

**From:** [Hill, Egan](#)  
**To:** [Colli, Garrett J. \(Perkins Coie\)](#)  
**Cc:** [Phan, Johnny](#); [Cano, Matt](#); [Guevara, J](#); [Do, Ryan](#)  
**Subject:** City Drafts of Encroachment Documents  
**Date:** Friday, March 19, 2021 2:42:00 PM  
**Attachments:** [Council Authorization \[Clean 3.19.21\].docx](#)  
[Council Authorization \[CAO Redline 3.19.21\].docx](#)  
[Permit Checklist \[Clean 3.19.21\].docx](#)  
[Permit Checklist \[CAO Redline 3.19.21\].docx](#)  
[Encroachment Agmt \[Clean 3.19.21\].docx](#)  
[Encroachment Agmt \[CAO Redline 3.19.21\].docx](#)  
[DWIS & DWIP Amendment Process \[CAO Redline 3.19.21\].docx](#)

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Hi Garrett,

As discussed yesterday, attached are the City's clean copies and redlines (against Google's prior drafts) of the: (1) Encroachment Agreement, (2) Council Authorization, and (3) Encroachment Permit Checklist. Also attached are the City's proposed revisions to the amendment processes for the DWIS and DWIP (please note these may have been made to an older version of the document, but I believe these sections are substantially similar to the current drafts). As I mentioned during our call, the City proposes to use the DWIP and Plan Sheets instead of the Encroachment Diagram to determine what City Council is authorizing and what standard of review applies to proposed changes to the encroachments and public infrastructure after the Council approval date.

Please let me know if you would like to discuss.

Have a nice weekend.

**Egan Hill**

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## **DWIS**

### **1.4. Ancillary Documents Providing Standards**

These Downtown West Improvement Standards refer to certain ancillary documents to provide standards for horizontal improvements. Such ancillary documents are typically referred to herein by the name of the preparing agency, the name of the document, and the year the document was approved or most recently amended (e.g., “CalTrans Specification (2018)”). It is anticipated that these ancillary documents may be amended or superseded in the future by the agencies responsible for their preparation and approval. In the event that any standard from an ancillary document referenced herein is amended or superseded, the project applicant may submit a request for relief to the City pursuant to Section 1.5 of the DWIS.

### **1.5. Future Modifications to DWIS, 1992 Specifications, or Ancillary Documents**

The project sponsor may submit a written request for relief from:

- (a) The 1992 Specifications (as incorporated by reference in the DWIS) that have not been superseded or modified by the DWIS;
- (b) An existing standard in an ancillary document referenced in the DWIS;
- (c) Application of a future modification of a standard in an ancillary document referenced in the DWIS as applied to Downtown West; or
- (d) An existing DWIS standard (collectively, “DWIS Modification”).

Requests for a DWIS Modification shall be submitted to, and approved by, the Public Works Director for public improvements or privately-owned improvements on public property, or the Planning Director with respect to privately-owned improvements on private property, provided that the proposed relief: (1) is consistent with sound engineering practices, as may be evidenced by reference to industry standards; (2) would not have a material adverse effect on public or private property, utilities or improvements and (23) if applied, would not result in horizontal improvements that present a substantial-material risk to public health and safety.

The project sponsor may request for a DWIS Modification on an individual basis as applied to an Improvement Plan or similar application, or as a permanent modification to the DWIS. A DWIS Modification pursuant to this Section 1.5 does not require an amendment to the Downtown West PD Permit. Any approved DWIS Modification will be memorialized in an updated version of the DWIS to be retained on file by the City.

## **INFRASTRUCTURE PLAN**

**Infrastructure Plan.** The Downtown West Infrastructure Plan describes the horizontal improvements to be constructed as part of Downtown West. The Infrastructure Plan, *[which is an exhibit to the Development Agreement]*, works in tandem with the DWIS, and DWDSG, to set forth the City’s and project sponsor’s responsibilities relating to the design and construction of the horizontal improvements.

The Horizontal Review Process is set forth in the [Downtown West Planned Development Zoning Ordinance / DA / Infrastructure Plan] and establishes the submission and review criteria

for 35%, 65% and 95% Improvement Plans (“Preliminary Improvement Plans”) by the Director of Public Works and applicable City agencies. Prior to the submission of the Preliminary Improvement Plans, the project sponsor has the option to submit Preliminary Concept Documents that would provide sufficient information to convey intent in advance of commencing improvement drawings and to seek feedback from Public Works.

As street and infrastructure improvement plans progress from 35%, 65% to 95% Plans, minor deviations will may be reflected in the Plans, examples may include but are not limited to the following:

- location of the ~~utilidor-District Systems infrastructure~~ within a private property ~~and within ROW in designated street~~ as defined in concept infrastructure planned sheets ;
- resizing or pipe material changes for private utilities within the utilidor;
- location and size of utilidor access vaults;
- extent of temporary improvements required;
- location of utility manholes, valves, laterals and related appurtenances;
- specified equipment within the water reuse facility provided that the functional intent of each individual system does not change;
- relocation or resizing of public utilities within the public right-of-way, location or sizing of franchise utilities within the public right-of-way, ~~or location of a utilidor crossing of the public right-of-way~~, provided that any mitigation proposed by the Developer (including relocation of City Utilities at the Developer’s cost) meets all applicable standards and codes;
- extension of utilities beyond the limits shown within the Infrastructure Plan;
- the location of stormwater treatment facilities within the ROW, provided that it meets all the minimum requirements of the Green Stormwater Infrastructure (GSI) Plan.

Minor deviations are permitted by the permitting agency provided the deviation will not affect the overall system, its configuration and performance, is otherwise compatible with the intent of the Infrastructure Plan, will not have a material adverse effect on public or private property, utilities or improvements, and does not otherwise qualify for treatment as a Non-Material Amendment or Material Amendment as set forth in Section \_\_\_\_.

## Section \_\_\_\_: Amendments to the Infrastructure Plan

The project sponsor may request (1) Non-Material Amendments, and (2) Material Amendments from the Infrastructure Plan, including the Infrastructure Plan Sheets. The table below details the review process for Non-Material and Material Amendments.

Type of Relief	Standard of Review	Decision Maker
<b>Non-Material Amendment:</b> The project applicant may request a Non-Material Amendment <del>from to</del> the Infrastructure Plan. <u>A Non-Material Amendment is a change to the Infrastructure Plan that is within the scope of the Infrastructure Plan and does not represent a material</u>	The project applicant may submit a request for a Non-Material Amendments as part of the Improvement Plan Review process.  The Public Works Director shall approve a Non-Material Amendment if the following criteria are met:	The Public Works Director is responsible for reviewing and approving a requested Non-Material Amendment. The Public Works Director shall circulate the requested Non-Material Amendment to applicable City agencies for review. Where a requested Non-Material Amendment

<p><u>deviation from its terms or of the drawings contained in the Infrastructure Plan Sheets.</u></p> <p>Any amendment that is not considered <u>by both the City and project applicant to be</u> a Material Amendment, defined below, or deviation shall be processed as a Non-Material Amendment.</p> <p><u>A-Non-Material Amendments</u> may include <u>such topics as but is not limited to</u>: routing of public utilities within private parcels; public utility distribution / collection adjustments (i.e. altering the drainage watershed of the storm drain system, rerouting a building to a different sewershed, <del>rerouting of utilidor to alternative street</del>, location of retaining walls within the public ROW); addition of public utility easements.</p>	<ul style="list-style-type: none"> <li>• The DWIS &amp; applicable federal and state standards are met;</li> <li>• The Non-Material Amendment will be in accordance with all <u>applicable appropriate</u> public health or safety standards;</li> <li>• <u>The Non-Material Amendment will not result in a new or more significant environmental impact than previously analyzed under the Downtown West Final Environmental Impact Report.</u></li> <li>• <u>The Non-Material Amendment will not have a material adverse effect on public or private property, utilities or improvements.</u></li> </ul> <p>Any approved <del>N</del>on-Material Amendments will be memorialized in an updated version of the Infrastructure Plan to be retained on file by the City.</p>	<p>involves improvements within private property, the Public Works Director shall review the request in consultation with the Director of PBCE.</p> <p><u>If the City and project applicant cannot agree on whether a requested amendment is Non-Material or Material, the project applicant may appeal the decision of the Public Works Director or Planning Director, as applicable, to the City Council.</u></p>
<p><b>Material Amendment:</b> The following shall constitute a Material Amendment:</p> <ol style="list-style-type: none"> <li>1. A change in the service intent of one or more proposed utility systems (collection or distribution) beyond the alternatives listed within the IP;</li> </ol> <p style="text-align: center;">OR</p> <ol style="list-style-type: none"> <li>2. A <u>significant-material</u> change in the required</li> </ol>	<p>The Director of Public Works, or City Council, as applicable, may approve a Material Amendment provided all of the following findings are made:</p> <ol style="list-style-type: none"> <li>1. The Infrastructure Plan, as amended, is consistent with and furthers the policies of the General Plan (as vested under the DA);</li> </ol>	<p>If the requested Material Amendment, can be approved in reliance on the Downtown West Final EIR, an Addendum to the EIR, or a Supplemental or Subsequent EIR that does not identify any new or substantially more severe significant environmental effects, following mitigation, than the original EIR, the Director of Public Works is responsible for reviewing and approving a requested</p>

<p>flood protection strategy beyond the alternatives listed within the IP;</p> <p>OR</p> <p><del>3. Addition of utilidor crossings within the ROW beyond what was previously submitted in the Major Encroachment Agreement.</del></p> <p><u>3. Any other change that is not within the scope of, and/or is a material deviation from, the terms of the Infrastructure Plan Sheets or the drawings shown in the Infrastructure Plan Sheets.</u></p>	<p>2. The Infrastructure Plan, as amended, conforms in all respects to the PD Zoning District;</p> <p>3. The Material Amendment will not <u>have a</u> materially <del>and adversely affect</del> <u>existing on public or private property, utilities or</u> improvements <del>or third-party private</del> improvements;</p> <p>Any Material Amendments will be memorialized in an updated version of the Infrastructure Plan to be retained on file by the City.</p>	<p>Material Amendment. The Public Works Director shall circulate the requested Material Amendment to applicable City agencies for review. Where a requested Material Amendment involves improvements within private property, the Public Works Director shall review the request in consultation with the Director of PBCE.</p> <p>City Council (following a recommendation from Planning Commission) if a Supplemental or Subsequent EIR is required and identifies one or more new or substantially more severe significant effects, following mitigation, than the original EIR.</p>
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**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

City of San José  
Department of Public Works  
200 E. Santa Clara St., 5th Floor  
Attention: Director of Public Works  
File No.:

RECORDED WITHOUT FEE  
PER GOVERNMENT CODE  
SECTIONS 6103 AND 27383

SPACE ABOVE RESERVED FOR RECORDER'S USE

**ENCROACHMENT AGREEMENT**  
**ENCROACHMENT AGREEMENT**

**BETWEEN**  
**THE CITY OF SAN JOSE**  
**AND**  
**GOOGLE LLC**

**GOOGLE LLC**

This Encroachment Agreement ("Agreement") is made and entered into by and between the City of San José, a municipal corporation of the State of California ("City") and ~~Google LLC, a Delaware limited liability company~~ Google LLC, a Delaware limited liability company and its successors in interest ("Permittee"), as of ~~DATEDATE~~ ("Effective Date").

**RECITALS**

**WHEREAS**, the Permittee is the owner of certain real property in the City of San José, County of Santa Clara, State of California, described as ~~DESCRIPTION~~ DESCRIPTION ("Property") which is more particularly described in Exhibit A attached hereto and incorporated herein by reference; and

**WHEREAS**, the Property is bounded by or subject to those certain public rights-of-way or other

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public easements owned or controlled by the City that have been expressly or impliedly dedicated to the public, commonly known as ~~PUBLIC PROPERTY NAME~~PUBLIC PROPERTY NAME (“Public Property”); and

~~WHEREAS, the City Council has approved the Downtown West Mixed Use Plan (“Project”), including the Development Agreement by and between the City and Permittee Relative to the Development of Property Located in the Downtown Station Area, approved by Ordinance No. \_\_\_\_\_ and dated \_\_\_\_\_ for reference purposes (“Development Agreement”); amendments to the City’s General Plan; Planned Development Rezoning; a General Development Plan; a Planned Development Permit, including adoption of Downtown West Design Standards and Guidelines; and related entitlements from the City (collectively the “Project Approvals”); and~~

~~WHEREAS, the City Council has further approved a Vesting Tentative Map for the Project subject to conditions of approval that contemplate the potential delivery of utility services within the Project area from privately owned district utility systems (“District Systems”), and which will be subject to “District Systems Transactional Documents” both as defined in as described in Resolution No. [ \_\_\_\_\_];~~

WHEREAS, the Permittee has requested that the City authorize the Permittee to design, construct, maintain, repair, occupy and use ~~a sub-grade utility corridor structure to house District Systems and to allow~~subsurface utility infrastructure for ~~access and maintenance consistent with the Authorization~~purpose of operating a private district utility system for the Property as described in the Infrastructure Plan (as defined below) (“Encroachment”), which is intended to reside within portions of ~~PUBLIC PROPERTY NAME~~PUBLIC PROPERTY NAME (the “Subject Premises”), as more particularly described in Exhibit A attached hereto and incorporated herein by reference and as set forth in the Plans (as defined below); and

~~WHEREAS, the City Council has approved the Downtown West Mixed-Use Plan, including the Development Agreement by and between the City and Permittee Relative to the Development of Property Located in the Downtown Station Area, approved by Ordinance No. \_\_\_\_\_ and dated \_\_\_\_\_ for reference purposes, a Planned Development Permit, including adoption of Downtown West Design Standards and Guidelines and the Downtown West Infrastructure Plan and Plan~~

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Sheets (collectively "Infrastructure Plan") and related entitlements from the City; and

**WHEREAS**, the City's Director of Public Works has approved plans and specifications for the design and construction of the Encroachment, which are on file with the City and are incorporated herein by reference, subject to the additional conditions and terms contained in that approval (collectively, "Plans"); and

**WHEREAS**, the ~~City Council adopted a resolution authorizing~~City Council adopted a resolution authorizing the Encroachment, subject to the conditions set forth therein, a true copy of which is attached hereto as Exhibit B and incorporated herein by reference ("Authorization"); and

**WHEREAS**, this Agreement, including the Plans and any conditions contained therein, and the Authorization together constitute a revocable permit from the City allowing the Permittee to maintain the Encroachment, subject to the terms and conditions set forth therein (collectively "Permit");

**NOW, THEREFORE**, in consideration of the City's granting revocable permission for the Encroachment, and subject to all of the terms, conditions and restrictions set forth in this Agreement and the Authorization, the City and Permittee, for itself and all successive owners of the Property, intending to be bound thereby for the benefit of the Public Property, do hereby agree as follows:

1. Incorporation of Recitals. The recitals are true and correct and are incorporated herein as if repeated in their entirety.
2. Revocable License. ~~Subject to Section 5 below, the~~The Encroachment shall be allowed only as a revocable license, and the City shall not be estopped from ordering removal of the Encroachment or demanding compliance with any of Permittee's obligations under the Permit. The Permit shall not be construed to create any property right in the Subject Premises that the Permittee did not possess prior to receiving the Permit. The Permit shall have no value in any proceeding greater than the Permittee's cost to obtain the Permit. The Permittee shall be solely responsible for all costs of complying with its

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obligations under the Permit.

3. Term of Permit and Agreement. The term of the Permit shall commence upon the Effective Date and continue for the life of the Encroachment, except if earlier revoked or terminated by the City pursuant to this Agreement. The term of this Agreement shall commence upon the Effective Date and expire upon the City's recordation of a notice of acceptance in accordance with Section 7.
4. Conformance with Permit. The Permittee acknowledges and agrees that the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment shall be in strict conformance with the Plans and the Permit. The Permit has been granted upon each and every condition contained therein and shall be strictly construed against the Permittee. The City grants the Permittee no rights that are not explicitly written in the Permit. The enumeration of the City's rights in the Permit shall not be considered exclusive or as limiting the rights generally reserved to the City under applicable law. Each of the obligations and conditions in the Permit is a material and essential condition to the granting of the Permit.
5. Revocation. The City Council may revoke any Permit issued under the Authorization if: (i) the City or a regional, County, State or Federal governmental agency determines to use the Subject Premises for a public purpose; (ii) the City ~~reasonably~~ determines that the Encroachment constitutes a public nuisance under state or federal law; or (iii) the Encroachment is declared unlawful under state or federal law by a court of competent jurisdiction. The City's revocation shall be effective one hundred eighty (180) days after the City Council's adoption of a resolution revoking the Permit, except if the City Council should provide a longer period of time in its resolution of revocation. For purposes of the Permit, the following shall not constitute a "public purpose" that would merit revocation of the Permit: (1) subsequent encroachments proposed by private property development projects, whether below, at or above-grade; (2) at-grade street projects such as light-rail transit infrastructure or street realignment, repaving or regrading; or (3) subsequent private ~~or quasi-public~~ subsurface utility infrastructure. If the City determines to use the Subject Premises for a ~~public purpose~~ City project, the City will give the Permittee at

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least one (1) calendar year advance written notice of any proposed City Council action, including any action to revoke the Authorization, that would require any material modification to, or removal in whole or in part of, the Encroachment ("Notice of Public Purpose"). The Notice of Public Purpose will specify, to the extent this information is available to the City at the time of the notice, the nature of the proposed public purpose and the anticipated nature of the conflict with the Encroachment. During this 1-year notice period, upon written request of the Permittee, the Director of Public Works or a designee will meet and confer with the Permittee regarding the proposed action and to evaluate the provision of interim and alternative permanent service and the re-routing of the Encroachment in an effort to ensure continuity of services provided by the ~~District Systems to residents and businesses both during and after the removal of the Encroachment. Without limitation of the foregoing, the City shall, upon Permittee's written request, evaluate alternative routing of District Systems and the delivery of associated services in the relevant environmental analyses prepared for the project proposing an alternative public use of the Subject Premises. If this Permit is revoked due to a conflict under this Section 5, Permittee may request an amendment to the Encroachment Diagram (as described in the Authorization) and issuance of a new Permit subject to the terms of this Agreement to accommodate the rerouted utility corridor and District Systems. The City Council will promptly consider any such request in its independent discretion pursuant to Title 13.37.400 (as it may be amended from time to time) and subject to compliance with the California Environmental Quality Act (Cal. Pub. Resources Code Section 21000 et seq.). In addition~~ district utility system to residents and businesses both during and after the removal of the Encroachment ("Meet and Confer"). In addition, upon written request of the Permittee, not to exceed one meeting every twelve (12) months, the Director of Public Works or a designee will meet with the Permittee to discuss any City public works projects planned or under consideration or construction that may impact the Encroachment ~~in Q1 and Q3, every calendar year during the term of this Agreement.~~ The foregoing Notice of Public Purpose and Meet and Confer obligations shall not apply to any City actions that only plan or consider public uses of the Subject Premises nor shall they apply to actions or plans by any governmental entities other than the City.

6. Termination. The City may terminate the Permit in the event of a Default under this Agreement. The termination shall be effective immediately upon the City's written notice to the Permittee.
7. Removal and Restoration. After revocation or termination of the Permit ~~for any reason, and assuming that alternative routing of District Systems has been established where required pursuant to Section 5,~~ the Permittee shall remove the Encroachment and restore the Subject Premises to a condition that is safely usable by the City and public, in compliance with City standards and specifications, and ~~reasonably~~ satisfactory to the City's Director of Public Works, all without liability or expense to the City. Prior to commencing any removal or restoration work, the Permittee shall submit to the City plans for the removal and restoration work, which shall be subject to the City's approval. All removal and restoration work shall be performed under the City's direction. The Permittee shall commence removal and restoration within thirty (30) days after the City's approval of the plans and shall complete removal and restoration within one hundred eighty (180) days, or such longer period of time as ~~reasonably~~ determined by the Director of Public Works, after the City's approval of the removal and restoration plans. The Permittee's obligations under this section shall not be deemed to have been satisfied until the City records a notice on the Property accepting the Permittee's removal and restoration work, ~~which.~~ The City shall record the notice ~~shall be recorded of acceptance~~ within ten (10) days of the Director's confirmation that the work has been completed. If the Permit has been terminated, the Permittee shall have no opportunity to cure any failure to comply with the foregoing removal and restoration requirements.
8. Default. Permittee shall be in default under the Permit if it breaches or fails to timely observe and perform any obligation under the Permit and fails to timely cure such breach or failure in accordance with this Agreement ("Default"). For the avoidance of doubt, a Default under the Permit shall not thereby automatically be considered a Default under any other encroachment permit issued to Permittee ~~under~~ pursuant to the Authorization or otherwise. The Director of Public Works shall notify the Permittee in writing of any breach or failure to perform. Except where a different time period is provided in this Agreement for a particular obligation, the Permittee shall, within thirty

(30) days of the Director of Public Works' notice, commence, diligently proceed using best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. If the Director of Public Works determines in writing that such breach or failure to perform is incapable of cure within thirty (30) days, the Director shall specify in writing the number of days in which Permittee shall complete its cure, and Permittee shall continue to diligently proceed to cure using its best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. Cure periods in excess of ~~two-one~~ hundred ~~seventy days (270)~~ eighty (180) days from the date of the Director's notice shall require City Council approval. The foregoing cure periods shall exclude time required for the City to review and approve any required City permit or authorization necessary to cure the Default. If the Permittee does not cure the breach or failure to perform to the City's satisfaction within the foregoing cure periods, the Permittee shall be in Default, and the Permittee hereby grants to the City any consent or right necessary for the City to remedy the Default. The Permittee shall be responsible for all of the City's costs to remedy the Default and shall reimburse the City for its costs within sixty (60) days of the City's invoice therefore. ~~The calculation of any time period for cure hereunder shall exclude any time required for the City to review and approve any required City permit or authorization necessary to cure the Default.~~ In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled to specific performance of Permittee's obligations under this Agreement and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.

9. Maintenance and Repair of Encroachment. The Permittee shall maintain and repair the Encroachment to the City's ~~reasonable~~ satisfaction so that it is in a safe condition and good working order for the intended purpose and in a similar condition to that which was originally constructed, except where a higher standard ~~for a utility corridor~~ is required by applicable law. All replacements, restorations and repairs shall be at least equal in quality to the original, except that such replacements, restorations, and repairs shall comply with all requirements of applicable law and City standards and specifications in effect at the time of the replacement, restoration or repair ~~for a utility corridor structure.~~ ~~To the extent that excavation within the Public Property is required for purposes of~~

~~maintaining or repairing the Encroachment, Permittee shall backfill the excavation and restore the Public Property to the condition existing prior to the excavation and subject to the terms of any associated Right-of-Way Work Permit as described in Section 12.~~ The City also shall have the right, but not the obligation, to stop or direct maintenance or repairs of the Encroachment to protect the public health or safety. Additional maintenance and repair requirements are set forth in Exhibit C attached hereto and incorporated herein by reference. For the avoidance of doubt, this Agreement does not obligate the Permittee to perform routine maintenance and repair of the Public Property.

10. City's Right to Enter and Cure. Notwithstanding anything to the contrary in this Agreement, the City may repair or remove the Encroachment at the Permittee's expense if the City determines that it represents a dangerous condition or threat of danger to life or property. The Permittee shall make any necessary modifications or repairs within ten (10) days after the City's written notice, or such longer period as specified in the City's written notice, except that in cases of emergency as determined by the City, the City shall only be required to provide Permittee with one (1) day telephone ~~notice in addition to an~~ email notice ~~notifying the same in accordance with Section 22 herein.~~ Where the necessary modifications or repairs cannot be completed within ten (10) days, the Permittee shall commence the modifications or repairs within ten (10) days and thereafter diligently proceed using best efforts and carry out to completion all actions necessary to eliminate the dangerous condition or threat of danger to life or property. For the avoidance of doubt, all modifications and repairs shall be performed pursuant to ~~any required regulatory authorizations~~ applicable laws and regulations and City-approved plans and will also be subject to the City's inspection and approval. The Permittee shall have no right to cure its failure to comply with the obligations in this section.

11. Right-of-Way Work. In accordance with the San José Municipal Code, Permittee shall obtain a Right-of-Way Work Permit prior to performing any work within Public Property, excluding routine maintenance and repair activities within the Encroachment. In addition, except for routine maintenance and repairs to the Encroachment that do not require a building or other permit or approval from the City, Permittee shall notify the City at least seventy-two (72) hours prior to starting any work authorized or required by the Permit to

arrange a schedule acceptable to the City. Permittee shall upon completion of any work under the Permit, notify the Director of Public Works in writing. No work shall be deemed complete until such notification is received and the work is approved by the Director of Public Works in writing.

12. City Access and Inspection. The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over the Subject Premises at all times without notice to the Permittee, including portions covered by structures, furnishings, materials or equipment, for any lawful purpose for which the Subject Premises may be used. Permittee shall grant the City and its agents, representatives, officers and employees, ~~access to the Subject Premises~~ upon reasonable ~~advance~~ written notice but in no event more than three (3) ~~calendar days~~ ~~written notice~~, which notice shall not be required in the case of emergencies, access to the Encroachment for any purpose allowed under this Agreement or applicable law. If the City's access to ~~an~~the Encroachment is through a building or other enclosed ~~improvement~~structure on the Property, such access shall be in accordance with Permittee's reasonable security or building management processes and may include being accompanied by the Permittee or ~~its~~an designee, agent or representative ~~of Permittee~~ at all times.
13. Public Utilities and Facilities. The Permittee's design, construction, maintenance, repair, occupancy, use and removal of the Encroachment shall not interfere with ~~or~~ impede or make more costly the City's operation, maintenance or improvement of the Public Property. The Permittee shall verify the location of all public and quasi-public utilities and facilities that may be affected by work pursuant to the Permit. The Permittee shall assume all responsibility for loss or damage to such utilities or facilities caused directly or indirectly by Permittee or its contractors, agents, employees or invitees, and shall immediately notify the Director of Public Works of any such loss or damage. Any repairs or restoration to public utilities or facilities shall be performed under the direction of the Director of Public Works. After obtaining any required City or third-party approvals, the Permittee shall commence such repairs and restoration within ten (10) days ~~after written demand from the City and shall complete such repairs within thirty (30) days of the City's~~

demand or such longer period as may be approved by the Director of Public Works. If the Permittee fails to commence and complete repairs or restoration within the ~~10-day period or fails to complete said repairs or restoration within the foregoing~~ time period ~~mutually agreed to by the parties~~ periods, the Permittee shall have no right to cure, and the City may perform such repairs or restoration and the Permittee shall reimburse the City for its costs within ~~forty-five (45)~~ thirty (30) days of the City's invoice therefore. If the design, construction, maintenance, repair, occupancy, use or removal of the Encroachment requires the removal, relocation, or repair of utilities or facilities, Permittee shall coordinate its work with the owner(s) of such utilities or facilities in advance of its performance of the work and shall be responsible for paying the affected owner(s) for any costs incurred due to the Permittee's performance under this Agreement.

14. Permittee Responsibility for Encroachment. The Permittee shall be solely responsible for the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment, and the City shall not be liable for its review, approval, inspection, maintenance, repair, restoration or removal of any aspect or portion of the Encroachment.
15. Risk of Loss. The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, "City Indemnitees") shall not be liable for any injury to persons or property arising out of, pertaining to or relating to the Encroachment. The Permittee acknowledges that it bears the full risk of loss or damage to the Encroachment and the Property and hereby waives any right to make or prosecute any claims or demands against the City Indemnitees for any loss or damage arising from or relating to the Encroachment. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises or any portion of the Public Property and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.
16. Indemnity/Hold Harmless. To the fullest extent permitted by law, Permittee shall indemnify, hold harmless and defend the City Indemnitees from and against all claims,

actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively "Claims"), whether or not the Claims involve a third party, which arise out of, relate to or result from: (i) any act or omission of the Permittee, its independent contractors, agents, officers, employees or invitees pursuant to or in connection with the Permit or while in or about the Encroachment or Property for any reason; (ii) the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment; and/or (iii) any breach of this Agreement or violation of applicable law by the Permittee, its independent contractors, agents, officers, employees or invitees, in each case whether or not caused by the negligence of the City Indemnitees, except for Claims resulting from the City Indemnitees' gross City's sole negligence-or willful misconduct. The foregoing obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligations arise at the time such claim is tendered to Permittee by the City and continues at all times thereafter.

17. Insurance. Permittee shall, at Permittee's sole cost and expense and for the full term of this Agreement, obtain and maintain at least all of the minimum insurance requirements described in Exhibit D attached hereto and incorporated herein by reference. Said insurance shall name the City as additional insured by endorsement and shall be filed with and approved by the City's Risk Manager. ~~[Note to City: Please provide proposed minimum insurance requirements. The proposed insurance terms will need to be reviewed and approved by Google's risk management team.]~~ **[TO BE DETERMINED BY CITY'S RISK MANAGER]**
18. Liens. Permittee shall not allow or permit to be enforced against the City any mechanic, laborer, materialmen, contractor, subcontractor, or any other liens, claims or demands arising from any work performed under this Permit. Permittee shall discharge or pay all of said liens, claims and demands before any action is brought to enforce the same against the City or the Subject Premises.
19. Sale or Transfer of Property. The Permittee shall notify potential successor owners of



the Property of the Encroachment's existence and the obligations under the Permit. At least sixty (60) days prior to the closing of any sale or transfer of the Property, the Permittee shall cause its successors, assigns and transferees to submit a written statement to the City evidencing the sale or transfer, agreeing to the terms and conditions of the Permit and providing updated contact information for purposes of notices under the Agreement.

20. Assignment. ~~This~~The Permit, and any and all rights and obligations arising thereunder may not be assigned, conveyed or otherwise transferred to any other person unless approved in writing by the City Council; provided, however, that Permittee may, without the City's pre-approval, assign ~~this~~the Permit in whole to ~~any of the following:~~ (i) ~~any assignee~~an Affiliate (as defined below), or (ii) one or more of the owner(s) of the Development Agreement during the term thereof: (ii) any commercial office building-owners or operators identified as having responsibility for ensuring continuity of utility supply for the District Systems pursuant to the then-current District Systems Transactional Documents; (iii) Lendlease; (iv) the owner of District Systems(s) located within the Encroachment or (v) an Affiliate on the Property. For the purposes of this Section, "Affiliate" means an entity or person that is directly or indirectly controlling, controlled by, or under common control with, Permittee. For the purposes of this definition, "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity or a person, whether through the ownership of voting securities, by contract, or otherwise, and the terms "controlling" and "controlled" have the meanings correlative to the foregoing. [NOTE: SECURITY FOR THE ENCROACHMENTS MAY BE REQUIRED IF PERMITTEE IS ALLOWED TO ASSIGN TO THIRD PARTIES OTHER THAN THOSE LISTED ABOVE]

21. Exclusive Ownership and Use of Permittee's Improvements. Notwithstanding any other provision of this Agreement, all infrastructure and improvements constructed and maintained pursuant to any Permit shall be the Permittee's sole and exclusive property. Such property of Permittee shall include, without limitation, all electric lines, recycled water pipes, sanitary sewer overflow pipes, pneumatic pipes, fiber optic cabling, thermal piping and fixtures, and all other associated conveyances, casings, safety devices,

system controls, enclosures, and other structures or improvements identified in the Plans. This Agreement shall not be construed to create any express or implied public dedication of such improvements or any right of the City or any member of the public to the use and enjoyment thereof. No third party shall have any right or privilege to use any portion of such improvements without the express written consent of Permittee.

22. Notices. Unless otherwise specified in this Agreement, all notices required or provided for under this Agreement shall be in writing and delivered in person or sent by mail, postage prepaid and addressed as provided in this section. Email notices may also be sent in addition to mail or in-person delivery. A notice shall be effective on the date it is delivered in person, or if mailed, on the date of deposit in the United States Mail. Any changes to the notice addresses must be delivered in accordance with this section. Notices shall be addressed as follows:

If to City:

City of San José  
200 East Santa Clara Street, 5th Floor  
San Jose, CA 95113  
Attn: Director of Public Works

With a copy to:

City Attorney  
200 East Santa Clara Street, 16th Floor  
San Jose, CA 95113

If to Permittee:

~~Google LLC~~  
~~1600 Amphitheatre Parkway~~  
~~Mountain View, CA 94043~~  
~~Attn: REWS Dept / Director, District Systems & Energy~~  
~~email: cindymuller@google.com~~  
~~phone: 650-502-0754~~

~~With a copy to:~~  
~~Google LLC~~  
~~1600 Amphitheatre Parkway~~  
~~Mountain View, CA 94043~~  
~~Attn: REWS Dept / Development Executive - San Jose Campus~~

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email: ~~arena@google.com~~  
phone: ~~650-253-9481~~

~~With a copy to:~~  
~~Google LLC~~  
~~1600 Amphitheatre Parkway~~  
~~Mountain View, CA 94043~~  
~~Attn: Legal Department / RE Matters~~

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

With a copy to:  
Google LLC  
Address  
Attn: Director of Real Estate  
Attn: Insert name and Email

With a copy to:  
Google LLC  
Address  
Attn:  
Attn: Insert name and Email

23. Compliance with Law. Permittee agrees to comply with all applicable laws, ordinances and regulations in its design, construction, maintenance, repair, occupancy, use and removal of the Encroachment.
24. Agreement Binding on Successor Owners. The Permittee consents to the City's recordation of the Permit against title to the Property. The Permit shall be binding upon all successor owners of the Property. Other than by virtue of the sale or transfer of the Property, Permittee shall not assign this Agreement in whole or in part.
25. Severability. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.

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26. Survival. All provisions of this Agreement shall survive revocation or termination of the Permit. The provisions under Sections 13-16, 18, 29 and 31-32 shall survive the expiration of this Agreement for a period equal to the statute of limitations applicable to the underlying claim or obligation.
27. Headings. The headings used in this Agreement are for convenience only and shall not be used in the interpretation of this Agreement.
28. Days. All references to days in this Agreement shall mean calendar days, unless specified otherwise.
29. Time is of the Essence. Time is of the essence in performing each and all obligations under this Agreement.
30. Amendment. ~~This~~Other than Non-Material Amendments, as specified in the Authorization, this Agreement may be amended only by a written instrument executed by the Permittee, approved by the City Council and recorded on title to the Property.  
~~Notwithstanding the foregoing, the Public Works Director shall be permitted to approve Non-Material Amendments to this Agreement. For purposes of this Agreement, "Non-Material Amendment" shall mean any modification that does not include one of the a change to expand the permissible uses of the Encroachment or effectuate any change to this Agreement that would materially increase the City's risk, pose a risk to public health-safety and welfare, or modify any provision relating to revocation, repair, maintenance or restoration of the Public Property, assignment, or any Permit, or Permittee's indemnification obligations hereunder.~~
31. Choice of Law. This Agreement shall be construed according to the laws of the State of California.
32. Venue. Any dispute arising under this Agreement shall be adjudicated in California State Court in and for the County of Santa Clara, or in the Federal Court in and for the

Northern District of California, as appropriate.

33. No Precedent. The terms and conditions in this Agreement shall not be construed to establish a precedent or policy for any subsequent City authorizations for encroachments.

**IN WITNESS WHEREOF**, this Agreement is executed by the parties as of the date first written above.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

\_\_\_\_\_  
[Sr.] Deputy City Attorney

By: \_\_\_\_\_  
Name:  
Title:

PERMITTEE\*

\_\_\_\_\_  
Print Name of Permittee and Type of Entity

By \_\_\_\_\_  
Name:  
Title:

By \_\_\_\_\_  
Name:  
Title:

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

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**EXHIBIT A**  
**DESCRIPTION OF**  
**SUBJECT PREMISES**

INSERT DESCRIPTION

INSERT DESCRIPTION

**EXHIBIT A**  
**MAP SHOWING THE**  
**SUBJECT PREMISES**

**EXHIBIT A**  
**DESCRIPTION**  
**OF THE PROPERTY**

All that certain real property situate in the City of San José, County of Santa Clara, State of California ~~DESCRIPTION~~~~DESCRIPTION~~ filed for record on ~~DATE~~~~DATE~~ in the official records of the County of Santa Clara in ~~BOOK #, PAGE #.~~





**EXHIBIT B**

**AUTHORIZATION~~AUTHORIZATION~~ FOR ~~ENCROACHMENT~~ENCROACHMENT**

## EXHIBIT C

### **ADDITIONAL ~~MAINTENANCE/REPAIR~~ MAINTENANCE/REPAIR REQUIREMENTS**

Permittee's maintenance and repair of the Encroachment shall include all of the following requirements, in addition to any additional requirements necessary to comply with applicable law:

- A. All work shall be coordinated through the ~~ENTER RESPONSIBLE CITY~~  
~~DEPARTMENT/DIVISION~~ ~~ENTER RESPONSIBLE CITY~~  
~~DEPARTMENT/DIVISION~~.
- B. All graffiti shall be removed from the Encroachment within five (5) business days of occurrence.
- C. All cosmetic damage (i.e., non-structural, damage posing no harm or threat of harm to life or property) to the Encroachment shall be repaired within ten (10) business days of occurrence.
- D. All structural damage to the Encroachment shall be repaired within thirty (30) days of occurrence, unless the damage represents a dangerous condition or threat of danger to life or property, in which case the Permittee shall repair the Encroachment in accordance with Section 10 of the Agreement.
- E. ~~INSERT ADDITIONAL REQUIREMENTS~~
- F. ~~INSERT ADDITIONAL REQUIREMENTS~~
- G. ~~INSERT ADDITIONAL REQUIREMENTS~~
- H. ~~INSERT ADDITIONAL REQUIREMENTS~~
- I. ~~INSERT ADDITIONAL REQUIREMENTS~~
- J. ~~INSERT ADDITIONAL REQUIREMENTS~~

E. INSERT ADDITIONAL REQUIREMENTS

F. INSERT ADDITIONAL REQUIREMENTS

G. INSERT ADDITIONAL REQUIREMENTS

H. INSERT ADDITIONAL REQUIREMENTS

I. INSERT ADDITIONAL REQUIREMENTS

J. INSERT ADDITIONAL REQUIREMENTS

**EXHIBIT D**

**INSURANCE REQUIREMENTS**

[TO BE DETERMINED BY CITY RISK MANAGER]

**RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:**

City of San José  
Department of Public Works  
200 E. Santa Clara St., 5th Floor  
Attention: Director of Public Works  
File No.:

RECORDED WITHOUT FEE  
PER GOVERNMENT CODE  
SECTIONS 6103 AND 27383

SPACE ABOVE RESERVED FOR RECORDER'S USE

**ENCROACHMENT AGREEMENT  
BETWEEN  
THE CITY OF SAN JOSE  
AND  
GOOGLE LLC**

This Encroachment Agreement ("Agreement") is made and entered into by and between the City of San José, a municipal corporation of the State of California ("City") and Google LLC, a Delaware limited liability company and its successors in interest ("Permittee"), as of **DATE** ("Effective Date").

**RECITALS**

**WHEREAS**, the Permittee is the owner of certain real property in the City of San José, County of Santa Clara, State of California, described as **DESCRIPTION** ("Property") which is more particularly described in Exhibit A attached hereto and incorporated herein by reference; and

**WHEREAS**, the Property is bounded by or subject to those certain public rights-of-way or other public easements owned or controlled by the City that have been expressly or impliedly dedicated to the public, commonly known as **PUBLIC PROPERTY NAME** ("Public Property"); and

**WHEREAS**, the Permittee has requested that the City authorize the Permittee to design, construct, maintain, repair, occupy and use subsurface utility infrastructure for the purpose of operating a private district utility system for the Property as described in the Infrastructure Plan (as defined below) ("Encroachment"), which is intended to reside within portions of **PUBLIC PROPERTY NAME** (the "Subject Premises"), as more particularly described in Exhibit A attached hereto and incorporated herein by reference and as set forth in the Plans (as defined below); and

**WHEREAS**, the City Council has approved the Downtown West Mixed-Use Plan, including the Development Agreement by and between the City and Permittee Relative to the Development of Property Located in the Downtown Station Area, approved by Ordinance No. \_\_\_\_\_ and dated \_\_\_\_\_ for reference purposes, a Planned Development Permit, including adoption of Downtown West Design Standards and Guidelines and the Downtown West Infrastructure Plan and Plan Sheets (collectively "Infrastructure Plan") and related entitlements from the City; and

**WHEREAS**, the City's Director of Public Works has approved plans and specifications for the design and construction of the Encroachment, which are on file with the City and are incorporated herein by reference, subject to the additional conditions and terms contained in that approval (collectively, "Plans"); and

**WHEREAS**, the City Council adopted a resolution authorizing the Encroachment, subject to the conditions set forth therein, a true copy of which is attached hereto as Exhibit B and incorporated herein by reference ("Authorization"); and

**WHEREAS**, this Agreement, including the Plans and any conditions contained therein, and the Authorization together constitute a revocable permit from the City allowing the Permittee to maintain the Encroachment, subject to the terms and conditions set forth therein (collectively "Permit");

**NOW, THEREFORE**, in consideration of the City's granting revocable permission for the Encroachment, and subject to all of the terms, conditions and restrictions set forth in this Agreement and the Authorization, the City and Permittee, for itself and all successive owners of the Property, intending to be bound thereby for the benefit of the Public Property, do hereby agree as follows:

1. Incorporation of Recitals. The recitals are true and correct and are incorporated herein as if repeated in their entirety.
2. Revocable License. The Encroachment shall be allowed only as a revocable license, and the City shall not be estopped from ordering removal of the Encroachment or demanding compliance with any of Permittee's obligations under the Permit. The Permit shall not be construed to create any property right in the Subject Premises that the Permittee did not possess prior to receiving the Permit. The Permit shall have no value in any proceeding greater than the Permittee's cost to obtain the Permit. The Permittee shall be solely responsible for all costs of complying with its obligations under the Permit.
3. Term of Permit and Agreement. The term of the Permit shall commence upon the Effective Date and continue for the life of the Encroachment, except if earlier revoked or terminated by the City pursuant to this Agreement. The term of this Agreement shall commence upon the Effective Date and expire upon the City's recordation of a notice of acceptance in accordance with Section 7.
4. Conformance with Permit. The Permittee acknowledges and agrees that the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment shall be in strict conformance with the Plans and the Permit. The Permit has been granted upon each and every condition contained therein and shall be strictly construed against the Permittee. The City grants the Permittee no rights that are not explicitly written in the Permit. The enumeration of the City's rights in the Permit shall not be considered exclusive or as limiting the rights generally reserved to the City under applicable law. Each of the obligations and conditions in the Permit is a material and essential condition to the granting of the Permit.
5. Revocation. The City Council may revoke any Permit issued under the Authorization if: (i) the City or a regional, County, State or Federal governmental agency determines to use the Subject Premises for a public purpose; (ii) the City determines that the Encroachment constitutes a public nuisance under state or federal law; or (iii) the Encroachment is declared unlawful under state or federal law by a court of competent jurisdiction. The City's revocation shall be effective one hundred eighty (180) days after



the City Council's adoption of a resolution revoking the Permit, except if the City Council should provide a longer period of time in its resolution of revocation. For purposes of the Permit, the following shall not constitute a "public purpose" that would merit revocation of the Permit: (1) subsequent encroachments proposed by private property development projects, whether below, at or above-grade; (2) at-grade street projects such as light-rail transit infrastructure or street realignment, repaving or regrading; or (3) subsequent private subsurface utility infrastructure. If the City determines to use the Subject Premises for a City project, the City will give the Permittee at least one (1) calendar year advance written notice of any proposed City Council action, including any action to revoke the Authorization, that would require any material modification to, or removal in whole or in part of, the Encroachment ("Notice of Public Purpose"). The Notice of Public Purpose will specify, to the extent this information is available to the City at the time of the notice, the nature of the proposed public purpose and the anticipated nature of the conflict with the Encroachment. During this 1-year notice period, upon written request of the Permittee, the Director of Public Works or a designee will meet and confer with the Permittee regarding the proposed action and to evaluate the provision of interim and alternative permanent service and the re-routing of the Encroachment in an effort to ensure continuity of services provided by the district utility system to residents and businesses both during and after the removal of the Encroachment ("Meet and Confer"). In addition, upon written request of the Permittee, not to exceed one meeting every twelve (12) months, the Director of Public Works or a designee will meet with the Permittee to discuss any City public works projects planned or under consideration or construction that may impact the Encroachment. The foregoing Notice of Public Purpose and Meet and Confer obligations shall not apply to any City actions that only plan or consider public uses of the Subject Premises nor shall they apply to actions or plans by any governmental entities other than the City.

6. Termination. The City may terminate the Permit in the event of a Default under this Agreement. The termination shall be effective immediately upon the City's written notice to the Permittee.
7. Removal and Restoration. After revocation or termination of the Permit, the Permittee shall remove the Encroachment and restore the Subject Premises to a condition that is safely usable by the City and public, in compliance with City standards and

specifications, and satisfactory to the City's Director of Public Works, all without liability or expense to the City. Prior to commencing any removal or restoration work, the Permittee shall submit to the City plans for the removal and restoration work, which shall be subject to the City's approval. All removal and restoration work shall be performed under the City's direction. The Permittee shall commence removal and restoration within thirty (30) days after the City's approval of the plans and shall complete removal and restoration within one hundred eighty (180) days, or such longer period of time as determined by the Director of Public Works, after the City's approval of the removal and restoration plans. The Permittee's obligations under this section shall not be deemed to have been satisfied until the City records a notice on the Property accepting the Permittee's removal and restoration work. The City shall record the notice of acceptance within ten (10) days of the Director's confirmation that the work has been completed. If the Permit has been terminated, the Permittee shall have no opportunity to cure any failure to comply with the foregoing removal and restoration requirements.

8. Default. Permittee shall be in default under the Permit if it breaches or fails to timely observe and perform any obligation under the Permit and fails to timely cure such breach or failure in accordance with this Agreement ("Default"). For the avoidance of doubt, a Default under the Permit shall not thereby automatically be considered a Default under any other encroachment permit issued to Permittee pursuant to the Authorization or otherwise. The Director of Public Works shall notify the Permittee in writing of any breach or failure to perform. Except where a different time period is provided in this Agreement for a particular obligation, the Permittee shall, within thirty (30) days of the Director of Public Works' notice, commence, diligently proceed using best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. If the Director of Public Works determines in writing that such breach or failure to perform is incapable of cure within thirty (30) days, the Director shall specify in writing the number of days in which Permittee shall complete its cure, and Permittee shall continue to diligently proceed to cure using its best efforts and carry out to completion all actions necessary to correct the breach or failure to perform and prevent its recurrence. Cure periods in excess of one hundred eighty (180) days from the date of the Director's notice shall require City Council approval. The foregoing cure periods shall exclude time required for the City to review and approve any required City permit or authorization necessary to cure the Default. If

the Permittee does not cure the breach or failure to perform to the City's satisfaction within the foregoing cure periods, the Permittee shall be in Default, and the Permittee hereby grants to the City any consent or right necessary for the City to remedy the Default. The Permittee shall be responsible for all of the City's costs to remedy the Default and shall reimburse the City for its costs within sixty (60) days of the City's invoice therefore. In addition to any other remedies available at law or in equity in the event of a Default, the City shall be entitled to specific performance of Permittee's obligations under this Agreement and to such other injunctive or other equitable relief as may be granted by a court of competent jurisdiction.

9. Maintenance and Repair of Encroachment. The Permittee shall maintain and repair the Encroachment to the City's satisfaction so that it is in a safe condition and good working order for the intended purpose and in a similar condition to that which was originally constructed, except where a higher standard is required by applicable law. All replacements, restorations and repairs shall be at least equal in quality to the original, except that such replacements, restorations, and repairs shall comply with all requirements of applicable law and City standards and specifications in effect at the time of the replacement, restoration or repair. The City also shall have the right, but not the obligation, to stop or direct maintenance or repairs of the Encroachment to protect the public health or safety. Additional maintenance and repair requirements are set forth in Exhibit C attached hereto and incorporated herein by reference. For the avoidance of doubt, this Agreement does not obligate the Permittee to perform routine maintenance and repair of the Public Property.
10. City's Right to Enter and Cure. Notwithstanding anything to the contrary in this Agreement, the City may repair or remove the Encroachment at the Permittee's expense if the City determines that it represents a dangerous condition or threat of danger to life or property. The Permittee shall make any necessary modifications or repairs within ten (10) days after the City's written notice, or such longer period as specified in the City's written notice, except that in cases of emergency as determined by the City, the City shall only be required to provide Permittee with one (1) day telephone and email notice. Where the necessary modifications or repairs cannot be completed within ten (10) days, the Permittee shall commence the modifications or repairs within ten (10) days and thereafter diligently proceed using best efforts and carry out to completion all actions

necessary to eliminate the dangerous condition or threat of danger to life or property. For the avoidance of doubt, all modifications and repairs shall be performed pursuant to applicable laws and regulations and City-approved plans and will also be subject to the City's inspection and approval. The Permittee shall have no right to cure its failure to comply with the obligations in this section.

11. Right-of-Way Work. In accordance with the San José Municipal Code, Permittee shall obtain a Right-of-Way Work Permit prior to performing any work within Public Property, excluding routine maintenance and repair activities within the Encroachment. In addition, except for routine maintenance and repairs to the Encroachment that do not require a building or other permit or approval from the City, Permittee shall notify the City at least seventy-two (72) hours prior to starting any work authorized or required by the Permit to arrange a schedule acceptable to the City. Permittee shall upon completion of any work under the Permit, notify the Director of Public Works in writing. No work shall be deemed complete until such notification is received and the work is approved by the Director of Public Works in writing.
12. City Access and Inspection. The City, and its agents, representatives, officers, employees and other authorized persons shall have the full and free right of ingress and egress under, on, through and over the Subject Premises at all times without notice to the Permittee, including portions covered by structures, furnishings, materials or equipment, for any lawful purpose for which the Subject Premises may be used. Permittee shall grant the City and its agents, representatives, officers and employees, upon reasonable written notice but in no event more than three (3) days, which notice shall not be required in the case of emergencies, access to the Encroachment for any purpose allowed under this Agreement or applicable law. If the City's access to the Encroachment is through a building or other enclosed structure on the Property, such access shall be in accordance with Permittee's reasonable security or building management processes and may include being accompanied by the Permittee or its designee, agent or representative at all times.
13. Public Utilities and Facilities. The Permittee's design, construction, maintenance, repair, occupancy, use and removal of the Encroachment shall not interfere with, impede or make more costly the City's operation, maintenance or improvement of the Public

Property. The Permittee shall verify the location of all public and quasi-public utilities and facilities that may be affected by work pursuant to the Permit. The Permittee shall assume all responsibility for loss or damage to such utilities or facilities caused directly or indirectly by Permittee or its contractors, agents, employees or invitees, and shall immediately notify the Director of Public Works of any such loss or damage. Any repairs or restoration to public utilities or facilities shall be performed under the direction of the Director of Public Works. After obtaining any required City or third-party approvals, the Permittee shall commence such repairs and restoration within ten (10) days after written demand from the City and shall complete such repairs within thirty (30) days of the City's demand or such longer period as may be approved by the Director of Public Works. If the Permittee fails to commence and complete repairs or restoration within the foregoing time periods, the Permittee shall have no right to cure, and the City may perform such repairs or restoration and the Permittee shall reimburse the City for its costs within thirty (30) days of the City's invoice therefore. If the design, construction, maintenance, repair, occupancy, use or removal of the Encroachment requires the removal, relocation, or repair of utilities or facilities, Permittee shall coordinate its work with the owner(s) of such utilities or facilities in advance of its performance of the work and shall be responsible for paying the affected owner(s) for any costs incurred due to the Permittee's performance under this Agreement.

14. Permittee Responsibility for Encroachment. The Permittee shall be solely responsible for the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment, and the City shall not be liable for its review, approval, inspection, maintenance, repair, restoration or removal of any aspect or portion of the Encroachment.
15. Risk of Loss. The City, its officials, boards, commissions and members thereof, agents, employees and contractors (collectively, "City Indemnitees") shall not be liable for any injury to persons or property arising out of, pertaining to or relating to the Encroachment. The Permittee acknowledges that it bears the full risk of loss or damage to the Encroachment and the Property and hereby waives any right to make or prosecute any claims or demands against the City Indemnitees for any loss or damage arising from or relating to the Encroachment. The City makes no representations or warranties regarding the suitability, condition or fitness of the Subject Premises or any portion of the

Public Property and shall not be responsible or liable for any costs or expenses resulting from unknown or unanticipated conditions.

16. Indemnity/Hold Harmless. To the fullest extent permitted by law, Permittee shall indemnify, hold harmless and defend the City Indemnitees from and against all claims, actions, suits, demands, damages, liabilities, obligations, losses, settlements, judgments, costs and expenses, of any kind (including without limitation reasonable attorney's fees and costs) (collectively "Claims"), whether or not the Claims involve a third party, which arise out of, relate to or result from: (i) any act or omission of the Permittee, its independent contractors, agents, officers, employees or invitees pursuant to or in connection with the Permit or while in or about the Encroachment or Property for any reason; (ii) the design, construction, maintenance, repair, occupancy, use and removal of the Encroachment; and/or (iii) any breach of this Agreement or violation of applicable law by the Permittee, its independent contractors, agents, officers, employees or invitees, in each case whether or not caused by the negligence of the City Indemnitees, except for Claims resulting from the City's sole negligence. The foregoing obligation applies to all Claims that potentially fall within this indemnity provision, even if the allegations are or may be groundless, false or fraudulent, which obligations arise at the time such claim is tendered to Permittee by the City and continues at all times thereafter.
17. Insurance. Permittee shall, at Permittee's sole cost and expense and for the full term of this Agreement, obtain and maintain at least all of the minimum insurance requirements described in Exhibit D attached hereto and incorporated herein by reference. Said insurance shall name the City as additional insured by endorsement and shall be filed with and approved by the City's Risk Manager. [TO BE DETERMINED BY CITY'S RISK MANAGER]
18. Liens. Permittee shall not allow or permit to be enforced against the City any mechanic, laborer, materialmen, contractor, subcontractor, or any other liens, claims or demands arising from any work performed under this Permit. Permittee shall discharge or pay all of said liens, claims and demands before any action is brought to enforce the same against the City or the Subject Premises.

19. Sale or Transfer of Property. The Permittee shall notify potential successor owners of the Property of the Encroachment's existence and the obligations under the Permit. At least sixty (60) days prior to the closing of any sale or transfer of the Property, the Permittee shall cause its successors, assigns and transferees to submit a written statement to the City evidencing the sale or transfer, agreeing to the terms and conditions of the Permit and providing updated contact information for purposes of notices under the Agreement.
20. Assignment. The Permit, and any and all rights and obligations arising thereunder may not be assigned, conveyed or otherwise transferred to any other person unless approved in writing by the City Council; provided, however, that Permittee may without the City's pre-approval assign the Permit in whole to: (i) an Affiliate (as defined below), or (ii) one or more of the owner(s) of the commercial office building(s) located on the Property. For the purposes of this Section, "Affiliate" means an entity or person that is directly or indirectly controlling, controlled by, or under common control with, Permittee. For the purposes of this definition, "control" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of an entity or a person, whether through the ownership of voting securities, by contract, or otherwise, and the terms "controlling" and "controlled" have the meanings correlative to the foregoing. [NOTE: SECURITY FOR THE ENCROACHMENTS MAY BE REQUIRED IF PERMITTEE IS ALLOWED TO ASSIGN TO THIRD PARTIES OTHER THAN THOSE LISTED ABOVE]
21. Exclusive Ownership and Use of Permittee's Improvements. Notwithstanding any other provision of this Agreement, all infrastructure and improvements constructed and maintained pursuant to any Permit shall be the Permittee's sole and exclusive property. Such property of Permittee shall include, without limitation, all electric lines, recycled water pipes, sanitary sewer overflow pipes, pneumatic pipes, fiber optic cabling, thermal piping and fixtures, and all other associated conveyances, casings, safety devices, system controls, enclosures, and other structures or improvements identified in the Plans. This Agreement shall not be construed to create any express or implied public dedication of such improvements or any right of the City or any member of the public to the use and enjoyment thereof. No third party shall have any right or privilege to use any portion of such improvements without the express written consent of Permittee.

22. Notices. Unless otherwise specified in this Agreement, all notices required or provided for under this Agreement shall be in writing and delivered in person or sent by mail, postage prepaid and addressed as provided in this section. Email notices may also be sent in addition to mail or in-person delivery. A notice shall be effective on the date it is delivered in person, or if mailed, on the date of deposit in the United States Mail. Any changes to the notice addresses must be delivered in accordance with this section. Notices shall be addressed as follows:

If to City:

City of San José  
200 East Santa Clara Street, 5th Floor  
San Jose, CA 95113  
Attn: Director of Public Works

With a copy to:

City Attorney  
200 East Santa Clara Street, 16th Floor  
San Jose, CA 95113

If to Permittee:

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

With a copy to:  
Google LLC  
Address  
Attn: Director of Real Estate  
Attn: Insert name and Email

With a copy to:  
Google LLC  
Address  
Attn: \_\_\_\_\_  
Attn: Insert name and Email

23. Compliance with Law. Permittee agrees to comply with all applicable laws, ordinances and regulations in its design, construction, maintenance, repair, occupancy, use and



removal of the Encroachment.

24. Agreement Binding on Successor Owners. The Permittee consents to the City's recordation of the Permit against title to the Property. The Permit shall be binding upon all successor owners of the Property. Other than by virtue of the sale or transfer of the Property, Permittee shall not assign this Agreement in whole or in part.
25. Severability. If any provision of this Agreement is held to be invalid, unenforceable or illegal to any extent, such provision shall be severed and such invalidity, unenforceability or illegality shall not prejudice or affect the validity, enforceability and legality of the remaining provisions of this Agreement.
26. Survival. All provisions of this Agreement shall survive revocation or termination of the Permit. The provisions under Sections 13-16, 18, 29 and 31-32 shall survive the expiration of this Agreement for a period equal to the statute of limitations applicable to the underlying claim or obligation.
27. Headings. The headings used in this Agreement are for convenience only and shall not be used in the interpretation of this Agreement.
28. Days. All references to days in this Agreement shall mean calendar days, unless specified otherwise.
29. Time is of the Essence. Time is of the essence in performing each and all obligations under this Agreement.
30. Amendment. Other than Non-Material Amendments, as specified in the Authorization, this Agreement may be amended only by a written instrument executed by the Permittee, approved by the City Council and recorded on title to the Property.
31. Choice of Law. This Agreement shall be construed according to the laws of the State of California.
32. Venue. Any dispute arising under this Agreement shall be adjudicated in California

State Court in and for the County of Santa Clara, or in the Federal Court in and for the Northern District of California, as appropriate.

33. No Precedent. The terms and conditions in this Agreement shall not be construed to establish a precedent or policy for any subsequent City authorizations for encroachments.

**IN WITNESS WHEREOF**, this Agreement is executed by the parties as of the date first written above.

APPROVED AS TO FORM:

CITY OF SAN JOSE, a municipal corporation

\_\_\_\_\_  
[Sr.] Deputy City Attorney

By: \_\_\_\_\_  
Name:  
Title:

PERMITTEE\*

\_\_\_\_\_  
Print Name of Permittee and Type of Entity

By \_\_\_\_\_  
Name:  
Title:

By \_\_\_\_\_  
Name:  
Title:

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

**EXHIBIT A**  
**DESCRIPTION OF  
SUBJECT PREMISES**

INSERT DESCRIPTION

**EXHIBIT A**  
**MAP SHOWING THE**  
**SUBJECT PREMISES**

**EXHIBIT A**  
**DESCRIPTION**  
**OF THE PROPERTY**

All that certain real property situate in the City of San José, County of Santa Clara, State of California **DESCRIPTION** filed for record on **DATE** in the official records of the County of Santa Clara in **BOOK #, PAGE #**.

**EXHIBIT B**

**AUTHORIZATION FOR ENCROACHMENT**

## **EXHIBIT C**

### **ADDITIONAL MAINTENANCE/REPAIR REQUIREMENTS**

Permittee's maintenance and repair of the Encroachment shall include all of the following requirements, in addition to any additional requirements necessary to comply with applicable law:

- A. All work shall be coordinated through the **ENTER RESPONSIBLE CITY DEPARTMENT/DIVISION**.
- B. All graffiti shall be removed from the Encroachment within five (5) business days of occurrence.
- C. All cosmetic damage (i.e., non-structural, damage posing no harm or threat of harm to life or property) to the Encroachment shall be repaired within ten (10) business days of occurrence.
- D. All structural damage to the Encroachment shall be repaired within thirty (30) days of occurrence, unless the damage represents a dangerous condition or threat of danger to life or property, in which case the Permittee shall repair the Encroachment in accordance with Section 10 of the Agreement.
- E. **INSERT ADDITIONAL REQUIREMENTS**
- F. **INSERT ADDITIONAL REQUIREMENTS**
- G. **INSERT ADDITIONAL REQUIREMENTS**
- H. **INSERT ADDITIONAL REQUIREMENTS**
- I. **INSERT ADDITIONAL REQUIREMENTS**
- J. **INSERT ADDITIONAL REQUIREMENTS**

**EXHIBIT D**

**INSURANCE REQUIREMENTS**

[TO BE DETERMINED BY CITY RISK MANAGER]



~~DIRECTOR'S CHECKLIST~~CRITERIA FOR  
ENCROACHMENT PERMITS  
~~ISSUED UNDER~~  
~~COUNCIL RESOLUTION~~ISSUED PURSUANT TO  
COUNCIL RESOLUTION NO. \_\_\_\_\_  
DOWNTOWN WEST PROJECT

**GENERAL INFORMATION:**

This ~~checklist~~Criteria for Encroachment Permits ("Encroachment Permit Criteria") sets forth the requirements for the Permittee's Application submissions and the necessary findings for the Director's ~~ministerial~~ approval of ~~Major~~ Encroachment Permits pursuant to ~~the authority delegated by~~ City Council Resolution No. \_\_\_\_\_, adopted \_\_\_\_\_, 2021 (~~hereafter~~ "Authorization").

All defined terms shall have those meanings ascribed to them in the Authorization, or the form of Encroachment Agreement approved by the Authorization ("Agreement"), unless otherwise defined.

**SUBMITTAL REQUIREMENTS:**

The Permittee shall submit all of the following in connection with an Application as PDF documents on a disc, USB flash drive or through other electronic means agreeable to the City and Permittee:

- ☐ [Three (3)] sets of complete plans ~~that~~ at 100% design that include:
  - ☐ A location map;
  - ☐ A 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.
- ☐ A detailed written description of the proposed Encroachment, including the manner of all proposed uses, and a requirements for the maintenance of the Encroachment;
- ☐ A showing that the Encroachment is consistent with the Infrastructure Plan, showing in detail any deviations from the Infrastructure Plan;
- ☐ A showing the 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;
- ☐ A showing of the Encroachment's consistency with previously-approved or pending tract improvement plans;
- ☐ Evidence of consent of any public agencies, public ~~or~~ quasi-public or private

utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment;

- ☐ ~~Evidence that the Permittee will have the ability to construct, maintain, and repair the proposed Encroachment;~~
- ☐ Evidence of ~~compliance with the required insurance coverages set forth in~~required by the Agreement; ~~and~~
- ☐ ~~plat~~Plat map and legal description of the applicable public property where the Encroachment is proposed to reside; prepared by or under the direction of a civil engineer;
- ☐ A legal description of the applicable Permittee property, prepared by or under the direction of a civil engineer; and
- ☐ ~~Permittee to pay for Permit processing fees, as set forth in the Department of Public Works fee schedule appended hereto as Appendix 1; and~~
- ☐ ~~PDF copy of all submittal materials on a disc or USB flash drive.~~
  
- ☐ ~~DIRECTOR~~ Any other information reasonably requested by the Director related to the application under consideration.

**DIRECTOR'S FINDINGS REQUIRED TO APPROVE APPLICATION:**

- ☐ ~~Permittee has provided evidence demonstrating its ability to install, maintain, and repair the Encroachment;~~
- ☐ ~~The Encroachment is consistent with the Master Encroachment Diagram;~~
- ☐ ~~Permittee has obtained approval of, or has applied for, a phased final map or parcel map that encompasses the area subject to the proposed Encroachment;~~
- ☐ ~~Permittee has obtained approval of, or applied for, approval of tract improvement plans that encompass the proposed Encroachment; and~~
- ☐ Permittee has submitted all materials described in the Submittal Requirements pertaining to the proposed Encroachment.;

## APPENDIX 1

### FEE SCHEDULE

- ☐ The Encroachment does not present a conflict with existing improvements or infrastructure or with any planned public projects;
- ☐ The Permittee has obtained any consent from public agencies, public, quasi-public or private utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment;
- ☐ The Encroachment is consistent with the Infrastructure Plan;
- ☐ The Permittee's evidence of insurance complies with the Encroachment Agreement;
- ☐ The proposed uses are consistent with the Authorization;
- ☐ The Encroachment does not pose a threat to the public health, safety or welfare;
- ☐ Permittee has obtained approval of, or has submitted for approval, a phased final map or parcel map that encompasses the area subject to the proposed Encroachment;
- ☐ Permittee has obtained approval of improvement plans that encompass the proposed Encroachment; and
- ☐ Permittee has paid applicable fees, as set forth in the Department of Public Works fee schedule appended hereto as Appendix 1. [PUBLIC WORKS TO REVIEW/APPROVE FEES]

CRITERIA FOR  
ENCROACHMENT PERMITS  
ISSUED PURSUANT TO  
COUNCIL RESOLUTION NO. \_\_\_\_\_  
DOWNTOWN WEST PROJECT

**GENERAL INFORMATION:**

This Criteria for Encroachment Permits (“Encroachment Permit Criteria”) sets forth the requirements for the Permittee’s Application submissions and the necessary findings for the Director’s approval of Encroachment Permits pursuant to City Council Resolution No. \_\_\_\_\_, adopted \_\_\_\_\_, 2021 (“Authorization”).

All defined terms shall have those meanings ascribed to them in the Authorization or the form of Encroachment Agreement approved by the Authorization (“Agreement”), unless otherwise defined.

**SUBMITTAL REQUIREMENTS:**

The Permittee shall submit all of the following in connection with an Application as PDF documents on a disc, USB flash drive or through other electronic means agreeable to the City and Permittee:

- ☐ [Three (3)] sets of complete plans at 100% design that include:
  - ☐ A location map;
  - ☐ A 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.
- ☐ A detailed written description of the proposed Encroachment, including the manner of all proposed uses, and a requirements for the maintenance of the Encroachment;
- ☐ A showing that the Encroachment is consistent with the Infrastructure Plan, showing in detail any deviations from the Infrastructure Plan;
- ☐ A showing the 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;
- ☐ A showing of the Encroachment’s consistency with previously-approved or pending tract improvement plans;
- ☐ Evidence of consent of any public agencies, public, quasi-public or private utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment;

- ☐ Evidence of insurance required by the Agreement;
- ☐ Plat map and legal description of the applicable public property where the Encroachment is proposed to reside prepared by or under the direction of a civil engineer;
- ☐ A legal description of the applicable Permittee property, prepared by or under the direction of a civil engineer; and
- ☐ Any other information reasonably requested by the Director related to the application under consideration.

**DIRECTOR'S FINDINGS REQUIRED TO APPROVE APPLICATION:**

- ☐ Permittee has submitted all materials described in the Submittal Requirements pertaining to the proposed Encroachment;
- ☐ The Encroachment does not present a conflict with existing improvements or infrastructure or with any planned public projects;
- ☐ The Permittee has obtained any consent from public agencies, public, quasi-public or private utilities and adjacent property owners that may be required for the placement, installation, construction, maintenance or removal of the Encroachment;
- ☐ The Encroachment is consistent with the Infrastructure Plan;
- ☐ The Permittee's evidence of insurance complies with the Encroachment Agreement;
- ☐ The proposed uses are consistent with the Authorization;
- ☐ The Encroachment does not pose a threat to the public health, safety or welfare;
- ☐ Permittee has obtained approval of, or has submitted for approval, a phased final map or parcel map that encompasses the area subject to the proposed Encroachment;
- ☐ Permittee has obtained approval of improvement plans that encompass the proposed Encroachment; and
- ☐ Permittee has paid applicable fees, as set forth in the Department of Public Works fee schedule appended hereto as Appendix 1. [PUBLIC WORKS TO REVIEW/APPROVE FEES]

**Council Authorization – ~~Proposed~~ Terms and Conditions**

A. All encroachment permits issued pursuant to this Authorization shall be subject to an Encroachment Agreement substantially in the form attached hereto as Exhibit A. Following execution of an Encroachment Agreement, the Director is hereby delegated the authority to execute Non-Material Amendments (as defined below) to the Encroachment Agreement. Notwithstanding the foregoing, the Director shall not be obligated to execute any amendments to the Encroachment Agreement. For purposes of amending the Encroachment Agreement, “Non-Material Amendment” shall mean any modification that would not:

1. Materially change or expand the Encroachment as specified in this Authorization and/or the Encroachment Agreement;
2. Modify the allocation of risk under the Encroachment Agreement;
3. Pose a risk to public health, safety or welfare; or
4. Modify any provision relating to: (i) revocation or termination of the Permit, (ii) removal, repair, maintenance or restoration of the Encroachment, Public Property or public facilities, (iii) Permittee default; (iv) assignment of the Permit, or (v) the Permittee’s indemnification obligations.

B. The ~~Major~~ Director may issue Permits pursuant to this Authorization only to the extent that the proposed Encroachment is consistent with the Downtown West Infrastructure Plan and Infrastructure Plan Sheets dated \_\_\_\_\_, 2021 (collectively, “Infrastructure Plan”). **[NOTE: SUBJECT TO GOOGLE'S AGREEMENT WITH CITY COMMENTS TO INFRASTRUCTURE PLAN AMENDMENT PROCESS]**

A.C. Notwithstanding anything to the contrary in the Infrastructure Plan, the Encroachment shall be operated only for the purpose of providing

private energy, wastewater, recycled water and solid waste utility services to the Permittee's real property as described in the Infrastructure Plan ("District System"). The Permittee shall be allowed to install, use, maintain and repair utility infrastructure and maintenance purposes which shall refer to a corridor for private district utility systems ("Utilidor") and the systems therein serving real property within the Downtown West Planned Development Zoning District. Utility infrastructure purposes includes the placement of associated communications and logistical equipment, routine maintenance and repair of the utility systems, such as pipes, conduits and associated infrastructure contained therein consistent with the Major Encroachment Agreement equipment, consistent with the form attached hereto as Exhibit A. The Major foregoing utility services. The Encroachment may not be used for any other purpose without the City Council's prior written consent.

B.D. Each portion of the Utilidor District System crossing dedicated public property shall be issued its own Major Encroachment Permit (hereafter "Encroachment Permit" or "Permit"). The Permit for each portion of the Utilidor District System shall be recorded on all real properties served by the Utilidor District System.

C.E. The Public Works Director ("Director") shall issue Permits pursuant to this Authorization in compliance with the following process:

1. Procedure for Permit Issuance.

1. Pre-Application Procedure. Prior to the submittal of any Application (as defined below) and concurrent with the submittal of preliminary tract improvement plans as described in the Downtown West Planned Development Permit approved by City Council Ordinance No. \_\_\_\_\_, Permittee shall submit to the Director for review and comment a preliminary draft location map, plan view, and elevation showing the

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

2. Application Procedure. Permittee shall submit a letter to the Director to commence the process for issuance of each ~~Encroachment Permit authorized under this Authorization ("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 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 reasonably necessary for the Director to assess the consistency of the Application with the Encroachment Permit Checklist. The Application shall be accompanied by the Permittee's payment of applicable fees~~Permit pursuant to this Authorization ("Application"). Such Application shall include all of the information contained in the "Submittal Requirements" of the Encroachment Permit Criteria attached hereto as Exhibit B.

3. Director's Review. ~~Upon the Director's determination of the Application's completeness, the~~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 B. in accordance with the following:~~

- a. Approval. The Director shall approve an Application that meets all of the Director's Required Findings of the Encroachment Permit Criteria.

a.b. Conditional Approval. ~~The~~ As an alternative to denial of an Application, the Director ~~shall~~may conditionally approve ~~any~~an Application ~~for an Encroachment Permit~~ where the Director ~~reasonably~~ determines that a condition should be imposed to ensure satisfaction of any ~~provision of the Director's Required Findings~~ of the Encroachment Permit ~~Checklist or the Encroachment Agreement and which~~ Criteria that have not been satisfied as of the date of approval of the Application, ~~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 appeal within the foregoing time period shall render the condition(s) final and non-appealable. The City Council's determination on appeal shall be final.

b.c. Denial ~~and Appeals~~. If the Director determines ~~the requirements that any of the Director's Required Findings~~ of the Encroachment Permit ~~Checklist~~ Criteria are not met, and the Director determines not to conditionally approve the Application, the Director shall deny the Application in writing, which writing shall include a description of the reasons for which the Application is denied. Permittee may within thirty (30) days of receipt of such denial appeal the Director's decision to the City Council. The Permittee's failure to appeal within the foregoing time period shall render the ~~condition~~ denial final and non-appealable. The City Council's determination on appeal shall be final.

~~i. Major Encroachment Agreement. Any Permit issued hereunder shall require Permittee to execute an agreement substantially consistent with the form Major Encroachment Agreement. The Director shall be permitted to make any necessary conforming edits to the form Major Encroachment Agreement, including the incorporation of relevant exhibits. In addition, the Public Works Director may approve Non-Material Amendments to the form Major Encroachment Agreement. "Non-Material Amendment" shall mean any modification that does not include a change to expand the permissible uses of any encroachment or any change to the Major Encroachment Agreement that would materially increase the City's risk, pose a risk to public health safety and welfare, or modify any provision relating to revocation of Permits, repair, maintenance or restoration of public property, assignment of any permit, or Permittee's indemnification obligations.~~

4. Alternative Procedures. The ~~procedures~~foregoing procedure for issuance of ~~Encroachment Permits by the Director provided~~ under this ~~Permit~~Authorization shall not be interpreted to prevent the Permittee, at its election, from pursuing ~~an Encroachment Permit~~permits under ~~the procedures set forth in~~ Title 13 of the San José Municipal Code, as amended, for encroachments other than those for the District System.

D.F. The term of this Authorization shall correspond to the term of the Development Agreement; provided, however, ~~the term of any Permit will extend unless and until the specific Permit is revoked as described in the Major Encroachment Agreement or the encroachment is removed. This authorization~~that this Authorization is conditional upon

- the Permittee's proposed locations for the ~~Utilidor as described in the~~  
~~Master Encroachment Diagram~~District System being available at the  
time the Permittee obtains a Permit for each portion ~~of the~~  
~~Utilidor thereof~~. If the proposed District System location conflicts with  
existing private or public improvements or infrastructure or planned  
public projects, the Permittee shall be required at its cost to ~~either, as~~  
applicable: (1) negotiate with the owner of ~~the any~~ improvements or  
infrastructure that conflict with the proposed ~~Utilidor~~District System  
location to resolve the conflict, or (2) re-apply to the City ~~Council~~ to  
amend the ~~Master Encroachment Diagram~~Infrastructure Plan to allow  
an alternative location for that portion of the ~~Utilidor~~District System.
- ~~B. The Infrastructure Plan incorporated into the Development Agreement~~  
~~as Exhibit ("Infrastructure Plan") provides for certain relocations or~~  
~~resizing of Utilidors, which may be approved as "minor deviations" and~~  
~~"Non-Material Amendments" as defined in the Infrastructure Plan.~~  
~~Provided that the Permittee submits a satisfactory Application, the~~  
~~Director shall issue Permits for any Utilidor notwithstanding a~~  
~~relocation or modification of said Utilidor compared to the Master~~  
~~Encroachment Diagram where such relocation or modification is~~  
~~authorized as a minor deviation or Non-Material Amendment under~~  
~~the Infrastructure Plan.~~
- G. If a Permit is revoked pursuant to the terms of the Encroachment  
Agreement, the Permittee may request an amendment to the  
Infrastructure Plan to provide for re-routing of the utility infrastructure  
and may apply for a new encroachment permit to accommodate the  
re-routed utility infrastructure. Any issuance of a new permit for re-  
routed utility infrastructure shall be governed by the San José  
Municipal Code, as may be amended from time to time, and issued in  
the City Council's discretion.

### **Council Authorization – Terms and Conditions**

- A. All encroachment permits issued pursuant to this Authorization shall be subject to an Encroachment Agreement substantially in the form attached hereto as Exhibit A. Following execution of an Encroachment Agreement, the Director is hereby delegated the authority to execute Non-Material Amendments (as defined below) to the Encroachment Agreement. Notwithstanding the foregoing, the Director shall not be obligated to execute any amendments to the Encroachment Agreement. For purposes of amending the Encroachment Agreement, “Non-Material Amendment” shall mean any modification that would not:
1. Materially change or expand the Encroachment as specified in this Authorization and/or the Encroachment Agreement;
  2. Modify the allocation of risk under the Encroachment Agreement;
  3. Pose a risk to public health, safety or welfare; or
  4. Modify any provision relating to: (i) revocation or termination of the Permit, (ii) removal, repair, maintenance or restoration of the Encroachment, Public Property or public facilities, (iii) Permittee default; (iv) assignment of the Permit, or (v) the Permittee’s indemnification obligations.
- B. The Director may issue Permits pursuant to this Authorization only to the extent that the proposed Encroachment is consistent with the Downtown West Infrastructure Plan and Infrastructure Plan Sheets dated \_\_\_\_\_, 2021 (collectively, “Infrastructure Plan”). [NOTE: SUBJECT TO GOOGLE’S AGREEMENT WITH CITY COMMENTS TO INFRASTRUCTURE PLAN AMENDMENT PROCESS]
- C. Notwithstanding anything to the contrary in the Infrastructure Plan, the Encroachment shall be operated only for the purpose of providing

- private energy, wastewater, recycled water and solid waste utility services to the Permittee's real property as described in the Infrastructure Plan ("District System"). The Permittee shall be allowed to install, use, maintain and repair utility infrastructure, such as pipes, conduits and associated equipment, consistent with the foregoing utility services. The Encroachment may not be used for any other purpose without City Council's prior written consent.
- D. Each portion of the District System crossing dedicated public property shall be issued its own Permit. The Permit for each portion of the District System shall be recorded on all real properties served by the District System.
- E. The Director shall issue Permits pursuant to this Authorization in compliance with the following process:
1. Pre-Application Procedure. Prior to the submittal of any Application (as defined below) and concurrent with the submittal of preliminary tract improvement plans as described in the Downtown West Planned Development Permit approved by City Council Ordinance No. \_\_\_\_\_, Permittee shall submit to the Director for review and comment a preliminary draft location map, plan view, and elevation showing the dimensions and location of the proposed encroachment and its relationship to adjoining properties, any public property, and any structures, utilities or improvements and any additional information requested by the Director related to the evaluation of any encroachment for consistency with the Infrastructure Plan and corresponding preliminary tract improvement plans under concurrent review (collectively "Preliminary Application Materials"). Permittee shall submit Preliminary Application Materials developed at each of the thirty-five percent (35%), sixty-five percent (65%) and ninety-five percent (95%) levels. For each submittal, the Director will review the Preliminary

Application Materials for consistency with the Infrastructure Plan and Infrastructure Plan Sheets and the preliminary tract improvement plans under concurrent review by the Director. The Director will provide comments on the Preliminary Application Materials in accordance with the Public Works Standard Review Timelines for improvement plans.

2. Application Procedure. Permittee shall submit a letter to the Director to commence the process for issuance of each Permit pursuant to this Authorization (“Application”). Such Application shall include all of the information contained in the “Submittal Requirements” of the Encroachment Permit Criteria attached hereto as Exhibit B.
3. Director’s Review. The Director shall review the Application and shall either approve, conditionally approve or deny such Application in accordance with the following:
  - a. Approval. The Director shall approve an Application that meets all of the Director’s Required Findings of the Encroachment Permit Criteria.
  - b. Conditional Approval. As an alternative to denial of an Application, the Director may conditionally approve an Application where the Director determines that a condition should be imposed to ensure satisfaction of any of the Director’s Required Findings of the Encroachment Permit Criteria that have not been satisfied as of the date of approval of the Application. If the Director conditionally approves a Permit, the Permittee may within thirty (30) days of receipt of any conditional approval appeal the condition(s) to the City Council. The Permittee’s failure to appeal within the foregoing time period shall render the condition(s) final and non-appealable. The City Council’s determination on appeal shall be final.

- c. Denial. If the Director determines that any of the Director's Required Findings of the Encroachment Permit Criteria are not met, and the Director determines not to conditionally approve the Application, the Director shall deny the Application in writing, which writing shall include a description of the reasons for which the Application is denied. Permittee may within thirty (30) days of receipt of such denial appeal the Director's decision to the City Council. The Permittee's failure to appeal within the foregoing time period shall render the denial final and non-appealable. The City Council's determination on appeal shall be final.
- 4. Alternative Procedures. The foregoing procedure for issuance of Permits under this Authorization shall not be interpreted to prevent the Permittee, at its election, from pursuing permits under Title 13 of the San José Municipal Code, as amended, for encroachments other than those for the District System.
- F. The term of this Authorization shall correspond to the term of the Development Agreement; provided, however, that this Authorization is conditional upon the Permittee's proposed locations for the District System being available at the time the Permittee obtains a Permit for each portion thereof. If the proposed District System location conflicts with existing private or public improvements or infrastructure or planned public projects, the Permittee shall be required at its cost to, as applicable: (1) negotiate with the owner of any improvements or infrastructure that conflict with the proposed District System location to resolve the conflict, or (2) re-apply to the City to amend the Infrastructure Plan to allow an alternative location for that portion of the District System.
- G. If a Permit is revoked pursuant to the terms of the Encroachment Agreement, the Permittee may request an amendment to the



Infrastructure Plan to provide for re-routing of the utility infrastructure and may apply for a new encroachment permit to accommodate the re-routed utility infrastructure. Any issuance of a new permit for re-routed utility infrastructure shall be governed by the San José Municipal Code, as may be amended from time to time, and issued in the City Council's discretion.