

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Draft Settlement Agreement
Date: Thursday, May 27, 2021 4:08:55 PM
Attachments: [Confidential Settlement Agreement 1.docx](#)

From: Phan, Johnny
Sent: Tuesday, May 25, 2021 1:13 AM
To: Lucy Lofrumento <lal@lmallp.com>
Cc: Jim Goddard <jgoddard@sapcenter.com>; Jonathan Becher <jbecher@sjsharks.com>;
jgustafson@sharksice.com
Subject: Draft Settlement Agreement

See attached.

Johnny V. Phan

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SETTLEMENT AND RELEASE AGREEMENT

This Settlement and Release Agreement (“Agreement”) is entered into by and between the following: (i) GOOGLE LLC, a Delaware limited liability company, ("Google"), (ii) CITY OF SAN JOSE, a California municipal corporation ("City"), and (iii) SHARKS SPORTS & ENTERTAINMENT LLC, a _____ (“SSE”). Google, SSE and City, where appropriate, are hereafter referred to individually as “Party” and collectively as the “Parties.”

RECITALS

A. On or about October 10, 2019, Google submitted project applications for the Downtown West Mixed-Use Plan, a proposed mixed-use project consisting of up to 5,900 residential units; up to 7,300,000 gross square feet (gsf) of office space; up to 500,000 gsf of active uses such as retail, cultural, arts, etc.; up to 300 hotel rooms; up to 800 limited-term corporate accommodations; up to two event and conference centers totaling up to 100,000 gsf; up to two central utility plants totaling approximately 130,000 gsf; logistics/warehouse(s) totaling approximately 100,000 gsf; approximately 15 acres of open space; and infrastructure, transportation, and public realm improvements ("Project").

B. The Project is located in the City on approximately 80 acres in an area generally bounded by Lenzen Avenue and the Union Pacific Railroad tracks to the north; North Montgomery Street, Los Gatos Creek, the Guadalupe River, South Almaden Street, and Royal Avenue to the east; Auzerais Avenue to the south; and Diridon Station, the Caltrain rail corridor, and Cahill Street to the west as well as the area bounded by Los Gatos Creek to the west, San Fernando Street to the south, the Guadalupe River to the east, and Santa Clara Street to the north (“Property”).

C. On December 8, 2020, and April 28, 2021, SSE submitted comment letters to the City setting forth SSE's concerns and objections relating to the Draft Environmental Impact Report and the First Amendment to the Draft Environmental Impact Report (collectively, the "EIR") prepared by the City for the Project pursuant to the California Environmental Quality Act (Pub. Res. Code, §§ 21000, et seq.) (“CEQA”) and the CEQA Guidelines (Title 14, Cal. Code Regs., §§ 15000, et seq.).

D. On April 1, April 21 and April 27, 2021, SSE submitted letters to the City setting forth concerns and objections relating to the City's compliance with the Second Amended and Restated Arena Management Agreement between the City and San Jose Arena Management, LLC, dated August 15, 2018, and as amended by the First Amendment to the Second Amended and Restated Arena Management Agreement, dated December 4, 2018 ("AMA"), the Option/Negotiation Rights Agreement between the City and Google, dated December 4, 2018 ("Option Agreement") and the Development Agreement statute with respect to the Project.

E. On April 28, 2021, the San Jose Planning Commission held a duly noticed public hearing on the Project and recommended that the San Jose City Council take the following actions: certification of the EIR and adoption of findings pursuant to CEQA, a Mitigation Monitoring and Reporting Program, and a Statement of Overriding Considerations; an override of the Santa Clara County Airport Land Use Commission’s Comprehensive Land Use Plan inconsistency

determination; amendments to the General Plan; amendments to the Diridon Station Area Plan; Planned Development Rezoning, including a General Development Plan; a Planned Development Permit; amendments to Title 20 of the San José Municipal Code; approval of the Development Agreement for the Downtown West Mixed-Use Plan; approval of a Vesting Tentative Map; approval of amendments to the boundaries of Historic Landmarks (San José Water Company at 374 West Santa Clara Street and Southern Pacific Depot Historic District); an amendment to Historic Preservation Permit (HP16-002); approval of Major Encroachment Permits; approval of a Construction Impact Mitigation Plan; and approval of partial vacation of certain streets within Downtown West (the "Project Approvals"). The actions on the Project Approvals are set for a hearing before the City Council on May 25, 2021 and are identified as Item 10.2 of the Agenda and reference File Nos. GP19-009, PDC19-039, PD19-029, HP20-002, and PT20-027. For purposes of this Agreement, the "Project Approvals" shall also include Subsequent Approvals as defined in the Development Agreement except those that include a Material Change as defined in Section 1.76 (ii), (iv), or (v) of the Development Agreement.

F. On April 28, 2021, the San Jose Planning Commission held a duly noticed public hearing on a City-initiated General Plan Amendment to the Diridon Station Area Plan and recommended that the San Jose City Council take the following actions: adoption of an Addendum to the Downtown Strategy 2040 Environmental Impact Report and Addenda thereto; an override of the Santa Clara County Airport Land Use Commission's Comprehensive Land Use Plan inconsistency determination; amendments to the General Plan; and rezoning of certain real property within the Diridon Station Area Plan ("City-Initiated Approvals"). The actions on the City-Initiated Approvals are set for a hearing before the City Council on May 25, 2021 and are identified as Item 10.3 of the Agenda and reference File Nos. GP20-007 and C20-002.

G. Prior to the Planning Commission hearing on the City-Initiated Approvals, SSE submitted comment letters to the City setting forth SSE's concerns and objections relating to the City-Initiated Approvals and the City responded to SSE's letters.

H. On May 14, 2021, the City responded to SSE's letters, including by proposing certain changes to the Project Approvals.

I. On May 17 and May 21, 2021, SSE sent additional letters requesting additional changes to the Project Approvals. (Collectively, the December 8, 2020, April 1, 21, 27, and 28 and May 17 and 21 2021 letters from SSE are known as the "SSE Letters.")

I. By this Agreement, it is the intent of the Parties to fully resolve all disputes between the Parties arising out of, and in connection with the Project Approvals and the City-Initiated Approvals in the manner provided herein.

SETTLEMENT TERMS

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, without acknowledging the validity of any concerns that were or could have been raised by SSE, and in consideration of the foregoing recitals and the mutual promises and

covenants hereinafter set forth, and in an effort to avoid the expense of litigation, it is agreed between the Parties as follows:

1. Effective Date. The effective date of this Agreement shall be the date on which this Agreement is fully executed by all of the Parties (“Effective Date”).

2. Google Obligations. In exchange for the releases provided in Section 5 of this Agreement, Google shall seek the modifications to the Project Approvals described in Sections 2(a) through 2(e) below and agrees to the coordination obligation described in Section 2(f).

a. Ordinance Rezoning the Property to the DC (PD) Planned Development Zoning District (“PD Zoning Ordinance”)

i. Section 6, paragraph B of the PD Zoning Ordinance has been revised to include language acknowledging that the City does not intend to prohibit any uses and/or structure the City is obligated to allow under the AMA and that any non-conforming use limitations established under Chapter 20.150 of the San Jose Municipal Code do not apply to Lots ABC to the extent necessary to allow uses or structures the City is obligated to allow under the AMA. Section 6, paragraph B of the PD Zoning Ordinance has been modified as follows:

Existing Uses and Structures. The City Council does not intend to prohibit any uses and/or structures the City is obligated to allow on Lots ABC pursuant to the Arena Management Agreement by and between the City of San José and San José Arena Management, LLC as amended through December 4, 2018 (the “AMA”). The uses the City is required to allow on such property under the AMA, which include parking and supporting entertainment uses, are consistent with the General Plan as amended through the effective date of this ordinance, including the applicable Downtown and Commercial Downtown land use designations. The requirements of this ordinance, the GDP, the PD Permit, and Municipal Code chapter 20.150 shall not apply to Lots ABC (and Lots ABC shall retain their existing Industrial / Heavy Industrial zoning) until such time as the Project Sponsor acquires fee title or any other legal or equitable interest that includes a right to possession of Lots ABC.

b. Development Agreement.

i. Sections 3.3 and 14.6 of the Development Agreement have been revised to incorporate SSE's requested edits in its letter dated May 17, 2021, to clarify Developer's rights and obligations with respect Development Parcels, as follows:

Section 3.3 revision: Developer may pursue approval of Final Maps for Development Parcels in phases that include only portions of the associated Tentative Map.

Section 14.6 revision (now 14.7 due to addition of provision noted below): Developer shall exercise full dominion and control over the Development Parcels-Project Site, subject only to the limitations and obligations of Developer contained in this Agreement.

ii. A new Section 14.2 has been added to the Development Agreement (and the subsequent provisions of Section 14 renumbered accordingly) to include the following clarification:

Relationship to Option Agreement. Nothing in this Agreement is intended, nor shall be interpreted to affect, eliminate, or modify the provisions of or the City's rights under the Option/Negotiation Rights Agreement between the City of San José, a California municipal corporation, and Google LLC, a Delaware limited liability company, dated December 4, 2018, for the property referred to as "Lots A-C," and more particularly described in Exhibit A to that Agreement, located in the City of San José, California.

c. Exhibit K to Development Agreement, Downtown West Parking Requirements. Exhibit K has been revised to clarify that (i) the parking spaces to be provided by the Project will be located within 1/3-mile of the south entrance to the SAP Center, (ii) 2,850 commercial parking spaces within the Project Site boundary and within 1/3-mile of the south entrance to the SAP Center will remain "Available," as defined in the Exhibit, and (iii) to make other clarifying edits all as shown in Attachment 1 .

d. Conformance Review Implementation Guide. Section II (Vertical Conformance Review Application Submittal Requirements) of the Conformance Review Implementation Guide has been revised to incorporate SSE's requested edits in its letter dated May 17, 2021, to establish a meet and confer process with SSE on select parking-related vertical improvements. A new subsection (m) has been added under Section II.B.1 as follows:

(m) Meet and Confer with Sharks Sports & Entertainment (SSE) on Select Parking-Related Vertical Improvements. At least seven (7) business days before submitting a Conformance Review Application for Vertical Improvements (schematic level of design) that includes replacement parking facilities proposed by the project sponsor to be made available to SSE, the project sponsor shall provide written notice to up to three SSE representatives, as identified by SSE, of the anticipated Conformance Review Application. If within seven (7) business days of receiving such notice, SSE requests a meet and confer meeting ("Meet and Confer") with the project sponsor and the City regarding the Conformance Review Application, then the project sponsor shall provide SSE with a copy of the project sponsor's Conformance Review Application concurrent with its application submittal to the City. The project sponsor and city shall use commercially reasonable efforts to schedule and conduct the Meet and Confer with SSE within seven (7) business days following Conformance Review Application submittal. At the Meet and Confer, SSE may provide the project sponsor with comments on the applicable Conformance Review

Application, which comments shall be (1) limited to the design and function of those parking facilities proposed to be made available to SSE; and (2) focused on industry best practices relating to the design and function of such parking facilities. The City may in its discretion consider comments provided by SSE during the Meet and Confer as part of the City's review of the Conformance Review Application pursuant to the timelines set forth in Section IV.B.

e. Conformance Review Implementation Guide. Appendix A (Downtown West Planned Development Zoning District Vertical and Open Space Conformance Review Approval Form) of the Conformance Review Implementation Guide has been revised to clarify that compliance with Exhibit K parking requirements will be reviewed as part of the Conformance Review process. The following clarifications were added to Section B (Consistency Determination), subsection 2(e) of Appendix A:

(e) If a Vertical Conformance Review Application includes office development, the development proposal described in the Application complies with the requirements of Exhibit K to the Development Agreement, as follows:

(1) The number of commercial/public parking spaces satisfies the Required Parking Ratio.

☐ Yes

☐ No

(2) The project sponsor has demonstrated that at least 2,850 "Available" parking spaces will be maintained in the aggregate within the Project boundary and within one-third (1/3)-mile radius of the south entrance to SAP Center (which radius shall be defined to include the entirety of the parking garage proposed to be located on Parcel F, as such Parcel is depicted in the DWDSG). A publicly-accessible parking space is "Available" if it is unoccupied and accessible to SAP Center customers on weekends and after 6:30 PM on weekdays, on SAP Center event days.

☐ Yes

☐ No

f. Quarterly Event Coordination. Following the Completion and commencement of the use of Privately-Owned Publicly Accessible Open Space and any Event/Conference Center space within the Project site, Google and SSE shall meet on a quarterly

basis, or with such other frequency mutually agreed to between the parties, for the following purpose: (1) to identify special events anticipated to occur for the upcoming year or more on Privately-Owned Publicly Accessible Open Space, Event/Conference Center space, and at the SAP Center; and (2) to coordinate on the special events to address any potential transportation and access issues that may impact SSE's operation of the SAP Center or Google's operation of the Project site.

3. City Obligations. In exchange for the releases provided in Section 6 of this Agreement, City shall institute the following process improvements:

- a. Establish an internal system within its new development and project review system to notify City staff when a proposed project or permit request requires a review of the AMA and/or coordination with SSE;
- b. Implement a process improvement to ensure that Construction Impact Mitigation Plans (CIMPs) for vertical and open space development within the vicinity of the SAP Arena are shared with SSE for feedback prior to building permit submission and allow time for meaningful review and input; and
- c. Facilitate the Quarterly Event Coordination described in Paragraph 2(f), above.

Moreover, City shall not allow the alteration of any sidewalks along Arena frontages at W. Santa Clara Street or N. Autumn Street without SSE's consent that such alteration does not materially negatively affect operations of the Arena (such as safety, security, crowd control, etc.), whose consent shall not be unreasonably withheld.

4. No Google Liability for City Obligations; No City Liability for Google Obligations. Google shall have no obligation to perform, and no liability for non-performance of, the City's obligations set forth in Section 3. City shall have no obligation to perform, and no liability for non-performance of, Google's obligations set forth in Section 2. No remedy awarded against the City for any default by City on a City obligation under this Agreement shall entitle SSE to such remedy against Google and in no event shall a default by City result in termination of this Agreement. Further, no remedy awarded against Google for any default by Google on a Google obligation under this Agreement shall entitle SSE to such remedy against City and in no event shall a default by Google result in termination of this Agreement.

5. Release and Waiver Relating to Google Obligations. As of the Effective Date of this Agreement, on the condition that the changes to the Project Approvals set forth in Section 2 are incorporated into the Project Approvals and that there are no other material changes to the Project Approvals, SSE on behalf of itself and its affiliates, including San Jose Arena Management, LLC and San Jose Sharks, LLC, and their respective past, present and future assigns, successors, heirs, executors, and administrators (collectively, the "SSE Parties") and their respective officers, directors, members, insurers and agents, hereby releases and forever discharges the City and Google and their past, present and future employees, partners, officers, officials, directors,

members, insurers, agents, predecessors, successors, consultants, attorneys, and assigns, all of whom expressly deny any liability, from any and all claims, demands, damages, actions, or suits, known and unknown, asserted or not asserted, which the SSE Parties ever had, now have, claim to have had, may have had or will have relating to, arising out of, or in any way connected with the Project, the EIR, or the Project Approvals that may be granted, including, but not limited to, any challenges to the legality of the Project, the EIR, or any Project Approval; or that the City's actions relating to the Project, the EIR or the Project Approvals result in a breach of the AMA or the Option Agreement, or in any way interfere with the City's contractual obligations owed to the SSE Parties. Nothing in this section in particular, is intended to release the Parties or any other person from any claim that is not related, directly or indirectly, to the Project, the EIR, the or Project Approvals. In making this release, SSE acknowledges that Section 1542 of the Civil Code of the State of California provides as follows:

“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”

SSE represents that it has read, understood and reviewed Civil Code Section 1542 with counsel, and that it hereby waives any and all present and future rights and benefits under Section 1542 to the extent it would permit claims based on facts found to be different from the facts believed to be true at the time this Settlement Agreement was executed.

6. Release and Waiver Relating to City Obligations. As of the Effective Date of this Agreement, the SSE Parties and their respective officers, directors, members, insurers and agents, hereby releases and forever discharges the City and Google and their past, present and future employees, partners, officers, officials, directors, members, insurers, agents, predecessors, successors, consultants, attorneys, and assigns, all of whom expressly deny any liability, from any and all claims, demands, damages, actions, or suits, known and unknown, asserted or not asserted, which the SSE Parties ever had, now have, claim to have had, may have had or will have relating to, arising out of, or in any way connected with the City-Initiated Approvals or the associated CEQA document, including, but not limited to, any challenges to the legality of the City-Initiated Approvals and the associated CEQA document; or that the City's actions relating to the City-Initiated Approvals and the associated CEQA document, result in a breach of the AMA or the Option Agreement, or that Google in any way interfered with the City's contractual obligations owed to the SSE Parties, or City in approving the Project Approvals or implementing the Project Approvals in any way violate or breach the AMA or Option Agreement. Nothing in this section is intended to release the Parties or any other person from any claim that is not related, directly or indirectly, to the City-Initiated Approvals and accompanying CEQA document or claim of violation or breach of the AMA or Option Agreement as described herein. In making this release, SSE acknowledges that Section 1542 of the Civil Code of the State of California provides as follows:

“A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party.”

SSE represents that it has read, understood and reviewed Civil Code Section 1542 with counsel, and that it hereby waives any and all present and future rights and benefits under Section 1542 to the extent it would permit claims based on facts found to be different from the facts believed to be true at the time this Settlement Agreement was executed.

7. Covenant Not to Sue. SSE on behalf of itself and the SSE Parties hereby covenants that it shall not sue or assist any other person or entity to sue or in any manner institute, prosecute, or pursue any litigation, arbitration, or administrative proceeding against any person or entity, based, in whole or in part, on the released claims set forth in Sections 5 and 6, respectively, above. For purposes of this Covenant Not to Sue, “assist” includes providing financial assistance or strategic or informational guidance or any other advice to any other party. This Agreement shall constitute, and may be pled as, a full and complete defense to, and may be used as basis for an injunction against, and civil action or suit, which may be instituted, prosecuted or maintained in breach of the terms contained in this Agreement.

8. Ongoing Rights and Obligations under the AMA and Option Agreement. Nothing in this Agreement shall alter or limit the respective rights and obligations of City and SSE under the AMA or the Option Agreement, and nothing herein shall limit SSE’s remedies in connection with any breach of the AMA by the City, other than as expressly provided herein.

9. Assuming the Risk. Upon entering this Agreement, each Party assumes the risk of mistakes, and if any Party should subsequently discover that its understanding of the facts or law was incorrect, such Party shall not be entitled to set aside this Agreement or any portion of it by reason thereof, or be entitled to recover any damages or obtain any other relief, or be entitled to any offset or recoupment by reason thereof. This Agreement is intended to be final and binding by and among the Parties regardless of any mistakes of fact or law, and any claims based upon any such mistakes shall not be actionable.

10. Material Inducement; Survival of Representation and Warranties. The Parties, individually and collectively, hereby acknowledge and agree that the representations and covenants contained in this Agreement are material inducements for each of them to enter into this Agreement. All representations and warranties contained in this Agreement shall survive its execution and the execution of any other documents required to be executed and delivered in accordance with the Agreement, but not the termination of this Agreement.

11. Legal Advice and Authority. The Parties warrant, represent and agree that in executing this Agreement, they do so with full knowledge of their rights, having had full opportunity to do whatever investigation they desired, and after having received independent legal advice from attorneys of their choosing with respect to all rights which are herein settled.

12. Attorneys’ Fees; Litigation Expenses; and Costs. **[UNDER REVIEW]** Each Party to this Agreement shall bear its own expenses and costs, including attorneys’ fees, incurred with respect to the preparation of and any action brought to enforce the rights of a Party under this Agreement.

13. Notice. In the event notice is required under this Agreement, notice shall be made by personal service or reputable overnight mail service. All notices shall be sent to the following:

To Google:

With a Copy to:

Coblentz Patch Duffy & Bass LLP
One Montgomery Street, Suite 3000
San Francisco, California 94104
Attention: Miles Imwalle

To SSE:

With a Copy to:

To City:

City Attorney
San Jose City Attorney's Office
200 E. Santa Clara Street

San Jose, CA 95113

14. Authority to Enter Agreement. The Parties warrant that they have the full authority to enter into this Agreement. Where applicable, all corporate, organizational or other action necessary to authorize such execution has been taken and completed. The signatory of each Party to this Agreement has the full right and authority to commit and bind each respective Party, and all members and/or individuals related thereto, to the fullest extent of the law.

15. Governing Law; Venue. The Parties hereby agree that this Agreement is made, executed and entered into, and is intended to be formed within the State of California and that this Agreement is to be interpreted and enforced under the internal laws of the State of California without reference to choice of law or conduct of law provisions. Venue shall be in the County of Santa Clara.

16. Counterparts. This Agreement may be executed in counterparts, each of which is hereby declared to be an original. All, however, shall constitute but one and the same Agreement. In any action or proceeding, any photographic or other copy of this Agreement may be introduced into evidence.

17. Binding. This Agreement shall inure to the benefit of and be binding upon the heirs, representatives, predecessors, successors, and assigns of each of the Parties.

18. Complete Agreement. This Agreement contains the entire agreement and understanding concerning the subject matter herein and supersedes and replaces any and all prior negotiations and agreements between the Parties or any of them, whether written or oral. Each of the Parties acknowledges that no other party or agent or attorney of any other Party hereto has made any promise, representation, or warranty, express or implied, not contained herein, concerning the subject matter hereof, to induce any other Party hereto to execute this Agreement, and each Party hereto acknowledges that it, he, or she has not executed this Agreement in reliance on any such promise or representation or warranty not contained in this Agreement.

19. No Waiver. A waiver by one Party of a breach of any provision of this Agreement by any other Party hereto shall not operate or be construed as a waiver of any subsequent breach by such other Party.

20. Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be invalid under law, each such provision can be severed without invalidating the entire Agreement.

21. Neutrality. This Agreement is the product of negotiations and was drafted by all Parties; therefore, it shall not be construed in favor of or against any particular Party.

22. Modification. No supplement, modification, amendment or change in any terms of this Agreement shall be binding on the Parties unless in writing and executed by the Parties.

23. No Third Party Beneficiaries. Unless expressly stated herein, this Agreement is entered into for the sole benefit of the Parties, and no other parties are intended to be direct or incidental beneficiaries of this Agreement and no third party shall have any right in, under or to this Agreement.

24. No Admission of Liability. This Agreement is entered into by the Parties solely for the purpose of compromising and settling the matters in dispute. This Agreement, and the actions undertaken and statements made in connection with this Agreement, do not constitute, nor shall it be construed to be, an admission of liability or wrongdoing, directly or by implication, of the truth or validity or scope of any claims or assertions made by any Party.

25. Headings. The headings of this Agreement are for reference purposes only and shall not affect in any way the meanings or interpretations of this Agreement.

26. Time is of the Essence. Time is of the essence in all aspects of the performance of the obligations hereunder.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement on the date below.

Date: May _____, 2021

GOOGLE LLC, a Delaware limited liability company

By: _____

Print Name:

Title:

Date: May _____, 2021

**SHARKS SPORTS & ENTERTAINMENT LLC,
a _____**

By: _____

Print Name:

Title:

Date: May _____, 2021

CITY OF SAN JOSE, A MUNICIPAL CORPORATION

By: _____

Print Name:

Title:

ATTEST:

APPROVED AS TO FORM:

City Attorney

Attachment 1

[Revised Exhibit K](#)