

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - Diridon/DW - Revised DA and Revise AFH and Key Transfer Terms
Date: Tuesday, April 6, 2021 3:25:20 PM
Attachments: [Google - DW - Development Agreement - CPDB Working Draft 3.29.21 2.0.docx](#)
[Redline - Exhibit D - Affordable Housing Program and Key Transfer Terms - CPDB 3-29 Draft vs 3-26 Draft.docx](#)

From: Miller, Gregg <gmiller@coblentzlaw.com>
Sent: Monday, March 29, 2021 11:41 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Straka, Stephanie <SStraka@coblentzlaw.com>
Subject: Google - Diridon/DW - Revised DA and Revise AFH and Key Transfer Terms

[External Email]

Johnny: please see attached track changes redlines of the Development Agreement and Exhibit D Affordable Housing Program and Key Transfer Terms. For the DA, we made our track changes edits in the version you sent Sunday evening. The redline of Exhibit D shows the changes made to the version we sent the City on 3-26. Please note these remain subject to developer review, in particular, the sections in the DA noted as still under developer review. Thanks,

Gregg Miller

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CPDB Responses 3-29-21 to City Comments 3-28-21

Subject to Developer review and comment

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

**RECORDING REQUESTED BY
THE CITY COUNCIL
OF THE CITY OF SAN JOSE**

(Exempt from Recording Fees
Pursuant to Government Code
Section 27383)

AND WHEN RECORDED MAIL TO:

Johnny V. Phan
Chief Deputy City Attorney
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200 East Santa Clara Street
San José, CA 95113-1905

**DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF SAN JOSE
AND GOOGLE LLC**

**RELATIVE TO THE DEVELOPMENT OF PROPERTY LOCATED IN THE
DIRIDON STATION AREA PLAN**

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EXHIBITS

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- C Public Benefits
 - C1 Base Requirements and Community Benefits Schedule
 - C2 Autumn Street Parcels Site Plan and Legal Descriptions
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 - Appendix A: Community Benefits Adjustment: Office Parcel Yield
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- K Downtown West Parking Requirements
- L List of Approvals
- M List of Applicable City Impact Fees
- N Form of Notice of Completion and Termination
- O Form of Assignment and Assumption Agreement
- P Form of Status Notice (Ten or Twenty Year Development Obligation)
- Q Copy of Municipal Code Sections ____, ____ and ____ (as in effect on the Effective Date)

SCHEDULES

- A Form of Reimbursement Agreement

**DEVELOPMENT AGREEMENT
BY AND BETWEEN
THE CITY OF SAN JOSE
AND GOOGLE LLC**

THIS DEVELOPMENT AGREEMENT, dated for reference purposes only as of this ____ day of _____, 2021 (the "Reference Date"), is by and between GOOGLE LLC, a Delaware limited liability company (herein, "Google" or "Developer"), and the CITY OF SAN JOSE, a municipal corporation (herein, "City"), pursuant to the authority of Sections 65864 through 65869.5 of the California Government Code (herein, "Development Agreement Statute") and pursuant to the City's powers as a charter city and Chapter 18.02 of the San José Municipal Code (herein, "Development Agreement Ordinance"). The City and Developer are also sometimes referred to individually as a "Party" and together as the "Parties". Capitalized terms not defined when introduced shall have the meanings given in Article 1.

RECITALS

This Agreement is made with reference to the following facts:

A. The City Council of the City adopted the *Envision San José 2040 General Plan* ("General Plan") in 2011 setting forth a vision and comprehensive road map to guide the City's continued growth through the year 2040.

B. The General Plan includes land use policies to shape the transformation of strategically identified "Growth Areas" into higher density, mixed-use, urban districts that can accommodate employment and housing growth and reduce environmental impacts of that growth by promoting transit use and walkability. The Diridon Station Area is located generally within the Downtown Growth Area in the General Plan.

C. The City Council of the City adopted the Diridon Station Area Plan (DSAP) in 2014 to establish a land use plan and policy framework that will guide future development and

redevelopment toward land uses that support transit ridership and economic development, and create a world-class urban destination, among many other objectives.

D. In December 2018, Developer and City entered into a non-binding Memorandum of Understanding (herein, the "MOU") with the intention to "collaborate on development in and around the Diridon Station Area to aid implementation of the planned expansion of San José's Downtown, the Diridon Station Area Plan, and the General Plan." The MOU set forth a vision for new development and optimized redevelopment potential to transform the current area into a vibrant, fully functional transit-oriented neighborhood that embodies a commitment to place-making, social equity, economic development, environmental sustainability, and financially viable private development.

E. The shared goals established in the MOU and advanced by the Project, as described in more detail below, include: balancing the objectives of the City, Developer, and the community; capitalizing on transit synergy; optimizing density and the mix of land uses; preserving existing housing and creating new housing; creating broad job opportunities; and pursuing equitable development. Goals also address high-quality, human-scaled design; improvements to the public realm; enhanced sustainability, environmental stewardship, and innovation; improvements to existing transit access and the minimization of parking; timely implementation; assurance that private developers will fund a fair share of amenities and other improvements and pay prevailing wages to construction workers in office/research and development buildings; and public involvement in discussions regarding public benefits.

F. The MOU states that, should a project be approved, the Developer would enter into a development agreement with the City to "memorialize community benefits and secure vested development rights aligned with any proposed development masterplan." The MOU contemplates

a development agreement that provides, among other things, “certainty with regard to the rules and regulations that will govern the future development in addition to other terms, a time frame for delivery of development projects, a description of the specific project types and densities, and a schedule of payment or delivery and community benefits.” The MOU also recognizes that development agreement negotiations will take into account the financial viability of Developer’s proposed project and the development-related priorities of the City and community.

G. In October 2019, Google submitted an application to the City for the Downtown West Mixed-Use Plan (herein, the "Project"). The Project site is located in the General Plan Downtown Growth Area and mostly within the boundaries of the DSAP, an area of the City that is anchored by public transportation. Additionally, the Project re-envisioned a significant portion of the DSAP as a mixed-use area that integrates housing and increases open space, rather than solely maximizing office development.

H. The Project site is described in Exhibit A (and its approximate boundaries, as set forth in the Downtown West Planned Development Permit, are depicted in Exhibit B) and is generally bounded by Lenzen Avenue and the Union Pacific Railroad (UPRR) tracks to the north; North Montgomery Street, Los Gatos Creek, the Guadalupe River, Barack Obama Boulevard (formerly South Autumn Street), and Royal Avenue to the east; Auzerais Avenue to the south; and Diridon Station and the Caltrain rail tracks to the west (herein the "Project Site" or "site"). The site is approximately 78 acres in size, approximately one mile long from north to south and generally less than 800 feet wide from east to west, although the site reaches nearly 1,500 feet from east to west at its widest, just south of West Santa Clara Street. Developer and Valley Transportation Authority (VTA) have entered into a Public-Private Partnership Agreement ("P3 Agreement"), dated October 2, 2020, in which VTA has agreed to transfer its fee interest in approximately 6,871

square feet of land identified as APN 259-38-014 and 259-38-133 pursuant to the terms of the P3 Agreement (the “VTA Parcels”). The VTA Parcels are located within the boundaries of the Project Site but are not currently included as Development Parcels for purposes of this Development Agreement. Certain other parcels owned by VTA (APNs 261-34-002, -003, -004, -005, -006, -011, and -023) are within the project site analyzed in the environmental impact report (EIR) for the project, and are included in the Project's Planned Development Zoning and General Development Plan, but are not within the Project Site, and are not Development Parcels, for purposes of this Development Agreement. Certain property owned by the Pacific Gas and Electric Company (a portion of APN 261-35-002), certain property owned by the Peninsula Corridor Joint Powers Board (APN 261-34-020), or certain other property owned by VTA (APNs 259-38-139, 259-38-114, 259-38-134) are included within the boundaries of the Project Site and in the Downtown West Planned Development Zoning and General Development Plan, the Downtown West Design Standards and Guidelines, and the Vesting Tentative Map for the Project [**Note: to be refined prior to approval**], but are not currently Development Parcels for the purposes of this Development Agreement.

I. The Project consists of the phased demolition of most of the existing buildings and phased development of new buildings in the Project Site. The Project includes development of the following land uses: a maximum of 7.3 million gross square feet (gsf) of commercial office space; a maximum of 5,900 residential units; a maximum of 500,000 gsf of active uses (commercial retail/restaurant, arts, cultural, live entertainment, community spaces, institutional, childcare and education, maker spaces, non-profit, and small-format office space); a maximum of 300 hotel rooms; a maximum of 800 limited-term corporate accommodations that would accommodate Google employees for up to 60 days; a maximum of 100,000 gsf of event and conference space;

up to 4,800 publicly accessible commercial parking spaces and up to 2,360 unbundled parking spaces for residential use; a potential "District Systems" approach to delivery of on-site utilities, including designated infrastructure zones with up to two on-site centralized utility plants totaling up to 130,000 gsf; one or more on-site logistics centers to serve the commercial on-site uses that would occupy a total of about 100,000 gsf; a total of approximately 15 acres of parks, plazas and open space, including areas for outdoor seating and commercial activity (such as retail, cafes, and restaurants), green spaces, landscaping, mid-block passages, riparian setbacks, riparian corridors and trails; and various improvements to the public realm to improve transit access and pedestrian and bicycle circulation and facilitate connectivity, both within the site and to and from surrounding neighborhoods.

J. The Project would provide upwards of eight hundred ninety million dollars (\$890,000,000) in infrastructure investments that include new and improved streets, utilities, open spaces, local transportation improvements, site development, and more. This amount does not include certain discretionary infrastructure-related costs for Project Features that Google is incurring in excess of this amount, such as the costs of enhanced public realm finishes and innovative District Systems.

K. On December 30, 2019, Governor Gavin Newsom certified the Project under the Jobs and Economic Improvement through Environmental Leadership Act of 2011 (Assembly Bill [AB] 900, as amended by Senate Bill 734, Senate Bill 7, adopted _____, 2021], and AB 246). As an environmental leadership development project, the Project must: (1) result in a minimum investment of one hundred million dollars (\$100,000,000) in California upon completion of construction; (2) create high-wage, highly skilled jobs that provide construction jobs and permanent jobs for Californians, and help reduce unemployment; (3) not result in any net

additional greenhouse gas (GHG) emissions; (4) comply with state requirements for commercial and organic waste recycling; and (5) have a binding commitment with the City, as set forth in the conditions of approval for the Downtown West Planned Development Permit and other Approvals, committing to implement and monitor mitigation measures required to comply with AB 900, as amended.

L. The Project requires an amendment to the General Plan and DSAP; Planned Development Rezoning, including a General Development Plan; a Planned Development Permit, including adoption of the Downtown West Design Standards and Guidelines, Downtown West Improvement Standards, and Conceptual Infrastructure Plan Sheets; Vesting Tentative Map(s)/Tentative Map(s)/Final Map(s); Major Encroachment Permits; vacations of portions of existing City streets; and related entitlements from the City, including, but not limited, to this Development Agreement, and permits related to tree removal, demolition, grading, building, and historic preservation (collectively, the "Approvals"). The full list of Approvals is provided in Exhibit L hereto.

M. In order to strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic risk of development, the Legislature of the State of California adopted the Development Agreement Statute, which authorizes the City to enter into a development agreement with any person having a legal or equitable interest in real property regarding the development of such property. Pursuant to Government Code Section 65865, the City adopted the Development Agreement Ordinance establishing procedures and requirements for entering into a development agreement pursuant to the Development Agreement Statute. The Parties are entering into this Agreement in accordance with the Development Agreement Statute and Development Agreement Ordinance.

N. In addition to the significant housing, jobs, urban revitalization, and economic benefits to the City that will arise from development of the Project, the City and Developer have agreed, as more specifically set forth in this Agreement or in the land use controls applicable to the Project, that the Project will provide additional benefits to the public that could not be otherwise obtained through application of existing City ordinances, regulations, and policies. Major additional benefits to the City from the Project are set forth in Exhibits D, E, G, H, and I hereto, and include: a combination of mechanisms, such as land dedication, moderate income inclusionary housing units, development fees, and other funding sources for affordable housing production and preservation, all of which will contribute significantly to the goal of achieving twenty-five percent (25%) affordable housing overall within the boundaries of the DSAP; development of approximately fifteen (15) acres of new open space, including: (i) approximately ten and two tenths (10.2) acres of privately-owned publicly accessible parks – roughly seven (7) acres of which will be subject to a recorded restrictive covenant, – and (ii) approximately four and eight tenths (4.8) acres of improved parks to be dedicated to the City in satisfaction of the Project's Parkland Obligation for development of 4,000 residential units; new bike and pedestrian infrastructure and enhanced access to public transit, as part of the Project's substantial investment (estimated to be approximately \$890,000,000 in 2021 dollars) in infrastructure improvements, not including additional infrastructure Project Features; workforce commitments, including payment of prevailing wage and local hire goals; seed funding for a Community Stabilization and Opportunity Pathways Fund to invest in education and workforce development, small business capacity building and incubation, affordable housing preservation, anti-displacement, homeless prevention, and homeless services, each as further described in this Agreement.

O. It is the intent of the Parties that all acts referred to in this Agreement shall be accomplished in a way as to fully comply with the California Environmental Quality Act (California Public Resources Code Section 21000 *et seq.*; "CEQA"), the CEQA Guidelines (Title 14, California Code of Regulations, Section 15000 *et seq.*; "CEQA Guidelines"), the Development Agreement Statute, the Development Agreement Ordinance, the San José Municipal Code, and all other applicable Laws in effect as of the Effective Date. This Agreement does not limit the City's obligation to comply with applicable environmental Laws, including CEQA, before taking any discretionary action regarding the Project, or the Developer's obligation to comply with all applicable Laws in connection with the development of the Project.

P. The Final Environmental Impact Report ("FEIR") prepared for the Project and certified by the City Council on _____, 2021, together with the CEQA findings (the "CEQA Findings") and the Mitigation Monitoring and Reporting Program ("MMRP") adopted concurrently therewith, comply with CEQA, the CEQA Guidelines, and Title 21 of the City's Municipal Code. The FEIR thoroughly analyzes the Project and Project alternatives, and the Mitigation Measures were designed to mitigate significant impacts to the extent they are susceptible to feasible mitigation. The information in the FEIR and the CEQA Findings were considered by the City Council in connection with approval of this Agreement.

Q. On _____, 2021, the Planning Commission held a public hearing on this Agreement and the Project, duly noticed and conducted under the Development Agreement Statute and Development Agreement Ordinance. Following the public hearing, the Planning Commission determined among other things that the FEIR thoroughly analyzes the Project, and the Mitigation Measures are designed to mitigate significant impacts to the extent they are susceptible to feasible mitigation, and further determined that the Project and this Agreement will, as a whole, be

consistent with the objectives, policies, and general land uses and programs specified in the General Plan (together the "General Plan Consistency Findings"). The Planning Commission adopted Resolution No. XXX, recommending that the City Council adopt the CEQA findings, approve this Agreement, and approve the Project.

R. On _____, 2021, the City Council, having received the Planning Commission's recommendations, held a public hearing on the FEIR, the Project, and this Agreement pursuant to the Development Agreement Statute and the Development Agreement Ordinance. Following the public hearing, the City Council adopted Resolution No. XXX, certifying the FEIR, making the CEQA Findings required by CEQA, adopting a Mitigation Monitoring and Reporting Program, and adopting a Statement of Overriding Considerations; adopted Resolution No. XXX approving an override of the Santa Clara County Airport Land Use Commission inconsistency determination; adopted Resolution No. XXX, approving amendments to the General Plan; adopted Resolution No. XXX approving amendments to the Diridon Station Area Plan; introduced Ordinance No. XXX, approving a Planned Development Rezoning, including a General Development Plan; adopted Resolution No. XXX, conditionally approving a Vesting Tentative Map(s); adopted Resolution No. XXX, conditionally approving a Planned Development Permit and adopting the Downtown West Design Standards and Guidelines and the Downtown West Improvement Standards, Conformance Review Implementation Guide, and Conceptual Infrastructure Plan Sheets; introduced Ordinance No. XXX approving an amendment to Title 20 of the City's Municipal Code; adopted Resolutions No. XXX and No. XXX, conditionally amending the boundaries for Historic Landmarks (San José Water Company Building at 374 West Santa Clara Street, and Southern Pacific Historic District); adopted Resolution No. XXX, conditionally approving an amendment to Historic Preservation Permit

(HP16-002); adopted Resolution No. XXX, authorizing, with conditions, Major Encroachment Permits for the District Systems infrastructure; adopted Resolution No. XXX, conditionally vacating certain streets within the Project Site; and introduced Ordinance No. XXX, approving this Agreement.

S. On _____, 2021, the City Council adopted Ordinance Nos. _____, approving a Planned Development Rezoning, adopted Ordinance No. ____ approving an amendment to Title 20 of the City's Municipal Code, adopted Resolution No. _____ conditionally approving the vacation of certain streets within the Project Site, and adopted Ordinance No. _____, approving this Agreement, including the Parkland Agreement included herewith as Exhibit E, and authorizing the City Manager to execute this Agreement on behalf of the City (the "Enacting Ordinance"). The Enacting Ordinance took effect on _____, 2021.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

AGREEMENT

1. DEFINITIONS

In addition to the definitions set forth in the above preamble paragraph, Recitals, and elsewhere in this Agreement, the following definitions shall apply to this Agreement:

1.1 "Accepted", "Acceptance" and variations thereof when capitalized in this Agreement shall mean, with respect to any Public Improvement, that the work authorized in the permit or permits for such Public Improvement has been completed to the reasonable satisfaction of the City acting in good faith, as certified by the City's authorized representative, such as the City Engineer, and the City is otherwise ready to prepare and issue a Notice of Acceptance.

1.2 "Affiliate" or "Affiliates" means any entity that directly or indirectly, through one or more intermediaries, Controls, is Controlled by, or is under common Control with, the specified entity.

1.3 "Affordable Housing Program" shall mean the Affordable Housing Program attached hereto as Exhibit D, pursuant to Municipal Code Chapter 5.08].

1.4 "Affordable Housing Unit" shall have the meaning set forth in the Affordable Housing Program.

1.5 "Agreement" shall mean this Development Agreement, the Exhibits which have been expressly incorporated herein, and any amendments thereto.

1.6 "Applicable Laws" shall have the meaning set forth in Section 5.2 (where "applicable" is not capitalized, "applicable Law" has its plain meaning and refers to Laws as otherwise defined herein).

1.7 "Approvals" shall mean the City approvals, entitlements, and permits for the Project listed on Exhibit L.

1.8 "Assembly Bill (AB) 900" shall mean the Jobs and Economic Improvement through Environmental Leadership Act of 2011, effective January 1, 2018, and codified in Public Resources Code Section 21178 *et. seq.*, as amended.

1.9 "Assignment and Assumption Agreement" shall have the meaning set forth in Section 12.2.

1.10 "Base Requirements" shall mean those elements of the Project required to satisfy state and/or City statutory or regulatory requirements, including, but not limited to, payment of fees, CEQA mitigation measures set forth in the MMRP, City-Dedicated Open Space, and the

portion of the Affordable Housing Program that satisfies the requirements of the City's Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08).

1.11 "Building" or "Buildings" shall mean each of the existing, modified, and new buildings, located on a Development Parcel(s) within the Project Site, and as described in the Project Description.

1.12 "CEQA" shall have the meaning set forth in Recital P.

1.13 "CEQA Findings" shall have the meaning set forth in Recital Q.

1.14 "CEQA Guidelines" shall have the meaning set forth in Recital P.

1.15 "City" shall mean the City as defined in the opening paragraph of this Agreement. Unless the context or text specifically provides otherwise, references to the City means the City acting by and through the Director of PBCE or, as necessary, the Planning Commission, the City Manager, or the City Council.

1.16 "City Agency" or "City Agencies" shall mean the City departments, agencies, boards, commissions, and bureaus that have subdivision or other permit, entitlement, or approval authority or jurisdiction over development of the Project, or any improvement located on or off the Project Site, including, without limitation, the City Manager, PBCE Department, Director of PBCE, Department of Parks, Recreation, and Neighborhood Services, Environmental Services Department, Housing Department, and Department of Public Works, together with any successors to the foregoing City agencies, departments, boards, or commissions.

1.17 "City Attorney's Office" shall mean the Office of the City Attorney of the City San José.

1.18 "City Costs" shall mean the actual and reasonable third-party costs incurred by a City Agency in preparing, adopting or amending this Agreement, in performing its obligations or

defending its actions under this Agreement, or otherwise contemplated by this Agreement, including reasonable attorneys' fees and costs, consistent with other development projects approved in the City but excluding work, hearings, costs or other activities contemplated or covered by Processing Fees; provided, however, City Costs shall not include any costs incurred by a City Agency in connection with a City Default.

1.19 "City Council" or "Council" shall mean the City Council of the City of San José.

1.20 "City-Dedicated Open Space(s)" shall mean the parks and trail to be dedicated to the City and improved by Developer in conformance with the Parkland Agreement, and as set forth in Exhibit E hereto.

1.21 "City Manager" shall mean the City Manager of the City of San José.

1.22 "City Parties" shall have the meaning set forth in Section 4.8.

1.23 "City-Wide" shall mean all real property within the territorial limits of the City of San José, not including any property owned or controlled by the United States or by the State of California and therefore not subject to City regulation.

1.24 "Commence Construction", "Commencement of Construction" and similar variations thereof shall mean commencement of vertical physical site work pursuant to a building permit, excluding demolition, grading, excavation, or foundation. For Buildings containing basements, vertical physical site work includes any permanent elements of the basement above the lowest level basement slab.

1.25 "Community Benefits" shall mean those Public Benefits provided by the Project that are generally aligned with the goals and priorities identified in the MOU approved by the City Council, and that exceed the Base Requirements, and are not Project Features.

1.26 "Complete" and any variation thereof when capitalized in this Agreement shall mean, as applicable, that: (i) with respect to Privately-Owned Publicly Accessible Open Space and Privately-Owned Improvements, the City Agencies or the Non-City Agencies with jurisdiction over any required permits for such Privately-Owned Publicly Accessible Open Space or Privately-Owned Improvements have issued any approvals required for use of such space or improvement for the contemplated use with construction having been completed substantially in accordance with the DWDSG and to such an extent that safe use of the space or improvement is viable; (ii) with respect to any Public Improvement, the Public Improvement, or portion thereof, has been completed substantially in accordance with related subdivision map conditions of approval and any applicable Public Improvement Agreement and, if applicable, Exhibit E of this agreement, and has been Accepted by the City; and (iii) with respect to any Building, a Final Certificate of Occupancy has been issued.

1.27 "Conformance Review" shall mean the Downtown West Planned Development Zoning/Design Conformance Review process established by the General Development Plan, pursuant to which the Director of PBCE or Director of PW, as specified in the General Development Plan, reviews Conformance Review Applications for Vertical Improvements, Open Space Improvements, and Horizontal Improvements for conformance with the General Development Plan and Downtown West Planned Development Permit as a prerequisite to the issuance of permits to construct open space, Vertical Improvements, or Horizontal Improvements, as applicable.

1.28 "Conformance Review Application" shall mean a written request on a form approved by the Director of PBCE, along with payment of any then-due Processing Fees, for a Conformance Review determination by the Director of PBCE that Vertical Improvements, open

space and Park Improvements, or Horizontal Improvements for a particular area of the Project Site satisfies the applicable standards of the General Development Plan and Downtown West Planned Development Permit.

1.29 "Construction Cost Index" or "CCI" shall mean the Engineering News Record (ENR) Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication.

1.30 "Control" means (i) the direct or indirect ownership of more than fifty percent (50%) of the profits or capital of the specified entity; or (ii) the right to dictate the specified entity's major decisions, subject to the rights of other owners; or (iii) the power to direct the day-to-day management or control of the specified entity, directly or indirectly and whether through ownership of voting securities, membership or partnership interests, or other interests, or by contract, or otherwise; or (iv) the right to appoint fifty percent (50%) or more of the specified entity's managers or directors.

1.31 "Default" shall have the meaning set forth in Section 9.3.

1.32 "Developer" shall have the meaning set forth in the opening paragraph of this Agreement, and shall also include any and all authorized successor Transferees of all or any Development Parcel(s) during the Term and any other successors permitted under this Agreement.

1.33 "Development Agreement Ordinance" shall mean Chapter 18.02 of the Municipal Code, as in effect as of the Effective Date.

1.34 "Development Agreement Statute" shall have the meaning set forth in the Preamble to this Agreement, as in effect as of the Effective Date.

1.35 “Development Parcel” shall mean any real property (or vertical subdivision thereon or thereunder) located within the boundaries of the Project Site in which Developer has a legal or equitable interest.

1.36 "Director of PBCE" shall mean the Director of Planning, Building and Code Enforcement of the City of San José.

1.37 Director of PRNS shall mean the Director of Parks, Recreation and Neighborhood Services for the City of San José.

1.38 "Diridon Station Area Plan" or "DSAP" shall mean the Diridon Station Area Plan approved by Resolution No. 77096, as may be amended from time to time.

1.39 "Diridon Integrated Station Concept Plan" or "DISC" shall mean the collective plan by the DISC Partner Agencies to expand and redevelop the San José Diridon Station, which Plan is under development and has not been fully funded, as of the Effective Date.

1.40 "DISC Partner Agencies" or "DISC Partner Agency" in connection with DISC, or other transit project(s), shall mean any one or more of the following agencies: California High-Speed Rail Authority (CHSRA), Caltrain, Metropolitan Transportation Commission (MTC), Santa Clara Valley Transportation Authority (VTA), and the City (and any successor agency(ies)).

1.41 "District Systems" shall mean the "district system(s)" described in Exhibits I and J.

1.42 "Downtown West Design Standards and Guidelines" or “DWDSG” shall mean that certain Downtown West Design Standards and Guidelines, which are a component of the Downtown West Planned Development Permit, approved by the City Council by Resolution No. _____ on _____, 2021, as same may be amended from time to time.

1.43 "Downtown West Planned Development Permit" shall mean that certain planned development permit effectuating the Downtown West Planned Development Zoning District,

which includes the Downtown West Design Standards and Guidelines, the Downtown West Improvement Standards and Conceptual Infrastructure Plan Sheets, and the Downtown West Conformance Review Implementation Guide, approved by City Council Resolution No. _____ on _____, 2021, as same may be amended from time to time.

1.44 "Downtown West Planned Development Zoning District" shall mean the planned development zoning district established pursuant to Zoning Code Sections 20.60 et seq. and 20.120.500 et seq. by City Council Ordinance No. _____, including its accompanying General Development Plan.

1.45 "DSAP's Boundaries" means the geographic boundaries of the Diridon Station Area Plan, as in effect on the Effective Date of this Agreement.

1.46 "Effective Date" shall have the meaning set forth in Section 2.1.

1.47 "Enacting Ordinance" shall have the meaning set forth in Recital T.

1.48 "Encroachment Agreement" shall refer to Exhibit A of City Council Resolution No. _____."

1.49 "Existing Agreements" shall mean the Option/Negotiation Rights Agreement between the City of San José, a California municipal corporation, and Google LLC, a Delaware limited liability company, dated December 4, 2018, for the property referred to as "Lots A-C," and more particularly described in Exhibit A to that Agreement, located in the City of San José, California; the Purchase and Sale Agreement and Joint Escrow Instructions between the City of San José, a California municipal corporation, and Google LLC, a Delaware limited liability company, dated December 4, 2018, for the property located at 255 South Montgomery Street, San José, California (the "City Fire Training Facility Property"); and the Ground Lease between Google LLC, a Delaware limited liability company, and the City of San José, a California

municipal corporation, dated December 4, 2018, for the property located at 255 South Montgomery Street, San José, California (the "City Fire Training Facility Property").

1.50 "Existing Standards" shall have the meaning set forth in Section 5.2.

1.51 "Existing Uses" shall mean all existing lawful uses of the existing Buildings and improvements (and including, without limitation, lawful pre-existing, non-conforming uses under the Zoning Code) on the Project Site as of the Effective Date, as the same may be modified by the Approvals and any Subsequent Approvals.

1.52 "Federal or State Law Exception" shall have the meaning set forth in Section 5.8.1.

1.53 "FEIR" shall have the meaning set forth in Recital Q.

1.54 "Final Approval" shall mean that (i) all applicable appeal periods for the filing of any administrative or judicial appeal challenging the issuance or effectiveness of any of the Approvals, the Development Agreement or the FEIR shall have expired and no such appeal shall have been filed, or if such an administrative or judicial appeal is filed, the Approvals, the Development Agreement or the FEIR, as applicable, shall have been upheld by a final decision in each such appeal without adverse effect on the applicable Approval, the Development Agreement or the FEIR and the entry of a final judgment, order or ruling upholding the applicable Approval, the Development Agreement or the FEIR and (ii) if a referendum petition relating to any Approval or the Development Agreement is timely and duly circulated and filed, certified as valid and the City holds an election, the date the election results on the ballot measure are certified by the City Council in the manner provided by applicable City laws reflecting the approval by voters of the referended Approval or Development Agreement.

1.55 "Final Certificate of Occupancy" shall mean the permit or other documentation issued by the City Building Division following its final inspection of the applicable Building or structure.

1.56 "Final Map" shall mean a "Final Map" as defined in Section 19.08.160 of the Subdivision Code.

1.57 "Force Majeure" or "Force Majeure Event" shall mean, for purposes of this Agreement, any event or condition that: (i) is beyond a Party's control; (ii) prevents the Party's performance of this Agreement; (iii) that the Party could not have reasonably foreseen; and (iv) that arises from one or more of the following: (1) naturally occurring events constituting an act of God; (2) unusually severe and abnormal climactic conditions (as compared with the five-year average weather statistics compiled by the United States National Oceanic and Atmospheric Administration for the time of year and locality of the Subject Property); (3) strikes, stoppages or boycotts that affect a specific trade on a national or regional level, to the extent not caused by the acts or omissions of the Party; (4) the unavailability of construction materials for projects similar to the Project (i.e. a large scale mixed-use project) that causes significant construction delays, or significant construction delays resulting from such materials being unusually difficult or impossible to obtain, or from defects, tariffs, embargoes, or trade disputes, where, in each case, Developer is unable to obtain alternative or replacement materials, within the same or substantially similar time period at substantially the same cost (and without having to forfeit any significant deposits or advance payments); (4) acts of terrorism or war; (5) riots or other civil unrest; (6) a local, state or federal declaration of emergency based on an epidemic or pandemic, including any quarantine or other health-related orders, directives, regulations, laws or other requirements implemented in response to such epidemic or pandemic; (7) orders issued by any other

governmental body having jurisdiction over the Project; (8) casualty; or (9) condemnation unrelated to DISC or other transit project(s). Neither the inability of Developer to obtain construction financing for the Project nor the condition of, or changes in, the real estate market shall constitute a Force Majeure Event, except to the extent such inability or changes result from a Force Majeure Event.

1.58 "Foreclosure Transferee" shall mean any purchaser at a foreclosure sale or similar transaction under a Mortgage and any person or entity which acquires title to all or any portion of the Project Site in lieu of the foreclosure of a Mortgage, except for Developer or an Affiliate of Developer.

1.59 "Funding Mechanism" shall have the meaning set forth in Section 7.6.1.

1.60 "Future Changes to Existing Standards" shall have the meaning set forth in Section 5.4.

1.61 "General Plan" has the meaning set forth in Recital A.

1.62 "General Plan Consistency Findings" has the meaning set forth in Recital R.

1.63 "Good Faith Efforts" and any variation thereof shall mean the efforts that a reasonable person would determine is a diligent and honest effort under the same or similar set of facts or circumstances.

1.64 "Google Affiliate" shall mean any entity that directly or indirectly Controls, is Controlled by, or is under common Control with Google LLC, including (i) Alphabet, Inc.; (ii) any Affiliate of Alphabet, Inc.; (iii) companies spun-off from Google LLC or Alphabet, Inc. and any of their Affiliates; and (iv) any entities related to Google LLC or Alphabet, Inc. as a result of merger, acquisition or by operation of law.

1.65 "Horizontal Improvement" shall mean (a) the initial construction of any one or more Public Improvements and (b) the initial construction of any one or more Privately-Owned Improvements.

1.66 "Impact Fees" shall mean those fees and exactions set forth on Exhibit M to this Development Agreement.

1.67 "Infrastructure" shall mean the facilities, both on- and off-site and in District Systems, described in the Infrastructure Plan included herewith as Exhibit I, and including the electrical microgrid ("Microgrid") described in Exhibit J.

1.68 "Infrastructure Plan" shall mean the Infrastructure Plan attached as Exhibit I.

1.69 "Law(s)" shall mean the Constitution and laws of the United States of America, the Constitution and laws of the State of California, the charter and laws of the City of San José, and any codes, statutes, rules, regulations, or executive mandates thereunder, and any State or Federal court decision (including any order, injunction, or writ) thereunder. The term "Laws" shall refer to any or all Laws as the context may require.

1.70 "Lendlease Affiliate" shall mean any Affiliate of Lendlease Americas Holdings Inc., a Delaware corporation.

1.71 "Litigation Extension" shall have the meaning set forth in Section 11.5.1.

1.72 "Losses" shall have the meaning set forth in Section 4.8.

1.73 "Major Encroachment Permit" shall refer to a permit issued under Title 13.37.400 of the Municipal Code."

1.74 "Material Change" shall mean any modification that would materially alter the rights, benefits, or obligations of the City or Developer under this Agreement that (i) extends or reduces the Term, (ii) changes the permitted uses of the Project Site, except as permitted by, and

approved in the manner set forth in the Downtown West Planned Development Zoning District and/or the Downtown West Design Standards and Guidelines, (iii) decreases or increases the Community Benefits, except as permitted as a Community Benefits Adjustment, (iv) as to a particular Building, increases the maximum density, or overall square footage of the Project, in each case by more than 10%, (v) decreases the parking ratios, except as permitted by the Approvals and this Agreement, or (v) reduces or changes the Impact Fees applicable to the Project, except as authorized on the Effective Date, or imposes any new development or impact fees or exactions or other fees, contributions, special taxes, exactions, impositions or dedications, whether any of the foregoing are imposed as a fee, a zoning requirement or otherwise, except as expressly permitted in this Agreement.

1.75 "Mitigation Measures" shall mean the mitigation measures (as defined by CEQA) applicable to the Project as set forth in the MMRP or that are necessary to mitigate adverse environmental impacts identified through the CEQA process as part of a Subsequent Approval.

1.76 "MMRP" shall mean that certain mitigation monitoring and reporting program adopted by the City for the Project.

1.77 "Mortgage" shall mean a mortgage, deed of trust, or other lien on all or part of the Project Site to secure an obligation made by Developer to repay borrowed funds to be used by Developer to improve the applicable property so encumbered in a manner consistent with this Agreement, but shall not include any mortgage, deed of trust or other lien that is also secured by real property that is not part of the Project Site or which secures an obligation to repay borrowed funds used to acquire or improve real property that is not part of the Project Site, or which is cross-defaulted with any obligation relating to or secured by real property that is not part of the Project Site.

1.78 "Mortgagee" shall mean a person or entity that is not an Affiliate of Developer and that is the holder of, and beneficiary or mortgagee under, a Mortgage.

1.79 "Municipal Code" shall mean the San José Municipal Code.

1.80 "Non-City Agency" shall have the meaning set forth in Section 7.3.

1.81 "Non-City Approval" shall have the meaning set forth in Section 7.3.

1.82 "Notice of Completion" means the form of Form of Notice of Completion and Termination attached to this Agreement at Exhibit N.

1.83 "Official Records" shall mean the official real estate records of the City of San José, as maintained by the Santa Clara County Assessor-Recorder's Office.

1.84 "Open Space Improvements" shall mean, collectively, City-Dedicated Open Space and Privately-Owned Publicly Accessible Open Space (defined as Project-Sponsor Owned Open Space in the Downtown West Planned Development Zoning District and Downtown West Planned Development Permit).

1.85 "Parcel Map" shall mean a Parcel Map as defined in Section 19.08.320 of the Subdivision Code.

1.86 "Park Construction Right of Entry", as more specifically described in Exhibit E, shall mean a temporary Right of Entry Agreement within a City-Dedicated Open Space entered into by the Parties following Acceptance of the Open Space by the City, for the purpose of allowing Developer to complete construction of an adjacent Building(s).

1.87 "Park Improvements" shall have the meaning set forth in the Parkland Agreement included herewith as Exhibit E.

1.88 "Parkland Fee" shall mean the fee established by the City Council pursuant to Chapters 14.25 or 19.38 of the San José Municipal Code.

1.89 "Party" and "Parties" shall have the meaning set forth in the opening paragraph of this Agreement.

1.90 "PBCE Department" shall mean the Planning, Building, and Code Enforcement Department of the City of San José.

1.91 "Planned Development Permit" means the Planned Development Permit approved by Resolution No. XXX.

1.92 "Planning Commission" means the Planning Commission of the City of San José.

1.93 "Potentially Participating Parcels" shall mean (a) any land that is located within the Project Site as to which Developer acquires after the Effective Date, either (i) fee title or (ii) any other legal or equitable interest that includes a right of possession; and (b) any VTA Parcels.

1.94 "Privately-Owned Publicly Accessible Open Space" shall mean those parks and open spaces described in Section 4.1.3 hereto, and in the Downtown West Design Standards and Guidelines, that are not City-Dedicated Open Spaces.

1.95 "Privately-Owned Improvements" shall mean those facilities and services that are privately-owned and privately-maintained, at no cost to the City (other than any costs related to public financing, such as an infrastructure finance district), for the public benefit and not dedicated to the City, including Privately-Owned Publicly Accessible Open Spaces and Park Improvements thereto, and any Infrastructure that is not a Public Improvement. The Privately-Owned Improvements do not include City-Dedicated Open Space or any Public Improvements.

1.96 "Processing Fees" shall mean, as applicable, the (i) standard fee imposed by the City upon the submission of an application for a permit or approval, which is not an Impact Fee, in accordance with the City practice on a City-Wide basis or within the DSAP's Boundaries, for the same or similar permits or approvals and applied in an equitable and non-discriminatory

manner; or (ii) the City's standard hourly rate and standard charges for review of an application for a permit approval, in accordance with the City practice on a City-Wide basis or within the DSAP's Boundaries, to the same or similar work and applied in an equitable and non-discriminatory manner, for City staff who are processing the application.

1.97 "Project" shall mean the mixed use development project as described in Recital D and the Approvals, together with Developer's rights and obligations under this Agreement.

1.98 "Project Description" shall refer to the Project described in the FEIR. In the event that the Director of PBCE approves a request by Developer to convert land uses pursuant to the General Development Plan, then any references to the Project Description herein shall be deemed to automatically incorporate such changes without requiring amendment of this Agreement.

1.99 "Project Documents" shall mean, individually or collectively as the context requires, the Project Boundaries, Base Requirements and Community Benefits Schedule, Infrastructure Plan, Parkland Agreement, Affordable Housing Program, Downtown West Design Standards and Guidelines, Downtown West Improvement Standards, Conceptual Infrastructure Plan Sheets, Downtown West Conformance Review Implementation Guide, Major Encroachment Agreement, Transportation Demand Management Plan, and this Agreement.

1.100 "Project Feature" shall mean features or elements of the Project that Developer has voluntarily agreed to construct or include that are not Community Benefits or Base Requirements and that provide a benefit to the public.

1.101 "Project Site" shall have the meaning set forth in Recital G, and as more particularly described in Exhibit A and depicted in Exhibit B.

1.102 "Public Health and Safety Exception" shall have the meaning set forth in Section 5.8.1.

1.103 "Public Benefit" shall mean, collectively, the (i) Base Requirements, (ii) Community Benefits, and (iii) Project Features that benefit the public.

1.104 "Public Improvement" shall mean the facilities, both on- and off-site, to be improved, constructed, and dedicated by Developer and, upon completion in accordance with the Public Improvement Agreement, or the Parkland Agreement, as applicable, Accepted by the City. Public Improvements include the public streets within the Project Site shown on Exhibit I and/or within the Local Transportation Analysis Report prepared by Fehr & Peers, dated _____, 2021, all Infrastructure and public utilities within such streets (such as electricity, water and sewer lines, but excluding any non-municipal utilities or Privately-Owned Infrastructure), including sidewalks, landscaping, bicycle lanes, street furniture, and paths and intersection improvements (such as curbs, medians, signaling, traffic controls devices, signage, and striping), and all improvements that Developer is required to complete within City-Dedicated Open Spaces. The Public Improvements do not include Privately-Owned Publicly Accessible Open Space or any Privately-Owned Improvements, including Privately-Owned Improvements within the public right-of-way, if any.

1.105 "Public Improvement Agreement" shall mean an agreement between the City and Developer for the completion of improvements required as a condition of subdivision map approval pursuant to Government Code Section 66462.

1.106 "Public Works" shall mean the San José Department of Public Works.

1.107 "Public Works Director" shall mean the Director of Public Works.

1.108 "Qualified Developer" shall mean any entity, or such entity's project team, with experience developing projects of a similar scale in a similar urban environment and have completed a minimum of two (2) similar scale projects in an urban environment within the seven

(7) year period preceding the effective date of the Transfer, as shown by reasonable evidence delivered to City for reasonable review and approval.

1.109 "Reimbursement Agreement" shall mean a form of reimbursement agreement entered into between the Parties with respect to the payment of Processing Fees and City Costs, which agreement shall be substantially in the form attached hereto at Schedule A to this Agreement.

1.110 "Subdivision Code" shall mean Title 19 of the San José Municipal Code.

1.111 "Subdivision Map Act" shall mean the California Subdivision Map Act, California Government Code § 66410 *et seq.*

1.112 "Subsequent Approval" shall mean any other land use approvals, entitlements, or permits from the City other than the Approvals that are necessary or advisable for the implementation of the Project, including without limitation, Conformance Review determinations or approvals, demolition permits, grading permits, site permits, building permits, right-of-way work permits, lot line adjustments, sewer and water connection permits, major and minor encroachment permits, street and sidewalk modifications, street improvement permits, permits to alter, certificates of occupancy, transit stop relocation permits, subdivision maps, improvement plans, lot mergers, lot line adjustments, and re-subdivisions. A Subsequent Approval shall also include any amendment to the foregoing land use approvals, entitlements, or permits, or any amendment to the Approvals that are sought by Developer and approved by the City in accordance with the standards set forth in this Agreement.


1.113 "Substantial Completion" shall mean that construction of the base building is sufficiently complete and the City has issued a Temporary Certificate of Occupancy.

1.114 "Temporary Certificate of Occupancy" shall mean the permit or other documentation issued by the City Building Division following its inspection(s) of the applicable building or structure that is not a Final Certificate of Occupancy (i) but allows temporary occupancy of the Building or structure for its intended use or (ii) means that the Building or structure is ready for tenant improvements or similar work.

1.115 "Ten Year Development Obligation" shall mean (i) the Substantial Completion of the base building(s) for not less than two million (2,000,000) gross square feet of office development within the Project Site, and completion of all payments or contributions, including Community Benefits, due pursuant to this Agreement and Exhibits hereto with respect to such two million (2,000,000) gross square feet of office development at or prior to the end of the 10-year period described in Section 2.2; or (ii) Developer's satisfaction, whether by payment or performance as applicable and prior to the expiration of the 10-year period described in Section 2.2, of the Community Benefits associated with such two million (2,000,000) gross square feet of office development, which Community Benefits are equal to \$24.26/gsf of office (\$21.20/gsf for Community Stabilization and Opportunity Fund and \$3.06/gsf for Unallocated Community Benefit Commitment); or (iii) partial performance of the obligations described in the preceding clauses (i) and (ii), which, when such partial performance under each clause is combined, results in satisfaction of the Ten Year Development Obligation (for the purposes of illustration only, the sum of Substantial Completion of only 1,000,000 gross square feet of office development and all payments or contributions due, including Community Benefits, with respect to such square footage and Developer's satisfaction of the Community Benefits associated with an additional 1,000,000 gross square feet of office development would constitute satisfaction of the Ten Year Development Obligation).

1.116 "Tentative Map" shall mean both a "Tentative Map" as defined in Section 19.08.460 of the Subdivision Code and a "Vesting Tentative Map" as defined in Section 19.13.020(A) of the Subdivision Code.

1.117 "Term" shall have the meaning set forth in Section 2.2.

1.118  "Third-Party Challenge" shall have the meaning set forth in Section 7.4.

1.119 "Third Party Transferee" shall mean any entity that is not Google LLC, a Google Affiliate or a Lendlease Affiliate.

1.120 "Transfer" shall have the meaning set forth in Section 12.

1.121 "Transferee" shall mean any party that is the transferee in a Transfer.

1.122 "Transportation Demand Management Plan" shall mean the transportation demand management plan attached to the FEIR, as the same may be modified from time to time at the request of Developer and subject to the approval of the Director of PBCE in his or her sole discretion..

1.123 "Twenty Year Development Obligation" shall mean (i) the Substantial Completion of the base building(s) for not less than two million (2,000,000) additional gross square feet of office development within the Project Site (four million (4,000,000) gross square feet total including the Ten Year Development Obligation), and completion of all payments or contributions due pursuant to this Agreement and the Exhibits hereto with respect to such additional 2,000,000 gross square feet of office development at or prior to the end of the 20-year period described in Section 2.2; or (ii) Developer's satisfaction, whether by payment or performance as applicable and prior to the expiration of the 20-year period described in Section 2.2, of the Community Benefits associated with such additional 2,000,000 gross square feet of office development, which Community Benefits are equal to \$24.26/gsf of office (\$21.20/gsf for Community Stabilization

and Opportunity Fund and \$3.06/gsf for Unallocated Community Benefit Commitment); or (iii) partial performance of the obligations described in the preceding clauses (i) and (ii), which, when such partial performance under each clause is combined, results in satisfaction of the Twenty Year Development Obligation (for the purposes of illustration only, the sum of Substantial Completion of only 1,000,000 additional gross square feet of office development and all payments or contributions due with respect to such square footage and Developer's satisfaction of the Community Benefits associated with an additional 1,000,000 gross square feet of office development would constitute satisfaction of the Twenty Year Development Obligation). For clarity, the amount of office development or Community Benefits under this Twenty Year Development Obligation shall be in addition to the amount of office development or Community Benefits required to satisfy the Ten Year Development Obligation.

1.124 "Vertical Improvement" shall mean a Building or other improvement to be developed under this Agreement that is not parks and open space or infrastructure, or any portion thereof that is considered a Horizontal Improvement.

1.125 "Vested Elements" shall have the meaning set forth in Section 5.1.

1.126 "VTA Parcels" shall mean all or any of VTA Parcels as such term is defined in Recital H above and any other parcels which the VTA owns and which are described in Recital H above.

1.127 "Zoning Code" shall mean Title 20 of the San José Municipal Code.

2. EFFECTIVE DATE; TERM


2.1 Effective Date. This Agreement shall take effect upon the later of (i) the full execution and delivery of this Agreement by the Parties, and (ii) the date the Enacting Ordinance is effective ("Effective Date").

2.2 Term. The term of this Agreement shall commence upon the Effective Date and shall continue in full force and effect for thirty (30) years thereafter unless extended or earlier terminated as provided herein ("Term"); provided, however, that (i) the Term shall be extended for each day of a Litigation Extension, Force Majeure, or any other extension provided under this Agreement, and (ii) upon Completion of Building(s) within a Development Parcel reflected on the Vesting Tentative Map and the Community Benefits required for that Building(s), as set forth in Section 7.1, including any associated park and open space delivery obligations, and provided that any and all ongoing Developer or owner obligations, including but not limited to Community Benefit obligations, shall survive such termination and remain in full force and effect as required by the Approvals, this Agreement, or combination thereof, Developer shall have the right to terminate this Agreement with respect each such Development Parcel. The City shall have the right to terminate this Agreement prior to the expiration of the Term as follows: (a) if, on or before the date that is the last day of the tenth (10th) year after the Effective Date (as such 10-year period may be extended by a Litigation Extension, Force Majeure, or any other extension provided under this Agreement) the Ten Year Development Obligation has not been satisfied; or (ii) if, on or before the date that is the last day of the twentieth (20th) year after the Effective Date (as such 20-year period may be extended by a Litigation Extension, Force Majeure, or any other extension provided under this Agreement) the Twenty Year Development Obligation has not been satisfied. Section 11.2 below sets forth the procedures for terminating this Agreement for failure to satisfy the Ten Year Development Obligation or the Twenty Year Development Obligation. If Developer is satisfying its obligations under the Ten or Twenty Year Development Obligation by means of clause (ii) or clause (iii) in the definitions of the Ten Year Development Obligation or the Twenty Year Development Obligation above by paying or performing the required Community Benefits,

then any such payment or performance shall be due or completed prior to the expiration of the respective ten (10) or twenty (20) year time periods specified in clause (a) above in this Section 2.2, with respect to the Ten Year Development Obligation, and clause (b) above in this Section 2.2 with respect to the Twenty Year Development Obligation.

3. GENERAL RIGHTS AND OBLIGATIONS; DEVELOPMENT PROCESS

3.1 Development of the Project. Developer shall have the vested right to develop the Project, including any and all Development Parcels, in accordance with and subject to the provisions of this Agreement and the Approvals, and the City shall consider and process all Subsequent Approvals for development of the Project, including any and all Development Parcels, in accordance with and subject to the provisions of this Agreement and the Approvals. Developer may proceed (in accordance with this Agreement and the Approvals) with the construction, and upon Completion, use and occupancy of the Project, including any and all Development Parcels, as a matter of right, subject to obtaining any required Subsequent Approvals and any Non-City Approvals.

3.2 Timing of Base Requirements, Community Benefits, and Infrastructure. Because the Project will be built out over a number of years, the amount and timing of the Base Requirements and Community Benefits, including the Public Improvements, Affordable Housing Program, and City-Dedicated Open Space are to be provided as set forth in Exhibit C1, the Affordable Housing Program included herewith as Exhibit D, the City-Dedicated Open Space Dedication and Improvements Schedule included herewith as Exhibit E3.1, the Infrastructure Plan included herewith as Exhibit I, and as more particularly described in Section 4.1. For certain Project Features,  such as the District Systems, timing requirements have been intentionally omitted, and these Features are otherwise subject to receipt of necessary permits or other

conditions precedent, as noted or described in the applicable Exhibit or as may be required in the Project's conditions of approval. The scope and timing of Infrastructure that is associated with specific parcels or Buildings, as described in Exhibit I, shall be reviewed and approved by the City through the Conformance Review process as set forth in the General Development Plan and Implementation Guide.

3.3 Approval of Subdivision Maps. Developer shall obtain approval of Tentative Maps, Final Maps and Parcel Maps as required by the Subdivision Map Act and the Subdivision Code to subdivide the Project Site for purposes of disposition and development as contemplated by this Agreement. Developer may pursue a single Tentative Map covering the entire Project site or multiple Tentative Maps. Approval of any Tentative Map shall require compliance with California Government Code Section 66473.7, and Tentative Maps shall include conditions that Developer Complete any required Public Improvements and Privately-Owned Publicly Accessible Open Spaces in a manner consistent with the terms and conditions printed on the face of said map and the Project Documents which terms and conditions shall be consistent with the requirements of this Development Agreement, the Approvals and any conditions imposed on the Approvals. Developer may pursue approval of Final Maps in phases that include only portions of the associated Tentative Map. Developer acknowledges that approval of any Final Map for a subdivision that will rely on District Systems for utility service shall require compliance with all Tentative Map conditions of approval pertaining to District Systems.

3.4 Conformance Review. The Approvals and the Project Documents are intended to ensure that the urban, architectural, and landscape design of the Buildings, the Public Improvements, and the public realm at the Project Site will be of high quality and appropriate scale, include sufficient open space, and promote the public health, safety and general welfare.

The Conformance Review procedures applicable to Vertical Improvements, Open Space Improvements, and Public Improvements and Horizontal Improvements, as indicated in the Downtown West Design Standards and Guidelines, shall be as set forth in the General Development Plan, the Downtown West Planned Development Permit (consisting of the Downtown West Design Standards and Guidelines, the Downtown West Improvement Standards, the Conceptual Infrastructure Plan Sheets and the Conformance Review Implementation Guide), the [**Note:** *timing of Major Encroachment Permit likely not until final map approval and 100% improvement plans:*] Major Encroachment Agreement, and Exhibits hereto. The City shall review and approve or disapprove any Conformance Review Application in accordance with the requirements of this Agreement and the procedures specified in the General Development Plan, and the Downtown West Planned Development Permit. In considering a Conformance Review Application and any Subsequent Approval for those aspects of the Conformance Review Application the City acknowledges and agrees that (i) it has exercised its discretion in approving the Downtown West Planned Development Zoning District and the Project Documents, including all applicable conditions of approval and (ii) any proposed Conformance Review Application or Subsequent Approval shall be reviewed pursuant to the standard of review for Conformance Review Applications established in the General Development Plan and Downtown West Planned Development Permit.

3.5 Timing for Completion of Public Improvements and Privately-Owned Improvements. All Public Improvements that are required to serve a Building or Buildings (as identified in Exhibit C1, E3.1, E3.2, I, and/or Section 4.1): must be performed and Completed as specified in this Agreement, the applicable Exhibit to this Agreement, in the Public Improvement Agreement and/or in the Infrastructure Plan, as applicable.

3.6 Diridon Integrated Station Concept (DISC) Plan Implementation. As articulated in the MOU, Developer and City have a shared goal of timely implementation of development projects in the Diridon Station Area to maximize integration with planned transit projects. As such, Developer, City, and the DISC Partner Agencies have engaged in considerable collaborative efforts to account for the future needs of both DISC and the Project, including the affordable housing program, parks and open space, and Community Benefits and Project Features to be provided by the Project. Developer and City shall continue to work in good faith to support the DISC program of projects through ongoing coordination and collaboration between the Parties and with the DISC Partner Agencies. The shared goals of these efforts are to effectively deliver both the Project and DISC, and to minimize the impact of each project on the other and on the surrounding community, including impacts of DISC to affordable housing and parks/open space to be developed as part of the Project. To this end, Developer, City, and the other DISC Partner Agencies – led by Caltrain as the rail corridor owner – intend to exercise good faith efforts to document the parameters of their collaboration and coordination efforts (anticipated by way of a subsequent memorandum of understanding or similar agreement). This documentation is expected to provide clarity regarding anticipated DISC right-of-way for the expanded Diridon Station, to memorialize the conceptual elevated rail designs and preliminary DISC construction methodology, and to provide a framework for DISC Partner Agencies and Developer to agree to associated commercial terms for any permanent or temporary land needs, including the permanent and temporary use of City-Dedicated Open Spaces and land planned for the same by the DISC Partner Agencies, with consideration of state and federal regulations (e.g., the United States Department of Transportation’s Section 4(f) provision).

4. PUBLIC BENEFITS; DEVELOPER OBLIGATIONS AND CONDITIONS TO DEVELOPER'S PERFORMANCE



4.1 Public Benefits Exceed Those Required by Existing Ordinances and Regulations.

The Parties acknowledge and agree that the development of the Project in accordance with this Agreement provides a number of Community Benefits and Project Features to the City beyond those required by or achievable through existing Laws, including, but not limited to, those set forth in this Section 4. The City acknowledges and agrees that the Community Benefits and Project Features would not otherwise be achievable without the express agreement of Developer under this Agreement. Upon Developer's receipt of a building permit, the Public Benefit obligations tied to, or triggered by that Building shall survive the expiration or termination of this Agreement to the date of the Completion of the applicable Public Benefit.

4.1.1 Base Requirements. In satisfaction of City statutory and/or regulatory requirements, Developer shall, provide the following Base Requirements in accordance with Exhibit C1, D, E, and I, as applicable, and as set forth herein:

(a) the Affordable Housing Program benefits in satisfaction of the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08) and Commercial Linkage Fee requirements, as further described in Exhibit D;

(b) the City-Dedicated Open Spaces in satisfaction of Developer's Parkland Obligation, as further described in Exhibit E and the DWDSG;

(c) those elements of the Infrastructure Plan (including all of the Public Improvements and all of the Privately-Owned Improvements) as further described in Exhibit I (not including the enhanced infrastructure, District Systems, and Microgrid elements described in Section 4.1.3(c)).

Unless indicated elsewhere in this Agreement, Developer shall Complete each of the foregoing Base Requirements on or before the applicable dates provided in this Agreement and Exhibits hereto, and the Approvals; if no deadline is provided in this Agreement and Exhibits hereto or the Approvals, the normal deadline pursuant to City rules, standards, and/or practice shall apply. This Section 4.1.1 shall not be construed to limit Developer's obligations to comply with all applicable Existing Standards and Applicable Laws whether listed in this Section 4.1.1 or not.

4.1.2 Community Benefits Provided By Project. In addition to the Base Requirements, Developer agrees to provide the Community Benefits described in this Section 4.1.2 and Exhibit C1. Developer acknowledges and agrees that, as a result of the benefits to Developer under this Agreement, Developer has received good and valuable consideration for its provision of the Community Benefits described herein, and that the City would not be willing to enter into this Agreement without the Developer's obligation to provide, among other things, such Community Benefits:

(a) Community Stabilization and Opportunity Pathways Fund. Developer and/or Google, as applicable, shall establish and provide funding for the Community Stabilization and Opportunity Pathways Fund, as described in Exhibit H;

(b) the Affordable Housing Program benefits described in Exhibits C1 and D that exceed Developer's Base Requirements pursuant to the City Inclusionary Housing Ordinance (San José Municipal Code Ch. 5.08); and

(c) Fee simple transfer to City of "Autumn Street Parcels" (Contiguous parcels: 255 Autumn St., 260 & 240 N Montgomery St. San Jose, 95110, as shown on Exhibit C2 (Site Plan and Legal Descriptions)) three (3) months after Final Approval, free and clear of any occupants and leases, but in its otherwise as-is condition. The Autumn Street Parcels may allow

for approximately two hundred (200) units of affordable housing, if the City approves a rezoning and any necessary project approvals and CEQA review.

(d) Job Readiness and Stabilization. Developer shall provide seven million five hundred thousand dollars (\$7,500,000) in funding for jobs readiness and stabilization programs, to be paid on or before one hundred twenty (120) days after Final Approval, as set forth in Exhibit C1.

(e) Unallocated Community Benefit Commitment. Developer shall provide additional funding as a community benefit in the amount of three and 06/100 dollars (\$3.06) per gross square foot of office development, to be paid upon issuance of a Temporary Certificate of Occupancy for an office Building.

4.1.3 Project Features. In addition to the Community Benefits, Developer has opted to provide the following additional Project Features as a Public Benefit:

(a) Privately-Owned Publicly Accessible Open Space. In addition to the City-Dedicated Open Space described in Exhibit E hereto, and the Park Improvements to the City-Dedicated Open Space described therein, Developer is providing as a Project Feature certain Privately-Owned Publicly Accessible Open Space totaling approximately 10.2 acres (approximately seven (7) acres of which will be further subject to restrictive covenants as described herein, referred to herein as the “Covenant Privately-Owned Publicly Accessible Open Space”), generally depicted on Exhibit E3.2 hereto and as described in the Downtown West Design Standards and Guidelines (referred to therein as "Project Sponsor-Owned Open Space").

Prior to issuance of a Temporary Certificate of Occupancy for any Building on the Development Parcel corresponding to a Covenant Privately-Owned Publicly Accessible Open Space, as provided by the schedule in Section 4.1.3(a)(i) below, Developer shall execute and

record a declaration of public access covenants and restrictions, in form and substance satisfactory to the City Attorney and substantially in the form attached hereto as Exhibit F1 (“Declaration of Public Access Covenants and Restrictions”).

The Declaration of Public Access Covenants and Restrictions shall set forth the categories and limitations on use of the Covenant Private-Owned Publicly Accessible Open Space, all in accordance with the DWDSG and this Agreement. The hours of operation and scope of permissible park use are set forth in Exhibit F2, which Exhibit shall be incorporated by reference into the Public Access Restrictive Covenants. The provisions in Exhibit F2 may not be changed or modified with respect to the Covenant Privately-Owned Publicly Accessible Open Spaces if such change or modification would be more restrictive, meaning that the change would reduce the hours of operation, or restrict or eliminate a permissible park use, without prior written approval by the Director of PRNS; provided, however, that a permanent decrease in the hours of operation by five percent (5%) or more for any Covenant Privately-Owned Publicly Accessible Open Space shall require a public hearing by the City Council and approval by a majority vote.

For provisions regarding public events, private events, and temporary closures, which provisions are set forth in Exhibit F3, except as set forth in paragraph (p) therein regarding closures for maintenance and repair, or to protect the public health and safety, any permanent change or modification to these provisions that would reduce by ten percent (10%) or more the cumulative amount of reservable areas or the number of days or hours during which private events may occur shall require prior written approval by the Director of PRNS.

In addition to the provisions included in Exhibits F2 and F3, which apply to all Privately-Owned Publicly Accessible Open Spaces, Developer will provide rules for the Privately-Owned Publicly Accessible Open Spaces regarding prohibited conduct, which rules generally will

prohibit conduct that interferes with permissible park uses and general public use and enjoyment of the Privately-Owned Publicly Accessible Open Spaces. These rules, and any updates to the same, will be posted on a website and at each Privately-Owned Publicly Accessible Open Space.

The final acreage and/or boundaries of each Privately-Owned Publicly Accessible Open Space, including each Covenant Privately-Owned Publicly Accessible Open Space, may be subject to adjustment pursuant to the provisions of the DWDSG, except that any reduction in acreage of an individual Covenant Privately-Owned Publicly Accessible Open Space of more than five percent (5%), unless reallocated to another Covenant Privately-Owned Publicly Accessible Open Space, shall only be permissible if necessary due loss of developable area resulting from eminent domain by a DISC Agency(ies) or other government entity, or street vacation. The Privately-Owned Publicly Accessible Open Space shall also be permitted to be reconfigured as permitted by the DWDSG and/or the General Development Plan, with approval by the Director of PBCE, in consultation with the Director of PRNS, so long as the Project at full buildout continues to provide 7 acres of Covenant Privately-Owned Publicly Accessible Open Space. As provided in the General Development Plan, final acreage shall be identified and finally approved at the Conformance Review stage or the processing of a final map that includes the subject open space, whichever occurs first.

The public right of access to the Privately-Owned Publicly Accessible Open Spaces is a Public Benefit that exceeds what would be required under the City's Parkland Dedication Ordinance; however, Privately-Owned Publicly Accessible Open Spaces shall not be used to satisfy Developer's Parkland Dedication Obligation. The Privately-Owned Publicly Accessible Open Space categories, design, boundaries, and programming are set forth in the DWDSG.

(i) Completion of Privately-Owned Publicly Accessible Open

Space. Completion of the Privately-Owned Publicly Accessible Open Spaces means that City sign-off of final inspection has occurred; however, Completion does not include or require completed installation of design elements, art, structures, or features not essential to the intended use of the park by the public, so long as final installation of such elements or features does not interfere with safe use of the open spaces; nor does Completion include or require improvement of the fifty (50) feet of a Privately-Owned Publicly Accessible Open Spaces that fronts an incomplete vertical parcel (the "Temporary Construction Area") to allow for safe construction on that vertical parcel, so long as the Temporary Construction Area is relinquished and improved within six (6) months of issuance of a Final Certificate of Occupancy for the Building located on the vertical parcel.

Subject to Sections 4.2 and 11.5, Developer shall deliver the Completed Privately-Owned Publicly Accessible Open Spaces identified in Exhibits E2 and E3.2, within thirty (30) months following issuance of a Temporary Certificate of Occupancy for any Building on the Development Parcels as indicated in the following schedule:

- Creekside Walk (the later of D8, D9, D10, D11, D12 or D13)
- Gateway to San José (E1)
- Los Gatos Creek East (the later of E1 or E2)
- the Meander (F Office [excluding areas between F2/F4/150 South Montgomery, which are to be delivered within 30 months from the issuance of Temporary Certificate(s) of Occupancy for the final Building of F2, F4 or 150 South Montgomery]);
- Los Gatos Creek Park 2 (H2)
- N. Montgomery Pocket Park (B1)

- Los Gatos Creek Riparian Setback adjacent to Los Gatos Creek Connector (later of H3 and H5)

Semi-Public Open Space, as defined in the DWDSG, that is adjacent to a City-Dedicated Open Space shall be Completed within thirty (30) months of issuance of a Temporary Certificate of Occupancy for the fronting Building.

The following Privately-Owned Publicly Accessible Open Spaces shall be delivered within eighteen (18) months following issuance of a Temporary Certificate of Occupancy for a Building on the indicated Development Parcels, which delivery trigger is the same as for the adjacent City-Dedicated Open Space, as indicated in the following schedule and as referenced in Exhibit E3.2:

- Los Gatos Creek Park (G1)
- Northend Park (A1)

(ii) Term of Privately-Owned Publicly Accessible Open Space.

The approximately seven (7) acres of Covenant Privately-Owned Publicly Accessible Open Space consists of the Privately-owned Public Parks, Los Gatos Creek Riparian Setback, and Los Gatos Creek Riparian Corridor. Each Public Access Restrictive Covenant shall ensure the Covenant Privately-Owned Publicly Accessible Open Space is maintained and open for public use per the terms of the Public Access Restrictive Covenant until either: (i) the end of the useful life of the Building that triggers the specific Covenant Privately-Owned Publicly Accessible Open Space, or (ii) the City Council approves or authorizes an alternate use of the specific Covenant Privately-Owned Publicly Accessible Open Space, which approval or authorization shall require a minimum two-thirds affirmative vote of the City Council.

(iii) Penalty Fee For Covenant Privately-Owned Publicly Accessible Open Space Delay. In no event shall a delay in the Completion of any Privately-Owned Open Space constitute a Default pursuant to this Agreement. For the Covenant Privately-Owned Publicly Accessible Open Space, in the event Developer fails to Complete any such Open Space in accordance with the Completion schedule set forth in Section 4.1.3(a)(i), subject to any extensions that may be provided by this Agreement, Developer shall be required to pay a penalty fee to the City (the "Private Open Space Delay Penalty Fee"). The Private Open Space Delay Penalty Fee shall be based on the total square footage of the delayed Covenant Privately-Owned Publicly Accessible Open Space, and shall be paid for each month the Completion of that Covenant Privately-Owned Publicly Accessible Open Space is delayed beyond the thirtieth (30th) month following issuance of a Temporary Certificate of Occupancy for the corresponding Building shown in Section 4.1.3(a)(i), as follows:

- Months 31 to 36: Private Open Space Delay Penalty Fee of fifty cents (\$0.50) per square foot of the delayed Covenant Privately-Owned Publicly Accessible Open Space;
- Months 37 to 42: Private Open Space Delay Penalty Fee of one dollar (\$1.00) per square foot of the delayed Covenant Privately-Owned Publicly Accessible Open Space;
- After Month 42: Private Open Space Delay Penalty Fee of ten dollars (\$10.00) per square foot per month of the delayed Covenant Privately-Owned Publicly Accessible Open Space; provided, however, that the total Private Open Space Delay Penalty Fee shall not exceed an amount equal to the total fair market land value at the time that the final Penalty is paid, plus the value of the Park Improvements for the delayed Covenant Privately-Owned Publicly Accessible Open Space, which total Park Improvements Value shall be determined by multiplying the total acreage of that Covenant Privately-

Owned Open Space by one hundred ninety-five dollars (\$195) (total acreage x \$195 = total value), subject to escalation based on the Construction Cost Index based on the date on which the final Penalty is paid.

Pursuant to the terms of the Parkland Agreement, included as Exhibit E to this Agreement, the Parties acknowledge and understand that a delay in the Completion of any Covenant Privately-Owned Publicly Accessible Open Space could impair the Project's ability to provide a cumulative minimum fifty-two (52) square feet of Completed open space (inclusive of both City-Dedicated Open Space and Covenant Privately-Owned Publicly Accessible Open Space) for each residential unit that is constructed, as set forth in and required by Exhibit E. As provided in the Parkland Agreement, 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 fifty-two (52) square feet.

(iv) Transfer of Privately-Owned Publicly Accessible Open Space. Any Privately-Owned Publicly Accessible Open Space shall only be Transferred together with the adjacent Building or Buildings that trigger delivery of the subject Open Space and, except for midblock passages as defined in the DWDSG, where there are multiple potential trigger Buildings the Privately-Owned Publicly Accessible Open Space shall be Transferred with a trigger Building that is at least one hundred thousand (100,000) square feet in size. In addition to complying with all applicable requirements of this Agreement, for a Transfer of a Privately-Owned Publicly Accessible Open Space, Transferee shall expressly be required to comply with the Completion requirements set forth herein, including payment of the Private Open Space Delay Penalty Fee, if owed, and shall continuously provide the subject Privately-Owned Publicly Accessible Open Space, including the amenities/improvements thereon, in compliance with the

applicable regulations set forth in the Project Approvals, including the DWDSG and this Agreement.

(b) Publicly Available Parking Spaces. Developer shall provide publicly available parking spaces within the Project in the manner and number set forth in Exhibit K.

(c) Enhanced Infrastructure, District Systems, and Microgrid. Subject to receipt of necessary state and Non-City Agency permits and approvals, the Project proposes a District Systems approach to handle many of its utilities—such as electricity, thermal, wastewater, recycled water, and solid waste, as described in Exhibit I. The Project's Infrastructure Plan (Exhibit I) also includes enhanced right of way improvements, utility upgrades and relocation, undergrounded overhead power and communication lines, rehabilitation work to Los Gatos Creek, and replacement of the San Fernando Bridge as additional Project Features. In addition, if feasible, the Project will connect some or all Buildings to an electric microgrid.

(d) Workforce, Learning, and Education. Developer and/or Google, as applicable, will provide the additional Workforce, Learning, and Education benefits described in Exhibit G.

(e) AB 900; Environmental Leadership Project Features. As described in Recital K, the Project is an Environmental Leadership Project pursuant to AB 900. As such, Developer has included as part of its AB 900 package the following Project Features: the Project will be designed in pursuit of LEED for Neighborhood Development Gold Certification based on requirements in effect as of the Effective Date, with efforts to design vertical office Buildings to be eligible for LEED Gold Certification based on requirements in effect as of the Effective Date; and the Project would offset emissions, resulting in no net new greenhouse gas emissions, in part

through a combination of design measures intended to reduce energy consumption described in Exhibit I and in the FEIR, switching to equipment utilizing lower emission energy sources, water use and vehicular movement efficiencies, and purchasing GHG emissions offsets.

4.2 Community Benefits Adjustments.

4.2.1 Definition. "Community Benefits Adjustment" shall mean an adjustment or modification to the amount or other elements of a Community Benefit, as permitted and/or required by the Downtown West Planned Development Zoning District, General Development Plan, Downtown West Design Standards and Guidelines, or Downtown West Improvement Standards and Conceptual Infrastructure Plan Sheets, and subject to the applicable review and/or approval processes set forth therein, that is necessitated by any subsequent proceedings initiated by any of the DISC Partner Agencies to acquire any portion of the Project Site in connection with DISC or other transit project(s), if such acquisition results in a reduction in the development program as established by the Project Approvals.

4.2.2 Community Benefits Adjustments Due to Acquisition by DISC Agencies or Other Transit Agencies. In furtherance of the collaborative efforts described in Section 3.6, as well as the collective goals of the Developer, City, and the DISC Partner Agencies to effectively deliver both the Project and DISC, the following provisions set forth the understandings and obligations of the Parties in the event of an eminent domain proceeding initiated by a DISC Partner Agency(ies), and the circumstances in which Developer shall be provided a Community Benefits Adjustment:

(a) The Parties agree and have established an estimated area of the Project Site located in proximity to a proposed transit alignment, referred to as the "Transit Project Buffer Zone" and depicted in Exhibit C3 (shown thereon as consisting of the "HSR Buffer Zone"

and "DISC Buffer Zone"). In the event a DISC Partner Agency acquires any portion of the Project Site located within the Transit Project Buffer Zone through eminent domain, the Parties understand that the 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 it may be amended from time to time. The Parties also understand and acknowledge that a taking within the Transit Project Buffer Zone would negatively affect the value of the Project and, in particular, diminish the value of all land within the Project Site, and that such value loss may be recoverable as compensation from the condemning agency. Within the Transit Project Buffer Zone, the Parties will work together in good faith to retain Developer's office yield; however, in the event office yield within the Transit Project Buffer Zone is reduced due to an acquisition through eminent domain, Developer assumes the risk that the amount of displaced office yield would need to fit on the remaining Project Site if that displaced office yield is to be developed, which would necessitate development at greater densities, resulting in increased development costs. To that end, and despite the risk that Developer may be undercompensated in the eminent domain process if office yield is reduced within the Transit Project Buffer Zone, there shall not be a Community Benefits Adjustment as a result of a DISC Partner Agency acquiring any portion of the Project Site located within the Transit Project Buffer Zone.

(b) It is further understood by the Parties that acquisition of any amount or portion of the Project Site beyond the Transit Project Buffer Zone would result in a reduction in the Project's development program that could be substantial and, due to the fixed infrastructure costs of the Project, such acquisition could directly affect the overall feasibility of the Project. Like a taking within the Transit Project Buffer Zone, a taking of any portion of the Project Site beyond that zone (e.g., Parcels A1, B1, C2, F5, and G1) would also diminish the value of the remaining

portion of Project Site (the “Remainder”), and this diminution in value would be at least one hundred twenty-one and 92/100 dollars (\$121.92) per office gross square foot (“Base Diminution Value”). If Developer is awarded severance damages equal to or greater than the Base Diminution Value, measured on a per square foot basis of office loss or as otherwise defined, there will be no adjustment to Community Benefits as described in Paragraph (c) below, despite the fact that the cost impact to Developer of a taking beyond the Transit Project Buffer Zone will substantially exceed the Base Diminution Value. The Parties acknowledge, to the City’s benefit, that the Base Diminution Value does not include all of Developer’s cost impacts, and to the extent that additional severance damage proceeds are received beyond one hundred percent (100%) of the Base Diminution Value on a per square foot basis, those proceeds shall be used to offset Developer’s additional cost impacts. For clarity, for the determination of whether a Community Benefits Adjustment is to be made, the relevant reference point is whether the severance damage award is equal to or greater than \$121.92 per gross square foot of office space lost as a result of the taking, regardless of whether the condemned property is from one or more parcels in the Project Site.

With respect to parking, if the land acquired through eminent domain results in reduced office yield and area available for parking, the parking provided by the Project would be similarly reduced based on the Required Parking Ratio, and the requirement that a minimum of 2,850 publicly available parking spaces be maintained within the Project Site would be reduced by the number of spaces that otherwise would have been accommodated within the affected portions of the Project Site and associated lost parking area.

(c) In the event a DISC Partner Agency(ies) condemns or acquires any portion of the Project Site beyond the Transit Project Buffer Zone, and there is no award of severance damages, or such award is less than the Base Diminution Value described in Paragraph

(b) above, then (i) a Community Benefits Adjustment commensurate with the difference between the severance damages award and the Base Diminution Value shall be required, and (ii) the City agrees that such Community Benefits Adjustment shall be according to the following formula (with all values subject to escalation based on the Construction Cost Index):

Lost Land Area outside the Transit Buffer Zone x Office Parcel Yield PSF (see Appendix A to Exhibit C3) = Total Lost Office Program

(Total Lost Office Program x PSF Base Diminution Value) - Severance Damages = Net Value Loss

Remaining Community Benefits - Net Value Loss = Adjusted Community Benefits Value

Adjusted Community Benefits Value / (Remaining Office Program-Total Lost Office Program) = Adjusted Community Benefits Value PSF

Office Parcel Yield per square foot of land area (Office Parcel Yield PSF) is equivalent to Floor Area Ratio for individual office buildings, and, for purposes of this Section 4.2.2 only, will be calculated for individual parcels in the table below based on the values in Appendix A to Exhibit C3. Remaining Community Benefits will be calculated by the City and are equal to two hundred million dollars (\$200,000,000), less the value of Moderate Inclusionary Units (\$7,000,000), Prepayment for Job Readiness and Stabilization (\$7,500,000), Autumn Street Parcel Donation (\$8,400,000), and Developer Community Benefits Payments for office development that has received the Temporary Certificate of Occupancy (calculated at the time of the Community Benefit Adjustment). The Remaining Office Program reflects an office capacity of 7.3 million square feet, less office that has received a Temporary Certificate of Occupancy.

(d) Further, if a DISC Partner Agency(ies) condemns or acquires a portion of the F5 Development Parcel located beyond the Transit Project Buffer Zone, the Parties agree that the entire Parcel would be deemed non-developable unless the remaining parcel size is at least 0.75 acres, with a minimum east to west dimension of 70' and average east to west

dimension of 110'; if deemed non-developable, a Community Benefits Adjustment shall be provided based on loss of the full developable area of the Parcel.

(e) With respect to the portion of the Project Site known as "Lot ABC," the Parties agree that any taking of that portion of the Project Site, or any part of it, will have the same economic impact on the remaining Project Site as a taking beyond the Transit Project Buffer Zone, even if such taking occurs while Lot ABC is owned by the City (i.e., before Developer exercises its option). Accordingly, if some or all of Lot ABC is taken while the lot is owned by the City, the Community Benefits Adjustment described in Paragraph (c) above will be applied as though the property were owned by Developer.

Similarly, with respect to Development Parcels A1, B1, and C2, if a DISC Partner Agency(ies) condemns or acquires a portion of any such Development Parcel located beyond the Transit Project Buffer Zone in excess of the following percentages, the Parties agree that the entire Parcel(s) would be deemed non-developable, in which case a Community Benefits Adjustment shall be provided based on the loss of the full developable area of the Parcel(s): fifteen percent (15%) or more of the portion of Parcel A1 located beyond the Transit Project Buffer Zone; ten percent (10%) or more of the portion of Parcel B1 located beyond the Transit Project Buffer Zone; and/or five percent (5%) or more of the portion of Parcel C2 located beyond the Transit Project Buffer Zone. However, if following receipt of a Community Benefits Adjustment as described in this paragraph Developer does develop on these sites, then any such development shall be credited back to the total developable square footage on which the Community Benefits are based.

This Section 4.2.2 shall be superseded by the future agreement between the Developer, City, and the other DISC Partner Agencies referenced in Section 3.6 upon the effective date of such agreement.

4.2.3 Community Benefits Adjustment Due to Construction Crane Policy. In the event the City adopts a construction Crane Policy, if the aggregate fees owed or costs incurred across the Project pursuant to that Crane Policy exceed one hundred thousand dollars (\$100,000), Developer shall receive a Community Benefits Adjustment in an amount equal to one dollar for every dollar over \$100,000 that is owed or incurred.

(a) In furtherance of the Project and the shared objectives articulated in the MOU and in this Agreement, the City further agrees that it will not create new policies or guidance that adversely affect the crane or building heights within the Project boundary. For the Term of this Agreement, while it is understood that the Norman Y. Mineta San Jose International Airport (the "Airport") is required to communicate with the Federal Aviation Administration (FAA) on airspace when requested by the FAA, the Parties acknowledge and support that the Airport will defer to the FAA process for all determinations of height for cranes and buildings set forth in the following table and will not impose any additional restrictions:

Building	Maximum Building Height Desired (AGL)	Minimum Crane Height Clearance Required
A1	180	70
B1	200	70
C2	230	70
C3	230	40
D4	255	70
D7	270	70
E1	260	70
F1	280	70
G1	290	70

4.3 Conditions to Performance of Public Benefits. Developer's obligation to perform Public Benefits is expressly conditioned upon the satisfaction of each and all of the following conditions precedent:

4.3.1 Final Approval has occurred for all Approvals (including any Subsequent Approvals as set forth in Section 4.3.3 below);

4.3.2 The City and any applicable Non-City Agency(ies) shall have performed or granted all of their respective actions, approvals or authorizations and/or issued such permits or licenses required in order to permit Developer to Commence Construction of the Building(s) or Project component(s) to which the particular Public Benefit applies, and Final Approval shall have occurred for same except to the extent that such actions, approvals or authorizations, or permits or licenses have not been performed or granted due to the failure of Developer to timely initiate in conformance with the Approvals and then diligently and using Good Faith Efforts pursue such actions, approvals, authorizations, or issuances; provided, however, Developer shall be deemed to have timely initiated and diligently pursued such actions, approvals, authorizations, or issuances notwithstanding a determination of inconsistency if Developer complies with the requirements for obtaining the same as set forth in the applicable Approvals and Project Documents; and

4.3.3 Developer shall have obtained all Subsequent Approvals necessary to Commence Construction of the applicable Building(s) or Project component(s) to which the Public Benefit applies, and Final Approval shall have occurred for same, except to the extent that such Subsequent Approvals have not been obtained or Final Approval has not occurred for same due to the failure of Developer to timely initiate in conformance with the Approvals and then diligently and using Good Faith Efforts pursue such Subsequent Approvals; provided, however, Developer shall be deemed to have timely initiated and diligently pursued a Subsequent Approval notwithstanding a determination of inconsistency if Developer complies with the requirements for obtaining the Subsequent Approval as set forth in the applicable Approvals and Project Documents.

Except as expressly set forth in any of the applicable Exhibits to this Agreement, and in addition to any other available remedy, whenever this Agreement requires completion of a Public Benefit at or before Completion of a Building, the City may withhold a Final Certificate of Occupancy for that Building until the required Public Benefit is Completed.

4.4 Limited Term Corporate Accommodations Contributions. Developer agrees to make certain contributions to City related to development of Limited-Term Corporate Accommodations, as such use is defined in the Downtown West Planned Development Zoning District and General Development Plan. The contribution mechanism set forth below is a one-time arrangement for no more than eight hundred (800) Limited-Term Corporate Accommodations within the Project, and no more than 100,000 net square feet of Limited-Term Corporate Accommodations shall be permitted on parcels zoned for residential uses. The net square footage for purposes of this clause shall be measured using all net rentable square footage, which includes measurements from the outside surface of the exterior stud walls and include all finished living space, and any Limited Term Corporate Accommodation designated common areas. The net square footage does not include parking areas, common hallways, building common rooms, building lobbies, balconies, elevator shafts, building common stairways, utility shafts, janitorial closets, building common recreation areas, and storage lockers not located within Limited-Term Corporate Accommodations. This arrangement shall in no way serve as a precedent or guide for any other contributions, uses, agreements, or projects in the City, by Developer or any other developer.

4.4.1 Limited Term Corporate Accommodations Affordable Housing Contribution. Developer shall contribute to City the amount of eighteen and 70/100 dollars

(\$18.70) per net square foot of Limited-Term Corporate Accommodations (the "Corporate Accommodations Affordable Housing Contribution"). The calculation of net square footage shall:

- exclude areas outside the usable accommodation such as lobby, storage areas, mechanical/utility rooms, etc.; and
- if there are shared kitchen facilities, then shall include community rooms, common rooms/lounges together with supporting facilities such as kitchens and restrooms and other heated interior residential areas associated with the dwelling units or suites.

This Contribution shall be paid upon issuance of a building permit for a Building containing Limited-Term Corporate Accommodations. The Corporate Accommodations Affordable Housing Contribution shall be vested for the term of this Agreement, subject to escalation based on the Construction Cost Index. Pursuant to Section 5.6 of this Agreement, Developer shall not be subject to any new Impact Fee (or any new development or impact fees or exactions or other fees, contributions, special taxes, exactions, impositions or dedications, whether any of the foregoing are imposed as a fee, a zoning requirement or otherwise) for Limited-Term Corporate Accommodations or similar use that City may adopt. Any amounts collected would be used by the City for affordable housing City-Wide.

4.4.2 Limited Term Corporate Accommodations Parks Contribution. Developer shall contribute to City the amount of four thousand eight hundred fifty dollars (\$4,850) for each Limited-Term Corporate Accommodation bedroom (i.e. separate enclosed sleeping quarter) developed within the Project (the "Corporate Accommodations Parks Contribution"), which Contribution shall be paid upon issuance of a building permit for a Building containing Limited-Term Corporate Accommodations. The Corporate Accommodations Parks Contribution shall be vested for the term of this Agreement. Pursuant to Section 5.6 of this Agreement, Developer shall

not be subject to any new Impact Fee (or any new development or impact fees or exactions or other fees, contributions, special taxes, exactions, impositions or dedications, whether any of the foregoing are imposed as a fee, a zoning requirement or otherwise) for Limited-Term Corporate Accommodations or similar use that City may adopt. Any amounts collected would be spent by the City on parks consistent with the City's 2009 Greenprint for Parks, Recreation Facilities and Trails, as it may be amended from time to time, and City will distribute funds within nexus.

4.5 No Additional CEQA Review Required; Reliance on FEIR for Future Discretionary Approvals. The Parties acknowledge that the FEIR prepared for the Project complies with CEQA. The Parties further acknowledge that (a) the FEIR contains a thorough analysis of the Project and possible alternatives, (b) the MMRP has been adopted to eliminate or reduce to an acceptable level certain adverse environmental impacts of the Project, and (c) the City Council adopted CEQA Findings, including a statement of overriding considerations in connection with the Approvals, pursuant to CEQA Guidelines Section 15093, for those significant impacts that could not be mitigated to a less than significant level. For these reasons, the City shall rely on the FEIR, to the greatest extent possible in accordance with applicable Laws, in all future discretionary actions related to the Project; provided, however, that nothing shall prevent or limit the discretion of the City to conduct additional environmental review, at Developer's expense, in connection with any Subsequent Approvals to the extent that such additional environmental review is required by applicable Laws, including CEQA. Developer acknowledges that if the City determines, based on additional required environmental review in accordance with CEQA, that the modified project will result in significant new effects or substantially increases the severity of effects beyond those identified in the FEIR for the Project, City may require, and Developer shall comply at its expense with all additional mitigation measures required to mitigate such impacts.

4.5.1 Compliance with CEQA Mitigation Measures. Developer shall comply with all Mitigation Measures imposed as applicable on each Project component, except for any Mitigation Measures that are expressly identified as the responsibility of a different party or entity. Without limiting the foregoing, Developer shall be responsible for the completion of all Mitigation Measures identified as the responsibility of the "owner" or the "project sponsor" or the "project applicant". The Parties expressly acknowledge that the FEIR and the associated MMRP are intended to be used in connection with each of the Approvals and any Subsequent Approvals to the extent appropriate and permitted under applicable Law. Nothing in this Agreement shall limit the ability of the City to impose conditions on any new, discretionary permit resulting from a modification to the Project, as such conditions are determined by the City to be necessary to mitigate potentially significant adverse environmental impacts identified through any subsequently required CEQA process and associated with that Project modification or a Subsequent Approval or permit; provided, however, any such conditions must be in accordance with Applicable Law.

4.6 Nondiscrimination. In the performance of this Agreement, Developer agrees not to discriminate against any employee, City employee working with any Developer's contractor or subcontractor, applicant for employment with such contractor or subcontractor, or against any person seeking accommodations, advantages, facilities, privileges, services, or membership in all business, social, or other establishments or organizations, on the basis of the fact or perception of a person's race, color, creed, religion, national origin, ancestry, age, height, weight, sex, sexual orientation, gender identity, domestic partner status, marital status, disability or Acquired Immune Deficiency Syndrome or HIV status (AIDS/HIV status), or association with members of such protected classes, or in retaliation for opposition to discrimination against such classes.

4.7 City Cost Recovery.

4.7.1 Developer shall timely pay to the City the Impact Fees set forth in Exhibit M with respect to the Project or the Project Site as set forth in Section 5.6. Such fees shall be the only Impact Fees applicable to the Project or Project Site during the Term of this Agreement (and no new development or impact fees or exactions or other fees, contributions, special taxes, exactions, impositions or dedications, whether any of the foregoing are imposed as a fee, a zoning requirement or otherwise, shall apply to the Project or Project Site, except as expressly permitted in this Agreement).

4.7.2 Except as otherwise set forth in this Agreement and/or the Exhibits hereto, Developer shall timely pay to the City all applicable Processing Fees with respect to the processing or review of applications for the Approvals and Subsequent Approvals as set forth in Section 5.6.

4.7.3 Developer shall pay to the City all Processing Fees and City Costs incurred in connection with the drafting and negotiation of this Agreement, and defending the Approvals as set forth in Section 7.4, and in processing and issuing any Subsequent Approvals or administering this Agreement (except for the costs that are covered by Processing Fees), in accordance with any existing or future Reimbursement Agreement between Developer and the City with respect to such Processing Fees and City Costs.

4.7.4 The Parties shall enter into a Reimbursement Agreement with respect to Processing Fees and City Costs pursuant to which Developer shall reimburse the City for Processing Fees and City Costs incurred in performing work in connection with coordinating and processing Subsequent Approvals required to implement the Project, including but not limited to any further environmental review, Conformance Review Applications, phased final subdivision maps, and grading and building permits, all on an expedited basis. The Reimbursement Agreement

shall establish the City's commitment to process Subsequent Approvals on an expedited basis and the terms for Developer's reimbursement to the City for such Processing Fees and City Costs, and shall set forth (i) the scope of City Costs eligible for reimbursement; (ii) a process for the parties to agree to an annual (or other applicable period based on the anticipated scope of the work) budget of Processing Fees and City Costs based on anticipated schedule of reimbursable work, a reconciliation process for budget inconsistencies, and a process for periodically reducing or augmenting the budget where necessary; (iii) Developer's rights to review or challenge Processing Fees and City Costs; (iv) Developer's rights to review and verify for reasonableness consultant scopes of work, expenses, and budgets; (v) the City's responsibility for tracking, maintaining, and reporting Processing Fees and City Costs incurred in relation to an approved budget; (vi) the process for Developer's payment of Processing Fees and City Costs; and (vii) any other related terms mutually agreed upon between the Parties. The Reimbursement Agreement shall be in a form substantially similar to the form attached hereto as Schedule A.

4.8 Prevailing Wages. Developer acknowledges that Developer shall be required to pay prevailing wages to all persons performing labor in the construction of public improvements on the Project Site to the extent required by California law, including specifically the California Labor Code, the California Public Resources Code, and the requirements of the Department of Industrial Relations, and as may be required by the Municipal Code or City rules, regulations, or policies. Developer shall include this requirement in any contract entered into by Developer for the construction of any such public improvements. Upon request, Developer and its contractors shall provide to City any workforce payroll records as needed to confirm compliance with this Section.

4.9 Indemnification of City. To the fullest extent by law, Developer shall indemnify, reimburse, and hold harmless the City and its officers, agents and employees (the "City Parties")

from and, if requested, shall defend them against any and all loss, cost, damage, injury, liability, judgments, attorney fee awards, and claims ("Losses") arising or resulting directly or indirectly from (i) any third party claim arising from a Default by Developer under this Agreement, (ii) Developer's failure to comply with any Approval, Subsequent Approval or Non-City Approval, (iii) the failure of any improvements constructed pursuant to the Approvals, Subsequent Approvals, or this Agreement, to comply with any Federal or State Laws, the Existing Standards or any permitted Future Changes to Existing Standards, (iv) any accident, bodily injury, death, personal injury, or loss of or damage to property occurring on a Project Site (or off-site, with regard to the Public Improvements) in connection with the construction by Developer or its agents or contractors of any improvements pursuant to the Approvals, Subsequent Approvals or this Agreement, (v) a Third-Party Challenge instituted against the City or any of the City Parties, (vi) any contract dispute between Developer, its contractors or subcontractors, any other third party, or any combination thereof, relating to the construction of any part of the Project, including but not limited to disputes related to prevailing wage requirements, and (vii) any dispute between Developer and any Transferee or any subsequent owner of any portion of the Project Site or development thereof relating to any assignment of this Agreement or the obligations that run with the land, or any dispute between Developer and any Transferee or other person relating to which party is responsible for performing certain obligations under this Agreement, each regardless of the negligence of, and regardless of whether liability without fault is imposed or sought to be imposed on, the City or any of the City Parties, except to the extent that such indemnity is void or otherwise unenforceable under applicable Law, and except to the extent such Loss is the result of the sole negligence or willful misconduct of any City Party. The foregoing indemnity shall include, without limitation, reasonable attorneys' fees and costs and the City's reasonable cost of

investigating any claims against the City or the City Parties. All indemnifications set forth in this Agreement shall survive the expiration or termination of this Agreement .

4.9.1 The City shall promptly notify Developer of any claim, action or proceeding within the scope of this Section and the City shall cooperate fully in the defense of any such claim or action, but shall have the right to resolve any challenge, in any manner, in its sole discretion, provided, however, Developer's consent shall be required if the resolution of the challenge shall require a payment by Developer or limit Developer's rights under this Agreement. The City shall invoice Developer for any City costs or fees for which Developer is responsible under Section 4.8 in the manner and subject to the provisions of Section 4.6, including pursuant to a Reimbursement Agreement.

5. VESTING AND CITY OBLIGATIONS

5.1 Vested Rights. By granting the Approvals, the City has made a policy decision that the Project, as described herein and as may be modified in accordance with the Approvals, is in the best interests of the City and promotes the public health, safety and welfare. Developer shall have the vested right to develop the Project as set forth in this Agreement, and authorized by the Approvals, including but not limited to, the Downtown West Planned Development Zoning District, the General Development Plan, the Downtown West Planned Development Permit, the Vesting Tentative Map for Downtown West, and including without limitation with the following vested elements: the land uses, height and bulk limits, including the maximum density, intensity and gross square footages, the permitted uses, the provisions for open space, and the Impact Fees set forth in Exhibit M (collectively, the "Vested Elements"). The Vested Elements are subject to and shall be governed by Applicable Laws. The expiration of any building permit or Approval shall not limit the Vested Elements, and Developer shall have the right to seek and obtain

subsequent building permits or approvals, including Subsequent Approvals at any time during the Term, any of which shall be governed by Applicable Laws. Each Subsequent Approval, once granted, shall be deemed an Approval for purposes of this Section 5.1.

5.2 Existing Standards. The City shall process, consider, and review all Subsequent Approvals in accordance with (i) the Approvals, (ii) the San José General Plan, the Municipal Code (including the Subdivision Code), amendments to the Municipal Code set forth in City Council Ordinance No. [REDACTED] and all other applicable City policies, rules, and regulations, as each of the foregoing is in effect on the Effective Date ("Existing Standards"), as the same may be amended or updated in accordance with permitted Future Changes to Existing Standards as set forth in Section 5.4, and (iii) this Agreement (collectively, "Applicable Laws").

5.3 Criteria for Subsequent Approvals; Limitation on City's Future Discretion. As set forth in Section 5.6 below, Developer and City shall commence the preparations necessary for the City to be ready to receive and promptly process applications for Subsequent Approvals. Developer shall be responsible for obtaining any required Subsequent Approvals. The City, in granting the Approvals and vesting the Project through this Agreement, is limiting its future discretion with respect to Subsequent Approvals to the extent that they are consistent with the Approvals and this Agreement. The City acknowledges and agrees that (i) Developer's commitment to provide the various benefits described in this Agreement is, in part, consideration for the City's agreement to limit its discretion with respect to Subsequent Approvals and to process Subsequent Approvals in a prompt and efficient manner, and (ii) the City's inability or refusal to process Subsequent Approvals in such manner and otherwise in accordance with this Agreement and the Approvals may cause Developer significant harm. Accordingly, in no event shall a City Agency deny, or withhold issuance of a Subsequent Approval based upon items that are in

compliance with the Approvals and this Agreement, unless required by Applicable Law, and shall consider all such applications pursuant to the procedures set forth in the Approvals (including the Downtown West Planned Development Zoning District and its accompanying General Development Plan, and the Downtown West Design Standards and Guidelines), as applicable, and in accordance with its customary practices (subject to the requirements of this Agreement). Subject to the requirements of this Agreement, the City shall not impose any new condition for a Subsequent Approval that conflicts with the Approvals, except when such condition is necessary to bring the Subsequent Approval into compliance with Applicable Laws. For any part of a Subsequent Approval request that has not been previously reviewed or considered by the applicable City Agency (such as additional details or plans), the City Agency shall exercise its discretion consistent with the Approvals and otherwise in accordance with the City's customary practice (but subject to the requirements of this Agreement). City Agency discretion for certain Subsequent Approvals, including but not limited to Conformance Review Applications, shall be exercised consistent with the General Development Plan, Downtown West Planned Development Permit, and other Approvals as applicable. Consequently, the City shall not use its discretionary authority to change the policy decisions reflected by the Approvals and this Agreement or in such manner as would prevent or delay development of the Project as contemplated in the Approvals and this Agreement. If the City denies any application for a Subsequent Approval that implements the Project as contemplated by the Approvals, then such denial must be consistent with Applicable Laws and the City must specify in writing the reasons for such denial and shall suggest, in a detailed writing, modifications required for approval of the application. Any such specified modifications shall be consistent with Applicable Laws and City staff shall promptly approve the application if it is subsequently resubmitted for City review and corrects or mitigates, to the City's

reasonable satisfaction, the stated reasons for the earlier denial in a manner that is consistent and compliant with Applicable Laws and does not include significant new or additional information or materials that give the City a reason to object to the application under the standards set forth in this Agreement. Nothing in the foregoing shall impact or limit the City's discretion with respect to: (i) proposed Subsequent Approvals that seek a Material Change to the Approvals, or (ii) City approvals of subsequent tentative maps or vesting tentative maps, to the extent required by Law, not contemplated by the Approvals; (iii) City's ability to address any public health, or safety concerns, or to comply with applicable State or Federal Laws. Until such time as the City approves the application for Subsequent Approval, Developer shall have no obligation to provide any of the Public Benefits specifically associated with the development that is the subject of the Subsequent Approval. Notwithstanding the foregoing, and for clarity, deviations or modifications authorized to be approved pursuant to procedures established by the General Development Plan, without requiring amendment to the General Development Plan, shall not constitute a Material Change. By way of example and without limitation, approval of allowable transfers and allowable conversions described on Sheet 3.03 of the General Development Plan and of minor modifications, exceptions, deferrals, amendments to the Planned Development Permit, including DWDSG, DISC process, each as described on Sheet 8.02 of the General Development Plan would not constitute Material Changes. Additionally, adjustments, deviations or modifications authorized to be approved pursuant to procedures established by the Planned Development Permit, and Non-Material Amendments authorized by the Downtown West Improvement Standards or the Infrastructure Plan shall not constitute a Material Change.

5.4 Future Changes to Existing Standards. All future changes to Existing Standards and any other Laws, plans, or policies adopted by the City or adopted by voter initiative after the

Effective Date ("Future Changes to Existing Standards") shall apply to the Project and the Project Site, except to the extent they conflict with this Agreement, or the terms and conditions of the Approvals. In the event of such a conflict, the terms of this Agreement and the Approvals shall prevail, subject to the terms of this Section 5.4.

5.4.1 Developer and the City have provided for changes or adjustments to the Project due to DISC or Cranes in Sections 4.2.2 and 4.2.3 of this Agreement. As such, this Section 5.4.1 addresses other potential future changes to Existing Standards. Future Changes to Existing Standards shall be deemed to conflict with this Agreement and the Approvals if they substantially or materially:

(a) limit or reduce the density or intensity of the Project, or any part thereof, or otherwise require any reduction in the square footage or number of proposed Buildings or change the location of proposed Buildings or change or reduce other improvements from that permitted under this Agreement for the Project, the Existing Standards, or the Approvals;

(b) limit or reduce the height or bulk of the Project, or any part thereof, or otherwise require any reduction in the height or bulk of individual proposed Buildings or other improvements that are part of the Project from that permitted under this Agreement, the Existing Standards, or the Approvals;

(c) limit, reduce or change the allowed location of vehicular access or parking from that permitted under this Agreement, the Existing Standards, or the Approvals;

(d) limit any land uses for the Project from that permitted under this Agreement, the Existing Standards, the Approvals, or the Existing Uses;

(e) materially limit or control the rate, timing, phasing, or sequencing of the approval, development, or construction of all or any part of the Project in any manner, including the demolition of existing Buildings at the Project Site;

(f) require the issuance of permits or approvals by the City other than those required under the Existing Standards, except as otherwise provided in Section 5.4.2;

(g) limit or control the availability or the type or nature of public utilities, services, or facilities, or any privileges or rights to public utilities, services, or facilities for the Project as contemplated by the Approvals;

(h) conflict with, or otherwise limit, control, or change the management, delivery, or governance of a Privately-Owned Publicly Accessible Open Space as set forth in this Agreement;

(i) materially and adversely limit the processing or procuring of applications and approvals of Subsequent Approvals that are consistent with Approvals; or

(j) increase or decrease any Impact Fees, as they apply to the Project, except as permitted under Section 5.4.2, or impose any new development or impact fees or exactions or other fees, contributions, special taxes, exactions, impositions or dedications, whether any of the foregoing are imposed as a fee, a zoning requirement or otherwise, except as expressly permitted in this Agreement.

[Note to City] – *this language is undergoing Developer review. Also, if acceptable then other changes need to be made above, such as to clause (i), which already has a materiality modifier: Developer and City, working together in good faith, shall reasonably determine whether any Future Change(s) to Existing Standards shall be deemed to conflict with this Agreement or the Approvals in any material or substantial way and shall take into account the aggregate effect of all*

previous Future Changes and any then-proposed Future Changes on this Agreement or the Approvals when considering any material or substantial effect(s).

5.4.2 Pursuant to the Downtown West Planned Development Zoning District and General Development Plan, Developer may request to have a Future Change to Existing Standards that is different or conflicts with this Agreement and the Approvals applied to the Project or the Project Site. Developer must make such a request in writing to the Director of PBCE, and the request shall identify the specific standard and state a rationale for the request. The Director of PBCE may approve the request in his or her sole reasonable discretion; provided, however, that if the application of such Future Change to Existing Standards would constitute a Material Change, the application of such Future Change to Existing Standards shall require the approval of the City Council. The Director of PBCE's or the City Council's decision, as applicable, to approve or disapprove Developer's request is not subject to appeal. If Developer's request is approved, the Future Change to Existing Standards shall be deemed to be an Existing Standard. Nothing in this Agreement shall preclude Developer from pursuing any challenge to the application by the City of any Future Changes to Existing Standards to all or part of the Project Site.

5.4.3 The Parties acknowledge that, for certain parts of the Project, Developer must submit a variety of applications for Subsequent Approvals before Commencement of Construction. Developer shall be responsible for obtaining all Subsequent Approvals before the start of any construction to the extent required under Applicable Law. Notwithstanding anything in this Agreement to the contrary, when considering any such application for a Subsequent Approval, the City shall apply the then-applicable provisions, requirements, rules, or regulations that are contained in the California Building Standards Code, as amended by the City, including, without limitation, the requirements of the City's Building Code, Housing Code, Mechanical

Code, Electrical Code, Plumbing Code, Fire Code, and other uniform construction codes applicable on a City-Wide basis or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner.

5.5 Filing of Subdivision Maps. Developer shall have the right, from time to time and at any time, to file subdivision-related applications (including but not limited to applications for maps to help effectuate a Transfer or other assignment of the Developer's rights and obligations under this Agreement, tentative maps, vesting tentative maps, final maps or phased final maps, lot line adjustments, lot mergers, and certificates of compliance) with respect to some or all of the Project Site, to subdivide, reconfigure, or merge the parcels comprising the Project Site as may be necessary or desirable in order to develop a particular part of the Project as shown generally in Exhibit B. The specific boundaries of parcels shall be set by Developer in accordance with all applicable subdivision and development standards and approved by the City during the subdivision process. Nothing in this Agreement shall authorize Developer to subdivide or use any of the Project Site for purposes of sale, lease, or financing in any manner that conflicts with the Subdivision Map Act or with the Subdivision Code. Nothing in this Agreement shall prevent the City from enacting or adopting changes in the methods and procedures for processing subdivision and parcel maps so long as such changes do not conflict with the provisions of this Agreement, including any timing requirements set forth herein or in the Exhibits, or with the Approvals.

5.6 Impact Fees; Processing Fees. Developer shall endeavor to contact the City at least six (6) months prior to the date on which Developer anticipates submitting its first application for a Subsequent Approval. Following such contact, Developer and the City shall promptly meet and confer and work with Google in good faith to (i) arrange for the City to prepare its staff for receipt and processing of such application and the requested Subsequent Approvals and (ii) enter into a

Reimbursement Agreement with respect to the Processing Fees and City Costs for such work. Developer acknowledges and agrees that in order for the City to receive and process the initial and subsequent applications for Subsequent Approvals in the time frames specified in the Approvals, the City will need sufficient advance notice in order to have available staff to do such work. Accordingly, if Developer does not contact the City in advance and thereafter meet, confer and work with the City as set forth hereinabove, then the City will be unable to timely process applications for Subsequent Approvals until the City has had sufficient time to provide available staff and enter into a Reimbursement Agreement. Similarly, the City agrees to meet, confer and work with Google as set forth hereinabove in order to help assure the timely processing of Subsequent Approvals, including as set forth in the Implementation Guide.

5.6.1 Generally. The Project shall be subject to only those Impact Fees set forth in Exhibit M, as set forth in this Section 5.6, and the City shall not impose any new development or impact fees or exactions or other fees, contributions, special taxes, exactions, impositions or dedications, whether any of the foregoing are imposed as a fee, a zoning requirement or otherwise, on the development of the Project or impose new conditions or requirements for the right to develop the Project (including required contributions of land, public amenities, or services) except as set forth in this Agreement. The Parties acknowledge that the provisions contained in this Section 5.6 are intended to implement the intent of the Parties that Developer have the right to develop the Project pursuant to specified and known criteria and rules, and that the City receive the benefits which will be conferred as a result of such development without abridging the right of the City to act in accordance with its powers, duties and obligations, except as specifically provided in this Agreement.

5.6.2 Applicable Impact Fees. The Impact Fees that apply to the Project are those Impact Fees set forth in Exhibit M hereto.

(a) The Parties acknowledge that the Diridon Infrastructure Fee is otherwise an impact fee applicable to the Project. However, in-lieu of paying the fee, Developer intends to construct in-kind infrastructure improvements as more particularly described in Exhibit I, which, if constructed, are anticipated to satisfy the Project's Diridon Infrastructure Fee obligations

(b) The Parties acknowledge that the Parkland Dedication requirements of Chapter 19.38 of the San José Municipal Code, including payment of the Parkland Fee, otherwise apply to the Project. Developer will satisfy this obligation as more specifically described in Exhibit E and the exhibits and schedules thereto, subject to the default provisions provided therein. To the extent any Parkland Fee is owed, it shall be the Parkland Fee in effect upon the Effective Date of this Agreement, which Fee is reflected in Exhibit E8, subject only to escalation based on the Construction Cost Index.

5.7 Processing Fees; Reimbursement Agreement. Processing Fees for the Project shall be limited to the Processing Fees in effect, on a City-Wide basis or within the DSAP's Boundaries, applicable to the same or similarly situated (i) uses or (ii) work that Developer is asking the City to undertake, and applied in an equitable and non-discriminatory manner, at the time that Developer applies for the Subsequent Approval for which such Processing Fee is payable in connection with the applicable portion of the Project. The Reimbursement Agreement to be entered into between City and Developer pursuant to Section 4.6.4 shall provide for Processing Fees paid by Developer to be credited against any Developer obligation to pay City Costs in connection with City processing of Subsequent Approvals.

5.8 Public Health and Safety; Changes in Federal or State Laws.

5.8.1 City's Exceptions. Each City Agency having jurisdiction over the Project shall exercise its discretion under this Agreement in a manner that is consistent with the public health and safety and shall at all times retain its respective authority to take any action that is reasonably necessary to protect the physical health and safety of the public, abate public nuisance, (the "Public Health and Safety Exception"), or that is reasonably calculated and narrowly drawn to comply with applicable changes in Federal or State Law affecting the physical environment (the "Federal or State Law Exception"), including the authority to condition or deny a Subsequent Approval, or to adopt a new Law applicable to the Project, so long as such condition or denial or new regulation (i) is limited solely to addressing a specific and identifiable issue in each case required to protect the physical health and safety of the public, or (ii) is required to comply with a Federal or State Law, and (iii) is applicable City-Wide, or within the DSAP's Boundaries, to the same or similarly situated uses and applied in an equitable and non-discriminatory manner, and in the case of each of (i), (ii) and (iii) is not for independent discretionary policy reasons that are inconsistent with the Approvals or this Agreement. Developer retains the right to dispute any City reliance on the Public Health and Safety Exception or the Federal or State Law Exception.

5.8.2 Changes in Federal or State Laws. If Federal or State Laws issued, enacted, promulgated, adopted, passed, approved, made, implemented, amended, or interpreted after the Effective Date have gone into effect and (i) preclude or prevent compliance with one or more provisions of the Approvals or this Agreement, or (ii) materially and adversely affect Developer's or the City's rights, benefits, or obligations, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such Federal or State Law. In such event, this

Agreement shall be modified only to the extent necessary or required to comply with such Law, subject to the provisions of Section 5.8.4, as applicable.

5.8.3 Changes to Development Agreement Statute or Development Agreement Ordinance. This Agreement has been entered into in reliance upon the provisions of the Development Agreement Statute and the Development Agreement Ordinance. No amendment of or addition to the Development Agreement Statute or Development Agreement Ordinance that would affect the interpretation or enforceability of this Agreement or increase the obligations or diminish the development rights of Developer hereunder, or increase the obligations or diminish the benefits to the City hereunder, shall be applicable to this Agreement unless such amendment or addition is specifically required by Law or is mandated by a court of competent jurisdiction. If such amendment or change is permissive rather than mandatory, this Agreement shall not be affected.

5.8.4 Termination of Agreement. If any of the modifications, amendments or additions described in Section 5.8.2 or Section 5.8.3 or any changes in Federal or State Laws described above would materially and adversely affect the construction, development, use, operation, or occupancy of the Project as currently contemplated by the Approvals, or any material portion thereof, such that the Project becomes economically infeasible as reasonably determined by Developer (a "Law Adverse to Developer"), then Developer shall notify the City and propose amendments or solutions that would maintain the benefit of the bargain (that is this Agreement) for both Parties. If any of the modifications, amendments, or additions described in Sections 5.8.2 or Section 5.8.3 or any changes in Federal or State Laws described thereunder would materially and adversely affect or limit the Community Benefits (a "Law Adverse to the City"), then the City shall notify Developer and propose amendments or solutions that would maintain the benefit of

the bargain (that is this Agreement) for both Parties. Upon receipt of a notice under this Section 5.8.4, the Parties agree to meet and confer in good faith for a period of not less than thirty (30) days in an attempt to resolve the issue. If the Parties cannot resolve the issue in thirty (30) days or such longer period as may be agreed to by the Parties, then the Parties shall mutually select a mediator at JAMS in San José for nonbinding mediation for a period of not less than thirty (30) days. If the Parties remain unable to resolve the issue following such mediation, then (i) Developer shall have the right to terminate this Agreement following a Law Adverse to Developer, upon not less than thirty (30) days prior notice to the City, and (ii) the City shall have the right to terminate this Agreement following a Law Adverse to the City, upon not less than thirty (30) days prior notice to Developer; provided, notwithstanding any such termination, Developer shall be required to Complete, in accordance with this Agreement, the Base Requirements, Community Benefits, and Privately-Owned Publicly Accessible Open Space for which substantial site work, including any demolition, grading and foundation work, has occurred in connection with any particular new Building as set forth in Section 4.

5.9 No Action to Impede Approvals. Except and only as required under Section 5.8, the City shall take no action under this Agreement, nor impose any condition on the Project, that would conflict with this Agreement or the Approvals. An action taken or condition imposed shall be deemed to be in conflict with this Agreement or the Approvals if such actions or conditions result in the occurrence of one or more of the circumstances identified in Section 5.6.1.

5.10 Estoppel Certificates. Developer may, at any time, and from time to time, deliver notice to the Director of PBCE requesting that the Director of PBCE certify to Developer, a potential Transferee, a potential lender to Developer, or a Mortgagee in writing that to the best of the Director of PBCE's knowledge: (i) this Agreement is in full force and effect and a binding

obligation of the Parties; (ii) this Agreement has not been amended or modified, and if so amended or modified, identifying the amendments or modifications and stating their date and providing a copy or referring to the recording information; (iii) Developer is not in Default in the performance of its obligations under this Agreement, or if in Default, to describe therein the nature and amount of any such Defaults; and (iv) the findings of the City with respect to the most recent annual review performed pursuant to Section 8 of this Agreement. The Director of PBCE, acting on behalf of the City, shall execute and return such certificate within forty-five (45) days after receipt of the request.

5.11 Existing, Continuing Uses and Interim Uses. The Parties acknowledge that the Existing Uses are lawfully authorized uses and may continue as such uses may be modified by the Project, provided that any modification thereof not a component of or contemplated by the Project is subject to the Zoning Code and the applicable provisions of Section 5. Developer may install interim or limited term and/or special event uses on the Project Site as provided for in, and consistent with, the requirements of the Downtown West Planned Development Zoning District, the accompanying General Development Plan, and/or the Downtown West Planned Development Permit.

5.12 Taxes. Nothing in this Agreement limits the City's ability to impose new or increased taxes or special assessments, or any equivalent or substitute tax or assessment, provided (i) the City shall not institute on its own initiative proceedings for any new or increased special tax or special assessment for a land-secured financing district (including the special taxes under the Mello-Roos Community Facilities Act of 1982 (Government Code §§ 53311 *et seq.*), but not including business improvement districts or community benefit districts formed by a vote of the affected property owners), that includes the Project Site unless Developer gives its express, prior

written consent (which it may withhold in its sole discretion except to the extent Developer has expressly requested that City institute proceedings for any such new or increased special tax or assessment, in which case Developer shall not unreasonably withhold its consent) to or specifically requests such proceedings, and (ii) no such tax or assessment shall be targeted or directed at the Project, including, without limitation, any tax or assessment targeted solely at all or any part of the Project Site, unless Developer gives its express, prior written consent (which it may withhold in its sole discretion) to or specifically requests such proceedings. Nothing in the foregoing prevents the City from imposing any tax or assessment against the Project Site, or any portion thereof, that is enacted in accordance with Law and applies on a City-Wide basis to the same or similarly situated property or uses in an equitable and non-discriminatory manner.

[Note to City – this language is still under Developer review: Developer shall endeavor to require the following provision, or a substantially similar version thereof, to be included in any general contract for the construction of base building improvements in the Project:

“Contractor shall, to the extent allowed by the California Department of Tax and Fee Administration and applicable sales and use tax laws and regulations ("Sales and Use Tax Laws"), coordinate with the City of San José to designate the City of San Jose as the place of use of any materials, goods, or services purchased by Contractor and the origin of any local sales taxes generated by Contractor. Notwithstanding the foregoing sentence, in no event shall Contractor be required to do anything that is in violation of or inconsistent with such Sales and Use Tax Laws.”

6. NO DEVELOPMENT OBLIGATION

Except as set forth in this Agreement and the Approvals, including, without limitation, the Ten Year and Twenty Year Development Obligations and other requirements set forth in Section 2.2, the timing of delivery of Base Requirements and Community Benefits as set forth in Exhibit C1, D, E, and I, the timing and delivery of Privately-Owned Publicly Accessible Open Space as described in Section 4.1.3(a), and the timing or phasing requirements forth in the FEIR and MMRP, there is no requirement under this Agreement that Developer initiate or complete development of the Project, or any portion thereof, or that development be initiated or completed within any period of time or in any particular order. The development of the Project is subject to numerous factors that are not within the control of Developer or the City, such as availability of financing, interest rates, access to capital, and such other factors. Except as expressly required by this Agreement and the Approvals, the City acknowledges that Developer may develop the Project in such order and at such rate and times as Developer deems appropriate within the exercise of its sole and subjective business judgment. In *Pardee Construction Co. v. City of Camarillo*, 37 Cal.3d 465 (1984), the California Supreme Court ruled that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development and controlling the parties' agreement. It is the intent of the Parties to avoid such a result by acknowledging and providing for the timing of development of the Project in the manner set forth herein. The City acknowledges that such a right is consistent with the intent, purpose and understanding of the Parties to this Agreement, and that without such a right, Developer's development of the Project would be subject to the uncertainties sought to be avoided by the Development Agreement Statute, the Development Agreement Ordinance and this Agreement.

7. MUTUAL OBLIGATIONS

7.1 Notice of Completion, Revocation or Termination. Upon any early revocation or termination of this Agreement (as to all or any part of the Project Site) under the circumstances and in the manner permitted herein, the Parties agree to execute, if requested in writing by the other Party, a written statement acknowledging such revocation or termination in the form attached as Exhibit N, signed by the appropriate agents of the City and Developer, and record such instrument in the Official Records. In addition, upon Developer's request, when one or more Buildings have been Completed, and all of the Base Requirements and Community Benefits, and other obligations and requirements tied to those specific Buildings have, in accordance with this Agreement, also been Completed, as more specifically set forth in the Notice of Completion, the City and Developer shall execute and record a Notice of Completion in the form attached as Exhibit N for the applicable property on which the Buildings, other facilities or improvements, or any combination thereof, are located.

7.2 General Agreement to Cooperate. As set forth in Section 5.3 above, in this Section 7.2 (including Section 7.2.1 below) and elsewhere in this Agreement, the Parties agree to cooperate with one another to expeditiously implement the Project in accordance with the Approvals, any Subsequent Approvals and this Agreement, and to undertake and complete all actions or proceedings reasonably necessary or appropriate to ensure that the objectives of this Agreement, the Approvals and any Subsequent Approvals are implemented, including any stated review periods therein. Except for ordinary administrative costs of the City, nothing in this Agreement obligates the City to spend any sums of money or incur any costs other than City Costs or costs that Developer must reimburse through the payment of permitted Processing Fees. The Parties agree that the PBCE Department or Public Works Department, as appropriate (or such other

department to whom the obligation is delegated by the Director of PBCE after notice to Developer), will act as the City's lead agency to facilitate coordinated City review of applications for the Project. As such, PBCE Department or Public Works Department (or such other designated department) staff will: (i) work with Developer to ensure that all such applications to the City are technically sufficient and constitute complete applications, and (ii) interface with City staff responsible for reviewing any application under this Agreement to facilitate an orderly, prompt and efficient review process that avoids delay and redundancies, and that is undertaken in the manner set forth in the Approvals, and any Subsequent Approvals.

7.2.1 Specific Actions by the City. The City actions and proceedings subject to this Agreement shall be through the PBCE Department, as well as affected City Agencies (and when required by applicable Law, the City Council), and shall include, upon application by Developer, instituting and completing proceedings for the temporary or permanent closing or occupancy, widening, modifying (including changes from vehicular to pedestrian use) or changing the grades of streets, alleys, sidewalks, and other rights-of-way, and other necessary modifications of the streets, the street layout, and other public or private rights-of-way in or near the Project Site, including streetscape improvements, encroachment permits, improvement permits, and any requirement to abandon, remove, and relocate public utilities (and, when applicable, City utilities) within the public rights-of-way as identified in the Approvals and Subsequent Approvals. Except as set forth in Section 9.3.4 and upon receiving payments of all applicable Processing Fees then due, City Agencies shall process with due diligence all complete submissions and applications by Developer on all permits, approvals, construction, or occupancy permits for the Project, subject to the acceptance of the same as complete; provided, however, that any delays in City's processing of such submission and applications attributable to a delay or failure by any Non-City Agency to

perform or grant any required action, approval, or authorization, shall not be deemed to be breach by City of this Section.

7.3 Non-City Approvals; Cooperation to Obtain Permits. The Parties acknowledge that certain portions of the Project may require the approval of Federal, State, and local governmental agencies that are independent of the City and not a Party to this Agreement ("Non-City Agencies"). The City will cooperate with reasonable requests by Developer in connection with Developer's efforts to obtain permits, agreements, or entitlements from Non-City Agencies as may be necessary or desirable for the development, operation and use of the Project, including with respect to the study and development of the District Systems as contemplated by the MOU (each, a "Non-City Approval").

7.3.1 City Cooperation Regarding Trail Alignments. City and Developer understand and agree that the proposed Los Gatos Creek Trail Multi-Use Trail segments included as part of the Project will enhance trail connectivity in the City of San José, and also will provide for the cohesive open space network envisioned by the Developer and City as part of the Project. To allow for Completion of the trail alignments, City and Developer specifically agree to cooperate in good faith, and City shall lead such efforts as appropriate or necessary, to secure authorization, including an easement, joint use, or similar agreement, for trail alignments and under-crossings that may affect property owned by the Santa Clara Valley Water District.

7.3.2 Conditions of Cooperation to Obtain Permits. The City's commitment to Developer under this Section 7.3 is subject to the following conditions:

(a) Throughout the permit process for any Non-City Approval, Developer shall consult and coordinate with each affected City Agency in Developer's efforts to

obtain the permits, agreements, or entitlements, and each such City Agency shall cooperate reasonably with Developer in Developer's efforts to obtain the same.

(b) Developer shall not agree to conditions or restrictions in any Non-City Approval that could create: (1) any obligations on the part of any City Agency that are in addition to any obligations under applicable Laws or other agreements with the applicable Non-City Agency, unless the City Agency agrees in writing, in its sole discretion and following the receipt of any necessary governmental approvals, to assume such obligations; or (2) any restrictions on City property that are in addition to any obligations under applicable Laws or other agreements with the applicable Non-City Agency, unless in each instance the City, including each affected City Agency, has previously approved, in its sole discretion and in writing, the conditions or restrictions following the receipt of any necessary governmental approvals. If the City does not agree to any such conditions or restrictions, and such refusal results in Developer's inability to resolve a conflicting obligation, then the City shall cooperate with Developer and the applicable Non-City Agency to arrive at a mutually acceptable resolution.

(c) The City shall cooperate with public utilities and communication service providers, including as necessary for the District Systems, to the extent that the cooperation efforts requested by Developer are consistent with the City's typical efforts in connection with other major development and construction projects in the City, subject to Processing Fees and Reimbursement Agreement.

7.3.3 Costs. Developer shall bear all costs associated with applying for and obtaining any necessary Non-City Approval, including reimbursement of City for any City Costs incurred in performing work in connection with Section 7.3 that is beyond the City's typical efforts in connection with other major development and construction projects in the City. Developer, at

no cost to the City, shall be solely responsible for complying with any Non-City Approval and any and all conditions or restrictions imposed on Developer or the Project as part of a Non-City Approval. Developer shall pay or otherwise discharge any fines, penalties, or corrective actions imposed as a result of Developer's failure to comply with any Non-City Approval.

7.4 Cooperation in the Event of Third-Party Challenge. In the event any administrative, legal, or equitable action or proceeding is instituted by any party, other than the City or Developer, challenging the validity or performance of any provision of this Agreement, the Project, the Approvals or Subsequent Approvals, the adoption or certification of the FEIR or other actions taken pursuant to CEQA, or other approvals under Laws relating to the Project, any action taken by the City or Developer in furtherance of this Agreement, or any combination thereof relating to the Project or any portion thereof ("Third-Party Challenge"), the Parties shall cooperate in defending against such challenge. The City shall promptly notify Developer of any Third-Party Challenge instituted against the City and/or the Project. To the extent permitted by then-applicable law, City agrees to take reasonable actions consistent with AB 900 to facilitate expedited legal review of any Third Party Challenge related to a Subsequent Approval.

7.4.1 Developer shall assist and cooperate with the City at Developer's own expense in connection with any Third-Party Challenge. The City Attorney's Office may use its own legal staff or outside counsel in connection with defense of the Third-Party Challenge, at the City Attorney's sole discretion. Developer shall reimburse the City for its actual costs in defense of the action or proceeding, including but not limited to the time and expenses of the City Attorney's Office and any outside counsel retained in connection with the defense and any consultants pursuant to a Reimbursement Agreement.

7.4.2 To the extent that any such Third-Party Challenge results in the entry of a final judgment or order limiting Developer's right to proceed with the Project or any material portion thereof under this Agreement (whether the Project commenced or not), including the City's actions taken pursuant to CEQA, Developer may elect to terminate this Agreement. Upon any such termination (or, upon the entry of a judgment terminating this Agreement, if earlier), the City and Developer shall jointly seek to have the Third-Party Challenge dismissed. Developer shall be responsible for payment of any costs, damages, attorney fee awards, or combination thereof that any court of competent jurisdiction may award to the third party as a result of any Third-Party Challenge.

7.5 Permits to Enter City Property. Subject to the rights of any third party, the rights of the public, and the City's agreement on the scope of the proposed work and insurance and security requirements, each City Agency with jurisdiction shall grant permits to enter City-owned property on the City's standard form permit, including, without limitation, provisions regarding release, waivers, and indemnification in keeping with the City's standard practices, so long as the same is consistent with Applicable Law, in order to permit Developer to enter City-owned property as necessary to construct the Project or comply with or implement the Approvals, Subsequent Approvals, or other requirements in this Agreement. The City and Developer acknowledge that the Major Encroachment Permit includes a form of Major Encroachment Agreement that will provide for certain access rights and obligations between the Parties.

7.6 Infrastructure Reimbursement. The Project provides for the construction of significant new or upgraded public infrastructure within the Project Site. Developer has provided a cost estimate of approximately one hundred seventy-four million dollars (\$174,000,000) for the upgraded public infrastructure, which includes costs for improvements both included and not

included in the existing Diridon Station Area Basic Infrastructure Fee pursuant to San José Municipal Code Chapter 14.35. Developer's cost estimate for public infrastructure improvements includes, among other improvements, enhanced right-of-way improvements, utilities upgrades and relocation, as further detailed in the Infrastructure Plan included as Exhibit I. The Developer and the City have agreed to a range of horizontal improvements to be confirmed as part of a future updated infrastructure plan or Nexus Study.

7.6.1 The City recognizes that some of the new and/or upgraded public infrastructure (excluding District Systems) may be beneficial not only to development within the Project Site but also to existing and future development outside of the Project Site, including development within the broader DSAP's Boundaries and surrounding portions of the City. Therefore, subject to appropriation of the funding by the City Council, the City will take actions reasonably necessary, and Developer will cooperate reasonably, to develop an updated or new infrastructure program (excluding District Systems), including preparation of appropriate infrastructure plans, technical (e.g., "nexus") studies and associated financial feasibility studies, that include the Project Site and which analyze the public infrastructure improvements to be installed by Developer. Such an infrastructure program may include impact mitigation fees, community facilities districts, infrastructure facilities districts, or other similar programs or mechanisms for the funding of the cost of public infrastructure improvements ("Funding Mechanism"). Upon adoption of a Funding Mechanism(s), Developer would be eligible to receive a credit and/or reimbursement (including pursuant to Municipal Code Section 14.35 et seq.) for the costs of installing qualifying improvements within the Plan Area, and the City and Developer would then reasonably cooperate to enter into a reimbursement agreement, for such reimbursement

and/or credit. To be eligible for such credit and/or reimbursement, all of the following would need to occur:

- (a) City Council approval of a Funding Mechanism(s) in accordance with State laws;
- (b) Construction of qualifying infrastructure subject to credit or reimbursement, which are supported by the appropriate technical (e.g., "nexus") studies and associated financial feasibility studies;
- (c) City Council approval of a reimbursement agreement between the City and Developer setting forth the terms and conditions for reimbursement, consistent with the above conditions;
- (d) City collection of sufficient funding in the infrastructure program(s) to provide reimbursement, subject to annual appropriation of the City Council; and
- (e) Compliance with applicable local, state, and federal laws.

The City agrees to work with Developer to secure additional infrastructure funding, including grants and/or reimbursement from available programs to provide infrastructure improvements in the Plan Area. For example, the City will work with Developer to implement the undergrounding of overhead electrical facilities by the Developer if legally permissible under the California Public Utilities Commission (CPUC) Electric Rule No. 20 program (https://www.pge.com/notes/rates/tariffs/tm2/pdf/ELEC_3860-E.pdf) and related CPUC regulations and orders subject to CPUC and PG&E approval, as well as, San Jose Municipal Code, Chapters 15.20, 15.24 and/or 15.26. Any and all undergrounding of electric facilities in the Plan Area by the Developer or a third party such as PG&E, shall also comply with the City's undergrounding policies, including any electrical voltage level within the project area (currently

set up to 115kV), and further including without limitation, the City's annual Fiscal Year Workplan for the Rule 20A and Rule 20B (In-Lieu Fee) Underground Utility Program and the Fiscal Year Rule 20B (In-Lieu Fee) Undergrounding Master Plan, as may be approved by the City Council.

7.6.2 In addition, City and Developer shall work together towards the solution of modifying the existing North Montgomery Street at-grade railroad crossing to serve as the sole emergency vehicle access point to Block A. Such work shall include obtaining any necessary CPUC approval of changes to the crossing. New technologies would be introduced at that crossing, such as remotely controlled bollards/gates and integrated communications between building fire alarm systems and rail and/or mass notification systems. City and Developer shall work in coordination to implement the appropriate technologies and necessary upgrades to the crossing to achieve safe and reliable emergency vehicle access to Block A.

7.6.3 Cinnabar Storm Drain Reimbursement. With respect to Developer's work to upgrade the City-owned stormwater drainage within Cinnabar Street (the "Cinnabar Storm Drain Work" or "Work"), Developer shall not undertake such Work unless City agrees to reimburse Developer in full. Developer shall not proceed with the Work unless and until City has provided Developer with sufficient information to demonstrate that it has funding sources available to fully reimburse Developer for its costs associated therewith immediately upon Completion of the Work. Alternatively, City and Developer may agree that Developer is to be reimbursed through the form of credits toward connection fees.]

7.7 Good Faith and Fair Dealing. The Parties shall cooperate with each other and act in good faith in complying with the provisions of this Agreement and implementing the Approvals and any Subsequent Approvals. In their course of performance under this Agreement, each Party shall refrain from doing anything that would render its performance under this Agreement

impossible. The Parties shall cooperate and shall undertake such actions as may be reasonably necessary to implement the Project as contemplated by this Agreement, including such actions as may be necessary to satisfy or effectuate any applicable conditions precedent to the performance of the Public Benefits.

7.8 Other Necessary Acts. Each Party shall use Good Faith Efforts to take such further actions as may be reasonably necessary to carry out this Agreement, the Approvals, and any Subsequent Approvals, in accordance with the terms of this Agreement (and subject to all applicable Laws) in order to provide and secure to each Party the full and complete enjoyment of its rights and privileges hereunder.

8. ANNUAL REVIEW OF DEVELOPER'S COMPLIANCE

8.1 Annual Compliance Review. Pursuant to Section 65865.1 of the Development Agreement Statute and the Development Agreement Ordinance, annual compliance review shall be conducted in accordance with Section 18.02.300 of the Development Agreement Ordinance. In the event of a conflict between the provisions of Section 18.02.300 and this Agreement, the terms of this Agreement shall apply. A copy of Chapter 18.02 of the Municipal Code as in effect on the Effective Date is attached hereto at Exhibit Q.

8.1.1 Effect on Transferees. If Developer has effected a Transfer or another assignment, transfer or conveyance permitted under this Agreement has occurred so that its interest in the Project Site and Public Benefit obligations, or a portion or portions thereof, has/have been divided between Developer and/or Transferees, then the annual review hereunder shall be conducted separately with respect to Developer and each Transferee, and the Planning Commission or City Council, as applicable, shall make its determinations and take its action separately with respect to Developer and each Transferee, as applicable, pursuant to the

Development Agreement Ordinance; provided, however, that if Developer and Transferee do not agree as to which party is responsible (as between Developer or Transferee) for fulfilling or performing a duty under this Agreement, then City shall have the right to require Developer and Transferee to submit to a joint annual review until the dispute is resolved. If the City Council terminates, modifies, or takes such other actions as may be specified in the Development Agreement Ordinance and this Agreement in connection with a determination that Developer or a Transferee has not complied with the terms and conditions of this Agreement, such action by the Director of PBCE, Planning Commission, or City Council shall be effective only as to the party to whom the determination is made and the portions of the Project Site in which such party has an interest.

9. ENFORCEMENT OF AGREEMENT; DEFAULT; REMEDIES

9.1 Enforcement. The only Parties to this Agreement are the City and Developer (and any successors and Transferees). This Agreement is not intended, and shall not be construed, to benefit or be enforceable by any other person or entity whatsoever.

9.2 Meet and Confer Process. Before sending a notice of Default in accordance with Section 9.3, the Party that may assert that the other Party has failed to perform or fulfill its obligations under this Agreement shall first attempt to meet and confer with the other Party to discuss the alleged failure and shall permit such Party a reasonable period, but not less than thirty (30) days and not more than sixty (60) days, to respond to or cure such alleged failure; provided, however, the meet and confer process shall not be required (i) for any failure to pay amounts due and owing under this Agreement, [Note to City: *this language is not needed. Transfer Agreements will provide rights and remedies for failure to transfer*](ii) ~~for a transfer to a third party of unimproved or improved land due and owing to the City~~, or (iii) if a delay in sending a notice

pursuant to Section 9.3 would impair, prejudice or otherwise adversely affect a Party or its rights under this Agreement. The Party asserting such failure shall request that such meeting and conference occur within twenty (20) business days following the request and if, despite the Good Faith Efforts of the requesting Party, such meeting has not occurred within twenty (20) business days of such request, such Party shall be deemed to have satisfied the requirements of this Section and may proceed in accordance with the issuance of a notice of default under Section 9.3.

9.3 Default. Except as otherwise set forth herein and/or in the Exhibits hereto, the following shall constitute a "Default" under this Agreement: (i) the failure to make any payment when due; or (ii) the failure to perform or fulfill any other material term, provision, obligation, or covenant of this Agreement, where in each case such failure remains uncured after the expiration of applicable notice and cure periods. The City shall follow the procedures set forth in Sections 18.02.260 and 18.02.300 of the Development Agreement Ordinance with respect to any alleged or actual Default of Developer. Notwithstanding the foregoing, if a failure can be cured but the cure cannot reasonably be completed within thirty (30) days, then it shall not be considered a Default if a cure is commenced within said 30-day period and diligently prosecuted to completion thereafter. Any notice of Default given by Developer to the City shall specify the nature of the alleged failure and, where appropriate, the manner in which said failure satisfactorily may be cured (if at all). The City shall follow the aforementioned provisions of the Development Agreement Ordinance with respect to any notice of Default to Developer. Notwithstanding any other provision in this Agreement to the contrary but subject to Article 12 below, if Developer conveys or Transfers some but not all of the Project and there is more than one Party that assumes obligations of "Developer" under this Agreement, there shall be no cross-default between the separate Parties that assumed Developer obligations. Accordingly, if, for example, a Transferee Defaults, it shall

not be a Default by any other Transferee or Developer that owns a different portion of the Project Site. As an alternative to the Default procedure set forth herein, the City may elect to first hold a compliance review as set forth in the Development Agreement Ordinance. Further, in the event of noncompliance with a condition required under an administrative permit or any subsequent planned development permit issued for a conditional or special use, the PBCE Director may revoke, suspend or modify the administrative permit or subsequent planned development permit or otherwise enforce the requirements of the administrative permit and subsequent planned development permit pursuant to the remedies available to the City under the Municipal Code. A violation of an administrative permit or a subsequently issued planned development permit for a conditional or special use shall not, by itself, constitute a violation of the Downtown West PD Permit.

9.4 Remedies.

9.4.1 Specific Performance. Subject to, and as limited by, the provisions of Section 9.3.3, 9.3.4 and 9.3.5, in the event of a Default, the remedies available to a Party shall include specific performance of this Agreement in addition to any other remedy available at law (including, under Section 18.02 of the Development Agreement Ordinance) or in equity.

9.4.2 Termination. Subject to the limitation set forth in Section 9.2, 9.3.4 and 9.3.5, in the event of a Default by the City, Developer may elect to terminate this Agreement by sending a notice of termination to the City, which notice of termination shall state the Default. This Agreement will be considered terminated effective upon the date set forth in the notice of termination, which shall in no event be earlier than sixty (60) days following delivery of the notice. The City shall follow the provisions of Sections 18.02.260 and 18.02.300 of the Municipal Code with respect to any termination of this Agreement as a result of Developer's Default.

9.4.3 Limited Damages. The Parties have determined that except as set forth in this Section 9.3.3, (i) monetary damages are generally inappropriate, (ii) it would be extremely difficult and impractical to fix or determine the actual damages suffered by a Party as a result of a Default hereunder, and (iii) equitable remedies and remedies at law not including damages but including specific performance, termination, and other injunctive or declaratory relief are particularly appropriate remedies for enforcement of this Agreement. Consequently, Developer and the City each agrees that it shall not be liable to the other for damages under this Agreement, and each covenants not to sue the other for or claim any damages under this Agreement and expressly waives its right to recover damages under this Agreement, except as follows: (1) either Party shall have the right to recover actual damages only (and not consequential, punitive or special damages, each of which is hereby expressly waived) for a Party's failure to pay sums to the other Party as and when due under this Agreement, (2) the City shall have the right to recover actual damages for Developer's failure to make any payment due, including any applicable Base Requirements or Community Benefits that are in the form of a cash payment, under this Agreement, (3) for any Base Requirement or Community Benefit for which specific performance is determined by a court of competent jurisdiction not to be an available remedy (and the attached Exhibit does not include a liquidated damages remedy), except if and to the extent directly or indirectly resulting from action or inaction by or on behalf of the City or any City Agencies ~~except if directly and solely resulting from action or inaction by or on behalf of City or any City Agencies,~~ the City shall have the right to monetary damages according to proof against Developer equal to the costs that would have been incurred by Developer to Complete the required Base Requirements or Community Benefits, and (4) the City shall have the right to administrative penalties or liquidated damages if and only to the extent expressly stated in an Exhibit or in Applicable Laws.

For purposes of the foregoing, "actual damages" means the actual amount of the sum due and owing under this Agreement, with interest as provided by Law, together with such judgment collection activities as may be ordered by the judgment, and no additional sums.

9.4.4 City Processing/Certificates of Occupancy. Except as otherwise set forth in this Agreement, including the Exhibits and Schedules attached hereto and Section 9.3 above (regarding no cross-defaults), the City shall not be required to process any requests for approval, including any Conformance Reviews or Subsequent Approvals, or take other actions under this Agreement during any period in which payments from Developer are past due or if Developer has committed a Default under this Agreement. Except as otherwise set forth in this Agreement, including the Exhibits and Schedules attached hereto and Section 9.3 above (regarding no cross-defaults), the City shall have the right to withhold a Final or Temporary Certificate of Occupancy for a Building, or both, as may be applicable under the requirements of this Agreement, until all of the required Public Benefits and other obligations triggered by, or associated with that Building have been Completed or otherwise substantially satisfied; provided, however, if the City issues a Final or Temporary Certificate of Occupancy, or both, before such obligations are Completed or substantially satisfied, then Developer shall promptly Complete (in accordance with this Agreement) such obligations following issuance.

9.5 Time Limits; Waiver; Remedies Cumulative. Failure by a Party to insist upon the strict or timely performance of any of the provisions of this Agreement by the other Party, irrespective of the length of time for which such failure continues, shall not constitute a waiver of such Party's right to demand strict compliance by such other Party in the future. No waiver by a Party of any condition or failure of performance, including a Default, shall be effective or binding upon such Party unless made in writing by such Party, and no such waiver shall be implied from

any omission by a Party to take any action with respect to such failure. No express written waiver shall affect any other condition, action or inaction, or cover any other period of time, other than as specified in such express waiver. One or more written waivers under any provision of this Agreement shall not be deemed to be a waiver of any subsequent condition, action or inaction, and the performance of the same or any other term or provision contained in this Agreement. Nothing in this Agreement shall limit or waive any other right or remedy available to a Party to seek injunctive relief or other expedited judicial and/or administrative relief to prevent irreparable harm. Except as expressly stated in this Agreement to the contrary, no right or remedy is intended to be exclusive of any other right or remedy; and each and every such right or remedy shall be cumulative.

9.6 Attorneys' Fees. Should legal action be brought by either Party against the other for a Default under this Agreement or to enforce any provision herein, the prevailing Party in such action shall not be entitled to recover its attorneys' fees and costs from the other Party. Each Party to the legal action shall bear its own attorneys' fees and costs.

10. MORTGAGE PROTECTION.

10.1 Mortgage Protection. This Agreement shall be superior and senior to the lien of any Mortgage placed upon the Project Site or any portion thereof after the date of recording of this Agreement. Notwithstanding the foregoing, no breach of or Default under this Agreement shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of any Mortgagee or Foreclosure Transferee who acquires title or possession to the Project Site, or any portion thereof.

10.2 Mortgagee Not Obligated; Exception for Community Benefits. Notwithstanding the provisions of Section 10.1 above, no Mortgagee or Mortgage Transferee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion, on the Project Site or applicable portion thereof, except that Base Requirements, Community Benefits, and Privately-Owned Publicly Accessible Open Space must nevertheless be completed as set forth in Section 4.1 and otherwise in accordance with this Agreement; provided, however, that a Mortgagee or Foreclosure Transferee shall not be entitled to devote the Project Site to any use, or to construct any improvements thereon, or to institute any uses other than those uses or improvements provided for or authorized by this Agreement, or otherwise allowed under the Vested Elements and Approvals. Additionally, notwithstanding that title to or possession of all or any portion of the Project Site shall have been acquired by a Mortgagee or Foreclosure Transferee, a failure to meet any construction deadlines under this Agreement as to any portion of the Project Site shall not relieve Developer of the consequences under this Agreement of, or liability under this Agreement for, the failure of such improvements to be completed.

10.3 Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any notice of Default given Developer hereunder and specifying the address for service thereof and enclosing a copy of its Mortgage, then City agrees (i) to use its best efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed a Default, and (ii) that if City determines that Developer is not in compliance with this Agreement, City shall likewise use its best efforts to serve notice of such noncompliance on such Mortgagee concurrently with service thereon on Developer. Each Mortgagee shall have the right during the same period

available to Developer to cure or remedy, or to commence to cure or remedy, the Default claimed or the areas of noncompliance set forth in City's notice, plus additional time, as reasonably determined by the Director of PBCE under Section 18.02.300, to allow Mortgagee sufficient time to make the election to cure and thereafter prosecute such cure to completion. If a Mortgagee shall be required to obtain title or possession in order to cure any Default, the time to cure shall be tolled so long as the Mortgagee is diligently attempting to obtain possession, including by appointment of a receiver or foreclosure, and provides City upon written request from time to time of reasonable evidence of such diligent efforts. A delay or failure by the City to provide such notice required by this Section shall extend, for the number of days until notice is given, the time allowed to the Mortgagee for cure.

11. AMENDMENT; TERMINATION; EXTENSION OF TERM

11.1 Amendment or Termination. This Agreement may only be amended with the mutual written consent of the City and Developer, provided following a Transfer, the City and Developer or any Transferee may amend this Agreement as it affects Developer or the Transferee and the portion of the Project Site owned by Developer or the Transferee without affecting other portions of the Project Site or other Transferees. Similarly, subject to any required environmental review, this Agreement may be amended to include any land or legal parcels that are located within the Project's Planned Development Zoning and General Development Plan, but which are not originally included in this Agreement, and in which Developer has a legal or equitable interest and to which Developer desires to have this Agreement apply, and any such amendment may approved and entered into by the Director of PBCE. Other than upon the expiration of the Term and except as provided in Sections 3.2, 5.8.4, 7.4.2, 9.2, and 11.2, this Agreement may only be terminated

with the mutual written consent of the Parties. The procedure for an amendment shall be as specified in the Development Agreement Ordinance.

11.2 City's Early Termination Rights for Failure to Satisfy Ten or Twenty Year Development Obligations. At each annual compliance review of this Agreement and of Developer's performance hereunder pursuant to Section 18.02.300 of the Development Agreement Ordinance, the City and Developer shall discuss the then-current status of Developer's satisfaction of the Ten Year or Twenty Year Development Obligation, as applicable, and, whether development and payment obligations remain to be performed in order to satisfy the Ten or Twenty Year Development Obligation. In addition, if Developer has not already satisfied the Ten Year or Twenty Year Development Obligation, as applicable, then, no earlier than one (1) year and not less than ninety (90) days prior to the end of the ten (10) or twenty (20)-year period described in Section 2.2, Developer shall give City notice of the status of Developer's satisfaction of the Ten Year or Twenty Year Development Obligation, as applicable, substantially in the form of the notice letter attached hereto at Exhibit P (the "Status Notice"). If Developer has given the City a Status Notice, and Developer thereafter fails to satisfy the Ten Year Development Obligation or the Twenty Year Development Obligation on or before the applicable deadline for satisfying the obligations thereunder, then the City may give Developer a termination notice at any time after the last date by which Developer must satisfy (a) the Ten Year Development Obligation, in the case of a notice regarding the failure to satisfy the Ten Year Development Obligation or (b) the Twenty Year Development Obligation, in the case of a notice regarding the failure to satisfy the Twenty Year Development Obligation, which termination notice shall terminate this Agreement effective as of the date of Developer's receipt of such termination notice; provided, however, that if Developer satisfies the applicable obligation prior to the date on which Developer receives the

termination notice, then such termination notice shall be null and void and this Agreement shall remain in effect. If (i) Developer fails to provide a Status Notice and (ii) Developer has not satisfied the Ten Year Development Obligation or Twenty Year Development Obligation, as applicable, and such failure to satisfy the applicable obligation is not then the subject of a dispute between the City and Developer, then this Agreement shall terminate on the date immediately following the end of the ten (10) or twenty (20)-year period described in Section 2.2, as applicable, without the need for the City to give Developer a termination notice.

11.3 Termination and Vesting. The term of any non-legislative Approvals, including any subdivision map approval, and Subsequent Approval shall coincide with and in no event extend beyond the Term of this Agreement notwithstanding any other statute, rule, or authority that purports to set a different term for such Approvals, and, except as expressly set forth in this Agreement, any termination under this Agreement shall concurrently effect a termination of the Approvals with respect to the terminated portion of the Project Site. Notwithstanding the foregoing, the General Plan amendments and adopted Downtown West Planned Development Zoning District and accompanying General Development Plan shall not be affected by the termination of this Agreement. If a Conformance Review has been approved during the Term of the Development Agreement, then the Project Sponsor shall be entitled to apply for, process, and obtain a building permit and introduce uses in reliance upon such Conformance Review even after termination of the Development Agreement provided that (i) in no event shall such rights apply to more than one million two hundred fifty thousand (1,250,000) rentable square feet of office, residential or commercial development in the aggregate and (ii) such termination of the Development Agreement shall not have occurred as a result of a Default by Developer. A Planned Development Permit issued for any portion of the Project Site shall not expire if Developer has

received a building permit for any part of the development described in the Planned Development Permit prior to termination of the Development Agreement. A Planned Development Permit issued for any portion of the Project Site shall not expire as to those uses commenced or Buildings that have Commenced Construction, during the term of the Development Agreement. In the event of any termination of this Agreement by Developer resulting from a Default by the City and except to the extent prevented by such City Default, Developer's obligation to Complete the applicable Base Requirements, Community Benefits, Privately-Owned Publicly Accessible Open Space, and/or payments required in satisfaction of City statutory and/or regulatory requirements as described in Section 4 shall continue as to any Building which has Commenced Construction and all relevant and applicable provisions of this Agreement shall be deemed to be in effect as such provisions are reasonably necessary in the construction, interpretation, or enforcement of this Agreement as to any such surviving obligations. The City's and Developer's rights and obligations under this Section 11.3 shall survive the termination of this Agreement.

11.4 Amendment Exemptions; Addition of Potentially Participating Parcels. The addition to this Development Agreement of any Potentially Participating Parcels shall not constitute a Material Change and shall not require an amendment to this Agreement; provided, however, that Developer or City may request an amendment (which may be approved by the Director of PBCE or the City Manager and executed by the City Manager) to formally memorialize the addition of any such parcels. No modification to a diagram or figure included as an Exhibit to this Agreement, and that is marked as "conceptual", shall by itself require an amendment to this Agreement. No issuance of a Subsequent Approval, or amendment of an Approval or Subsequent Approval, shall by itself require an amendment to this Agreement. No change, modification, deviation, or amendment to the Project that is authorized to be approved pursuant to procedures

described in the Downtown West Planned Development Zoning District or the Downtown West Planned Development Permit shall require an amendment to this Agreement. Further, in the event a Community Benefits Adjustment is required, such Adjustment shall not by itself require an amendment to this Agreement. Upon issuance or approval, any such matter shall be deemed to be incorporated automatically into the Project and vested under this Agreement (subject to any conditions set forth in the amendment or Subsequent Approval). Notwithstanding the foregoing, if there is any direct conflict between the terms of this Agreement and a Subsequent Approval, or between this Agreement and any amendment to an Approval or Subsequent Approval, then the Parties shall concurrently amend this Agreement (subject to all necessary approvals in accordance with this Agreement) in order to ensure the terms of this Agreement are consistent with the proposed Subsequent Approval or the proposed amendment to an Approval or Subsequent Approval. The Director of PBCE, Director of Public Works, and the Planning Commission, as applicable, shall have the right to approve changes to the Project as described in the Exhibits, including the Downtown West Planned Development Zoning District and the Downtown West Planned Development Permit, and in keeping with the City's customary practices, and any such changes shall not be deemed to conflict with or require an amendment to this Agreement or the Approvals so long as they do not constitute a Material Change. If the Parties fail to amend this Agreement as set forth above when required, however, then the terms of this Agreement shall prevail over any Subsequent Approval or any amendment to an Approval or Subsequent Approval that conflicts with this Agreement.

11.5 Extension Due to Legal Action or Referendum; Force Majeure; Rail Improvement Activity.

11.5.1 Litigation and Referendum Extension. If any litigation is filed challenging this Agreement, the FEIR, or an Approval having the direct or indirect effect of delaying this Agreement or any Approval (including but not limited to any CEQA determinations), including any challenge to the validity of this Agreement or any of its provisions, or if this Agreement or an Approval is suspended pending the outcome of an electoral vote on a referendum, then the Term of this Agreement and all Approvals shall be extended for the number of days equal to the period starting from the commencement of the litigation or the suspension (or as to Approvals, the date of the initial grant of such Approval) to the end of such litigation or suspension (a "Litigation Extension"); provided, however, that if any litigation is filed challenging any Subsequent Approval which has the effect of delaying any Subsequent Approval, the term of this Agreement solely as it applies to the specific Subsequent Approval(s) shall receive a Litigation Extension. The Parties shall document the start and end of a Litigation Extension in writing within thirty (30) days from the applicable dates.

11.5.2 Force Majeure. Upon the request of any party hereto, an extension of time will be granted for the period of delay caused by a Force Majeure Event, as provided in this Section 11.5.2, and no party shall be deemed to be in Default under this Agreement where delays in performance or failure to perform are caused by a Force Majeure Event and authorized pursuant to this Section 11.5.2. Promptly after learning of the occurrence of a Force Majeure Event that actually causes delay, the affected Party shall notify the other Party in writing of the occurrence of such Force Majeure Event, the manner in which such occurrence is likely to substantially interfere with the ability of the delayed Party to perform under this Agreement, and the anticipated length

of delay in performance resulting from the Force Majeure Event. Upon the other Party's receipt of such notice, the Term of this Agreement then in effect shall be extended by a period of time equal to the number of days during which performance is delayed due to the specified Force Majeure Event.

11.5.3 BART or Rail Improvement Activity. For development of the Project on the portion of the Project Site located north of Post Street, a Party's performance of its obligations under this Agreement as to the affected portion of the Project Site shall be excused during, and extended for a period of time equal to, any period of delay caused by reason of construction staging or other activities related to an extension of the Bay Area Rapid Transit system ("BART") by the Santa Clara Valley Transportation Agency ("VTA"), or other rail or infrastructure improvements that are not part of the Project ("Rail Improvement Activity") where such Rail Improvement Activity requires use of, or otherwise impacts development upon the Project Site located north of Post Street. Upon the request of any Party, an extension of time will be granted for the period of delay caused by Rail Improvement Activity, and no Party shall be deemed to be in Default under this Agreement where delays in performance or failure to perform are caused by Rail Improvement Activity. Promptly after learning of the occurrence of Rail Improvement Activity that actually causes or is reasonably anticipated (by the affected Party) to cause delay, the affected Party shall notify the other Party in writing of the occurrence of such Rail Improvement Activity, the manner in which such occurrence is likely to cause delay, and the anticipated length of delay in performance resulting from the Rail Improvement Activity. Upon the other Party's receipt of such notice, any deadline for performance of the obligations delayed as to the specific portion of the Project Site impacted, except the Ten Year Development Obligation and the Twenty Year Development Obligation deadlines, shall be extended, but only as to the affected portion(s) of the

Project Site by a period of time equal to the number of days during which performance is delayed due to the specified Rail Improvement Activity.

12. TRANSFER OR ASSIGNMENT

12.1 Permitted Transfer of this Agreement. Subject to Sections 12.2 and 12.5 and contingent upon the assignor and assignee entering into an Assignment and Assumption Agreement meeting the criteria set forth in Section 12.2 below, Developer shall have the right to sell, assign, convey, hypothecate, or otherwise transfer or alienate in whole or in part its rights, duties, obligations, or interests under this Agreement to any person or entity at any time during the term of this Agreement (a "Transfer") without the consent of City; provided, however, that in no event shall the obligations or benefits conferred upon Developer under this Agreement be at any time so Transferred except through a transfer of the associated, concomitant portion of the Project Site to which that obligation or benefit relates. In the event of a transfer of a portion of the Project Site, Developer shall have the right to Transfer its rights, duties, obligations or interests under this Agreement that are identified as Transferred with the transferred real property and to retain all rights, duties, obligations or interests other than those Transferred with the transferred real property; however, if an obligation relating to a portion of the Project Site is not Transferred together with the applicable portion of the Project Site itself, and the obligation is a condition to development of the portion transferred, then satisfaction of the obligation shall continue to be a condition to development of the portion transferred.

12.2 Assignment and Assumption Agreement. Subject to the provisions and conditions of this Subsection, upon the Transfer of any or all of the rights, duties, obligations or interests under this Agreement and receipt by City of an Assignment and Assumption Agreement in substantially the form provided as Exhibit O and as provided for herein, or a substantially similar

form acceptable in good faith to City (each an "Assignment and Assumption Agreement"), Developer may assign those obligations under this Agreement and the Approvals that: (a) are specified in the Assignment and Assumption Agreement as having been Transferred with the transferred real property and assumed by the Transferee, or (b) necessarily relate to the development or redevelopment of improvements located on the transferred real property owned by the Transferee, and (c) are not otherwise specified in the Assignment and Assumption Agreement as having been retained by Developer. Upon providing such Assignment and Assumption Agreement to City, any Default by a Transferee of any rights, duties, obligations or interests so Transferred and assumed by the Transferee shall not thereby constitute a Default by Developer with respect to the rights, duties, obligations or interests not Transferred, but any obligations that are conditions to development on the applicable portion of the Project Site and any conditions to development on said portion shall remain conditions to development on said portion. Notwithstanding anything to the contrary in this Section 12, the Assignment and Assumption Agreement with respect to any Transfer of the legal parcel that is currently referred to as the "Social Heart" in the Parkland Agreement shall contain the express assignment and assumption of the bonding requirements with respect to such parcel that are set forth in the Parkland Agreement. Further, the airspace parcel for the subterranean garage beneath the Social Heart City-Dedicated Open Space (the "Garage") may only be Transferred with an office Building that is at least four hundred thousand (400,000) square feet in size. Following Completion of construction of the Social Heart City-Dedicated Open Space and the Garage, a reciprocal easement agreement ("REA") between the City and owner of the Garage shall be promptly executed following City's issuance of a Notice of Acceptance (as defined in the Parkland Agreement) for the Social Heart City-Dedicated Open Space and recordation of the grant deed. The REA shall include provisions

to require commercially reasonable property and liability insurance that includes coverage for the replacement of the Garage.

12.2.1 Failure by a Transferee to deliver a written Assignment and Assumption Agreement hereunder shall not affect the validity of a transfer by Developer of the portion of the Project Site so transferred to the Transferee, except that the Assignment and Assumption Agreement shall only be effective and Transferee shall only obtain any rights for the transferred property pursuant to the terms of this Agreement at such time as the City has received a fully executed copy of the Assignment and Assumption Agreement. The parties to an Assignment and Assumption Agreement shall use Good Faith Efforts to coordinate with City (including City's attendance at meetings) to address in detail whether and how each obligation and right set forth in this Agreement shall be divided, allocated, assigned or otherwise Transferred, in whole or in part, between Developer and a Transferee so as to avoid later confusion regarding what obligations and rights have and have not been Transferred. Developer shall reimburse City for the City Costs of coordination with the Developer and each potential Transferee, whether or not the coordination results in a transfer. Where a transfer of a portion of the Project Site has been completed, Developer and said Transferee shall be jointly and severally liable and obligated to City to fulfill any duty or obligation under this Agreement (and under the other Approvals or Vested Elements) where Developer and a Transferee do not agree as to which party is responsible (between Developer or a Transferee) for fulfilling or performing a duty or obligation under an Assignment and Assumption Agreement. Where a transfer of a portion of the Project Site has been completed but City has not received an Assignment and Assumption Agreement that Transfers a particular duty or obligation under this Agreement or under the Approvals or Vested Elements in question, then, notwithstanding the foregoing, City shall have the right to look to Developer (i.e., the assignor),

and such Developer shall remain liable and obligated to City to fulfill those duties or obligations under this Agreement.

12.2.2 Provided that City has received an Assignment and Assumption Agreement pursuant to Section 12.2 hereof, any Impact Fees set forth in Exhibit M, Mitigation Measures, Processing Fees, taxes or special assessments, and any other costs, burdens, obligations, mitigation measures, and exactions of any kind to implement development of the Project pursuant to this Agreement (which City may impose or require only consistent with this Agreement) (collectively, "Additional Conditions") imposed by City as a condition to the approval of any development permit application for such development submitted or authorized to be submitted to City by any Transferee of any portion of the Project Site related to a portion of the Project Site owned or controlled by the Transferee shall be imposed entirely on such portion of the Project Site and shall not be imposed by City directly on other portions of the Project Site or the owners of such other portions; provided, however, that nothing in this Section precludes City from imposing upon a Transferee that applies or authorizes an application for a development project those costs, burdens, obligations, mitigation measures, conditions of approval, and exactions appropriate to such proposed development project and otherwise consistent with this Agreement. Further, in the event of any Transfer pursuant to Section 12 hereof, all fees, costs, burdens, obligations, exactions, or other requirements of any kind transferred to Transferee shall be completed in accordance with the timing required under this Agreement, including any applicable Exhibits or Schedules to this Agreement.

12.3 Notice of Transfer. Developer shall, in accordance with the notice provisions of Section 14.11 and at least thirty (30) days prior to the anticipated effective date of a proposed Transfer of any portion of the Project Site, provide written notice to the City Manager and the

Director of PBCE of (a) the identity or identities and addresses for notices of said Transferee(s), (b) the anticipated effective date of the Transfer of the portion of the Project Site at issue, and (c) the right, title, or interest in the portion of the Project Site that is the subject of the proposed Transfer. Additionally, a Transferor, including without limitation Developer, shall provide the City Manager and the Director of PBCE with written notice of the effective date of a Transfer of any right, title or interest in any portion of the Project Site within ten (10) days after such effective date. Subject to Section 12.2 hereof, notwithstanding the foregoing, failure to provide either notice required under this Section 12.3 shall not, by itself, affect: (a) the validity of the Transfer at issue nor (b) the ability of a Transferee to provide an Assignment and Assumption Agreement to City pursuant to the provisions of this Section.

12.4 District Systems Transfers. Notwithstanding any of the foregoing, any transfers of District Systems, including infrastructure, rights and obligations relating to service shall be consistent with the requirements of the conditions of approval relating to District Systems in Council Resolution No. [_____].

12.5 Certain Limitations on Transfers of Office and Residential Development.
Notwithstanding the foregoing, with respect to office development:

12.5.1 (1) Developer shall not have the right to Transfer to a Third Party Transferee portions of the Project Site designated for development of office space under the General Plan and DSAP land use maps (without first obtaining the City's written consent, which shall not be unreasonably withheld, conditioned or delayed) if such Transfer would be effective prior to the date on which Google LLC or any Google Affiliate has achieved Substantial Note to City – the changes remains subject to Developer review: Completion of two million (2,000,000) gross square feet of office development in the Project Site; and (2) at no time may the aggregate

amount of gross square feet of potential office development on the portions of the Project Site Transferred to a Third Party Transferee(s) exceed forty percent (40%) of the amount of gross office square footage for which the Substantial Completion of the base Building(s), by or on behalf of Google LLC or any Google Affiliate has occurred. For the purposes of illustration only, if such Substantial Completion of base Building(s), by or on behalf of Google LLC or any Google Affiliate, for three million (3,000,000) gross square feet of office development has occurred and physical site work has commenced and vertical construction application(s) has/have been submitted on another one million (1,000,000) gross square feet of office development, then Transfers to Third Parties of portions of the Project Site intended for development of office space under the Approvals of up to one million six hundred thousand (1,600,000) gross square feet (i.e., 40% of 4,000,000) shall be allowed without City consent but otherwise subject to the provisions of this Article 12. City Manager shall consider, in good faith, any request by Google LLC or any Google Affiliate to Transfer office development rights to a Third Party Transferee(s) in a manner inconsistent with this Section 12.5 if such Transfer would likely result in the development of office space earlier than would otherwise occur if such Transfer were not to proceed; and

12.5.2 with respect to residential, hotel, limited-term corporate accommodations, and retail development, City's consent shall not be required for any Transfer so long as such Transfer is to (1) Lendlease or any Lendlease Affiliate or (2) a Qualified Developer.

12.6 Non-Transfers. Subject to the terms and conditions, herein, the following shall not be considered a Transfer and shall not require the City's consent and shall not be subject to Section 12.5: (i) leases, subleases, licenses, other occupancy agreements, or easements, sale-leaseback transactions; or the granting of any mortgage or deed of trust or any foreclosure thereof or deed-in-lieu with respect thereto; (ii) any change, directly or indirectly, in the ownership

interests of Google LLC or any Google Affiliate or any Transferee or any of their respective affiliates, (iii) joint ventures in which Google LLC or any Google Affiliate has major decision rights; and (iv) any transfer of land or improvements to the City or the City's designee or to non-profits approved by City in satisfaction of obligations under this Agreement or the Approvals. Notwithstanding the foregoing provisions of this Section 12.6 but subject to Section 12.5 above, (i) if any such transaction includes the transfer of rights and obligations under this Agreement and (ii) Developer and the transferee enter into an Assignment and Assumption Agreement as described herein above and provide a copy of such agreement to the City, then Developer may elect to have any of the transactions described in this Section 12.6 be treated as a "Transfer" under this Agreement and the transferee with respect thereto be a treated as a "Transferee".

12.7 Reasonableness of Transfer Requirements. The parties agree that the restrictions and conditions on the right to assign any portion of the Project Site set forth in this Agreement are necessary and appropriate to assure the achievement of the objectives of the General Plan, the Approvals and this Agreement and are reasonable. Developer agrees to and accepts the restrictions herein set forth in this Section 12 as being a material inducement to the City to enter into this Agreement.

12.8 City Administration. City shall administer the provisions of this Section 12 through the City Manager.

13. DEVELOPER REPRESENTATIONS AND WARRANTIES

13.1 Interest of Developer; Due Organization and Standing. Developer represents that it has a legal or equitable interest in the Development Parcels described in Exhibit B1 to this Agreement, with authority to enter into this Agreement on behalf of all fee owners of the Project Site. Developer is a Delaware limited liability company, duly organized and validly existing and

in good standing under the Laws of the State of Delaware, and in full compliance with all applicable Laws of the State of California. Developer has all requisite power to own its property and authority to conduct its business as presently conducted. Developer represents and warrants that there is no existing lien or encumbrance recorded against any Development Parcel that, upon foreclosure or the exercise of remedies, would permit the beneficiary of the lien or encumbrance to eliminate or wipe out the obligations set forth in this Agreement that run with applicable land.

13.2 No Inability to Perform; Valid Execution. Developer represents and warrants that it is not a party to any other agreement that would conflict with Developer's obligations under this Agreement and it has no knowledge of any inability to perform its obligations under this Agreement. The execution and delivery of this Agreement and the agreements contemplated hereby by Developer have been duly and validly authorized by all necessary action. This Agreement will be a legal, valid, and binding obligation of Developer, enforceable against Developer in accordance with its terms.

13.3 Conflict of Interest. Through its execution of this Agreement, Developer acknowledges that it is familiar with the provisions of Section 607 of the City's Charter, Title 12 of the City's Municipal Code, and Section 87100 *et seq.* and Section 1090 *et seq.* of the California Government Code, and certifies that it does not know of any facts which constitute a violation of said provisions and agrees that it will immediately notify the City if it becomes aware of any such fact during the Term.

13.4 Other Documents. To the current, actual knowledge of [_____], after reasonable inquiry, no document furnished by Developer to the City with its application for this Agreement nor this Agreement contains any untrue statement of material fact or omits a material


fact necessary to make the statements contained therein, or herein, not misleading under the circumstances under which any such statement shall have been made.

13.5 No Bankruptcy. Developer represents and warrants to the City that Developer has neither filed nor is the subject of any filing of a petition under the federal bankruptcy law or any federal or state insolvency laws or Laws for composition of indebtedness or for the reorganization of debtors, and, to the best of Developer's knowledge, no such filing is threatened.

14. MISCELLANEOUS PROVISIONS.

14.1 Entire Agreement. This Agreement, including the preamble paragraph, Recitals and Exhibits, and the agreements between the Parties specifically referenced in this Agreement, constitutes the entire agreement between the Parties with respect to the subject matter contained herein.

14.2 Incorporation of Exhibits. Except for the Approvals which are listed solely for the convenience of the Parties, each Exhibit to this Agreement is incorporated herein and made a part hereof as if set forth in full. Each reference to an Exhibit in this Agreement shall mean that Exhibit as it may be updated or amended from time to time in accordance with the terms of this Agreement.

14.3 Binding Covenants; Run With the Land. Pursuant to Section 65868 of the Development Agreement Statute, from and after recordation of this Agreement, all of the provisions, agreements, rights, powers, standards, terms, covenants, and obligations contained in this Agreement shall be binding upon the Parties and, subject to Section 12, their respective heirs, successors (by merger, consolidation, or  otherwise) and assigns, and all persons or entities acquiring the Project Site, any lot, parcel or any portion thereof (including any Potentially Participating Parcels) or any interest therein, whether by sale, operation of law, or in any manner whatsoever, and shall inure to the benefit of the Parties and their respective heirs, successors (by

merger, consolidation or otherwise) and assigns. Subject to the provisions on Transfers set forth in Section 12, all provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants and benefits running with the land pursuant to applicable Law, including but not limited to California Civil Code Section 1468.

14.4 Applicable Law and Venue. This Agreement has been executed and delivered in and shall be interpreted, construed, and enforced in accordance with the Laws of the State of California. All rights and obligations of the Parties under this Agreement are to be performed in the City of San José, and the County of Santa Clara shall be the venue for any legal action or proceeding that may be brought, or arise out of, in connection with or by reason of this Agreement.

14.5 Construction of Agreement. The Parties have mutually negotiated the terms and conditions of this Agreement and its terms and provisions have been reviewed and revised by legal counsel for both the City and Developer. Accordingly, no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement. Language in this Agreement shall be construed as a whole and in accordance with its true meaning. The captions of the paragraphs and subparagraphs of this Agreement are for convenience only and shall not be considered or referred to in resolving questions of construction. Each reference in this Agreement to this Agreement or any of the Approvals shall be deemed to refer to this Agreement or the Approvals as amended from time to time pursuant to the provisions of this Agreement, whether or not the particular reference refers to such possible amendment. In the event of a conflict between the provisions of this Agreement and the Development Agreement Ordinance, the provisions of this Agreement will govern and control.

14.6 Project Is a Private Undertaking; No Joint Venture or Partnership. The development proposed to be undertaken by Developer on the Project Site is a private development. The City has

no interest in, responsibility for, or duty to third persons concerning any of said improvements. Developer shall exercise full dominion and control over the Project Site, subject only to the limitations and obligations of Developer contained in this Agreement.

Nothing contained in this Agreement, or in any document executed in connection with this Agreement, shall be construed as creating a joint venture or partnership between the City and Developer. Neither Party is acting as the agent of the other Party in any respect hereunder. Developer is not a state or governmental actor with respect to any activity conducted by Developer hereunder.

14.7 Recordation. Pursuant to the Development Agreement Statute and Development Agreement Ordinance, the City Clerk shall have a copy of this Agreement recorded in the Official Records within ten (10) days after the mutual execution and delivery of this Agreement or any amendment thereto, with costs to be borne by Developer.

14.8 Obligations Not Dischargeable in Bankruptcy. Developer's obligations under this Agreement are not dischargeable in bankruptcy.

14.9 Survival. Following expiration of the Term, this Agreement shall be deemed terminated and of no further force and effect except for any provision which, by its express terms, survive the expiration or termination of this Agreement.

14.10 Signature in Counterparts. This Agreement may be executed in duplicate counterpart originals, each of which is deemed to be an original, and all of which when taken together shall constitute one and the same instrument.

14.11 Notices. Any notice or communication required or authorized by this Agreement shall be in writing and may be delivered personally or by registered mail, return receipt requested. Notice, whether given by personal delivery or registered mail, shall be deemed to have been given

and received upon the actual receipt by any of the addressees designated below as the person to whom notices are to be sent. Either Party to this Agreement may at any time, upon notice to the other Party, designate any other person or address in substitution of the person and address to which such notice or communication shall be given. Such notices or communications shall be given to the Parties at their addresses set forth below:

To City:

Director of Planning, Building, and Code Enforcement
Planning Department
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

with a copy to:

City Attorney
Office of the City Attorney
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

City Manager
Office of the City Manager
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

Director of Economic Development
Office of the City Manager
City of San José
200 East Santa Clara Street
San José, CA 95113-1905

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

Coblentz Patch Duffy & Bass LLP
One Montgomery Street, Suite 3000
San Francisco, CA 94104
Attn: Head of the Real Estate and Land Use Department

14.12 Severability. Except as is otherwise specifically provided for in this Agreement with respect to any Laws which conflict with this Agreement, if any term, provision, covenant, or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions of this Agreement shall continue in full force and effect unless enforcement of the remaining portions of this Agreement would be unreasonable or grossly inequitable under all the circumstances or would frustrate the purposes of this Agreement.

14.13 Public Records Act. Developer understands and agrees that under the City's Open Government Ordinance (Municipal Code, Title 12, Chapter 12.21) and the California Public Records Act (California Government Code Section 250 *et seq.*), this Agreement and any and all records, information, and materials submitted to the City hereunder are public records subject to public disclosure. To the extent that Developer in good faith believes that any financial materials reasonably requested by the City constitutes a trade secret or confidential proprietary information protected from disclosure under the Public Records Act and other Laws, Developer shall mark any such materials as such. When a City official or employee receives a request for information that has been so marked or designated, the City may request further evidence or explanation from Developer. If the City determines, in its sole discretion, that the information does not constitute a trade secret or proprietary information protected from disclosure, the City shall notify Developer

of that conclusion and that the information will be released by a specified date in order to provide Developer an opportunity to obtain a court order prohibiting disclosure.

14.14 Non-Liability of City Officials and Others. Notwithstanding anything to the contrary in this Agreement, no individual board member, director, commissioner, officer, employee, official or agent of City or other City Parties shall be personally liable to Developer, its successors and assigns, in the event of any Default by City, or for any amount which may become due to Developer, its successors and assigns, under this Agreement.

14.15 Non-Liability of Developer Officers and Others. Notwithstanding anything to the contrary in this Agreement, no individual board member, director, officer, employee, official, partner, employee or agent of Developer or any Affiliate of Developer shall be personally liable to City, its successors and assigns, in the event of any Default by Developer, or for any amount which may become due to City, its successors and assign, under this Agreement.

14.16 No Third Party Beneficiaries. There are no third party beneficiaries to this Agreement.

14.17 Number of Days. Provisions in this Agreement relating to the number of days shall be calendar days, unless otherwise specified, provided that if the last day of any period to give notice, reply to a notice, or to undertake any other action occurs on a Saturday, Sunday, or a bank or City holiday, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding City working day.

[signatures follow on next page]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day
and year first above written.

CITY:

CITY OF SAN JOSÉ,
a municipal corporation

Approved as to form:

Nora Frimann, City Attorney

By: _____
Toni Taber, City Clerk

By: _____
Johnny V. Phan
Chief Deputy City Attorney

Approved on _____, 2021
City Council Ordinance No. _____

[**Note:** City will need a corporate resolution
from Google establishing who has authority
to execute on behalf of Google, LLC.
Signatures will need to be notarized for
recording.]

Exhibit D

Affordable Housing Program

I. Intro/Recitals

The Downtown Mixed-Use Plan ("**Project**") provides for the development of a substantial amount of residential units to help address the City's housing crises related to both market rate and affordable housing. This Affordable Housing Program, which assumes 4,000 residential units, furthers Developer's and City's shared goal that development within the Diridon Station Area Plan ("**DSAP**") results in twenty-five percent (25%) of all residential units as affordable housing. Consistent with this goal, in October 2020, the City designated the Diridon Station Area as a prioritized growth area in the City-wide Affordable Housing Investment Plan for the development of affordable housing and use of affordable housing funds to encourage and assist in such development.

This Affordable Housing Program will enable the Project to provide financial and other commitments sufficient to (i) satisfy Developer's obligations under the City's adopted Inclusionary Housing Ordinance ("**IHO**") as set forth in San José Municipal Code Chapter 5.08 in effect on the Effective Date of the Development Agreement, a copy of which is attached hereto as Exhibit D5; and (ii) substantially further achievement of the twenty-five percent (25%) affordable housing goal within the DSAP.

This Affordable Housing Program is provided in order to satisfy and exceed the requirements under the IHO. Pursuant to Sections 5.08.570 and Sub-Section F of Section 5.08.610 of the IHO, the City Manager has determined that this Affordable Housing Program represents an acceptable alternative method of meeting the City's inclusionary housing requirements because, based on its terms, it will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of the IHO and any existing or future City guidelines for inclusionary housing.

As set forth in this Affordable Housing Program, Developer will fulfill its obligations through land dedication, monetary contributions, and production of on-site moderate income (100% of Area Median Income (as such term is defined below)) affordable residential units, and the City will through Good Faith Efforts direct affordable housing funds generated by the Project to affordable housing projects on the land Developer dedicates to the City pursuant to this Affordable Housing Program for that purpose.

Terms that are used but not defined in this Affordable Housing Program shall have the meanings given such terms in Section VI below or in the body of the Development Agreement to which this Affordable Housing Program is attached.

II. Summary of the Affordable Housing Program

This Affordable Housing Program applies to all housing developed pursuant to the Development Agreement (and is based on the assumption that development of 3,400 market rate and 100% AMI units at an average unit size of 637 rentable square feet will occur) and consists of the following elements, which are summarized here and discussed in more detail in Sections III and IV below:

1. Developer's transfer of three parcels of real property, currently identified as Properties H1, H5 and H6, totaling approximately 2.15 acres, to the City (or its Designee) for use in the production of affordable housing. See Exhibit D1 for Site Plan.

2. Developer's production of a minimum of one hundred and seventy (170) inclusionary housing units at 100% of AMI, which units must be provided within the market rate buildings at a rate of 5% of the total number of units, consistent with the IHO Mixed Compliance Option.

3. Developer's production of a minimum of an additional thirty (30) inclusionary housing units at 100% of AMI as a community benefit, which units must be provided within the market rate buildings at a rate of 0.88% for the first 3,400 units (which, when added to the inclusionary units described in paragraph II.2 above, results in 5.88% of the first 3,400 residential units being restricted units at 100% of AMI).

4. Developer's payment of IHO in-lieu fees (either \$18.70 per rentable square foot (“rsf”)¹ if Developer provides 5% of the residential units as inclusionary units or \$43.00 per rsf if Developer does not provide 5% of the residential units as inclusionary units)(“**IHO Fee**”) for all residential developments in the Project area pursuant to the IHO, subject to credits for the value of the H1, H5 and H6 Properties as listed in the table below that are transferred to the City or an affordable housing developer designated by the City (“**Designee**”) as more specifically set forth below.

5. Developer's payment of fees on the Project's office development pursuant to the City's adopted Commercial Linkage Fee Ordinance set forth in San José Municipal Code Chapter 5.11 et seq.

6. Subject to City Council appropriation of funding, the City's commitment to (i) implement the affordable housing priorities for the DSAP that are set forth in the City's Affordable Housing Investment Plan, which reinforces that the DSAP is a priority area for the City's available

¹ **Note to City:** we propose to define “rsf” per the IHO Staff report, which states: “‘To calculate the in-lieu fee cost for a rental project, the in-lieu fee is multiplied by all net rentable square feet. All net rentable square footage includes measurements from the outside surface of the exterior stud walls and include all finished living space. It does not include parking areas, common hallways, common rooms, building lobbies, balconies, elevator shafts, common stairways, utility shafts, janitorial closets, common recreation areas, and storage lockers not located within unit.’”

affordable housing funds, and (ii) use Good Faith Efforts to direct CLF generated from commercial development within the Project Site to the production of affordable housing on land transferred from Developer to the City for that use, and then to affordable housing production within the DSAP's Boundaries.

7. Developer's performance of the Early H6 Work and the Early H5 Work earlier than Developer would otherwise be obligated to perform such work.

8. Housing contribution of community benefits to the Community Stabilization and Opportunity Pathways Fund, as further described in Section IV B. below.

III. Inclusionary Housing Ordinance Compliance

A. Land Dedication; Early H5 and H6 Work; Availability of District Systems.

Developer shall dedicate Properties H1, H5 and H6, consisting of a total of approximately 2.15 acres of real property to the City (or its Designee) pursuant to separate transfer agreements between the Developer and the City, with respect to each of the properties. If, due solely to Developer's actions, any Property is reduced in size by (i) five percent (5%) or less from its current size as shown on the attached Site Plan (Exhibit D1), then the credits associated with such site shall be adjusted pro-rata or (ii) more than five percent (5%), then Developer shall have to right to (a) provide a replacement site to the City, which site shall be acceptable to the City's Director of Housing in his or her sole and absolute discretion or (b) if no such site is available, as reasonably determined by Developer or if the City rejects that site, then Developer shall pay the in-lieu fee of \$43.00 per rsf. The City will use Good Faith Efforts to deliver 600 units in total on the dedicated Properties. The actual number of units to be constructed on the dedicated Properties will be determined through the City's affordable housing development process, including input from potential affordable housing partners.

Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the eventual transfers of the H1, H5 and H6 Properties to City (the "**H1 Transfer Agreement**", "**H5 Transfer Agreement**" and "**H6 Transfer Agreement**", respectively, and collectively, the "**Transfer Agreements**").

H5 & H6 Early Work

In response to the City's desire to cause the dedication of the H6 and H5 Properties to occur earlier than required, Developer is willing to perform certain work with respect to those properties earlier than necessary subject to the terms herein below. The City and Developer agree that the cost of performing the Early H5 Work and Early H6 Work is \$19,300,000 as of the Effective Date of the Development Agreement. Such costs shall be subject to Annual Increases until the date of transfer of the H6 Property and the H5 Property respectively. As such, the City agrees that Developer may utilize a portion, in the amount of \$19,300,000, of the CLF that would be due with respect to the first and any subsequent office buildings in the Project comprising \$10,100,000 to accelerate dedication of the H6 Property ("**H6 Early Work CLF Amount**") and \$9,200,000 to accelerate dedication of the H5 Property ("**H5 Early Work CLF Amount**", and collectively with

the H6 Early Work CLF Amount, the “**Early Work CLF Amount**”). As set forth in more detail below, Developer will repay the Early Work CLF Amount as CLF; provided, however, that if Developer has not repaid all of the Early Work CLF on or before the expiration of the time period in which Developer must satisfy the Ten Year Development Obligation, then Developer shall pay the then-remaining balance of the Early Work CLF prior to the expiration of such time period.

The demolition and removal of the existing buildings, rough grading of the H6 Property, street and sidewalk improvements, and other work comprising the early H6 work will be further described in an exhibit to the Transfer Agreement for the H6 Property (“**Early H6 Work**”). Developer’s obligation to perform such work will be triggered by approval of the Vertical Improvement superstructure permit associated with the first office building (“**Permit**”), at which time the H6 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Temporary Certificate of Occupancy of the first and, if applicable, any subsequent office buildings will be reduced by the H6 Early Work CLF Amount. On receipt of the Permit, Developer will begin necessary drawings and permitting work associated with demolition of the buildings included in the Early H6 Work. Developer anticipates that it will take approximately fifteen (15) months (from the date on which Developer’s obligation to perform the Early H6 Work is triggered) to design, permit and complete the Early H6 Work. Once the Early H6 Work is complete, Developer will transfer the H6 Property per the H6 Transfer Agreement but in no event will the Closing Date for the transfer of the H6 Property be later than the date on which the Temporary Certificate of Occupancy is issued for the first Developer-constructed *market rate residential* building (subject to delays caused by Force Majeure or City-caused delays or if City has requested to defer the closing as more specifically set forth in the Transfer Agreement for H6). Upon (i) the closing of the transfer of the H6 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City’s request to defer the closing as more specifically set forth in the Transfer Agreement, Developer will (a) receive an IHO credit in the same amount as the H6 Early Work CLF Amount, and (b) be obligated to re-pay the H6 Early Work CLF Amount at Temporary Certificate of Occupancy of the office building that results in delivery of the cumulative amount of 2,500,000 sf of office development completed by Developer.

The demolition and removal of the existing buildings, rough grading of the H5 Property, street and sidewalk improvements, and other work comprising the early H5 work will be further described in an exhibit to the Transfer Agreement for the H5 Property (“**Early H5 Work**”). Developer’s obligation to perform such work will be triggered by the City’s notification to Developer (the “**H5 Notice**”) of the occurrence of either of the following, whichever is earlier, that (i) the H5 affordable housing developer has been selected and a funding commitment for predevelopment has been made, but no earlier than the Commencement of Construction of the affordable housing development on the H6 Property or (ii) it is the City’s reasonable expectation that the Temporary Certificate of Occupancy for the affordable housing development on the H6 Property will be issued approximately twelve (12) months from the date of such notice. The H5 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Temporary Certificate of Occupancy of the first and, if applicable any subsequent office buildings will be reduced by the H5 Early Work CLF Amount. On receipt of the H5 Notice,

Developer will begin necessary drawings and permitting work associated with the Early H5 Work. Developer anticipates that it will take approximately twelve (12) months (from the date on which Developer's obligation to perform the Early H5 Work is triggered) to design, permit and complete the Early H5 Work. Once the Early H5 Work is complete, Developer will transfer the H5 Property per the H5 Transfer Agreement, but in no event will the Closing Date for the transfer of the H5 Property be later than the date on which the Temporary Certificate of Occupancy is issued for the fourth Developer-constructed market rate residential building (subject to delays caused by Force Majeure or City-caused delays or if City has requested to defer the closing as more specifically set forth in the Transfer Agreement for H5) Upon (i) the closing of the transfer of the H5 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement, Developer will (a) receive an IHO credit in the same amount as the H5 Early Work CLF Amount, and (b) be obligated to re-pay the H5 Early Work CLF Amount at Temporary Certificate of Occupancy of the office building that delivers the cumulative amount of 3,500,000 sf completed by Developer.

District Systems are anticipated to be made available to the H5 and H6 Properties, in which case those Properties would have the right to connect to the District Systems subject to any required regulatory requirements and supply agreements consistent with other residential development being supplied by the District Systems. The timing of delivery and commissioning of the District Systems may not be such that they are available to the H5 and H6 Properties at the time they are being constructed, and Developer makes no representations as to when and if they will be made available in any specific timeframe. In the event they are made available to one or both of the properties, then City may elect to connect at its sole cost and expense.

B. On-Site Inclusionary Units.

Developer shall provide on-site inclusionary units as part of the market rate residential development in the Project in compliance with this Section 3 and the IHO's "Mixed Compliance Option" as described herein and in the following applicable provisions of the IHO attached at Exhibit D5: 5.08.525.

1. **Inclusionary Units.** In fulfillment of its IHO obligations, Developer shall produce a minimum of 5% on-site inclusionary units at 100% AMI within the market rate buildings, subject to Developer's right to obtain approval for clustering, as set forth in Section III.B.1(d), below. Assuming a total of 3,400 Developer-constructed residential units across the Project, one hundred seventy (170) on-site inclusionary residential units within the Project Site would be provided as deed-restricted units that are limited to occupancy by households with incomes up to 100% of the AMI, as published annually by the City (hereafter "**Restricted Units**").

a. As a Community Benefit, Developer shall provide, within the first three-thousand four hundred (3,400) Developer-constructed residential units developed, an additional thirty (30) Restricted Units limited to occupancy by households with incomes up to 100% of AMI. The additional 30 units will be provided on a prorata basis with the required 5%, with the result that the market rate buildings are anticipated to contain 5.88% Restricted Units.

b. Each Restricted Unit shall be deed-restricted consistent with the City's standard affordable housing forms for occupancy by income qualified households for the term provided in the Inclusionary Housing Ordinance as of the Effective Date, as such deed- restrictions are set forth in Schedule D3 *attached* hereto.

c. The Restricted Units shall be integrated into market rate housing, in accordance with the dispersion requirements of Section 5.08.470 of the IHO and this Affordable Housing Program, and shall not be concentrated in a single building, block, or geographic area of the Project. In the case of a project of ten (10) stories or more of mass timber (CLT) or Type 1 (concrete and steel) construction, the Restricted Units, may be dispersed through the lowest 50% of the building as measured by floor (for example: in a 20 story building, the lowest 50% is floors 1-10; for any fraction, the floor count is rounded up, e.g., if the building is 19 stories, then units would be provided in floors 1-10 stories).

d. Notwithstanding the foregoing provisions of this Section III. B.1, the Director of PBCE may approve (i) a market rate building that clusters Restricted Units in a wing of a building or (ii) placing all of the units in another building (on the same parcel or otherwise in the vicinity of the applicable market rate building(s)) if Developer submits a proposal, approved by the City's Director of Housing, with a satisfactory explanation of clustering benefits through the Conformance Review Process.

e. The Restricted Units shall consist of a mix of unit sizes that is substantially the same as the mix of unit sizes in each respective building (i) in which the Restricted Units are integrated or, (ii) in the case of clustering or location of the Restricted Units in a separate building, with respect to which the Restricted Units are built. The Restricted Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. The number of bedrooms in each unit and the average size of the units in each respective building shall be considered in determining whether the mix and size of Restricted Units is substantially the same as the overall mix and size of units in a building. Square footage will be considered comparable if the total average square footage of the Restricted Units is at least 85% of the total average square footage of the market rate units for each unit by bedroom type (for example, the average square footage for 1-bedroom Restricted Units must be at least 85% of the average square footage for 1-bedroom market rate units).

f. The quality of the exterior design of any building consisting entirely of Restricted Units and overall quality of construction of the Restricted Units must be consistent with the exterior design of comparable buildings containing market rate units. Restricted Units may have different interior finishes and features than the market rate units in the market rate building, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and the quality of materials and the size of structures.

g. If Developer pursues and obtains a residential condominium map for any residential building but operates such building's residential units as rental housing, then the rental housing IHO section applies as described in Section III.B.1. At any such time that all or any portion

of the mapped rental units become a for-sale unit, then the Restricted Units shall remain restricted, on a for-sale basis, at the same affordability levels. Existing tenants of the Restricted Units shall have first right of refusal to purchase their units and all subsequent sales of the Restricted Unit shall follow the City's IHO for-sale procedures. If the existing tenant does not exercise its first right of refusal, then the Developer shall make necessary relocation accommodations under the applicable relocation provisions of Municipal Code Section 20.170-400 thru 20.170-460 as in effect on the Effective Date [, whereupon the unit may be sold to a qualified buyer at the then-applicable sales price for 100% AMI buyers per the City's IHO for-sale procedures. A Restricted Unit shall remain subject to the applicable regulatory agreement for the full term of the applicable restrictions, and if such form of regulatory agreement changes due to the unit becoming a for-sale unit, then the amount of time as a rental Restricted Unit shall count against the for sale restricted term.

C. IHO Fees

This Affordable Housing Program assumes compliance with the IHO's "Mixed Compliance Fee" provisions, such that so long as Developer restricts not less than 5.00% of the market rate units of a building as 100% AMI Restricted Units then, unless City has previously approved a lower percentage of 100% AMI units per Section III.B.1.(d) above, Developer shall be obligated to pay an IHO in-lieu fee of \$18.70 per rsf of each market rate residential unit and each Restricted Unit. All fees and credits under this Section II.C are in the amounts in effect in 2021 and shall escalate in lockstep based on the City's methodology for escalating the IHO Fee which is based on the change in the Engineering News Record (ENR) Construction Cost Index for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication per the Mixed Compliance Option of the IHO code ("**Annual Increases**"). Pursuant to Schedule D-4, IHO Fee Credits (as defined in Schedule D-4) are earned at time of Closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the Closing would have occurred but for the City's exercise of its Extension right(s).

1. IHO Fee Rate. The Mixed Compliance Fee provision requires 5% on-site inclusionary units at 100% AMI and payment of the in-lieu fee of \$18.70 per rentable square foot for all units. Therefore, if Developer does not provide such 5% on-site inclusionary units, then the "In-Lieu Fee" option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1.(d)) in which case the \$18.70 fee shall apply. See Section B On-site Inclusionary Units for discussion of Community Benefits units at 100% AMI, an additional 0.88% will be provided at that time of the 5% on-site inclusionary (subject to clustering in Section III.B.1(d)). Should the Developer propose a condominium, for-sale project, then the applicable in-lieu fee rate applies which is \$25/rsf, subject to applicable fee increases per IHO Code.

2. Land Dedication (H1 Property) - IHO Fee Credit. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H1 Property to the City (or Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H1 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have

occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H1 Property is \$22,034,898. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$22,034,898 at \$18.70/rsf equals 1,179,337 sf of credit for residential rsf (including market rate and 100% AMI units).]

3. Land Dedication (H5 Property) - IHO Fee Credit. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H5 Property to the City (or Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H5 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H5 Property is \$9,226,561. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$9,226,561 at \$18.70/rsf equals 493,399 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

4. Land Dedication (H6 Property) - IHO Fee Credit. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H6 Property to the City (or its Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H6 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H6 Property is \$10,079,062. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$10,079,062 at \$18.70/rsf equals 538,987 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

5. Land Dedication - IHO Fee Credit.

The table below provides an illustrative summary of how the Project proposes to satisfy and exceed the IHO Fee requirements by means of land dedication and payments, as set forth above in this Affordable Housing Program, assuming development of 3,400 residential units.

This table is provided for illustrative purposes only and the dollar amounts included in the table are approximate numbers based on the assumptions described in this Section C.5, all of which may change as development proceeds based on the actual development program.	
Affordable Land Dedication	IHO Credits
H1	\$22M
H5	\$9.2M
H6	\$10.1M
Total Credits	\$41.3M

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The table above illustrates the IHO Fee Credits (in 2021 dollars) from land dedication of H1, H5 and H6 Parcels. IHO Fee Credits will convert to residential square footage as described in the examples above using the applicable fee. If Developer is developing for-sale units, then the applicable fee is \$25/rsf. For any residential units in excess of 3,400, Developer will satisfy its obligations under the IHO through the Mixed Compliance Option, whereby 5% of the units are on-site inclusionary affordable units and in-lieu fee payment of \$18.70/rsf is made, including as set forth in Section 6 below. If Developer does not provide such 5% on-site inclusionary units, then the “In-Lieu Fee” option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1(d)) in which case the \$18.70 rsf fee shall apply.

6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) not accrued any IHO Fee credits or (ii) exhausted all the credit attributable to the dedication of H1, H5 and H6, then Developer shall pay IHO Fees in the amount of (a) \$18.70 per rsf for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per rsf if Developer does not provide the 5% on-site inclusionary units.

7. Excess IHO Fee Credits. If there are excess IHO Fee credits at the end of the Term, then Developer would have the right to monetize the excess IHO Fee credits by selling them to other developers needing credits to satisfy their inclusionary housing obligations provided that Developer’s sale(s) of any such excess IHO Fee credits must close and be utilized as part of an approved Affordable Housing Compliance Plan, so long as the City does not unreasonably withhold approval of the Affordable Housing Compliance Plan, within five (5) years after the expiration or termination of the Term.

D. Process; Tracking and Reporting of Developer's Compliance

1. Data Chart with Application. Developer’s obligations in this Affordable Housing Program are subject to Developer proceeding with development, and such obligations shall be satisfied pro-rata on a building-by-building basis, as and when development proceeds, in accordance with this Affordable Housing Program and the other applicable provisions of the Development Agreement. As such, in order to track Developer’s compliance with the Affordable Housing Program, Developer shall submit a data chart with each Vertical Conformance Review Application that contains information addressing the following: the total rentable square footage of residential development proposed as part of each Vertical Conformance Review Application, including the number of market rate units and below-market rate units, including applicable AMI percentage; the location of the market rate units and below-market rate units; number of units broken down by unit type (e.g., studio, one bedroom); the leasing and marketing plan for below-market rate units² and a description of the access to amenities and the types of fixtures for the

² **Note to City:** Developer is working on adapting the City’s current marketing/rental guidelines to fit this Affordable Housing Program and will send City a draft soon.

market rate units and the below-market rate units, consistent with the guidelines in Sections III.B.1(e) and (f) above. The Affordable Housing Program information required to be submitted with each Vertical Conformance Review Application is further described in the Downtown West Conformance Review Implementation Guide.

2. Notices Regarding the H1, H5 and H6 Properties. Developer will provide City with advance notice of the anticipated closing date for dedication of each of the H1, H5 and H6 Properties per the terms of the respective Transfer Agreement. Developer will also include in the Conformance Review checklist a requirement that the Planning Department notify the Housing Department of Developer's application submittal in order to provide the Housing Department's production division with notice of the initiation of the Early H6 Work and Early H5 Work, as applicable. Developer will also notify the City after a ground lease with, or transfer to, Lendlease or a Lendlease Affiliate has been executed/has occurred for the first residential building.

3. Affordability Restrictions. As a condition precedent to the City's issuance of a Building Permit for development of a residential building in which any inclusionary units are to be constructed, Developer shall record the affordability restrictions attached hereto as Schedule C (the "**Affordability Restrictions**") against the real property on which any Restricted Unit is to be constructed. The term of the Affordability Restrictions for rental units shall be per the IHO. The Affordability Restrictions shall provide that, upon Developer's or owner's written request at any time following expiration, the City shall provide a release of the Affordability Restrictions in a form reasonably acceptable to the owner within thirty (30) days after such request.

IV. Other Fees and Fee Credits.

A. Commercial Linkage Fee Provisions.

1. Payment of CLF. Subject to Section III.A above regarding the Early H5 Work and the Early H6 Work, Developer shall pay the CLF in accordance with the adopted Commercial Linkage Fee Ordinance in effect on the Effective Date of the Development Agreement (a copy of the CLF is attached to the Development Agreement at Exhibit Q, subject to Annual Increases as described in the Commercial Linkage Fee Ordinance.

2. Allocation of CLF. Subject to annual appropriation and compliance with applicable laws, the City shall make Good Faith Efforts to allocate Developer-paid CLF to support the development of affordable housing on land that Developer dedicates for such purpose. Provided, however, if the City demonstrates the commitment of other funding sources for those dedicated parcels, then Developer-paid CLF shall be used to support affordable housing production within the DSAP's Boundaries. Good Faith Efforts include (i) the City's Housing Department making recommendations to the Mayor and City Council to provide any necessary annual budgetary approvals or authorizations that would allow such allocation of the Developer-paid CLF Fees, and (ii) an agreement to commence pre-development activity with respect to one or more Developer-dedicated properties previously transferred to City or for which Developer has satisfied all conditions precedent to City closing, promptly following Developer's submittal of (x) an office building construction permit application that contains information about the total square footage of such building, and (y) information to the City regarding the expected timing of payment of the

CLF for such office building (Final Certificate of Occupancy of office building). Such pre-development activity would include identifying potential qualified, experienced affordable housing developers for the Developer-dedicated affordable housing site or sites and identifying a pre-development loan with anticipation of CLF funding for the additional gap loan required. The City's agreement to allocate CLF generated from development within the Project Site to the Developer-dedicated properties shall not constitute use of City's funds to assist Developer since such funds will be used to accelerate production of affordable housing on the Developer-dedicated properties following their transfer to the City. Nothing in this program shall preclude the City from providing financial assistance for additional affordable housing units beyond those required by this Agreement. If no sites have been provided by Developer, or all the sites provided to date have been developed and/or have begun construction, and/or the City has achieved the 25% affordable housing goal in DSAP, then City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide.

B. Community Stabilization Fund. Office Development in the Project Site will result in contributions to the Fund that the City can then make available to housing stabilization efforts, all as more specifically described in Exhibit H (Community Stabilization and Opportunity Pathways Fund) to the Development Agreement.

V. DISC Adjustments

This Affordable Housing Program shall be subject to modification pursuant to the Development Agreement's provisions regarding Community Benefits adjustments due to acquisition by DISC Agencies or Other Transit Agencies, as applicable.

VI. Definitions

1. "Area Median Income" or "AMI" means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of San José in the event that such median income figures are no longer published periodically in the California Code of Regulations.

2. "CLF Resolution" means the City of San José Resolution No. 79705, adopted September 1, 2020, Establishing the Amounts of Commercial Linkage Fee in Accordance with Chapter 5.11 of Title 5 of the San Jose Municipal Code, a copy of which is attached to the Development Agreement at Exhibit Q.

3. "Commercial Linkage Fee" or "CLF" means the commercial linkage fee adopted by the City Council as set forth in Chapter 5.11 of Title 5 of the San José Municipal Code in effect on the Effective Date of this Development Agreement, and as further set forth in the CLF Resolution.

4. "Fund" means the Community Stabilization and Opportunity Pathways Fund described in Exhibit H to the Development Agreement.

5. **"H1 Property"** means that property as generally shown on Schedule D1 attached to this Affordable Housing Plan.

6. **"H5 Property"** means that property as generally shown on Schedule D1 attached to this Affordable Housing Plan.

7. **"H6 Property"** means that property as generally shown on Schedule D1 attached to this Affordable Housing Plan.

8. **"Inclusionary Housing Ordinance"** or **"IHO"** means the City of San José Inclusionary Housing Ordinance as set forth in Chapter 5.08 of Title 5 of the San José Municipal Code, adopted by Ordinance No. 30538, dated March 9 2021, related Resolutions No. ____ and ____, copies of which are attached hereto at Schedule D5.

Schedule D4 to Affordable Housing Program

Terms for Transfer of Parcels H1, H5 and H6 Pursuant to Transfer Agreements between Developer and City or City's Designated Affordable Housing Developer

Land Dedication – Key Terms of Transfer Agreements for Parcels H1, H5 and H6

A. **Land Dedication.**

Developer shall dedicate the H1, H5 and H6 Properties, consisting of a total of approximately 2.15 acres of real property, to the City or the City's designated affordable housing developer ("Designee") pursuant to separate Transfer Agreements between Developer and the City. Below are the key terms to be included in the respective Transfer Agreements.

B. **H1 Property.**

1. **Transfer Agreement:** Concurrently with entering into the Development Agreement, Developer and City shall enter into a separate Transfer Agreement for the transfer of the H1 Property to City in accordance with the terms and conditions set forth below and the terms and conditions of **Attachment A** attached hereto and incorporated herein (the "**H1 Transfer Agreement**"). The H1 Transfer Agreement will not be attached to the Development Agreement as an Exhibit. Any initially capitalized term used but not defined herein shall have the meaning given it in **Attachment A**.

2. **Legal Description of H1:** The indicative site plan of the property to be transferred shall be set forth in the H1 Transfer Agreement, and legal description to be provided prior to the Closing Date (as defined below) in accordance with Developer's Final Map or after the Closing Date, if mutually agreed upon with the City.

3. **Leases:** It shall be a condition to the closing under the H1 Transfer Agreement, for City's benefit, that Developer shall transfer the H1 Property unencumbered by and free of any leases, unless City otherwise waives such condition in writing.

a. **Ongoing Property Condition:** During the escrow period, Developer may record documents in connection with the Approvals. Following the closing, City or its Designee shall be responsible to keep the H1 Property in good, clean and safe condition. In connection therewith, City or Designees, as applicable, shall be responsible to maintain attractive fencing, and to provide for adequate lighting and security prior to and during development and construction of the H1 Property. This requirement shall also be set forth as a restriction in the Grant Deed for the H1 Property, which deed restriction shall run with the land of the H1 Property.

b. **Construction Right of Entry:** Effective as of the closing, City shall grant Developer such construction right of entry as may be reasonably necessary for the construction of Developer's

overall project, provided that such rights of entry do not materially interfere with City's development and use of the H1 Property.

c. **Remediation Easement:** Effective as of the closing, City shall grant Developer such remediation easements, licenses or access agreements as are necessary for Developer to implement any Groundwater Work as provided in **Attachment A**, subject to the terms and limitations set forth in **Attachment A** provided the work does not prevent the City from building a building from property line to property line and that the access does not interfere with the VIMS system.

4. **Closing Date:** The closing under the H1 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("**Closing Date**"). Subject to satisfaction of the closing conditions, the H1 Closing Date is anticipated to occur after the H5 Property and the H6 Property have been transferred to the City and on or before issuance of a Temporary Certificate of Occupancy for the seventh Developer-constructed market rate residential building (subject to delays caused by Force Majeure or City-caused delays or if City has requested to defer the closing as more specifically set forth in Section B.6.a below) after all existing IHO Fee Credits have been exhausted.

5. **Due Diligence:**

a. **Access:** City shall be entitled to the right of access to the H1 Property to conduct its due diligence on the terms and conditions set forth in the H1 Transfer Agreement. City shall complete its due diligence within ninety (90) days after execution of the Transfer Agreement ("**Diligence Period**"). Subject to the terms and conditions of the H1 Transfer Agreement (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence shall include site inspections only, given Developer's obligations as set forth in **Attachment A**.

b. **Title:** City shall review and approve title to the Property during the Diligence Period. Developer shall provide City with a then current title report for the H1 Property on or before execution of the Transfer Agreement.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections B.3 above and **Attachment A**, the following shall be conditions to the closing under the H1 Transfer Agreement, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H1 Transfer Agreement but which shall include any exceptions recorded in connection with obtaining the Approvals or required in order to satisfy the Approvals, as well as any exceptions recorded in connection with the development pursuant to the Approvals consistent with the Approvals); and (ii) Developer shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period.

The City's ability to secure funds or other commitments to enable the construction of affordable housing on the H1 Property shall not be a condition to closing; provided,

however, that the City shall have the right to extend (“**Extension**”) the Closing Date two (2) times for periods of one hundred eighty (180) days each (each, an “**Extension Period**”, the first such extension of the Closing Date being the “**Extended Closing Date**” and the second such extension of the Closing being the “**Outside H1 Closing Date**”) if the City has not identified the Designee by the scheduled Closing Date or Extended Closing Date, as applicable, by providing Developer with written notice of the exercise of the extension together with a status report of City’s efforts to identify the Designee together with documentation evidencing City's Good Faith Efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date, or has extended closing a second time, then by the Outside H1 Closing Date, the Grant Deed shall identify the Designee as the transferee/grantee of the H1 Property. If City has not identified and selected the Designee by the Extended Closing Date or Outside H1 Closing Date, as applicable, then there will be no further extensions of the closing and City shall take title to the H1 Property in City’s name or be in default of the H1 Transfer Agreement. In addition, if, as set forth in the H1 Transfer Agreement, City elects to defer the transfer of title of H1 Property to City (or its Designee) to the Extended Closing Period or Outside H1 Closing Date, as applicable, then the City shall reimburse Developer for property taxes payable with respect to such Property during the deferral period and Developer’s costs to light, fence, insure, and maintain the property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer’s request. IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) described in this section to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s). Developer shall provide the City with reasonable documentation of such taxes and costs.

b. Developer Conditions: In addition to the closing conditions specifically set forth in **Attachment A**, the following shall be conditions to the closing under the H1 Transfer Agreement, for Developer's benefit: (i) the City shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period, and (ii) Developer is obligated to transfer the H1 Property in order to satisfy its affordable housing requirements equal to the value of the IHO Fee Credit (as defined below) for the H1 Property (i.e., see Section B.8) as a result of the amount of market rate units being developed.

c. Pad-Ready Condition. Provided that the conditions set forth in **Attachment A** are satisfied, Developer shall cause the H1 Property to be delivered at closing in rough-graded, pad-ready condition for City's affordable housing development, based on the scope included as an exhibit to the H1 Transfer Agreement.

d. Assignment: Following the closing, City may assign its rights and obligations under **Attachment A** that expressly survive the closing to a developer of affordable housing.

8. IHO Fee Credits: As of the Effective Date, the amount of the IHO Fee Credit for the H1 Property shall be \$22,034,898 (the “**H1 Transfer IHO Fee Credits**”). \$22,034,898 IHO Fee Credit at \$18.70/rsf equals 1,178,337 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time of closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on

the date on which the closing would have occurred but for the City's exercise of its Extension right(s).

9. **No Assignment:** Except as set forth in Section B.7(d) above, City may not assign its rights or obligations under the H1 Transfer Agreement. As more specifically set forth in Section 6(a), above, the City may identify a Designee to take title to the H1 Property at closing and in such event, Developer shall provide for the H1 Property to be deeded to the Designee at closing.

10. **Purchase Price:** The purchase price for the H1 Property shall be \$1.00. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H1 Property being transferred directly to the Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the H1 Property was deeded directly to City), then City or the Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H1 Property (to be mutually agreed upon in the H1 Transfer Agreement), notwithstanding that the purchase price for the H1 Property is \$1.00.

11. **AS IS Sale:** Except for the environmental obligations as set forth in **Attachment A** that expressly survive the closing, at the closing, Developer shall transfer the H1 Property to City or Designee, as applicable, in its AS IS, WHERE IS condition and City and Designee shall waive and release all claims against Developer related to the physical and environmental condition of the H1 Property. City shall bear all construction costs related to the affordable housing project on the H1 Property.

12. **Default:**

a. **Default by City:** If City defaults under the H1 Transfer Agreement and fails to close, Developer shall have the right to terminate the H1 Transfer Agreement, and in such event, City shall continue to recognize the H1 Transfer IHO Fee Credits that Developer would have received if the H1 Agreement not been terminated due to City's default.

b. **Default by Developer:** If Developer defaults under the H1 Transfer Agreement and fails to perform the obligations thereunder, City's sole and exclusive remedy shall be to terminate the H1 Transfer Agreement, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence in which case Developer would not receive any H1 Transfer IHO Fee Credits and Developer shall satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least 300 affordable units as anticipated on the H1 Property, or Developer pays 150% of the IHO Fees due or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing.

C. **H5 and H6 Properties.** The H5 and H6 Properties will be transferred separately to the City. Developer anticipates that it will transfer the H6 Property first. Prior to such transfers, Developer will perform the Early H5 and H6 Work, as more specifically described in Section III.A of Exhibit D to the Development Agreement (the "**Early H5 and H6 Work**"), in order to help accelerate the development of affordable housing on the H5 and H6 Properties. Developer will

retain ownership of the mid-block crossing between the H5 and H6 Properties and shall provide to City a construction easement over the mid-block crossing for the time period covering construction on the H5 Property, H6 Property, or combination thereof, plus an additional six (6) months after the issuance of the last Temporary Certificate of Occupancy for a building on the H5 and H6 Properties.

1. Transfer Agreement: Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the transfer of the H5 Property and the H6 Property, respectively, to City in accordance with the terms and conditions set forth below and the terms and conditions of the Early H5 and H6 Work (individually the "**H5 Transfer Agreement**" and the "**H6 Transfer Agreement**" and sometimes collectively the "**H5 and H6 Transfer Agreements**"). The H5 Transfer Agreement and the H6 Transfer Agreement will not be attached to the Development Agreement as Exhibit(s).

2. Legal Description of H5 and H6: An indicative site plan of the H5 Property and the H6 Property (collectively, the "**H5 and H6 Properties**") will be attached to the H5 and H6 Transfer Agreements, with legal descriptions to be provided prior to the Closing Date. As set forth in Section C.2.a below, the legal descriptions may be modified prior to the Closing Date for each property in accordance with Developer's Final Map or after the Closing Date, if mutually agreed upon with the City.

a. Parcelization Condition: City acknowledges that the H5 and H6 Properties are not legal parcels as of the Effective Date. It shall be an unwaivable condition to the closing, for Developer's and City's benefit, that the H5 and H6 Properties shall be legal parcels for conveyance prior to the closing which legal separation shall be accomplished at Developer's cost.

b. Early H5 and H6 Work: Developer shall perform the Early H5 and H6 Work using the Early Work CLF Amount (as such term is defined in Section III.A. of Exhibit D to the Development Agreement) prior to the respective closings of the transfers of the H6 Property and the H5 Property. The description of the Early H5 and H6 Work, will be included as an exhibit to the H5 and H6 Transfer Agreements, respectively.

c. Construction of Private Street. Developer shall construct a private street serving the H block parcels, including the H5 and H6 Properties as part of the Early H5 Work. The City shall give notice to the Developer not later than twelve (12) months prior to the City's anticipated date of receiving a temporary certificate of occupancy ("**TCO**") for the H6 Property (the "**TCO Notice**"). City or its Designee will coordinate in a timely manner with Developer for noticing, access and other construction coordination necessary for Developer to construct and complete the private road. Details on this work will be included as an exhibit to each of the H5 and H6 Transfer Agreements.

3. Leases: It shall be a condition to the closing under each of the H5 and H6 Transfer Agreements, for City's benefit, that Developer shall transfer the H5 and H6 Properties unencumbered by and free of any leases, unless City otherwise waives such condition in writing.

4. Closing Date: The closing under the H6 Transfer Agreement shall occur following Completion of the Early H6 Work, on a date selected by Developer on at least sixty (60) days' prior written notice to City but in no event will the Closing Date for the transfer of the H6 Property be later than the date on which the Temporary Certificate of Occupancy is issued for the first Developer-constructed market rate residential building (subject to delays caused by Force Majeure or City-caused delays or if City has requested to defer the closing as more specifically set forth in Section C.6.a below) ("**H6 Closing Date**"). The closing under the H5 Transfer Agreement shall occur following Completion of the Early H5 Work, on a date selected by Developer on at least sixty (60) days' prior written notice to City but in no event will the Closing Date for the transfer of the H5 Property be later than the date on which the Temporary Certificate of Occupancy is issued for the fourth Developer-constructed market rate residential building (subject to delays caused by Force Majeure or City-caused delays or if City has requested to defer the closing as more specifically set forth in Section C.6.a below) ("**H5 Closing Date**"). As used in this Section 4, "**Completion**" shall mean that the H5 or H6 Early Work, as applicable, has been completed in accordance with the building permit(s) issued with respect to such work and the City Building Division has completed its final inspection of the work.

a. Ongoing Property Condition: During the escrow period, Developer may record documents in connection with the Approvals. Following each closing, City or its Designee shall be responsible to keep the H5 and H6 Properties in good, clean and safe condition. In connection therewith, City or Designee shall be responsible to maintain attractive fencing and to provide for adequate lighting and security prior to and during development and construction of the H5 and H6 Properties. This requirement shall also be set forth as a restriction in the Grant Deed(s) for the H5 and H6 Properties, which deed restriction shall run with the land of each of the H5 and H6 Properties.

b. Construction Right of Entry: Effective as of the closing, City shall grant Developer such construction rights of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H5 and H6 Properties. In addition, the H5 and H6 Transfer Agreements shall contain provisions whereby the City (or its Designee) and the Developer agree to coordinate construction activities and schedules to ensure timely construction of the private road, as more specifically described in Section C.2(c) above required for mutual benefit of the H5 Property, the H6 Property and the other H block market rate residential parcels, and such provisions shall survive the closing or may be in form of an easement or other agreement.

5. Due Diligence:

a. Access: City shall be entitled to the right of access to the H5 and H6 Properties to conduct its due diligence on the terms and conditions set forth in the Access Agreements. City shall complete its due diligence within ninety (90) days after execution of the applicable Transfer Agreement ("**Diligence Period**"). Subject to the terms and conditions of the Transfer Agreements (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence may include site testing, including but not limited to testing related to environmental conditions and mitigation or remediation requirements for use of the property for residential purposes.

b. Title: City shall review and approve title to the Property during the Diligence Period. Developer shall provide City with a then current title report for the H5 and H6 Properties on or before execution of the Transfer Agreement for each property.

6. Conditions to Closing:

a. City Conditions: In addition to the closing conditions specifically set forth in Sections C.2(a) and C.3(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer Agreements, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H5 and H6 Transfer Agreements but which shall include any exceptions recorded in connection with obtaining the Approvals or required in order to satisfy the Approvals, as well as any exceptions recorded in connection with the development pursuant to the Approvals and consistent with the Approvals); (ii) Developer shall not be in default under the respective H5 and H6 Transfer Agreements beyond any applicable notice and cure period; (iii) there shall have been no material adverse change in the environmental condition of the H5 Property or the H6 Property since the date of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively; and (iv) all historical restrictions related to the existing building(s) located on the larger parcel of which the H5 Property and H6 Property are currently a part shall be terminated with respect to the H5 Property and the H6 Property.

City shall have no right to terminate the H5 Transfer Agreement or the H6 Transfer Agreement if City is unable to secure funds or other commitments to enable the construction of affordable housing on either or both of the H5 Property or the H6 Property; provided, however, that City shall have the right to extend ("**Extension**") the closing under each of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively, two (2) times for periods of one hundred eighty (180) days each (each, an "**Extension Period**", the first such extension of the Closing Date being the "**Extended Closing Date**" and the second such extension of the Closing Date being the "**Outside H5/H6 Closing Date**") if the City has not identified the City's Designee by the scheduled Closing Date or Extended Closing Date, as applicable, for that property by providing Developer with written notice of the exercise of the extension with the status of City's efforts to identify the Designee together with documentation evidencing City's Good Faith Efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date (or has extended a second time, then by the Outside H5/H6 Closing Date, as applicable) the Grant Deed shall identify the Designee as the transferee/grantee of the H5 Property or H6 Property, as applicable. If City has not identified and selected the Designee by the Extended Closing Date or Outside H5/H6 Closing Date, as applicable, then there will be no further extensions of the closing and City shall take title the H5 Property or the H6 Property, as applicable, in City's name or be in default of the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable. In addition, if, as set forth in the H5 Transfer Agreement or the H6 Transfer Agreement, City elects to defer the transfer of title of the H5 Property or the H6 Property from Developer to City (or its Designee), then the City shall reimburse Developer for property taxes payable with respect to such Property(ies) during the deferral period and Developer's costs to light, fence, insure, and maintain the subject property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. Developer shall provide the

City with reasonable documentation of such taxes and costs. IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) in this section to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

b. Developer Conditions: In addition to the closing condition specifically set forth in Section C.2(a) above, the following shall be a condition to the closing under the H5 and H6 Transfer Agreements, for Developer's benefit: City shall not be in default under the H5 and H6 Transfer Agreements beyond any applicable notice and cure period.

7. Environmental:

a. Environmental Indemnity: If the H5 Property and/or the H6 Property is transferred to the City or Designee, as applicable, Developer shall indemnify, defend, and hold harmless City and City Indemnitees against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by exposure to environmental contamination existing at the H5 Property under the H5 Transfer Agreement and the H6 Property under the H6 Transfer Agreement which exposure occurred prior to the closing date of that property and such actions or claims first accrued prior to the Closing Date for that property, which indemnity and defense obligation of Developer shall survive the transfer of the H5 Property or H6 Property to City, as applicable. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims that arise from the negligence or willful misconduct of City or Designee.

b. Assignment: Following the closing of the H5 Property and/or H6 Property, as applicable, City may assign its rights and obligations under this Section C.7 that expressly survive the closing to a developer of affordable housing.

8. IHO Fee Credits: As of the Effective Date, the amount of the IHO Fee credit for the H5 Property shall be \$9,226,561 (the "**H5 Transfer IHO Fee Credits**"). \$9,226,561 IHO Fee Credit at \$18.70/rsf equals 493,399 sf of credit for market rate rentable sf (including 100% AMI units). As of the Effective Date, the amount of the IHO Fee credit for the H6 Property shall be \$10,079,062 (the "**H6 Transfer IHO Fee Credits**"). \$10,079,062. IHO Fee Credit at \$18.70/rsf equals 538,987 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) described in Section C.6.a above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

9. No Assignment: Except as set forth in Section C.7(b) above, City may not assign its rights or obligations under the H5 and H6 Transfer Agreements. As more specifically set forth in Section C.6(a), above, the City may identify a Designee to take title to the H5 or H6 Property at closing and in such event, Developer shall provide for the H5 Property or H6 Property, as applicable, to be deeded to the Designee at closing.

10. Purchase Price: The purchase price for the H5 Property and for the H6 Property shall be \$1.00 per property. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H5 Property and/or H6 Property being transferred directly to the applicable Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the subject property was deeded directly to City), then City or the applicable Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H5 Property or H6 Property, as applicable (to be mutually agreed upon in the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable), notwithstanding that the purchase price for the H5 Property and H6 Property is \$1.00.

11. AS IS Sale: Except for the Developer's obligations as set forth in Section C.2(b) above and C.7(a) above, at the closing of each of the H5 Property and the H6 Property, Developer shall transfer the H5 Property and the H6 Property to City each in its AS IS WHERE IS condition and City shall waive and release all claims against Developer related to the physical and environmental condition of the property so conveyed. City shall bear all construction costs related to the affordable housing project on the H5 Property and the H6 Property.

12. Default:

a. Default by City: If City defaults under either the H5 Transfer Agreement or the H6 Transfer Agreement and fails to close, Developer shall have the right to terminate the H5 Transfer Agreement and/or H6 Transfer Agreement, as applicable, and in such event, City shall continue to recognize the affordable housing credits Developer would have received as a result of the transfer of the H5 Property, the H6 Property or both (as applicable) to City but for the termination of the respective H5 Transfer Agreement, H6 Agreement or both due to City's default.

b. Default by Developer: If Developer defaults under either the H5 Transfer Agreement, the H6 Transfer Agreement or both, as applicable and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate the respective H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence, in which case Developer would not receive any IHO Fee Credits with respect to the H5 Property or H6 Property, as applicable, and would therefore satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least (a) 120 affordable units in the case of H5 Property, and (b) 180 affordable units in the case of the H6 Property, or Developer pays 150% of the IHO Fees due for applicable property, or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing.

ATTACHMENT A TO H1 TRANSFER PROVISIONS

The following sets forth the terms regarding the City's acceptance of the H-1 Property:

1. Developer will retain an outside environmental consultant ("**Developer's Environmental Consultant**") with suitable experience in reviewing and overseeing the remediation work to be undertaken on the H1 Property. Developer will contract with this consultant and be solely responsible for the work of this consultant.
2. Developer will seek approval of a new Remedial Action Plan ("**RAP**") from the Department of Environmental Health or other environmental regulatory agency(ies) with jurisdiction that Developer may be referred to by the Department of Environmental Health ("**DEH**") to address the volatile organic compounds ("**VOCs**") and any other contaminants of concern to the DEH ("**COCs**") currently present in soil, soil vapor and groundwater at the H1 Property ("**Environmental Conditions**"), including, but not limited to, those which are the subject of open Geotracker case FORMER TRUE DRIVE-IN CLEANERS (T10000011874).
3. The RAP will be designed to address the Environmental Conditions to allow construction of a concrete foundation structure without an occupiable basement on the entirety of the H1 Property, with a passive vapor intrusion mitigation system integrated into the foundation system which has the capability of being activated, if needed ("**VIMS**") (collectively, the "**Intended Design**") with the ground floor limited to parking and/or commercial uses and/or resident support/offices/community space only and with residential uses allowed only on the second floor and above (the "**Intended Use**"). The H1 Property will be restricted to the Intended Design and Intended Use in the Land Use Covenant and/or Grant Deed to the H1 Property.
4. The RAP will provide that Developer will excavate and dispose of VOCs and COCs impacted soil, to the extent required by DEH for the Intended Design and the Intended Use, at an appropriate disposal facility ("**Soil Removal Work**"). The RAP will also include remedial actions to be implemented by Developer to address DEH requirements for the groundwater ("**Groundwater Work**"). The RAP will be designed to meet all applicable environmental regulatory requirements to allow for the Intended Use in combination with the Intended Design. Any ongoing work of Developer (after the site is transferred to the City) shall not interfere with the City's planned building and shall be accessed from outside the property line and not disturb the vapor barrier or the other elements of the VIMS. The RAP will also provide that the City or its Designee that builds the building on the H1 Property will install, maintain and monitor the passive VIMS (with the ability to convert to an active VIMS through the addition of a fan or motor and shall activate it if and when required by DEH)(collectively, "**VIMS OMM**").

5. Developer will be responsible for implementing at its cost the Soil Removal Work in a commercially reasonable manner and timeframe, subject to the Catastrophic Cost Increase provisions below. If the costs of implementing the Soil Removal Work are equal to or greater than Six Million One Hundred Twenty-Nine Thousand Three Hundred Sixty-Three Dollars (\$6,130,000) (such amount being a “**Catastrophic Cap**” and such event being a “**Catastrophic Cost Increase**”), then, Developer may decide not to transfer the H1 Property to City. If a Catastrophic Cost Increase occurs, then Developer shall not be in default and Developer shall satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least 300 affordable units as anticipated on the H1 Property, or Developer pays 150% of the IHO Fees due or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing. Developer shall be solely responsible for completing the Groundwater Work after transfer of the H1 Property to the City, at Developer’s sole cost and expense, and for obtaining a no further action letter (“**NFA**”) from the DEH, except as to the responsibility of the City or its Designee for the VIMS and the VIMS OMM as set forth herein.
6. As a condition to the City’s acceptance of the H1 Property, Developer’s Environmental Consultant shall have issued a report, which may be relied upon by both Developer and the City, confirming that the Soil Removal Work has been completed as required by the RAP for the Intended Design and Intended Use.
7. Developer shall provide the NFA to the City (or then owner of the building) after receipt, which will occur after the Groundwater Work is complete.
8. The City will pay a maximum of Five Hundred Thousand Dollars (\$500,000) for the VIMS and VIMS OMM (“**Baseline Costs**”). If the costs of the VIMS and VIMS OMM for the Intended Design and Intended Use, any ongoing monitoring, as well as without limitation, DEH oversight and permitting costs, in the approved final RAP (or associated documents) are in excess of Baseline Costs (“**Excess Costs**”), as determined immediately prior to the scheduled H1 Property Closing Date by an independent consultant retained by the Developer and acceptable to the City (“**RAP Consultant**”) then the following provisions shall apply. The RAP Consultant will estimate costs (both operational and installation hard costs) based on unescalated dollars.
 1. If the Excess Costs, plus the costs of (A) the Soil Removal Work costs and (B) the other anticipated Developer clean-up costs ((A) and (B) collectively, “**Developer Remediation Costs**”), are equal to or more than the Catastrophic Cap, then Developer may elect to follow the procedures provided in subsection (e) above for Catastrophic Cost Increases.
 2. If the Excess Costs, plus the Developer Remediation Costs, are less than the Catastrophic Cap, Developer shall fund the Excess Costs to City at the H1 Property Closing and the City shall hold and invest the Excess Costs in trust to pay the Excess Costs as they accrue over time.

9. Developer will keep the City informed of the timing and status throughout the RAP approval process, including providing the City with the draft and final RAP.
10. Following the transfer of the H1 Property to City (or its Designee), Developer will respond at its sole cost and expense to any inquiries, orders or actions from any regulatory agency with respect to the Groundwater Work or the Environmental Conditions other than the "Building Conditions". The term "**Building Conditions**" shall mean the conditions inside of the future building and/or parking area in the building, including, without limitation, indoor air conditions.
11. Developer will pay all agency oversight and permitting costs associated with the RAP and obtaining the NFA.
12. To the fullest extent permitted by law, Developer shall indemnify, defend and hold harmless the City for any and all claims for response costs or response actions or any third party claims associated with the Groundwater Work or the Environmental Conditions but excluding the Building Conditions. Additionally, if the H1 Property is transferred to the City or Designee, Developer shall indemnify, defend, and hold harmless City and City Indemnitees or Designee against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by alleged exposure to environmental contamination existing at the H1 Property which exposure occurred prior to the H1 Property Closing Date and such actions or claims first accrued prior to the H1 Property Closing Date. The indemnity and defense obligations of Developer shall survive the transfer of the H1 Property to City or Designee. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to the extent that any actions or claims arise from the negligence or willful misconduct of City or the Designee.
13. Developer shall have no responsibility or liability for the Building Conditions, VIMS or the VIMS OMM, including, without limitation, its installation, its failure, its maintenance, repair, operation or monitoring and no responsibility for any claims arising out of the Building Conditions, VIMS, the VIMS OMM, soil vapor, indoor air and/or any claims arising from failure of these systems.
14. The City and Developer agree that all cost amounts set forth herein or determined hereafter pursuant to its terms are the cost as of the Effective Date of the Development Agreement and shall be subject to Annual Increases.