

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: DW - Reimbursement Agreement  
**Date:** Tuesday, May 18, 2021 12:19:01 PM  
**Attachments:** [Draft Reimbursement Agreement \(PC 3-22-21\).docx](#)

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**From:** MWChan@perkinscoie.com <MWChan@perkinscoie.com>  
**Sent:** Monday, March 22, 2021 6:31 PM  
**To:** Phan, Johnny <Johnny.Phan@sanjoseca.gov>  
**Cc:** Gray, Matthew S. (Perkins Coie) <MGray@perkinscoie.com>  
**Subject:** DW - Reimbursement Agreement

[External Email]

Johnny,

Please find attached a draft of the form Reimbursement Agreement that is proposed to be attached to the Development Agreement. Please let us know if you have any questions, or if helpful to schedule time to discuss. Thanks,

Michelle

**Michelle Chan | Perkins Coie LLP**  
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**REIMBURSEMENT AGREEMENT  
BY AND BETWEEN  
THE CITY OF SAN JOSE AND GOOGLE LLC**

This REIMBURSEMENT AGREEMENT (“Agreement”) dated for reference purposes as of \_\_\_\_, 2021 is entered into 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.”

**RECITALS**

A. The Parties entered into a Development Agreement, dated [\_\_\_\_], 2021 (“Development Agreement”), for the Downtown West Mixed-Use Plan (“Project”) and approved by City Council by Ordinance No. [\_\_\_\_]. Capitalized terms used but not defined in this Agreement shall have the meanings for such terms set forth in the Development Agreement and other applicable Project Approvals and Project Documents.

B. The Project includes the development of: up to 7.3 million gross square feet (gsf) of commercial office space; up to 5,900 residential units; up to 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); up to 300 hotel rooms; up to 800 limited-term corporate accommodations; up to two event and conference centers totaling up to 100,000 gsf; up to 4,800 publicly accessible commercial parking spaces and up to 2,360 unbundled parking spaces for residential use; a potential "District Systems" approach to delivery of on-site utilities, including designated infrastructure zones with up to two (2) 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 and open space; and various other 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.

C. On May \_\_, 2021, City Council certified the Final Environmental Impact Report (“FEIR”) for the Project pursuant to the requirements of the California Environmental Quality Act (“CEQA”), together with CEQA findings (the "CEQA Findings"), the Mitigation Monitoring and Reporting Program ("MMRP"), and the Statement of Overriding Considerations.

D. The City also approved: (1) amendments to the General Plan by Resolution No. \_\_; (2) amendments to the Diridon Station Area Plan by Resolution No. \_\_; (3) an override of the Santa Clara County Airport Land Use Commission’s inconsistency determination by Resolution No. \_\_; (4) approval of the Development Agreement, including the Parkland Agreement, by Ordinance No. \_\_; (5) approval of the Downtown West Planned Development Zoning District (“Downtown West PD Zoning District”), including a General Development Plan (“GDP”) by Ordinance No. \_\_; (6) approval of the Downtown West Planned Development Permit (“Downtown West PD Permit”), which consists of the Downtown West Design Standards and Guidelines (“DWDSG”), Downtown West Improvement Standards (“DWIS”), Conceptual

Infrastructure Plan Sheets, and the Conformance Review Implementation Guide (“Implementation Guide”) by Resolution No. \_\_; (7) amendments to Title 20 of the City of San José Municipal Code by Ordinance No. \_\_; (8) conditionally approving a Vesting Tentative Map by Resolution No. \_\_; (9) conditionally amending the boundaries for Historic Landmarks (San José Water Company at 374 West Santa Clara Street, and Southern Pacific Depot Historic District) by Resolutions No. \_\_ and \_\_; (10) conditionally approving an amendment to Historic Preservation Permit (HP16-002) by Resolution No. \_\_; (11) conditionally approving a Major Encroachment Agreement by Resolution No. \_\_; and (12) conditionally approving the vacation of certain streets within the Project site by Resolution No. \_\_.

E. The design and development of the Project will be an iterative process that will occur in phases. The Project is located within the Downtown West Planned Development Zoning District (“Downtown West PD Zoning District”), which consists of approximately 79 acres of real property that 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 Bird Avenue), and Royal Avenue to the east; Auzerai Avenue to the south; and Diridon Station and the Caltrain rail tracks to the west.

F. The Downtown West PD Zoning District and the General Development Plan (“GDP”) authorizes and establishes the Downtown West PD Zoning District / Design Conformance Review (“Conformance Review”) process, a subsequent review process to confirm that the design and development of vertical improvements, open space, and horizontal improvements are consistent with the GDP, DWDSG, DWIS, and other applicable Project approvals and documents.

G. The Conformance Review process provides for expedited review timelines for Conformance Review Applications as further described in the Implementation Guide *[and the Parkland Agreement establishes the subsequent review process for City-Dedicated Open Space designs]*.

H. Implementation of the Project will also require other Subsequent Approvals, as defined in Section 1.109 of the Development Agreement, review and approval of City-Dedicated Open Space designs as set forth in the Parkland Agreement, and associated environmental review that may be required for subsequent discretionary actions to implement the Project.

I. Pursuant to Section 4.6.4 of the Development Agreement, the Parties agreed to enter into a reimbursement agreement pursuant to which the Project Sponsor shall reimburse the City for City Costs and Processing Fees incurred in performing work related to the processing of all Subsequent Approvals required to implement the Project, including but not limited to any further environmental review, Conformance Review Applications, City Dedicated Open Space designs, phased final subdivision maps, improvement plans, and grading and building permits, all on an expedited basis (“Reimbursable Work”).

J. The City and Project Sponsor have entered into this Agreement to provide the City with assurance of recovery of costs associated with Project implementation and to provide Google with assurance of efficient and expedited review and processing of Subsequent

Approvals, including as set forth in the Implementation Guide, to facilitate timely delivery of the Project and its associated community benefits. Project Sponsor

## AGREEMENT

In consideration of the foregoing recitals and for other good and valuable consideration, as the receipt and sufficiency of which is hereby acknowledged, the Parties hereby agree as follows:

1. Recitals. The recitals set forth above are true and correct and made a part of this Agreement.
2. Reimbursement Obligation. Google agrees to reimburse the City for City Costs and Processing Fees associated with City's performance of Reimbursable Work, provided that such Reimbursable Work shall be completed by the City on an expedited basis, including on timelines established by the Implementation Guide as applicable, and pursuant to the terms of this Agreement.
3. Consultants. The City may select and retain third-party professionals, consultants and attorneys ("Consultants") to perform Reimbursable Work. The City may allocate and reallocate from time to time, in its reasonable discretion, the specific tasks and services comprising such work between and among Consultants and City staff. City shall reasonably confer with Project Sponsor to ensure that Consultants are used in an efficient manner to limit Project Sponsor's expense and avoid redundancies. City shall use staff resources and outside Consultants in a cost-effective and business-like manner, including by maximizing full-time equivalent staff as described in Section 4 below. *[Note: Discuss whether appropriate to include provision to provide for engagement of Consultants under certain circumstances (e.g. anticipated busy period). It does not require the City to use Consultants but establishes requirements in the event the City does.]*
4. City Costs. "City Costs" shall have the meaning set forth in Section 1.18 of the Development Agreement, which for the avoidance of doubt, shall mean "the actual and reasonable third-party costs incurred by a City Agency in preparing, adopting or amending this [Development] Agreement, in performing its obligations or defending its actions under this [Development] Agreement, or otherwise contemplated by this [Development] 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." City Costs shall include the following:
  - 4.1 City's "Fully Loaded Costs" which shall mean salary and benefits for "Dedicated Staff," which shall mean [four (4)] full-time equivalent staffing corresponding to the following positions: (i) Department of Planning, Building and Code Enforcement (PBCE) Planner II, (ii) PBCE Planner IV, (iii) Department of Public Works (PW) Senior *[provide full title]*, and (iv) PW Junior Transportation Specialist. City and Project Sponsor acknowledge and agree that the full time equivalent "Dedicated Staff" identified in this Section 3.1 represent the Parties good

faith estimate of the staffing levels required to perform the Reimbursable Work based on the information available as of the Effective Date. The Parties agree to periodically review and adjust the Dedicated Staff staffing levels during the term of the Agreement pursuant to Section 10 below to ensure that appropriate levels of City resources are available to perform the Reimbursable Work. The Project Liaison (as defined in Section 10.5) would assist in coordinating between the City and Google as set forth in Section 10.5 below.

4.2 Actual costs of Consultants, if retained by the City to provide support to the City in the review and processing of Conformance Review Applications and other Subsequent Approvals.

4.3 Actual costs of City staff time, based on [standard salary rate], incurred in connection with the Reimbursable Work (that cannot reasonably be performed by Dedicated Staff), by City departments, including the Department of Planning, Building, Code and Enforcement, Department of Public Works, City Attorney, San José Fire Department, San José Police Department, Office of Cultural Affairs.

4.4 To the extent Processing Fees are charged by the City in connection with any application by Project Sponsor for a Subsequent Approval or any other Reimbursable Work, such one hundred percent (100%) of such Processing Fee shall be credited against Google's liability for reimbursement of City Costs pursuant to this Agreement.

5. Effective Date. This Agreement shall become effective upon the date this Agreement is fully executed by the Parties ("Effective Date").

6. Term. The term of this Agreement shall be coterminous with the term of the Development Agreement unless this Agreement is terminated earlier by the Parties pursuant to Section 13.

7. Schedule and Work Plan. A minimum of [thirty (30) days] prior to the commencement of each Budget Period, Google shall submit to the City a proposed schedule and work plan ("Work Plan") that identifies for the upcoming Budget Period Google's (i) anticipated schedule for the submission of Conformance Review Applications and other Subsequent Approval applications, (ii) the anticipated number of Conformance Review Applications and other Subsequent Approval applications, (iii) the 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.

8. Budget and Reporting.

8.1 Initial Budget. Google shall deliver to the City written notice identifying the date of commencement of this Agreement ("Commencement Date"). Google shall deliver the written notice a minimum of [ninety (90) days] prior to the identified Commencement Date. The initial budget period ("Initial Budget") shall commence on the Commencement Date. During the [ninety (90) day period] between Google's delivery of written notice and the Commencement

Date, the City and Developer shall meet and confer in good faith to establish the City's budget of estimated City Costs ("Budgeted City Costs") for the Initial Budget period.

8.2 Annual Budget. Each budget period "Budget Period" shall be from June 1 to May 31 of a particular year. At least sixty (60) days prior to the commencement of the next Budget Period, City shall provide a subsequent annual budget (each an "Annual Budget") to the Project Sponsor for its review and approval. The Project Sponsor shall review each Annual Budget and shall, within thirty (30) days of receipt, submit any comments on the Annual Budget to City. City shall reasonably consider such comments and shall reasonably adjust the Annual Budget in response to the Project Sponsor's comments. Where the Project Sponsor has submitted comments on the Annual Budget, City shall submit a revised Annual Budget that reflects the Project Sponsor's comments (or explains the City's responses to the Project Sponsor's comments) no less than fifteen (15) days prior to the commencement of the Budget Period. The City and Google shall reasonably cooperate in resolving any outstanding concerns regarding an Annual Budget. In the event the Project Sponsor has not approved the Annual Budget by [May 31] of each year, the City shall have the right to cease the Reimbursable Work.

8.3 Budget Augmentation. The Budgeted City Costs for any Budget Period may be increased from time to time with the written consent of Google, which shall not be unreasonably withheld, conditioned, or delayed, provided that before the Budgeted City Costs are increased: (1) the City shall have conferred with Google and furnished reasonable written justification for the increase; (2) City shall have provided all relevant Consultant invoices to Google on a reasonably timely basis; and (3) where the increase is attributable to a new or modified contract with a Consultant, the City shall have conferred with Project Sponsor as provided in Section 3. If Project Sponsor disapproves or fails to approve any requested augmentation of an Annual Budget for any Budget Period within sixty (60) days following City's request, or if Project Sponsor fails to increase the Deposit (as defined in Section 9) within thirty (30) days after approving such augmentation, the City shall have no obligation to continue processing the Reimbursable Work until such time as the requested augmentation to the Annual Budget has been approved and additional funds required to supplement the Deposit have been delivered.

8.4. Reporting. The City shall deliver quarterly cost variance reports ("Quarterly Report") to Google on [September 30, December 31, March 31, and May 31 of each Budget Period] that details City Costs incurred by the City and third-party professional in relation to the approved Budgeted City Costs for a particular year. The Quarterly Report should also detail the percentage of work that has been completed by the City's team and Consultants on the then-current scopes of work, and how much remains available for billing under the then-approved Annual Budget.

## 9. Deposit and Payment.

9.1 Initial Deposit. Within thirty (30) days after the Effective Date, Google shall deliver to the City a deposit in the amount of [\$\_\_\_/\_\_\_% of the Initial Budget] ("Initial Deposit") to be held by the City to ensure City has sufficient funds on hand at all times to secure payment of City Costs identified in the Initial Budget.

9.2 Subsequent Deposits. Provided the City has satisfied its obligations pursuant to Section 7.2 in connection with any Annual Budget, the Project Sponsor shall deposit, no less than five (5) days prior to commencement of the Budget Period, the Project Sponsor-approved amount of the Annual Budget for such Budget Period (“Deposit”). The Initial Deposit and any subsequent Deposits shall be held by the City [in a non-interest bearing account]. The Initial Deposit and subsequent Deposits is not a “source of income” within the meaning of the California Political Reform Act (California Government Code Section 87103.6).

10. Cooperation. The City agrees 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 Project Documents.

10.1 The City shall in an efficient manner to limit Project Sponsor’s expenses, avoid redundancies in the performance of Reimbursable Work, and endeavor to use staff resources in the most efficient manner possible.

10.2 City shall consider and shall reasonably accommodate the Project Sponsor’s recommendations when selecting Dedicated Staff.

10.3 The Project Sponsor may request, and City shall reasonably consider and implement, changes to Dedicated Staff where the Project Sponsor submits information demonstrating that Dedicated Staff has not acted on Subsequent Approval applications in an expeditious manner, had not reasonably considered applications for Subsequent Approvals, or otherwise has not advanced the parties’ shared goal of timely implementing the Project and delivery of its associated community benefits.

10.4 The Project Sponsor may request, and the City shall reasonably implement, any reduction in Dedicated Staff and/or Consultant time and expense in the event the Project Sponsor anticipates a slowdown in applications for Subsequent Approvals and/or development activity relating to the Project, provided that the Project Sponsor shall provide at least [3 months advance notice] of such reduction.

10.5 City Funded Liaison In recognition of the Project Sponsor’s significant investment in City staff and Consultant time, the City agrees that it shall engage, at the City’s sole cost and expense, a full-time dedicated liaison to the Project (“Project Liaison”) to assist in the review and approval of Subsequent Approvals and implementation of the Project. The Project Liaison shall be employed and funded by the City’s [*Office of Economic Development or City Manager’s Office*]. The Project Liaison shall schedule, agendize, and host weekly meetings among the City, Project Sponsor, and all Dedicated Staff and Consultants pursuant to this Agreement to ensure that (1) applications are being timely processed and approved, including as required by the Implementation Plan; (2) Reimbursable Work is being performed efficiently and expeditiously consistent with the requirements of this Agreement; (3) serve as a liaison between the Project Sponsor and City departments when reasonably requested by the Project Sponsor; (4) resolve disputes between the Project Sponsor and City departments in connection with the Conformance Review process and the review of other Subsequent Approvals; and (5) facilitate the referral of significant issues relating to the Conformance Review process and the review of other Subsequent Approvals to [\_\_\_\_\_].

11. Dispute Resolution. Any dispute between the Parties arising under the terms of this Agreement 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 pursuant to Section 12 below].

12. Default. Google shall be in default under this Agreement if it: (i) fails to timely fund or replenish the Deposit in accordance with Section 9.2 and does not cure such failure within sixty (60) days after service of written notice from City; or (ii) fails to perform any other obligation under this Agreement and does not cure such failure within sixty (60) days after service of written notice from the City.

13. Termination. This Agreement may only be terminated as follows:

13.1 Automatic Termination. This Agreement shall automatically terminate upon the termination of the Development Agreement. Following such termination, neither Party shall have any further rights or obligations herein, except for those provisions expressly identified to survive said termination.

13.2 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 in Section 12, the City may terminate this Agreement by written notice to Google specifying the date of termination which shall not be less than ten (10) days following the date of such notice. If City terminates this Agreement due to an uncured Google default, the City shall have no further obligation to process or continue processing the Reimbursable Work.

13.3 Termination by Google. Google may terminate this Agreement by written notice to City specifying the effective date of termination which shall not be less than ten (10) days following the date of such notice. In the event of such termination by Google, the City shall have no further obligation to process or continue processing the Reimbursable Work.

14. Amendment. This Agreement may be amended from time to time, in whole or in part, only by written amendment executed by the Parties.

15. Recordkeeping and Audits

15.1 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. City shall retain such Records for the period required by law, or, for records that are the subject of audit findings, until such audit findings have been resolved. The Records shall include official documentation evidencing the charges to support all costs.

15.2 No less than forty-eight (48) hours, prior notice by Project Sponsor to City, City shall make available to Project Sponsor for examination of all Records. City shall permit Project Sponsor to audit, examine, duplicate, and make excerpts or transcripts of the Records. If any audit reveals inaccuracies in billings or payments, the necessary adjustments to correct the inaccuracies shall be made.



15.3 Nothing in this Agreement shall be construed to require the City to provide Project Sponsor with documents or portions of documents that are privileged, attorney work product, or attorney-client privileged.

16. Notice. All notices to be given hereunder shall be in writing and shall be served, either personally or by mail, postage prepaid, to the addresses set forth below, or to any other address provided by one party to the other in writing.

City: City of San Jose  
Office of Economic Development  
200 E. Santa Clara Street, 17th Floor  
San Jose, CA 95113  
Attn:

Project Sponsor: Google LLC  
1600 Amphitheatre Parkway  
Mountain View, CA 94043

With a copy to: Perkins Coie LLP  
505 Howard Street, Suite 1000  
San Francisco, CA 94105  
Attn: Matthew Gray

The effective date of such written notice shall be the date of personal delivery or the date of receipt by certified mail or three (3) calendar days after mailing in the United States Mail.

17. Assignment. If Google assigns, or partially assigns, its rights, duties, obligations or interests to a third-party (“Assignee”) pursuant to the terms of the Development Agreement, Google may assign or partially assign its obligations under this Agreement to an Assignee as it relates to the Assignee’s implementation of the Project. Within [thirty (30) days] of providing the City with an Assignment and Assumption Agreement as set forth under Section 12 of the Development Agreement, the Assignee shall prepare and submit to the City an anticipated Work Plan that identifies the Assignee’s (i) anticipated schedule for the submission of Conformance Review Applications and other Subsequent Approval applications, (ii) the anticipated number of Conformance Review Applications and other Subsequent Approval applications, (iii) the 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 the Assignee’s implementation of the Project. Within [fourteen (14) days] of providing the City with the Assignee’s Work Plan, the City shall provide the Assignee with a proposed budget for its review and approval of the estimated amount of City Costs in connection with performing Reimbursable Work as it relates to the Assignee. Assignee shall review and approve the City’s proposed budget pursuant to the timeframes and process set

forth in Section 8.2 and deposit the Assignee-approved amount of the budget pursuant to Section 9.2. The Assignee shall be responsible for timely funding applicable Reimbursable Work relating to such Assignee's Work Plan and replenishing the Deposit associated therewith in accordance with the terms of this Agreement. Google's obligations to reimburse for the Reimbursable Work shall be reduced commensurate with the amount of any Assignee's Annual Budget for such Assignee's Work Plan. The City shall also take all reasonable steps, including processing of amendments to this Agreement, to reflect the assignment of various reimbursement obligations pursuant to this Section.

18. Entire Agreement. This Agreement contains the entire understanding between the parties with respect to the subject matter herein. This Agreement supersedes any and all prior representations, agreements, arrangements, or understandings (whether oral or written) between or among the parties relating to the subject matter of this Agreement.

19. Waiver. The parties agree that waiver by either party of any breach of one or more of the terms, covenants or conditions under this Agreement or any default in the performance of any obligations under this Agreement shall not be construed as waiver by that party of any other term, covenant, condition, or obligation; nor shall a waiver of any incident of breach or default constitute a continuing waiver of same.

20. Applicable Law and Venue. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either party to enforce or interpret the terms of this Agreement, 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 Jose, California.

21. No Third-Party Beneficiaries. This Agreement shall not be construed as, or deemed to be an Agreement for the benefit of, any third party or parties; and no third party or parties shall have any right or action hereunder for any cause whatsoever.

22. No Joint Venture. Neither this Agreement, nor the reimbursements made hereunder, shall constitute or create any form of association, joint venture, partnership, or cooperative activity of any nature whatsoever for any purpose between City and Google.

23. Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the Parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, either City or Project Sponsor may (in their sole and absolute discretion) terminate this Agreement according to the provisions of Section 13.