.

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

Developer Initial:

City Initial:

**D. Conduct Of Work.**

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

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

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

**E. Access For Inspection.**

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

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

2. Representatives.

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

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

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

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

**F. Acceptance of Park Improvements.**

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

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



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

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

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

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

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

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

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


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


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

5. Notwithstanding anything contrary herein, any City-Dedicated Open Space shall meet applicable environmental regulatory requirements for public parks and trails use (based on the approved park design). The only exception to this requirement is Los Gatos Creek Connector where the land will be dedicated to the City early and un-improved, subject to a leaseback agreement, as further described in Section 3.D of this Parkland Agreement. Developer shall subsequently construct the Park Improvements and such that they meet applicable environmental regulatory requirements (based on the approved park design) for public parks and trails use.

#### **G. City-Dedicated Open Space.**

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

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

b. A Grant Deed for the City-Dedicated Open Space containing the legal description of the City-Dedicated Open Space, as approved by City Surveyor, properly executed and acknowledged, subject only to the  exceptions to title set forth in Exhibit E9. Title to the City-Dedicated Open Space shall be vested in City free and clear of all title defects, liens, encumbrances, conditions, covenants, restrictions, and other adverse interests of record or known to Developer, subject only to those exceptions set forth in Exhibit E9 ("**Permitted Exceptions**"), which Permitted Exceptions shall not impact or otherwise count against the credit value of the affected City-Dedicated Open Space except as indicated in Exhibit E9 and the Parkland Agreement. The Grant Deed, subject to approval of City, for the City-Dedicated Open Space shall be delivered to the City's Real Estate Division at least ninety (90) days prior to the anticipated completion of the Park Improvements.

c. Developer shall also cause to be provided to City, concurrently with the conveyance of each City-Dedicated Open Space to City, a C.L.T.A. owner's form policy of title insurance issued for the specific City-Dedicated Open Space by a reputable title company

currently doing business with City, with City named as the insured, in an amount as determined by the City consistent with the terms of the Development Agreement and Parkland Agreement, insuring the title of City to the City-Dedicated Open Space is subject to only the Permitted Exceptions.

d. Any and all reports related to the condition of the City-Dedicated Open Space and the lands adjacent to the City-Dedicated Open Space caused to be performed by the Developer or in the Developer's possession or control. Developer shall also provide to City, at the Developer's sole cost, a report, prepared or updated no earlier than twelve (12) months before the proposed acceptance of the Park Improvements by a qualified consultant analyzing the condition of the City-Dedicated Open Space with respect to the presence of Hazardous Materials on or adjacent to the City-Dedicated Open Space ("**Hazardous Materials Report**"). The definition of Hazardous Materials for purposes of this Agreement is set forth in Section 3(A)(2) of this Exhibit. The scope of the Hazardous Materials Report shall, at minimum, contain the elements set forth below in Section 4. Any Hazardous Materials Reports prepared pursuant to this Agreement shall specify that they may be relied upon by both Developer and City.

e. Subject to Section 3 and the disclosures and obligations set forth therein, in the event that the Hazardous Materials Report(s) disclose(s) the presence of Hazardous Materials on any of the City-Dedicated Open Space (1) in excess of generally accepted environmental screening limits (e.g., San Francisco Regional Water Quality Control Board Environmental Screening Levels or background levels or other then applicable regulatory standards) for the park land and recreational uses as set forth in the Downtown West Design Standards and Guidelines for parklands or (2) in violation of any hazardous materials/waste laws such that park land and recreational uses as set forth in the Downtown West Design Standards and Guidelines would be prohibited, the Director shall have the right to require Developer, as a condition of acceptance, to remediate or mitigate the condition to the extent required for the park to be used as designed and intended in the Downtown West Design Standard and Guidelines for parklands. The type of remediation or mitigation required for the City-Dedicated Open Space pursuant to this Agreement shall be at no cost to the City and be subject to the review and approval of the Director.

f. To the fullest extent permitted by law, Developer shall indemnify, defend and hold the City, its officers, agents and employees harmless for any and all third party claims for liability, loss, cost, expense or obligations arising out of or in any way connected with the presence of Hazardous Substances on or under the City-Dedicated Open Space provided the claim arose prior to the date of City's acceptance of the City-Dedicated Open Space. This provision shall survive expiration or termination of this Agreement. Notwithstanding the foregoing, City shall remain responsible and liable for any Hazardous Substances as set forth in the Existing Agreements.

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

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

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

#### **H. Compliance With Laws/Permits.**

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

2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses, and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review. Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. Consistent with the terms of the Development Agreement, City agrees to cooperate with Developer in its efforts to obtain any such governmental reviews and approvals, licenses, and/or permits. City also shall consider any Subsequent Approvals required for the construction of the Park Improvements in a manner consistent with the Development Agreement. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace

any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 6 of this Agreement.

### **SECTION 3. ENVIRONMENTAL CONDITIONS FOR CITY AND DEVELOPER WARRANTIES.**


**A.** As a condition to the City's acceptance of the Park Improvements and dedication of the City-Dedicated Open Space, the following conditions shall be satisfied except that (i) if such condition is disclosed in the Hazardous Materials Report, the Existing Phase I Report, the Phase I ESA Update, the Existing Phase II Report, and/or (ii) if the condition is the responsibility or liability of the City as set forth in the Existing Agreements (e.g., the City is the responsible party for the Hazardous Material condition as agreed upon in the Existing Agreements as of the date of this Agreement), then that particular condition or conditions shall be deemed satisfied and waived by City:


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

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

3. Developer has not caused or permitted the release of, and has no knowledge of the release or presence of, any Hazardous Substance onto the soil of the City-Dedicated Open Space or the property on which the Park Improvements are to be constructed, or the migration of any Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the Park Site, that will preclude its use as a park or open space.

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

5. Neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any monitoring, reporting, or restrictions relative to its use as a park or open space by any governmental authority with jurisdiction over the City-Dedicated Open Space, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board. 

6. Subject to Section 2(G)(1)(b) of this Exhibit, and Exhibit E9 to the Agreement, neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any burden, easements, covenants or land use restrictions recorded against any part of the Park Improvements or City-Dedicated Open Space that would prohibit the use of the Park Improvements or the City-Dedicated Open Space for their intended use as designed. 

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

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

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

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

1. Any proceeding or investigation by any federal, state or local governmental authority with respect to the presence of any Hazardous Substance on the City-Dedicated Open Space or the migration thereof from or to any other property adjacent to, or in the vicinity of, the City-Dedicated Open Space that is not disclosed in the Hazardous Materials Report, the Existing Phase I Report, the Phase I ESA Update, the Existing Phase II Report or any other environmental report obtained by the City; and

2. Any claims made or threatened by any third party against Developer, City or the City-Dedicated Open Space relating to any loss or injury resulting from any Hazardous Substance that is not disclosed in the Hazardous Materials Report, the Existing Phase I Report, the Phase I ESA Update, the Existing Phase II Report or any other environmental report obtained by the City; and

3. Developer's discovery (meaning not disclosed in the Hazardous Materials Report, the Existing Phase I Report, the Phase I ESA Update, the Existing Phase II Report or any other environmental report obtained by the City) of any occurrence or condition on any property adjoining or in the vicinity of the City-Dedicated Open Space that could cause the City-Dedicated Open Space or any part thereof to be subject to any restrictions on its ownership, occupancy, use for the purpose for which it is intended, transferability or suit under any environmental law.

## SECTION 4. HAZARDOUS MATERIALS REPORT.

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

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

a. The historical usage of the City-Dedicated Open Space and adjacent parcels dating back to the City-Dedicated Open Space’s first developed use (including any agricultural use) or 1940, whichever is earlier.

b. Results of the site visits pertaining to the current condition of the City-Dedicated Open Space, including without limitation, any observed storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space, or evidence indicating possible past or current storage, handling, or release of any Hazardous Materials on, under, above, or about the City-Dedicated Open Space.

c. Results of the review of all reasonably available historical documents and records of regulatory agencies concerning the storage, handling, or release of any Hazardous Materials and/or contamination of any or all of the City-Dedicated Open Space.

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

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

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

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

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

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

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

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

## **SECTION 5. INSURANCE REQUIREMENTS.**

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

### **A. Minimum Scope of Insurance.**

Coverage shall be at least as broad as:



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

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

**B. Minimum Limits of Insurance.**

Developer shall maintain limits no less than:

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

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

**C. Deductibles and Self-Insured Retentions.**

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

**D. Provisions Of Policies.**

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

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

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

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

**E. Duration.**

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

**F. Acceptability of Insurers.**

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

**G. Verification of Coverages.**

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

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

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

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

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



**RECORDING REQUESTED  
BY CITY OF SAN JOSE:**

When Recorded, Return To:  
City of San José  
200 East Santa Clara Street  
San José, CA 95113  
Attn: City Clerk, 2<sup>nd</sup> Floor West Wing

**PARKLAND AGREEMENT  
FOR  
TENTATIVE MAP NO. [REDACTED].  
BETWEEN  
CITY OF SAN JOSE  
AND  
GOOGLE LLC AND  
RESTRICTIONS AND COVENANTS RELATING TO  
PRIVATE RECREATIONAL IMPROVEMENTS**

This Agreement (“Agreement”) is made and entered into by and between the CITY OF SAN JOSE, a municipal corporation of the State of California (“City”), and GOOGLE LLC, a Delaware limited liability company (“Developer”) as of the date of City's execution (“Effective Date”). Each of City and Developer are sometimes hereinafter referred to as a “Party” and collectively as the “Parties.”

**RECITALS**

- A. In connection with its Downtown West Mixed-Use Plan (herein, the "Project"), City and Developer have entered into a Development Agreement (the "Development Agreement"), adopted by the City Council on \_\_\_\_\_, 2021, by Ordinance No. \_\_\_\_\_, approving the Development Agreement and authorizing the City Manager to execute the Development Agreement on behalf of the City (the "Enacting Ordinance"). The Enacting Ordinance took effect on \_\_\_\_\_, 2021.
- B. In connection with the Project, Developer has filed Vesting Tentative Map Number [REDACTED] (the “Tentative Map”) with the City’s Planning Department for the subdivision of the

Project site, as defined in the Development Agreement, and has obtained Planned Development Permit No. PD19-029 (“PD Permit”) for the Project.

- C. Under the provisions of Chapter 19.38 of the San José Municipal Code (“Parkland Dedication Ordinance”), developers of residential subdivisions are required to dedicate property for neighborhood and community parks, construct park or recreational improvements, and/or pay in-lieu fees (“Parkland Dedication Obligation”).
- D. In order for Developer to satisfy Developer’s Parkland Dedication Obligation for the residential units identified on the Tentative Map, Developer and City desire to enter into this Agreement pursuant to which Developer shall satisfy its Parkland Dedication Obligation for development of four thousand (4,000) residential units as follows: (i) Developer shall dedicate a minimum of four and eight-tenths (4.8) acres of real property for public parks and trail to the City of San José; and (ii) Developer shall construct turnkey improvements, enhanced landscaping, and new plantings to these dedicated parks and trail, providing design and programming that would meet or exceed the requirements of the City's Parkland Dedication Ordinance (collectively, the “Park Improvements”, and individually a “Park Improvement”); and (iii) for development of residential units in excess of four thousand (4,000), payment of in-lieu fees (“Parkland Fees”) or use of credits as set forth in this Agreement. Park Improvements are to have an average value of One hundred Ninety Five Dollars (\$195) per square foot (in 2021 dollars, escalating by the California Construction Cost Index, which is a subset of the Engineering News Record Construction Cost Index), as specified in Table 1 of Exhibit E1 hereto (“Park Improvements Value”). The Park Improvements Value includes, but is not limited to, the City’s Review Fees as defined in Section 3(I), and all fees and costs for design and construction materials and labor incurred by Developer in connection with the Park Improvements, including direct costs, soft costs, and contingency as reflected in Table 2 of Exhibit E1. Costs associated with any remediation, removal, disposal, or any combination thereof, of contaminated materials to meet applicable regulatory requirements for public park and trails uses shall not be included in the Park Improvements Value or otherwise applied to satisfy the Parkland Dedication Obligation.

- E. Developer may also propose certain Private Recreation Improvements as defined in City Resolution No. 73587, dated January 9, 2007 (“Private Recreation Improvements”) within the Project in accordance with the requirements of the PD Permit and for which Developer is also eligible to receive credit against its Parkland Dedication Obligation as set forth in the Parkland Dedication Ordinance and this Agreement.
- F. City’s Director of Parks, Recreation and Neighborhood Services ("PRNS") (“PRNS Director”) is charged with the administration of this Agreement in conjunction with the Director of Public Works (“Director of PW”). The Director of PW in coordination with the PRNS Director is responsible for the review, inspection, approval, and acceptance of the proposed City-owned Park Improvements. As described in the Downtown West Planned Development Zoning and General Development Plan for the Plan Area, the Director of PBCE is the decisionmaker for Open Space Conformance Review, following consultation with PRNS Director.

NOW, THEREFORE, in consideration of the mutual covenants set forth in this Agreement and for valuable consideration, receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

**SECTION 1. REPRESENTATIONS AND WARRANTIES OF DEVELOPER.**

Developer represents and warrants to City that the following facts are true and correct:

- A. The statements and certificates made on the Tentative Map and documents filed in conjunction with the Tentative Map remain true and correct.
- B. Any and all documents provided to City pursuant to the terms of this Agreement, or in connection with the execution of this Agreement, are now in full force and effect and contain no inaccuracies or misstatements of fact. Developer covenants that at such time City notifies Developer of City's intention to accept any Park Improvements, if any of these documents contain inaccuracies, misstatements, or have become obsolete, Developer shall notify City and provide City with the information required to render the documents accurate, complete, and current.



- C. Developer has the legal ability to enter into this Agreement and Developer's signatory(ies) to this Agreement is (are) duly authorized to sign this Agreement on its behalf. In the event the Developer is not the legal owner of the real property identified in the Development or on the Tentative Map and on which any Park Improvements are to be constructed, then the legal owner shall also be required to execute this Agreement and shall be subject to all terms, conditions, and obligations of this Agreement.

**SECTION 2. COLLABORATION AND OBLIGATIONS REGARDING DISC AND CITY-DEDICATED OPEN SPACE.**

- A. In furtherance of the collaborative efforts described in Section 3.6 of the Development Agreement, as well as the collective goals of Developer, City, and the other DISC Partner Agencies (California High-Speed Rail Authority; Valley Transportation Authority; Caltrain; Metropolitan Transportation Commission (MTC)) to effectively deliver both the Project and DISC, this section describes the understandings of City and Developer relative to DISC and the City-Dedicated Open Space:
- a. The Project proposes to dedicate and improve the following City-Dedicated Open Spaces adjacent to the existing and potential future rail alignment: Northend Park, St. John Triangle, and Los Gatos Creek Connector.
  - b. DISC Partner Agencies have indicated an intention to elevate the rail tracks and rail structure as part of DISC, providing new opportunities to connect to these concurrently-planned parks to uses located to the west of the current rail alignment.
  - c. Timing and phasing of DISC and other potential rail or transit projects (including California High Speed Rail) in the vicinity of the Project have not been finalized; and as of the Effective Date of this Agreement a Concept Layout for the Diridon Integrated Station Concept has been approved by the City (February 2020).
  - d. In order to maximize parks and open space, as well as transit and connectivity in the near- and long-term, Developer and City shall proceed in the manner described in Section 2(B) of this Agreement with respect to any acquisition by a DISC Partner

Agency(ies); and with respect to any potential DISC construction needs that may affect a City-Dedicated Open Space, including any temporary construction easement(s) (TCE), Developer and City shall proceed in accordance with Section 2(C) of this Agreement. Such Sections include consultation and meet and confer processes between City and Developer, in addition to the City's and Developer's collaborative efforts with the DISC Agency(ies) described in Section 3.6 of the Development Agreement. Any changes to the design of a City-Dedicated Open Space resulting from City and/or Developer collaboration and discussions with a DISC Partner Agency(ies) shall be a subject for any meet and confer process(es) between City and Developer, and City and Developer shall proceed as otherwise described in this Agreement.

- e. To maximize functional park space, the Los Gatos Creek Connector has been designed to eventually extend underneath an elevated rail structure, which may require an easement or other ownership structure to be agreed upon by City and other DISC Partner Agency(ies). During construction, City and Developer anticipate that the DISC Partner Agency(ies) would require a TCE within the Los Gatos Creek Connector.
- f. New park spaces at St. John Triangle and the Northend Park have been planned to be outside of the established Transit Project Buffer Zone, as defined in the Development Agreement. City and Developer anticipate that a TCE may be required by a DISC Partner Agency(ies) for California High Speed Rail or other transit projects, at the western edge of the Northend Park.
- g. Compensation for any TCE required by a DISC Partner Agency(ies) – including any impact to the City-Dedicated or Privately-Owned Publicly Accessible Open Spaces, or any other private property – would be required consistent with law. In the event of any permanent acquisition by a DISC Partner Agency(ies), Developer or City as landowner, as applicable at the time of acquisition, would proceed in accordance with law and established practices for eminent domain proceedings.

B. 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 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(ies) 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(ies) 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 5(B), the Parties 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, as may be amended from time to time. 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 3(B) 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 4(F) regarding payment of Parkland Fees and use of Private Recreation Improvements credits, and the amount of the acquired acreage shall be counted toward Developer's acreage obligations set forth in Sections 3(O), 4(G)(b) and 4(G)(d) upon payment to the City of the fair market value received for the land. 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. In addition to the fair market land value pass-through payment described above, 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 to City prior to 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), subject to escalation based on the California Construction Cost Index.

- b. At least six (6) months prior to initiating design of a City-Dedicated Open Space, Developer shall consult with Department of Parks, Recreation and Neighborhood Services staff 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 5(B), 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; and
  3. The Parties intend to minimize impacts of DISC project construction activity on existing and future development within the Project Site boundary.
- 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, and the amounts received by City for the fair market value of the acquired land and for the value of any Park Improvements thereon shall be retained by PRNS.
- C. 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 City, and 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 4(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, escalated in accordance with the California Construction Cost Index, 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 City-Dedicated Open Space.

**SECTION 3. DEDICATION OF PARKS; DESIGN AND DEVELOPMENT OF PARK IMPROVEMENTS; CREDIT FOR PRIVATE RECREATIONAL IMPROVEMENTS.**

- A. Subject to Section 2(B), 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 concurrent with the final map that contains the subject City-Dedicated Open Space, and shall be recorded immediately following 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 and in accordance with the timing requirements, and in the delivery condition set forth in Exhibit E5. Subject to Developer’s rights under the Existing Agreements, 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. 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 such that credits would be provided and administered as set forth in Section 3(B), 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. All City-Dedicated Open Space shall meet the requirements and standards set forth in Exhibit E5.

- B. 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 West Planned Development District, with such credits provided at a ratio of one-to-one unit basis.
  
- C. Reconfiguration and/or Project redesign of a City-Dedicated Open Space may be necessary in the event Developer is prohibited from building to the maximum heights reflected in the DWDSG as a result of adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights. Any reconfiguration or redesign would have a negative impact on Developer's master planning efforts, lessening the amount of square footage for both commercial and residential uses, and potentially reducing the number of residential units that may be developed within the Plan Area.

Subject to the requirements of Sections 4(F), 4(G), and 4(J) of this Agreement, such reconfiguration and/or reduction in residential development may result in less parkland being constructed either as a result of a trigger building not being built or as a result of fewer residential units being constructed.

- D. As reflected in Exhibits E3.1 and E3.2, the land for Los Gatos Creek Connector 1 and Los Gatos Creek Connector 2 is to be dedicated by grant deed to the City prior to construction and dedication to the City of the Park Improvements thereon. The dedication of Los Gatos Creek Trail Connector 1 and Los Gatos Creek Trail Connector 2 shall be accepted by the City in conjunction with a fully executed leaseback agreement. The intent of the leaseback agreement is to enable Developer to Complete the required Park Improvements; allow non-income producing interim uses by Developer, such as landscaping and/or construction staging; require the same insurance and indemnification as set forth in this Agreement; and to require Developer to maintain and manage the property, including any necessary security and fencing, until such time as the Park Improvements are accepted by the City in accordance with the terms of this Agreement. Additionally, the parties have mutually agreed that the agreement between the Parties is for a gross leaseback to Developer for a cost of one dollar (\$1.00) per year. To enable Developer's timely construction and Completion of the Park Improvements on Los Gatos Creek Connector 1 and Los Gatos Creek Connector 2 as set forth in Exhibit E3.1, City shall provide written notice to Developer within ninety (90) days of City's issuance of a building permit for construction of, and also at issuance of a Certificate of Occupancy for, affordable housing developments on Block H5 and on Block H6.
- E. The Park Improvements to be installed on a City-Dedicated Open Space shall be Completed in accordance with the City-Dedicated Open Space Dedication and Improvements Schedule and Park Dedication/Delivery Triggers Figure set forth in Exhibits E3.1 and E3.2. For clarity, except as otherwise set forth herein, Developer shall not be obligated to install Park Improvements on any City-Dedicated Open Space unless and until Developer undertakes the actions or development set forth in Exhibit E3.1 that corresponds to any such Park Improvements. Subject to approval by the Directors of PRNS and PW,



City may elect to extend the Delivery trigger reflected in Exhibit E3.1 by twelve (12) months to allow Developer to complete installation of art, 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”). Alternatively, subject to approval of 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 be permitted to occur without first requiring the completed installation of 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 and in accordance with this Agreement. Separately, Completion also does not include or require relinquishment and improvement of any Park Construction Right of Entry, which Right of Entry areas are depicted in Exhibit E6 (referred to therein as “Temporary Construction Easement (TCE)”), so long as (i) Developer provides the Park Construction Right of Entry Security as described in this Agreement, and (ii) the Park Construction Right of Entry is relinquished and improved within six (6) months of issuance of the temporary certificate of occupancy for the fronting building; provided however, that City shall release all other bonds and securities as indicated in Exhibit E5 and in accordance with this Agreement, except the Park Construction Right of Entry Security as described in Section 6A 6 of this Agreement.

- F. As more particularly described in Exhibit E5, Developer shall be responsible for the development of Park Improvements Plans for, and the construction of the Park Improvements on the City-Dedicated Open Space, consistent with the Park Improvements Plans, and as otherwise described in this Agreement and the Development Agreement.

Developer shall construct the Park Improvements in conformance with the Park Improvements Plans and Downtown West Design Standards and Guidelines, and all applicable standards and specifications in effect on the Effective Date of this Agreement, except as otherwise set forth herein.

- G. Developer has no obligation to construct other improvements on the City-Dedicated Open Space beyond the Park Improvements.
- H. The Parties acknowledge that the exact size, dimensions, and other particular characteristics of the Park Improvements have not been determined as of the Effective Date of this Agreement. The Parties, however, agree that the Park Improvements shall consist of the Park Improvements as conceptually depicted and described in the Downtown West Design Standards and Guidelines, with a minimum cumulative acreage of 4.8 acres for the development of 4,000 units, as reflected on the Tentative Map for the Project and based on the unit equivalent values reflected in Table 1 of Exhibit E1. As described in Section 4(B), any future adjustments to the conceptual City-Dedicated Open Space sizes, as permitted by the General Development Plan, shall be identified and finally approved at the Conformance Review stage or the processing of a final map that includes the subject City-Dedicated Open Space, whichever occurs first, and shall be tracked using Exhibit E7, which Exhibit shall ensure compliance with the requirements of this Agreement.
- 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. For clarity, the Park Improvements Value includes, but is not limited to, the City's Review Fees and all fees and costs for design and construction materials and labor incurred by Developer in connection with the Park Improvements, including direct costs, soft costs, and contingency as reflected in Table 2 of Exhibit E1. Costs associated with any remediation, removal, disposal, or any combination thereof, of contaminated materials to meet applicable regulatory requirements for public park and trails uses shall not be included in the Park Improvements Value or otherwise applied to satisfy the Parkland Dedication

Obligation. Developer and City agree that the Park Improvements Value shall not be less than the values set forth in Table 1 of Exhibit E1. The Review Fees shall be in an amount equal to seventeen and one-half percent (17.5%) of the direct costs, which Review Fees are reflected in Table 2 of Exhibit E1, and 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.

- J. As described and depicted in the Downtown West Design Standards and Guidelines, kiosks and/or pavilions are included as optional features in some of the City-Dedicated Open Spaces. The improvement value of such kiosks and/or pavilions is not included in the Park Improvements Value and, therefore, it is understood that the improvement value of any kiosk or pavilion constructed within a City-Dedicated Open Space may exceed the Park Improvements Value. In its sole discretion, the City may elect to approve Park Improvements Plans for a City-Dedicated Open Space during Conformance Review with a kiosk and/or pavilion. If the City elects to include a kiosk/pavilion in a City-Dedicated Open Space, the improvement value of such kiosk/pavilion shall be permitted to be used to satisfy any outstanding Parkland Dedication Obligation associated with the development of four thousand (4,000) residential units. In the event the improvement value of such kiosk/pavilion exceeds the value of any remaining Parkland Dedication Obligation, Developer may use such value to satisfy any Parkland Dedication Obligation associated with the development of more than four thousand (4,000) residential units. If Developer does not develop more than four thousand (4,000) residential units, Developer's shall receive credits for the excess improvement value of a kiosk or pavilion, which shall be available for use consistent with Section 3(B).

- K. Each individual Park Improvement shall be deemed Completed and accepted by City upon recordation of the Notice of Acceptance by Director of PW as outlined in Exhibit E5 of this Agreement. Upon Developer's request, the PRNS Director, in consultation with the Director of PW, may, at the their discretion, grant extensions of one or more of the Completion requirements specified in this subsection.
- L. With respect to any Park Improvements which are owed but which have not been Completed as specified in Exhibit E3.1 to the Development Agreement, the credits for the incomplete improvements shall be disallowed and Developer and City shall proceed in accordance with Section 7.
- M. Subject to Section 3(O), the Project is eligible to receive credit for Private Recreation Improvements pursuant to the Parkland Dedication Ordinance. The description of the Private Recreation Improvements that may be included in the Project by Developer and that, if included, shall receive credit pursuant to Chapter 19.38 as set forth in City Council Resolution No. 73587 dated January 9, 2007. Developer may request Private Recreation Improvements credit for qualifying Private Recreation Improvements in a residential building at the time of Conformance Review for that building by submitting for review by the PRNS Director documentation including, but not limited to: (i) a written summary of all qualifying on-site Private Recreation Improvements, (ii) a table itemizing all proposed Private Recreation Improvements by net square footage, (iii) the location, (iv) classification type (active classification or non-active elements classification), (v) dimensioned and labeled floor plans showing all private recreational amenities, and (vi) photo simulations or other illustrative examples of proposed recreational accessories. The PRNS Director will review the Private Recreation Improvements credit documentation and, if in conformance with the criteria in Resolution No. 73587, tentatively approve the recreation credit. Credits shall be finally approved upon Completion of the Private Recreation Improvements consistent with the Private Recreation Improvements credit documentation and this Agreement, but shall only be available for Developer's use pursuant to the provisions of Section 3(O) below. Developer shall complete the installation of the Private Recreation Improvements described in Resolution No. 73587 prior to the issuance of a Final

Certificate of Occupancy for the residential building(s) in which the Private Recreation Improvements are located or to which the Private Recreation Improvements are tied.

With respect to any Private Recreation Improvements that have not been Completed prior to the issuance of a Final Certificate of Occupancy for the residential building of which the improvements are a part, the credits for the incomplete improvements shall be disallowed and Developer shall be required to pay Parkland Fees, if any such fee is owed, together with additional charges as set forth in the Parkland Dedication Ordinance.

- N. Developer acknowledges and agrees that Developer shall not receive any credit for eligible Private Recreation Improvements pursuant to the Parkland Dedication Ordinance unless (i) constructed in full compliance with this Agreement, or as otherwise creditable to the satisfaction of PRNS Director; and (ii) subject to a restrictive covenant as set forth below in Section 3(P).
- O. Credit for Private Recreation Improvements constructed in accordance with the requirements of this Agreement and the Exhibits hereto shall not be credited against the Parkland Dedication Obligation unless and until (i) at least two and four tenths (2.4) acres of City-Dedicated Open Space have been dedicated and Park Improvements associated with such acreage have been Completed and Accepted by the City, (ii) at least four (4) acres of Privately-Owned Publicly Accessible Open Space have been Completed and Delivered and a restrictive covenant(s) as described in Section 4.1.3 of the Development Agreement has (have) been recorded to maintain public access, and (iii) either (x) the Development Agreement has expired or terminated, or (y) Developer has satisfied its Parkland Dedication Obligation for the development of four thousand (4,000) residential units and thereafter constructs residential units in excess of those four thousand units. With respect to any Private Recreation Improvements that have not been Completed as specified in this Agreement, the credits for the incomplete improvements shall be disallowed.
- P. Prior to receipt of credit for any Private Recreation Improvements, Developer acknowledges and agrees that use of the Private Recreation Improvements shall be restricted for recreation purposes by a recorded covenant which runs with the land for the

life of the subject residential building, and which expressly cannot be defeated or eliminated without the written consent of the City as described in the Parkland Dedication Ordinance. For clarity, Private Recreation Improvements for which Developer does not receive credit toward its Parkland Dedication Obligation are not subject to this, or any other requirements of this Agreement.

- Q. Developer acknowledges that pursuant to the covenants set forth in Section 3(P) above, the Developer or Owner shall henceforth be required to maintain all such Private Recreation Improvements in safe working order and provide access for regular inspections at the City's request. After any such inspection and pursuant to written request by the City, the Developer or Owner shall promptly provide for any remedial actions, replacement, and/or repair work as may be necessary to ensure that the improvements remain in safe working order for recreational use.
- R. In the event that the project contains Private Recreational Improvements designated in this Agreement or associated exhibits as 'publicly accessible,' the Developer or Owner agrees to maintain public access to these amenities for a minimum of 360 days per year. The Developer may however, post reasonable Rules and Regulations for respectful use and maintenance of Private Recreational Improvements and areas as well as conduct occasional extended closures, subject to approval by PRNS Director. This Section shall apply in addition to any Easements or Restrictions which may be in place providing for public access and/or appurtenant uses.

**SECTION 4. COMPLIANCE WITH THE PARKLAND DEDICATION ORDINANCE AND SATISFACTION OF PARKLAND OBLIGATION.**

- A. Subject to Section 2(B), the Parties acknowledge and agree that the calculation of the Developer's Parkland Dedication Obligation for development of four thousand (4,000) residential units is set forth in Exhibit E8, including the calculation of Parkland Fees. As reflected in Exhibit E8, the total Parkland Dedication Obligation, based on the number of type of units to be provided – such as mid-rise, high-rise, market-rate, and affordable – shall be blended across the Project, regardless of unit type, and administered uniformly

based on the number of residential units produced, as shown in Table 2 in that Exhibit. The Park Improvements Value is set forth in Table 1 of Exhibit E1. Credits for Private Recreational Improvements, if any, are described in City Council Resolution No. 73587.

- B. The final acreage of each City-Dedicated Open Space shall be verified at the Conformance Review stage or the processing of a final map that includes the subject open space, whichever occurs first. If the size of a City-Dedicated Open Space is different from the acreage set forth in this Agreement and Exhibit E2 hereto, which may occur due to final roadway or parcel alignments, among other reasons, that acreage will be reflected and tracked in Exhibit E7. If the size of a City-Dedicated Open Space is increased or decreased, subject to Section 2(B), Developer shall adjust other City-Dedicated Open Spaces so that the total acreage of City-Dedicated Open Space provided for the development of 4,000 residential units is at least 4.8 acres. Such reallocation shall not require amendment to this Agreement or to the Development Agreement. At the termination or expiration of the Development Agreement, City and Developer shall verify the total City-Dedicated Open Space acreage provided by the Project and calculate any remaining Parkland Dedication Obligation that is owed. Any remaining Parkland Dedication Obligation shall be satisfied in accordance with Section 4(L).
- C. Except as otherwise provided herein and in the Development Agreement, provided that Developer is not in material default hereunder, and provided further that Developer satisfies all other terms, conditions, and requirements associated with issuance of a building permit(s), City shall issue all building permits necessary for the residential units identified on the Tentative Map.
- D. City acknowledges and agrees that Developer's performance of this Agreement shall fully satisfy Developer's Parkland Dedication Obligation under the City's Parkland Dedication Ordinance for development of four thousand (4,000) residential units in the Plan Area. The Parties further acknowledge and agree that the Parkland Dedication Obligation set forth in Exhibit E8 for development of four thousand (4,000) residential units is based on and assumes the development of six hundred (600) of the 4,000 residential units as affordable

housing units on the affordable housing sites H1, H5, and H6 that Developer will dedicate to the City. In the event the City and/or an affordable housing developer causes more than 600 affordable housing units to be developed on the affordable housing sites, any parkland dedication obligation applicable to such additional affordable housing units shall be the responsibility of, and attributed to the developer of those additional units; and Developer's Parkland Dedication Obligation shall not be decreased or increased or otherwise affected as a result of such additional affordable housing development on the affordable housing sites, nor shall such additional units be counted toward or otherwise affect any milestones or triggers set forth in this Agreement, including, but not limited to, the requirements contained in Section 4(H) and in Exhibit E8 hereto.

- 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. 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. Further, the following underlying assumptions upon which the Parkland Dedication Obligation is based, and which are set forth in Exhibit A to Resolution Number 73587 and Section 1 of Exhibit A of Resolution No. 75346 as amended by Resolution \_\_\_\_\_ [**ADD FINAL RESOLUTION NUMBER**], shall be fixed and vested for the term of the Development Agreement: (i) mid-rise residential units have an occupancy rate of two and thirty-four hundredths (2.34) persons per unit; (ii) high-rise residential units have an occupancy rate of one and fifty-one hundredths (1.51) persons per unit; (iii) the Parkland Fees charged for each deed restricted, low income residential unit shall be set at fifty percent (50%) of the otherwise applicable Parkland Fees for each such unit; and (iv) the Parkland Fees charged for each deed restricted, moderate income residential unit shall be set at fifty percent (50%) of the otherwise applicable Parkland Fees for each such unit.



- F. Regardless of any land acquisition or condemnation that may occur as a result of the actions described in Section 2(B) of this Agreement and which affects a portion(s) of the Plan Area anticipated for development of City-Dedicated Open Space, in no event shall Developer be permitted to satisfy more than fifty percent (50%) of its Parkland Dedication Obligation through the combination of (a) payment of Parkland Fees, and (b) Private Recreation Improvements credit. Further, City and Developer acknowledge and agree that, following dedication and acceptance by the City of a City-Dedicated Open Space, the amount of credits received by Developer for such land and any Park Improvements thereon shall be unaffected by any future actions by any DISC Partner Agency that may affect such land.
- G. Developer acknowledges that of the 4,000 housing units covered in this Agreement, approximately 2,900 units are proposed south of Santa Clara Street and approximately 1,100 units are proposed north of Santa Clara Street. While Developer is committed to providing Privately-Owned Publicly Accessible Open Space in addition to its commitments set forth in this Parkland Agreement, as described in Section 4.1.3(a) of the Development Agreement, the Privately-Owned Publicly Accessible Open Space is not counted toward satisfaction of Developer's Parkland Obligation. As a result, the Parkland Dedication Obligation for units developed south of Santa Clara Street above the 2,000th residential unit cannot be fully met through the proposed City-Dedicated Open Space located south of Santa Clara Street. The following provisions address how the Parkland Dedication Obligation may be met while addressing this imbalance.
- a. **At the end of the Term of this Agreement, if fewer than two thousand (2,000) residential units are constructed south of Santa Clara Street,** the Developer shall dedicate City-Dedicated Open Space and construct Park Improvements thereon sufficient to meet the minimum Parkland Dedication Obligation for the number of residential units constructed no later than thirty (30) years after the Effective Date of the Development Agreement, which Parkland Dedication Obligation for fewer than 2,000 residential units cannot be met by payment of Parkland Fees, use of credits for Private Recreation Improvements, or provision of Privately-Owned Publicly Accessible Open Space; provided, however, if

satisfaction of this requirement would obligate Developer to dedicate and/or Complete only a portion of a proposed City-Dedicated Open Space, City and Developer shall cooperate in Good Faith to (i) redesign proposed Park Improvements to Los Gatos Creek Connector 1 and/or Los Gatos Creek Connector 2 so that the land value plus the Park Improvements Value does not exceed, and is equivalent to the remaining Parkland Dedication Obligation, in which case the applicable Park Improvements Value reflected in Table 1 of Exhibit E1 would not apply and certain requirements of the DWDSG may need to be waived as permitted by the DWDSG and/or the General Development Plan; (ii) increase the size of a City-Dedicated Open Space(s), or add a City-Dedicated Open Space adjacent to a residential building, in an amount equal to the remaining Parkland Dedication Obligation, provided the location and size of such space is approved by the Director of PRNS; (iii) dedicate and improve a portion of a Privately-Owned Publicly Accessible Open Space that is equivalent to the remaining Parkland Dedication Obligation, converting that portion to a City-Dedicated Open Space; and/or (iv) pay Parkland Fees to satisfy the remaining obligation. The obligations under this Section 4(G)(a) apply even if the buildings that would otherwise trigger the Parkland Dedication Obligation as set forth in Exhibits E3.1 and E3.2 have not been constructed during the 30-year period after the Effective Date of the Development Agreement.

- b. **At the end of the Term of this Agreement, if two thousand (2,000) or more residential units are constructed south of Santa Clara Street and Developer does not develop North of Santa Clara Street**, then Developer shall dedicate at least two and four tenths (2.4) acres of City-Dedicated Open Space South of Santa Clara Street and construct Park Improvements thereon to satisfy the Parkland Dedication Obligations for 2,000 residential units, and may improve and dedicate additional parkland, pay Parkland Fees, apply accrued credits for Private Recreation Improvements, or any combination thereof, in order to satisfy the remaining Parkland Dedication Obligation for the residential units constructed in

excess of 2,000. The obligations under this Section 4(G)(b) cannot be met by the provision of Privately-Owned Publicly Accessible Open Space. The obligations under this Section 4(G)(b) apply even if 2.4 acres of City-Dedicated Open Space has not otherwise been triggered as set forth in Exhibits E3.1 and E3.2 because construction on the development parcels that correspond to the City-Dedicated Open Space has not occurred during the 30-year period after the Effective Date of the Development Agreement.

- c. **At the end of the Term of this Agreement, if more than 2,000 residential units are constructed south of Santa Clara Street and Developer develops any additional buildings North of Santa Clara Street,** then Developer shall have dedicated the City-Dedicated Open Spaces and constructed Park Improvements thereon in accordance with this Agreement, including the delivery and Completion triggers set forth in Exhibits E3.1 and E3.2, subject to Section 2(B), which delivery triggers ensure that 2.4 acres of City-Dedicated Open Space is provided for the development of 2,000 residential units. For example, under this scenario development of the City-Dedicated Open Spaces south of Santa Clara Street in accordance with the triggers set forth in Exhibit E3.1 would provide approximately 2.38 acres, and development of the first Building on Block A1 north of Santa Clara Street would require development of the Northend Park City-Dedicated Open Space (approximately 0.89 acres), for a total of approximately 3.27 acres of City-Dedicated Park. Additional development thereafter would trigger the remaining City-Dedicated Open Spaces in accordance with Exhibits E3.1 and E3.2. Any outstanding Parkland Obligation shall be satisfied in accordance with Section 4(L). ALT LANGUAGE: [For example, if 2,000 residential units are constructed and a Temporary Certificate of Occupancy for a Building on Block G is not issued, Los Gatos Creek Park and Los Gatos Creek Trail (Block G), which are triggered by issuance of a Temporary Certificate of Occupancy on Block G, would not be required to be built if development also occurs north of Santa Clara (such as on Block A1, which would trigger construction of Northend Park) because the combined acreage would be equal to or greater than 2.4 acres for the 2,000 residential units].

- d. In no event shall the use of Private Recreation Improvements credit be used prior to Developer's Completion of 2.4 acres of City-Dedicated Open Space and construction of Park Improvements thereon, nor shall any combination of Parkland Fees and Private Recreation Improvements credit be applied to satisfy more than fifty percent (50%) of the Project's Parkland Dedication Obligation, consistent with Section 4(F).

The obligations of this Section 4(G) shall survive the termination or expiration of this Agreement and/or the Development Agreement.

- H. Upon Developer's dedication of three parcels of real property, currently identified as Properties H1, H5 and H6 (the "City-Dedicated Affordable Housing Sites") to the City (or its designee) for use in the production of affordable housing, the combined six hundred (600) affordable housing units that are assumed for these Sites, as reflected in Exhibit E8, shall be counted toward the 1,250 residential units that would trigger the Design Outside Date referenced in Section 5(B) and set forth in Section 5(C) for the Social Heart open space, and toward the 1,500 residential units and 3,250 residential units, respectively, that would trigger the dedication and Completion for the Social Heart open space and the St. John Triangle open space, which triggers are set forth in Exhibits E3.1 and E3.2. For clarity, upon dedication of each of the three City-Dedicated Affordable Housing Sites, it shall be assumed, for the limited purpose of triggering the Design Outside Date, dedication, and Completion of the Social Heart, and the dedication and Completion of St. John Triangle, that the residential units assumed for that Site have received Temporary Certificates of Occupancy. Therefore, upon dedication of all three of the City-Dedicated Affordable Housing Sites and issuance of Temporary Certificates of Occupancy for the balance of the residential units indicated in Exhibit E3.1—whether issuance of Temporary Certificates of Occupancy for such residential units occurs before or after dedication of the City-Dedicated Affordable Housing Sites, and no matter where such units are located within the Project Site—the Design Outside Date, and the dedication and Completion requirements for the Social Heart, respectively, shall be triggered and the Social Heart shall be delivered within twenty-four (24) months of issuance of a Temporary Certificate of Occupancy for

the 1,500th residential unit, unless earlier triggered by the issuance of a Temporary Certificate of Occupancy for development on Block D4; and the dedication and Completion of St. John Triangle shall be triggered and St. John Triangle shall be delivered within 12 months of issuance of a Temporary Certificate of Occupancy for the 3,250th residential unit, unless earlier triggered by issuance of a Temporary Certificate of Occupancy for a Building on Block C2.

- I. Notwithstanding the Completion timing requirements set forth in Section 4(H), 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 that portion of the VTA's BART Silicon Valley Phase II Extension Project located adjacent to the south side of West Santa Clara Street, between Autumn Street and the San José Diridon Caltrain Station ("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.
- J. In addition to adhering to the schedule set forth in Exhibits E3.1 and E3.2 and the other timing requirements of this Agreement, and the Development Agreement, through Completion and delivery of a combination of (i) City-Dedicated Open Space and (ii) Privately-Owned Publicly Accessible that is subject to recorded restrictive covenant(s) as described in Section 4.1.3 of the Development Agreement and reflected in Exhibit E7 (the "Covenant Privately-Owned Publicly Accessible Open Space"), Developer shall ensure that a cumulative minimum of fifty-two (52) square feet of Completed open space is provided for each residential unit that is constructed. Continued compliance shall be demonstrated and confirmed through the accounting process required as part of the

Conformance Review for vertical development. Final acreage of the open spaces shall be verified in the manner set forth in Section 4(B). City shall deny Conformance Review for a subsequent residential building that would cause the cumulative minimum square feet of open space for each residential unit to fall below 52 square feet. Further, pursuant to Section 4.1.3(a)(iii) of the Development Agreement, in the event Developer fails to Complete any Covenant Privately-Owned Publicly Accessible Open Space in accordance with the completion schedule set forth in Section 4.1.3(a)(i) therein, Developer shall be required to pay the Private Open Space Delay Penalty Fee. For clarity, it is understood that Privately-Owned Publicly Accessible Open Space, including Covenant Privately-Owned Publicly Accessible Open Space cannot be used to satisfy Developer's Parkland Dedication Obligation.

- K. Certain exceptions from the Parkland Dedication Ordinance (San José Municipal Code Chapter 19.38) are necessary in order to provide the City-Dedicated Open Spaces in the manner set forth in the Development Agreement and this Agreement. The exceptions from certain provisions of the Parkland Dedication Ordinance are listed in Exhibit E9. The City has agreed to grant the waivers or exceptions listed in Exhibit E9. With respect to items (i) and (ii) listed in Paragraph 2 of Exhibit E9, the City has further agreed that such exceptions shall not impact the amount of credit that Developer is eligible to receive for land and Park Improvements impacted by those exceptions, except that credit shall not be granted for above-grade existing and/or proposed building footprints, vehicular access ways and aprons, elevators and associated lobbies, and similar non-open, non-park or non-recreational features located within any City-Dedicated Open Space; and for item (iii) in Paragraph 2, the exception shall not impact the amount of the credit that Developer is eligible to receive for the Park Improvements, and the City agrees that it shall provide seventy-five percent (75%) credit for the land value of the Social Heart park. For clarity, credits shall be available for land underlying park-related and recreational structures, which structures may include but are not limited to kiosks/pavilions or similar structures permitted by the DWDSG, park maintenance facilities, or restrooms.

- L. Subject to Section 4(G), upon the termination or expiration of the Development Agreement, any outstanding Parkland Dedication Obligation that has accrued based on the number of residential units constructed as of such termination or expiration shall first be satisfied through any then-available credits from dedicated acreage and/or costs of Park Improvements for the City-Dedicated Open Space in accordance with Exhibit E8 and this Agreement. Thereafter, subject to Sections 3(O), 4(F), and 4(J), any remaining Parkland Dedication Obligation for the number of residential units constructed shall be satisfied with Private Recreation Improvements credits, if any, followed by payment of Parkland Fees. This Section 4(L) shall survive the termination or expiration of the Development Agreement.
  
- M. Subject to the mutual understandings and acknowledgments set forth in Section 4(D) and the other requirements and limitations set forth in this Agreement, in the event Developer intends to develop more than four thousand (4,000) residential units (meaning Developer develops more than 3,400 residential units, subtracting from the 4,000 total units the 600 residential units assumed to be developed on the City-Dedicated Affordable Sites), Developer agrees to immediately notify the PRNS Director. Any additional Parkland Dedication Obligation that may be required shall first be satisfied by excess credit from dedicated acreage and/or costs of Park Improvements for the City-Dedicated Open Space, if any. Any remaining obligation shall then be satisfied by Private Recreation Improvements credits authorized for the first 4,000 units, if any, followed by payment of Parkland Fees.
  
- N. Because of the benefit to the Development that will result from the Park Improvements and land dedication, Developer agrees to design, develop, and construct the Park Improvements on the City-Dedicated Open Space and to dedicate the City-Dedicated Open Space as specified in this Agreement and the exhibits and attachments hereto, and as provided in the Downtown West Design Standards and Guidelines, without any obligation on the part of City with respect to design, development, or construction except as otherwise provided in this Agreement.

**SECTION 5. REVIEW OF CITY-DEDICATED OPEN SPACE DESIGN; OPEN SPACE IMPROVEMENT CONFORMANCE REVIEW**

- A. Prior to initiating design of any City-Dedicated Open Space, Developer shall meet with PRNS Staff, after which PRNS Staff will support community outreach and engagement for the park design and naming. Developer agrees to hold two community meetings prior to submittal of an application for Open Space Improvement Conformance Review pursuant to the provisions of the Downtown West Planned Development Zoning and General Development Plan. Developer shall consider the input and comments received from the public during the community meetings when finalizing its application for Open Space Conformance Review. Following submittal of Developer's Open Space Conformance Review application, which application shall contain the thirty-five percent (35%) Park Improvements Plans described in Section 5(C), below, the Parks and Recreation Commission shall review the application and 35% Park Improvements Plans at a public hearing, and shall thereafter make a recommendation to the Director of PBCE regarding approval or disapproval of the Open Space Conformance Review. If consistent with all applicable design standards, taking into account input from the public and the Parks and Recreation Commission, the Director of PBCE, in consultation with the Director of PRNS, shall approve the Open Space Conformance Review and 35% Park Improvements Plans contained therein. Technical review of the City-Dedicated Open Space design shall occur in accordance with the provisions of Exhibit E5.
- B. In accordance with the Design Outside Date Schedule set forth below, as part of its Open Space Improvement Conformance Review application for the Park Improvements, in addition to paying Review Fees in accordance with Section 3(I), Developer shall submit Park Improvements Plans (defined in Exhibit E5) at thirty-five percent (35%) consistent with the Design Submittal Requirements set forth in the City's Turnkey Project Process and Submittal Requirements, dated November 5, 2019, and the Conformance Review Implementation Guide for the Project. Following Conformance Review Approval as described in Section 5(A), Developer shall submit Park Improvements Plans at sixty-five percent (65%) and ninety-five percent (95%), consistent with the Design Submittal



Requirements set forth in the City's Turnkey Project Process and Submittal Requirements, dated November 5, 2019, and the Conformance Review Implementation Guide for the Project, which 65% and 95% Plans and technical specifications shall be reviewed by the Director of PW. The 95% Park Improvements Plans for City-Dedicated Open Space shall be reviewed, approved, and signed by the Director of PW, and approval from the Director of PW and issuance of a Notice to Proceed shall authorize construction.

- C. The Design Outside Date Schedule referenced in Section 5(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 (Block 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 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.

## **SECTION 6. BONDS AND SECURITY.**

Developer shall furnish to City the following security separately for each City-Dedicated Open Space, for the purposes, in the amounts, and under the conditions that follow:

### **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 equal to one hundred percent (100%) of the direct costs reflected in Table 2 of Exhibit E1 for the Park Improvements for the City-Dedicated Open Space(s) included in the final map, subject to escalation based on the California Construction Cost Index (hereinafter "Performance Security"), which shall be furnished by Developer to the City prior to approval of the final map and shall be subject to adjustment pursuant to Section 6(B)(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 direct cost reflected in Table 2 of Exhibit E1 for the subject Park Improvements for the subject City-Dedicated Open Space, subject to escalation based on the California Construction Cost Index (hereinafter "Payment Security"), which shall be furnished by Developer to the City prior approval of the final map; 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 direct costs reflected in Table 2 of Exhibit E1 for the Park Improvements for the subject City-Dedicated Open Space, subject to escalation based on the California Construction Cost Index (hereinafter “Warranty Security”). The Warranty Security shall be furnished by Developer to the City prior to issuance of the Notice of Acceptance.

4. Landscaping Security. To secure Developer’s installation and maintenance of landscaping as may be required by the landscaping specifications in the Park Improvement Plans, at such time as any drought restrictions on landscaping installation have been rescinded (hereinafter “Landscaping Security”). The Parties acknowledge that any City restrictions on the installation of landscaping because of drought conditions may delay Developer's installation of the landscaping contemplated by this Agreement. If, due to drought restrictions, Developer is unable to install the landscaping in time to be inspected by the Director of PW for the purposes of accepting the Completed Park Improvements, Developer shall post a bond or other form of security acceptable to the Director of PW.
5. Park Art and Optional Structures Security. To allow for City to install or construct any remaining Park Art and 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 at that time 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.
6. Park Construction Right of Entry Security. To allow for City to Accept a Completed City-Dedicated Open Space within which Developer retains a Park Construction Right of Entry as described in Section 3(E), Developer shall post a bond or other form of security acceptable to the Director of PW for the portion of the City-

Dedicated Open Space subject to the Construction Right of Entry (the “Right of Entry area”), and in an amount equal to one hundred percent (100%) of the direct costs for the Park Improvements Value attributable to the Right of Entry Area. Such amount shall be determined by dividing the direct costs for the Park Improvements Value reflected in Table 2 of Exhibit E1 for the subject City-Dedicated Open Space (which costs are subject to escalation based on the California Construction Cost Index) by the total square footage of that City-Dedicated Open Space, and multiplying that value by the total square footage of the Right of Entry Area ([direct costs/total square footage] \* Right of Entry area square footage). The Park Construction Right of Entry 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.

B. Conditions.

1. Developer shall provide the required security on forms approved by City and from sureties authorized by the California Insurance Commissioner to transact the business of insurance. Any bonds furnished by Developer to satisfy the security requirements in this Section 6 shall be in the forms attached hereto as Exhibit E10, as may be amended by City from time to time.
2. A condition of the Developer’s security is that any changes in the Park Improvements cost as reflected in the construction contract that do not exceed ten percent (10%) of the original estimated hard cost of the Park Improvements as reflected in Table 2 of Exhibit E1 shall not relieve the security. In the event that the construction contract indicates that the Park Improvements cost is more than ten percent (10%) over the original estimated cost of the Park Improvements, Developer shall provide security as required by Section 6(A) of this Agreement for One Hundred Percent (100%) of the total estimated cost of the Park Improvements as reflected in the construction contract.

3. Developer's Performance Security pursuant to Section 6(A)(1) shall compensate City for the actual cost of Completing the required Park Improvements in the Event of Default, as defined in Section 7 below, by Developer in the performance of this Agreement, regardless of whether City's cost of Completion exceeds the Park Improvements Value of the Park Improvements.
4. A condition of Developer's security is that any request by Developer for an extension of time for the commencement or Completion of the work under this Agreement may be granted by City without notice to Developer's surety and such extensions shall not affect the validity of this Agreement or release the surety or sureties on any security given for this Agreement.
5. As a condition of granting any extension for the commencement or Completion of any work under this Agreement, Director of PW may require Developer to furnish new security guaranteeing performance of this Agreement, as extended, in an increased amount to compensate for any increase in construction costs as determined by Director of PW.
6. If Developer seeks to replace any security with another security or securities, the replacement shall: (1) comply with all the requirements for security in this Agreement; (2) be provided by Developer to Director of PW; and (3) upon its written acceptance by Director of PW, be deemed to be a part of this Agreement. Upon Director of PW's acceptance of a replacement security, the former security may be released by City.
7. 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.

C. Release of Securities. City shall release the securities required by this Agreement as follows:

1. Performance Security. City shall release each Performance Security for a Park Improvement upon recordation of the Notice of Acceptance for that Park Improvement, or any portion thereof, or as may otherwise be authorized in accordance with California Government Code Sections 66499.7(a)–(g).
2. Payment Security. City shall release the Payment Security for a Park Improvement included in a final map in accordance with California Government Code Section 66499.7(h).
3. Warranty Security. City shall release the Warranty Security for a Park Improvement upon expiration of the warranty period for that Park Improvement and settlement of any claims filed during the warranty period. City may retain from any security released, an amount sufficient to cover costs and reasonable expenses and fees, including reasonable attorney's fees, for any claims filed during the warranty period.
4. Landscaping Security. City shall release the Landscaping Security at such time when the drought restrictions have been rescinded as further described in Section F(3) of Exhibit E5.
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.
6. Park Construction Right of Entry Security. City shall release the Park Construction Right of Entry Security upon Developer's relinquishment of the Park Construction

Right of Entry and Completion of Park Improvements within the Right of Entry area in accordance with this Agreement.

- D. Injury to Park Improvements, Public Property, or Public Utility Facilities. Until recordation of the Notice of Acceptance of the Park Improvements as provided in Exhibit E5, Developer assumes responsibility for the care and maintenance of, and any damage to, the Park Improvements. Developer shall replace or repair all Park Improvements, public utility facilities, and surveying or subdivision monuments and benchmarks that are destroyed or damaged for any reason, regardless of whether resulting from the acts of the Developer, prior to the recordation of the Notice of Acceptance; provided, however, that if Developer identifies a responsible third party for such damage, Developer may pursue recovery of its repair costs and expenses from such responsible third party at its sole cost and expense. Developer shall bear the entire cost of such replacement or repairs regardless of what entity owns the underlying property. Any repair or replacement shall be to the satisfaction, and subject to the approval of the Director of PW.

Neither the City, nor any officer or employee thereof, shall be liable or responsible for any accident, loss, or damage, regardless of cause, occurring to the work or Park Improvements prior to recordation of the Notice of Acceptance of the work or improvements.

#### **SECTION 7. DEFAULT.**

- A. Developer shall be in default hereunder upon the occurrence of any one or more of the following events (“Event of Default”):
1. Developer’s failure to timely Complete construction of one of more Park Improvements under this Agreement;
  2. Developer’s failure to timely cure any defect in any Park Improvement;
  3. Developer’s failure to perform construction work for a period of twenty (20) business days after commencement of work;

4. Developer's insolvency, appointment of receiver, or the filing of any petition in bankruptcy, either voluntary or involuntary, which Developer fails to discharge within sixty (60) days;
  5. Developer assigns this Agreement in violation of Section 10; or
  6. Developer fails to perform or satisfy any other term, condition, or obligation under this Agreement.
- B. If an Event of Default occurs and the Event of Default is not cured by Developer in accordance with Section 7(E) below, City in its sole discretion shall be entitled to terminate Developer's control over the Park Improvements described herein and hold Developer and its surety liable for all damages suffered by City as a result of the Event of Default. City shall have the right, at its sole discretion, to draw upon or use the appropriate security to mitigate City's damages in the Event of Default by Developer. City may use the sums provided by the Performance Security in addition to any other remedies available at law or in equity to City for the Completion of the Park Improvements in accordance with the Park Improvements Plans. The Parties acknowledge and agree that the estimated costs and security amounts may not reflect the actual cost of construction of any specific Park Improvement for which the security is provided, and therefore, City's damages in the Event of Default by Developer shall be measured by the actual cost of Completing the required Park Improvements to the satisfaction of City. City may use the sums provided by the securities for the Completion of the Park Improvements for which the security is provided in accordance with the Project Specifications.
- C. City may take over the work and Complete the Park Improvements for which the security is provided, by contract or by any other method City deems appropriate, at the sole cost and expense of Developer. In such event, City, without any liability for any work or actions previously performed by Developer with respect to the subject Park Improvements, may Complete the Park Improvements using any of Developer's materials, appliances, plans, or other property located at the Park Site and that are necessary to Complete the Park



Improvements. The rights and remedies set forth in this Section 7 shall affect and concern only the specific Park Improvement(s) that are the subject of the specific Event of Default.

- D. Unless the PRNS Director determines that the circumstances warrant immediate enforcement of the provisions of this Section 7 in order to preserve the public health, safety, and welfare, the PRNS Director shall give twenty (20) working days' prior written notice of termination to Developer ("Notice Period"), which notice shall state in reasonable detail the nature of Developer's default and the manner in which Developer can cure the default. During the Notice Period, Developer shall have the right to cure any such default; provided, however, if a default is of a nature which cannot reasonably be cured within the Notice Period, Developer shall be deemed to have timely cured such default for purposes of this Section if Developer commences to cure the default within the Notice Period, and prosecutes the same to completion within a reasonable time thereafter.
- E. If an Event of Default occurs and the Event of Default is not cured by Developer in accordance with Section 7(D) above, City in its sole discretion shall be entitled to terminate Developer's control over the specific Park Improvement(s) that is the subject of the Event of Default and hold Developer and its surety liable for all damages suffered by City as a result of the Event of Default. City shall have the right, at its sole discretion, to draw upon or use the appropriate security to mitigate City's damages in the Event of Default by Developer. City may use the sums provided by the Performance Security for the Completion of the Park Improvements in accordance with the Park Improvements Plans.

Following an Event of Default and Developer's failure to cure, City may take over the work and Complete the Park Improvements, by contract or by any other method City deems appropriate. In such event, City may Complete the Park Improvements using any of Developer's materials and/or plans that are necessary to Complete the Park Improvements.

- F. If an Event of Default occurs, Developer agrees to pay any and all costs and expenses incurred by City in securing performance of such terms, conditions, or obligations giving rise to the Event of Default, including but not limited to, fees and charges of architects,

engineers, contractors, and other professionals but specifically excluding legal costs and expenses including attorneys' fees and court costs.

- G. City's rights and remedies specified in this Section 7 shall be deemed cumulative and in addition to any rights or remedies City may have at law or in equity, including but not limited to withholding the approval of Conformance Review for a subsequent residential building.

**SECTION 8. INDEMNITY/HOLD HARMLESS.**

City, or any officer, employee, or agent thereof shall not be liable for any loss or injury to persons or property occasioned by reason of the acts or omissions of Developer, its agents, employees, contractors, or subcontractors in the performance of this Agreement. Developer further acknowledges and agrees to protect, indemnify, defend and hold City, its officers, agents and employees harmless from and against any and all liability, loss, cost and obligations on account of or arising out of or resulting from any injury or loss caused directly or indirectly by any cause whatsoever in connection with or incidental to the activities performed by Developer under this Agreement, except to the extent such injury or harm is caused by the sole active negligence or willful misconduct of City, its officers, agents, or employees. This Section 8 shall survive the recordation of the Notice of Acceptance, acceptance of any Park Improvement as to that Park Improvement, or sooner termination of this Agreement for a period of one (1) year from the date of such acceptance or termination. Recordation of the Notice of Acceptance by City of any Park Improvement shall not constitute an assumption by City of any responsibility or liability for any loss or damages covered by this Section 8.

Developer shall reimburse City for all reasonable costs and expenses, including but not limited to fees and charges of architects, engineers, attorneys, and other professionals, and court costs, incurred by City in enforcing this Section 8.

**SECTION 9. NOTICES.**

Any notice required or permitted to be given under this Agreement shall be in writing and personally served or sent by U.S. mail, postage prepaid, addressed as follows:

To PRNS Director: City of San José  
Department of Parks, Recreation and Neighborhood Services  
Attn: PRNS Parks Planning Division Manager  
200 East Santa Clara Street, Tower-9<sup>th</sup> Floor  
San José, CA 95113

To Director of PW: City of San José  
Department of Public Works  
Attn: City Facilities Architectural Services Deputy Director  
200 East Santa Clara Street, Tower-6<sup>th</sup> Floor  
San José, CA 95113

To Developer: Google LLC  
1600 Amphitheatre Parkway  
Mountain View, Ca 94043  
Attn: REWS Department / Downtown West SJ Project  
Executive

with a copy to:

Google LLC  
1600 Amphitheatre Parkway  
Mountain View, Ca 94043  
Attn: Legal Department / R/E Matters

Attn: Gregg Miller  
Coblentz Patch Duffy & Bass LLP  
One Montgomery Street, Suite 3000  
San Francisco, CA 94104

Notice shall be deemed given upon receipt. The Parties shall notify each other of changes in either their respective addresses or their representatives subject to notification in accordance with the provisions of this Section.

**SECTION 10. TRANSFER AND RELEASE.**

This Agreement may not be assigned or transferred in part or in whole by Developer except as allowed by the Development Agreement. Any attempts to assign or transfer any terms, conditions, or obligations under this Agreement without compliance with the requirements set forth in the Development Agreement shall be voidable at City's sole discretion.

**SECTION 11. BINDING UPON SUCCESSORS.**

Subject to Section 10, this Agreement shall be binding upon and shall inure to the benefit of the Parties' respective successors, assignees, transferees, and legal representatives.

**SECTION 12. GOVERNING LAW.**

This Agreement shall be governed by and construed in accordance with California law.

**SECTION 13. ENTIRE AGREEMENT.**

The Development Agreement and this Agreement, including the exhibits, attachments and appendices, contain the entire agreement of the Parties with respect to the satisfaction of the requirements of the Parkland Dedication Ordinance for the Project and supersedes all prior understandings or representations of the Parties, whether written or oral. Any subsequent modification of this Agreement must be made in writing and signed by all Parties hereto.

**SECTION 14. TIME OF ESSENCE.**

Time is of the essence in the performance of this Agreement.

**SECTION 15. FORCE MAJEURE.**

- A. "Force Majeure" has the meaning as set forth in the Development Agreement.
- B. Should a Force Majeure Event prevent performance of this Agreement, in whole or in part, the Party affected by the Force Majeure Event shall be excused or performance under this Agreement shall be suspended to the extent commensurate with the Force Majeure Event; provided that the Party availing itself of this Section promptly notifies the other Party after learning of the occurrence of a Force Majeure Event that actually causes delay; and

provided further that the time of suspension or excuse shall not extend beyond that reasonably necessitated by the Force Majeure Event.

C. Notwithstanding the foregoing, the following shall not excuse or suspend performance under this Agreement:

1. Performance under this Agreement shall not be suspended or excused for a Force Majeure Event pertaining to the Work if such event is not defined as a Force Majeure Event under the applicable contract for the Work.
2. Negligence or failure of Developer to perform its obligations under a contract for the Work (other than for a Force Majeure Event as defined under the applicable contract) shall not constitute a Force Majeure Event.
3. The inability of Developer for any reason to have access to funds necessary to carry out its obligations under this Agreement or the termination of any contract for the prosecution of the Work for such reason or for Developer's default under such contract shall not constitute a Force Majeure Event.

#### **SECTION 16. BOOKS AND RECORDS.**

A. Developer shall be solely responsible to implement internal controls and record keeping procedures in order to comply with this Agreement and all applicable laws. Developer shall maintain any and all ledgers, books of account, invoices, vouchers, bids, cancelled checks, and other records or documents evidencing or relating to the activities performed by Developer under this Agreement, including without limitation those relating to the construction of the Park Improvements, for a minimum period of three (3) years, or for any longer period required by law, from the date of termination of this Agreement or the date of the City's acceptance of the Park Improvements, whichever is longer. Notwithstanding this previous sentence, Developer shall retain such records beyond three (3) years so long as any litigation, audit, dispute, or claim is pending.

- B. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Developer's address indicated for receipt of notices in this Agreement.
- C. Where City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Developer's business, City may, by written request by any of the above-named officers, require that custody of the records be given to City and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized in writing by Developer, Developer's representatives, or Developer's successor-in-interest.
- D. Developer's obligations under this Section shall be in addition to Developer's obligations specified in Exhibit E5.

**SECTION 17. MISCELLANEOUS PROVISIONS.**

- A. Captions. Captions and Sections of this Agreement are for convenience only and shall not be considered in resolving any questions of interpretation or construction.
- B. Incorporation of Recitals. The Recitals in this Agreement are hereby incorporated into the terms of this Agreement.
- C. Jurisdiction. In the event that suit shall be brought by any of the Parties, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.
- D. Waiver. Developer agrees that waiver by City of any breach or violation or any term, condition, or obligation of this Agreement shall not be deemed to be a waiver of any other

term, condition, or obligation contained herein or a waiver of any subsequent breach or violation of the same term, condition, or obligation.

- E. Plurality. As used in this Agreement and when required by the context, each number (singular and plural) shall include all numbers.
- F. Compliance with Laws. Developer, its employees, agents, representatives, contractors, and subcontractors shall comply with all local, state and federal laws in the performance of this Agreement.
- G. Nondiscrimination. Developer, its employees, agents, representatives, contractors, and subcontractors shall not discriminate, in any way, against any person on the basis of age, sex, race, color, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, national origin, or any other recognized or protected class in connection with or related to the performance of this Agreement. Developer shall expressly require compliance with the provisions of this Section 1(G) in all agreements with contractors and subcontractors for the performance of the improvements hereunder.
- H. Developer has read each and every part of this Agreement, including without limitation, its exhibits, and Developer freely and voluntarily has entered into this Agreement. This Agreement is a negotiated document and shall not be interpreted for or against any party by reason of the fact that such Party may have drafted this Agreement or any of its provisions.
- I. Whenever in this Agreement words of obligation or duty are used, such words shall have the force and effect of covenants. Any obligation imposed by either Party shall include the imposition on such Party of the obligation to pay all costs and expenses necessary to perform such obligation, except as otherwise provided herein.
- J. Severability. If any provisions or portions of this Agreement are held to be invalid by a court of competent jurisdiction, the remaining provisions or portions of this Agreement

shall remain in full force and effect unless amended or modified by mutual written consent of the Parties.

- K. This Agreement is entered into pursuant to and shall be governed by the Parkland Dedication Ordinance and the Development Agreement. If not otherwise defined in this Agreement or in the Development Agreement, capitalized terms shall have the meanings set forth in Chapter 19.38 of the San José Municipal Code.

**SECTION 18. AGREEMENT'S EXHIBITS.**

This Agreement includes the following Exhibits:

- E1 Park Improvements Value and Costs
- E2 Public and Private Open Space Approximate Acreage
- E3 Delivery of City-Dedicated Open Space
  - E3.1 City-Dedicated Open Space Dedication and Improvements Schedule
  - E3.2 Park Dedication/Delivery Triggers Figure
- E4 Dedication Form
- E5 Design and Construction Requirements
- E6 Diagram of Construction Right of Entry Area
- E7 Park Dedication Tracking and Verification Table
- E8 Parkland Dedication Obligation
- E9 List of Required Exceptions from Parkland Dedication Ordinance
- E10 Bond Forms



WITNESS THE EXECUTION HEREOF the day and year hereinafter written by City.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

By: \_\_\_\_\_

City Clerk

Date: \_\_\_\_\_

\_\_\_\_\_  
Johnny V. Phan  
Chief Deputy City Attorney

DEVELOPER

GOOGLE LLC, a Delaware limited liability  
company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

- \* All Developer's signatures must be accompanied by an attached notary acknowledgement.
- \* Proof of authorization for Developer's signatures is required to be submitted concurrently with this Agreement.



## Exhibit E1

### Park Improvements Value and Costs

**Table 1 - Estimated Credits, Park Improvements Value, and Unit Equivalency<sup>1</sup>**

Parks and Open Space	Acreage Credit	Units Equivalent	Improvement Costs	Units Equivalent	Total Credits	Total Units Equivalent
LGC Connector <sup>2</sup>	\$2,936,320	210	\$5,647,039	405	\$8,583,359	615
LGC Park on G	\$1,189,476	85	\$3,669,093	263	\$4,858,569	348
Social Heart	\$1,387,223	99	\$7,221,778	517	\$8,609,000	617
St. John Triangle	\$4,943,422	354	\$14,544,521	1,042	\$19,487,943	1,396
Northend Park	\$2,856,030	205	\$5,225,147	374	\$8,081,177	579
<b>Subtotal Parks OS</b>	<b>\$13,312,471</b>	<b>954</b>	<b>\$36,307,578</b>	<b>2,601</b>	<b>\$49,620,048</b>	<b>3,555</b>
Los Gatos Creek Trail (E)	\$821,178	59	\$1,781,907	128	\$2,603,085	187
Los Gatos Creek Trail (G)	\$890,886	64	\$2,713,981	194	\$3,604,867	258
<b>Subtotal Trails OS</b>	<b>\$1,712,064</b>	<b>123</b>	<b>\$4,495,888</b>	<b>322</b>	<b>\$6,207,952</b>	<b>445</b>
<b>Total OS</b>	<b>\$15,024,535</b>	<b>1,076</b>	<b>\$40,803,466</b>	<b>2,924</b>	<b>\$55,828,000</b>	<b>4,000</b>

<sup>1</sup> The cost of the Park Improvements (the “Park Improvements Value”) reflected in Table 1 includes, but is not limited to, the City’s Review Fees, direct costs, soft costs, and contingency reflected in Table 2 of this [Exhibit E1](#).

<sup>2</sup> As set forth in [Exhibit E3.1](#), Los Gatos Creek Connector is anticipated to be improved in two parts -- Los Gatos Creek Connector 1 and Los Gatos Creek Connector 2, which each have different Completion triggers. Upon Completion of Park Improvements in accordance with [Exhibit E3.1](#), each of these spaces shall result in a proportional share of the aggregated Improvement Value credits.

**Table 2 - Detailed Cost Estimates**

<b>City-Dedicated Open Spaces</b>	<b>Baseline Direct</b>	<b>Soft Cost (18%)</b>	<b>Project Contingency (25%)</b>	<b>City Review Fee (17.5%)</b>	<b>Baseline Construction Budget</b>	<b>Cost/Acre</b>	<b>Cost/SF</b>
<b>Los Gatos Creek Connector</b>	<b>\$3,422,448</b>	<b>\$616,041</b>	<b>\$1,009,622</b>	<b>\$598,928</b>	<b>\$5,647,039</b>	<b>\$6,205,475</b>	<b>\$142</b>
Supply & Installation of Hard Landscaping	\$492,034	\$88,566	\$145,150	\$86,106	\$811,856		
Supply & Installation of Semi Permeable	\$730,136	\$131,425	\$215,390	\$127,774	\$1,204,725		
Supply & Installation of Softscape including Trees & Plant	\$1,104,154	\$198,748	\$325,726	\$193,227	\$1,821,855		
Supply & Installation of FF&E	\$1,096,123	\$197,302	\$323,356	\$191,822	\$1,808,603		
<b>Los Gatos Creek Park on G</b>	<b>\$2,223,693</b>	<b>\$400,265</b>	<b>\$655,989</b>	<b>\$389,146</b>	<b>\$3,669,093</b>	<b>\$9,916,591</b>	<b>\$228</b>
Supply & Installation of Hard Landscaping	\$265,481	\$47,787	\$78,317	\$46,459	\$438,044		
Supply & Installation of Semi Permeable	\$123,376	\$22,208	\$36,396	\$21,591	\$203,571		
Supply & Installation of Softscape including Trees & Plant	\$810,600	\$145,908	\$239,127	\$141,855	\$1,337,489		
Supply & Installation of FF&E	\$1,024,236	\$184,362	\$302,150	\$179,241	\$1,689,989		
<b>Social Heart</b>	<b>\$4,376,832</b>	<b>\$787,830</b>	<b>\$1,291,165</b>	<b>\$765,946</b>	<b>\$7,221,773</b>	<b>\$12,669,879</b>	<b>\$291</b>
Supply & Installation of Hard Landscaping	\$1,261,386	\$227,050	\$372,109	\$220,743	\$2,081,288		
Supply & Installation of Semi Permeable	\$59,570	\$10,723	\$17,573	\$10,425	\$98,291		

Supply & Installation of Softscape including Trees & Plant	\$704,559	\$126,821	\$207,845	\$123,298	\$1,162,523		
Supply & Installation of FF&E	\$2,351,316	\$423,237	\$693,638	\$411,480	\$3,879,671		
<b>St John Triangle</b>	<b>\$8,814,863</b>	<b>\$1,586,675</b>	<b>\$2,600,384</b>	<b>\$1,542,601</b>	<b>\$14,544,523</b>	<b>\$9,506,196</b>	<b>\$218</b>
Supply & Installation of Hard Landscaping	\$1,844,446	\$332,000	\$544,112	\$322,778	\$3,043,336		
Supply & Installation of Semi Permeable	\$437,400	\$78,732	\$129,033	\$76,545	\$721,710		
Supply & Installation of Softscape including Trees & Plant	\$2,550,958	\$459,172	\$752,533	\$446,418	\$4,209,081		
Supply & Installation of FF&E	\$3,982,059	\$716,771	\$1,174,707	\$696,860	\$6,570,397		
<b>Northend Park</b>	<b>\$3,166,751</b>	<b>\$570,015</b>	<b>\$934,191</b>	<b>\$554,181</b>	<b>\$5,225,139</b>	<b>\$5,871,003</b>	<b>\$135</b>
Supply & Installation of Hard Landscaping	\$249,520	\$44,914	\$73,609	\$43,666	\$411,709		
Supply & Installation of Semi Permeable	\$763,579	\$137,444	\$225,256	\$133,626	\$1,259,906		
Supply & Installation of Softscape including Trees & Plant	\$1,231,738	\$221,713	\$363,363	\$215,554	\$2,032,368		
Supply & Installation of FF&E	\$921,913	\$165,944	\$271,964	\$161,335	\$1,521,156		
<b>Los Gatos Creek Trail on E</b>	<b>\$1,079,944</b>	<b>\$194,390</b>	<b>\$318,584</b>	<b>\$188,990</b>	<b>\$1,781,908</b>	<b>\$7,127,632</b>	<b>\$164</b>
Supply & Installation of Hard Landscaping	\$678,167	\$122,070	\$200,059	\$118,679	\$1,118,975		
Supply & Installation of Softscape including Trees & Plant	\$127,238	\$22,903	\$37,535	\$22,267	\$209,942		

Supply & Installation of FF&E	\$274,540	\$49,417	\$80,989	\$48,045	\$452,991		
<b>Los Gatos Creek Trail on G</b>	<b>\$1,644,837</b>	<b>\$296,071</b>	<b>\$485,227</b>	<b>\$287,846</b>	<b>\$2,713,980</b>	<b>\$9,692,787</b>	<b>\$223</b>
Supply & Installation of Hard Landscaping	\$1,033,114	\$185,961	\$304,769	\$180,795	\$1,704,638		
Supply & Installation of Softscape including Trees & Plant	\$193,793	\$34,883	\$57,169	\$33,914	\$319,758		
Supply & Installation of FF&E	\$417,930	\$75,227	\$123,289	\$73,138	\$689,585		
<b>GRAND TOTAL</b>	<b>\$24,729,367</b>	<b>\$4,451,286</b>	<b>\$7,295,163</b>	<b>\$4,327,639</b>	<b>\$40,803,456</b>	<b>\$8,500,728</b>	<b>\$195</b>

**Exhibit E2**

**City-Dedicated Open Space and  
Covenant Privately-Owned Publicly Accessible Open Space Approximate Acreages**

<b>Open Space</b>	<b>City-Dedicated Acreage<sup>1</sup> (AC)</b>	<b>Privately-Owned Open Space Acreage Subject to Restrictive Covenant<sup>1,2</sup> (AC)</b>
<b>Los Gatos Creek Connector</b>	0.91	0.33
<b>Los Gatos Creek Park</b>	0.37	1.58
<b>The Meander</b>	-	0.87
<b>Social Heart</b>	0.57	-
<b>Creekside Walk</b>	-	1.24
<b>Los Gatos Creek East</b>	-	1.09
<b>Gateway Plaza</b>	-	1.01
<b>St. John Triangle</b>	1.53	-
<b>North Montgomery Pocket Park</b>	-	-
<b>Northend Park</b>	0.89	0.88
<b>Los Gatos Creek Trail (E)</b>	0.25	-
<b>Los Gatos Creek Trail (G)</b>	0.28	-
<b>Total</b>	4.80	7.0

<sup>1</sup> Acreages are approximate and will be confirmed pursuant to the verification process described in Section 4(B) and Exhibit E7.

<sup>2</sup> Acreage for Privately-Owned Publicly Accessible include the following typologies as defined by the DWDSG: Privately-owned Public Park, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor

**Exhibit E3**

**Delivery of City-Dedicated Open Space**



**Exhibit E3.1**

**City-Dedicated Open Space Dedication and Improvement Schedule\***

<b>Open Space</b>	<b>Outside Date</b>	<b>EIR Phasing</b>	<b>Dedication and Delivery Trigger (Building Parcels)</b>
Los Gatos Creek Trail (E)	12 months after TCO	1	First TCO for any building in E1
Los Gatos Creek Trail (G)	12 months after TCO	1	First TCO for any building in G1
Los Gatos Creek Park	18 months after TCO	1	First TCO for any building in G1
Los Gatos Creek Connector 1	12 months after TCO	1	Dedication of land with 2nd market-rate residential building within the project; Improvements with first TCO for any building in the later of H3 or H5
Social Heart	24 months after TCO	1	Earlier of TCO for 1,500th Units <sup>1</sup> , or First TCO for any building in D4
Northend Park	18 months after TCO	2	First TCO for any building in A1
Los Gatos Creek Connector 2	12 months after TCO	2	Dedication of land with 2nd market-rate residential building within the project; Improvements with first TCO for any building in H6
St. John Triangle	12 months after TCO	3	Earlier of first TCO for any building in C2, or 3,250 Units <sup>1</sup>

<sup>1</sup> Trigger by residential unit count is subject to the requirements of Section 4(H).

\*Except for Los Gatos Creek Connector 1 and Los Gatos Creek Connector 2, offers of dedication shall be made as set forth in Section 3(A) of the Parkland Agreement. The dedication schedule for Los Gatos Creek Connector 1 and Los Gatos Creek Connector 2 is as set forth herein and described in Section 3(D) of the Parkland Agreement.

**Exhibit E3.2**

**Park Dedication/Delivery Triggers Figure**

**Exhibit E4**

**Dedication Form**

RECORDED WITHOUT FEE UNDER  
SECTION 6103 GOVERNMENT CODE  
OF THE STATE OF CALIFORNIA

**RECORDING REQUESTED BY,  
AND WHEN RECORDED MAIL TO,  
AND MAIL TAX/ASSESSMENT  
STATEMENTS TO:**

City of San Josè – Public Works  
200 East Santa Clara Street, 3<sup>rd</sup> Floor  
San Josè, CA 95113-1905

Deed No: \_\_\_\_\_

3 Dash No: \_\_\_\_\_

APN(s): \_\_\_\_\_

Space above this line for Recorder's use

The Undersigned Grantee(s) Declare(s): DOCUMENTARY TRANSFER TAX \$0; CITY TRANSFER TAX \$0; Recorded for the benefit of the City of San Jose and is exempt from fee per Government Code Sections 27383 and 6103.

- computed on the consideration or full value of property conveyed, OR  
 computed on the consideration or full value less value of liens and/or encumbrances remaining at time of sale,  
 unincorporated area;  **City of San Josè**, and  
 \_\_\_\_\_  
Signature of Declarant

## OFFER OF DEDICATION

GOOGLE LLC, a Delaware limited liability company (“GRANTOR”) does hereby OFFER TO DEDICATE to the CITY OF SAN JOSÈ, a municipal corporation of the State of California (“CITY”) the real property described in the attached Exhibit “A” for park and open space purposes (the “Park Property”).

Such dedication of the Park Property shall be deemed to have been accepted by CITY upon recordation of a grant deed (“Grant Deed”) in the Santa Clara County, Office of the County-Recorder and the issuance to CITY at GRANTOR’S expense of an owner’s title policy (“Title Policy”) in the amount of the [value of the Property] by [a title company selected by CITY] [\_\_\_\_\_] [NAME THE TITLE COMPANY WHO WILL HAVE ISSUED THE PTR FROM WHICH THE TITLE EXCEPTIONS ON THE EXHIBIT WILL HAVE BEEN OBTAINED], with the title company’s standard printed title exceptions and the title exceptions described on Exhibit “B” attached hereto, but without any title exceptions that would be omitted based on the title company’s owner’s certificate/affidavit (“Certificate”).

The Certificate and Grant Deed shall be promptly and diligently completed, executed and delivered to the title company by GRANTOR, duly acknowledged, in accordance with Section 3(A) of the Parkland Agreement included as Exhibit E to the Development Agreement between GRANTOR and CITY dated \_\_\_\_\_, 202\_\_, recorded on \_\_\_\_\_, 202\_\_ as Document Number Number \_\_\_\_\_ in the Official Records of Santa Clara County (the "DA"). If necessary for the issuance of the Title Policy, City will provide the title company with a Certificate of Acceptance for the Grant Deed, and GRANTOR shall provide the title company with organizational documents and evidence of duly authorized execution of the Grant Deed and Certificate and any other documents typically required by the title company in order to issue an owner's title policy.

The Grant Deed shall be recorded in such Official Records, and the Title Policy shall be issued, in accordance with written recording instructions by CITY to the title company, which shall condition the recording upon the commitment of the title company to issue the Title Policy at GRANTOR's expense, and which may also condition the recording upon the satisfaction of all or any of the conditions described on EXHIBIT "C".

GRANTOR, with respect to such offer of dedication, retains the right to control the Park Property until this offer of dedication is accepted and the Grant Deed is recorded as described herein. Accordingly, until such Grant Deed is recorded, CITY shall not be responsible for and shall incur no liability with respect to the Park Property, and GRANTOR shall defend, indemnify and hold CITY harmless from and against any and all claims, liabilities, losses, damages, costs and expenses arising from or relating to conditions of the Park Property or events occurring on or about the Park Property prior to such recordation (and GRANTOR's obligations hereunder shall survive the recording and acceptance of the Grant Deed).

In accordance with Section 3(A) of the Parkland Agreement included as Exhibit E to the DA, if prior to the expiration or termination of the DA GRANTOR has not undertaken the specific actions set forth in the Parkland Agreement as conditions precedent to CITY'S acceptance of this Offer of Dedication, upon the termination or expiration of the DA this Offer of Dedication shall also terminate and be void regardless of CITY'S later recordation of a notice terminating or vacating this Offer of Dedication.

The provisions hereof shall inure to the benefit of and be binding upon the heirs, successors, assigns and personal representatives of the respective parties hereto, and shall bind the Park Property, and all successors to any portion of or interest in the Park Property.

\_\_\_\_\_, 20 \_\_\_\_\_

GOOGLE LLC,  
a Delaware limited liability company

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: 1600 Amphitheatre Parkway  
Mountain View, CA 94043

Attn: \_\_\_\_\_

\*Proof of authorization for GRANTOR's signature(s) is required to be submitted concurrently with this Agreement.

\*All of GRANTOR's signatures must be accompanied by an attached notary acknowledgement.

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 \_\_\_\_\_ )

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 \_\_\_\_\_ )

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**



**EXHIBIT "B"**

**PERMITTED TITLE EXCEPTIONS**

[INSERT LIST OF TITLE EXCEPTIONS FROM A PTR FROM THE TITLE COMPANY THAT HAVE BEEN REVIEWED AND APPROVED BY CITY; TITLE COMPANY WILL NEED LEGAL DESCRIPTION OF PROPERTY IN ORDER TO PREPARE THE PTR]

**EXHIBIT "C"**

**ADDITIONAL CONDITIONS TO RECORDING**

[ INCLUDE HERE CONFIRMATION BY CITY AFTER FURTHER INSPECTION OF THE PROPERTY THAT THE CONDITION OF PROPERTY: (I) COMPLIES WITH RELEVANT SECTION OF THE DA, AND/OR (II) THAT GRANTOR HAS NOT VIOLATED THE DA SECTION REQUIRING THAT GRANTOR NOT ALTER OR PERMIT ALTERATION OF THE PROPERTY, OR RELEASE HAZMAT OR PERMIT THE RELEASE OF HAZMAT ON THE PROPERTY]

1. \_\_\_\_\_

Any of the foregoing conditions \_\_, \_\_, or \_\_\_ may be waived by the City Manager, provided that the applicable waiver is in writing.

**EXHIBIT E5**

**Design and Construction Requirements**

**Exhibit E6**

**Diagram of Construction Right of Entry Area**

**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 Table 1 of 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. In the event that Developer pays Parkland Fees pursuant to Section 2, 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			

**Exhibit E8**

**Parkland Dedication Obligation**

<b>Table 1 Calculation of Total Parkland Dedication Obligation</b>			
<b>Assumptions</b>	<b>Mid-Rise</b>	<b>High-Rise</b>	<b>Total</b>
In-Lieu Fee \$/Unit - Market Rate	\$22,600	\$14,600	
In-Lieu Fee \$/Unit - Moderate Income Rate (50% Credits)	\$11,300	\$7,300	
In-Lieu Fee \$/Unit - Affordable BMR Rate (50% Credits)	\$11,300	\$7,300	
MR to HR Ratio - Market Rate Units	3%	97%	
MR to HR Ratio - Moderate Income Units	4%	97%	
MR to HR Ratio - Land Dedicated BMR Units	100%	0%	
# of Market Rate Unit	105	3,095	3,200
# of Moderate Income Unit	7	193	200
# of Land Dedicated BMR Unit	600	-	600
<b>Total Units</b>	<b>712</b>	<b>3,288</b>	<b>4,000</b>
Population/Unit	2.34	1.51	
Total Population (# of Units x Population Ratio)	1,666	4,965	6,631
<b>Parkland Required (0.003 ac/person)</b>	<b>5.00 ac</b>	<b>14.89 ac</b>	<b>19.89 ac</b>
In-Lieu Fee - Market Rate Units	\$2.4M	\$45.2M	\$47.6M
In-Lieu Fee - Inclusionary Units	\$.1M	\$1.4M	\$1.5M
In-Lieu Fee - Land Dedicated BMR Unit	\$6.8M	-	\$6.8M
<b>Total Net In-Lieu Fee</b>	<b>\$9.2M</b>	<b>\$46.6M</b>	<b>\$55.8M</b>

**Table 2 Blended Per Unit In-Lieu Fee Obligation\***

In-Lieu Fee	\$13,957
-------------	----------

\*The Parkland Dedication Obligation, based on the number of type of units to be provided – such as mid-rise, high-rise, market-rate, and affordable – shall be blended across the Project, regardless of unit type, and administered uniformly based on the number of residential units produced, as reflected in Table 2 to this Exhibit.

## Exhibit E9

### **List of Required Exceptions from Parkland Dedication Ordinance**

1. San Jose Municipal Code Section 19.38.300(A) - The Park Improvements to be installed on the City-Dedicated Open Space shall be Completed in accordance with the City-Dedicated Open Space Dedication and Improvements Schedule included as Exhibit E3 to this Agreement. Although the City has determined that dedication of the open spaces and Completion of the Park Improvements in accordance with the Schedule set forth in Exhibit E3 is in the public interest and ultimately will be beneficial to the City, Completion and delivery is not tied directly to production of residential units in the same manner described in Section 19.38.300(A). Therefore, an exception from Section 19.38.300(A) is required to allow Completion and delivery of open space in the manner depicted in Exhibits E3.1 and E3.2.
  
2. San Jose Municipal Code Section 19.38.330 (B) - The Project requires a waiver from the requirement that real property conveyed to the City be dedicated free and clear of encumbrances. Development of the Project requires (i) utilities easements through portions of some of the City-Dedicated Open Spaces to serve the Project buildings; (ii) emergency vehicle access easements to serve Project buildings and/or DISC Agency facilities; and (iii) easements for utilities, vehicle and pedestrian ingress and egress, and elevator access, among other potential easements and encumbrances, to allow for development of the Social Heart City-Dedicated Open Space, provided however, that surface areas dedicated to such uses set forth in this provision (iii) shall not count toward the Parkland Dedication Obligation.

**Exhibit E10**

**Bond Forms**



Bond No. \_\_\_\_\_

Premium \_\_\_\_\_

## FAITHFUL PERFORMANCE BOND

WHEREAS, the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and *[insert name of Developer or Contractor, type of entity, and state of incorporation if applicable]* as principal ("Principal") have entered into an agreement entitled *[insert title of turnkey agreement and identifying development permit number, tract map or tentative map number or some other identifier unique to this project]*, incorporated herein by reference and referred to as the "Contract," which requires Principal to dedicate real property for neighborhood and community parks, construct park or recreational improvements and/or pay parkland in-lieu fees; and,

WHEREAS, under the terms of the Contract and prior to commencing any work under the Contract, Principal is required to furnish a bond to City for faithful performance of the Contract;

NOW, THEREFORE, we the Principal and *[insert full name of Surety]*, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto the City in the sum of *[insert bond amount]*, for the payment of which sum well and truly to be made, we the Principal and Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The condition of this obligation is such that, if the Principal, Principal's heirs, executors, administrators, successors, or assigns shall in all things stand to and abide by, and well and truly keep and perform all covenants, conditions, and agreements required to be kept and performed by Principal in the Contract and any changes, additions, or alterations made thereto, to be kept and performed at the time and in the manner therein specified, and in all respects according to their true intent and meanings, and shall indemnify and save harmless City, its officers, employees, and agents, as therein provided, then this obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

As a part of the obligation secured hereby and in addition to the sum specified above, there shall be included all costs, expenses, and fees, including attorney's fees, reasonably incurred by City in successfully enforcing such obligation, all to be taxed as costs and included in any judgment rendered.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration, or addition to the terms of the Contract or to the work to be performed thereunder or to the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration, or addition.

**IN WITNESS WHEREOF**, this instrument has been duly executed by authorized representatives of the Principal and Surety. SIGNED AND SEALED on \_\_\_\_\_, 20\_\_\_\_\_.

PRINCIPAL:

SURETY:

\_\_\_\_\_  
(Principal name) (Seal)

\_\_\_\_\_  
(Surety name) (Seal)

BY: \_\_\_\_\_  
(Signature)

BY: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print name and title)

\_\_\_\_\_  
(Print name and title)

Principal address and telephone:

Surety address and telephone:

*Affix Corporate Seals*  
*Attach Notary Acknowledgments for All Signatures*  
*Attach Power-of-Attorney if executed by Attorney-in-Fact*

Bond No. \_\_\_\_\_

Premium \_\_\_\_\_

### PAYMENT (LABOR AND MATERIALS) BOND

WHEREAS, the CITY OF SAN JOSE, a municipal corporation of the State of California ("City"), and insert name of Developer or Contractor, type of entity, and state of incorporation if applicable, as principal ("Principal") have entered into an agreement entitled insert title of turnkey agreement and identifying development permit number, tract map or tentative map number or some other identifier unique to this project, incorporated herein by reference and referred to as the "Contract," which requires Principal to dedicate real property for neighborhood and community parks, construct park or recreational improvements and/or pay parkland in-lieu fees; and,

WHEREAS, under the terms of the Contract and prior to commencing any work under the Contract, Principal is required to furnish a good and sufficient payment bond to the City to secure the claims to which reference is made in Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the California Civil Code.

NOW, THEREFORE, we the Principal and insert full name of Surety, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California ("Surety"), are held firmly bound unto the City, and unto all contractors, subcontractors, suppliers, laborers, materialmen and other persons employed in the performance of the Contract and referred to in the aforesaid Civil Code, as obligees, in the sum of insert bond amount, on the condition that if Principal shall fail to pay for any materials or equipment furnished or used or for any work or labor thereon of any kind, or for amounts due under the Unemployment Insurance Act with respect to such work or labor, or for any amounts required to be deducted, withheld, and paid over to the Employment Development Department from the wages of employees of the Principal and all subcontractors with respect to such work or labor, then the Surety shall pay the same in an amount not exceeding the sum specified above. If suit is brought upon this bond, Surety shall pay, in addition to the above sum, all costs, expenses, and fees, including attorney's fees, reasonably incurred by any obligee in successfully enforcing the obligation secured hereby, all to be taxed as costs and included in the judgment rendered. Should the condition of this bond be fully performed, then this obligation shall become null and void; otherwise, it shall be and remain in full force and effect, and shall bind Principal, Surety, their heirs, executors, administrators, successors, and assigns, jointly and severally.

**IT IS HEREBY EXPRESSLY STIPULATED AND AGREED** that this bond shall inure to the benefit of all persons, companies, corporations, political subdivisions, and State agencies entitled to file claims under Title 15 (commencing with Section 3082) of Part 4 of Division 3 of the Civil Code, so as to give a right of action to them or their assigns in any suit brought upon this bond. The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the

specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any such change, extension, alteration or addition.

**IN WITNESS WHEREOF**, this instrument has been duly executed by authorized representatives of the Principal and Surety. SIGNED AND SEALED on \_\_\_\_\_, 20\_\_\_\_.

PRINCIPAL:

SURETY:

\_\_\_\_\_  
Principal name)

(Seal)

\_\_\_\_\_  
(Surety name)

(Seal)

BY: \_\_\_\_\_

(Signature)

BY: \_\_\_\_\_

(Signature)

\_\_\_\_\_  
Print name and title)

Principal address and telephone:

\_\_\_\_\_  
Print name and title)

Surety address and telephone:

***Affix Corporate Seals***

***Attach Notary Acknowledgments for All Signatures***

***Attach Power-of-Attorney if executed by Attorney-in-Fact***

Bond No. \_\_\_\_\_

Premium \_\_\_\_\_

## WARRANTY BOND

**WHEREAS**, the City of San Jose, a municipal corporation of the State of California (“City”) and ***[insert name of Developer/Contractor, type of entity, and state of incorporation if applicable]*** as principal (“Principal”) have entered into an agreement entitled ***[insert title of turnkey agreement and identifying development permit number, tract map or tentative map number or some other identifier unique to this project]***, incorporated herein by reference and referred to as the “Contract,” which requires Principal to dedicate real property for neighborhood and community parks, construct park or recreational improvements and/or pay parkland in-lieu fees; and,

**WHEREAS**, under the terms of the Contract, Principal is required to furnish a bond to City to make good and protect the City against the results of any work or labor done or materials or equipment furnished which are defective or not in accordance with the terms of the Contract having been used or incorporated in any part of the work so contracted for, which shall have appeared or been discovered, within the period of one (1) year from and after the completion and final acceptance of the work done under the Contract.

**NOW, THEREFORE**, we the Principal and ***[insert full name of Surety]***, a corporation duly authorized and admitted to transact business and issue surety bonds in the State of California (“Surety”), are held firmly bound unto the City in the sum of ***[insert bond amount – 25% of Faithful Performance Bond]***, for the payment of which sum well and truly to be made, we the Principal and Surety bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally.

The condition of this obligation is such that, if the Principal shall well and truly make good and protect the City against the results of any work or labor done or materials or equipment furnished which are defective or not in accordance with the terms of the Contract having been used or incorporated in any part of the work performed under the Contract, which shall have appeared or been discovered within said one-year period from and after completion of all work under the Contract and final acceptance by City of said work, then this obligation shall be null and void; otherwise, it shall be and remain in full force and effect.

The Surety, for value received, hereby stipulates and agrees that no change, extension of time, alteration or addition to the terms of the Contract or to the work to be performed thereunder or the specifications accompanying the same shall in any way affect its obligations on this bond, and it does hereby waive notice of any change, extension of time, alteration or addition.

**IN WITNESS WHEREOF**, this instrument has been duly executed by authorized representatives of the Principal and Surety. SIGNED AND SEALED on \_\_\_\_\_, 20\_\_\_\_\_.

PRINCIPAL:

SURETY:

\_\_\_\_\_  
(Principal name) (Seal)

\_\_\_\_\_  
(Surety name) (Seal)

BY: \_\_\_\_\_  
(Signature)

BY: \_\_\_\_\_  
(Signature)

\_\_\_\_\_  
(Print name and title)

\_\_\_\_\_  
(Print name and title)

Principal address and telephone:

Surety address and telephone:

*Affix Corporate Seals*  
*Attach Notary Acknowledgments for All Signatures*  
*Attach Power-of-Attorney if executed by Attorney-in-Fact*