

**From:** [Tu, John](#)  
**To:** [Downtown West Project](#)  
**Subject:** Fw: Encroachment Resolution  
**Date:** Monday, April 19, 2021 3:43:16 PM  
**Attachments:** [REDLINE Encroachment Authorization \(4.19.21\).docx](#)  
[Encroachment Authorization \(4.19.21\).docx](#)

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Best,  
Tong (John) Tu

Planner IV (Supervising Planner) | Planning Division | PBCE  
City of San José | 200 East Santa Clara Street  
Email: [john.tu@sanjoseca.gov](mailto:john.tu@sanjoseca.gov) | Phone: (408)-535-6818  
For More Information Please Visit: <http://www.sanjoseca.gov/planning>

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**From:** Amanda Wolf <[amandawolf@google.com](mailto:amandawolf@google.com)>  
**Sent:** Monday, April 19, 2021 3:39 PM  
**To:** Hill, Egan <[Egan.Hill@sanjoseca.gov](mailto:Egan.Hill@sanjoseca.gov)>  
**Cc:** Tu, John <[john.tu@sanjoseca.gov](mailto:john.tu@sanjoseca.gov)>; Han, James <[James.Han@sanjoseca.gov](mailto:James.Han@sanjoseca.gov)>; Colli, Garrett J. (Perkins Coie) <[GColli@perkinscoie.com](mailto:GColli@perkinscoie.com)>  
**Subject:** Encroachment Resolution

[External Email]

Hi Egan,

We made a redline to one of the recitals in the Encroachment Permit resolution so that it is now consistent with the same recital in the other resolutions. See redline and clean version attached.

Thank you,  
Amanda

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**Amanda Wolf** |  
Development Manager  
Working for Lendlease at Google  
Sunnyvale, CA |  
[628-240-4111](tel:628-240-4111)

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RESOLUTION NO. \_\_\_\_\_

**A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AUTHORIZING A MAJOR ENCROACHMENT PERMIT PURSUANT TO SAN JOSE MUNICIPAL CODE CHAPTER 13.37 FOR DISTRICT SYSTEMS INFRASTRUCTURE AT VARIOUS LOCATIONS WITHIN THE DOWNTOWN WEST DEVELOPMENT AREA**

**WHEREAS**, Google LLC (“Permittee”) has applied for an encroachment permit pursuant to Chapter 13.37 of the San José Municipal Code (“Chapter 13.37”); and

**WHEREAS**, this Resolution is a companion to the following approvals relating to Downtown West: an override of the Santa Clara County Airport Land Use Commission’s Comprehensive Land Use Plan inconsistency determination (Resolution No. \_\_\_\_); amendments to the General Plan (Resolution No. \_\_\_\_); amendments to the Diridon Station Area Plan (Resolution No. \_\_\_\_); the Development Agreement for the Downtown West Mixed-Use Plan (Ordinance No. \_\_\_\_); Planned Development Rezoning, including a General Development Plan (Ordinance No. \_\_\_\_); a Planned Development Permit (Resolution No. \_\_\_\_); amendments to Title 20 of the San José Municipal Code (Ordinance No. \_\_\_\_); approval of a Vesting Tentative Map (Resolution No. \_\_\_\_); amendments to the landmark boundaries the San José Water Company Building at 374 West Santa Clara Street and the Southern Pacific Historic District (Resolutions No. \_\_\_\_ and \_\_\_\_); an amendment to Historic Preservation Permit (HP16-002) (Resolution No. \_\_\_\_); ; and approval of the Construction Impact Mitigation Plan (Resolution No. \_\_\_\_).

**WHEREAS**, the Permittee owns and/or is in the process of developing various properties located in the Downtown West Area as shown on the Vesting Tentative Map (collectively, the “Property”); and

**WHEREAS**, the Property is bounded by certain public rights-of-way as shown on the Conceptual Encroachment Plan Sheets (“Public Property”) in which the Permittee has

proposed to design, construct, maintain, repair, occupy and use privately-owned, subsurface energy (thermal heating and cooling), wastewater, recycled water and electrical systems infrastructure within the Public Property (“District Systems” or “Encroachment”); and

**WHEREAS**, on \_\_\_\_\_, 2021, the Director of the Department of Public Works (“Director”) submitted to the City Council a memorandum setting forth his findings and recommendations for the conditional approval of the Encroachment (hereinafter “Report”); and

**WHEREAS**, this resolution shall constitute the City Council’s authorization for the Encroachment pursuant to Chapter 13.37, subject to the terms and conditions contained herein (“Authorization”), and together with an executed Encroachment Agreement, shall constitute the revocable license for the Encroachment (“Permit”);

**NOW, THEREFORE**, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

**SECTION 1.** The City Council hereby adopts the Report, and based on the Report and all other evidence submitted, as well as the conditions and limitations contained in this Authorization, makes the following findings:

- A. The Encroachment will provide a public benefit to those using the Public Property;
- B. No other reasonable method of obtaining the desired results is available except for the Encroachment as proposed;
- C. Granting the Permit will not unreasonably interfere with or disrupt use of the Public Property;

- D. The Public Property has the capacity to accommodate the proposed Encroachment and any other existing or foreseeable public or private facilities;
- E. Granting the Permit will not be detrimental to the public interest, safety, health or welfare or have the potential to injure the property interests of others; and
- F. The Permittee has demonstrated its ability to install, maintain, repair and remove the Encroachment.

**SECTION 2.** Permits for the Encroachment are hereby authorized, subject to the following:

- A. All Permits issued pursuant to this Authorization shall be subject to an Encroachment Agreement substantially in the form attached hereto as Exhibit A (“Encroachment Agreement”). Following execution of an Encroachment Agreement, the Director is hereby delegated the authority to execute Non-Material Amendments (as defined below) to the Encroachment Agreement. Notwithstanding the foregoing, the Director shall not be obligated to execute any amendments to the Encroachment Agreement. For purposes of amending the Encroachment Agreement, “Non-Material Amendment” shall mean any modification that would not:
  - 1. Materially change or expand the Encroachment as specified in this Authorization and/or the Encroachment Agreement;
  - 2. Modify the allocation of risk under the Encroachment Agreement;
  - 3. Pose a risk to public health, safety or welfare; or

4. Modify any provision relating to: (i) revocation or termination of the Permit, (ii) removal, repair, maintenance or restoration of the Encroachment, Public Property or public facilities, (iii) Permittee default; (iv) assignment of the Permit, or (v) the Permittee's indemnification obligations.
- B. The Director may issue Permits pursuant to this Authorization only to the extent that the proposed Encroachment is consistent with the Downtown West Infrastructure Plan dated \_\_\_\_\_, 2021 and Conceptual Encroachment Plan Sheets dated \_\_\_\_\_, 2021 (collectively, "Infrastructure Plan"). The Conceptual Encroachment Plan Sheets are attached hereto as Exhibit B.
  - C. Notwithstanding anything to the contrary in the Infrastructure Plan, the Encroachment shall be operated only for the purpose of providing District Systems service to the Permittee's real property as described in the Infrastructure Plan. The Permittee shall be allowed to install, use, maintain and repair infrastructure, such as pipes, conduits and associated equipment, consistent with the foregoing District Systems services. The Encroachment may not be used for any other purpose without City Council's prior written consent.
  - D. Each portion of the District Systems crossing dedicated public property shall be issued its own Permit. The Permit for each portion of the District Systems shall be recorded on all real properties served by the District Systems.
  - E. The Director shall issue Permits pursuant to this Authorization in compliance with the following process:
    1. Pre-Application Procedure. Prior to the submittal of any Application (as defined below) and concurrent with the submittal of preliminary tract improvement plans as described in the Downtown West Planned Development Permit approved by City Council Ordinance No. \_\_\_\_\_, Permittee shall

submit to the Director for review and comment a preliminary draft location map, plan view, and elevation showing the dimensions and location of the proposed encroachment and its relationship to adjoining properties, any public property, and any structures, utilities or improvements and any additional information requested by the Director related to the evaluation of any encroachment for consistency with the Infrastructure Plan and corresponding preliminary tract improvement plans under concurrent review (collectively "Preliminary Application Materials"). Permittee shall submit Preliminary Application Materials developed at each of the thirty-five percent (35%), sixty-five percent (65%) and ninety-five percent (95%) levels. For each submittal, the Director will review the Preliminary Application Materials for consistency with the Infrastructure Plan and Infrastructure Plan Sheets and the preliminary tract improvement plans under concurrent review by the Director. The Director will provide comments on the Preliminary Application Materials in accordance with the Public Works Standard Review Timelines for improvement plans.

2. Application Procedure. Permittee shall submit a letter to the Director to commence the process for issuance of each Permit pursuant to this Authorization ("Application"). Such Application shall include all of the information contained in the "Submittal Requirements" of the Encroachment Permit Criteria attached hereto as Exhibit C.
3. Director's Review. The Director shall review the Application and shall either approve, conditionally approve or deny such Application in accordance with the following:
  - i. Approval. The Director shall approve an Application that meets all of the Director's Findings Required to Approve

Application (“Director’s Findings”) as set forth in the Encroachment Permit Criteria.

- ii. Conditional Approval. As an alternative to denial of an Application, the Director may conditionally approve an Application where the Director determines that a condition should be imposed to ensure satisfaction of any of the Director’s Findings that have not been satisfied as of the date of approval of the Application. If the Director conditionally approves a Permit, the Permittee may within thirty (30) days of receipt of any conditional approval appeal the condition(s) to the City Council. The Permittee’s failure to appeal within the foregoing time period shall render the condition(s) final and non-appealable. The City Council’s determination on appeal shall be final.
  - iii. Denial. If the Director determines that any of the Director’s Findings are not met, and the Director determines not to conditionally approve the Application, the Director shall deny the Application in writing, which writing shall include a description of the reasons for which the Application is denied. Permittee may within thirty (30) days of receipt of such denial appeal the Director’s decision to the City Council. The Permittee’s failure to appeal within the foregoing time period shall render the denial final and non-appealable. The City Council’s determination on appeal shall be final.
4. Alternative Procedures. The foregoing procedure for issuance of Permits under this Authorization shall not be interpreted to prevent the Permittee, at its election, from pursuing permits under Title 13 of the San José Municipal Code, as amended, for encroachments other than those for the District Systems.



- F. The term of this Authorization shall correspond to the term of the Development Agreement; provided, however, that this Authorization is conditional upon the Permittee's proposed locations for the District Systems being available at the time the Permittee obtains a Permit for each portion thereof. If the proposed District Systems location conflicts with existing private or public improvements or infrastructure or planned public projects, the Permittee shall be required at its cost to, as applicable: (1) negotiate with the owner of any improvements or infrastructure that conflict with the proposed District Systems location to resolve the conflict, or (2) amend the Infrastructure Plan in accordance with its terms to allow an alternative location for that portion of the District Systems.
- G. If a Permit is revoked pursuant to the terms of the Encroachment Agreement, the Permittee may request an amendment to the Infrastructure Plan to provide for re-routing of the District Systems infrastructure and may apply for a new encroachment permit to accommodate the re-routed District Systems infrastructure. Any issuance of a new permit for re-routed District Systems infrastructure shall be governed by the San José Municipal Code, as may be amended from time to time, and issued in the City Council's discretion.

**SECTION 3.** After satisfaction of all conditions to issuance of a Permit under this Authorization, the Director is hereby directed to execute the Encroachment Agreement and record a certified copy of the Permit with the Office of the Recorder for the County of Santa Clara.

ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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SAM LICCARDO  
Mayor

ATTEST:

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TONI J. TABER, CMC  
City Clerk

## **EXHIBIT A**

[Exhibit A follows on next page]

## **EXHIBIT B**

[Exhibit B follows on next page]

## **EXHIBIT C**

[Exhibit C follows on next page]

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ADOPTED this \_\_\_\_\_ day of \_\_\_\_\_, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

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SAM LICCARDO  
Mayor

ATTEST:

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TONI J. TABER, CMC  
City Clerk

## **EXHIBIT A**

[Exhibit A follows on next page]

## **EXHIBIT B**

[Exhibit B follows on next page]

## **EXHIBIT C**

[Exhibit C follows on next page]