

From: [Colli, Garrett J. \(Perkins Coie\)](#)
To: [Hill, Egan](#)
Subject: RE: Downtown West Encroachment Permit
Date: Wednesday, February 17, 2021 2:03:06 PM
Attachments: [1785972_2.docx](#)

[External Email]

Thanks, Egan. I believe there's a meeting between our respective clients tomorrow. Google was hoping to discuss any key encroachment-related issues at that time. If you have even a few minutes at the end of the day today (any time after 5:00 p.m.) it might be helpful for us to connect in advance of tomorrow's meeting, but I understand if you can't swing it.

If nothing else, would you mind confirming (even with a quick e-mail) that the attached ("Council Authorization - Proposed Terms and Conditions") would be part of the legislation approving the Encroachment Agreement?

Thanks,

Garrett Colli | Perkins Coie LLP

PARTNER
505 Howard Street Suite 1000
San Francisco, CA 94105
D. +1.415.344.7160
F. +1.415.344.7260
E. GColli@perkinscoie.com

From: Hill, Egan <Egan.Hill@sanjoseca.gov>
Sent: Wednesday, February 17, 2021 1:53 PM
To: Colli, Garrett J. (SFO) <GColli@perkinscoie.com>
Subject: RE: Downtown West Encroachment Permit

Hi Garrett,

Unfortunately, I am not. But I am available tomorrow 11:30a-4:30p and Friday 11:30a-2p.

Thanks.

From: Colli, Garrett J. (Perkins Coie) <GColli@perkinscoie.com>
Sent: Wednesday, February 17, 2021 1:40 PM
To: Hill, Egan <Egan.Hill@sanjoseca.gov>
Subject: Downtown West Encroachment Permit

[External Email]

Hi Egan,

Any chance you're available to discuss the City's comments between 2:00 – 3:30 p.m. today?

Thanks,

Garrett Colli | Perkins Coie LLP

PARTNER

505 Howard Street Suite 1000

San Francisco, CA 94105

D. +1.415.344.7160

F. +1.415.344.7260

E. GColli@perkinscoie.com

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Council Authorization – Proposed Terms and Conditions

- A. The Major Encroachment shall be operated only for utility infrastructure purposes to act as a corridor for utility systems serving the Permittee's real property. Utility infrastructure purposes includes routine maintenance and repair of the utility infrastructure contained therein consistent with the Major Encroachment Agreement. The Major Encroachment may not be used for any other purpose without City Council's prior consent.
- B. As a condition precedent to the issuance of each Permit, the Permittee shall provide the City with a maintenance and removal bond in a form approved by the City Attorney in an amount equal to the estimated cost to remove the portion of the Utilidor covered by the Permit and restore the public property in accordance with the Major Encroachment Agreement.
- C. Each Permit shall be conditioned on the Utilidor improvements and all of the real property served by the Utilidor being under common ownership (including corporate affiliates of such common owner). A subsequent sale or transfer of any property individually to a third party shall constitute a basis for the City to terminate the Permit unless the City pre-approves a transfer of the Permit to such separate owner(s). If the City approves a transfer to the separate owner(s), the City may require a revised Permit as a condition of its approval.
- D. Each portion of the Utilidor crossing dedicated public property shall be issued its own Permit. The Permit for each portion of the Utilidor shall be recorded on all real properties served by the Utilidor.
- E. The Director shall issue Permits in compliance with the following:
 - 1. Procedure for Permit Issuance.
 - i. Pre-Application Procedure. Prior to the submittal of any Application (as defined below) and concurrent with the

Commented [A1]: DISCUSS COUNCIL AUTHORIZATION PROCESS
Issues:
1. Approval Criteria: 13.37.400.B.
2. Conditions of Approval: 13.37.410.C.

Commented [A2]: DISCUSS USES AUTHORIZED BY THE CITY

Commented [A3]: DISCUSS MAINTENANCE/REMOVAL SECURITY

Commented [A4]: DISCUSS PERMIT ISSUANCE PROCESS

Commented [A5]: DISCUSS NECESSITY FOR PRE-APPLICATION PROCESS

submittal of preliminary tract improvement plans as required by the City prior to City's approval of phased final maps and final tract improvement plans, Permittee shall submit a preliminary draft location map, plan view, and elevation showing the dimensions and location of the proposed encroachment and its relationship to adjoining properties, Public Property, and any structures, utilities or improvements and any additional information requested by the Director (collectively "Preliminary Application Materials") to the Director for review and comment. Permittee shall submit Preliminary Application Materials developed at each of the thirty-five percent (35%), sixty-five percent (65%) and ninety-five percent (95%) levels. For each submittal, the Director will review the Preliminary Application Materials for consistency with the Master Encroachment Diagram and the preliminary tract improvement plans under concurrent review by the Director. The Director will provide comments on the Preliminary Application Materials in accordance with the Public Works Standard Review Timelines.

- ii. **Application Procedure.** Permittee shall submit a letter to the Director to commence the process for issuance of each Encroachment Permit authorized under this Agreement ("Application"). Such Application shall include the following information: (i) a detailed written description of the nature of the proposed encroachment; (ii) a showing that the proposed Encroachment is consistent with the Master Encroachment Diagram, showing in detail any deviations from the Master Encroachment Diagram; (iii) confirmation that the

Commented [A6]: DISCUSS TIMING OF APPLICATION MATERIALS

Per Ch. 13.37, these materials must be submitted at the time of Council's Authorization. Understanding that they may not be available at that time, discuss what will be provided at the time of Council's Authorization.

For example, evidence that Permittee will have the ability to construct, maintain, repair and remove the Encroachment must be provided at the time of Council's Authorization.

Commented [A7]: DISCUSS APPLICATION PROCESS

encroachment concerns an area that is within an area subject to an approved final map or parcel map or for which there is a pending application for such a map; (iv) consistency with previously-approved or pending tract improvement plans; (v) a location map, plan view, and elevations showing the dimensions and exact location of the proposed Encroachment and its relationship to adjoining properties, Public Property and any structures, utilities or other improvements, each at one-hundred percent (100%) design level; and (vi) evidence of consent of any public agencies, utilities, and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment. In addition to the foregoing information, the Permittee shall provide additional information requested by the Director in connection with the Director's review of the Application. The Application shall be accompanied by the Permittee's payment of applicable fees.

- iii. Director's Review. Upon the Director's determination of the Application's completeness, the Director shall review the Application and shall either approve, conditionally approve or deny such Application. The Director shall approve an Application for an Encroachment Permit that meets all conditions of the "Encroachment Permit Checklist" attached hereto as Exhibit A.
- iv. Conditional Approval. The Director shall conditionally approve any Application for an Encroachment Permit where the Director determines that a condition should be imposed to ensure satisfaction of any provision of the Encroachment Permit Checklist or the Encroachment

Commented [A8]: DISCUSS TIMING OF PAYMENTS

Commented [A9]: DISCUSS CONTENTS OF PERMIT CHECKLIST

Agreement or as required to protect the public health, safety or welfare. If the Director conditionally approves a Permit, the Permittee may within thirty (30) days of receipt of any conditional approval appeal the condition(s) to the City Council. The Permittee's failure to so appeal shall render the condition final and non-appealable. The City Council's determination on appeal shall be final.

- v. Denial and Appeals. If the Director determines the conditions of the Encroachment Permit Checklist are not met, the Director shall deny the Application in writing, which writing shall include a description of the reasons for which the Application is denied. Permittee may within thirty (30) days of receipt of such denial appeal the Director's decision to the City Council. The Permittee's failure to so appeal shall render the condition final and non-appealable. The City Council's determination on appeal shall be final.
- vi. Alternative Procedures. The procedures for issuance of Encroachment Permits by the Director provided under this Agreement shall not be interpreted to prevent the Permittee, at its election, from pursuing an Encroachment Permit under the procedures set forth in Title 13 of the San José Municipal Code.

- F. The term of this Authorization shall correspond to the term of the Development Agreement; provided, however, that this Authorization is conditional upon the Permittee's proposed locations for the Utilidor being available at the time the Permittee obtains a Permit for each portion of the Utilidor. If the proposed location conflicts with existing improvements or infrastructure, the Permittee shall be required at its cost to either: (1) negotiate with the owner of the improvements or

Commented [A10]: DISCUSS ALTERNATIVE PROCEDURE

What differences does Google see between the foregoing process and the process contained in Ch. 13.37?

infrastructure that conflict with the proposed Utilidor location to resolve the conflict, or (2) re-apply to the City Council to amend the Master Encroachment Diagram to allow an alternative location for that portion of the Utilidor.