

From: [Hill, Egan](#)
To: [Colli, Garrett J. \(Perkins Coie\)](#)
Subject: RE: DW Encroachment Agreement
Date: Monday, April 5, 2021 8:28:00 AM
Attachments: [1806358.doc](#)
[1798379_2.docx](#)
[1785920_7.docx](#)

Hi Garrett,

Please updated drafts of the Council Authorization, Encroachment Agreement (with insurance requirements) and Permit Checklist. These should be in near final form, subject to Google's review of the insurance provisions.

On another note, have you been able to confirm whether Google wants to proceed with the Streets & Highways vacation process? As we discussed with Ryan last week, the S&H process will raise a number of issues, but one that we didn't discuss was whether the County would accept for recording the Council vacation resolution. Per S&H 8325, the Clerk must certify the Council reso for recording. However, the current Vacation Reso does not contain the legal descriptions or maps that show the vacated area. Therefore, there will need to be a separate document prepared for recording, but I'm not sure whether the Clerk can certify that separate document as the Council resolution. We probably should discuss in more detail after you've had a chance to touch base with Google.

Just a reminder that I'll be out of the office starting Tuesday afternoon for the remainder of the week.

Thanks.

From: Colli, Garrett J. (Perkins Coie) <GColli@perkinscoie.com>
Sent: Friday, April 2, 2021 6:42 PM
To: Hill, Egan <Egan.Hill@sanjoseca.gov>
Subject: RE: DW Encroachment Agreement

[External Email]

Thank you, Egan. We'll return a draft back to you with updated Google contact info for Section 22. Please let me know when you might be able to share the final Authorization so I can provide that to Google.

Thanks again.

Garrett Colli | Perkins Coie LLP

PARTNER

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

From: Hill, Egan <Egan.Hill@sanjoseca.gov>
Sent: Friday, April 2, 2021 12:41 PM
To: Colli, Garrett J. (SFO) <GColli@perkinscoie.com>
Subject: RE: DW Encroachment Agreement

Thanks, Garrett. Please see revised clean draft attached.

From: Colli, Garrett J. (Perkins Coie) <GColli@perkinscoie.com>
Sent: Friday, April 2, 2021 9:17 AM
To: Hill, Egan <Egan.Hill@sanjoseca.gov>
Subject: DW Encroachment Agreement

[External Email]

Hi Egan,

Please see attached for a proposed edit to Section 8 per our discussion.

Thank you,

Garrett Colli | Perkins Coie LLP

PARTNER

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San Francisco, CA 94105
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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
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 privately-owned, subsurface energy (thermal heating and cooling), wastewater, recycled water and electrical systems infrastructure (“District Systems”) for the purpose of providing service to 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 the Downtown West Design Standards and Guidelines and the Downtown West Infrastructure Plan (included as Exhibit I to the Development Agreement) and the Conceptual Encroachment Plan Sheets (the Downtown West Infrastructure Plan and the Conceptual Encroachment Plan Sheets are collectively referred to herein as the “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 subsurface private or franchised 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 Systems to residents and businesses both during and after the removal of the Encroachment ("Meet and Confer"). If, after the City's delivery of the Notice of Public Purpose, the City and Permittee agree in good faith that more than one (1) year from the date of the delivery of the Notice of Public Purpose will be required to complete the environmental review and planning activities necessary to address the Permittee's removal and/or relocation of the Encroachment, the City will delay the initiation of City Council revocation proceedings by up to one (1) additional year beyond the initial one (1) year Notice of Public Purpose period. 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 as determined by 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; provided, however, that if cure of the breach or failure to perform requires the Permittee to perform construction, the Director may authorize a cure period of up two hundred seventy (270) days, with any longer cure period requiring 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 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, as determined by the Director of Public Works. 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 or impede the City's maintenance, and shall not interfere with, impede or make more costly the City's operation 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 sixty (60) 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"), 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 to the extent such Claims result from the City's gross 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.
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), (ii) one or more of the owner(s) of the commercial office building(s) located on the Property, or (iii) a commercial owners' association comprised of owners of office buildings 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.

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

This Exhibit D identifies the minimum insurance requirements with which Permittee shall comply; however, the minimum insurance requirements shall not relieve Permittee of any other obligations under the Permit. Permittee may carry, at its own expense, any additional insurance it deems necessary or prudent.

A. Minimum Scope of Insurance. Coverage shall be at least as broad as:

1. The coverage provided by Insurance Services Office Commercial General Liability coverage ("occurrence") Form Number CG 0001, including products and completed operations and explosion, collapse and underground coverages, and coverage for economic loss; and
2. The coverage provided by Insurance Services Office Form Number CA 0001 covering Automobile Liability. Coverage shall be included for all owned, non-owned and hired automobiles; and
3. Contractor's Pollution Liability with respect to initial construction of the District Systems and, thereafter, site-specific Pollution Legal Liability, insurance applying to both sudden conditions for all operations, completed operations and professional services, and including coverage for on-site and off-site bodily injury, property damage, clean up and defense costs and economic loss; and
4. Workers' Compensation insurance as required by the California Labor Code and Employer's Liability insurance; and
5. Builder's Risk during the course of construction of the District Systems; and
6. Property insurance providing "all risk" coverage for the completed Encroachment.

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

B. Minimum Limits of Insurance. Permittee shall maintain limits no less than:

1. Commercial General Liability: \$50,000,000 per occurrence for bodily injury, personal injury and property damage. If Commercial General Liability Insurance or other form with a general aggregate limit is used, either the general aggregate limit shall apply separately to this project/location or the general aggregate limit shall be twice the required occurrence limit.
2. Automobile Liability: \$5,000,000 per accident for bodily injury and property damage.
3. Contractor's Pollution Liability: \$10,000,000 each occurrence/aggregate limit.

4. Workers' Compensation: Coverage as required by the Labor Code of the State of California, and Employer's Liability \$1,000,000 per accident.
5. Builder's Risk: Full replacement value.
6. Property: Full replacement value.

Any limits requirement may be met with any combination of primary and excess coverage so long as the excess coverage is written on a "follow form" or umbrella basis.

C. **Deductibles and Self-Insured Retentions.** Any deductibles or self-insured retentions must be declared to, and approved by, the City's Risk Manager.

D. **Endorsements.** The insurance policies shall be endorsed (or shall contain provisions) as follows:

1. Commercial General Liability, Automobile Liability and Pollution Liability

- a. The City, its officers, employees and agents are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, Permittee; products and completed operations of Permittee; premises owned, leased or used by Permittee; and automobiles owned, leased, hired or borrowed by Permittee. The scope of protection afforded to City, its officers, employees and agents shall extend to cover their concurrent negligence.
- b. Permittee's insurance coverage shall be primary insurance as respects City, its officers, employees and agents. Any insurance or self-insurance maintained by City, its officers, employees or agents shall be excess of Permittee's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies by Permittee shall not affect coverage provided City, its officers, employees or agents.
- d. Coverage shall state that Permittee's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability.
- e. Coverage shall contain waiver of subrogation in favor of the City, its officers, employees and agents.

2. Workers' Compensation and Employers' Liability; Builder's Risk and Property. Coverage shall contain waiver of subrogation in favor of the City, its officers, employees and agents.

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

E. Duration.

1. Commercial General Liability (or the completed operations component thereof) and Pollution Liability coverages shall be maintained continuously for a minimum of five (5) years after the later to occur of expiration of the Agreement or completion of work or other operations under the Permit.
2. If any of such coverages, which are permitted to be written on a claims-made basis, are written on a claims-made basis, the following requirements apply:
 - a. The policy retroactive date must precede the effective date of the Permit.
 - b. If the policy is cancelled or non-renewed and coverage cannot be procured with the original retroactive date, Permittee must purchase an extended reporting period equal to or greater than five (5) years after completion of work under the Agreement.

F. Acceptability of Insurers. All insurance companies providing coverage to Permittee shall have an AM. Best rating of A-, Financial Size Category VII or better.

G. Verification of Coverage. Permittee shall furnish City with certificates of insurance and with endorsements affecting coverage required by this Exhibit D. The certificates and endorsements for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf. Proof of insurance shall be emailed in pdf format to: Riskmgmt@sanioseca.gov:

Certificate Holder
City of San Jose - Finance Department
Risk Management & Insurance
200 East Santa Clara St., 14th Floor
San Jose, CA 95113-1905

These insurance requirements are subject to amendment or waiver if so approved in writing by the City's Risk Manager.

City reserves the right to review these insurance requirements from time to time and at anytime during the term of the Permit and to make reasonable adjustments thereto when deemed necessary and prudent by the City's Risk Manager based upon (by way of example only) changes in law, principles of sound risk management practice, or inflation. Should the City's Risk Manager request adjustments in writing to Permittee, Permittee shall use commercially reasonable efforts to cause its insurers to implement such adjustments.

H. Coverage for Third Parties. Permittee shall include all contractors and other parties with whom it is contracting (whether directly or indirectly) in connection with work or other operations under the Permit ("Third Parties") as insured under its policies or shall obtain separate certificates and endorsements for each such Third Party evidencing their compliance with these insurance requirements, including without limitation additional insured's coverage and waivers of subrogation. Notwithstanding the generality of the foregoing, the City's Risk Manager may from time to time approve amendments of these

requirements as they apply to Third Parties (such as, by way of example only, reduction of limits), provided the Permittee has requested such amendment in writing and the City's Risk Manager has determined that such amendment is acceptable based upon principles of sound risk management practice.

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.

RESOLUTION NO. _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN JOSE AUTHORIZING A MAJOR ENCROACHMENT PERMIT PURSUANT TO SAN JOSE MUNICIPAL CODE CHAPTER 13.37 FOR DISTRICT SYSTEMS INFRASTRUCTURE AT VARIOUS LOCATIONS WITHIN THE DOWNTOWN WEST DEVELOPMENT AREA

WHEREAS, Google LLC (“Permittee”) has applied for an encroachment permit pursuant to Chapter 13.37 of the San José Municipal Code (“Chapter 13.37”); and

WHEREAS, this Resolution is a companion to the following approvals relating to Downtown West: certification of the Downtown West Final Environmental Impact Report, adoption of CEQA Findings, a Mitigation Monitoring and Reporting Program, and Statement of Overriding Considerations (Resolution No. ____); City approval of an override of the Santa Clara County Airport Land Use Commission’s inconsistency determination (Resolution No. ____); amendments to the DSAP (Resolution No. ____); approval of the Development Agreement for the Downtown West Mixed-Use Plan (Ordinance No. ____); approval of a Planned Development Rezoning, including a General Development Plan (Ordinance No. ____); approving a Planned Development Permit (Resolution No. ____); amendments to Title 20 of the San José Municipal Code (Ordinance No. ____); conditionally approving a Vesting Tentative Map (Resolution No. ____); conditionally amending the boundaries for Historic Landmarks (San José Water Company Building at 374 West Santa Clara Street, and Southern Pacific Historic District) (Resolutions No. ____ and ____); conditionally approving an amendment to Historic Preservation Permit (HP16-002) (Resolution No. ____); **conditionally vacating certain streets within the Project site (Resolution No. ____)**; and

WHEREAS, the Permittee owns and/or is in the process of developing various properties located in the Downtown West Area as shown on the Vesting Tentative Map (collectively, the “Property”); and

WHEREAS, the Property is bounded by certain public rights-of-way as shown on the Conceptual Encroachment Plan Sheets (“Public Property”) in which the Permittee has proposed to design, construct, maintain, repair, occupy and use privately-owned, subsurface energy (thermal heating and cooling), wastewater, recycled water and electrical systems infrastructure within the Public Property (“District Systems” or “Encroachment”); and

WHEREAS, on _____, 2021, the Director of the Department of Public Works (“Director”) submitted to the City Council a memorandum setting forth his findings and recommendations for the conditional approval of the Encroachment (hereinafter “Report”); and

WHEREAS, this resolution shall constitute the City Council’s authorization for the Encroachment pursuant to Chapter 13.37, subject to the terms and conditions contained herein (“Authorization”), and together with an executed Encroachment Agreement, shall constitute the revocable license for the Encroachment (“Permit”);

NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN JOSE THAT:

SECTION 1. The City Council hereby adopts the Report, and based on the Report and all other evidence submitted, as well as the conditions and limitations contained in this Authorization, makes the following findings:

- A. The Encroachment will provide a public benefit to those using the Public Property;

- B. No other reasonable method of obtaining the desired results is available except for the Encroachment as proposed;
- C. Granting the Permit will not unreasonably interfere with or disrupt use of the Public Property;
- D. The Public Property has the capacity to accommodate the proposed Encroachment and any other existing or foreseeable public or private facilities;
- E. Granting the Permit will not be detrimental to the public interest, safety, health or welfare or have the potential to injure the property interests of others; and
- F. The Permittee has demonstrated its ability to install, maintain, repair and remove the Encroachment.

SECTION 2. Permits for the Encroachment are hereby authorized, subject to the following:

- A. All Permits issued pursuant to this Authorization shall be subject to an Encroachment Agreement substantially in the form attached hereto as Exhibit A (“Encroachment Agreement”). 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 dated _____, 2021 and Conceptual Encroachment Plan Sheets dated _____, 2021 (collectively, "Infrastructure Plan"). The Conceptual Encroachment Plan Sheets are attached hereto as Exhibit B.
- C. Notwithstanding anything to the contrary in the Infrastructure Plan, the Encroachment shall be operated only for the purpose of providing District Systems service to the Permittee's real property as described in the Infrastructure Plan. The Permittee shall be allowed to install, use, maintain and repair infrastructure, such as pipes, conduits and associated equipment, consistent with the foregoing District Systems services. The Encroachment may not be used for any other purpose without City Council's prior written consent.
- D. Each portion of the District Systems crossing dedicated public property shall be issued its own Permit. The Permit for each portion of the District Systems shall be recorded on all real properties served by the District Systems.
- 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 C.

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:
 - i. Approval. The Director shall approve an Application that meets all of the Director's Findings Required to Approve Application ("Director's Findings") as set forth in the Encroachment Permit Criteria.
 - ii. 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 Findings 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.
 - iii. Denial. If the Director determines that any of the Director's Findings 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 Systems.
- 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 Systems being available at the time the Permittee obtains a Permit for each portion thereof. If the proposed District Systems 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 Systems location to resolve the conflict, or (2) amend the Infrastructure Plan in accordance with its terms to allow an alternative location for that portion of the District Systems.
- 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 District Systems infrastructure and may apply for a new encroachment permit to accommodate the re-routed District Systems infrastructure. Any issuance of a new permit for re-routed District Systems 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.

SECTION 3. After satisfaction of all conditions to issuance of a Permit under this Authorization, the Director is hereby directed to execute the Encroachment Agreement

and record a certified copy of the Permit with the Office of the Recorder for the County of Santa Clara.

ADOPTED this _____ day of _____, 2021, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk

EXHIBIT A

[Exhibit A follows on next page]

EXHIBIT B

[Exhibit B follows on next page]

EXHIBIT C

[Exhibit C follows on next page]