

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX
Date: Tuesday, May 18, 2021 11:38:41 AM
Attachments: [image001.png](#)
[Final2 CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX](#)

From: David Snow <DSnow@rwglaw.com>
Sent: Thursday, May 13, 2021 1:09 PM
To: Miller, Gregg <gmiller@coblentzlaw.com>; Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Straka, Stephanie <sstraka@coblentzlaw.com>
Subject: RE: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

[External Email]

Attached is the updated version with the changes. Note, I previously checked the Article 4 renumbering / cross references and think that's addressed but good to check again when we have more time.

Best,

Dave

From: Miller, Gregg <gmiller@coblentzlaw.com>
Sent: Thursday, May 13, 2021 12:30 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>; David Snow <DSnow@rwglaw.com>
Cc: Straka, Stephanie <SStraka@coblentzlaw.com>
Subject: RE: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

Yes please put back the language in 1.75. Thanks,

Gregg Miller

Coblentz Patch Duffy & Bass LLP

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Cell: 415-939-3142 | Direct Dial 415-772-5736 | Office 415-391-4800

gmiller@coblentzlaw.com

www.coblentzlaw.com

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

From: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Sent: Thursday, May 13, 2021 12:26 PM
To: Miller, Gregg <gmler@coblenzlaw.com>; David Snow <DSnow@rwglaw.com>
Cc: Straka, Stephanie <SStraka@coblenzlaw.com>
Subject: [EXTERNAL] RE: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

Hi Gregg,

1. The draft that sent to us last night included the deletion relating to Material Change. We can include back in if that is an issue.
2. Okay on \$3 million as opposed to \$3.125 million.
3. Yes, we need to correct the numbering in Section.

Dave can make these changes and we are final??

Thanks. Johnny

Johnny V. Phan

Chief Deputy City Attorney
Office of the City Attorney
City of San Jose
200 East Santa Clara Street
San Jose, CA 95113-1905
Main Ph: (408) 535-1900
Direct No.: (408) 535-1981
Fax No. (408) 998-3131

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

From: Miller, Gregg <gmler@coblenzlaw.com>
Sent: Thursday, May 13, 2021 12:21 PM
To: David Snow <DSnow@rwglaw.com>; Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Straka, Stephanie <ssraka@coblenzlaw.com>
Subject: RE: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

[External Email]

Sorry – balance would be \$4.5M

Gregg Miller

Coblentz Patch Duffy & Bass LLP

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Cell: 415-939-3142 | Direct Dial 415-772-5736 | Office 415-391-4800

gmler@coblentzlaw.com

www.coblentzlaw.com

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

From: Miller, Gregg

Sent: Thursday, May 13, 2021 12:20 PM

To: David Snow <DSnow@rwglaw.com>; 'Phan, Johnny' <Johnny.Phan@sanjoseca.gov>

Cc: Straka, Stephanie <SStraka@coblentzlaw.com>

Subject: RE: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

Johnny and David: just three things:

1. I don't have authority to agree to the deletion in 1.75 (Material Change definition). Can we keep the language – its been in the draft for a long time.
2. Re the new Covid language, I am now being told the \$3.125M should be \$3M leaving the balance at \$4M.
3. Section numbering in Article 4 changed. We'll need to check x-refs elsewhere in the DA to make sure the refs are to the right section but we can handle that in the execution version.

Thanks,

Gregg Miller

Coblentz Patch Duffy & Bass LLP

One Montgomery Street, Suite 3000

San Francisco, CA 94104

Cell: 415-939-3142 | Direct Dial 415-772-5736 | Office 415-391-4800

gmler@coblentzlaw.com

www.coblentzlaw.com

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

From: David Snow <DSnow@rwglaw.com>
Sent: Thursday, May 13, 2021 11:40 AM
To: 'Phan, Johnny' <Johnny.Phan@sanjoseca.gov>
Cc: Straka, Stephanie <SStraka@coblentzlaw.com>; Miller, Gregg <gmler@coblentzlaw.com>
Subject: [EXTERNAL] RE: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

Trying again – looks like changes were stripped out – use this one:

From: David Snow
Sent: Thursday, May 13, 2021 11:38 AM
To: 'Phan, Johnny' <Johnny.Phan@sanjoseca.gov>
Cc: 'Straka, Stephanie' <SStraka@coblentzlaw.com>; Miller, Gregg <gmler@coblentzlaw.com>
Subject: Final CC Redline Google - DW - Development Agreement April 2021 vs 5.12.21-c.DOCX

Attached is the final redlined version showing cumulative changes from the Planning Commission version of the DA.

Please let us know if there are any questions or comments, and if not this will be the final for submittal to the Clerk.

Thanks,

Dave

David M. Snow

Attorney



RICHARDS WATSON GERSHON

350 South Grand Avenue, 37th Floor
Los Angeles, CA 90071

T: 213.626.8484

D: 213.253.0259

E: dsnow@rwglaw.com

W: rwglaw.com

NOTICE: This communication may contain privileged or other confidential information. If you are not the intended recipient of this communication, or an employee or agent responsible for delivering this communication to the intended recipient, please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.

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

Click [here](#) to report this email as spam.

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

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
Office of the City Attorney
City of San José
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**

TABLE OF CONTENTS

	<u>Page</u>
1. DEFINITIONS.....	10
2. EFFECTIVE DATE; TERM.....	31
2.1 Effective Date	31
2.2 Term	31
3. GENERAL RIGHTS AND OBLIGATIONS; DEVELOPMENT PROCESS.....	3332
3.1 Development of the Project	3332
3.2 Timing of Base Requirements, Community Benefits, and Infrastructure	33
3.3 Approval of Subdivision Maps	3433
3.4 Conformance Review.....	34
3.5 Timing for Completion of Public Improvements and Privately-Owned Improvements	35
3.6 Diridon Integrated Station Concept (DISC) Plan Implementation	3635
4. PUBLIC BENEFITS; DEVELOPER OBLIGATIONS AND CONDITIONS TO DEVELOPER'S PERFORMANCE.....	3736
4.1 Public Benefits Exceed Those Required by Existing Ordinances and Regulations	3736
4.2 Community Benefits Adjustments.....	4749
4.3 Conditions to Performance of Public Benefits.....	5255
4.4 Limited Term Corporate Accommodations Contributions	5456
4.5 <u>INTENTIONALLY OMITTED.</u>	589
4.6 No Additional CEQA Review Required; Reliance on FEIR for Future Discretionary Approvals	5658
4.6.4.7 Nondiscrimination.....	5759
4.7.4.8 City Cost Recovery	5760
4.8.4.9 Prevailing Wages	5961
4.9.4.10 Indemnification	of 5962
5. VESTING AND CITY OBLIGATIONS.....	6163
5.1 Vested Rights	6163
5.2 Existing Standards	6264
5.3 Criteria for Subsequent Approvals; Limitation on City's Future Discretion	6264

5.4	Future Changes to Existing Standards	6467
5.5	Filing of Subdivision Maps.....	6770
5.6	Impact Fees; Processing Fees	6871
5.7	Processing Fees; Reimbursement Agreement.....	7073
5.8	Public Health and Safety; Changes in Federal or State Laws.....	7073
5.9	No Action to Impede Approvals	7376
5.10	Estoppel Certificates	7376
5.11	Existing, Continuing Uses and Interim Uses	7476
5.12	Taxes	7477
6.	NO DEVELOPMENT OBLIGATION.....	7578
7.	MUTUAL OBLIGATIONS.....	7679
7.1	Notice of Completion, Revocation or Termination	7679
7.2	General Agreement to Cooperate.....	7779
7.3	Non-City Approvals; Cooperation to Obtain Permits.....	7881
7.4	Cooperation in the Event of Third-Party Challenge	8083
7.5	Permits to Enter City Property	8284
7.6	Infrastructure Reimbursement	8285
7.7	Good Faith and Fair Dealing.....	8588
7.8	Other Necessary Acts.....	8588
8.	ANNUAL REVIEW OF DEVELOPER'S COMPLIANCE.....	8688
8.1	Annual Compliance Review	8688
9.	ENFORCEMENT OF AGREEMENT; DEFAULT; REMEDIES	8789
9.1	Enforcement.....	8789
9.2	Meet and Confer Process	8789
9.3	Default.....	8890
9.4	Remedies	8991
9.5	Time Limits; Waiver; Remedies Cumulative	9193
9.6	Attorneys' Fees.....	9294
10.	MORTGAGE PROTECTION.....	9294
10.1	Mortgage Protection.....	9294
10.2	Mortgagee Not Obligated; Exception for Community Benefits	9295
10.3	Notice of Default to Mortgagee	9395
11.	AMENDMENT; TERMINATION; EXTENSION OF TERM.....	9496

11.1	Amendment or Termination.....	94 <u>96</u>
11.2	City's Early Termination Rights for Failure to Satisfy Ten or Twenty Year Development Obligations	94 <u>97</u>
11.3	Termination and Vesting.....	95 <u>98</u>
11.4	Amendment Exemptions; Addition of Potentially Participating Parcels.....	97 <u>99</u>
11.5	Extension Due to Legal Action or Referendum; Force Majeure; Rail Improvement Activity	98 <u>101</u>
12.	TRANSFER OR ASSIGNMENT.....	100 <u>103</u>
12.1	Permitted Transfer of this Agreement.....	100 <u>103</u>
12.2	Assignment and Assumption Agreement.....	101 <u>104</u>
12.3	Notice of Transfer	104 <u>107</u>
12.4	District Systems Transfers	104 <u>107</u>
12.5	Certain Limitations on Transfers of Office and Residential Development ...	105 <u>107</u>
12.6	Non-Transfers	106 <u>108</u>
12.7	Reasonableness of Transfer Requirements	106 <u>109</u>
12.8	City Administration	107 <u>109</u>
13.	DEVELOPER REPRESENTATIONS AND WARRANTIES	107 <u>109</u>
13.1	Interest of Developer; Due Organization and Standing	107 <u>109</u>
13.2	No Inability to Perform; Valid Execution.....	107 <u>110</u>
13.3	Conflict of Interest	108 <u>110</u>
13.4	Other Documents	108 <u>110</u>
13.5	No Bankruptcy	108 <u>110</u>
14.	MISCELLANEOUS PROVISIONS.....	108 <u>111</u>
14.1	Entire Agreement.....	108 <u>111</u>
14.2	Incorporation of Exhibits	109 <u>111</u>
14.3	Binding Covenants; Run With the Land	109 <u>111</u>
14.4	Applicable Law and Venue.....	109 <u>112</u>
14.5	Construction of Agreement.....	109 <u>112</u>
14.6	Project Is a Private Undertaking; No Joint Venture or Partnership	110 <u>112</u>
14.7	Recordation	110 <u>113</u>
14.8	Obligations Not Dischargeable in Bankruptcy	111 <u>113</u>
14.9	Survival	111 <u>113</u>
14.10	Signature in Counterparts	111 <u>113</u>

14.11	Notices	111 113
14.12	Severability	112 115
14.13	Public Records Act	113 115
14.14	Non-Liability of City Officials and Others	113 115
14.15	Non-Liability of Developer Officers and Others	113 116
14.16	No Third Party Beneficiaries	114 116
14.17	Number of Days	114 116

EXHIBITS

- A Description of Project Site's Approximate Boundaries
- B Project Boundaries
 - B1 Legal Descriptions of Development Parcels Located within the Project Boundaries
- C Public Benefits
 - C1 Base City Housing Requirements and Community Benefits Schedule
 - C2 Autumn Street Parcels Site Plan and Legal Descriptions
 - C3 Transit Project Buffer Zone Diagram
 - Appendix A: Community Benefits Adjustment: Office Parcel Yield
- D Affordable Housing Program
 - Schedule D1 Project Site Plan Generally Depicting Location of H1, H5 and H6 Properties; H1, H5 and H6 Site Maps
 - Schedule D2 Project Inclusionary Housing Ordinance Implementation Guidelines
 - Schedule D3 City's Form of [Inclusionary Housing Agreement and](#) Affordability Restrictions for Deed
 - Schedule D4 Terms for Transfer of Parcels H1, H5 and H6 Pursuant to Transfer Agreements between Developer and City or City's Designated Affordable Housing Developer
 - Schedule D5 Copy of the [Housing Inclusionary Housing Ordinance \(Ordinance No. 30538\), and Resolution Nos. 79903 and 79904](#) as in effect on the Effective Date; [Council Memorandum, dated February 22, 2021 \(File No. 21-324\), Actions Related to the Amendment of the Inclusionary Housing Ordinance](#)
- E Parkland Agreement
 - E1 Park Improvements Value and Costs
 - E2 City-Dedicated Open Space and Covenant Privately-Owned Publicly Accessible Open Space Approximate Acreage
 - E3 Delivery of City-Dedicated Open Space
 - E3.1 City-Dedicated Open Space Dedication and Improvements Schedule
 - E3.2 Park Dedication/Delivery Triggers Figure

- E4 Dedication Form
- E5 Design and Construction Requirements
- E6 Diagram of Construction Right of Entry Area
- E7 Parkland Dedication Tracking and Verification Table
- E8 Parkland Dedication Obligation
- E9 List of Required Exceptions from Parkland Dedication Ordinance
- E10 Bond Forms
- F Privately-Owned Publicly Accessible Open Space
 - F1 Declaration of Public Access Covenants and Restrictions
 - F2 Rules Regarding Public Access
 - F3 Rules Regarding Public Events, Private Events, and Temporary Closures
- G Workforce, Learning, and Education Commitments
- H Community Stabilization and Opportunity Pathways Fund
- I Infrastructure Plan
- J Framework for City-Owned Electrical Microgrid at Google's Downtown West Project
- 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 Notice Regarding Status of Satisfaction of Ten or Twenty Year Development Obligation
- Q Copy of Municipal Code [Chapter 5.11](#), 18.02, and [Sections _____ and _____ 19.38](#) (as in effect on the Effective Date)

SCHEDULES

- A [Form of Term Sheet for 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, ⁶¹"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."²² 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~~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~~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; Auzerai 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”). [Developer has also entered into 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 ABC,” located in the City of San José, California, and identified as APNs 259-28-041, 259-28-043, and 259-28-044.](#) The VTA Parcels [and Lots ABC](#) 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, but are not currently Development Parcels for the purposes of this Development Agreement.

I. The [~~Project~~Downtown West Mixed-Use Plan](#) consists of the phased demolition of most of the existing buildings and phased development of new buildings ~~in~~[on](#) the Project Site [\(the "Project"\)](#). 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 [officers, employees, consultants, vendors, contractors, and/or sponsored guests](#) 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 "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 Permit(s); ~~vacations~~abandonment 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; ⁷ 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 April 28, 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 Permit(s) for the District Systems infrastructure; adopted Resolution ~~No~~Nos. XXX, conditionally ~~vacating~~approving the partial vacation of 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~~Clerk 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 Clerk" shall mean the City Clerk of the City of San José.

1.19 ~~4.18~~"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.

1.20 ~~4.19~~"City Council" or "Council" shall mean the City Council of the City of San José.

1.21 ~~4.20~~"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.

1.22 ~~4.21~~"City Manager" shall mean the City Manager of the City of San José.

1.23 ~~4.22~~"City Parties" shall have the meaning set forth in Section 4.84.10.

1.24 ~~4.23~~"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.

1.25 ~~4.24~~"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.

1.26 ~~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.

1.27 ~~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.

1.28 ~~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.

1.29 ~~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.

1.30 ~~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.

1.31 ~~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.

1.32 ~~1.31~~ "Default" shall have the meaning set forth in Section 9.3.

1.33 ~~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.

1.34 ~~1.33~~ "Development Agreement Ordinance" shall mean Chapter 18.02 of the Municipal Code, as in effect as of the Effective Date.

1.35 ~~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.

1.36 ~~1.35~~"Development Parcel²²" 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.

1.37 ~~1.36~~"Director of PBCE" shall mean the Director of Planning, Building and Code Enforcement of the City of San José.

1.38 ~~1.37~~"Director of PRNS" shall mean the Director of Parks, Recreation and Neighborhood Services for the City of San José.

1.39 ~~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.

1.40 ~~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.

1.41 ~~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)).

1.42 ~~1.41~~"District Systems" shall mean the "district system(s)" described in Exhibits I and J.

1.43 ~~1.42~~"Downtown West Design Standards and Guidelines" or ~~"DWDSG²³"~~ 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.

1.44 ~~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.

1.45 ~~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.

1.46 ~~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.

1.47 ~~1.46~~ "Effective Date" shall have the meaning set forth in Section 2.1.

1.48 ~~1.47~~ "Enacting Ordinance" shall have the meaning set forth in Recital T.

1.49 ~~1.48~~ "Encroachment Agreement" shall refer to Exhibit A of City Council Resolution No. _____."

1.50 ~~1.49~~ ~~"Existing Agreements"~~²²¹ 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,"~~²²¹ 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").

1.51 ~~1.50~~"Existing Standards" shall have the meaning set forth in Section 5.2.

1.52 ~~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.

1.53 ~~1.52~~"Federal or State Law Exception" shall have the meaning set forth in Section 5.8.1.

1.54 ~~1.53~~"FEIR" shall have the meaning set forth in Recital Q.

1.55 ~~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.

1.56 ~~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.

1.57 ~~1.56~~ "Final Map" shall mean a "Final Map" as defined in Section 19.08.160 of the Subdivision Code.

1.58 ~~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); (45) acts of terrorism or war; (56) riots or other civil unrest; (67)

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; (78) orders issued by any other governmental body having jurisdiction over the Project; (89) casualty; or (910) 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.

1.59 ~~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.

1.60 ~~1.59~~ "Funding Mechanism" shall have the meaning set forth in Section 7.6.1.

1.61 ~~1.60~~ "Future Changes to Existing Standards" shall have the meaning set forth in Section 5.4.

1.62 ~~1.61~~ "General Plan" has the meaning set forth in Recital A.

1.63 ~~1.62~~ "General Plan Consistency Findings" has the meaning set forth in Recital R.

1.64 ~~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.

1.65 ~~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.

1.66 ~~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.

1.67 ~~1.66~~ "Impact Fees" shall mean those fees and exactions set forth on Exhibit M to this Development Agreement.

1.68 ~~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.

~~1.69~~ ~~1.68~~ "Infrastructure Plan" shall mean the Infrastructure Plan attached as Exhibit I.

~~1.69~~ ~~1.70~~ ~~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.

~~1.71~~ ~~1.70~~ "Lendlease Affiliate" shall mean any Affiliate of Lendlease Americas Holdings Inc., a Delaware corporation.

~~1.70~~ ~~1.72~~ ~~1.71~~ "Litigation Extension" shall have the meaning set forth in Section 11.5.1.

~~1.71~~ ~~1.73~~ ~~1.72~~ "Losses" shall have the meaning set forth in Section 4.94.10.

~~1.72~~ ~~1.74~~ ~~1.73~~ "Major Encroachment Permit" shall refer to a permit issued under Title 13.37.400 of the Municipal Code."

~~1.73~~1.75 ~~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 ten percent (10%), (v) decreases the parking ratios, except as permitted by the Approvals and this Agreement, or (vi) 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.

~~1.74~~1.76 ~~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.

~~1.75~~1.77 ~~1.76~~"MMRP" shall mean that certain mitigation monitoring and reporting program adopted by the City for the Project.

~~1.76~~1.78 ~~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.

~~1.77~~1.79 ~~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.

~~1.78~~1.80 ~~1.79~~"Municipal Code" shall mean the San José Municipal Code.

~~1.79~~1.81 ~~1.80~~"Non-City Agency" shall have the meaning set forth in Section 7.3.

~~1.80~~1.82 ~~1.81~~"Non-City Approval" shall have the meaning set forth in Section 7.3.

~~1.81~~1.83 ~~1.82~~"Notice of Completion" means the form of Form of Notice of Completion and Termination attached to this Agreement at Exhibit N.

~~1.82~~1.84 ~~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.

~~1.83~~1.85 ~~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).

~~1.84~~1.86 ~~1.85~~"Parcel Map" shall mean a Parcel Map as defined in Section 19.08.320 of the Subdivision Code.

~~1.85~~1.87 ~~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).

~~1.86~~1.88 ~~1.87~~"Park Improvements" shall have the meaning set forth in the Parkland Agreement included herewith as Exhibit E.

~~1.87~~1.89 ~~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.

~~1.88~~1.90 ~~1.89~~"Party" and "Parties" shall have the meaning set forth in the opening paragraph of this Agreement.

~~1.89~~1.91 ~~1.90~~"PBCE Department" shall mean the Planning, Building, and Code Enforcement Department of the City of San José.

~~1.90~~1.92 ~~1.91~~"Planned Development Permit" means the Planned Development Permit approved by Resolution No. XXX.

~~1.91~~1.93 ~~1.92~~"Planning Commission" means the Planning Commission of the City of San José.

~~1.92~~1.94 ~~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.~~

~~1.93~~1.95 ~~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.

~~1.94~~1.96 ~~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.

~~1.95~~1.97 ~~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.

~~1.96~~1.98 ~~1.97~~"Project" shall mean the mixed use development project as described in Recital DI and the Approvals, together with Developer's rights and obligations under this Agreement.

~~1.97~~1.99 ~~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.

~~1.98~~1.100 ~~1.99~~"Project Documents" shall mean, individually or collectively as the context requires, the Project Boundaries, Base City Housing 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.

~~1.99~~1.101 ~~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.

~~1.100~~1.102 ~~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.

~~1.101~~1.103 ~~1.102~~"Public Health and Safety Exception" shall have the meaning set forth in Section 5.8.1.

~~1.102~~1.104 ~~1.103~~"Public Benefit" shall mean, collectively, the (i) Base Requirements, (ii) Community Benefits, and (iii) Project Features that benefit the public.

~~1.103~~1.105 ~~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 September 2020, and/or within the Focused Local Transportation Analysis for the Vesting Tentative Map to Verify Right-of-Way for the Internal Roadway Network for the Downtown West Mixed-Use Project – Admin Draft, prepared by Fehr & Peers, dated April 16, 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.

~~1.104~~1.106 ~~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.

~~1.105~~1.107 ~~1.106~~"Public Works" shall mean the San José Department of Public Works.

~~1.106~~1.108 ~~1.107~~"Public Works Director" shall mean the Director of Public Works.

~~1.107~~1.109 ~~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.

~~1.108~~1.110 ~~1.109~~"Reimbursement Agreement" shall mean (i) 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 incorporate the terms from the Term Sheet attached hereto at Schedule A to this Agreement, and (ii) any other reimbursement agreement entered into between the Parties related to a Third Party Challenge, legal costs for preparation of agreements associated with District Systems, and/or any other fees and costs mutually agreed upon between the parties.

~~1.109~~1.111 ~~1.110~~"Subdivision Code" shall mean Title 19 of the San José Municipal Code.

~~1.110~~1.112 ~~1.111~~"Subdivision Map Act" shall mean the California Subdivision Map Act, California Government Code § 66410 *et seq.*

~~1.111~~1.113 ~~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.

~~1.112~~1.114 ~~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.

1.115 ~~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.

~~1.113~~1.116 ~~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 twenty-four and 26/100 dollars (\$24.26^A) per gross square foot (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).

~~1.114~~1.117 ~~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.

~~1.115~~1.118 ~~1.117~~"Term" shall have the meaning set forth in Section 2.2.

~~1.116~~1.119 ~~1.118~~"Third-Party Challenge" shall have the meaning set forth in Section 7.4.

~~1.117~~1.120 ~~1.119~~"Third Party Transferee" shall mean any entity that is not Google LLC, a Google Affiliate or a Lendlease Affiliate.

~~1.118~~1.121 ~~1.120~~"Transfer" shall have the meaning set forth in Section 12.

~~1.119~~1.122 ~~1.121~~"Transferee" shall mean any party that is the transferee in a Transfer.

~~1.120~~1.123 ~~1.122~~"Transportation Demand Management Plan" shall mean the transportation demand management plan ~~attached to~~for the ~~FEIR~~Project, 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.

~~1.121~~1.124 ~~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 twenty-four and 26/100 dollars (\$24.26/gsf) per gross square foot 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.

~~1.122~~1.125 ~~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.

~~1.123~~1.126 ~~1.125~~"Vested Elements" shall have the meaning set forth in Section 5.1.

~~1.124~~1.127 ~~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.

~~1.125~~1.128 ~~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 Final 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 by submitting a completed Notice of Completion to the City that demonstrates Completion of the Community Benefits as set forth in the checklist attached to such notice. The completed checklist shall be consistent with (i) Developer's obligations under the Approvals, this Agreement, and the Subsequent Approvals for such Building(s), and (ii) any written summary of such obligations that Developer submitted in connection with the then most-recent annual review, if any, of such Buildings pursuant to Section 8.1 of this Agreement. 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 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 [DISC-related items, including](#) anticipated DISC right-of-way for the expanded Diridon Station, to memorialize the conceptual elevated rail designs, [current approach to alignment and facilities locations](#), 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 address urgent needs for tenant protections and assistance related to the COVID-19 pandemic, three million one hundred twenty-five thousand dollars (\$3,000,000) of the total \$7,500,000 in funding (for community stabilization and ownership programs) is to be paid on or before thirty (30) days after Final Approval, as set forth in Exhibit C1. The remaining four million three hundred seventy-five thousand dollars (\$4,500,000) is, 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~~permissible 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~~The complete list of 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~~abandonment, or if the necessary land is not a Development Parcel (in which case the requirements and obligations of Section 4.1.3(a)(v) shall apply). 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 written 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, subject to Section 4.1.3(a)(v). 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 4.1.3(a)(v), 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, subject to Section 4.1.3\(a\)\(v\)](#):

- 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 Section 4.1.3(a)(v) and 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 [acreagesquare footage](#) 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 Section 4(J) of 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 Creekside Walk and midblock passages as defined in the DWDSG, where there are multiple potential trigger Buildings the Privately-Owned Publicly Accessible Open Space shall only be Transferred with a trigger Building that is at least one hundred thousand (100,000) square feet in

size. Creekside Walk shall only be Transferred together with at least four (4) of the associated trigger Buildings. 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.¶

(v) Potential Pedestrian/Bicycle Streets Within or Adjacent to Privately-Owned Publicly Accessible Open Space(s). All or portions of several streets within the Project Site have been approved for abandonment pursuant to the Vesting Tentative Map, with such abandonment to be effectuated on phased final maps pursuant to the Subdivision Map Act. Certain of those streets, namely a portion of Park Avenue at the northeast corner of the intersection of Park Avenue and South Montgomery Street together with an adjacent portion of South Montgomery Street, South Montgomery Street between Park Avenue and West San Fernando Street, Cinnabar Street between North Autumn Street and the Peninsula Corridor Joint Powers Board rail tracks, and Otterson Street east of Cahill (together, "Potential Ped/Bike Streets") may not be abandoned if Developer and/or the City do not acquire fee title to certain lands underlying the Potential Ped/Bike Streets.¶

1. The Parties acknowledge that it is in their mutual interests for ownership of the areas within the Potential Ped/Bike Streets to be acquired by the City or by Developer in advance of Developer's submittal of the first phased final map for Development Parcel(s) adjacent to each such Potential Ped/Bike Street. Therefore, in furtherance of this interest,

City and Developer shall use good faith efforts to acquire the Potential Ped/Bike Street and, to the extent one of the Parties is able to do so (i) by the time of Developer's submittal of a phased final map for the adjacent Development Parcel(s), (ii) at a fair market value for remnant parcels (estimated \$37/sf) and commercially reasonable terms and (iii) City subsequently abandons the Right of Way, then Developer must commit to improving the Potential Ped/Bike Street area as Privately-Owned Publicly Accessible Open Space consistent with requirements of the DWDSG, with the higher caliber capital investment and events programming described in the DWDSG and this Agreement for such Open Spaces, including, but not limited to, installation and maintenance of the following design elements, as applicable to each Open Space per the DWDSG: Promenade, Anchor Plaza, Flex Lawn, Program Deck (outdoor seating), Kiosk, Water Feature, Art, Understory Planting, Fixed Social Seating, Outdoor Program Area, Tree Groves and Canopy Trees, and/or Shade Canopy/Trellis. These additional improvements within the Potential Ped/Bike Street area would provide approximately eight million eight hundred thousand dollars (\$8,800,000) in value to the City.

2. As to each of the Potential Ped/Bike Streets, if not abandoned and/or fee title ownership to any portion of the Potential Ped/Bike Street is not owned by either Developer or City at the time Developer submits a phased final map for a Development Parcel(s) adjacent to such Potential Ped/Bike Street, the Parties agree that as to such Potential Ped/Bike Street area, in accordance with Resolution Nos. _____, (x) Developer shall construct public pedestrian and bicycle improvements within such Potential Ped/Bike Street sufficient to maintain the pedestrian and bicycle circulation functions of the reserved pedestrian and bicycle street rights, but not including the higher caliber capital investment and events programming or the design elements listed in Paragraph (1) of this Section; and (y) Developer

shall retain ownership of such improvements, subject to Resolution No. _____ [Master Encroachment], and Developer shall pay maintenance costs for the improvements for fifty (50) years following completion of same, with an option for Developer, at its election, to extend the maintenance period for a total of up to ninety-nine (99) years. The improvements installed pursuant to this Paragraph (2) shall be subject to Conformance Review in the same manner as a Privately-Owned Publicly Accessible Open Space. Permitted uses, including public and private events and permitting for same, within the Potential Ped/Bike Street shall be consistent with the General Development Plan and Exhibit F3 hereto. The Potential Ped/Bike Street and any improvements thereon shall not be counted toward Developer's Parkland Obligation and shall not be subject to Exhibit E.¶

3. Further, if fee title to the entirety of a Potential Ped/Bike Street is subsequently obtained by Developer, the Parties shall cooperate in the processing of a request to vacate the Potential Ped/Bike Street and any reserved public utility easements within such Potential Ped/Bike Street, and convey any remaining rights or interests to Developer. Notwithstanding the foregoing, Developer shall have the right to determine the timing for the vacation of the Potential Ped/Bike Street. Following the vacation of the Potential Ped/Bike Street and conveyance of any remaining rights or interests to Developer, Developer shall be obligated to further implement the event programming in accordance with Exhibit F3.

(b) Publicly~~Available-Accessible~~ Parking Spaces. Developer shall provide publicly~~available-accessible~~ 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 [pursuant to any applicable federal, state and/or local laws](#). 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~~[may](#) 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~~-accessible 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 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~~ of any fees owed ~~or costs incurred~~ across the Project ~~pursuant to that Crane~~ under such Policy ~~exceed~~ [AMOUNT TBD], ~~Developer shall receive a Community Benefits Adjustment in an amount equal to one dollar for every dollar over \$[TBD] that is owed or incurred~~ shall be capped at one hundred thousand dollars (\$100,000).

(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:

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 in no event shall more than 100,000 net square feet of Limited-Term Corporate Accommodations 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 lobbies, balconies, elevator shafts, building common stairways, utility shafts, janitorial closets, 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 INTENTIONALLY OMITTED.

4.6 ~~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.

~~4.5.14.6.1~~ 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.

4.7 ~~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.

4.8 ~~4.7~~ City Cost Recovery.

~~4.5.24.8.1~~ 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).

[4.5.34.8.2](#) [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](#).

[4.5.44.8.3](#) [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. [Reimbursement related to any Third-Party Challenge, legal costs for preparation of agreements associated with District Systems, and any other fees and costs mutually agreed upon between the parties will be covered in a separate Reimbursement Agreement\(s\).](#)

[4.5.54.8.4](#) [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 agreed upon terms for such Reimbursement Agreement ~~shall be in a form substantially similar to the form~~ attached hereto as Schedule A.

4.9 ~~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.

4.10 ~~4.9~~ Indemnification of City. To the fullest extent permitted 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.

~~4.5.64.10.1~~ ~~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 Sections ~~4.6~~4.8 and 5.7, 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. ____ 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, it being agreed that, in order to give Developer certainty with regard to the rules and regulations that will govern the future development of the Project, and give City certainty of Public Benefits in exchange, the City and Developer have agreed upon a mix of rights and obligations under this Agreement that are vested in accordance with the terms of this Agreement. Accordingly, except as expressly set forth in this Agreement, Future Changes to Existing Standards that would substantially or materially increase Developer's rights or obligations or decrease Developer's rights or obligations under this Agreement shall conflict with terms of this Agreement and the Approvals and shall not apply to this Agreement or 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.

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 and Exhibit M.

(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 4.6.44.8.4 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.

Developer shall require the following provision, or a substantially similar version thereof, to be included in any general contract for the construction of core and shell work (including windows, elevators, and escalators) 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/nots/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, or (ii) 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 significant action or material omission by or on behalf of the 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 and as confirmed during an annual compliance review, 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. [This Agreement shall not apply to a Potentially Participating Parcel until Developer adds such Parcel to this Development Agreement by giving notice to the City of such addition or including all or a portion of the Parcel in any Conformance Review Application, following which such Potentially Participating Parcel or portion thereof shall be a Development Parcel.](#) 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 [or the City Clerk](#)) 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. 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 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. 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 [_____] [Alexa Arena](#), 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. _____

DEVELOPER:

GOOGLE LLC,
a Delaware limited liability company

By: _____
Name: David Radcliffe
Title: Vice President, Real Estate &
Workplace Services

[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 C

Public Benefits

Exhibit C1

Exhibit C1

Base City Housing Requirements and Community Benefits Schedule

Base City Requirements + Community Benefits	Base Requirement		Community Benefits		Timing and Notes
	Basis	Per 7.3M gsf of Office	Basis	Per 7.3M gsf of Office	
Affordable Housing: IHO “Mixed Compliance Option”	\$18.70/nsf Residential	Equivalent of: \$5.55 x 7.3M gsf Office: ~\$40,500,000			This fee requires provision of Moderate Inclusionary units as described in Exhibit D.
Affordable Housing: Moderate Inclusionary Units	170 Units	Equivalent of \$5.45 x 7.3M gsf Office: \$39,785,000	30 Units	Equivalent of: \$0.96 x 7.3M gsf Office: ~\$7,000,000	Delivered with market rate residential development at a ratio of 5.88% of total market rate units
Commercial Linkage Fee	\$12/gsf Office	\$12.00 x 7.3M gsf Office: \$87,600,000			Pay at TCO of each office building
Community Stabilization and Opportunity Fund			\$21.20/gsf Office	\$21.20 x 7.3M gsf Office: \$154,760,000	Pay at TCO of each office building
Prepayment for Job Readiness and Stabilization			~\$1.03/gsf Office	~\$1.03 x 7.3M gsf Office: \$7,500,000	Pay <u>\$3,000,000 30 days after Final Approval</u> ; Pay <u>\$4,500,000</u> 120 days after Final Approval
Unallocated Community Benefit Commitment			\$3.06/gsf Office	\$3.06 x 7.3M gsf Office: \$22,340,000	Pay at TCO of each office building
Autumn Street Parcels			In-kind (\$1.15/gsf Office)	\$1.15 x 7.3M gsf Office: ~\$8,400,000	Fee simple transfer to the City 3 months after Final Approval in the transfer condition described in DA Section 4.1.2(c)
Total Baseline City Requirements + Community Benefits	\$23.00/gsf Office	\$23.00 x 7.3M gsf Office: ~\$167,885,000	\$27.40/gsf Office	\$27.40 x 7.3M gsf Office: ~\$200,000,000	

Exhibit D

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 Schedule 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. See Schedule D2 for IHO Implementation Guidelines applicable to this Affordable Housing Program for the administrative procedures related to IHO compliance.

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, as defined below) for use in the production of affordable housing. See Schedule 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”, as defined in the “Applying the In-lieu Fee on a Square Footage Basis” section of the IHO Supplemental Memo to San Jose City Council, dated February 22, 2021 and attached here at Schedule D5) 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, that is an “Affordable Housing Developer” as defined in the IHO and has entered into a contract with the City for development of affordable housing on the applicable Property (“**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 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 Schedule 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 value](#) of performing the Early H5 Work and Early H6 Work [and transferring the H6 and H5 Properties](#) 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 [\(which amount represents the sum of the land value of \\$8.8 million and the \\$1.3 million value of Early H6 Work\)](#) to accelerate dedication of the H6 Property ("**H6 Early Work CLF Amount**") and \$9,200,000 [\(which amount represents the sum of the land value of \\$6.1 million and the \\$3.1 million value of Early H5 Work\)](#) 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 (“**First Vertical Office 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 First Vertical Office 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 that is fifteen (15) months from the date on which the Temporary Certificate of Occupancy is issued for the first Developer-constructed market rate residential building (subject to City caused delays or if City has requested to defer the closing Developer’s obligation to perform the Early H6 Work is triggered, as may be extended as more specifically set forth in the Transfer Agreement for the H6 Property. 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 as set forth in the same amount as the H6 Early Work CLF Amount Section III.C.4 below, 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. Notwithstanding the foregoing, (1) if the circumstances set forth in Section 19.2(a) of the Transfer Agreement for the H6 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H6 Work until the Transferor’s Work has been Completed (as such terms are defined in the Transfer Agreement) or (2) if the circumstances set forth in Section 19.2(b) of the Transfer Agreement for the H6 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H6 Work regardless of whether the Transferor’s Work is eventually Completed (as such terms are defined in the Transfer Agreement) pursuant to said Section 19.2(b).

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 twelve (12) months from the date ~~on which~~ of the ~~Temporary Certificate of Occupancy is issued for the fourth Developer-constructed market rate residential building (subject to City-caused delays or if City has requested to defer the closing~~ H5 Notice, as such 12-month deadline may be extended as more specifically set forth in the Transfer Agreement for the H5) Property. 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 as set forth in the same amount as the H5 Early Work CLF Amount Section III.C.3 below, 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. Notwithstanding the foregoing, (1) if the circumstances set forth in Section 19.2(a) of the Transfer Agreement for the H5 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H5 Work until the Transferor's Work has been Completed (as such terms are defined in the Transfer Agreement) or (2) if the circumstances set forth in Section 19.2(b) of the Transfer Agreement for the H5 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H5 Work regardless of whether the Transferor's Work is eventually Completed (as such terms are defined in the Transfer Agreement) pursuant to said Section 19.2(b). ¶

¶
If the triggers described above (First Vertical Office Permit and H5 Notice) in conjunction with the time intervals to complete the respective Early Work and close the transfers of the Properties have not resulted in Developer earning enough IHO credits to process a TCO for an additional residential unit, then Developer shall be required to transfer H6, and then H5, to generate enough IHO credit to cover the TCO requirements on the next residential building.

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 Schedule 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~~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~~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 [\(the “IHO Credit Table”\).](#)



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 (land value including Early H5/H6 Work)	IHO Credits (land value only)	Early H5/H6 Work Portion of IHO Credits
H1	\$22M	\$22M	Not applicable
H5	\$9.2M	\$6.1M	\$3.1M
H6	\$10.1M	\$8.8M	\$1.3M
Total Credits	\$41.3M	\$36.9M	\$4.4M

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 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.¶



[All numbers in this paragraph 5 are in 2021 dollars, and will be calculated on that basis.](#)

6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) not accrued ~~any~~sufficient IHO Fee ~~credits~~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~~Credits at the end of the Term, then Developer would have the right to monetize the excess IHO Fee ~~credits~~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~~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 units and a description of the access to amenities and the types of fixtures for the market rate units and the below-market rate units, consistent with the Guidelines attached hereto at Schedule D2. 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 D3 (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 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. 79903 and 79904, and Supplemental Memo to San Jose City Council, dated February 22, 2021, copies of which are attached hereto at Schedule D5.

Schedule D2

¶
SCHEDULE D2
DEVELOPMENT AGREEMENT INCLUSIONARY HOUSING ORDINANCE
IMPLEMENTATION GUIDELINES
¶
¶

¶
These Guidelines are based on existing City Guidelines as of the Effective Date. References to San Jose Municipal Code Sections means those sections as in effect on the Effective Date of the Development Agreement. ¶

¶
¶
INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS: PROCEDURE
FOR BUILD ON-SITE OPTION ¶
(PROVIDING RENTAL INCLUSIONARY UNITS WITH ABILITY TO CHANGE TO FOR
SALE) ¶

¶
I. Affordable Housing Compliance Plan Application (SJMC Sections 5.08.120, 5.08.155, 5.08.320, 5.08.420, 5.08.610) ¶

¶
As part of the application for First Approval of any Residential Developments, unless otherwise provided in Section III of Exhibit D of the Development Agreement, Developers are required to submit a signed Affordable Housing Compliance Plan application to the City, and pay the application processing fee. Developers who elect the Build On-Site Compliance Option must provide the following information when submitting the Affordable Housing Compliance Plan application: ¶

- ¶
- 1) General information about the Developer and the Residential Development; ¶
 - 2) Whether the Developer intends to seek a parcel, or tentative, and final map for the project; ¶
 - 3) Affirming that the Developer intends to build Inclusionary Rentals on-site consistent with the standards in the Development Agreement; ¶
 - 4) Detailed information about the unit makeup of the Residential development: ¶
 - i. Total number of units; ¶
 - ii. Total number of Inclusionary Rentals by income level of the units; ¶
 - iii. Unit type (e.g. townhouse, attached multi-family) and tenure (e.g. For-Sale or Rental); ¶
 - iv. Number of bedrooms and bathrooms; ¶
 - v. Parcel map and/or site plan(s) indicating the proposed location and square

footage of both the Inclusionary Units and the market rate units. ¶

vi. Construction and completion schedule of all Inclusionary and market rate units, and ¶

vii. Phasing of Inclusionary Rentals in relation to market rate rentals. ¶

5) As part of the Affordable Housing Compliance Plan application process, Developers shall provide a marketing plan that includes the following: ¶

i. Anticipated timeline for the rental of both market rate and Inclusionary Units, and ¶

ii. The planned approach to offering the Inclusionary Rentals to the public in a non-discriminatory and equitable manner. ¶

¶

II. Inclusionary Housing Agreement (SJMC Sections 5.08.195, 5.08.420, 5.08.460, 5.08.600, 5.08.610, 5.08.710; Development Agreement - Exhibit D) ¶

¶

The Inclusionary Housing Agreement is a covenant by the Developer for the benefit of the City of San José governing how the Residential Development's inclusionary housing obligation will be satisfied. The Inclusionary Housing Agreement may be comprised of more than one document. The City may require that the approved Affordable Housing Compliance Plan application, including all components required to satisfy the Developer's selected compliance option, be attached to the Inclusionary Housing Agreement. ¶

¶

Prior to the approval of any final or parcel map, or the issuance of any Building Permit for a Residential Development subject to the Ordinance, the City and Developer will execute an Inclusionary Housing Agreement. The Inclusionary Housing Agreement will then be recorded against the entire property on which the Residential Development will be located, and any other property used for the purposes of memorializing the requirement to meet the obligations of the Ordinance. The Developer will include with each vertical conformance review application information as required in Section III.D of Exhibit D of the Development Agreement demonstrating when the Inclusionary Housing Agreement will be recorded for each property that will be developed under the Development Agreement. ¶

¶

A marketing plan for the Inclusionary Rentals is required, including a commitment to provide the Inclusionary Rentals to the public in a nondiscriminatory and equitable manner. Such a plan should provide for concurrent marketing and the rental of one (1) inclusionary unit for each six (6) market rate units. ¶

¶

III. Standards for Rental Inclusionary Units (SJMC Section 5.08.470) ¶

¶

The Inclusionary Rentals shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. Square footage will be considered comparable if the total average square footage of Inclusionary Rentals 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 Inclusionary Rentals must be at least 85% of the average square footage for 1-bedroom market rate units). ¶

¶

In addition, Inclusionary Rentals must be dispersed throughout the project site with the market rate units and not clustered together, except as provided in Section III of Exhibit D of the Development Agreement. ¶

¶

The quality of exterior design and overall quality of construction of the Inclusionary Rentals must be consistent with the exterior design of the market rate units. Inclusionary Rentals may have different interior finishes and features than the market rate units in the Residential Development, 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, to some extent, the quality of materials and the size of structures. ¶

¶

IV. Inclusionary Rentals Household Income Limits (SJMC Sections 5.08.400.B, 5.08.600.A) The Developer is responsible for verifying the income eligibility of Rental Inclusionary Unit tenants, based on the following methodology and definitions. ¶

¶

IHO Guidelines – Attachment B-1: Rental On-Site Compliance Option ¶

¶

1) Household Composition Definition ¶

The Household is comprised of **all** eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Rental. New household members **cannot** be added to the application to income qualify for an Inclusionary Unit after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in caretakers. To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria: ¶

¶

- i. All household members who are 18 years of age or more (adult household members) must be included on the application to rent the inclusionary unit; or ¶

¶

- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member. ¶

¶

2) Household Income Limits ¶

To establish the eligibility of households who intend to occupy the Inclusionary Rental, limits are set on the amount of income that households (including all Eligible Household Members) can earn. These limits are based on the number of

Eligible Household Members; the family size to be used for determining the Household Income Limit is the number of Eligible Household Members. ¶

The Ordinance (No. 30538) Section 5.08.525 Mixed Compliance with Rental Inclusionary Units On-Site includes that five percent (5%) of total Dwelling Units in the Residential Development shall be made available for rent at an Affordable Housing cost to Moderate Income Households, as defined below: ¶

- i. When Moderate Income Rental Inclusionary Units are provided on-site, Moderate Income Households are defined in the ordinance as households earning no more than 100% of AMI for the household's family size. Please refer to the income limits currently published at 25 Cal. Code Reg Section 6932 for the current AMI in Santa Clara County by family size. ¶

The City of San José annually publishes Income and Rent Levels for the City and posts these on its website. ¶

3) Household Income Definition ¶

For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12. In the event that current monthly income deviates by more than 15% from the preceding 12- month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level. ¶

4) Types of Income ¶

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions; ¶
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets); ¶
- iii. Interest and dividends (including income from assets – see Excluded Income section below); ¶
- iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment; ¶
- v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay; ¶
- vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities; ¶
- vii. Periodic and determinable allowances, such as alimony and child support

- payments, and regular contributions or gifts received from persons not residing in the home; ¶
- viii. All regular pay, special pay and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and ¶
- ix. Any earned income tax credit to the extent that it exceeds income tax liability. ¶

¶

5) Excluded Income ¶

- i. Casual, sporadic or irregular gifts; ¶
- ii. Amounts that are specifically for, or in reimbursement of, medical expenses; ¶
- iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses; ¶
- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income; ¶
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire; ¶
- vi. Foster child care payments; ¶
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program; ¶
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973; ¶
- ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes; ¶
- x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program; ¶
- xi. Payments received from the Job Training Partnership Act; and ¶
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians. ¶

¶

6) Determination of Income from Assets ¶

To determine a Household's income eligibility for occupancy of an Inclusionary Rental, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the Housing Department website for current income limits. When the total of the Household's assets exceed the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of: ¶

- i. The actual annual income generated from the assets; or ¶
- ii. 2.5% of all assets in excess of the Household Income Limit. ¶

¶

7) Assets ¶

Assets are defined as: ¶

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds; ¶
- ii. Marketable securities, stocks, bonds and other forms of capital investment; ¶
- iii. Inheritance and lump sum insurance payments, already received; ¶
- iv. Settlements for personal or property damage already received; ¶
- v. Equity in real estate including residential and commercial property and unimproved land; and ¶
- vi. Other personal property that is readily convertible into cash. ¶

¶

The following are not considered assets: ¶

- i. Ordinary household effects including furniture, fixtures, and personal property; ¶
- ii. Automobiles used for personal use; and ¶
- iii. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service. ¶

¶

V. Affordable Rental Rates for On-Site Rental Inclusionary Units (SJMC Section 5.08.400.A). The City of San José annually publishes AMI levels for the City and posts these on its website. As defined in Health and Safety Code Section 50052.5 (h), the family size appropriate for the Rental Inclusionary Unit is determined by the number of bedrooms. The “family size” is equal to one person greater than the number of bedrooms in the unit. For the purpose of determining the Affordable Rental Rate, each Rental Inclusionary Unit shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons. These apply when there are no other pertinent federal statutes applicable to the Rental Inclusionary Units. However if federal statutes apply (e.g. Tax Credit Allocation Committee - TCAC) the following occupancy guidelines may be used: 1.5 persons per bedroom. Owners may make an election to use the TCAC occupancy guidelines for an entire property. Affordable Rental Rate includes all charges related to occupancy of the unit including utilities, parking fees, fees for use of common facilities, and other fees and charges. If utilities are paid by tenants of the Rental Inclusionary Units, the rent for the Rental Inclusionary Units must be adjusted downward for tenant utility expenses, calculated in accordance with the utility allowances published by the Santa Clara Housing Authority annually. In situations where there are multiple affordability restrictions/income or rent limits set by different funding requirements or jurisdictions, the Project must adhere to the strictest requirement so it can meet all of the layering restrictions. ¶

¶

VI. Occupancy Conditions ¶

The approved tenant(s) must occupy the Rental Inclusionary Unit as its principal

residence during the entire term of the lease. If an additional occupant (roommate, family member, etc.) moves into the Rental Inclusionary Unit, he/she will be considered part of the existing household. As a condition for lease or occupancy of a Rental Inclusionary Unit, tenant must be required to provide notice to the owner/property manager, prior to the move in date of a new household member, and the entire household (including the new occupant) will be reevaluated to determine eligibility, including household income requirements. If the tenant(s) fail to receive approval from the owner/property manager for any changes in occupancy or if the tenant(s) subleases the property or fails to provide the annual Tenant Income Certification, the tenant shall be in violation of its lease and will no longer qualify as a Rental Inclusionary Unit tenant. If the owner/property manager suspects that there have been any changes to the occupancy of the Rental Inclusionary Unit, the owner/property manager shall make a reasonable effort to determine who is occupying the unit. ¶



VII. Minimum Household Size ¶

To be eligible for a Rental Inclusionary Unit, a household must be of a size at least equal to the number of bedrooms in the Rental Inclusionary Unit. For example, in order to rent a two- bedroom unit, a household must have at least two Eligible Household Members. Minimum household sizes for Rental Inclusionary units are as follows: one bedroom unit = one person, two bedroom unit = two persons, three bedroom unit = three persons, four bedroom unit = four persons. A household is comprised of all eligible individuals who are currently living together at the same address and will continue to be living together in the Rental Inclusionary Unit. ¶



VIII. Annual Rent Adjustments ¶

The maximum Affordable Rental Rates will be adjusted annually based on the most recently published household income limits for Santa Clara County by family size. The City or its agent will notify the property owner/property manager of the new rental rates. If the owner chooses to raise rents, the tenant must be given a sixty (60) day notice before any rent increase. ¶



IX. Ongoing Compliance with Affordability Restrictions (SJMC Section 5.08.710) ¶

The developer of each project containing Rental Inclusionary Units is required to submit an Annual Compliance Report and pay any City monitoring fees. The Annual Compliance Report (ACR) consists of the following three documents which may be obtained from the Department of Housing's website at . ¶

- 1) Tenant Income Certification (TIC): Completed and signed by residents residing in the Inclusionary Rental. It is used to document family size, income and other financial information. Residents must be recertified annually to maintain eligibility at the inclusionary project. ¶
- 2) Certified Rent Rolls: A report listing each affordable unit, the resident's name, rental rate, household income, the household size, and any other information regarding property tenancy. ¶
- 3) Rent Rolls should be electronically submitted in an excel spreadsheet provided by the Department of Housing. The Rent Roll form can be found here: . The City reserves the right to change the Rent Roll form at any time. ¶
- 4) Certificate of Continuing Program Compliance: A signed statement attesting that

the project is in compliance with the City of San José Inclusionary Housing Agreement. The Annual Certificate of Continuing Program Compliance can be found here: ¶

¶

X. Annual Tenant Income Certification (TIC) (SJMC Section 5.08.710) ¶

Leases for Rental Inclusionary Units shall provide for submittal of signed TIC forms upon written request of the owner or property manager and if tenants fail to submit the form within thirty (30) days of receipt of a written request, then this is a violation of the lease and the lease shall automatically terminate. If the renter fails to comply after notice, the owner or property manager will institute eviction proceedings. If a tenant's household income increases and exceeds 140% of the Moderate Income Limit, the tenant will be given three months to locate alternate housing and vacate the inclusionary apartment unit. A three-month extension may be granted in cases of extreme hardship. The property may also offer the tenant a market rate unit. ¶

¶

XI. Terms of Tenancy ¶

Rental Inclusionary Unit tenants will be subject to the same conditions of tenancy as other tenants occupying the same property, except for terms relating to occupancy, income eligibility, annual recertification, and limits on rents. The initial lease term for the Inclusionary Rental will be for one year. ¶

¶

XII. Availability of New Units for Lease ¶

A Rental Inclusionary Unit may not be leased until the City has approved the unit for occupancy. ¶

¶

XIII. Marketing /Leasing of Units ¶

The Developer is responsible for marketing the Inclusionary Rentals and identifying qualified tenants that meet the income eligibility requirements of the Rental Inclusionary Units. Developer shall post the available Rental Inclusionary Units on the county-wide listing service site located at or such other site as may be requested by the City. In reviewing each candidate, the owner or property manager may apply the same tenant selection criteria, such as past performance in meeting financial obligations and credit references, as those applied to applicants for non-inclusionary units on the property, except for those standards relating to income eligibility. The Inclusionary Rentals within a Residential Development will not be operated at less than ninety percent (90%) occupancy for more than six consecutive months unless market conditions otherwise dictate. Developer shall post each vacant Rental Inclusionary Unit as soon as possible but not later than ten (10) days after notice of an impending vacancy and provide advanced notice of the opening of any wait list on the county-wide listing service site located at or such other site as may be requested by the City. ¶

¶

XIV. XVIII. Owner/Manager Certification ¶

Prior to the rental of the first Rental Inclusionary Unit on a property, the owner/property manager will sign a certification of receipt of these Guidelines with a statement of intent to manage the Rental Inclusionary Units according to these procedures. Developers will also submit to the City for approval a management plan consistent with the City's

standards for management of affordable units. Subsequent property owners/property manager may be asked to sign certifications of receipt of these Guidelines. ¶

¶
INCLUSIONARY HOUSING ORDINANCE (IHO) COMPLIANCE OPTIONS:
PROCEDURE FOR BUILD ON-SITE OPTION¶
(PROVIDING FOR-SALE INCLUSIONARY UNITS)¶

¶
I. Pricing For-Sale Inclusionary Homes (SJMC Sections 5.08.400.B, 5.08.600.A) ¶
Inclusionary Homes are sold at their Fair Market Value, as defined below but discounted by an amount that is equal to the difference between the Fair Market Rate value of the home and the Affordable Housing Cost as adjusted to an Affordable Sales Price pursuant to these Guidelines, and the buyer of an Inclusionary Home acknowledges the discount provided under the Ordinance by execution of subordinate shared appreciation loan documents and agrees to the income restriction and other conditions. In escrow, the buyer executes a City promissory note and other subordinate shared appreciation loan documents that reflect this cost differential, also referred to as “Developer Discount.” ¶

¶
"Fair Market Value" for the purposes of the Ordinance and the Guidelines, means the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obligated to sell, and a buyer, being ready, willing and able to buy but under no particular or urgent necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the Inclusionary Home is reasonably adaptable and available but as though there was no affordability requirement imposed on the home. The Fair Market Value shall be verified by a licensed real estate appraiser, commissioned by the borrower or borrower's lender, prior to the close of escrow. The Developer must provide 90 days' advance written notice to the City of the initial marketing of the Inclusionary Homes. The Housing Department will calculate the Affordable Housing Cost, as adjusted to an Affordable Sales Price pursuant to these Guidelines which will then be identified as the maximum affordable price that may be charged to prospective homebuyers for the Inclusionary Homes within a Residential Development. This calculation of Affordable Sales Price shall be done within 90 days before the date of the first close of escrow for an Inclusionary Home in a project and the values (Affordable Sales Price and Fair Market Value) shall be updated every 90 days thereafter. ¶

¶
Method of Calculating the Income Limit for Pricing ¶

First, using the number of bedrooms in the particular Inclusionary Home, the maximum income limit of 110% of AMI (as shown in the Santa Clara County table contained in 25 Cal. Code Reg. Section 6932, or successor regulation, prorated from the 100% of AMI amount if needed) is adjusted for family size. In order to adjust for family size as defined in Health and Safety Code Section 50052.5 (h) the family size appropriate for the Inclusionary Home is determined by the number of bedrooms. That “family size” is equal to one person greater than the number of bedrooms in the home. Specifically, for the purpose of determining the income limit in order to calculate the Affordable Housing Cost, each Inclusionary Home shall be adjusted for family size appropriate for the unit based on the number of bedrooms as follows: a studio = one person, one bedroom = two

persons, two bedrooms = three persons, three bedrooms = four persons, and four bedrooms = five persons. ¶

The income limits in 25 Cal. Code Reg. Section 6932 are updated annually by the California Department of Housing and Community Development (HCD) and posted on the City's website. ¶

¶

Method of Calculating the Affordable Housing Cost and Affordable Sales Price ¶

Pursuant to Health & Safety Code Section 50052.5, the Affordable Housing Cost for an owner occupied unit is 35% of the Income Limit. The monthly Affordable Housing Cost is calculated by dividing the Affordable Housing Cost by 12. This monthly Affordable Housing Cost is intended to cover all of the purchaser's housing costs, so in order to determine the maximum affordable sales price ("Affordable Sales Price") that Affordable Housing Cost amount must be adjusted as described below. ¶

¶

The City uses the procedures adopted by HCD in 25 Cal. Code Reg. Section 6920 as a basis to establish the Affordable Sales Price based on the Affordable Housing Cost. To determine the Affordable Sales Price from the monthly Affordable Housing Cost involves a three-step process: ¶

¶

- 1) Subtract applicable property taxes, homeowners' association fees, annual maintenance and repair allowance, insurance – including hazard insurance, mortgage insurance and other applicable insurance – and utilities cost from the monthly Affordable Housing Cost amount. The remainder is the amount that would be available to pay the monthly mortgage payment (monthly **Affordable Mortgage Payment**). To establish a consistent methodology, the Housing Department has defined the following criteria for calculating housing related expenses that must be covered by the Affordable Housing Cost in addition to the mortgage payment: ¶
 - i. Homeowner Association (HOA) Fees – Actual amount approved by the State of California Department of Real Estate for the project. ¶
 - ii. Property Tax – The Housing Department shall use the standard of 1.25% of the Market Price of the unit. In the event that any special assessments bring the property tax rate above 1.25%, the City will utilize the actual property tax rate for the Inclusionary Home. ¶
 - iii. Utility Costs – See current Utility Allowance schedule provided by the Santa Clara County Housing Authority. The utility allowance must include heating, cooking, other electric, water heater, water, and garbage, if not included in HOA fees. The utility allowance changes periodically so please check the Santa Clara County Housing Authority website to obtain current information . ¶
 - iv. Hazard Insurance Cost – If not included in HOA fees, the City will estimate the monthly cost of hazard insurance at \$75. This amount may be adjusted for inflation. ¶
 - v. Mortgage Insurance Premium – If the calculated amount of the Developer Discount Loan is not greater than 20% of the Fair Market Value of the property, the Housing Department will establish a market rate Private Mortgage Insurance (PMI) premium corresponding to the rates published by

- the Federal Housing Administration (FHA). ¶
- vi. Maintenance and Repair Allowance of \$25 per bedroom, per month. This amount may be adjusted for inflation. ¶

- ¶
- 2) Follow the process below to calculate the amount of the mortgage loan that could be obtained (**Financed Affordable Loan**) based on the amount of monthly Affordable Mortgage Payment as determined in Step 1 above. ¶
- i. The mortgage loan interest rate shall be based on a 5% down payment, thirty (30) year, fully amortizing fixed rate mortgage based on the Freddie Mac Weekly Mortgage Survey at the time of pricing, as determined by the Housing Department. This mortgage amount does not include any pre-paid points or loan fees. ¶
- ii. Using the Monthly Affordable Mortgage Payment, the interest rate calculated above, and a fully amortized fixed rate mortgage without points or loan fees to determine the maximum Financed Affordable Loan. ¶

- ¶
- 3) Add to the Financed Affordable Loan amount determined in Step 2 an assumed amount of borrowers' own funds of 5% for a down payment to determine the **Affordable Sales Price**. Waiver required under SJMC 5.08.400.B.4 ¶
- A Developer may apply for limited term waiver of the terms of the subordinate shared appreciation documents required by SJMC Section 5.08.600.A, which shall be granted if the appraised unrestricted market value of an inclusionary home is less than 5% greater than the Affordable Sales Price (as determined from the Affordable Housing Cost). The term of the waiver shall not exceed 6 months. The waiver shall require that the Inclusionary Home be sold at or below the Affordable Sales Price and that the Inclusionary Home shall initially be owner-occupied. In the event that the waiver is granted, requirements of the subordinate shared appreciation documents will be waived and the City will not require income verification for the purchaser. ¶

¶

II. Homeowner Inclusionary Housing Requirements (SJMC 5.08.600.F) ¶

- 1) First Time Home Buyer Requirement ¶
- Purchasers of Inclusionary Homes must be certified by the Housing Department as First Time Home Buyers. In order to be certified as a First Time Homebuyer, the home buyer must be the unit's Principal Occupant, and cannot hold or have held an Ownership Interest, in whole or in part, of a residential property during the three-year period immediately prior to the home buyer(s) certification of eligibility by the Housing Department to purchase an Inclusionary Home unless one of the following is true: ¶
- i. Is a "displaced homemaker" who within the past two years has not worked on a full-time basis in the labor market, experiencing difficulty in obtaining employment, and has worked primarily without pay to care for the home and family; ¶
- ii. Is a single parent who is unmarried or legally separated from a spouse, is pregnant, or has sole or joint custody of at least one minor child, and does not have an Ownership Interest in residential property; or ¶
- iii. Is a current owner-occupant of a mobile home that does not meet local

building codes, and the home cannot be brought into compliance for less than the cost of constructing a new home. ¶

¶

2) Household Composition Definition ¶

The Household is comprised of all eligible individuals who are currently living together at the same address and will continue to be living together in the Inclusionary Home. New household members **cannot** be added to the application to income qualify for an Inclusionary Home after initial submission of an application. In addition, the following individuals are not counted as part of the household: foster children, unborn children, children who are subject to a shared-custody agreement, in which the child resides with the household less than 50% of the time, children being pursued for legal custody or adoption who are not yet living with the household at the time of application, and non-related live-in caretakers. To be considered an Eligible Household Member, an individual must comply with the above criteria and meet one of the following criteria: ¶

- i. All household members who are 18 years of age or more (adult household members) must be included for income qualification purposes documents and must appear on the application to purchase the Inclusionary Home; or ¶
- ii. Any minor individual who is a dependent listed on the most recent year's tax returns of an adult household member. All household members who are under 18 years of age must be the legal dependent of an adult household member. ¶

¶

3) Household Income Limits for Buyers ¶

To establish the eligibility of households who intend to purchase an Inclusionary Home, limits are set on the amount of income households (including all Eligible Household Members) can earn. These limits are based on the AMI and the number of Eligible Household Members. The Ordinance allows moderate-income households to purchase Inclusionary Homes. Moderate-income households are defined as those with gross incomes between 90% and 110% of AMI. The City publishes the AMI and the income limits are updated annually. ¶

¶

4) Household Income Definition ¶

Households may not have an income in excess of 110% of AMI (Household Income Limit). The family size to be used for determining the Household Income Limit is the number of Eligible Household Members. For income eligibility purposes, the gross annual income (income before deductions or exemptions) received by all members of the household 18 years of age or older (except for non-related live-in caretakers paid by an outside source who are not considered household members) will be considered. The gross annual income is determined by calculating the household's total current monthly income and then multiplying that total by 12. In the event that current monthly income deviates by more than 15% from the preceding 12-month average, the gross annual income will be determined by combining the preceding half year's gross income with one-half year's gross income at the current level. ¶

¶

5) Types of Income ¶

- i. All wages and salaries, overtime pay, commissions, fees, tips, bonuses, and other compensation for personal services, before payroll deductions; ¶
- ii. The net income from the operation of a business or profession or from the rental of real or personal property (without deducting expenditures for business expansion or amortization of capital indebtedness, or any allowance for depreciation of capital assets); ¶
- iii. Interest and dividends (including income from assets – see Excluded Income section below); ¶
- iv. The full amount of periodic payments received from Social Security, annuities, insurance policies, retirement funds, pensions, disability or death benefits, and other similar types of periodic receipts, including any lump sum payment for the delayed start of a periodic payment; ¶
- v. Payments in lieu of earnings, such as unemployment, disability compensation, and severance pay; ¶
- vi. The maximum amount of public assistance available to household members, other than the amount of assistance specifically designated for shelter and utilities; ¶
- vii. Periodic and determinable allowances, such as alimony and child support payments, and regular contributions or gifts received from persons not residing in the home; ¶
- viii. All regular pay, special pay, and allowances of a member of the Armed Forces (whether or not living in the dwelling) who is the head of household or spouse; and ¶
- ix. Any earned income tax credit to the extent that it exceeds income tax liability. ¶

¶

6) Excluded Income ¶

- i. Casual, sporadic or irregular gifts; ¶
- ii. Amounts that are specifically for, or in reimbursement of, medical expenses; ¶
- iii. Lump sum additions to household assets (as defined in the Assets section below), such as inheritances, insurance payments (including payments under health and accident insurance and workmen's compensation), capital gains, and settlement for personal losses; ¶
- iv. Monies received for educational scholarships paid either directly to students, or to the educational institution, as well as amounts paid by the Government to a Veteran of the U.S. Armed Forces for use in meeting the costs of tuition, fees, books, and equipment. Any money received over and above the associated educational costs listed are not exempt and considered income; ¶
- v. Special pay to a person in the U.S. Armed Forces who is head of household who is deployed and exposed to hostile fire; ¶
- vi. Foster child care payments; ¶
- vii. The value of benefits received from the Supplemental Nutrition Assistance Program; ¶
- viii. Payments to volunteers under the Domestic Volunteer Service Act of 1973; ¶

- ix. Income derived from certain sub-marginal land of the United States that is held in trust for certain Indian tribes; ¶
- x. Payments or allowances made under the Department of Health and Human Services' Low-Income Home Energy Assistance Program; ¶
- xi. Payments received from the Job Training Partnership Act; and ¶
- xii. Income derived from the disposition of funds of the Grand River band of Ottawa Indians. ¶

¶ 7) Determination of Income from Assets ¶

To determine a Household's income eligibility for purchase of an Inclusionary Home, a percentage of the Household's assets (as defined in the Assets section below) shall be added to the Household income only when the Household's assets exceed the annual Household Income Limit. Please refer to the of Housing Department website for current income limits. When the total of the Household's assets exceeds the Household Income Limit for the Household, then the amount of income attributed to these assets shall be computed as the higher of: ¶

- i. The actual annual income generated from the assets; or ¶
- ii. 2.5% of all assets in excess of the Household Income Limit. ¶

¶ 8) Assets ¶

Assets are defined as: ¶

- i. Cash savings, including but not limited to bank accounts, credit union accounts, certificates of deposit, and money market funds; ¶
- ii. Marketable securities, stocks, bonds, and other forms of capital investment; ¶
- iii. Inheritance and lump sum insurance payments, already received; ¶
- iv. Settlements for personal or property damage already received; ¶
- v. Equity in non-residential real estate such as commercial property and unimproved land, except as described as "not considered asset" in iii below; and ¶
- vi. Other personal property that is readily convertible into cash. ¶

The following are not considered assets: ¶

- i. Ordinary household effects including furniture, fixtures, and personal property; ¶
- ii. Automobiles used for personal use; ¶
- iii. Any deposits on Inclusionary Home (Equity on a parcel or lot on which an Inclusionary Home is to be built); and ¶
- iv. Cash, securities, stocks, bonds, and other forms of capital held in a tax deferred retirement plan recognized by the Federal Internal Revenue Service. ¶

¶ 9) Execution of Subordinate Shared Appreciation Loan Documents; Restrictions (SJMC Section 5.08.600) Each purchaser will be required to execute a promissory note in favor of the City of San José, secured by a deed of trust for the amount of the Subordinate Shared Appreciation Loan. The City will also

require a recorded Affordability Restriction as described in Part IX, Section 10 below and may require execution of a loan agreement and other ancillary documents. The Subordinate Shared Appreciation Loan amount is Developer Discount, which is the difference, if any, between the restricted Affordable Sales Price of the Inclusionary Home and its Fair Market Value at the time of the initial sale to the purchaser. ¶

If the property is subsequently transferred to a non-qualified affordable buyer, the Subordinate Shared Appreciation Loan would become due and payable along with a prorated percentage of any equity received in the sale to a non-qualifying buyer under the Ordinance. The Subordinate Shared Appreciation Loan would not become due and payable if the property is sold to a qualified buyer under the Ordinance who agrees to assume the loan, in an arm's length transaction. If the property is sold to a qualified buyer under the Ordinance who does not agree to assume the loan, then the Subordinate Shared Appreciation Loan would become due and payable along with a prorated percentage of any equity based on the then Fair Market Value of the unit. ¶

¶ The Inclusionary Home shall be the purchaser's primary place of residence. To be considered as a principal place of residency, the Inclusionary Home must not be rented or leased unless the purchaser has a household hardship and has applied for and obtained an emergency limited term authorization to rent approved by the Director of Housing. In the event that the purchaser fails to comply with this requirement the City may enforce and pursue any and all remedies in law or equity for such violations, including, but not limited to, declaring the Subordinate Shared Appreciation Loan due and payable. ¶

¶ Upon request of the Housing Department, the purchaser of the Inclusionary Home must provide, within 30 days, documents verifying the purchaser's occupancy of the home as the purchaser's primary residence, that the home is not rented or leased, and that there have been no changes in the title to the home. Such documents may include but are not limited to utility bills, property tax bills, and mortgage statements reflecting the owners name and address of the Inclusionary Home. Pursuant to the Subordinate Shared Appreciation Loan documents, an annual submittal will be required thereafter, along with a monitoring fee. ¶

- 10) Execution of an Affordability Restriction (SJMC Section 5.08.600.A) ¶
Each purchaser of an Inclusionary Home will be required to execute and consent to recording of an Affordability Restriction for their unit at close of escrow, with a term consistent with Exhibit D Section III of the Development Agreement. The restriction will be recorded and "run with the land" such that it is binding on any successor to the purchaser. ¶

Schedule D3

RECORDING REQUESTED BY:¶
WHEN RECORDED MAIL TO:¶

¶
City of San José ¶
Housing Department ¶
200 East Santa Clara Street, T-12¶
San José, CA 95113¶
Attention: Inclusionary Housing¶
Project: _____¶

¶
APN: _____¶

¶
No fee for recording pursuant to Government Code Section 27383¶
(Space above for Recorder's Use) ¶

¶
¶
¶
¶
¶

FORM OF
INCLUSIONARY HOUSING AGREEMENT¶

[to be modified to conform to specifics of a particular building or buildings]¶

¶

(Covenant for the Benefit of the City of San José)¶
[Insert name of Project]¶

¶
¶
¶

NOTICE: THIS AGREEMENT CONTAINS SUBORDINATION REQUIREMENTS TO
PRESERVE THE PRIORITY OF LAND USE AND AFFORDABLE HOUSING
REGULATORY COVENANTS RESTRICTING SALE OR RENTAL OF DWELLING
UNITS¶

2. ¶

¶

This INCLUSIONARY HOUSING AGREEMENT (“Agreement”) is entered into as of this _____ day of _____, 20____, by and between the CITY OF SAN JOSE, a municipal corporation (the “City”), and _____, a _____ [Insert Name and entity type] (the “Developer”), with reference to the following facts:¶

¶

A. This is a form of agreement to be recorded in connection with the implementation of the Developer’s Inclusionary Housing Program under the Development Agreement. ¶

¶

B. The Developer is the only owner of the fee interest in certain real property located at _____ [Insert addresses or if none, reference to cross streets] in the City of San José, California and more particularly described in the attached **Exhibit A** (the “Property”) that is the subject of this Agreement. If the Developer is not the only owner of the Property, both the Developer and the Owner (as defined in Section 1 below) must execute and record this Agreement. ¶

¶

C. The Property is located within the boundaries of the Downtown West Planned Development Permit. The Property is subject to the terms and conditions of the Development Agreement during the term of the Development Agreement, as recorded in the Official Records of the County of Santa Clara as document number _____.¶

¶

D. Exhibit D of the Development Agreement is the Affordable Housing Program to which the Developer and the City have agreed as the affordable housing requirements applicable to the Project (the “Affordable Housing Program”) and is a hybrid program based on the City’s Inclusionary Housing Ordinance, San José Municipal Code Chapter 5.08 in effect on the Effective Date, a copy of which is attached to the Development Agreement at Schedule D5 (“Chapter 5.08” or the “Ordinance”), and sets forth the Developer’s inclusionary housing obligations and the methods for satisfying those obligations, including by means of on-site inclusionary units, land dedication, and payment of in-lieu fees (the “Inclusionary Obligation”).¶

¶

E. The Affordable Housing Program includes implementation Development Agreement IHO Guidelines at Schedule D2 of the Development Agreement (the “Development Agreement IHO Guidelines”).¶

¶

F. This Agreement, including the attached Exhibits, is intended to set forth the terms and conditions for the implementation of the Developer’s agreement to meet the Inclusionary Obligation in accordance with the Development Agreement’s Exhibit D.¶

¶

G. The Developer is developing a project requiring a planning permit that creates _____ (_____) new, additional or modified rental or for-sale dwelling units on the Property (“Total Dwelling Units”). The project has obtained planning permits designated _____ and _____ [list type of permit, permit number] which were approved by the City of San Jose on _____, 20____. The Developer’s residential project (the “Project” or “Residential Development”) is described in more detail on the approved Affordable Housing Compliance Plan (“Compliance Plan”) dated _____, 20____ and approved on _____.

20_____, on file with the City Housing Department a summary of which is attached as **Exhibit B** including the project's permit information, the total number of dwelling units, whether the units are rental or for-sale, the Developer's Inclusionary Obligation compliance option election, any exemptions claimed, any contiguous property under common ownership or control, timing of construction, and any requested project phasing.¶

¶

H. _____ This Agreement must be executed and recorded against the Property prior to the issuance of the first Building Permit needed for vertical construction of the Project. This Agreement must be senior to all deeds of trust or other documents with a power of sale, all mortgages, all judgment liens, and any other liens not in favor of the City (except for liens for property taxes and assessments not yet payable).¶

¶

I. _____ This Agreement includes a restriction on the Sale or Rental of new, additional or modified rental or for-sale dwelling units on the Property. ¶

¶

COVENANTS¶

¶

NOW, THEREFORE, it is mutually agreed by and between the Developer and the City (the "Parties") as follows:¶

¶

Section 1. Definitions. All capitalized terms used in this Agreement but not defined shall have the meanings provided in the Ordinance or the Development Agreement IHO Guidelines adopted for its implementation. For the purpose of this Agreement, the following terms have the following meanings:¶

¶

a) _____ “Affordable Housing Compliance Plan” means Compliance Plan as defined below.¶

¶

b) _____ “Affordable Housing Cost” shall have the meaning provided by California Health & Safety Code section 50052.5 for owner-occupied housing.¶

¶

c) _____ “Affordable Rent” means rent, which including a reasonable utility allowance, does not exceed: ¶

¶

1. _____ for very low-income households, the product of 30 percent times 50 percent of the area median income adjusted for family size appropriate for the unit;¶

¶

2. _____ for lower income households rents shall be set at an affordable rent as defined in Section 50053 of the Health & Safety Code (the product of 30 percent of 60 percent of the area median income adjusted for family size appropriate for the unit); ¶

¶

3. _____ Effective May 1, 2021, for on-site moderate income Inclusionary Units rents shall be set at no more than thirty percent (30%) of one hundred percent (100%) of Area Median Income adjusted for family size appropriate for the unit.¶

¶

d) _____ “Building Permit” includes full structural building permits as well as

partial permits such as foundation-only permits.¶

¶

e) “Compliance Plan” means a plan prepared in connection with Developer’s Vertical Conformance Review Application pursuant to Section III.D.1 of Exhibit D of the Development Agreement and the Compliance Plan requirements in the Development Agreement IHO Guidelines.¶

¶

f) “Dwelling Unit” shall have the meaning provided in the Ordinance.¶

¶

g) “For-Sale Development” means a Residential Development with a tentative map, final map, parcel map, condominium plan, or other similar documentation allowing for the creation of separately conveyable dwelling units or interests (such as condominiums, stock cooperatives, or community apartments), and demonstrating compliance with Subdivided Lands Act, including the formation of a Homeowner’s Association prior to issuance of its Certificate of Occupancy.¶

¶

h) “Development Agreement IHO Guidelines” has the meaning set forth in the Recitals above.¶

¶

i) “H1, H5 and H6 Property” shall have the respective meanings given each term in the Affordable Housing Program.¶

¶

j) “IHO Fee Credit” shall have the meaning provided in the Affordable Housing Program.¶

¶

k) “Inclusionary Unit” shall have the meaning provided in the Ordinance.¶

¶

l) “In Lieu Fee” means the fee that the Developer may elect to pay to the City in lieu of constructing the Inclusionary Units within the Residential Development consistent with the Affordable Housing Program and the Ordinance.¶

¶

m) “Ordinance” or “Chapter 5.08” shall have the meaning set forth in the Recitals above for so long as the Development Agreement applies to the Property or Project and thereafter shall mean San José Municipal Code Chapter 5.08.¶

¶

n) “Owner” includes all persons and entities having fee ownership of the Property.¶

¶

o) “Rental Development” means any Residential Development that is not a For-Sale Development.¶

¶

p) “Residential Development” shall have the meaning provided in Section 5.08.250 of the Ordinance.¶

¶

q) “Surplus Inclusionary Units” shall have the meaning provided in Section 5.08.255 of the Ordinance.¶

¶

r) “Transfer Agreement” shall mean the applicable Property Transfer Agreement between the City and the Developer (or their respective assignees) for the H1, H5 or H6 Property as applicable.¶

¶

Section 2. Affirmative Covenants and Warranties. The Developer warrants and covenants as follows:¶

a) All of the Developers statements and representations in the Compliance Plan and this Agreement are true and correct.¶

b) The Developer shall comply with the compliance option selected in the Compliance Plan (consistent with the Developer’s obligations under the Affordable Housing Plan) to meet the Inclusionary Housing Obligation.¶

c) The Developer shall record the notice of completion issued for the Residential Development in the Official Records of the County of Santa Clara. ¶

d) If the Developer shall fail to comply with the requirements of that compliance option within the specified timing, then the Developer will satisfy its Inclusionary Obligations in the manner otherwise required in the Affordable Housing Program as defined in Section III of Exhibit D of the Development Agreement.¶

e) In the event that there is Contiguous Property under Common Ownership or Control, the Developer shall execute and record the City’s Covenant for Contiguous Property under Common Ownership or Control in the Official Records of the County of Santa Clara against such Contiguous Property concurrently herewith.¶

f) If the compliance option selected by the Developer includes off-site units, credits or otherwise includes commitments regarding other property, the Developer shall execute and record this Agreement in the Official Records of the County of Santa Clara concurrently herewith against all other property required for the specific compliance election made in the Compliance Plan.¶

Section 3. Authority; Due Diligence Required Prior to Execution of the Agreement. If the Developer is not the Owner of the Property, this Agreement must be executed by the Developer and the Owner, and the covenants hereunder shall apply to both such parties. Prior to the execution of this Agreement, ownership documentation satisfactory to the City is required and if the Developer or the Owner is not a natural person, documentation satisfactory to the City will be required to establish the existence of the entity, authority to operate in California and delegation of authority for the person(s) signing on behalf of the Developer or Owner.¶

¶

Section 4. Compliance Option.¶

¶

a) The Developer, by the signatures below affirms it has elected in its Compliance Plan to comply with the following Inclusionary Obligation by providing all three components as described below consistent with the Affordable Housing Program, the Ordinance

and the Development Agreement IHO Guidelines and summarized in **Exhibit B:** ¶

1. Onsite Units - Provide 5.88% of Total Dwelling Units as moderate income rental Inclusionary Units on-site, consistent with the Affordability Restriction(s) attached hereto as **Exhibit C** and the Affordable Housing Program; and¶

2. Land Dedication - Close (or be deemed to have closed) the transfer to the City or the City's designee of the H6, H5 or H1 Property, as applicable, under the applicable Transfer Agreement; and In-lieu Fees - Apply the applicable unexpended IHO Fee Credits from the Transfers to satisfy any applicable remaining inclusionary housing requirements in accordance with the Affordable Housing Program; and 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, as applicable, then for any unsatisfied IHO Fee obligation, the Developer shall pay IHO Fees in the amount of \$18.70 per rentable square foot (rsf) for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI), as more specifically set forth in the Affordable Housing Program, including the provisions regarding Annual Increases.¶

b) Future Conversion and Relocation - During the term of the Development Agreement, allow the Developer to request conversion of the 100% AMI rental units to units for-sale at an affordable sales price based on 100% AMI, consistent with Exhibit D Section III of the Development Agreement.¶

c) The mere mapping of the units consistent with a For Sale Development shall not cause the units to be treated as a For Sale Development unless and until Developer provides notice of the City and residents, compliance with the Subdivided Lands Act and compliance with the applicable requirements of the City's Conversion Ordinance consistent with Section III of the Development Agreement.¶

Section 5. Covenants to Run with the Land. The Developer hereby subjects the Property and the Project to the covenants and restrictions set forth in this Agreement. Developer hereby declares its express intent that the covenants and restrictions set forth herein shall be deemed covenants running with the land and shall pass to and be binding upon the Developer's successors in interest. All provisions of this Agreement shall be binding upon and inure to the benefit of the heirs, administrators, executors, successors-in-interest, transferees, and assigns of Developer and the City, regardless of any voluntary or involuntary conveyance or transfer of the Property. Except as provided in any written agreement executed by City, each and every contract, deed, lease or other instrument covering, conveying or otherwise transferring the Property or improvements constructed on the Property or any portion thereof or interest therein (a "Contract") shall conclusively be held to have been executed, delivered and accepted subject to this Agreement regardless of whether the terms of this Agreement are set forth in such Contract and regardless of whether the other party or parties to such Contract have actual knowledge of this Agreement. ¶

¶

Developer and the City hereby declare their understanding and intent that: ¶

¶

a) the covenants and restrictions contained in this Agreement shall be construed as covenants running with the land pursuant to California Civil Code section 1468 and not as conditions which might result in forfeiture of title by Developer; and ¶

¶

b) the burden of the covenants and restrictions set forth in this Agreement touch and concern the Property in that the Developer's legal interest in the Property and all improvements thereon are rendered less valuable thereby; and ¶

¶

c) the benefit of the covenants and restrictions set forth in this Agreement touch and concern the land by enhancing and increasing the potential enjoyment and use of the Property and Units by Moderate, Low and Very Low Income Households, the intended beneficiaries of such covenants and restrictions. ¶

¶

Section 6. Release of Project Units from Agreement. The covenants and conditions herein contained shall apply to and bind, during their respective periods of fee ownership, Developer and its heirs, executors, administrators, successors, transferees, and assignees having or acquiring any right, title or interest in or to any part of the Property and shall run with and burden such portions of the Property until rescinded in accordance with Section 12 below. ¶

¶

Except with respect to any portions of the Property which are released from the burdens of this Agreement by a rescission or partial rescission executed by the City; the Owner of the Property shall expressly make the conditions and covenants contained in this Agreement a part of any deed or other instrument conveying any interest in such property. ¶

¶

At any time following the expiration of this Agreement and upon Developer's written request, the City shall provide a release of this Agreement, in recordable form and otherwise reasonably acceptable to Developer, within thirty (30) days after such request. ¶

¶

Section 7. Default. ¶

¶

a) During Development Agreement. So long as the Property is subject to the terms of the Development Agreement, Article 9 (Enforcement of Agreement; Default; Remedies) of the Development Agreement regarding default and remedies shall apply and control with respect to any failure of the Developer to perform its obligations under this Agreement and Sections 7.b and 8 below shall not apply during such time. Notwithstanding the above, this limit shall not apply to the remedies in Exhibit C. ¶

¶

b) Following Development Agreement. Following the expiration or sooner termination of the Development Agreement or at such other time as the Development Agreement no longer applies to the Property, then the following provisions with respect to default shall control: ¶

¶

Failure of the Developer to cure any default in the Developer's obligations under the terms of this Agreement within thirty (30) days after the delivery of a notice of default from the

City will constitute a default under this Agreement and a failure to satisfy the Conditions of Approval with respect to the Project and Property and the requirements of the Ordinance and Development Agreement IHO Guidelines and, in addition to remedies for breach of this Agreement, the City may exercise any and all remedies available to it under the Subdivision Map Act, Chapter 5.08, or otherwise, with respect to the Developer's failure to satisfy the Conditions of Approval and the requirements of Chapter 5.08 including but not limited to:

¶

(a) withholding, conditioning, suspending or revoking any permit, license, subdivision approval or map, or other entitlement for the Project including without limitation final inspections for occupancy and/or certificates of occupancy;

¶

(b) instituting against the Developer, or other parties, a civil action for declaratory relief, injunction or any other equitable relief, or relief at law, including without limitation an action to rescind a transaction and/or to require repayment of any funds received in connection with such a violation;

¶

(c) where one or more persons have received financial benefit as a result of violation of this Agreement or of any requirement imposed under Chapter 5.08, the City may assess, and institute legal action to recover as necessary, a penalty in any amount up to and including the amount of financial benefit received, in addition to recovery of the benefit received;

¶

(d) prosecuting a misdemeanor against any person who has rented a residential unit at a rent exceeding the maximum allowed under this Agreement or to a household not qualified under this Agreement, or who has otherwise violated Chapter 5.08, or any other agreement, restriction or requirement authorized or imposed under Chapter 5.08;

¶

(e) remedies set forth in this Agreement (such as the remedies described in Exhibit C); or

¶

(f) any other means authorized by state law or the City's Municipal Code.

¶

Section 8. Remedies Cumulative. No right, power, or remedy given to the City by the terms of this Agreement, the Regulatory Agreement or Chapter 5.08 is intended to be exclusive of any other right, power, or remedy; and each and every such right, power, or remedy shall be cumulative and in addition to every other right, power, or remedy given to the City by the terms of any such document, Chapter 5.08, or by any statute or otherwise against Developer and any other person. Neither the failure nor any delay on the part of the City to exercise any such rights and remedies shall operate as a waiver thereof, nor shall any single or partial exercise by the City of any such right or remedy preclude any other or further exercise of such right or remedy, or any other right or remedy.

¶

Section 9. Hold Harmless. Developer will indemnify and hold harmless (without limit as to amount) City and its elected officials, officers, employees and agents in their official capacity (collectively, the "Indemnitees"), and any of them, from and against all loss, all risk of loss and all damage (including expense) and all liability sustained or incurred because of or by

reason of any and all claims, demands, suits, actions, judgments and executions for damages of any and every kind and by whomever and whenever made or obtained, allegedly caused by, arising out of or relating in any manner to the Project, the Inclusionary Units, or Developer's performance or non-performance under this Agreement, and shall protect and defend Indemnitees, and any of them with respect thereto, except to the extent arising from the gross negligence or willful misconduct of the City. The provisions of this section shall survive expiration or other termination of this Agreement or any release of part or all of the Property from the burdens of this Agreement, and the provisions of this section shall remain in full force and effect. Notwithstanding the foregoing, so long as the Property is subject to the term of the Development Agreement, Section 4.10 (Indemnification of City) of the Development Agreement (and not this Section 9) shall apply and control with respect to any obligation of the Developer to indemnify, reimburse or hold harmless the City and any City Parties with respect to any Losses (as such terms are defined in such Section 4.10). ¶

¶

Section 10. Notices. All notices required pursuant to this Agreement shall be in writing and may be given by reputable overnight delivery service for next business day delivery or by registered or certified mail, return receipt requested, to the party to receive such notice at the addressed set forth below:¶

¶

TO THE CITY:¶

¶

City of San José¶

Department of Housing¶

200 East Santa Clara Street, T-12¶

San José, CA 95113¶

Attn: Inclusionary Housing¶

¶

cc: ¶

City of San José¶

City Attorney's Office¶

200 East Santa Clara Street, T-16¶

San José, CA 95113¶

Attn: Housing Attorney¶

¶

TO THE DEVELOPER:¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

Attn: _____ ¶

¶
¶

Any party may change the address to which notices are to be sent by notifying the other parties of the new address, in the manner set forth above.¶

¶

Section 11. Integration; Conflict with Development Agreement. The Development Agreement; this Agreement with all of its recitals and exhibits, together with the Compliance Plan; any documents to be executed for the implementation of the Developer's Inclusionary Obligation including, but not limited to, documents to be recorded against any off-site property; and any covenant recorded on Contiguous Property under Common Ownership and Control embody the agreement between City and Developer for the Residential Development's compliance with the Affordable Housing Program, the Ordinance, the Development Agreement and their respective terms and conditions. No verbal agreements or conversations with any officer, agent or employee of City prior to the execution of this Agreement, shall affect or modify any of the terms or obligations contained in this Agreement. If there is an express conflict between the Development Agreement, including the Affordable Housing Program, and this Agreement, the Compliance Plan, or the Ordinance that prevents the implementation of the Development Agreement, then the Development Agreement shall control.¶

¶

Section 12. Duration and Amendment of Agreement; Rescission. This Agreement shall remain in effect until the ninety-ninth (99th) anniversary date of the recording of the notice of completion for the Residential Development. After the fifty fifth (55th) anniversary of the notice of completion for a rental Residential Development, the Developer may request rescission of the Inclusionary Housing Agreement. The City shall not unreasonably refuse to rescind the Inclusionary Housing Agreement provided that the City has been provided evidence the Developer has complied with all of the noticing and relocation benefit requirements for the tenants in the Residential Development, has obtained a demolition permit for the entire Residential Development and has completed its demolition. All tenants shall have the benefits required under the City's tenant protection ordinance, San José Municipal Code Chapter 17.23, Part 12 as may be amended. Additionally, a relocation plan shall be provided to the City for the Inclusionary Unit tenants prior to the approval of the demolition permit, which plan shall reflect the requirement that the those tenants shall be provided the relocation benefits required for displaced tenants under California Relocation Assistance Law, Government Code Section 7260 et seq and its implementing regulations, as may be amended.¶

a) It may be rescinded by the City after Developer's compliance with the Inclusionary Obligation. This Agreement, and any section, subsection, or covenant contained herein, may be amended only upon the written consent of the City Manager who shall have authority to approve or disapprove minor or technical amendments on behalf of the City consistent with the Ordinance and Development Agreement IHO Guidelines . If the amendment makes a substantive or material change to this Agreement it shall be effective only if the change is consistent with the Ordinance and Development Agreement IHO Guidelines and following approval of the City authority that gave the First Approval for the Project and the City Manager. This Agreement shall not be amended without any necessary amendments to applicable Planning Permits and payment of any transaction fees.¶

b) If a unit becomes a For-Sale unit and, in connection therewith, a new form of Inclusionary Housing Agreement, Compliance Agreement or restrictive covenant is entered into and recorded with respect to such unit(s), then the amount of time such unit(s) was restricted as a rental Restricted Unit shall count toward the For-Sale restricted term as set forth in Section III.B.1.g of Exhibit D to the Development Agreement. The term for such “converted” For-Sale unit will be the number of years then remaining under the ninety-nine (99) year term.

¶
c) For a For-Sale Development the term will be forty-five (45) years consistent with the Ordinance.

¶

Section 13. Recitals and Exhibits Incorporated. All of the above Recitals, all Exhibits, and the Compliance Plan are hereby incorporated in this Agreement and made a part hereof.

¶

Section 14. Applicable Law. This Agreement shall be governed by the law of the State of California.

¶

Section 15. Waivers. Any waiver by the City of any obligation or condition in this Agreement must be in writing. No waiver will be implied from any delay or failure by the City to take action on any breach or default of Developer or to pursue any remedy allowed under this Agreement or applicable law. Any extension of time granted to Developer by the City Manager to perform any obligation under this Agreement shall not operate as a waiver or release from any of its obligations under this Agreement. Consent by the City to any act or omission by the Developer shall not be construed to be a consent to any other or subsequent act or omission or to waive the requirement for the City's written consent to future waivers.

¶

Section 16. Title of Parts and Sections. Any titles of the sections or subsections of this Agreement are inserted for convenience of reference only and shall be disregarded in interpreting any part of the Agreement's provisions.

¶

Section 17. Multiple Originals; Counterpart. This Agreement may be executed in multiple originals, each of which is deemed to be an original, and may be signed in counterparts.

¶

Section 18. Recording of Agreement. The Developer shall cause this Agreement to be recorded against the Property and any other Property required for satisfaction of the compliance option in the Developer's Compliance Plan in the Official Records of the County of Santa Clara.

¶

Section 19. Severability. In the event any limitation, condition, restriction, covenant, or provision contained in this Agreement is to be held invalid, void or unenforceable by any court of competent jurisdiction, the remaining portions of this Agreement shall nevertheless, be and remain in full force and effect.

¶

Section 20. Time of Essence. Time is of the essence of every provision hereof in which time is a factor.

Section 21. Exhibits. The following exhibits are attached to this Agreement: ¶

Exhibit A Legal Description of the Property¶

Exhibit B Summary of the Project and Compliance Plan¶

Exhibit C Affordability Restrictions (Rental)¶

Exhibit D Affordability Restrictions (For-Sale)¶

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed

Developer:

a _____

By: _____

Name: _____

Its: _____

Date: _____

If the Developer is not the sole owner, the Owner consents to the recording of the Agreement:

Owner: *[List all parties on title]*

a _____

By: _____

Name: _____

Its: _____

Date: _____

a _____

By: _____

Name: _____

Its: _____

Date: _____

Signatures must be notarized. Signatures continue on following page(s)

¶

¶

¶

City of San José, a municipal corporation ¶

¶

By: _____ ¶

¶

Name: _____ ¶

¶

Its: _____ ¶

¶

Date: _____ ¶

¶

¶

Approved as to form: ¶

¶

_____ ¶

Senior Deputy City Attorney

¶

¶

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

¶

¶

¶

State of _____¶

¶

County of _____¶

¶

On _____ before me, _____, Notary Public, personally¶

DATE _____ NAME OF NOTARY¶

appeared _____¶

NAME(S) OF SIGNER(S)¶

¶

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

¶

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

¶

WITNESS my hand and official seal¶

¶

_____¶

SIGNATURE OF NOTARY¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

¶

EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

EXHIBIT B
SUMMARY OF PROJECT AND
COMPLIANCE PLAN

This Exhibit summarizes and provides notice of the Compliance Plan executed by the Developer and on file with the Housing Department.

1. The Project's permit numbers, permit types, permit application and approval dates:

2. The total number of dwelling units: _____
3. Whether the project is anticipated to be rental or for-sale: _____
4. The Developer's Inclusionary Housing Ordinance Obligation compliance option election:

5. Any requirements that apply to other property based on the Developer's Inclusionary Housing Ordinance Obligation compliance option election: _____

6. List of any exemptions from the Inclusionary Housing Ordinance claimed in the Compliance Plan, any evidence submitted and whether the exemption was approved by City Manager.

7. List of any contiguous property under common ownership or control by address and APN

8. List any existing structures on the property, if the residential project includes any conversion or demolition _____
 - b. Summarize the timetable submitted showing timing of construction. _____

EXHIBIT C

AFFORDABILITY RESTRICTION

1. Affordability Restriction (Rental).

(a) Restriction to Affordable Rent. For a period commencing upon the recordation of this Agreement and ending on the 99th anniversary of the recordation of the Notice of Completion for the Project, or, if no Notice of Completion is recorded on the Project, until the sixtieth (60th) anniversary of the recording of this Agreement, not less than five percent (5.88%) of the Total Dwelling Units shall be rented or otherwise made available at Affordable Rent to Moderate Income Households.

(b) A person or family shall be determined to be eligible (an “Eligible Household”) to rent an Inclusionary Unit if the household income does not exceed on the maximum income level for a Moderate Income Household as required for that specific Inclusionary Unit.

(c) In adjusting for unit size to determine the maximum Affordable Rent, the following adjustments to the Area Median Income shall be made based on the number of bedrooms in the Inclusionary Unit: studio - one person, one bedroom - two persons, two bedrooms - three persons, three bedrooms - four persons, and four bedrooms - five persons. In the event that the Residential Development has or obtains Low Income Housing Tax Credits, after notice to the City these adjustments for assumed household size may be modified for new tenants to reflect federal unit size adjustments based on 1-1/2 persons per bedroom consistent with Health and Safety Code Section 50053. EXHIBIT C-1 attached hereto and incorporated herein by this reference contain illustrations of the calculation of Affordable Rent for a rental unit for Moderate Income Households.

(d) Developer shall prohibit any person or family who has not been determined to be an Eligible Household at the time of taking possession, renting or occupying any Inclusionary Unit and shall cause any such person or family to vacate any Inclusionary Unit so rented or occupied. When an Inclusionary Unit is vacated, for any reason whatsoever, the Inclusionary Unit shall then again be rented or otherwise made available at Affordable Rent to Moderate Income as specified for the unit. For the purposes of this Agreement, “vacate” shall include, without limitation, departure from an Inclusionary Unit at the termination (whether at the end of a term or upon default) of the lease pursuant to which the Inclusionary Unit was occupied (“Lease”), abandonment of the Inclusionary Unit, sublease or assignment of an Inclusionary Unit (whether or not such sublease or assignment complied with the terms and conditions of the Lease).

(e) Recertification of Income. On an annual basis, Developer shall submit a report (the “Annual Report”) to the City, which contains, with respect to each Inclusionary Unit, the rental rate and income and family size of the tenant household. The Annual Report shall be

based on information supplied by the tenant or occupant of each Inclusionary Unit in a certified statement on a form provided or previously approved by the City.¶

¶
2. Definitions. The definitions of Area Median Income, Lower (or Low) Income Household, Very Low Income Household, and Extremely Low Income Household shall have the definitions given these terms in Health and Safety Code Sections 50052.5, 50053, 50079.5, 50105, 50106 and 50093, as amended from time to time. ¶

¶
3. Default and Remedies.¶

¶
a) **Non-Complying Units.** In addition to and without limitation of any other rights and remedies set forth in this Agreement or otherwise available to any party legally entitled to enforce this Agreement, in the event of any Default (as defined below), after thirty (30) day notice by City to Developer, and Developer's failure to cure within such thirty (30)-day period City shall have the right to lease and Developer shall lease to City on demand for a rental of \$1.00 per Inclusionary Unit per year any and all of the "Non-Complying Inclusionary Units" (as defined below) at such time as the Non-Complying Inclusionary Unit(s) is vacated. "Non-Complying Inclusionary Units" shall mean an Inclusionary Unit which is occupied and/or leased in violation of this Agreement. Determination of such a violation may be based on information provided in the Annual Report or determined by City in its reasonable discretion based on information otherwise available to it. Notwithstanding any term or condition of the lease under which the City leases a Non-Complying Inclusionary Unit pursuant to this subsection, Developer hereby consents to and grants City the right to assign such lease or sublet such Inclusionary Unit(s) to a Moderate Income Household, as appropriate, at Affordable Rent or to any non-profit housing provider (a "Provider") in the community for \$1.00 per year on the condition that such Provider subleases such Inclusionary Unit(s) or assigns such lease(s) to Moderate Income Household, as appropriate, at Affordable Rent. If the City assigns or sublets to any Provider, the Developer hereby consents to and grants such Provider the right to assign such lease or sublet such Inclusionary Unit to any Eligible Household at an Affordable Rent. If the City leases any Inclusionary Unit(s) or a Provider subleases any Inclusionary Unit(s) or is the assignee of any lease(s) from the City, the City or Provider, as the case may be, to the extent necessary to ensure compliance with this Agreement, shall sublease such Inclusionary Unit(s) or assign such lease(s) to any Eligible Household at Affordable Rent. Any rent paid under such a sublease or assignment shall be paid to the Developer after the City or Provider, as the case may be, has been reimbursed for any expenses incurred by it in connection with exercising the rights and remedies set forth in this subsection; provided, that if the Developer is in default under any loan documents in connection with the financing of the Property or any improvements thereon, such rent shall be paid to the party legally entitled thereto. ¶

¶
b) **Excess Rent.** In the event that and to the extent that the Developer receives rents or other payments from the operation of the Inclusionary Units or other improvements constructed on the Property in excess of what is permitted to charge and receive pursuant to this Agreement, after thirty (30) day notice by City to Developer, Developer agrees and covenants to pay to the City the full amount of such excess immediately on demand by the City. Developer and the City agree and intend that the payment of such excess, absent other

¶

remedies described in this Agreement to ensure for the term hereof that rents or other payments do not exceed those Developer is permitted to charge and receive pursuant to this Agreement, shall not alone be an adequate remedy to accomplish the purposes of this Agreement ¶

¶

c) All Remedies Available and Cumulative. In the event of any breach of any of the covenants or restrictions set forth in this Exhibit C (a “Default”), the City or members of the community (as defined in the Health and Safety Code) shall have the right to exercise all the rights and remedies, and to maintain any action at law or suits in equity or other real property proceedings, including without limitation, specific performance, to enforce the covenants and restrictions and the curing of any breach or violation thereof. No delay in enforcing the provisions hereof as to any breach or violation shall impair, damage or waive the right of the City to enforce the provisions hereof in the future for any continuing or new breach or violation of any of the covenants or restrictions contained in this Agreement. All rights and remedies, including without limitation those set forth in paragraphs 3(a) through (c) above, of any party legally entitled to enforce this Agreement shall be cumulative and the exercise of any such right or remedy shall not impair or prejudice and shall not be a waiver of the right to exercise any other such rights and remedies.¶

¶

4. Reporting. In addition to the Annual Report, Developer shall provide all information reasonably requested by the City (not more frequently than once per calendar quarter) with respect to the number of Units in the Property and the income levels of the persons or families renting or otherwise occupying the Units. ¶

¶

5. Restriction to be Attached. Developer shall attach a copy of this Exhibit C to any lease or purchase and sale contract with respect to any Inclusionary Unit. ¶

¶

6. Transfer of Inclusionary Units. During the term of this Agreement, Developer must give written notice to the City at least 90 days in advance of any sale, agreement to sell, assignment, conveyance, lease (other than the rental or lease of Inclusionary Units to Eligible Households), or transfer of the Inclusionary Units or any part thereof, including the sale of any general partnership interests, the removal of any general partner, or any substantial change in operational or management control over the Inclusionary Units. ¶

¶

7. Monitoring. The City shall have the right to take such actions to monitor compliance with this Agreement as it deems necessary, including but not limited to reasonable requests for documents. ¶

¶

8. Monitoring Fees. Developer shall pay annual monitoring fees to the City in advance on or prior to July 1 consistent with the amount set forth in the City’s Schedule of Fees and Charges. As of 2020-2021, the fee is \$41.65 per Inclusionary Unit to City.¶

¶

9. Property Damage or Destruction. If any of the Inclusionary Units or access thereto is damaged or destroyed, Developer must notify the City within 30 days and must at its own cost and expense, repair or restore the Inclusionary Units. Such work shall be commenced within 120 days after the damage or loss occurs and shall be completed within one year thereafter. All insurance proceeds collected for such damage or destruction shall be applied to the cost of such

repairs or restoration. In the event that the Inclusionary Units are not rentable during this time, the term of this Agreement shall be extended by the period of time that any of the Inclusionary Units were not rented to and occupied by eligible households.

10. No Discrimination. The Developer covenants and agrees for itself, its heirs, successors, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the Property. The foregoing covenants shall run with the land.

All deeds, leases, and contracts for the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, or any portion thereof made or entered into by Developer, its successors or assigns, shall contain therein the following language:

(a) In Deeds:

"The grantee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through them, that there shall be no discrimination against or segregation of, any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the premises herein conveyed, nor shall the grantee or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees, or vendees in the premises herein conveyed. The foregoing covenants shall run with the land."

(b) In Leases:

"The lessee herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through him or her, and this lease is made and accepted upon and subject to the following conditions that there shall be no discrimination against or segregation of any person or group of persons, on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure, or enjoyment of the premises herein leased nor shall the lessee himself or herself, or any person claiming under or through him or her, establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use,

or occupancy, of tenants, lessees, sublessees, subtenants, or vendees in the premises herein leased.”¶

¶
¶ (c) In Contracts: ¶

¶
¶ "The contractor herein covenants by and for himself or herself, his or her heirs, executors, administrators, and assigns, and all persons claiming under or through it, and this contract is made and accepted upon and subject to the conditions that there shall be no discrimination against or segregation of any person or of a group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code, as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the property herein transferred nor shall the contractor or any person claiming under or through it establish or permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees in the Property. The foregoing provisions shall be binding upon and shall obligate the contractor and any subcontracting parties, successors, assigns and other transferees under the contract."¶

¶

EXHIBIT C-1

The following hypothetical illustrates the calculation of Affordable Rent **for a Moderate Income Households** (as defined in the Ordinance) who are **Renting** a Moderate Income Inclusionary one-bedroom unit with an assumed family size of 2 persons in Santa Clara County.

Assumptions.

1. Inclusionary Unit to be made available to Moderate Income Households.

2. Family Size = 2 Persons (for purposes of this example)

Person or Family need not have the maximum income for a Person or Family in the income category (adjusted for family size).

3. Electricity charges are separately metered and directly billed to the tenants by PG&E. A reasonable allowance for such charges based on the Utility Allowance Schedule published by the County of Santa Clara Housing Authority ("Allowance") is deducted.

As of April 2020, per 25 California Code of Regulations ("CCR") Section 6932, median income for a family of 2 is \$113,300 ("Area Median Income adjusted for family size") and the maximum income level for a Moderate Income Household with a family size of 2 in Santa Clara County is \$135,900 (100% of the Area Median Income adjusted for family size).

Pursuant to 25 CCR Section 6918, rent (for the purposes of this Exhibit defined as "Rent") includes, among other things, payment for use or occupancy of a housing unit and charges or fees charged or passed through by the landlord other than security deposits). Pursuant to Section 50053 of the Health and Safety Code and this Restriction, the Rent paid by a Moderate Income Household for a Moderate Income Inclusionary Unit shall not exceed 30% of 100% of the Area Median Income adjusted for family size.

CALCULATION OF RENT CHARGEABLE:

\$135,900 [100% of the area median income adjusted for family size (2 persons)]

X .30 [Rent cannot exceed 30% of 100% of area median income]

\$40,770.00

\$ 3,397.50 divided by 12 [to calculate the maximum monthly Rent]

-\$ 74.00 [Assumed allowance for an all-electric 1 bedroom apartment.]

\$ 3,323.50 [Maximum Rent after reasonable allowance for electric charges.]

As this hypothetical illustrates, as of April 2020, no Moderate Income Household with a family size of 2 that pays its own electric bill should be charged or pay Rent in excess of \$3,397.50 per month minus less the approved utility allowance; this amount may be adjusted as the CCR Sections above are amended or the reasonable allowance amount is adjusted.¶

EXHIBIT D
AFFORDABILITY RESTRICTIONS
(For Sale)

|



Schedule D4

|



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

In the event that there is a conflict between this Schedule D4 and the Transfer Agreements, then the Transfer Agreements shall prevail.

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 shall~~ occur after the H5 Property and the H6 Property have been transferred to the City and on or before the issuance of a Temporary Certificate of Occupancy for on the seventh Developer constructed market rate next residential building (subject to City caused delays or if City has requested to defer the closing as more specifically set forth in Section B.6.a below) unit that triggers payment of the IHO Fee after exhaustion of all existing IHO Fee Credits have been exhausted from the transfer of the H6 and H5 Properties.

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. The payment of 150% of the IHO Fees due shall be made in full to the City within the time period specified in Section 17.1 of the H1 Transfer Agreement, and Developer shall receive IHO Fee Credits for 100% of the IHO Fees but no credit for the additional 50% owed as a result of the default.

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~~issuance of a Temporary Certificate of Occupancy ~~is issued~~ for the first ~~Developer-constructed market rate~~ residential building ~~that triggers payment of the IHO Fee~~ (subject to 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~~sooner of (1) issuance of a Temporary Certificate of Occupancy ~~is issued for on~~ the ~~fourth Developer-constructed market rate~~next residential building (subject to City-caused delays or if City has requested to defer the closing as more specifically set forth in Section C.6.a below)unit that triggers payment of the IHO Fee after exhaustion of all IHO Fee Credits from the transfer of the H6 Property, and (2) twelve months after the H6 Development Anticipated TCO Notice (as defined in the H5 Transfer Agreement) (**"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; and (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~~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 (if the required 100% AMI units are constructed). As of the Effective Date, the amount of the IHO Fee ~~credit~~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 (if the required 100% AMI units are constructed). 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. The payment of 150% of the IHO Fees due shall be made in full to the City within the time period specified in Section 17.1 of the applicable Transfer Agreement, and Developer shall receive IHO Fee Credits for 100% of the IHO Fees but no credit for the additional 50% owed as a result of the default.

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~~Thirty 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.

Exhibit E

RECORDING REQUESTED
BY CITY OF SAN JOSE:

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

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

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

RECITALS

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

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

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

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

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

SECTION 1. REPRESENTATIONS AND WARRANTIES OF DEVELOPER.

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

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

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

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

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

- d. In order to maximize parks and open space, as well as transit and connectivity in the near- and long-term, Developer and City shall proceed in the manner described in Section 2(B) of this Agreement with respect to any acquisition by a DISC Partner Agency(ies); and with respect to any potential DISC construction needs that may affect a City-Dedicated Open Space, including any temporary construction easement(s) (TCE), Developer and City shall proceed in accordance with Section 2(C) of this Agreement. Such Sections include consultation and meet and confer processes between City and Developer, in addition to the City's and Developer's collaborative efforts with the DISC Agency(ies) described in Section 3.6 of the Development Agreement. Any changes to the design of a City-Dedicated Open Space resulting from City and/or Developer collaboration and discussions with a DISC Partner Agency(ies) shall be a subject for any meet and confer process(es) between City and Developer, and City and Developer shall proceed as otherwise described in this Agreement.
- e. To maximize functional park space, the Los Gatos Creek Connector has been designed conceptually to ~~eventually~~ extend underneath an elevated rail structure, which may require an easement or other ownership structure to be agreed upon by City and other DISC Partner Agency(ies). During construction, City and Developer anticipate that the DISC Partner Agency(ies) would require a TCE within the Los Gatos Creek Connector.
- f. New park spaces at St. John Triangle and the Northend Park have been planned to be outside of the established Transit Project Buffer Zone, as defined in the Development Agreement. City and Developer anticipate that a TCE may be required by a DISC Partner Agency(ies) for California High Speed Rail or other transit projects, at the western edge of the Northend Park.
- g. Compensation for any TCE required by a DISC Partner Agency(ies)– including any impact to the City-Dedicated or Privately-Owned Publicly Accessible Open Spaces, or any other private property – would be required consistent with law. In the event of any permanent acquisition by a DISC Partner Agency(ies), Developer or City as

landowner, as applicable at the time of acquisition, would proceed in accordance with law and established practices for eminent domain proceedings, as well as the terms and conditions of any agreements between the DISC Partner Agency(ies), Developer, and the City.

B. City and Developer acknowledge and understand that the Project and the Parkland Dedication Obligation described herein may be subject to subsequent proceedings initiated by any of the DISC Partner Agencies to acquire one or more portions of the Plan Area, potentially including one or more portions of the proposed City-Dedicated Open Space proximate to an existing rail line. If any DISC Partner Agency(ies) initiates proceedings to acquire any portion of the Plan Area for an approved alignment and expansion of the high speed rail right-of-way or other rail right-of-way, Developer may be unable to proceed in the manner described in this Agreement. In the event that a DISC Partner Agency(ies) initiates acquisition of one or more portions of the proposed City-Dedicated Open Space, City and Developer shall proceed in the following manner.

a. If a DISC Partner Agency initiates acquisition of all or a portion of a City-Dedicated Open Space prior to Developer's initiation of design for that City-Dedicated Open Space as described in Section 5(B), the Parties understand that Developer shall be compensated by the condemning authority for the land acquired based on its fair market value as defined in California Code of Civil Procedure Section 1263.320, as may be amended from time to time, and in accordance with any applicable federal, state and/or local laws. In the event of such an acquisition, and that acquisition results in a reduction in the size of a City-Dedicated Open Space as reflected in Exhibit E2, Developer shall pay to the City an amount equal to the fair market value received for the acquired land from the DISC Partner Agency(ies) promptly after such value is received by Developer, and that value shall then be available for use as credit toward the Project's Parkland Obligation for residential units constructed, or otherwise utilized as set forth in Section 3(B) upon termination or expiration of the Development Agreement. Any amounts paid to the City in the manner described in this paragraph shall not be subject to the limitations described in Section 4(F) regarding payment of

Parkland Fees and use of Private Recreation Improvements credits, and the amount of the acquired acreage shall be counted toward Developer's acreage obligations set forth in Sections 3(O), 4(G)(b) and 4(G)(d) upon payment to the City of the fair market value received for the land. Upon payment by Developer as described in this paragraph, any security(ies) provided by Developer for the acquired land shall be released. For the portion of the City-Dedicated Open Space that is not acquired by the DISC Partner Agency(ies), Developer shall construct Park Improvements and dedicate that remaining portion in accordance with this Agreement. In addition to the fair market land value pass-through payment described above, any required payment of Parkland Fees for the Park Improvements Value associated with the acquired portion of the City-Dedicated Open Space shall be paid to City prior to issuance of a building permit for the Building associated with the subject City-Dedicated Open Space in Exhibit E3.1, and such Parkland Fees shall be calculated based on the amount of acquired, or lost acres/square footage, multiplied by one hundred ninety-five dollars (\$195), subject to escalation based on the ~~California~~ Construction Cost Index.

- b. At least six (6) months prior to initiating design of a City-Dedicated Open Space, Developer shall consult with Department of Parks, Recreation and Neighborhood Services staff and Department of Transportation staff regarding the status of the DISC. At the time Developer initiates design of a City-Dedicated Open Space as described in Section 5(B), or any time thereafter but prior to City's issuance of a Notice of Acceptance and recordation of the grant deed for that City-Dedicated Open Space, if Developer and/or City reasonably determines that any portion of the Open Space is reasonably likely to be acquired by a DISC Partner Agency(ies), City and Developer shall meet and confer to reach agreement regarding the manner in which Developer is to satisfy its Parkland Obligation with respect to the subject City-Dedicated Open Space. Such agreement shall be consistent with the intent of this Parkland Agreement, and with the following principles.

- 1. Developer and City shall remain in a financially neutral position, meaning that Developer shall not be required to incur higher costs or expenses than it

otherwise would incur under this Agreement, or to pay amounts in excess of its Parkland Obligation; and Developer shall not be relieved of satisfying the Parkland Dedication Obligation for residential units constructed as part of the Project;

2. Both the Project and DISC are to be effectively delivered and accommodated to the extent feasible; and
 3. The Parties intend to minimize impacts of DISC project construction activity on existing and future development within the Project Site boundary.
- c. If a DISC Partner Agency initiates acquisition of all or a portion of a City-Dedicated Open Space after City's Acceptance of that City-Dedicated Open Space, Developer shall have no obligation to provide replacement open space area or to pay additional Parkland Fees, and the amounts received by City for the fair market value of the acquired land and for the value of any Park Improvements thereon shall be retained by PRNS.
- C. Prior to commencement of construction of a City-Dedicated Open Space, Developer shall again consult with City Parks, Recreation and Neighborhood Services Department and City Department of Transportation staff regarding the status of the DISC. If Developer and City determine that any portion of the Open Space is reasonably likely to require use by a DISC Agency(ies) for construction staging or similar disruptive construction activity, Developer shall remain obligated to dedicate the land to City, and City shall accept such land, in accordance with the terms of this Agreement, including Exhibit E5 hereto; provided, however, that City and Developer shall meet and confer to mutually determine whether Developer shall delay commencement of construction of the Park Improvements, including demolition and grading activity, until the DISC Agency activity within the Open Space has ceased, or whether Developer shall instead provide the Park Improvements Value to the City so that the City may itself complete the Park Improvements. If the Parties determine that Developer shall delay commencement of construction and Completion of the Park Improvements, Developer's obligation to construct the Park Improvements within the

affected portion of the City-Dedicated Open Space shall survive the termination or expiration of the Development Agreement. If City and Developer reasonably determine that use of all or a portion of a City-Dedicated Open Space by a DISC Agency(ies) would delay Completion of construction of the Park Improvements thereon by more than one year beyond the date on which the Development Agreement has terminated or expired, notwithstanding Section 4(F) of this Agreement, at its option Developer shall be permitted to provide the City with the remaining Park Improvements Value for the affected City-Dedicated Open Space, escalated in accordance with the ~~California~~-Construction Cost Index, and the City shall Accept the offer of dedication for the subject City-Dedicated Open Space, or portion thereof, and use the Park Improvements Value to construct the Park Improvements. If this occurs, the City shall release any security associated with such Park Improvements upon receipt of the funds and dedication of the land for City-Dedicated Open Space.

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

- A. Subject to Section 2(B), in satisfaction of its Parkland Dedication Obligation for development of four thousand (4,000) residential units Developer affirms its commitment to dedicate to City a minimum of four and eight-tenths (4.8) acres of real property located on Lots A, B, E, F, H, I, P, Q, R, and airspace parcel of Lot 20 (“City-Dedicated Open Space”) as identified on the Tentative Map for the Project, and as described in the Downtown West Design Standards and Guidelines. An offer of dedication for each City-Dedicated Open Space shall be made concurrent with the final map that contains the subject City-Dedicated Open Space, and shall be recorded immediately following approval of the final map that contains the Building or development parcel that corresponds with the trigger for that City-Dedicated Open Space as reflected in Exhibits E3.1 and E3.2. The offers for dedication shall be substantially in the form as set forth in Exhibit E4, and shall be recorded in the Official Records, as defined in the Development Agreement. City shall accept an offer of dedication by grant deed only after issuance of a Notice of Acceptance of the Park Improvements thereon and in accordance with the timing requirements, and in the delivery condition set forth in Exhibit E5. Subject to Developer’s rights under the Existing

Agreements, Developer shall be responsible for all costs incurred in the conveyance of the City-Dedicated Open Space to City in accordance with the requirements and specifications set forth in this Agreement and the Development Agreement. If the construction and Completion of the City-Dedicated Open Space is not triggered pursuant to Exhibits E3.1 and E3.2 prior to the expiration or termination of the Development Agreement, and Developer has not otherwise Completed the City-Dedicated Open Space such that credits would be provided and administered as set forth in Section 3(B), upon the termination or expiration of the Development Agreement the offer of dedication for such City-Dedicated Open Space shall also terminate and be void, and City shall promptly execute and record a notice terminating or vacating the offer of dedication. All City-Dedicated Open Space shall meet the requirements and standards set forth in Exhibit E5.

- B. In the event Developer Completes and dedicates a City-Dedicated Open Space, and the credit value for the improved City-Dedicated Open Space exceeds the Parkland Dedication Obligation for the Project upon the termination or expiration of the Development Agreement, Developer shall receive credit for the City Dedicated-Open Space, including the Park Improvements Value, and such credits shall be applied toward the Project's Parkland Dedication Obligation as residential units are constructed. Upon the termination or expiration of the Development Agreement, if any credits for land dedication and/or Park Improvements Value remain available and are not utilized to satisfy the Project's Parkland Dedication Obligation, such credits may be used by Developer, or by another developer(s) if transferred by Developer to that other developer(s), to satisfy the obligations under the City's Parkland Dedication Ordinance for new residential development within the Downtown West Planned Development District, with such credits provided at a ratio of one-to-one unit basis.
- C. Reconfiguration and/or Project redesign of a City-Dedicated Open Space may be necessary in the event Developer is prohibited from building to the maximum heights reflected in the DWDSG as a result of adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights. Any reconfiguration or redesign would have a negative impact on Developer's master planning efforts, lessening the amount

of square footage for both commercial and residential uses, and potentially reducing the number of residential units that may be developed within the Plan Area. Subject to the requirements of Sections 4(F), 4(G), and 4(J) of this Agreement, such reconfiguration and/or reduction in residential development may result in less parkland being constructed either as a result of a trigger building not being built or as a result of fewer residential units being constructed.

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

the actions or development set forth in Exhibit E3.1 that corresponds to any such Park Improvements. Subject to approval by the Directors of PRNS and PW, City may elect to extend the Delivery trigger reflected in Exhibit E3.1 by twelve (12) months to allow Developer to complete installation of art, or kiosks/pavilions or other optional structures, that are not essential to the intended use of the park by the public (“Park Art and Optional Structures”). Alternatively, subject to approval of the Directors of PRNS and PW, Completion of Park Improvements upon any City-Dedicated Open Space for purposes of determining compliance with Exhibit E3.1, and issuance of a Notice of Acceptance for such Park Improvements by Director of PW as outlined in Exhibit E5 of this Agreement shall be permitted to occur without first requiring the completed installation of Park Art and Optional Structures, so long as (i) final installation of such Park Art and Optional Structures will not interfere with the safe use of the park by the public, and (ii) Developer provides the Park Art and Optional Structures Security as described in this Agreement so that the City may utilize the Security to complete the installation or construction of the Park Art and Optional Structures following City’s acceptance of the Park Improvements, which City shall complete within twelve (12) months of Developer providing the Security; provided however, that City shall release all other bonds and securities as indicated in Exhibit E5 and in accordance with this Agreement. Separately, Completion also does not include or require relinquishment and improvement of any Park Construction Right of Entry, which Right of Entry areas are depicted in Exhibit E6 (referred to therein as “Temporary Construction Easement (TCE)”), so long as (i) Developer provides the Park Construction Right of Entry Security as described in this Agreement, and (ii) the Park Construction Right of Entry is relinquished and improved within six (6) months of issuance of the temporary certificate of occupancy for the fronting building; provided however, that City shall release all other bonds and securities as indicated in Exhibit E5 and in accordance with this Agreement, except the Park Construction Right of Entry Security as described in Section 6(A)(6) of this Agreement which shall be released as specified in Section 6(C)(6).

- F. As more particularly described in Exhibit E5, Developer shall be responsible for the development of Park Improvements Plans for, and the construction of the Park

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

- G. Developer has no obligation to construct other improvements on the City-Dedicated Open Space beyond the Park Improvements.
- H. The Parties acknowledge that the exact size, dimensions, and other particular characteristics of the Park Improvements have not been determined as of the Effective Date of this Agreement. The Parties, however, agree that the Park Improvements shall consist of the Park Improvements as conceptually depicted and described in the Downtown West Design Standards and Guidelines, with a minimum cumulative acreage of 4.8 acres for the development of 4,000 units, as reflected on the Tentative Map for the Project and based on the unit equivalent values reflected in Table 1 of Exhibit E1. As described in Section 4(B), any future adjustments to the conceptual City-Dedicated Open Space sizes, as permitted by the General Development Plan, shall be identified and finally approved at the Conformance Review stage or the processing of a final map that includes the subject City-Dedicated Open Space, whichever occurs first, and shall be tracked using Exhibit E7, which Exhibit shall ensure compliance with the requirements of this Agreement.
- I. Developer shall be responsible for all costs incurred for planning, design, construction, and supervision of the construction of all Park Improvements, including without limitation, the Review Fees. All such costs are included in, and are part of the Park Improvements Value. For clarity, the Park Improvements Value includes, but is not limited to, the City's Review Fees and all fees and costs for design and construction materials and labor incurred by Developer in connection with the Park Improvements, including direct costs, soft costs, and contingency as reflected in Table 2 of Exhibit E1. Costs associated with any remediation, removal, disposal, or any combination thereof, of contaminated materials to meet applicable

regulatory requirements for public park and trails uses shall not be included in the Park Improvements Value or otherwise applied to satisfy the Parkland Dedication Obligation. Developer and City agree that the Park Improvements Value shall not be less than the values set forth in Table 1 of Exhibit E1. The Review Fees shall be in an amount equal to seventeen and one-half percent (17.5%) of the direct costs, which Review Fees are reflected in Table 2 of Exhibit E1, and which direct costs and Review Fee shall both escalate by the **California** Construction Cost Index. Twenty percent (20%) of the Review Fees for each City-Dedicated Open Space shall be paid upon submittal of the Vertical Conformance Review application for the Building associated the subject City-Dedicated Open Space in Exhibit E3.1; and the remaining eighty percent (80%) of the Review Fees for each City-Dedicated Open Space shall be paid upon submittal of the Open Space Conformance Review application for the subject City-Dedicated Open Space. Developer shall cause all labor and material incorporated in the Park Improvements to be furnished in accordance with the requirements and specifications set forth in this Agreement.

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

improvement value of a kiosk or pavilion, which shall be available for use consistent with Section 3(B).

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

Agreement, but shall only be available for Developer's use pursuant to the provisions of Section 3(O) below. Developer shall complete the installation of the Private Recreation Improvements described in Resolution No. 73587 prior to the issuance of a Final Certificate of Occupancy for the residential building(s) in which the Private Recreation Improvements are located or to which the Private Recreation Improvements are tied.

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

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

- P. Prior to receipt of credit for any Private Recreation Improvements, Developer acknowledges and agrees that use of the Private Recreation Improvements shall be restricted for recreation purposes by a recorded covenant which runs with the land for the life of the subject residential building, and which expressly cannot be defeated or eliminated without the written consent of the City as described in the Parkland Dedication Ordinance. For clarity, Private Recreation Improvements for which Developer does not receive credit toward its Parkland Dedication Obligation are not subject to this, or any other requirements of this Agreement.
- Q. Developer acknowledges that pursuant to the covenants set forth in Section 3(P) above, the Developer or Owner shall henceforth be required to maintain all such Private Recreation Improvements in safe working order and provide access for regular inspections at the City's request. After any such inspection and pursuant to written request by the City, the Developer or Owner shall promptly provide for any remedial actions, replacement, and/or repair work as may be necessary to ensure that the improvements remain in safe working order for recreational use.
- R. In the event that the project contains Private Recreational Improvements designated in this Agreement or associated exhibits as 'publicly accessible,' the Developer or Owner agrees to maintain public access to these amenities for a minimum of 360 days per year. The Developer may however, post reasonable Rules and Regulations for respectful use and maintenance of Private Recreational Improvements and areas as well as conduct occasional extended closures, subject to approval by PRNS Director. This Section shall apply in addition to any Easements or Restrictions which may be in place providing for public access and/or appurtenant uses.

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

- A. Subject to Section 2(B), the Parties acknowledge and agree that the calculation of the Developer's Parkland Dedication Obligation for development of four thousand (4,000) residential units is set forth in Exhibit E8, including the calculation of Parkland Fees. As

reflected in Exhibit E8, the total Parkland Dedication Obligation, based on the number of type of units to be provided – such as mid-rise, high-rise, market-rate, and affordable – shall be blended across the Project, regardless of unit type, and administered uniformly based on the number of residential units produced, as shown in Table 2 in that Exhibit. The Park Improvements Value is set forth in Table 1 of Exhibit E1. Credits for Private Recreational Improvements, if any, are described in City Council Resolution No. 73587.

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

Parties further acknowledge and agree that the Parkland Dedication Obligation set forth in Exhibit E8 for development of four thousand (4,000) residential units is based on and assumes the development of six hundred (600) of the 4,000 residential units as affordable housing units on the affordable housing sites H1, H5, and H6 that Developer will dedicate to the City. In the event the City and/or an affordable housing developer causes more than 600 affordable housing units to be developed on the affordable housing sites, any parkland dedication obligation applicable to such additional affordable housing units shall be the responsibility of, and attributed to the developer of those additional units; and Developer's Parkland Dedication Obligation shall not be decreased or increased or otherwise affected as a result of such additional affordable housing development on the affordable housing sites, nor shall such additional units be counted toward or otherwise affect any milestones or triggers set forth in this Agreement, including, but not limited to, the requirements contained in Section 4(H) and in Exhibit E8 hereto.

- E. Pursuant to the terms of the Development Agreement, the Parkland Fee in effect upon the Effective Date of the Development Agreement, which Fee is reflected in Exhibit E8, is vested for the term of the Development Agreement, subject to escalation based on the ~~California~~ Construction Cost Index. Upon such escalation of the Parkland Fee, the land value of any City-Dedicated Open Space dedicated thereafter, and the Park Improvements Value for any Park Improvements constructed thereafter shall escalate by a commensurate amount using the ~~California~~ Construction Cost Index. Further, the following underlying assumptions upon which the Parkland Dedication Obligation is based, and which are set forth in Exhibit A to Resolution Number 73587 and Section 1 of Exhibit A of Resolution No. 75346 as amended by Resolution ~~_____~~ [ADD FINAL RESOLUTION NUMBER]79913, shall be fixed and vested for the term of the Development Agreement: (i) mid-rise residential units have an occupancy rate of two and thirty-four hundredths (2.34) persons per unit; (ii) high-rise residential units have an occupancy rate of one and fifty-one hundredths (1.51) persons per unit; (iii) the Parkland Fees charged for each deed restricted, low income residential unit shall be set at fifty percent (50%) of the otherwise applicable Parkland Fees for each such unit; and (iv) the Parkland Fees charged for each deed restricted, moderate income

residential unit shall be set at fifty percent (50%) of the otherwise applicable Parkland Fees for each such unit.

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

2,000 residential units cannot be met by payment of Parkland Fees, use of credits for Private Recreation Improvements, or provision of Privately-Owned Publicly Accessible Open Space; provided, however, if satisfaction of this requirement would obligate Developer to dedicate and/or Complete only a portion of a proposed City-Dedicated Open Space, City and Developer shall cooperate in Good Faith to (i) redesign proposed Park Improvements to Los Gatos Creek Connector 1 and/or Los Gatos Creek Connector 2 so that the land value plus the Park Improvements Value does not exceed, and is equivalent to the remaining Parkland Dedication Obligation, in which case the applicable Park Improvements Value reflected in Table 1 of Exhibit E1 would not apply and certain requirements of the DWDSG may need to be waived as permitted by the DWDSG and/or the General Development Plan; (ii) increase the size of a City-Dedicated Open Space(s), or add a City-Dedicated Open Space adjacent to a residential building, in an amount equal to the remaining Parkland Dedication Obligation, provided the location and size of such space is approved by the Director of PRNS; (iii) dedicate and improve a portion of a Privately-Owned Publicly Accessible Open Space that is equivalent to the remaining Parkland Dedication Obligation, converting that portion to a City-Dedicated Open Space; and/or (iv) pay Parkland Fees to satisfy the remaining obligation. The obligations under this Section 4(G)(a) apply even if the buildings that would otherwise trigger the Parkland Dedication Obligation as set forth in Exhibits E3.1 and E3.2 have not been constructed during the 30-year period after the Effective Date of the Development Agreement.

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

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

- c. **At the end of the Term of this Agreement, if more than 2,000 residential units are constructed south of Santa Clara Street and Developer develops any additional buildings North of Santa Clara Street,** then Developer shall have dedicated the City-Dedicated Open Spaces and constructed Park Improvements thereon in accordance with this Agreement, including the delivery and Completion triggers set forth in Exhibits E3.1 and E3.2, subject to Section 2(B), which delivery triggers ensure that 2.4 acres of City-Dedicated Open Space is provided for the development of 2,000 residential units. For example, if 2,000 residential units are constructed and a Temporary Certificate of Occupancy for a Building on Block G is not issued, Los Gatos Creek Park and Los Gatos Creek Trail (Block G), which are triggered by issuance of a Temporary Certificate of Occupancy on Block G, would not be required to be built if development also occurs north of Santa Clara (such as on Block A1, which would trigger construction of Northend Park) because the combined acreage would be equal to or greater than 2.4 acres for the 2,000 residential units. Any outstanding Parkland Obligation shall be satisfied in accordance with Section 4(L).
- d. In no event shall the use of Private Recreation Improvements credit be used prior to Developer's Completion of 2.4 acres of City-Dedicated Open Space and construction of Park Improvements thereon, nor shall any combination of Parkland Fees and Private Recreation Improvements credit be applied to satisfy more than fifty percent (50%) of the Project's Parkland Dedication Obligation, consistent with Section 4(F).

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

- H. Upon Developer's dedication of three parcels of real property, currently identified as Properties H1, H5 and H6 (the "City-Dedicated Affordable Housing Sites") to the City (or its designee) for use in the production of affordable housing, the combined six hundred (600) affordable housing units that are assumed for these Sites, as reflected in Exhibit E8, shall be counted toward the 1,250 residential units that would trigger the Design Outside Date referenced in Section 5(B) and set forth in Section 5(C) for the Social Heart open space, and toward the 1,500 residential units and 3,250 residential units, respectively, that would trigger the dedication and Completion for the Social Heart open space and the St. John Triangle open space, which triggers are set forth in Exhibits E3.1 and E3.2. For clarity, upon dedication of each of the three City-Dedicated Affordable Housing Sites, it shall be assumed, for the limited purpose of triggering the Design Outside Date, dedication, and Completion of the Social Heart, and the dedication and Completion of St. John Triangle, that the residential units assumed for that Site have received Temporary Certificates of Occupancy. Therefore, upon dedication of all three of the City-Dedicated Affordable Housing Sites and issuance of Temporary Certificates of Occupancy for the balance of the residential units indicated in Exhibit E3.1—whether issuance of Temporary Certificates of Occupancy for such residential units occurs before or after dedication of the City-Dedicated Affordable Housing Sites, and no matter where such units are located within the Project Site—the Design Outside Date, and the dedication and Completion requirements for the Social Heart, respectively, shall be triggered and the Social Heart shall be delivered within twenty-four (24) months of issuance of a Temporary Certificate of Occupancy for the 1,500th residential unit, unless earlier triggered by the issuance of a Temporary Certificate of Occupancy for development on Block D4; and the dedication and Completion of St. John Triangle shall be triggered and St. John Triangle shall be delivered within 12 months of issuance of a Temporary Certificate of Occupancy for the 3,250th residential unit, unless earlier triggered by issuance of a Temporary Certificate of Occupancy for a Building on Block C2.

- I. Notwithstanding the Completion timing requirements set forth in Section 4(H), in Exhibits E3.1 and E3.2, or elsewhere in Development Agreement and other Exhibits thereto, if the Completion requirement for the Social Heart is triggered by issuance of a Temporary Certificate of Occupancy for the 1,500th residential unit developed in the Project (rather than for issuance of a Temporary Certificate of Occupancy for a Building on Block D4), the Completion date for the Social Heart (inclusive of the subterranean garage) shall be extended to provide Developer twenty-four (24) months to Complete the Social Heart from the date on which that portion of the VTA's BART Silicon Valley Phase II Extension Project located adjacent to the south side of West Santa Clara Street, between Autumn Street and the San José Diridon Caltrain Station ("BART Project") is completed, if due to active or reasonably imminent construction staging or other construction-related activity on or in the vicinity of the Social Heart, the BART Project prevents, delays, or otherwise interferes with Developer's timely construction and Completion of the Social Heart and/or the subterranean garage.
- J. In addition to adhering to the schedule set forth in Exhibits E3.1 and E3.2 and the other timing requirements of this Agreement, and the Development Agreement, through Completion and delivery of a combination of (i) City-Dedicated Open Space and (ii) Privately-Owned Publicly Accessible that is subject to recorded restrictive covenant(s) as described in Section 4.1.3 of the Development Agreement and reflected in Exhibit E7 (the "Covenant Privately-Owned Publicly Accessible Open Space"), Developer shall ensure that a cumulative minimum of fifty-two (52) square feet of Completed open space is provided for each residential unit that is constructed. If Developer elects to complete the Meander as a Ped/Bike Street as described in Section 4.1.3(a)(v)(2) of the Development Agreement, then such space shall count toward the 52 square feet at a ratio of four (4) square feet of Ped/Bike Street to three (3) square feet of the 52 square-foot requirement (meaning that each square foot of Ped/Bike Street is counted as 0.75 square feet for purposes of the 52 square feet required by this Paragraph). Continued compliance shall be demonstrated and confirmed through the accounting process required as part of the Conformance Review for vertical development. Final acreage of the open spaces shall be verified in the manner set forth in

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

- K. Certain exceptions from the Parkland Dedication Ordinance (San José Municipal Code Chapter 19.38) are necessary in order to provide the City-Dedicated Open Spaces in the manner set forth in the Development Agreement and this Agreement. The exceptions from certain provisions of the Parkland Dedication Ordinance are listed in Exhibit E9. The City has agreed to grant the waivers or exceptions listed in Exhibit E9. With respect to items (i) and (ii) listed in Paragraph 2 of Exhibit E9, the City has further agreed that such exceptions shall not impact the amount of credit that Developer is eligible to receive for land and Park Improvements impacted by those exceptions, except that credit shall not be granted for above-grade existing and/or proposed building footprints, vehicular access ways and aprons, elevators and associated lobbies, and similar non-open, non-park or non-recreational features located within any City-Dedicated Open Space; and for item (iii) in Paragraph 2, the exception shall not impact the amount of the credit that Developer is eligible to receive for the Park Improvements, and the City agrees that it shall provide seventy-five percent (75%) credit for the land value of the Social Heart park. For clarity, credits shall be available for land underlying park-related and recreational structures, which structures may include but are not limited to kiosks/pavilions or similar structures permitted by the DWDSG, park maintenance facilities, or restrooms.
- L. Subject to Section 4(G), upon the termination or expiration of the Development Agreement, any outstanding Parkland Dedication Obligation that has accrued based on the number of residential units constructed as of such termination or expiration shall first be satisfied

through any then-available credits from dedicated acreage and/or costs of Park Improvements for the City-Dedicated Open Space in accordance with Exhibit E8 and this Agreement. Thereafter, subject to Sections 3(O), 4(F), and 4(J), any remaining Parkland Dedication Obligation for the number of residential units constructed shall be satisfied with Private Recreation Improvements credits, if any, followed by payment of Parkland Fees. This Section 4(L) shall survive the termination or expiration of the Development Agreement.

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

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

- A. Prior to initiating design of any City-Dedicated Open Space, Developer shall meet with PRNS Staff, after which PRNS Staff will support community outreach and engagement for the park design and naming. Developer agrees to hold two community meetings prior to

submittal of an application for Open Space Improvement Conformance Review pursuant to the provisions of the Downtown West Planned Development Zoning and General Development Plan. Developer shall consider the input and comments received from the public during the community meetings when finalizing its application for Open Space Conformance Review. Following submittal of Developer's Open Space Conformance Review application, which application shall contain the thirty-five percent (35%) Park Improvements Plans described in Section 5(C), below, the Parks and Recreation Commission shall review the application and 35% Park Improvements Plans at a public hearing, and shall thereafter make a recommendation to the Director of PBCE regarding approval or disapproval of the Open Space Conformance Review. If consistent with all applicable design standards, taking into account input from the public and the Parks and Recreation Commission, the Director of PBCE, in consultation with the Director of PRNS, shall approve the Open Space Conformance Review and 35% Park Improvements Plans contained therein. Technical review of the City-Dedicated Open Space design shall occur in accordance with the provisions of Exhibit E5.

- B. In accordance with the Design Outside Date Schedule set forth below, as part of its Open Space Improvement Conformance Review application for the Park Improvements, in addition to paying Review Fees in accordance with Section 3(I), Developer shall submit Park Improvements Plans (defined in Exhibit E5) at thirty-five percent (35%) consistent with the Design Submittal Requirements set forth in the City's Turnkey Project Process and Submittal Requirements, dated November 5, 2019, and the Conformance Review Implementation Guide for the Project. Following Conformance Review Approval as described in Section 5(A), Developer shall submit Park Improvements Plans at sixty-five percent (65%) and ninety-five percent (95%), consistent with the Design Submittal Requirements set forth in the City's Turnkey Project Process and Submittal Requirements, dated November 5, 2019, and the Conformance Review Implementation Guide for the Project, which 65% and 95% Plans and technical specifications shall be reviewed by the Director of PW. The 95% Park Improvements Plans for City-Dedicated Open Space shall

be reviewed, approved, and signed by the Director of PW, and approval from the Director of PW and issuance of a Notice to Proceed shall authorize construction.

C. The Design Outside Date Schedule referenced in Section 5(B) sets forth the dates by which the Conformance Review application and 35% Park Improvements Plans for each City-Dedicated Open Space shall be submitted in the manner described in the General Development Plan for the Downtown West Planned Development Zoning District. The Design Outside Date Schedule shall be as follows:

- a. Los Gatos Creek Trail (Block E): within six (6) months of Conformance Determination approval for Block E1;
- b. Los Gatos Creek Trail (Block G): within six (6) months of Conformance Determination approval for block G1;
- c. Los Gatos Creek Park: within six (6) months of Conformance Determination approval for block G1;
- d. Los Gatos Creek Connector 1: within six (6) months of Conformance Determination approval for 1st residential building of H3;
- e. Social Heart: within six (6) months of the earlier of Temporary Certificate of Occupancy for the twelve hundred fiftieth (1,250th) unit or Conformance Determination approval for Block D4;
- f. Northend Park: within six (6) months of Conformance Determination Approval for the first building on Block A1;
- g. Los Gatos Creek Connector 2: within six (6) months of Conformance Determination approval for the first (1st) residential building of Block H6;
- h. St. John Triangle: within six (6) months of Conformance Determination approval for the first (1st) building of Block C1 or C2.

SECTION 6. BONDS AND SECURITY.

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

A. Type and Amounts.

1. Performance Security. To assure the Developer's faithful performance to the City of this Agreement to Complete the Park Improvements in an amount equal to one hundred percent (100%) of the direct costs reflected in Table 2 of Exhibit E1 for the Park Improvements for the City-Dedicated Open Space(s) included in the final map, subject to escalation based on the ~~California~~ Construction Cost Index (hereinafter "Performance Security"), which shall be furnished by Developer to the City prior to approval of the final map and shall be subject to adjustment pursuant to Section 6(B)(2); and
2. Payment Security. To secure Developer's payment to any contractor, subcontractor, person renting or supplying equipment, or furnishing labor and materials for completion of the Park Improvements included in the final map, in the additional amount of one hundred percent (100%) of the direct cost reflected in Table 2 of Exhibit E1 for the subject Park Improvements for the subject City-Dedicated Open Space, subject to escalation based on the ~~California~~ Construction Cost Index (hereinafter "Payment Security"), which shall be furnished by Developer to the City prior approval of the final map; and
3. Warranty Security. To warranty the Developer's work to the City with respect to Park Improvements included in the final map, for a period of one (1) year following recordation of the Notice of Acceptance against any defective work or labor done or defective materials furnished in the additional amount of twenty-five percent (25%) of the direct costs reflected in Table 2 of Exhibit E1 for the Park Improvements for the subject City-Dedicated Open Space, subject to escalation based on the ~~California~~ Construction Cost Index (hereinafter "Warranty Security"). The Warranty Security

shall be furnished by Developer to the City prior to issuance of the Notice of Acceptance.

4. Landscaping Security. To secure Developer's installation and maintenance of landscaping as may be required by the landscaping specifications in the Park Improvement Plans, at such time as any drought restrictions on landscaping installation have been rescinded (hereinafter "Landscaping Security"). The Parties acknowledge that any City restrictions on the installation of landscaping because of drought conditions may delay Developer's installation of the landscaping contemplated by this Agreement. If, due to drought restrictions, Developer is unable to install the landscaping in time to be inspected by the Director of PW for the purposes of accepting the Completed Park Improvements, Developer shall post a bond or other form of security acceptable to the Director of PW.
5. Park Art and Optional Structures Security. To allow for City to install or construct any remaining Park Art and Optional Structures following Completion of a City-Dedicated Open Space, Developer shall post a bond or other form of security acceptable to the Director of PW, and in an amount equal to the cost at that time of the remaining Park Art and Optional Structures. The Park Art and Optional Structures Security shall be furnished by Developer to the City prior to the final Notice of Acceptance for a Park Improvement within the subject City-Dedicated Open Space.
6. Park Construction Right of Entry Security. To allow for City to Accept a Completed City-Dedicated Open Space within which Developer retains a Park Construction Right of Entry as described in Section 3(E), Developer shall post a bond or other form of security acceptable to the Director of PW for the portion of the City-Dedicated Open Space subject to the Construction Right of Entry (the "Right of Entry area"), and in an amount equal to one hundred percent (100%) of the direct costs for the Park Improvements Value attributable to the Right of Entry Area. Such amount shall be determined by dividing the direct costs for the Park Improvements Value reflected in Table 2 of Exhibit E1 for the subject City-Dedicated Open Space (which costs are

subject to escalation based on the ~~California~~-Construction Cost Index) by the total square footage of that City-Dedicated Open Space, and multiplying that value by the total square footage of the Right of Entry Area ([direct costs/total square footage] * Right of Entry area square footage). The Park Construction Right of Entry Security shall be furnished by Developer to the City prior to the final Notice of Acceptance for a Park Improvement within the subject City-Dedicated Open Space.

B. Conditions.

1. Developer shall provide the required security on forms approved by City and from sureties authorized by the California Insurance Commissioner to transact the business of insurance. Any bonds furnished by Developer to satisfy the security requirements in this Section 6 shall be in the forms attached hereto as Exhibit E10, as may be amended by City from time to time.
2. A condition of the Developer's security is that any changes in the Park Improvements cost as reflected in the construction contract that do not exceed ten percent (10%) of the original estimated hard cost of the Park Improvements as reflected in Table 2 of Exhibit E1 shall not relieve the security. In the event that the construction contract indicates that the Park Improvements cost is more than ten percent (10%) over the original estimated cost of the Park Improvements, Developer shall provide security as required by Section 6(A) of this Agreement for One Hundred Percent (100%) of the total estimated cost of the Park Improvements as reflected in the construction contract.
3. Developer's Performance Security pursuant to Section 6(A)(1) shall compensate City for the actual cost of Completing the required Park Improvements in the Event of Default, as defined in Section 7 below, by Developer in the performance of this Agreement, regardless of whether City's cost of Completion exceeds the Park Improvements Value of the Park Improvements.
4. A condition of Developer's security is that any request by Developer for an extension of time for the commencement or Completion of the work under this Agreement may

be granted by City without notice to Developer's surety and such extensions shall not affect the validity of this Agreement or release the surety or sureties on any security given for this Agreement.

5. As a condition of granting any extension for the commencement or Completion of any work under this Agreement, Director of PW may require Developer to furnish new security guaranteeing performance of this Agreement, as extended, in an increased amount to compensate for any increase in construction costs as determined by Director of PW.
 6. If Developer seeks to replace any security with another security or securities, the replacement shall: (1) comply with all the requirements for security in this Agreement; (2) be provided by Developer to Director of PW; and (3) upon its written acceptance by Director of PW, be deemed to be a part of this Agreement. Upon Director of PW's acceptance of a replacement security, the former security may be released by City.
 7. Upon a Transfer that includes the Transfer of Developer's obligations with respect to a City-Dedicated Open Space that has not yet been Completed, (i) Transferee shall provide security in accordance with the requirements of this Agreement, or (ii) if Developer has previously provided security in accordance with this Agreement for the subject City-Dedicated Open Space, Transferee shall promptly provide new security, which security shall replace the security provided by Developer for the subject City-Dedicated Open Space. If Transferee provides security as required by (ii), above, upon Director of PW's acceptance of the new security from Transferee, the former security provided by Developer/Transferor shall be released by the City.
- C. Release of Securities. City shall release the securities required by this Agreement as follows:
1. Performance Security. City shall release each Performance Security for a Park Improvement upon recordation of the Notice of Acceptance for that Park Improvement, or any portion thereof, or as may otherwise be authorized in accordance with California Government Code Sections 66499.7(a)–(g).

2. Payment Security. City shall release the Payment Security for a Park Improvement included in a final map in accordance with California Government Code Section 66499.7(h).
 3. Warranty Security. City shall release the Warranty Security for a Park Improvement upon expiration of the warranty period for that Park Improvement and settlement of any claims filed during the warranty period. City may retain from any security released, an amount sufficient to cover costs and reasonable expenses and fees, including reasonable attorney's fees, for any claims filed during the warranty period.
 4. Landscaping Security. City shall release the Landscaping Security at such time when the drought restrictions have been rescinded as further described in Section F(3) of Exhibit E5.
 5. Park Art and Optional Structures Security. City shall release the Park Art and Optional Structures Security upon its completed installation or construction of the remaining Park Art and Optional Structures.
 6. Park Construction Right of Entry Security. City shall release the Park Construction Right of Entry Security upon Developer's relinquishment of the Park Construction Right of Entry and Completion of Park Improvements within the Right of Entry area in accordance with this Agreement.
- D. Injury to Park Improvements, Public Property, or Public Utility Facilities. Until recordation of the Notice of Acceptance of the Park Improvements as provided in Exhibit E5, Developer assumes responsibility for the care and maintenance of, and any damage to, the Park Improvements. Developer shall replace or repair all Park Improvements, public utility facilities, and surveying or subdivision monuments and benchmarks that are destroyed or damaged for any reason, regardless of whether resulting from the acts of the Developer, prior to the recordation of the Notice of Acceptance; provided, however, that if Developer identifies a responsible third party for such damage, Developer may pursue recovery of its repair costs and expenses from such responsible third party at its sole cost and expense.

Developer shall bear the entire cost of such replacement or repairs regardless of what entity owns the underlying property. Any repair or replacement shall be to the satisfaction, and subject to the approval of the Director of PW.

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

SECTION 7. DEFAULT.

A. Developer shall be in default hereunder upon the occurrence of any one or more of the following events (“Event of Default”):

1. Developer’s failure to timely Complete construction of one of more Park Improvements under this Agreement;
2. Developer’s failure to timely cure any defect in any Park Improvement;
3. Developer’s failure to perform construction work for a period of twenty (20) business days after commencement of work;
4. Developer’s insolvency, appointment of receiver, or the filing of any petition in bankruptcy, either voluntary or involuntary, which Developer fails to discharge within sixty (60) days;
5. Developer assigns this Agreement in violation of Section 10; or
6. Developer fails to perform or satisfy any other term, condition, or obligation under this Agreement.

B. If an Event of Default occurs and the Event of Default is not cured by Developer in accordance with Section 7(E) below, City in its sole discretion shall be entitled to terminate Developer’s control over the Park Improvements described herein and hold Developer and its surety liable for all damages suffered by City as a result of the Event of Default. City shall have the right, at its sole discretion, to draw upon or use the appropriate security to

mitigate City's damages in the Event of Default by Developer. City may use the sums provided by the Performance Security in addition to any other remedies available at law or in equity to City for the Completion of the Park Improvements in accordance with the Park Improvements Plans. The Parties acknowledge and agree that the estimated costs and security amounts may not reflect the actual cost of construction of any specific Park Improvement for which the security is provided, and therefore, City's damages in the Event of Default by Developer shall be measured by the actual cost of Completing the required Park Improvements to the satisfaction of City. City may use the sums provided by the securities for the Completion of the Park Improvements for which the security is provided in accordance with the Project Specifications.

- C. City may take over the work and Complete the Park Improvements for which the security is provided, by contract or by any other method City deems appropriate, at the sole cost and expense of Developer. In such event, City, without any liability for any work or actions previously performed by Developer with respect to the subject Park Improvements, may Complete the Park Improvements using any of Developer's materials, appliances, plans, or other property located at the Park Site and that are necessary to Complete the Park Improvements. The rights and remedies set forth in this Section 7 shall affect and concern only the specific Park Improvement(s) that are the subject of the specific Event of Default.
- D. Unless the PRNS Director determines that the circumstances warrant immediate enforcement of the provisions of this Section 7 in order to preserve the public health, safety, and welfare, the PRNS Director shall give twenty (20) working days' prior written notice of termination to Developer ("Notice Period"), which notice shall state in reasonable detail the nature of Developer's default and the manner in which Developer can cure the default. During the Notice Period, Developer shall have the right to cure any such default; provided, however, if a default is of a nature which cannot reasonably be cured within the Notice Period, Developer shall be deemed to have timely cured such default for purposes of this Section if Developer commences to cure the default within the Notice Period, and prosecutes the same to completion within a reasonable time thereafter.

- E. If an Event of Default occurs and the Event of Default is not cured by Developer in accordance with Section 7(D) above, City in its sole discretion shall be entitled to terminate Developer's control over the specific Park Improvement(s) that is the subject of the Event of Default and hold Developer and its surety liable for all damages suffered by City as a result of the Event of Default. City shall have the right, at its sole discretion, to draw upon or use the appropriate security to mitigate City's damages in the Event of Default by Developer. City may use the sums provided by the Performance Security for the Completion of the Park Improvements in accordance with the Park Improvements Plans.

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

- F. If an Event of Default occurs, Developer agrees to pay any and all costs and expenses incurred by City in securing performance of such terms, conditions, or obligations giving rise to the Event of Default, including but not limited to, fees and charges of architects, engineers, contractors, and other professionals but specifically excluding legal costs and expenses including attorneys' fees and court costs.
- G. City's rights and remedies specified in this Section 7 shall be deemed cumulative and in addition to any rights or remedies City may have at law or in equity, including but not limited to withholding the approval of Conformance Review for a subsequent residential building.

SECTION 8. INDEMNITY/HOLD HARMLESS.

City, or any officer, employee, or agent thereof shall not be liable for any loss or injury to persons or property occasioned by reason of the acts or omissions of Developer, its agents, employees, contractors, or subcontractors in the performance of this Agreement. Developer further acknowledges and agrees to protect, indemnify, defend and hold City, its officers, agents and employees harmless from and against any and all liability, loss, cost and obligations on account of or arising out of or resulting from any injury or loss caused directly or indirectly by any cause

whatsoever in connection with or incidental to the activities performed by Developer under this Agreement, except to the extent such injury or harm is caused by the sole active negligence or willful misconduct of City, its officers, agents, or employees. This Section 8 shall survive the recordation of the Notice of Acceptance, acceptance of any Park Improvement as to that Park Improvement, or sooner termination of this Agreement for a period of one (1) year from the date of such acceptance or termination. Recordation of the Notice of Acceptance by City of any Park Improvement shall not constitute an assumption by City of any responsibility or liability for any loss or damages covered by this Section 8.

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

SECTION 9. NOTICES.

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

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

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

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

with a copy to:

Google LLC

Ex. E-37

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

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

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

SECTION 10. TRANSFER AND RELEASE.

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

SECTION 11. BINDING UPON SUCCESSORS.

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

SECTION 12. GOVERNING LAW.

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

SECTION 13. ENTIRE AGREEMENT.

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

SECTION 14. TIME OF ESSENCE.

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

SECTION 15. FORCE MAJEURE.

- A. “Force Majeure” has the meaning as set forth in the Development Agreement.
- B. Should a Force Majeure Event prevent performance of this Agreement, in whole or in part, the Party affected by the Force Majeure Event shall be excused or performance under this Agreement shall be suspended to the extent commensurate with the Force Majeure Event; provided that the Party availing itself of this Section promptly notifies the other Party after learning of the occurrence of a Force Majeure Event that actually causes delay; and provided further that the time of suspension or excuse shall not extend beyond that reasonably necessitated by the Force Majeure Event.
- C. Notwithstanding the foregoing, the following shall not excuse or suspend performance under this Agreement:
 - 1. Performance under this Agreement shall not be suspended or excused for a Force Majeure Event pertaining to the Work if such event is not defined as a Force Majeure Event under the applicable contract for the Work.
 - 2. Negligence or failure of Developer to perform its obligations under a contract for the Work (other than for a Force Majeure Event as defined under the applicable contract) shall not constitute a Force Majeure Event.
 - 3. The inability of Developer for any reason to have access to funds necessary to carry out its obligations under this Agreement or the termination of any contract for the prosecution of the Work for such reason or for Developer's default under such contract shall not constitute a Force Majeure Event.

SECTION 16. BOOKS AND RECORDS.

- A. Developer shall be solely responsible to implement internal controls and record keeping procedures in order to comply with this Agreement and all applicable laws. Developer shall maintain any and all ledgers, books of account, invoices, vouchers, bids, cancelled checks, and other records or documents evidencing or relating to the activities performed by Developer under this Agreement, including without limitation those relating to the construction of the Park Improvements, for a minimum period of three (3) years, or for any longer period required by law, from the date of termination of this Agreement or the date of the City's acceptance of the Park Improvements, whichever is longer. Notwithstanding this previous sentence, Developer shall retain such records beyond three (3) years so long as any litigation, audit, dispute, or claim is pending.
- B. Any records or documents required to be maintained pursuant to this Agreement shall be made available for inspection or audit at no cost to City, at any time during regular business hours, upon written request by the City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such documents shall be provided to City for inspection at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records shall be available at Developer's address indicated for receipt of notices in this Agreement.
- C. Where City has reason to believe that such records or documents may be lost or discarded due to dissolution, disbandment or termination of Developer's business, City may, by written request by any of the above-named officers, require that custody of the records be given to City and that the records and documents be maintained in City Hall. Access to such records and documents shall be granted to any party authorized in writing by Developer, Developer's representatives, or Developer's successor-in-interest.
- D. Developer's obligations under this Section shall be in addition to Developer's obligations specified in Exhibit E5.

SECTION 17. MISCELLANEOUS PROVISIONS.

- A. Captions. Captions and Sections of this Agreement are for convenience only and shall not be considered in resolving any questions of interpretation or construction.
- B. Incorporation of Recitals. The Recitals in this Agreement are hereby incorporated into the terms of this Agreement.
- C. Jurisdiction. In the event that suit shall be brought by any of the Parties, the Parties agree that venue shall be exclusively vested in the state courts of the County of Santa Clara, or if federal jurisdiction is appropriate, exclusively in the United States District Court, Northern District of California, San José, California.
- D. Waiver. Developer agrees that waiver by City of any breach or violation or any term, condition, or obligation of this Agreement shall not be deemed to be a waiver of any other term, condition, or obligation contained herein or a waiver of any subsequent breach or violation of the same term, condition, or obligation.
- E. Plurality. As used in this Agreement and when required by the context, each number (singular and plural) shall include all numbers.
- F. Compliance with Laws. Developer, its employees, agents, representatives, contractors, and subcontractors shall comply with all local, state and federal laws in the performance of this Agreement.
- G. Nondiscrimination. Developer, its employees, agents, representatives, contractors, and subcontractors shall not discriminate, in any way, against any person on the basis of age, sex, race, color, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity, national origin, or any other recognized or protected class in connection with or related to the performance of this Agreement. Developer shall expressly require compliance with the provisions of this Section 1(G) in all agreements with contractors and subcontractors for the performance of the improvements hereunder.

- H. Developer has read each and every part of this Agreement, including without limitation, its exhibits, and Developer freely and voluntarily has entered into this Agreement. This Agreement is a negotiated document and shall not be interpreted for or against any party by reason of the fact that such Party may have drafted this Agreement or any of its provisions.
- I. Whenever in this Agreement words of obligation or duty are used, such words shall have the force and effect of covenants. Any obligation imposed by either Party shall include the imposition on such Party of the obligation to pay all costs and expenses necessary to perform such obligation, except as otherwise provided herein.
- J. Severability. If any provisions or portions of this Agreement are held to be invalid by a court of competent jurisdiction, the remaining provisions or portions of this Agreement shall remain in full force and effect unless amended or modified by mutual written consent of the Parties.
- K. This Agreement is entered into pursuant to and shall be governed by the Parkland Dedication Ordinance and the Development Agreement. If not otherwise defined in this Agreement or in the Development Agreement, capitalized terms shall have the meanings set forth in Chapter 19.38 of the San José Municipal Code.

SECTION 18. AGREEMENT'S EXHIBITS.

This Agreement includes the following Exhibits:

- E1 Park Improvements Value and Costs
- E2 Public and Private Open Space Approximate Acreage
- E3 Delivery of City-Dedicated Open Space
 - E3.1 City-Dedicated Open Space Dedication and Improvements Schedule
 - E3.2 Park Dedication/Delivery Triggers Figure

- E4 Dedication Form
- E5 Design and Construction Requirements
- E6 Diagram of Construction Right of Entry Area
- E7 Park Dedication Tracking and Verification Table
- E8 Parkland Dedication Obligation
- E9 List of Required Exceptions from Parkland Dedication Ordinance
- E10 Bond Forms

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

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

By: _____

Johnny V. Phan
Chief Deputy City Attorney

City Clerk

Date: _____


DEVELOPER

GOOGLE LLC, a Delaware limited liability
company

By: _____

Name: _____

Title: _____

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

[illegible]

On _____ before me _____,
(Name, Title of officer – e.g. Jane Doe, Notary Public)

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

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

WITNESS my hand and official seal.

(Signature of Notary) (Seal)

Exhibit E1

Exhibit E1

Park Improvements Value and Costs

Table 1 - Estimated Credits, Park Improvements Value, and Unit Equivalency¹

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

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

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

Table 2 - Detailed Cost Estimates

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

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

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

Exhibit E2

Exhibit E2

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

Open Space	City-Dedicated Acreage¹ (AC)	Privately-Owned Open Space Acreage Subject to Restrictive Covenant^{1,2} (AC)
Los Gatos Creek Connector	0.91	0.33
Los Gatos Creek Park	0.37	1.58
The Meander	-	0.87
Social Heart	0.57	-
Creekside Walk	-	1.24
Los Gatos Creek East	-	1.09
Gateway Plaza	-	1.01
St. John Triangle	1.53	-
North Montgomery Pocket Park	-	-
Northend Park	0.89	0.88
Los Gatos Creek Trail (E)	0.25	-
Los Gatos Creek Trail (G)	0.28	-
Total	4.80	7.0

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

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

Exhibit E3

Delivery of City-Dedicated Open Space

Exhibit E3.1

Exhibit E3.1

City-Dedicated Open Space Dedication and Improvement Schedule*

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

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

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

Exhibit E3.2

Exhibit E4

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

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

City of San José – Public Works
200 East Santa Clara Street, 3rd Floor
San José, CA 95113-1905

Deed No: _____

3 Dash No: _____

APN(s): _____

Space above this line for Recorder's use

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

☐ computed on the consideration or full value of property conveyed, OR

☐ computed on the consideration or full value less value of liens and/or encumbrances remaining at time of sale,

☐ unincorporated area; ☒ **City of San José**, and

☐ _____

Signature of Declarant

OFFER OF DEDICATION

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

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

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

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

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

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

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

_____, 20____

GOOGLE LLC,
a Delaware limited liability company

By: _____

Print Name: _____

Title: _____

Address: 1600 Amphitheatre Parkway
Mountain View, CA 94043

Attn: _____

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

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

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

)
)

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

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

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

)
)

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

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

EXHIBIT “A”

LEGAL DESCRIPTION

EXHIBIT “B”

PERMITTED TITLE EXCEPTIONS

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

EXHIBIT “C”

ADDITIONAL CONDITIONS TO RECORDING

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

1. _____

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

EXHIBIT E5

EXHIBIT E5

DESIGN AND CONSTRUCTION REQUIREMENTS

SECTION 1. DESIGN AND CONSTRUCTION REQUIREMENTS.

A. Plans And Specifications.

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

1. Downtown West Improvement Standards, dated April 5, 20—2021 (“**DWIS**”), approved by the City Council on _____, 2021, as may be amended.
2. City's Standard Specifications and Standard Details, dated July 1992 (“**City’s Specifications**”), and on file with City's Department of Public Works, Architectural Division. Section 1 and the Technical Provisions of City's Standard Specifications (Section 10 through and including Section 1501) shall be applicable to this Agreement. References in the Standard Specifications to “Developer” shall be deemed to mean “Developer.”
3. City’s Turnkey Park Standards for Park Design & Construction, dated 2001 (“**Turnkey Standards**”), as may be amended from time to time, and on file with City’s Department of Public Works, Architectural Division; provided, however, that with respect to Hazardous Substances, Hazardous Materials and remediation of the City-Dedicated Open Space or Park Improvements, the terms and conditions of this Agreement and related exhibits shall apply in the event of a conflict with the Turnkey Standards, including, without limitation the provisions of Sections 2.2.G and 2.6.C.1 of the Turnkey Standards. Future amendments to the Turnkey Standards shall apply only to plans for Parkland Improvements for which ninety-five percent (95%) plans and specifications that are submitted for City review and approval after eighteen (18) months of the effective date of the amendments of the Turnkey Standards; provided, however, that with respect to Hazardous Substances, Hazardous Materials and remediation of the City-Dedicated Open Space or Park Improvements, the terms and conditions of this Agreement and related exhibits shall apply in the event of a conflict with the Turnkey Standards, including, without limitation the provisions of Sections 2.2.G and 2.6.C.1 of the Turnkey Standards. For clarity, if ninety-five (95%) plans and specifications are submitted seventeen (17) months after the effective date of the amendment or sooner, the amendment would not apply.
4. Public Works Standard Specifications- Section 329100 Planting Preparation. Soil specifications, survey requirements, and resulting soil amendment procedures prescribed in the

above guidelines, as they may be amended from time to time, shall be applicable to this agreement.

5. The Downtown West Planned Development Zoning District and accompanying General Development Plan, dated _____, 20____, adopted by the City Council on _____, 2021, [as may be amended](#).

6. The Downtown West Design Standards and Guidelines, dated _____, 20____, adopted by the City Council on _____, 2021, [as may be amended](#).

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

B. Application Of Plans And Specifications.

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

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

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

C. Project Plans Approval Process.

1. In accordance with the Design Outside Date Schedule set forth in the Parkland Agreement, Developer shall submit Park Improvements Plans at thirty-five percent (35%) as part of its Open Space Improvement Conformance Review application for the Park Improvements. The submittal of sixty-five percent (65%) and ninety-five percent (95%) Park Improvements Plans shall occur following the Open Space Improvement Conformance Review process set forth in the General Development Plan. The preparation, submittal, and review of the Park Improvements Plans shall be in accordance with this Agreement.
2. The Park Improvements Plans shall be submitted in a timely manner in order to insure that Developer completes the Park Improvements on or before the completion date specified in this Agreement. Developer shall not construct any Park Improvements unless and until the City's Director of PW has approved the Park Improvements Plans and issued a Notice to Proceed in writing. The approval process for the sixty-five percent (65%) and ninety-five (95%) Park Improvements Plans is more particularly set forth in the Turnkey Standards. City's Director of PW shall complete its review of each submittal and provide any comments to Developer within forty-five (45) days of submittal. City's Director of PW shall approve or disapprove Developer's bid submittal within thirty (30) days of a complete submittal.
3. Prior to acceptance of the Park Improvements Plans and/or proceeding with construction of the Park Improvements, the Developer shall provide the City with copies of all soil surveys along with recommended soil amendments. The City may, at its reasonable discretion, require inspection of the City-Dedicated Open Space for construction debris before construction may commence.
4. City's approval of the Park Improvements Plans shall not release Developer of the responsibility for the correction of mistakes, errors, or omissions contained in the Park Improvements Plans, including any mistakes, errors or omissions which may be the result of circumstances unforeseen at the time the Park Improvements Plans were developed or approved. If during the course of construction of the Park Improvements, the Director of PW determines in the Director of PW's reasonable discretion that the public safety requires modification of, or the departure from, the Plans, the Director of PW shall have the authority to require such modification or departure and to specify the manner in which the same may be made. The Parties acknowledge that the Park Improvements Plans, once approved by the Director of PW, shall be final and that, except as expressly provided in this subsection or elsewhere in the Parkland Agreement and/or Development Agreement, no revisions to the Park Improvements Plans shall be permitted unless approved by the Director of PW.

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

SECTION 2. PARTICULAR CONSTRUCTION REQUIREMENTS.

A. Developer Selection.

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

B. Prevailing Wage Requirement.

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

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

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

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

C. Remedies for Developer's Breach of Prevailing Wage Requirements.

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

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

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

- a. For each day after thirty (30) calendar days that Developer fails to completely respond to a request by City to provide records as required under Section 2(B), of this Exhibit E5, Developer shall pay to City as liquidated damages the sum of TWO HUNDRED FIFTY DOLLARS (\$250.00); and

b. For each instance where City has determined that the Prevailing Wage Requirements were not met, Developer shall pay to City as liquidated damages the sum of three (3) times the difference between the actual amount of wages paid and the prevailing wages which should have been paid.

3. Audit Rights. All records or documents required to be kept pursuant to this Agreement to verify compliance with the Prevailing Wage Requirement shall be made available for audit at no cost to City, at any time during regular business hours, upon written request by City Attorney, City Auditor, City Manager, or a designated representative of any of these officers. Copies of such records or documents shall be provided to City for audit at City Hall when it is practical to do so. Otherwise, unless an alternative is mutually agreed upon, the records or documents shall be available at Developer's address indicated for receipt of notices in this Agreement.

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

Developer Initial: _____ City Initial: _____

D. Conduct Of Work.

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

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

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

E. Access For Inspection.

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

2. Representatives.

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

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

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

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

F. Acceptance of Park Improvements.

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

1. City agrees to inspect and prepare a punchlist for the Park Improvements within ten (10) business days of notification by Developer that the Developer considers the construction of the Park Improvements to be substantially complete as defined by City standard specifications. City further agrees to perform its final inspection within ten (10) business days of notification by Developer that all punchlist work has been completed.

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

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

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

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

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

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

a. If a City-Dedicated Open Space is affected by a Park Construction Right of Entry, but Developer has otherwise satisfied all obligations set forth in this Agreement that are required for City's acceptance of that City-Dedicated Open Space and the Park Improvements thereon, the Director of PW shall process a Notice of Acceptance for that portion of the City-Dedicated Open Space and Park Improvements that are outside of the scope or boundaries of the Park Construction Right of Entry.

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

G. City-Dedicated Open Space.

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

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

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

c. Developer shall also cause to be provided to City, concurrently with the conveyance of each City-Dedicated Open Space to City, a C.L.T.A. owner's form policy of title insurance issued for the specific City-Dedicated Open Space by a reputable title company currently doing business with City, with City named as the insured, in an amount as determined by the City consistent with the terms of the Development Agreement and Parkland Agreement, insuring the title of City to the City-Dedicated Open Space is subject to only the Permitted Exceptions.

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

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

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

foregoing, City shall remain responsible and liable for any Hazardous Substances as set forth in the Existing Agreements (defined in the Development Agreement).

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

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

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

H. Compliance With Laws/Permits.

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

2. Developer shall, at its sole cost and expense, obtain all governmental reviews and approvals, licenses, and permits which are, or may be, required and necessary to construct and complete the Park Improvements in accordance with the provisions of this Agreement, including, but not limited to, site development reviews, development permits and environmental review. Developer shall comply with all conditions, restrictions or contingencies imposed upon, or attached to, such governmental approvals, licenses, and permits. Consistent with the terms of the Development Agreement, City agrees to cooperate with Developer in its efforts to obtain any such governmental reviews and approvals, licenses, and/or permits. City also shall consider any Subsequent Approvals required for the construction of the Park Improvements in a manner

consistent with the Development Agreement. If Developer for any reason fails to comply with any of City's requirements, or any other legal requirement concerning Developer's construction of the Park Improvements, then City shall have the right to require Developer to alter, repair, or replace any improvements or perform any other action to the satisfaction of the Director as reasonably required to correct any non-compliance of the Park Improvements with legal requirements or this Agreement and at no cost to City. Developer's failure to effect the cure as required by the Director shall constitute an Event of Default in accordance with Section 7 of this Agreement.

SECTION 3. ENVIRONMENTAL CONDITIONS FOR CITY AND DEVELOPER WARRANTIES.

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

1. Neither the Site nor Developer are in violation of any environmental law and neither the Site nor Developer are subject to any existing, pending, or threatened investigation by any federal, state, or local governmental authority under or in connection with the environmental laws relating to the City-Dedicated Open Space.
2. Neither Developer nor any other person with Developer's permission to be upon the Site shall use, generate, manufacture, produce, or release, on, under, or about the City-Dedicated Open Space, any Hazardous Substance except in compliance with all applicable environmental laws. For the purposes of this Agreement, the term "**Hazardous Substances**" or "**Hazardous Materials**" shall mean any substance or material which is capable of posing a risk of injury to health, safety or property, including all those materials and substances designated as hazardous or toxic by any federal, state or local law, ordinance, rule, regulation or policy, including but not limited to, all of those materials and substances defined as "Toxic Materials" in Sections 66680 through 66685 of Title 22 of the California Code of Regulations, Division 4, Chapter 30, as the same shall be amended from time to time, or any other materials requiring remediation under federal, state or local laws, ordinances, rules, regulations or policies.
3. Developer has not caused or permitted the release of, and has no knowledge of the release or presence of, any Hazardous Substance onto the soil of the City-Dedicated Open Space or the property on which the Park Improvements are to be constructed, or the migration of any

Hazardous Substance from or to any other property adjacent to, or in the vicinity of, the Park Site, that will preclude its use as a park or open space.

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

5. Neither the City-Dedicated Open Space nor Park Improvements located on the City-Dedicated Open Space shall be subject to any monitoring, reporting, or restrictions relative to its use as a park or open space by any governmental authority with jurisdiction over the City-Dedicated Open Space, including but not limited to, the California Department of Toxic Substances Control and California Regional Water Quality Control Board that are not the responsibility of the City under the Existing Agreements ("**Ongoing Park Requirements**"). If any Ongoing Park Requirements are imposed due to any Hazardous Materials conditions on the City-Dedicated Open Space or Park Improvements located on the City-Dedicated Open Space, then the City may either accept the City-Dedicated Open Space or the Park Improvements with such Ongoing Park Requirements or City may reject the City-Dedicated Open Space or the Park Improvements so subject to the Ongoing Park Requirements in which case Developer may pay the park fees then due in lieu thereof.

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

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

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

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

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

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

Phase I Report, the Phase I ESA Update, the Existing Phase II Report or any other environmental report obtained by the City; and

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

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

SECTION 4. HAZARDOUS MATERIALS REPORT.

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

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

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

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

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

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

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

4. **Phase II ESA (if necessary).** If any Phase I ESA Update recommends Phase II investigations, then Developer shall engage an environmental consultant to undertake those recommended Phase II investigations. The following tasks serve only as preliminary guidelines for potential Phase II investigation that may be recommended by the Phase I ESA Update, the results of which are subject to City's review and approval. It is possible that no Phase II investigation will be necessary for any of the City-Dedicated Property.

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

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

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

c. Report on any Remediation Work. A written report shall be prepared presenting the results of any remediation work resulting from a Phase II investigation. The report shall

include results from any chemical analysis completed during the survey, along with chain-of-custody documentation, boring logs of sampling locations or from any monitoring wells completed, and that any recommendations for any further investigation and remediation/source control necessary on the City-Dedicated Open Space have been completed.

SECTION 5. INSURANCE REQUIREMENTS.

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

A. Minimum Scope of Insurance.

Coverage shall be at least as broad as:

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

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

B. Minimum Limits of Insurance.

Developer shall maintain limits no less than:

1. Commercial General Liability: Five Million Dollars (\$5,000,000) per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit; and

2. Automobile Liability: One Million Dollars (\$1,000,000) combined single limit per accident for bodily injury and property damage; and
3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of One Million Dollars (\$1,000,000) per accident; coverage shall be endorsed to state carrier waives its rights of subrogation against the City, its officers, employees, agents, and contractors; and
4. Professional Liability Errors and Omissions: One Million Dollars (\$1,000,000) per claim/One Million Dollars (\$1,000,000) aggregate limit; and
5. Builders' Risk: Completed value of Project; and
6. Pollution Liability: Two Million Dollars (\$2,000,000) per occurrence/Two Million Dollars (\$2,000,000) aggregate limit.

C. Deductibles and Self-Insured Retentions.

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

D. Provisions Of Policies.

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

1. Regarding Commercial General Liability, Automobile Liability and Pollution Liability Coverages.
 - a. City, its officials, employees, agents and contractors are to be covered as an additional insured as respects: liability arising out of activities performed by, or on behalf of, the Developer; products and completed operations of the Developer; premises owned, leased or used by the Developer; or automobiles owned, leased, hired or borrowed by Developer. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, agents and contractors; and
 - b. The Developer's insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and contractors. Any insurance or self-insurance maintained by City, its officials,

employees, agents and contractors shall be excess of the Developer's insurance and shall not contribute with it; and

- c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City and the City, its officials, employees, agents and contractors; and

d. Coverage shall state that Developer's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability; and

e. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.

- 2. Workers' Compensation and Employers Liability Coverages shall contain a waiver of subrogation in favor of City, its officials, employees, agents, and contractors.

- 3. Builders' Risk policies shall contain the following provisions:

- a. City shall be named as loss payee.
- b. Coverage shall contain a waiver of subrogation in favor of City, its officials, employees, agents and contractors.

- 4. All Coverages.

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

E. Duration.

- 1. Commercial General Liability (including, without limitation, products and completed operations coverage), Professional Liability and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after completion of the work under this Agreement.
- 2. If any of such coverages are written on a claims-made basis, the following requirements apply:
 - a. The policy retroactive date must precede the date the work commenced under this Agreement.

- b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Developer must purchase an extended reporting period equal to or greater than five (5) years after completion of the work under this Agreement.

F. Acceptability of Insurers.

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

G. Verification of Coverages.

Developer shall furnish City (in the manner provided below) with certificates of insurance and with original endorsements affecting coverage required by this Agreement. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

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

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

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

Exhibit E6

Exhibit E7

Exhibit E7

Parkland Dedication Tracking and Verification Table

Note: City-Dedicated Open Space (CDOS) sizes as of the Effective Date of this Agreement are listed in the table below. When a CDOS receives approval of Conformance Review, the size will be filled in in column D. The Actual CDOS Size (column D) is calculated by measuring the final land area, subject to any exclusions set forth in the Agreements. Column B lists expected acreages stated in Exhibit E2. Column C lists unit equivalents stated in Table 1 of Exhibit E1. For the purposes of Column F, an Average Unit Equivalent/Acre (AC) has been calculated equal to 833 ⅓ units and will be applied to the adjustment to determine the Final Park Credit value per CDOS. This was derived by dividing 4,000 units by 4.8 acres. Subject to the other requirements, limitations, and/ or exclusions of this Agreement, if the Actual CDOS Size (column D) is less than the Land Expected (column B if in acres), one or more other CDOS areas shall be increased in size such that a minimum of 4.8 acres of CDOS are provided in the Project for the development of 4,000 residential units, subject to the requirements, allowances, and limitations set forth in the Parkland Agreement, including Section 2. In the event that Developer pays Parkland Fees pursuant to Section 2, such fees shall be calculated based on the amount of acquired, or lost acreage, which lost acreage shall be converted to square footage and multiplied by one hundred ninety-five dollars (\$195).

A. CDOS Name	B. Expected CDOS Size (AC)	C. Estimated Total Residential Unit Equivalent Per Expected Park	D. Actual CDOS Size (AC)	E. Adjustment (Column D - Column B)	F. Final Park Credit (Column E x Average Unit Equivalent/AC + Column C)
Los Gatos Creek Connector	0.91	615			
Los Gatos Creek Park	0.37	348			
Trail on G in Los Gatos Creek Park	0.28	258			
Social Heart	0.57	617			
Trail on E in Los Gatos Creek East	0.25	187			
St. John Triangle	1.53	1,396			
Northend Park	0.89	579			
Total	4.80	4,000			

Exhibit E8

Exhibit E8

Parkland Dedication Obligation

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

Table 2 Blended Per Unit In-Lieu Fee Obligation*

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

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

Exhibit E9

Exhibit E9

List of Required Exceptions from Parkland Dedication Ordinance

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

Exhibit E10

Bond No. _____

Premium _____

FAITHFUL PERFORMANCE BOND

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

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

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

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

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

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

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

PRINCIPAL:

SURETY:

(Principal name) (Seal)

(Surety name) (Seal)

BY: _____
(Signature)

BY: _____
Signature)

(Print name and title)

(Print name and title)

Principal address and telephone:

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

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

Bond No. _____

Premium _____

PAYMENT (LABOR AND MATERIALS) BOND

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

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

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

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

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

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

PRINCIPAL:

SURETY:

Principal name)

(Seal)

(Surety name)

(Seal)

BY: _____

(Signature)

BY: _____

(Signature)

Print name and title)

Principal address and telephone:

Print name and title)

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

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

Bond No. _____

Premium _____

WARRANTY BOND

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

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

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

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

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

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

PRINCIPAL:

SURETY:

(Principal name) (Seal)

(Surety name) (Seal)

BY: _____
(Signature)

BY: _____
(Signature)

(Print name and title)

(Print name and title)

Principal address and telephone:

Surety address and telephone:

Affix Corporate Seals

Attach Notary Acknowledgments for All Signatures

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

Exhibit F

Privately-Owned Publicly Accessible Open Space

Exhibit F1

Exhibit F1

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

Exempt from recording fees pursuant to Government Code § 27383.

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

[CHECK W/TITLE COMPANY ON FORM/FORMAT]

DECLARATION OF PUBLIC ACCESS COVENANTS AND RESTRICTIONS

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

RECITALS

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

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

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

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

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

AGREEMENT

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

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

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

3. Legal Description. Following Completion of the Covenant Privately-Owned Accessible Open Space, Declarant shall have the right to prepare a final legal description of such Space and an amendment to this Declaration, in which the precise location or boundaries of the Covenant Privately-Owned Accessible Open Space are described in the legal description or shown

on a site plan or map, and, subject to the City's review and approval of such description and amendment, record such amendment in the Official Records of the County of Santa Clara.

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

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

Declarant acknowledges and agrees that the provisions set forth in Exhibit F2 may not be changed or modified with respect to the Covenant Privately-Owned Publicly Accessible Open Space if such change or modification would be more restrictive, meaning that the change would reduce the hours of operation or restrict or eliminate a permissible park use, without prior approval by the Director of PRNS; provided, however, that a permanent decrease in the hours of operation for the Covenant Privately-Owned Publicly Accessible Open Space by five percent (5%) or more shall require a public hearing by the City Council and approval by a majority vote. Any such change or modification for which the required approval is not obtained shall be of no force or effect.

The Covenant Privately-Owned Publicly Accessible Open Space shall be maintained and open for public use pursuant the terms of this Declaration until either: (i) the end of the useful life of the [insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space and that triggered its Completion] or (ii) the City Council approves or authorizes an alternate use of the specific Covenant Privately-Owned Publicly Accessible Open Space, which approval or authorization shall require a minimum two-thirds affirmative vote of the entire City Council.

[Include if Declaration applies to the Covenant Privately-Owned Publicly Accessible Open Space portion of the Open Space Referred to as "the Meander"] In the event that construction on Blocks F1, F2, F3, or F6, or on 150 South Montgomery Street would pose a risk to public safety or interfere with public use of the portion of the Meander that is a Covenant Privately-Owned Publicly Accessible Open Space, and there is no feasible alternative to avoid that risk or interference while still allowing for construction to proceed, Declarant shall meet and confer with the Director of PRNS regarding the need for a temporary construction easement. The City will not unreasonably withhold authorization of a temporary construction easement over a portion of the Meander that is subject to this Declaration; however, the area of any such temporary construction easement or easements shall be the least impactful to public use of the Meander as feasible, and for the shortest duration necessary to protect public safety.

6. Maintenance and Repairs. Declarant shall, at its sole cost and expense, keep the Covenant Privately-Owned Publicly Accessible Open Space and all improvements thereon in good condition and repair at all times for public use.

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

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

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

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

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

contrary herein, in no event shall the additional cure period provided to the Lender exceed six (6) months beyond the cure period applicable to Declarant.

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

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

13. Miscellaneous.

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

If to Declarant:

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

With a Copy to:

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

If to City:

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

With Copy to:

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

(b) Runs With Land; Binds Successors-in-Interest. This Declaration binds the Covenant Privately-Owned Publicly Accessible Open Space and the [*insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space*], and binds all successors to any portion of or interest in the subject Covenant Privately-Owned Publicly Accessible Open Space and the [*insert name of the Building associated with the Covenant Privately-Owned Publicly Accessible Open Space*].

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

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

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

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

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

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

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

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

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

(l) [Insurance Requirements, with City named as additional insured.] [CITY STANDARD INSURANCE REQUIREMENTS]

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

DECLARANT:

GOOGLE LLC,
a Delaware limited liability company

By: _____
Print Name: _____
Title: _____

CITY:

CITY OF SAN JOSÉ,
a municipal corporation

By: _____
Print Name: _____
Title: _____

ATTEST:

City Clerk

Approved as to form:

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

State of California)
County of Santa Clara)

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

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

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

State of California)
County of Santa Clara)

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

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

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

WITNESS my hand and official seal.

Signature _____ (Seal)

EXHIBIT “A”

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

EXHIBIT “B”

EXHIBIT F2 TO DEVELOPMENT AGREEMENT

Exhibit F2

Exhibit F2

Rules Regarding Public Access

1. Hours of Operation

Except as set forth in Section 2 herein, each of the Privately-Owned Publicly Accessible Open Spaces, excluding the Los Gatos Creek Riparian Corridor, shall be open to the general public every day from sunrise until 9:00p.m.

2. Scope of Permissible Park Use

The public is welcome to access the Privately-Owned Publicly Accessible Open Spaces for the following general uses:

- to enjoy the park during the hours of operation ("park hours")
- to enjoy open spaces during park hours, other than those times reserved for private events or necessary closing
- to engage in commercial activity and revenue generating activities with permission of the Developer/owner
- to enjoy and participate in public, community curated events that do not require payment, which will happen a minimum ~~6~~[fifty-two \(52\)](#) times annually [at full buildout, but not less than six \(6\) times per year once the first Privately-Owned Publicly Accessible Open Space is completed](#)
- to enjoy the gardens, naturalized areas, and landscaping without entering flowerbeds or damaging vegetation
- to sit on a park chair or one seat on a bench designed for sharing
- to deposit waste in trash or recycling receptacles

- to walk dogs on a leash so long as the person walking the dog cleans up after the dog and deposits waste into appropriate receptacles
- to take souvenir photos; commercial photography by Developer/owner permission only
- to apply to the Developer/owner to host private events, i.e., corporate events, protests, or other special events

Exhibit F3

Exhibit F3

Rules Regarding Public Events, Private Events, and Temporary Closures

“Public event” and “private event” shall have the meaning set forth in the General Development Plan. Excluding semi-public open space (as defined in the DWDSG) under lease by a business, the Los Gatos Creek Riparian Corridor, and limited-access mid-block passages (as defined in the DWDSG), all spaces are publicly accessible, subject to the following limitations:

- a. All public events and private events require prior Developer/owner permission, and Developer/owner has the authority in its sole discretion to determine whether an event is permitted, consistent with the rules and limitations for public events, private events and/or temporary closures set forth in this Exhibit F3.
- b. All public events and private events permitted by this Exhibit F3 are permitted without any further authorization, permits, or approvals from the Director of PBCE or any other City department, except to the extent a permit is required under the San Jose Municipal Fire Code (Fire Code) or the event includes amplified noise that exceeds ~~[60]~~ decibels (dBA) based on an hourly L_{eq} , which permit processes and requirements are set forth in the General Development Plan. The General Development Plan also establishes a process for coordination with the San José Police Department (Police Department) and the San José Department of Transportation (DOT) in certain instances.
- c. Notwithstanding the limitations regarding partial closures set forth below, each individual Privately-Owned Publicly Accessible Open Space may be closed in its entirety (inclusive of the reservable areas) for a private event a maximum of six (6) times per year, not to exceed eight (8) hours in any month, except as permitted by

- Paragraph (p). Except for closures described in Paragraph (p), Developer or Owner shall provide notice to the City of each planned closure for a large private event as allowed under this paragraph at least seven (7) days in advance of the closure, and shall post notice at the entrance to the subject Open Space least forty-eight (48) hours in advance of such closure to inform the public.
- d. No more than one entire Privately-Owned Publicly Accessible Open Space's reservable area may be reserved for a private event at any one time, except for five (5) days per year, when all Privately-Owned Publicly Accessible Open Space reservable areas may be reserved for no more than five (5) consecutive days, provided that prior notification to the general public via posted signage, and written notification to the City Department of Parks, Recreation & Neighborhood Services (“PRNS”) and other stakeholders. During such closures, public access to all City-Dedicated Park spaces and trails shall be provided unless closure of such City-Dedicated Park space is expressly approved in writing by PRNS.
 - e. Private events held in Privately-Owned Publicly Accessible Open Space reservable areas shall be limited to no more than five (5) consecutive days in one location.
 - f. Events shall be assigned to specific venues within the Privately-Owned Publicly Accessible Open Space network appropriate to the size and nature of the event and where the event will impose the least impact to the level of service on the Privately-Owned Publicly Accessible Open Space or the public's use therefore, as determined by Developer/owner in its sole discretion.
 - g. Non-reservable event areas shall remain open and accessible to the public during private events.

- h. Events shall maintain a clear public path of travel around the event and through the Privately-Owned Publicly Accessible Open Space, including a safe path of travel marked in accordance with ADA standards shall be maintained.
- i. Private events held during business hours Monday through Thursday shall be encouraged to avoid high public use hours, as determined by Developer/owner.
- j. Private events held during evenings, weekends, and holidays and other hours of high public use should be limited, as determined by Developer/owner, in order to avoid high public use hours, as determined by Developer/owner.
- k. Private events held on weekends shall be limited to one weekend per month per Privately-Owned Publicly Accessible Open Space. As much as possible, as determined by Developer/owner, the event should allow the public to hear, see, or otherwise appreciate the event.
- l. Unless otherwise approved by Developer/owner, event support structures and furnishings shall be located on hardscape areas and shall be selected and arranged with a high regard for the visual and aesthetic quality of the Privately-Owned Publicly Accessible Open Space.
- m. Events involving animal acts, petting zoos, carnival rides, hot air balloons, or helicopter landings shall not be permitted.
- n. Vehicle access through the Privately-Owned Publicly Accessible Open Spaces is prohibited, except that vehicle access for the limited purpose of setting up or dismantling furnishings, decor, or other items associated with a public or private event may be permitted with prior approval of Developer/owner.

- o. Special Events, as defined in the General Development Plans, are permitted with prior Developer/owner permission. Special Events are permitted pursuant to the requirements specified in the Downtown West Planned Development Zoning District and General Development Plan.
- p. Notwithstanding any provision in this Exhibit to the contrary, Privately-Owned Publicly Accessible Open Spaces may be closed, at Developer/owner's reasonable discretion, on short-notice or at any time for security or safety needs, and for maintenance or repair. Any security or safety-related closure lasting longer than seven (7) days shall require written approval from City, a request for which shall be responded to within twenty-four (24) hours of receipt, and the approval of which shall not be unreasonably withheld.

Each of the following Privately-Owned Publicly Accessible Open Spaces may be partially closed for private events as described below (by percentage of total open space, and duration), subject to the rules and conditions above:

- a. Los Gatos Creek Park: A maximum of twenty-five percent (25%) of Los Gatos Creek Park is reservable by the public for private event use for each event zone depicted on Figure 1 for up to fifty-four (54) days per year (15%) from Sunrise to 9:00p.m. The same is reservable by Developer for private event use for each event zone depicted on Figure 1 for up to seventy-three (73) days per year (20%) from Sunrise to 9:00p.m.
- b. The Meander: A maximum of fifty percent (50%) of the total Privately-Owned Publicly Accessible Open Space within The Meander is reservable by the public for event use for each event zone depicted on Figure 2 for up to fifty-four (54) days per year (15%) from Sunrise to 9:00p.m. The same is reservable by Developer for private

- event use for each event zone depicted on Figure 2 for up to seventy-three (73) days per year (20%) from Sunrise to 9:00p.m.
- c. Creekside Walk: A maximum of thirty-five percent (35%) of the total Privately-Owned Publicly Accessible Open Space within Creekside Walk is reservable by the public for event use for each event zone up depicted on Figure 3 for up to fifty-four (54) days per year (15%) from Sunrise to 9:00p.m. The same is reservable by Developer for private event use for each event zone depicted on Figure 3 for up to one hundred twenty-seven (127) days per year (35%) from Sunrise to 9:00p.m.
 - d. The Gateway and Los Gatos Creek East: A maximum of thirty-five percent (35%) of the total Privately-Owned Publicly Accessible Open Space within the Gateway and Los Gatos Creek East is reservable by the public for event use for each event zone depicted on Figure 4 for up to fifty-four (54) days per year (15%) from Sunrise to 9:00p.m. The same is reservable by Developer for private event use for each event zone depicted on Figure 4 for up to seventy-three (73) days per year (20%) from Sunrise to 9:00p.m.
 - e. Northend Park: A maximum of fifty percent (50%) of the total Privately-Owned Open Space within Northend Park is reservable by the public for event use for each event zone depicted on Figure 5 for up to fifty-four (54) days per year (15%) from Sunrise to 9:00p.m. The same is reservable by Developer for private event use for each event zone depicted on Figure 5 for up to seventy-three (73) days per year (20%) from Sunrise to 9:00p.m.

Figures 1 through 5 *[separate pdf]*

Exhibit G

Exhibit G

Workforce, Learning, and Education Commitment

Section 1. Google Participation with Community-Based Organizations. Following issuance of a Certificate of Occupancy for the first commercial office Building in the Project, and as long as Google LLC or any Google Affiliate occupies commercial office space in the Project during the term, Google shall use, or cause the Google Affiliate to use, Good Faith Efforts:

a. to promote opportunities for Google employees to volunteer their time with, and to serve as mentors on behalf of community-based organizations that serve San José students from underrepresented backgrounds; and

b. to provide career exploration and skills development opportunities, such as onsite field trips, career days, and computer science workshops, to students from underserved communities and who have an interest in technology and technology-based careers.

Any Transferee that occupies commercial office space in the Project during the term shall meet and confer with the City regarding how it can use Good Faith Efforts to promote employee volunteer opportunities, provide career and skill development opportunities to students from underserved communities, or otherwise engage with community-based organizations.

Section 2. Local and Minority Business Enterprises; Local Hire.

2.1 Local and Minority Business Enterprises - Project Construction. For the construction of the commercial office Buildings within the Project, Developer will use Good Faith Efforts to achieve, or to cause the general contractor(s) to achieve, an overall LBE, DBE, MBE, WBE, and/or LGBTBE, DOBE, and/or SD/VBO participation goal of 10% of the total cost of all contracts for a commercial office building to be awarded to contractors, subcontractors, suppliers,

and/or consultants that qualify as a LBE, DBE, MBE, WBE, and/or LGBTBE, DOBE, and/or SD/VOB. To advance this goal, Developer will use Good Faith Efforts:

a. to include in its construction contracts for each commercial office building a requirement that the general contractor shall use Good Faith Efforts to contract with subcontractors, suppliers, and other businesses that qualify as a LBE, DBE, MBE, WBE, LGBTBE, DOBE, and/or SD/VOB;

b. to notify construction and DBE publications of contracting opportunities;
and

c. to host an annual development construction fair to bring together prime/general/sub contractors in an effort to increase diversity and inclusion on major construction projects.

2.2 Local and Minority Business Enterprises - Project Operation. In context to the opening of each commercial office Building, prior to the issuance of a Final Certificate of Occupancy for a commercial office Building in the Project, Developer shall use, or cause its affiliate company and/or its vendors to use, Good Faith Efforts:

a. to hire contractors, subcontractors, suppliers, and/or consultants that qualify as a LBEs, DBEs, MBEs, WBEs, LGBTBEs, DOBEs, and/or SD/VOBs for ongoing service contracts (e.g. maintenance, janitorial, landscaping, security etc.) related to Developer's commercial office Buildings; and

b. to host two (2) times per year on a semi-annual basis, an informational session targeted to LBEs, DBE, MBEs, WBEs, LGBTBEs, DOBEs, and/or SD/VOBs interested in providing goods and services to Developer's commercial office Buildings.

2.3 Local Hire - Project Construction. Developer will include in its construction contracts for all onsite construction activity a requirement that the contractor or subcontractor shall use Good Faith Efforts to achieve a goal that Local Residents comprise thirty percent (30%) of all new hires for employment opportunities under the applicable construction contract for construction trade positions and entry-level positions related to providing support to the construction industry. This obligation to use Good Faith Efforts shall not limit the ability of a contractor or subcontractor to assess qualifications of prospective workers, to require a contractor or subcontractor to employ a worker not qualified for the position in question, or to employ any particular worker.

2.4 Local Hire - Project Operation. In context to the opening of each commercial office Building, prior to the issuance of a Final Certificate of Occupancy for a commercial office Building in the Project, Developer shall use, or cause the Developer Affiliate to use, Good Faith Efforts:

a. to establish a “Local Community Liaison” who will be responsible for connecting primary building operations contractors (e.g. maintenance, janitorial, landscaping, security, and other non-college IT roles) with the City’s lead Workforce Development Board (e.g. work2future) and other local community-based workforce development organizations, and for promoting with the City’s lead Workforce Development Board and other local community-based workforce development organizations applicable roles with Developer or Developer Affiliate, to ensure qualified Local Residents seeking employment are aware of open positions at the Project Site and are considered for the open roles;

b. to encourage building operations contractors that provide services to Developer/affiliate-occupied Buildings to use their Good Faith Efforts to notify the City’s lead Workforce Development Board (e.g. work2future) and other local community based workforce

development organizations when the contractor is hiring for positions that service such buildings, and to make Good Faith Efforts to interview and consider referred candidates from the local workforce agencies with appropriate backgrounds, qualifications, and experience for the open roles;

c. to periodically participate in the City's lead Workforce Development Board (e.g. work2future) and other local community based workforce development organizations client outreach and recruiting events;

d. to host two (2) times per year on a semi-annual basis, a career development workshop or job fair targeted at local Economically Disadvantaged Communities and Underrepresented Workers;

e. to have a Developer representative serve as a board member on the City's lead Workforce Development Board (e.g. work2future); and

f. to collaborate on an annual basis with the Community Stabilization and Opportunity Pathways Fund, and with the City's lead Workforce Development Board (e.g. work2future) and other local community based workforce development organizations to analyze and identify job types, projections for in-demand roles, job readiness and potential career pathways for underrepresented workers leading to economic self-sufficiency.

Section 3 Definitions.

The following definitions apply to this Exhibit G (and any term not defined in this Section 3 shall have the meaning provided in the Development Agreement):

3.1 "Disability Owned Business Enterprise (DOBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons with a disability.

3.2 "Disadvantaged Business Enterprise (DBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who is a socially and economically disadvantaged individual.

3.3 "Economically Disadvantaged Communities" shall mean communities in which the median household income is less than eighty percent (80%) of the county median income, as compared to the nine-county Bay Area region and the respective U.S. Department of Housing and Urban Development income threshold.

3.4 "Good Faith Efforts" shall mean the commercially reasonable efforts that a public company can undertake in light of its fiduciary obligations to its shareholders. Good Faith Efforts shall not obligate Developer to undertake any expenditure or program relative solely to the cost to implement any particular measure described herein. Additionally, Good Faith Efforts shall in no event be interpreted to mean that Developer is obligated to include any particular term pursuant to this Workforce, Learning, and Education Commitment in any agreement, except as otherwise provided in this Exhibit.

3.5 "LGBT Business Enterprise (LGBTBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who identifies as a member of the Lesbian, Gay, Bisexual, and Transgender community.

3.6 "Local Business Enterprise (LBE)" shall have the same meaning as set forth in Chapter 4.12 of the City's Municipal Code.

3.7 "Local Resident" shall mean an individual who is domiciled, as defined by Section 349(b) of the California Election Code, as it may be amended, within Santa Clara County for at least seven (7) calendar days before commencing work on a Private Construction Project.

3.8 "Minority Business Enterprise (MBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who is a member of one or more ethnic minority group.

3.9 "Service-Disabled/Veteran Owned Business (SD/VOB)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by a person or persons who is a Service-Disabled Veteran or Service-Disabled Veterans, as defined in section 3(q) of the Small Business Act (15 U.S.C. 632(q)).

3.10 "Underrepresented Worker" shall mean an individual who meets any one of the following conditions:

(a) The individual is at risk of losing his/her home, the individual is homeless, or the individual is housed within the past twelve (12) months before which he/she was homeless;

(b) The individual is receiving public assistance;

(c) The individual is participating in a reentry program or was formerly incarcerated;

(d) The individual has been continuously unemployed for at least three months over the previous year;

(e) The individual has a family or household income that falls below the current United States Department of Housing and Urban Development threshold for low income households in Santa Clara County;

(f) The individual has been emancipated from the foster care system;

(g) The individual is a veteran of the United States military;

(h) The individual is participating in a program for "at-risk" youth; or

(i) The individual is a survivor of labor trafficking.

3.11 "Woman Business Enterprise (WBE)" shall mean any business that is an LBE and is at least fifty-one percent (51%) owned and Controlled (as defined in the Development Agreement) by one or more women.

Exhibit H

Exhibit H
Community Stabilization and Opportunity Pathways Fund

1. Establishment of Fund. The City intends to establish a fund to provide financial support to community stabilization (anti-displacement) efforts, and education and employment opportunity pathways within the City (the "Fund"). The Fund will concentrate on communities in San José who have historically been affected by structural racism and where the risk of displacement is the highest.
2. Purpose of the Fund. The purpose of the Fund is to minimize displacement and other potential negative impacts on people and place, including from rising costs of living ("community stabilization") and to maximize opportunities for local youth and adults to participate and benefit from job opportunities through training, education, and support ("opportunity pathways"). The Fund shall be used to support grantees and program activities serving low-income people living in neighborhoods experiencing or at high risk of displacement and underserved neighborhoods in Greater Downtown, East San José, and other areas identified by a credible, regularly updated source (such as the Urban Displacement Project at U.C. Berkeley). The Fund should focus on advancing racial equity, addressing the root causes of displacement and economic mobility, and resulting in measurable outcomes.
3. Fund Administration Overview. The administration of the Fund shall involve: a third party ("Fund Manager"), a Community Advisory Committee ("Committee"), City Council, and the City Administration. The model features delegation of grant administration to the Fund Manager and grant approval to the Committee, with oversight, accountability, and transparency to the City Council and public. This model is intended to put decision making into the hands of local residents and leaders. As described in detail in the following sections, the key steps include the following:
 - a. The City Council will appoint a Community Advisory Committee.
 - b. The City Administration will oversee the selection process and recommend a Fund Manager to the City Council, in consultation with the Committee.
 - c. The Fund Manager will work with the Committee to prepare a Five Year Strategic Plan for the Fund, and Strategic Plan Updates every 5 years. The Five Year Strategic Plan and Strategic Plan Updates will be presented to the City Council for approval.
 - d. The Fund Manager will administer the grant process and make recommendations on grant-making, based on consistency with the Five Year Strategic Plan.
 - e. The Committee will consider the Fund Manager's recommendations and approve the grants consistent with the Five Year Strategic Plan.
 - f. The Fund Manager will work with the Committee to prepare Annual Performance Reports, for the City Council to receive at a public meeting.
 - g. The Fund Manager shall be responsible for ongoing community engagement and communication.

4. Contributions by Google LLC. Google shall make payments to a restricted Fund in the amount of \$21.20 per gross square foot of office development, excluding any related or similar prepayment amounts identified in Exhibit C1 (subject to Consumer Price Index escalation not to exceed three percent (3%) per year), with payment to be made upon issuance of the Temporary Certificate of Occupancy for each commercial office Building. The amount of the payment shall be established at the time the building permit for construction of the office Building is issued.
5. Appropriation Process. Payments made by Google will be deposited into a City-restricted fund for the purpose set forth in this Exhibit H and transferred to the Fund Manager for Fund grant-making and functions supporting grant-making. The transfer of monies from the restricted fund to the Fund Manager will occur promptly after payments are received as part of the City's budget appropriation process and in accordance with the Council-approved Five Year Strategic Plan. Subject to appropriation, the City Council shall allocate monies for three functional categories: 1) contracted services of the Fund Manager for Fund administration; 2) City Administration and City Attorney costs to support the Fund; and 3) grant making and other grant-related activities of the Fund Manager and Committee aligned with the Council-approved Five Year Strategic Plan.
6. Funding Priorities and Allocations.
 - a. The City Council intends that the Fund shall be dedicated to the following two major program categories ("Program Areas"), with a focus on benefiting communities that have been historically underserved or marginalized:
 - i. Community Stabilization: Community Stabilization includes prevention of displacement and homelessness, preservation of affordable housing, homeless services, housing innovation research, tenant and landlord education, community land trusts, and stabilization of small local businesses.
 - ii. Opportunity Pathways: Opportunity Pathways includes adult and youth occupational skills training, college/post-secondary scholarships, career exploration for middle and high school youth, early childhood education, and small business and entrepreneurship programming.
 - b. Fund Allocations.
 - i. The maximum percentage of Fund allocation for City and Fund Manager administrative costs shall be outlined in each Council-approved Five Year Strategic Plan.
 - ii. Excluding payments for Fund administrative costs, the initial allocation of Fund monies in the initial Five Year Strategic Plan, shall be distributed to the Program Areas in the following percentages: no less than 50% to Community Stabilization and no less than 30% to Opportunity Pathways.
 - iii. The City intends for periodic review and adjustment of the percentage allocations between the two Program Areas; however, the Fund shall not

be directed to programs outside the Program Areas or for other uses, and administrative costs shall not exceed amounts outlined in the Council-approved Five Year Strategic Plan. The review and adjustment of percentage allocations may occur through the approval of each Five Year Strategic Plan Update by the City Council, as recommended by the Fund Manager and Committee.

- iv. The Fund Manager and Committee shall administer grants consistent with the Five Year Strategic Plan and the funding percentages set forth therein.
7. Grant Recipient Criteria. Grantees shall provide direct services, programs, and projects for the benefit of impacted communities in San José in the two Program Categories, consistent with the intent of the Fund as established in this Development Agreement and with the Five Year Strategic Plan. The City intends that grantees be limited to nonprofit 501(c)(3) organizations, public education institutions, and City of San José programs, with grants focused on direct on-the-ground services, and that grants shall not be used for lobbying or political organizing. For the purpose of clarification, tenant education or protection shall not be considered to be political organizing.
8. Roles and Responsibilities.
- a. Third Party Fund Manager. The primary roles of the Fund Manager will be to: ensure strategic impact over time; facilitate community involvement in the grant-making and planning processes; ensure compliance with City Council approved Five Year Strategic Plan; and leverage opportunities for additional monies from external parties. The Fund Manager will adhere to best practices for accounting and financial responsibility. Roles will include:
 - i. Administer the Fund under a contract with City.
 - ii. Support the Committee and any subcommittees, including by providing or facilitating training and capacity building.
 - iii. Manage the solicitation, evaluation, and award recommendations of each round of competitive grants.
 - iv. Qualify and certify alignment of grant awards with the approved Five Year Strategic Plan and grantee capacity to perform.
 - v. Manage development of the Five Year Strategic Plan to guide activities of the Fund.
 - vi. Recommend metrics to the City and Committee to evaluate the Fund's effectiveness as part of each Five Year Strategic Plan.
 - vii. Conduct public engagement to inform the Five Year Strategic Plan and grant-making processes.
 - viii. Develop Annual Performance Report for City Council and the public.
 - ix. Provide technical assistance to grantees and potential grantees.
 - x. Evaluate grantee qualification and performance.
 - xi. Solicit and manage grant programs supported by contributions from other companies and philanthropic organizations.

- xii. Escalate to City Administration material disputes with Committee or grantees.
- b. Community Advisory Committee. The City intends that the Fund's charter will include the establishment of a Community Advisory Committee to execute key functions of the Fund. Roles of the Committee would include:
 - i. Participate in the development of each Five Year Strategic Plan.
 - ii. Guide scoping of each round of competitive grant solicitations.
 - iii. Receive and consider recommendations from the Fund Manager and approve grants consistent with the Five Year Strategic Plan.
 - iv. Provide guidance and support for public outreach and engagement, including awareness of grant opportunities and organizations who might qualify to apply for grants.
 - v. Provide feedback on the Annual Performance Report prior to submission to City Council.
 - vi. Participate in fundraising activities.
 - vii. Hold regular public meetings. All meetings of the Committee shall be subject to and conducted in accordance with the open meeting requirements of the Brown Act and applicable City requirements.
 - viii. The Committee should have the authority to set its own chair and vice-chair, and form subcommittees. Decisions and recommendations should in all cases be consistent with the purpose of the Fund, funding priorities as defined in this Agreement, the Five Year Strategic Plan, and applicable laws.
 - ix. Escalate to City Administration material disputes with Fund Manager.
- c. City Council Role. City Council will retain its legislative authority, including to approve the fundamental policy goals and funding priorities for the Fund, adopt the Five Year Strategic Plan that will guide the budget appropriation, and conduct oversight and audits as necessary. Roles would include:
 - i. Provide high-level direction on fundamental policy decisions for the Fund through approval of this Agreement, the initial Five Year Strategic Plan, and subsequent Five Year Strategic Plan Updates.
 - ii. Select and approve the contract with the Fund Manager.
 - iii. Appoint Community Advisory Committee members.
 - iv. Approve the budget appropriation for the Fund, consistent with the Five Year Strategic Plan.
 - v. Conduct a public review of and approve the Five Year Strategic Plan, as well as subsequent Five Year Strategic Plan Updates, as part of a City Council meeting.
 - vi. Receive and review Annual Performance Reports as part of a City Council meeting.
 - vii. Initiate financial and performance audits for the Fund.
 - viii. Address material disputes raised by Fund Manager or Committee and unresolved by City Administration.

- d. City Administration Role. The City Administration will primarily serve as support for the other parties. Roles would include:
 - i. Support the City Council in establishing and maintaining the Committee membership.
 - ii. Ensure public meetings of the Committee are administered in accordance with local and state law.
 - iii. Administer the selection process for the Fund Manager, negotiate the contract with the Fund Manager, oversee contract compliance, and manage the fiduciary relationship with the Fund Manager.
 - iv. Provide general oversight and serve as a Fund liaison between the various parties involved in the Fund administration.
 - v. Bring forth the budget appropriation to City Council.
 - vi. Bring forth the Annual Performance Report to City Council.
 - vii. Manage any independent financial audits or program evaluations of the Fund.
 - viii. Support the public engagement process led by the Fund Manager.
 - ix. Escalate to City Council unresolved material disputes raised by Fund Manager or Committee.
 - e. Google Role. In addition to making monetary contributions to the Fund, the Google Community Liaison Manager identified in Exhibit G will explore with the City opportunities to work together in ways that are aligned with the Fund's objectives and Google's corporate social responsibility objectives. Google will engage with the Committee to the extent approved by City Council, as an ex officio member.
9. Selection and Compensation of Fund Manager. The City intends to use a solicitation process to select a qualified Fund Manager with experience managing grant programs that are similar in size and purpose as the Fund, and with experience evaluating program and grantee effectiveness. City Council shall appoint a Community Advisory Committee in advance of the Fund Manager solicitation. The City Administration shall work with the Community Advisory Committee to develop the solicitation and recommend a Fund Manager to City Council. The City intends that the Fund Manager will receive compensation for its management duties from the Fund, which shall be outlined in each Five Year Strategic Plan. Detailed qualifications of the experienced Fund Manager will be outlined in the solicitation process and approved by City Council.
10. Committee Composition. The Committee shall be comprised of thirteen (13) voting members. These members shall either live in San José, have a meaningful connection to San José, or have a history of working in San José in the relevant subject areas of the Fund, with the possible exception of one (1) academic/research role which may be statewide or national.
- a. It is the intent to have a balanced mix of local residents bringing their lived experience perspective to ensure that local needs are understood and met, local

community leaders with experience working with target populations to provide specific insights and solutions, and other experts in the program areas to help guide use of the Fund towards meaningful outcomes and systemic change.

- b. The Committee shall reflect the racial, ethnic, economic, generational and other diversity of the City of San José.
- c. Committee members shall have a commitment to furthering the City's goals for anti-displacement, economic mobility, education & workforce development, and racial equity, supporting workers and family-supporting jobs, and uplifting historically disadvantaged groups, including women, people of color, people with disabilities, low-income residents, and the chronically unemployed.
- d. At least five (5) members shall have Local Lived Experience in the core Fund areas. "Local Lived Experience" includes individuals with personal knowledge of the root causes of displacement gained through direct, first-hand involvement.
 - i. Committee members nominated in this category shall live or operate a small business in a census tract categorized as 'high-risk' or 'undergoing displacement' by a credible, regularly updated source (such as the Urban Displacement Project at U.C. Berkeley), including at least two (2) from East San José (defined as south of Berryessa Rd, north of Capitol Expressway and Aborn Rd., and east of Highway 101) and at least one (1) from the Greater Downtown Area that is part of the 'high risk' category in the Berkley or other relevant study.
 - ii. These Committee members should represent a range of experiences the Fund is intended to address, such as housing insecurity, neighborhood instability, homelessness, low-income, unemployment, and barriers to opportunity and economic mobility.
- e. The other eight (8) members of the Committee shall have significant professional experience and subject matter expertise (e.g., through service delivery, policy-making, academic, or institutional capacity), in one or more of the following fields:
 - i. Affordable housing preservation and/or shared equity and community ownership including finance models.
 - ii. Tenant advocacy and support.
 - iii. Homelessness or homeless support services.
 - iv. STEAM education (early childhood, K-12, post-secondary).
 - v. Employment and workforce development, job training, apprenticeship programs, labor.
 - vi. Minority-owned, disadvantaged, small, or micro business retention and growth.
 - vii. Neighborhood development, leadership development.
 - viii. Philanthropy, fundraising, grant-making.
 - ix. Nonprofit management, legal, finance experience.
 - x. Academic and/or research expertise in relevant fields such as equity, community development, sociology, demography and/or economic

mobility.

- f. While Committee members may have experience in multiple fields, members with deep expertise in a single field will be encouraged in order to create a balanced Committee in which no one area of expertise dominates. In making appointments, the City Council will strive to create a Committee with members that collectively possess expertise and local lived experience across all topic areas listed in this Section.
- g. Ex officio (non-voting) members shall include three (3) representatives of the City Administration and one (1) representative from Google for the duration of development implementation. The role of the City representatives is to consider alignment and collaboration with City strategies, goals, and programs. The Committee may add additional ex officio seats for additional major funders or others as deemed helpful by the Committee, and subject to approval by City Council.
- h. Committee members will be subject to applicable state and local disclosure and conflict of interest laws.

11. Committee Selection Process.

- a. It is the intent that within six (6) months of Final Approval of the Development Agreement the City Administration will bring forth an ordinance to the City Council to codify the creation of the Committee within Chapter 2.08 (“Boards, Bureaus, and Commissions”) of the City’s Municipal Code.
- b. The City shall conduct an open, transparent process for appointing the Committee members, initially and as terms expire. The process is envisioned to include the following steps, in consultation with the City Clerk and the City Administration’s Office of Racial Equity (ORE):
 - i. Soliciting applications/nominations using a standard form.
 - ii. Screening the nominations for eligibility.
 - iii. Recommending a slate of Committee members to City Council for review and approval at a public meeting.
- c. As part of the appointment process, the City Attorney’s Office will perform a conflict analysis for each candidate, consistent with City practice for appointments to City boards and commissions.
- d. Immigration status shall not be a factor in the Committee member selection process.
- e. Each Committee member shall file a Form 700 Statement of Economic Interests upon appointment and as required under the Political Reform Act and Fair Political Practices Commission (“FPPC”) regulations.
- f. Committee members shall be appointed by the City Council for staggered terms.
- g. It is the intent to complete the appointment process within six (6) months of approval of the first Conformance Review application.
- h. The City intends to solicit an advisor to support the Committee selection and Fund Manager solicitation processes.

12. Strategic Plan. As a first order of business, the Fund Manager shall develop a Five Year Strategic Plan in consultation with the Committee.
- a. The purpose of the Five Year Strategic Plan is to set the direction for the grant programs and funding allocation, including: the Fund's strategic vision, objectives, and funding priorities over the next five years, and the metrics to measure progress or success on its objectives and funding priorities. Once complete, the Five Year Strategic Plan shall be submitted to the City Council for review and approval.
 - b. The Five Year Strategic Plan shall include, but is not limited to:
 - i. Community needs assessment: such as community context, priority needs, analysis of gaps in system effectiveness.
 - ii. Desired outcomes, funding objectives, and performance metrics to evaluate Fund effectiveness.
 - iii. Recommended allocation of funding between Community Stabilization and Opportunity Pathways program areas.
 - iv. Categories of competitive grant programs.
 - v. Expectations for community engagement.
 - vi. Anticipated administrative costs by the City and payments to the Fund Manager for all contracted services; budget caps on these expenses.
 - c. Once approved by the City Council, the Fund Manager is tasked with implementing the Five Year Strategic Plan.
 - d. The Five Year Strategic Plan must be updated every five years, but may be updated more frequently based on changing conditions.
 - e. Between these updates, the City Council may propose and adopt changes to the then-applicable Five Year Strategic Plan; provided, however, that any changes must be approved by two-thirds vote of the City Council.
13. Annual Performance Report. Every year, the Fund Manager will generate an Annual Report describing the Fund's accomplishments and progress on performance metrics. The purpose of the Annual Performance Report shall be to analyze and report out on the effectiveness of the Fund's grant making activities, including achievement of outcomes, objectives, and metrics identified in each Five Year Strategic Plan.
- a. The Report will be developed in consultation with the Committee, who may review the Report and provide feedback to the Fund Manager.
 - b. The Annual Report will then be transmitted to the City Administration, who will bring it to Council for review and acceptance.
14. Public Engagement. The Fund Manager, with the support of the City Administration and Committee, will be expected to conduct public outreach and community engagement to inform each Five Year Strategic Plan and the grant making process.
- a. Specific steps that may involve public engagement include: preparing the needs assessments for the Strategic Plan; reaching out to potential grant applicants; and preparing the Annual Performance Report.

- b. The Fund Manager should develop and implement the community engagement strategy and methods to be used in collaboration with the Committee. The expectation is to use best practices for inclusive engagement, considering factors such as language and accessibility.
- 15. Audit Rights by the City Council. The City may complete an independent financial and performance audit of the Fund on a biannual basis to ensure conformance with this Agreement, the Five Year Strategic Plan, the contract with the Fund Manager, and applicable laws. Further, the City may take any and all necessary steps and actions to address any issues raised in annual reports, audits, allegations of misuse of funds, or violation of application policies, rules or laws.

Exhibit J

Exhibit J

Framework for City Provided Electric Service to the Downtown West Project

This Exhibit provides a framework for Developer and the City to follow to first confirm the viability of an electrical Microgrid as a key component of the Project, and then, subject to their respective actions and approvals, enter into a Business Relationship addressing development, ownership and operation of the Microgrid as specified in Section 3.5 below. Any capitalized terms not defined below shall have the meaning assigned to such terms in the Development Agreement ("Agreement").

1. Electric Microgrid Overview

- 1.1. Developer is developing district systems as a key tool to achieve the Project's environmental objectives and to increase the Project's resilience in the face of power and other system outages. One of the principal district systems is the electrical microgrid ("Microgrid"). The grid-tied Microgrid will be developed to supply electricity to the Project area. The Microgrid will be fed by a primary transmission level electricity supply – 115kV from PG&E – before transforming to 12kV or 21kV distribution supply via a dedicated Project substation. In the event of a failure of PG&E's primary supply, the system will be switched to island mode, meaning that it will operate in isolation from the PG&E network, and then utilize the Developer's embedded renewable energy systems, backup generation and storage to manage electrical supply to the Project. Implementation of a feasible Microgrid is a key component of the Project's District Systems strategy, and timely delivery and energization of the Microgrid is a key factor in the development of the Project's office component.

This Exhibit shall apply only if Developer elects to proceed with the scenario for development of the Microgrid that requires a Business Relationship with City, and not to other Microgrid development scenarios as described in Condition No. __ of Resolution No. _____.

- 1.2. The City and Developer are evaluating the option of City-provided electric service to all buildings and future customers within the Project area, subject to Council approval and applicable law.
 - a. Developer has funded a preliminary study and cost of service analysis by the City, to confirm the viability of the City-owned system. The results of this preliminary study indicate that City-provided electric service to the Project is viable.
 - b. Developer and the City have submitted applications for interconnection to PG&E.
 - c. Both parties acknowledge that City-provided electric service has potential mutual benefits, and have agreed to further develop the financial and legal basis for proceeding with the City ownership and operation of the Microgrid

following the issuance of Project entitlements, including negotiation of a Business Relationship.

2. Relationship to Project Approvals

- 2.1. The Microgrid is a component of the Project that was evaluated in the Project's Final Environmental Impact Report, and which is part of the Project's Infrastructure as reflected both in the Infrastructure Plan and in the Downtown West Planned Development Permit and its implementing components, including the Downtown West Improvement Standards, Conceptual Infrastructure Plan Sheets and the Downtown West Design Standards and Guidelines.
- 2.2. The City and Developer are evaluating the option of City-provided electric service, which may be effectuated through future City actions, approvals, and/or agreements with Developer or any of its successors or assigns under the Development Agreement, and which shall not require amendment to the Agreement, the Downtown West Planned Development Permit, or any other Approval.

3. Condition(s) Precedent

The City and Developer, prior to entering into a Business Relationship for City provided electric service to the Project area, shall satisfy the following conditions precedent:

- 3.1. City shall complete a preliminary cost of service analysis to determine economic feasibility of City provided electric service.
- 3.2. City and Developer shall make a determination whether to proceed with the City's Wholesale Transmission Interconnection Application to PG&E as reasonably practical and feasible, including any discussions, actions, approvals and/or agreements with PG&E regarding PG&E's System Impact Study, Facilities Study, interconnection facilities required to connect the Microgrid to the PG&E transmission grid, and/or Interconnection Agreement.
- 3.3. As soon as reasonably practicable and feasible, the City shall make a determination whether it will provide electric service to the Project, and shall take all steps necessary under applicable federal, state and local law to organize as an entity qualified to provide electrical energy service to meet the electrical loads of end-users within the Project, and to meet its other obligations under a prospective Business Relationship with Developer; City shall confirm completion of such steps in writing to Developer.
- 3.4. City and Developer shall negotiate and determine whether to execute the terms of a "Business Relationship", including but not limited to the following:
 - 3.4.1. Coordination and collaboration regarding Microgrid design and applicable design and performance standards for approval by the City.
 - 3.4.2. Development and installation of the Microgrid by Developer.

- 3.4.3. Ownership, operation and maintenance of the Microgrid, including but not limited to City acquisition of the Microgrid; necessary leases, easements, and licenses from the Developer for the City to operate and maintain the Microgrid on Developer-owned land; Developer ownership, and operation and maintenance of non-distribution system facilities such as behind the meter components.
- 3.4.4. Alterations and/or reconfigurations of the Microgrid, including but not limited to good faith efforts by the City to allow such alterations and/or reconfigurations determined to be mutually beneficial to end-use customers, the City and Developer.
- 3.4.5. Energy Services, including but not limited to the supply of energy to the Microgrid and establishment of fair and equitable cost-based rates.
- 3.4.6. Customer relations with the City, including but not limited to response to customer inquiries, adjudication of customer complaints, and billing.

Exhibit K

Exhibit K

Downtown West Parking Requirement

Downtown West Parking Requirements

This Exhibit is intended to ensure that sufficient parking is publicly-accessible within the Project site, for the Project uses and also for the SAP Center, to ensure consistency with the City's obligations under the Arena Management Agreement. Developer and the City anticipate the replacement of approximately 2,850 existing ~~available~~publicly-accessible surface parking spaces on property that will be redeveloped as part of the Downtown West project, and the development of at least 1,150 additional spaces (for a total of at least 4,000 publicly-~~available~~accessible parking spaces) at full buildout of office space within the Downtown West project~~to~~. This would ensure the long-term sustainability of the SAP Center. ~~This does~~These parking spaces do not include up to 2,360 residential parking spaces to be included in the project. Terms that are used but not defined in this Exhibit shall have the meanings given such terms in the body of the Development Agreement to which this Exhibit is attached. For purposes of this Exhibit K, a publicly-accessible parking space is "Available" if it is unoccupied and accessible to SAP Center customers on weekends and after 6:30 PM on weekdays, on SAP Center event days.

1. **Overall Requirements:** Over the course of the development of the Project, Developer shall be required to provide publicly-accessible off-street parking spaces serving new office development at a cumulative ratio between 0.5 and 0.645 spaces for each 1,000 square feet of Floor Area (which shall mean eighty-five percent (85%) of the total gross floor area) of such office buildings (the "Required Parking Ratio"). At the point of full build out of office space within the Downtown West project, the Required Parking Ratio shall be 0.645 spaces, and the project shall provide at least 4,000 publicly-accessible spaces.
 - a. Once 4,000 publicly~~available~~-accessible parking spaces are operational and in compliance with these terms, the Required Parking Ratio will no longer apply provided that the 4,000 publicly~~available~~-accessible spaces shall be maintained as described herein.
 - b. Developer may construct up to 4,800 publicly~~available~~-accessible parking spaces at its discretion; this parking would be reviewed as part of the Conformance Review process.
 - c. The Required Parking Ratio represents a reduction from standard City parking requirements, which would require as many as 15,500 spaces at Downtown Commercial parking ratios (2.5 spaces per 1,000 square feet of Floor Area), or 6,600 spaces with application of available standard parking reductions (1.06 spaces per 1,000 square feet of Floor Area). The Required Parking Ratio of 0.645 spaces per 1,000 square feet of Floor Area is warranted given the area's rich transit and mixed-use environment, sustainability and air quality imperatives, traffic reduction and City's multimodal goals, the fact that this parking is available to the public, and transportation demand management requirements.
 - d. The Required Parking Ratio is critical to serve the needs of the Project, as well as to replace parking currently utilized by transit riders and SAP Center patrons. With

this in mind, the commercial parking spaces will be publicly ~~available~~accessible and priced to allow for maximum efficiency to support the SAP Center, as well as the multimodal goals of the City and Project.

- i. At 4,000 publicly ~~available~~accessible commercial parking spaces, the project targets 85% of such spaces (3,400) to be Available for SAP Center event use.
- e. If, over the course of the Development Agreement, some parking is found to be no longer warranted, the Director of PBCE may, in its sole discretion, reduce the Required Parking Ratio and/or overall amount without requiring an amendment to the Development Agreement or to this Exhibit.
- f. The parking requirement must be satisfied in part through at least 2,850 publicly ~~available~~accessible commercial spaces within the Project Site~~;~~, including existing parking spaces, ~~2,850 publicly available commercial parking spaces must be maintained within the Project Site at all times and through all phases of Project development.~~
- g. As an option to satisfy the requirement for the 2,851 to 4,000 publicly ~~available~~accessible parking spaces set forth above (Section 1), Developer may deliver this parking either within the 1/3-mile radius of the SAP Center or through an Alternative Parking Arrangement.
 - i. Alternative Parking Arrangement: If Developer determines that it will not provide any number of the remaining required parking spaces within the Project Site, then, in order to meet the Required Parking Ratio, the City shall have the right to designate additional land owned by the City and within 1/3 of a mile of the SAP Center (the "Additional Parking Property") for Developer to build additional parking spaces; Developer would then be required to build additional spaces on the Additional Parking Property, subject to obtaining appropriate environmental clearance and any discretionary approvals, as well as ensuring compliance with any contractual obligations of the City; provided, however, in no event would Developer be required to build parking spaces on the Additional Parking Property that, when aggregated with the publicly ~~available~~accessible spaces located within the Project boundary, would exceed the Required Parking Ratio or 4,000 total spaces, as described above. ¶
 - In the event the Alternative Parking Arrangement results in designation by the City of "Lot E" for the development of additional parking by Developer, subject to any necessary environmental clearance, nothing in this Exhibit shall preclude the City from complying with its obligations under the Arena Management Plan Agreement with respect to Lot E, including regarding parking priority being provided for SAP Center event-related parking at least until June 30, 2025, which entity would manage the parking, and/or any option agreements to purchase that property.

City will not meet its parking obligations under the Arena Management Agreement due to temporary failure of the project to satisfy the Required Parking Ratio, Developer shall develop and obtain agreement from the City for one or more interim parking management strategies at that time.

- c. To the extent the Option Agreement for Lots A/B/C is exercised prior to 2040, the Developer must be in compliance with the Required Parking Ratio, subject to Section 2(a)(i), prior to beginning vertical development on Lots A/B/C. To the extent the existing Second Amended and Restated Arena Management Agreement between the City and San José Arena Management, LLC is terminated earlier than 2040 or at its scheduled expiration in 2040, Section 1d.i. and Section 2a.ii shall no longer apply.

Exhibit L

Exhibit L

List of Approvals

1. Certification of Environmental Impact Report for Downtown West Mixed-Use Project
(City Council Resolution No. ____) (includes Adoption of Mitigation Monitoring and Reporting Program, and CEQA Findings and Statement of Overriding Considerations)
2. Adopting Overriding Findings Regarding Santa Clara County Airport Land Use
Commission's Determination of Inconsistency for the Project (City Council Resolution No. ____)
3. Amendment to Envision San Jose 2040 General Plan (City Council Resolution No. ____)
4. Amendment to Diridon Station Area Plan (City Council Resolution No. ____)
5. Rezone to Planned Development Zoning District and approval of Downtown West General Development Plan (City Council Ordinance No. ____)
6. Amendment to Title 20 of the City of San Jose Municipal Code (City Council Ordinance No. ____)
7. Approval of Downtown West Planned Development Permit, including the Downtown West Design Standards and Guidelines, the Downtown West Infrastructure Standards, the Conceptual Civil Infrastructure Plan Sheets, and Conformance Review Implementation Guide (City Council Resolution No. ____)
8. Development Agreement for Downtown West Mixed-Use Plan (City Council Ordinance No. ____)
9. Vesting Tentative Map for Downtown West (City Council Resolution No. ____)
10. Approval of Major Encroachment Permit(s) (City Council Resolution No. ____)
11. Construction Impact Mitigation Plan (City Council Resolution No. ____)

12. Amendment of Historic Preservation Permit (City Council Resolution No. ____)
13. Landmark Designation Approval for Adjustment to San Jose Water Building (City Council Resolution No. ____)
14. Landmark Designation Approval for Adjustment to Southern Pacific Depot (City Council Resolution No. ____)
15. Major Encroachment Permit Pursuant to San José Municipal Code Chapter 13.37 For Streetscape Improvements at Various Locations Within the Downtown West Development Area (City Council Resolution No. ____)
16. Vacation of a Portion of Cinnabar Street with the Reservation of Public Easements Over the Vacated Area In Conjunction with the Downtown West Mixed-Use Plan (City Council Resolution No. ____)
17. Vacation of a Portion of Otterson Street with the Reservation of Public Easements Over the Vacated Area In Conjunction with the Downtown West Mixed-Use Plan (City Council Resolution No. ____)
18. Vacation of a Portion of Otterson Street with the Reservation of Public Easements Over the Vacated Area In Conjunction with the Downtown West Mixed-Use Plan (City Council Resolution No. ____)
19. Vacation of a Portion of South Montgomery Street with the Reservation of Public Easements Over the Vacated Area In Conjunction with the Downtown West Mixed-Use Plan (City Council Resolution No. ____)
20. ~~15. Street Vacation for Portions of North~~ ~~a Portion of South~~ Montgomery Street, Delmas Avenue, Park Avenue, ~~Cinnabar Street, Cottage Lane, and Barack Obama Boulevard (South Montgomery Street)~~ and Otterson Street with the Reservation of Public Easements

Over the Vacated Area In Conjunction with the Downtown West Mixed-Use Plan (City Council Resolution No.)

~~15.21.~~ Any Subsequent Approval (as defined in Section ~~1.112~~ 1.112 of the Development Agreement)

Exhibit M

Exhibit M

List of Applicable City Impact Fees

1. Commercial Linkage Fee as set forth in San José Municipal Code Chapter 5.11 as of the Effective Date;
2. Affordable Housing In-Lieu Fee (see Affordable Housing Program at Exhibit D above);
3. Construction Taxes on commercial and residential development pursuant to San José Municipal Code Chapter Chapters 4.46, 4.47, 4.54, 4.64;
4. Sanitary Sewer Connection and Storm Drainage Connection Fees pursuant to San José Municipal Code Chapter 15.16 which will be confirmed through the Conformance Review Process and as outlined in the Conditions of Approval; and
5. Utility Undergrounding Fees pursuant to San Jose Municipal Code Chapter 15.26.

The following Impact Fees are applicable to the Project, but Developer shall satisfy the obligations through actual construction or other methods, as indicated:

- Diridon Station Infrastructure Fee shall be satisfied in full through construction of in-kind infrastructure, as described in Exhibit I and will be confirmed by the City through the Conformance Review for Horizontal Improvements and specifically through the review of the applicable improvement drawings; and
- Parkland Dedication requirements pursuant to San Jose Municipal Code Chapter 19.38 shall be satisfied in full through a combination of methods as described in Exhibit E.

Exhibit N

Exhibit N

Form of Notice of Completion and Termination

RECORDING REQUESTED BY AND
WHEN RECORDED RETURN TO:

[address] _____

Attn: _____

(Space above this line reserved for Recorder's use only)

THIS NOTICE OF COMPLETION OF BUILDING AND ASSOCIATED OBLIGATIONS (this "Notice") dated for reference purposes only as of this ____ day of _____, 20__, is made by and between the CITY OF SAN JOSE, a political subdivision and municipal corporation of the State of California (the "City"), and _____, a _____] ("Developer") .

1. The City and Developer entered into that certain Development Agreement dated as of _____, 20__ and recorded in the Official Records of the County of Santa Clara on _____, as Document Number _____ (Book No. ____, Reel No. _____) (the "Development Agreement"). Capitalized terms used in this Notice that are not defined shall have meaning given to such terms in the Development Agreement.

2. Under Section 7.1 of the Development Agreement, when one or more Buildings have been completed and all of the associated Base Requirements, Community Benefits, and Privately-Owned Publicly Accessible Open Space, and other obligations and requirements (collectively "Obligations") tied to those specific Buildings have also been completed, the City agreed, upon Developer's request, to execute and record a notice of completion as it relates to the applicable Building.

3. The City confirms that the Building known as _____, located on the property described in the attached Exhibit A (the "Affected Property"), together with all of the Obligations tied to that Building through the Development Agreement and any and all Approvals (including Subsequent Approvals) granted by the City for the Project, have been completed in accordance with the Development Agreement, which Obligations may, in part or in whole, run with the land, survive Building completion, and/or continue to be binding as to the Building and Affected Property and to any and all parties having or later acquiring any interest in the Affected Property even after recordation of this Notice. All parties with an interest in the Affected Property have the right to rely on this Notice.

CITY:

CITY OF SAN JOSE,
a municipal corporation

By: _____
Director of Planning, Building
and Code Enforcement

Approved as to form:

[_____] , City Attorney

By: _____
Deputy City Attorney

Exhibit O

Exhibit O

Form of Assignment and Assumption Agreement

RECORDING REQUESTED BY
CITY CLERK
OF THE CITY OF SAN JOSE
(Exempt from Recording Fees
Pursuant to Government Code
Section 27383)

AND WHEN RECORDED MAIL TO:

[_____]
City Clerk, City of San José
200 E. Santa Clara Street, 14th Floor
San José, CA 95113

ASSIGNMENT AND ASSUMPTION AGREEMENT

RELATIVE TO DEVELOPMENT AGREEMENT FOR [_____]

THIS ASSIGNMENT AND ASSUMPTION AGREEMENT (hereinafter, the "**Assignment**") is entered into this ____ day of _____, 20__, by and between _____, a _____ ("**Assignor**") and _____, a _____ ("**Assignee**").

RECITALS

A. _____, a _____ and the City of San José, a political subdivision and municipal corporation of the State of California (the "**City**"), entered into that certain Development Agreement (the "**Development Agreement**") dated as of _____, 20__ for reference purposes, with respect to certain real property owned by Assignor, as such property is more particularly described in the Development Agreement (the "**Project Site**"). The Development Agreement was recorded in the Official Records of the County of Santa Clara on _____ as Document No. _____.

[add recital to document any previous transfer of the Transferred Property, with recording information]

B. The Development Agreement provides that, subject to the terms and requirements set forth therein, including, without limitation, Section 12 (Transfer or Assignment) Developer (Assignor) has the right to: (i) Transfer all or a portion of the Project Site, (ii) assign all of its rights, title, interest and obligations under the Development Agreement to a Transferee with respect to the portions of the Project Site transferred to the Transferee, and (iii) upon the execution and delivery of an approved Assignment and Assumption Agreement, to be released from any prospective liability or obligation under the Development Agreement with respect to

those rights, duties, obligations or interests and real property so Transferred, except as otherwise provided in the Development Agreement.

C. Assignor intends to convey certain real property as more particularly identified and described on Exhibit A attached hereto (hereafter the "**Transferred Property**") to Assignee. The Transferred Property is subject to the Development Agreement.

D. Assignor desires to assign and Assignee desires to assume Assignor's right, title, interest, burdens and obligations under the Development Agreement with respect to and as related to the Transferred Property, as more particularly described below.

ASSIGNMENT AND ASSUMPTION

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

1. Defined Terms. Initially capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Development Agreement.

2. Assignment of Development Agreement. Assignor hereby assigns to Assignee, effective as of the later of (i) Assignor's conveyance of the Transferred Property to Assignee or (ii) the date on which City receives a copy of the fully executed Assignment and Assumption Agreement, all of the rights, title, interest, burdens and obligations of Assignor under the Development Agreement with respect to the Transferred Property, including any Community Benefits that are tied to Buildings on the Transferred Property [all as more specifically set forth on Exhibit B to this Agreement](the "Assigned and Assumed Obligations"). Assignor retains all the rights, title, interest, burdens and obligations under the Development Agreement with respect to (i) the Transferred Property that are not Assigned and Assumed Obligations and (ii) all other portions of the Project Site owned by Assignor.

3. Assumption of Development Agreement. Assignee hereby assumes, effective as of Assignor's conveyance of the Transferred Property to Assignee, all of the Assigned and Assumed Obligations with respect to the Transferred Property, including its associated Community Benefits, and agrees to observe and fully perform, and to be subject to, all of the Assumed and Assigned Obligations. The parties intend that, upon the execution of this Assignment and conveyance of the Transferred Property to Assignee, Assignee shall become the "Developer" under the Development Agreement with respect to the Transferred Property and the Assigned and Assumed Obligations.

4. Reaffirmation of Indemnifications. Assignee hereby consents to and expressly reaffirms any and all indemnifications of the City set forth in the Development Agreement, including without limitation Section ____ of the Development Agreement.

[Note: Include this paragraph 5 if Transferred Property may be developed with residential uses: 5. Housing Obligations. Assignee has read and understands the obligations set forth in Exhibit D (Affordable Housing Program) of the Development Agreement as they relate to the Transferred Property. Without limiting the foregoing, Assignee agrees (1) to the terms and provisions of such Exhibit D, including the indemnities, waivers and releases set forth

therein, and (2) that the Development Agreement falls within the express exception to the Costa-Hawkins Act, Section 1954.52(b) because it is a contract with a public entity in consideration for contributions and other forms of assistance specified in Chapter 4.3 (commencing with Section 65919 of Division 1 of Title 7 of the California Government Code). Assignee understands that the City would not have been willing to enter into the Development Agreement without the provisions of such Exhibit D.]

6. Assignee's Covenants. Assignee hereby covenants and agrees that: (a) Assignee shall not challenge the enforceability of any provision or requirement of the Development Agreement; (b) Assignee shall not sue the City in connection with any and all disputes between Assignor and Assignee arising from this Assignment or the Development Agreement, including any failure to complete all or any part of the Project by any party; and (c) Assignee shall indemnify the City and its officers, agents and employees from, and if requested, shall defend them against any and all Losses resulting directly or indirectly from any dispute between Assignor and Assignee arising from this Assignment or the Development Agreement.

7. Binding on Successors. All of the covenants, terms and conditions set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

8. Notices. The notice address for Assignee under Section ____ of the Development Agreement shall be:

Attn: _____

With copy to:

Attn: _____

8. Counterparts. This Assignment may be executed in as many counterparts as may be deemed necessary and convenient, and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same instrument.

9. Governing Law. This Assignment and the legal relations of the parties hereto shall be governed by and construed and enforced in accordance with the laws of the State of California, without regard to its principles of conflicts of law.

IN WITNESS HEREOF, the parties hereto have executed this Assignment as of the day and year first above written.

ASSIGNOR:

[insert signature block]

ASSIGNEE:

[insert signature block]

Exhibit A to Assignment & Assumption Agreement -
Transferred Property

Exhibit B to Assignment & Assumption Agreement -
Detailed List of Assigned and Assumed Obligations

Obligations	Is this item Applicable for this Development Parcel Yes/No	Developer Retains Responsibility	Transferee Retains Responsibility	Comments
Affordable Housing & Fund				
Affordable Housing: Alternative Method IHO “Mixed Compliance Option” with land transfer for IHO fee credits				
Moderate Inclusionary Units (5% at 100% AMI inclusionary units and applicable fee payment, see above for IHO fee credits considerations)				
Community Stabilization and Opportunity Fund				
City-Dedicated Open Space: <i>Note and Attach Relevant Bonds, Certificates of Insurance, etc.</i>				
Los Gatos Creek Trail (E)				
Los Gatos Creek Trail (G)				
Los Gatos Creek Park				
Los Gatos Creek Trail Connector 1				
Social Heart (and Parking Garage Insurance)				
Northend Park				
Los Gatos Creek Connector 2				
St. John Triangle				

Privately-Owned Publicly Accessible Open Space				
Creekside Walk at South Autumn Street				
Gateway to San Jose				
Los Gatos Creek East				
The Meander				
Los Gatos Creek Park (H2)				
Los Gatos Creek Park (G)				
North Montgomery Pocket Park				
Northend Park				
Los Gatos Creek Riparian Setback adjacent to Los Gatos Creek Connector				
Semi-Public Open Space				
Impact Fees				
Commercial Linkage Fee				
Affordable Housing In-Lieu Fee				
Construction Taxes				
Sanitary Sewer Connection and Storm Drainage Connection Fees				
Utility Underground Fees				
Other				
Unallocated Community Benefit Commitment				
Required Parking Ratio				
LTCA Corporate Accommodations Housing Contribution				

LTCA Corporate Accommodations Parks Contribution				
Workforce, Learning, and Education Commitments (apart from Community Stabilization and Opportunity Fund)				
Public Improvements required to serve or applicable to Transferred Property				
Privately-Owned Improvements (other than Privately-Owned Publicly Accessible Open Spaces) required to serve or applicable to Transferred Property				
District Systems (Subject to Major Encroachment Agreement and Conditions of Approval)				
Other: _____				



Exhibit P

Exhibit OP

¶

Form of Notice Regarding Status of Satisfaction of Ten or Twenty Year Development
Obligation

¶

[On Developer Letterhead]

¶

_____, 20____

¶

Via Hand Delivery and Electronic Mail

Director of Planning, Building, and Code Enforcement

Planning Department

City of San José

200 East Santa Clara Street

San José, CA 95113-1905

¶

Re Status of Satisfaction of [Ten][Twenty] Year Development Obligation under the
Development Agreement, by and between the City of San Jose and Google LLC,
dated _____, 2021

¶

Dear _____:

¶

We provide this notice of the status of the [Ten][Twenty] Year Development Obligation (the
“Obligation”) pursuant to Section 11.2 of the Development Agreement. Capitalized terms that are
used but not defined in this notice shall have the meanings given such terms in the Development
Agreement. Developer hereby certifies to the City that (i) the deadline for satisfying the Obligation
is _____, 20____, and (ii) as of the date of this notice, the following have occurred:

¶

☐ 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, and completion
of all payments or contributions, including Community Benefits, due pursuant to the
Development Agreement with respect to such two million (2,000,000) [additional] gross
square feet of office development.

¶

☐ Payment or performance, pursuant to the Development Agreement, of the Community
Benefits associated with two million (2,000,000) [additional] gross square feet of office
development, which Community Benefits, as of the date of such payment or performance
were equal to \$[_____] /gsf of office development (\$[_____] /gsf for Community Stabilization
and Opportunity Fund and \$[_____] /gsf for Unallocated Community Benefit
Commitment).

¶

☐ Partial performance of the obligations described in the preceding paragraphs as follows (i)
Substantial Completion of the base building(s) for [_____] ([_____]) gross
square feet of office development within the Project Site, and completion of all payments

or contributions, including Community Benefits, due pursuant to the Development Agreement with respect to such amount of gross square feet of office development; and (ii) payment or performance, pursuant to the Development Agreement, of the Community Benefits associated with [] ([]) gross square feet of office development, which Community Benefits, as of the date of such payment or performance were equal to \$[]/gsf of office development (\$[]/gsf for Community Stabilization and Opportunity Fund and \$[]/gsf for Unallocated Community Benefit Commitment).

¶

¶

Accordingly, Developer [has][has not] satisfied the Obligation as of the date of this notice. ¶

¶

[If Developer has not satisfied the Obligation, then include the following, as well as providing the reasons for Developer's failure to satisfy the Obligation if relevant: In order to satisfy the Obligation, Developer needs to perform the following work [and][or] make the following payments: . Developer anticipates that it will satisfy the Obligation on or before , 20 . Developer will provide City with a supplemental notice substantially in the form of this notice in which Developer certifies to the City the then-current status of the satisfaction of the Obligation.]¶

¶

If you disagree with any of our statements in this notice, then, please provide us with a notice in which you describe the statements you disagree with and why you disagree. Please address such notice to: .¶

¶

¶

Sincerely,¶

¶

[]¶

Vice President, Real Estate and Development¶

¶

cc 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

Schedule A

TERM SHEET FOR ¶
REIMBURSEMENT AGREEMENT ¶
BY AND BETWEEN ¶
THE CITY OF SAN JOSE AND GOOGLE LLC ¶

This TERM SHEET memorializes the proposed terms for a REIMBURSEMENT AGREEMENT (“Agreement”) by and between GOOGLE LLC, a Delaware limited liability company authorized to do business in the State of California ("Google" or “Project Sponsor”), and the CITY OF SAN JOSE, a municipal corporation ("City"). City and Google are sometimes referred to individually herein as a “Party” and collectively as the “Parties.” The Agreement will provide for Google’s reimbursement of the City for “City Costs” in connection with the City’s performance of Reimbursable Work (as defined below) for the Downtown West Mixed-Use Project (“Project” or “Downtown West”). This Term Sheet is intended to establish the framework and identify key terms for an Agreement. Nothing in this Term Sheet shall be construed as a binding obligation. ¶

<u>¶</u> <u>Key Terms</u>	<u>Summary of Term</u>
<u>Section 1. Purpose and Intent Agreement</u>	<ul style="list-style-type: none">● <u>The Agreement is intended to memorialize the Parties long-term understanding of Google’s reimbursement of the City for “City Costs” in connection with the City’s processing of Downtown West.</u>● <u>The Parties share the objectives of ensuring (i) full cost recovery for the City in connection with the City’s processing of Downtown West; and (ii) timely processing of Subsequent Approvals in connection with the Project in order to advance the Parties shared vision of transforming Downtown San Jose and the Diridon Station Area Plan into a vibrant, transit-oriented neighborhood with a diverse and complementary mix of land uses that will provide substantial public benefits to the City, including expansion of economic opportunity within the City and significant improvements and investments in the public realm through the Parties’ shared goal of timely implementation of the Project.</u>
<u>Section 2. Reimbursement Obligation</u>	<ul style="list-style-type: none">● <u>Google agrees to reimburse the City for City Costs associated with the City’s performance of “Reimbursable Work”.</u>● <u>“Reimbursable Work” consists of the processing of</u>

	<p><u>Subsequent Approvals required to implement the Project, including but not limited to any further environmental review, Conformance Review Applications, City Dedicated Open Space designs, permits for Interim Uses and Special Events and Limited Term Uses during the term of the Agreement, phased final subdivision maps, improvement plans, and grading permits. Unless otherwise agreed to by the parties, processing of building permits shall not be considered “Reimbursable Work” under this Agreement and Project Sponsor shall pay any fees and charges incurred for building permits according to the City’s standard process and rates, with the ability to elect an expedited review process.</u></p> <ul style="list-style-type: none"> ● <u>Google’s reimbursement obligations in this Agreement, which exceed City standard review and processing fees, are intended by the Parties to compensate the City for its expedited review of Conformance Review Applications as established in the Implementation Guide and other Project approvals and documents. Unless stated otherwise in the Project approvals and documents, City review of Subsequent Approvals following the Conformance Review process shall adhere to standard requirements of the Municipal Code and the Permit Streamlining Act.</u> ● <u>Reimbursement related to litigation/challenges of the Project, legal costs for agreements associated with District Systems, public outreach/community engagement, and any other fees and costs mutually agreed upon between the parties will be covered in this same or a separate reimbursement agreement(s).</u>
<u>Section 3. Consultants</u>	<ul style="list-style-type: none"> ● <u>The City may select and retain Consultants to perform Reimbursable Work.</u> ● <u>As determined by the City through the Work Plan process (set forth in Section 7 below), Consultants will supplement certain Dedicated Staff and other City staff as needed to address intensification in development activity and/or provide technical or</u>

	<p><u>subject matter expertise. The City may allocate/reallocate, in its reasonable discretion, the specific tasks and services between Consultants and City staff and shall reasonably confer with Project Sponsor to ensure that Consultants are used in an efficient manner.</u></p>
<u>Section 4. City Costs</u>	<p><u>“City Costs” shall have the meaning set forth in Section 1.18 of the Development Agreement and include the following:</u></p> <ol style="list-style-type: none"> <u>1. City’s “Fully Loaded Costs” shall mean the standard rate in effect at the time services are provided, as established by City for the full cost to employ such Dedicated Staff and which generally includes the salary, benefits, and other related costs for the “Dedicated Staff.” Dedicated Staff shall include a certain number of new full-time equivalent staffing corresponding to City staff positions that represent the Parties’ good faith estimate of the staffing levels required to perform the Reimbursable Work. (For the avoidance of doubt, it is intended that this funding for full-time equivalent staff would enable the City to hire additional personnel and thereby increase staffing capacity beyond existing levels for the purpose of expediting the review and approval of Conformance Review/Subsequent Approval applications and implementation of the Project.)</u> <u>2. Actual costs of Consultants, if retained.</u> <u>3. Actual costs of City staff time, based on standard fully loaded hourly rate in effect at the time services are provided, incurred in connection with the Reimbursable Work that cannot reasonably be performed by Dedicated Staff. The fully loaded hourly rates published for City staff time includes the City’s standard overhead fee and may incorporate costs associated with Director and management -level staff time and coordination. There shall be no separate overhead cost charged to the Project Sponsor. The fully loaded hourly rate published for City staff time in PBCE, Public Works, and Fire incorporates</u>

	<p><u>costs associated with Director-level staff time and coordination; therefore, there shall be no separate costs associated with Director-level staff time charged to the Project Sponsor for these City departments. Project Sponsor understands and agrees that actual costs for any Director-level staff time incurred by other City departments may be charged as a separate cost. The City shall identify Director-level staff time from other City departments to be separately charged in each Budget. The Project Sponsor's reimbursement of actual costs of City staff time shall be in addition to the City's "Fully Loaded Costs" for Dedicated Staff.</u></p> <p><u>4. The Parties will periodically review and adjust (e.g. during Meet and Confer meetings as described below) Dedicated Staff and City staffing levels to ensure that appropriate levels of City resources are available to perform the Reimbursable Work.</u></p> <p><u>5. If Processing Fees are charged in connection with any Reimbursable Work, such Processing Fee shall be credited against Google's liability for reimbursement of City Costs; provided, however, that fees for building permits shall be charged according to the City's standard rates and process and are not Reimbursable Work unless otherwise agreed to between the parties. The parties may further coordinate with City departments, including the City's Building Division and the Fire Department as a component of Reimbursable Work under this Agreement.</u></p> <p><u>City Costs shall not include any costs that are not identified on an Approved Budget (as defined in Section 8).</u></p>
<u>Section 5. Term</u>	<u>The term of this Agreement shall be continuous with the term of the Development Agreement unless terminated earlier.</u>
<u>Section 6. Budget Period</u>	<u>Except for the Initial Budget Period (as defined below), each budget period "Budget Period" shall be from July 1 to June 30 consistent with the City's fiscal year.</u>

<p><u>Section 7. Project Sponsor's Schedule and Work Plan</u></p>	<ul style="list-style-type: none"> ● <u>To assist the City in preparing an annual budget for the upcoming Budget Period ("Annual Budget"), Google shall submit to the City by December 1st of each year, a proposed schedule and work plan ("Work Plan") that identifies Google's: (i) anticipated schedule for the submission of Conformance Review/Subsequent Approval applications, (ii) anticipated number of Conformance Review/Subsequent Approval applications, (iii) anticipated type of Conformance Review/Subsequent Approval applications; (iv) anticipated coordination meetings required of City staff and consultants; and (v) anticipated other efforts to be addressed over the course of the year, including but not limited to anticipated public outreach and community engagement to be conducted by or in coordination with the City in relation to the Reimbursable Work.</u> ● <u>Google shall notify the City as promptly as possible if it determines that the Work Plan will significantly change including anticipated schedule for the submission of Conformance Review/Subsequent Approval applications or the number of Conformance Review/Subsequent Approval applications will substantially deviate from the Work Plan previously submitted to the City.</u>
<p><u>Section 8. Annual Budget and Budgeted City Costs</u></p>	<ul style="list-style-type: none"> ● <u>Within forty-five (45) calendar days following Google's submittal of a Work Plan for an upcoming Budget Period, the City and Project Sponsor shall meet and confer in good faith to collectively prepare a proposed budget ("Budget") of estimated City Costs ("Budgeted City Costs") in-line with comparable projects for the upcoming Budget Period. The Parties shall prepare a mutually agreed upon Budget for the upcoming Budget Period by February 1st.</u> ● <u>Each Budget shall include detailed information of the proposed Budgeted City Costs for the applicable Budget Period, including but not limited to: (i) identifying all City departments and Consultants anticipated to be required to review Reimbursable</u>

	<p><u>Work for the upcoming Budget Period; (ii) a description of the anticipated proposed scope of work to be carried out by each City department and/or Consultant; (iii) identifying proposed City staff in each City department anticipated to be required to perform the Reimbursable Work; (iv) the standard hourly rate for the proposed City staff; and (v) an estimated not-to-exceed amount for each City department and/or Consultant for each half of the Budget Period.</u></p> <ul style="list-style-type: none"> ● <u>At least fifteen (15) calendar days prior to March 1st of each year, the City shall provide an Annual Budget that is the agreed upon Budget established through the collective process to the Project Sponsor for review and approval (“Approved Budget”), which the Project Sponsor shall reasonably approve if substantially consistent with the proposed Budget that the parties collectively prepared.</u> ● <u>Each Approved Budget shall be subject to the budget and appropriation process in Chapter 12 of the City Charter. Notwithstanding anything to the contrary herein, Project Sponsor shall have no obligation to deliver a Deposit to City for a particular Budget Period until the City Council has appropriated the monies relevant to and consistent with the applicable Approved Budget.</u>
<u>Section 9. Commencement Date and Initial Budget</u>	<ul style="list-style-type: none"> ● <u>Commencement Date. The commencement date of this Agreement shall be the later of (i) July 1, 2022; or (ii) termination of the [13-month Reimbursement Agreement] (“Commencement Date”).</u> ● <u>Initial Budget. The initial budget period (“Initial Budget Period”) shall commence on the Commencement Date and shall end on the next June 30th that occurs following the Commencement Date. Google shall submit to the City a Work Plan for the Initial Budget Period by December 1, 2021 and the parties shall coordinate and collectively develop a Budget for the Initial Budget</u>

	<u>Period pursuant to the timeframes and process in Section 8.</u>
<u>Section 10. Budget Reporting, Modifications and Augmentations</u>	<ul style="list-style-type: none"> • <u>Budget Modifications and/or Augmentation. Google understands the City must be fully cost recovery in providing services under this Agreement. The agreed upon annual Work Plan and Approved Budget for any Budget Period are a good faith estimate based on the information provided by Google. The City and applicable City departments will use its reasonable efforts to work within the agreed upon annual Work Plan and Approved Budget for any Budget Period. However, Google understands additional and unanticipated coordination, meetings, reviews, and other issues may arise as part of processing the Conformance Review applications requiring modification to the annual Work Plan and Approved Budget for any Budget Period. The Budgeted City Costs in an Approved Budget for any Budget Period may be modified or increased from time to time by the City with the written consent of Google, which shall not be unreasonably withheld, conditioned, or delayed, provided the City has conferred with Google and furnished reasonable written justification for the modification or increase. Google shall approve or disapprove a request for modification or increase of the Budgeted City Costs in an Approved Budget within twenty (20) calendar days of receiving the City's written request and supporting information. In the event Google provides written consent for an increase in the Budgeted City Costs during a Budget Period, Google shall increase the Deposit in the approved amount within thirty (30) calendar days after approving such increase.</u> • <u>Reporting. The City shall deliver quarterly cost variance reports ("Quarterly Report") to Google that details City Costs incurred by the City in relation to the approved Budgeted City Costs, the percentage of work that has been completed by each City department, and how much</u>

	<u>remains available for billing for each City department under the then-approved Annual Budget.</u>
<u>Section 11. Deposit and Payment</u>	<ul style="list-style-type: none"> ● <u>Initial Deposit. Within thirty (30) calendar days after the Commencement Date and prior to City commencing any Reimbursable Work, Google shall deliver to the City a deposit in the amount of [fifty percent (50%)] of the Initial Budget (“Initial Deposit”). The remaining fifty percent (50%) shall be deposited no later than January 15, 2023.</u> ● <u>Subsequent Bi-Annual Deposits. No less than five (5) calendar days prior to commencement of a Budget Period, the Project Sponsor shall deposit the approved amount for the first half of that Budget Period (“Deposit”). The Project Sponsor shall make an additional deposit no more than five (5) calendar days after January 1 of a Budget Period in the approved amount for that half of the Budget Period.</u>
<u>Section 12. Cooperation</u>	<ul style="list-style-type: none"> ● <u>Expeditious Processing. Provided Google has (i) provided all required notice, and (ii) fully made the payments to City as agreed upon, City agrees to make best efforts to expeditiously implement the Project and review and process Conformance Review Applications and other Subsequent Approvals in accordance with the Implementation Guide and other Project Approvals and Documents in an efficient manner to ensure timely delivery of the economic and community benefits associated with Project implementation.</u> ● <u>Project Manager. The City agrees that it shall engage, at Google’s sole cost and expense, a Dedicated Staff person who will act as a consistent liaison to the Project (“Project Manager”) to assist in coordinating the review and approval of Subsequent Approvals and implementation of the Project. The Project Manager shall host every-other-week meetings among the City, Project Sponsor, and all Dedicated Staff to ensure that the applications are being timely processed and approved-and Reimbursable Work is being performed efficiently and</u>

expeditiously. The Project Manager shall also be responsible for serving as a liaison between the Project Sponsor and City departments when reasonably requested by the Project Sponsor. As necessary, the Project Manager will engage Director-level support, whose time may not be charged as a separate City Cost under this Agreement, for the purpose of: (1) resolving disputes between the Project Sponsor and City departments; (2) facilitating Meet and Confer meetings as defined below; and (3) facilitating the referral of significant issues to the Director/Head of applicable City departments, and if necessary the City Manager.

- Director-Level Engagement. The City agrees that the Project Manager shall regularly engage a senior-level liaison (Director-level) to generally keep them apprised of the status of the Project, and to coordinate with other Director/Head of City departments as needed to resolve issues between the Project Sponsor and City departments. This will include regular Director-level attendance at Project meetings among the City, Project Sponsor, and Dedicated Staff.
- Meet and Confer. The City and the Project Sponsor agree to meet and confer (“Meet and Confer”) a minimum of every six (6) months to discuss matters related to the successful implementation of the Parties’ rights and obligations under this Agreement and the parties’ goal of timely implementing the Project. During a Meet and Confer, the City and the Project Sponsor may discuss the City’s planned or anticipated allocation of Dedicated Staff, any anticipated slowdown or intensification of development activity relative to the then-current Work Plan, and any other matters of concern under this Agreement pertaining to timely and effective review and consideration of Conformance Review/Subsequent Approval applications. Either Party may request a Meet and Confer with the other Party and the Parties shall reasonably seek to Meet and Confer within seven (7) calendar days of such request.

<u>Section 13. Dispute Resolution</u>	<u>Any dispute between the Parties shall be subject to the meet and confer process set forth in Section 9.2 of the Development Agreement before a Party sends a notice of default.</u>
<u>Section 14. Default</u>	<ul style="list-style-type: none"> ● <u>Google shall be in default under this Agreement if it: (i) fails to timely fund or replenish the Deposit and does not cure such failure within sixty (60) calendar days after service of written notice from City; (ii) fails to timely submit a Work Plan or timely approve or disapprove a City request for Budget modification or increase; or (iii) otherwise fails to perform any other obligation under this Agreement and does not cure such failure within sixty (60) calendar days after service of written notice from the City.</u> ● <u>The City shall be in default under this Agreement if it: (i) fails to timely provide Quarterly Reports; (ii) fails to use best efforts to timely process Subsequent Approvals pursuant to the timelines set forth in the Project approvals and documents provided that Google is not in default of this Agreement; and (iii) otherwise fails to perform any obligation under this Agreement and does not cure such failure within sixty (60) calendar days after service of written notice from Google.</u>
<u>Section 15. Termination</u>	<p><u>This Agreement may only be terminated as follows:</u></p> <ul style="list-style-type: none"> ● <u>Automatic Termination. This Agreement shall automatically terminate upon the termination of the Development Agreement.</u> ● <u>Termination by City. If Google is in default under this Agreement and fails to cure such default following written notice and expiration of the cure periods identified above, the City may terminate this Agreement by written notice to Google specifying the date of termination which shall not be less than ten (10) calendar days following the date of such notice.</u> ● <u>Termination by Google. If the City is in default under this Agreement and fails to cure such default following</u>

	<p><u>written notice and expiration of the cure periods identified above, Google may terminate this Agreement by written notice to City specifying the effective date of termination which shall not be less than ten (10) calendar days following the date of such notice.</u></p> <ul style="list-style-type: none"> ● <u>In the event of termination of the Agreement by Google or the City, the City’s review of the Conformance Review/Subsequent Approval applications would be subject to the standard requirements of the Municipal Code and the Permit Streamlining Act pursuant to the Conformance Review process authorized by the GDP and further set forth in the Implementation Guide (excluding expedited timeframes).</u>
<u>Section 16. Recordkeeping and Audits</u>	<ul style="list-style-type: none"> ● <u>City shall maintain records with respect to services performed by City and its Consultants under this Agreement (the “Records”) in accordance with the City’s current procedures. No less than seven (7) calendar days after notice by Project Sponsor, City shall make available to Project Sponsor all Records for examination.</u> ● <u>Nothing in this Agreement shall be construed to require the City to provide documents that are privileged, attorney work product, or attorney-client privileged.</u>
<u>Section 17. Assignment</u>	<ul style="list-style-type: none"> ● <u>Assignment to Lendlease and Lendlease Affiliate. If Google assigns, or partially assigns, its rights, duties, obligations or interests to Lendlease or any Lendlease Affiliate with respect to residential, hotel, limited-term corporate accommodations, or retail development pursuant to the terms of the Development Agreement, Google may assign or partially assign its obligations under this Agreement to Lendlease or any Lendlease Affiliate. Within thirty (30) calendar days of providing the City with an Assignment and Assumption Agreement as set forth under Section 12 of the Development Agreement, Lendlease or any Lendlease Affiliate shall prepare and submit to the City an anticipated Work Plan that identifies its (i) anticipated schedule for the</u>

	<p><u>submission of Conformance Review Applications and other Subsequent Approval applications, (ii) anticipated number of Conformance Review Applications and other Subsequent Approval applications, (iii) anticipated type of Conformance Review Applications and Subsequent Approval applications to be submitted, and (iv) other relevant information that may assist the City in preparing an Annual Budget and appropriate levels of City resources and staffing required to perform the Reimbursable Work for the upcoming Budget Period as it relates to its implementation of the Project. Within fourteen (14) calendar days of providing the City with its Work Plan, the City and Lendlease or Lendlease Affiliate shall meet and confer to establish a proposed budget pursuant to Sections 7 and 8 above as it relates to Reimbursable Work for Lendlease or any Lendlease Affiliate.</u></p> <ul style="list-style-type: none"> ● <u>Other Transfers/Assignments. If Google assigns, or partially assigns its rights, duties, obligations to a third-party (“Assignee”) other than Lendlease or any Lendlease Affiliate pursuant to the terms of the Development Agreement, Google may request, and the City in its sole and reasonable discretion may determine whether to approve this Agreement be assigned or partially assigned to the Assignee. Alternatively, the Assignee may negotiate a separate reimbursement agreement with the City, subject to City approval, to address the Assignee’s reimbursement of the City for “City Costs” in connection with the City’s Reimbursable Work for Assignee to advance the objective of timely implementation of the Downtown West project.</u>
--	--