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April 30, 2021

VIA E-MAIL johnny.phan@sanjoseca.gov

Johnny Phan
Deputy City Attorney
City of San Jose
San Jose City Attorney's Office
200 E Santa Clara St, San Jose, CA 95113

Re: Development Agreement for Google/Downtown West Project

Dear Mr. Phan:

As you know, our office represents the Peninsula Corridor Joint Powers Board. We have reviewed the draft 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 ("Development Agreement"). We respectfully request that the City incorporate the following revisions into the text of the Development Agreement.

Development Agreement section 3.6:

As articulated in the MOU, Developer and City have a shared goal of timely implementation of development projects in the Diridon Station Area to maximize integration with planned transit projects. As such, Developer, City, and the DISC Partner Agencies have engaged in considerable collaborative efforts to account for the future needs of both DISC and the Project, including the affordable housing program, parks and open space, and Community Benefits and Project Features to be provided by the Project. Developer and City shall continue to work in good faith to support the DISC program of projects through ongoing coordination and collaboration between the Parties and with the DISC Partner Agencies. The shared goals of these efforts are to effectively deliver both the Project and DISC, and to minimize the impact of each project on the other and on the surrounding community, including impacts of DISC to affordable housing and parks/open space to be developed as part of the Project. To this end, Developer, City, and the other DISC Partner Agencies – led by Caltrain as the rail corridor owner – intend to exercise good faith efforts to document the parameters of their collaboration and coordination efforts (anticipated by way of a subsequent memorandum of understanding or similar agreement). This documentation is expected to provide clarity regarding anticipated DISC right-of-way for the expanded Diridon Station, including a description of any property that may be reserved for a future transportation facility, to memorialize the conceptual elevated rail designs and preliminary DISC construction methodology, and to provide a conceptual 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).

Development Agreement section 4.2.2, subdivision (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 applicable federal and state 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.

Development Agreement section 4.2.2, subdivision (b), first paragraph:

It is further understood by the Parties that acquisition of any amount or portion of the Project Site beyond the Transit Project Buffer Zone ~~may 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) ~~may would~~ also diminish the value of the remaining portion of Project Site (the "Remainder"), and for the purposes of calculating an adjustment to Community Benefits as described in Paragraph (c) below, 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.

Development Agreement Section 4.2.2, subdivision (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 for the purposes of calculating an adjustment to Community Benefits as described in Paragraph (c) above, 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.

Development Agreement Section 4.2.2, subdivision (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 for the purposes of calculating an adjustment to Community Benefits as described in Paragraph (c) above, 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 for the purposes of calculating an adjustment to Community Benefits as described in Paragraph (c) above, 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.

Development Agreement, Exhibit E (Parkland Agreement), section 2, subdivision (A)(b):

DISC Partner Agencies have indicated an intention to effectively integrate the DISC with the surrounding community, including planned park uses. elevate the rail tracks and rail structure as part of DISC, providing new opportunities to connect to these concurrently planned parks to uses located to the west of the current rail alignment.

Development Agreement, Exhibit E (Parkland Agreement), section 2, subdivision (A)(e):

To maximize functional park space, the Los Gatos Creek Connector has been designed to eventually extend underneath an elevated rail structure, which may require an easement or other ownership structure to be agreed upon by City and other DISC Partner Agency(ies). During construction, City and Developer anticipate that the DISC Partner Agency(ies) would require a TCE within the Los Gatos Creek Connector.

Development Agreement, Exhibit E (Parkland Agreement), section 2, subdivision (A)(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 regarding any property that may be reserved for a future transportation facility.

Development Agreement, Exhibit E (Parkland Agreement), section 2, subdivision (B)(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 all applicable federal and state 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 acreage, multiplied by one hundred ninety-five dollars (\$195), subject to escalation based on the California Construction Cost Index.

If you have any questions, please do not hesitate to contact our office.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Ellis Raskin". The signature is fluid and cursive, with the first name "Ellis" and last name "Raskin" clearly distinguishable.

Ellis F. Raskin
Associate

EFR