



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Matt Loesch

SUBJECT: SEE BELOW

DATE: May 30, 2023

Approved

Date

6/6/23

COUNCIL DISTRICT: 3

SUBJECT: ACTIONS RELATED TO PROJECT VALLEY TITLE AND PROJECT BO TOWN'S ENCROACHMENT AGREEMENT

RECOMMENDATION

Adopt a resolution:

- (a) Conditionally authorizing a permit for a major encroachment (Encroachment Permit) to Project Valley Title LLC and Project Bo Town LLC (collectively, Permittees) to allow Permittees to construct, maintain, repair, reconstruct, occupy, and use privately owned, subsurface energy (heating and cooling), wastewater, recycled water, and electrical systems infrastructure within a portion of East San Salvador Street pursuant to San José Municipal Code Chapter 13.37; and
- (b) Authorizing the Director of Public Works to execute an encroachment agreement between the City of San José and Permittees, upon satisfaction of certain conditions, and record a certified copy of the Encroachment Permit on Permittees' properties with the County of Santa Clara Office of the Clerk-Recorder.

SUMMARY AND OUTCOME

The Permittees propose to construct privately owned underground utilities within and across a portion of East San Salvador Street between South First Street and South Second Street, including subsurface energy, wastewater, recycled water, and electrical systems infrastructure. Approval of the resolution authorizing the above actions will authorize Permittees to install privately owned underground utilities while supporting construction of sustainable development.

BACKGROUND

In December 2020, Project Bo Town LLC submitted a Site Development Permit application for a site located at 409 South Second Street. The application proposed demolition of an existing restaurant, including accessory buildings, and construction of a 30-story mixed residential and commercial building with up to 540 residential units and 7,430 gross square feet of ground floor commercial space (Bo Town Project). On November 29, 2022, the City Council adopted a resolution approving the Site Development Permit (Permit No. H20-038) for the Bo Town Project.

In March 2021, Project Valley Title LLC submitted a Site Development Permit application for a site located at 345 South Second Street. The property is situated directly across the street from the Bo Town Project site along East San Salvador Street between South First Street and South Second Street. The application proposed demolition of an existing office building and construction of two 20-story towers including approximately 1.3 million gross square feet of commercial office space and up to 60,430 gross square feet of ground floor retail/community space (Valley Title Project). Additionally, the application proposed an alternative design to allow connection of the two towers with an additional 15,900 square feet of office space. On September 28, 2022, the Director of Planning, Building, and Code Enforcement approved the Site Development Permit (Permit No. H21-012) for the Valley Title Project.

The Permittees propose to interconnect select private utilities to allow water and heat capture, exchange, and reuse between the two sites to make both projects more sustainable developments. The Permittees propose to construct, maintain, repair, reconstruct, occupy, and use privately owned, subsurface energy (heating and cooling), wastewater, recycled water, and electrical systems infrastructure (Encroachment) within a portion of East San Salvador Street. These private utilities will be connected at the basement level of each building and will be located at a minimum 15-feet below the surface of East San Salvador Street. The private utilities will be grouped within a 20-foot-wide section of right-of-way, running perpendicular to the direction of vehicular travel, spanning the entire 60-foot wide East San Salvador Street right-of-way.

The utilization of public right-of-way for the proposed privately owned utilities requires an Encroachment Permit pursuant to San José Municipal Code Chapter 13.37, which is subject to City Council approval. The Permittees applied for an Encroachment Permit, consented to the terms of the Encroachment Agreement, and provided conceptual plans. Final plans will be approved by the Director of Public Works prior to start of construction. (See **Exhibit A** – Privately Owned Underground Utilities Conceptual Site Plan; **Exhibit B** - Plat and Legal Description of Proposed Major Encroachment; and **Exhibit C** - Major Encroachment Agreement).

ANALYSIS

The proposed privately owned utilities are defined as a major encroachment, subject to the requirements of San José Municipal Code Chapter 13.37. Applying the San José Municipal Code approval criteria, staff evaluated the proposed utilities and recommends the conditional approval of an Encroachment Permit. The Encroachment will not unreasonably interfere with or disrupt the public's use of East San Salvador Street since the proposed private improvement is located entirely below East San Salvador Street and the Encroachment Agreement requires the removal or modification of the private utilities by the owner if they are determined to be a public nuisance, if they are determined to be unlawful, or if the City determines to use the area for a public purpose. The Encroachment Agreement includes maintenance requirements and other terms and conditions for the private improvement. In addition, issuance of the final Encroachment Permit and approval of final plans will result in a structure that conforms to the designs submitted with the encroachment application, and Permittees' execution of the form of Encroachment Agreement negotiated between the parties.

The proposed privately owned utilities also enable climate smart energy exchange between the two project sites. The physical utility connection is the only reasonable method, and its placement will not unreasonably interfere with the use of the public property nor be detrimental to the public interest, safety, health, or welfare. For environmental sustainability, the Encroachment Agreement meets several *Envision San José 2040 General Plan* goals and policies including Policy MS-1.4, which encourages "...design and construction of environmentally responsible commercial and residential buildings that are also operated and maintained to reduce waste, conserve water, and meet other environmental objects." By reducing the projects' demand and dependence on external water, sewer, and electrical services, the Encroachment increases availability of those services to others as a public benefit.

Therefore, staff recommends that the City Council authorize the Encroachment Permit. Permittees will be required to maintain minimum insurance to cover construction, operation, and maintenance of the private utilities. The Permittees' use of the Encroachment will only be for private utility transfer between both project sites. It may not be used for any other purposes without the City's advanced written consent, which will be considered on a case-by-case basis.

Climate Smart San José Analysis

Construction of the proposed privately owned utilities will facilitate energy and water efficiency of homes and commercial buildings as well as reduce energy and water consumption by allowing recycling, reuse, and exchange of water and energy between the two project sites. Waste heat from the office space will be captured during the day and will be transferred to the residential space during morning and evening peak hours. Wastewater will be treated and the recycled water will be used for irrigation to serve both sites. The Encroachment will help reduce demand on external resources and support sustainable development in San José.

EVALUATION AND FOLLOW-UP

No further follow-up actions with the City Council are anticipated at this time. However, future termination of this major Encroachment Permit would require City Council approval, at which time staff would return with a recommendation for City Council action.

COST SUMMARY/IMPLICATIONS

The Public Works Department will collect cost-recovery fees during Fiscal Year 2022-2023 in the amount of \$4,929 to process the Major Encroachment Permit. These fees will support the Public Works Development Fee Program.

COORDINATION

This memorandum has been coordinated with the City Attorney's Office, the City Manager's Budget Office, and the Department of Planning, Building, and Code Enforcement.

PUBLIC OUTREACH

The public was given the opportunity to comment on the Bo Town Project and the Valley Title Project and site plans as part of the planning permit review and approval process for the two development projects. Additionally, this memorandum will be posted on the City's Council Agenda website for the June 20, 2023 City Council meeting.

COMMISSION RECOMMENDATION AND INPUT

No commission recommendation or input is associated with this action.

CEQA

Determination of Consistency with the Bo Town Mixed Use Project Final Supplemental Environmental Impact Report to the Downtown Strategy 2040 Final Environmental Impact Report (Resolution No. 80787), File No. H20-038; and the Valley Title Commercial Project Final Supplemental Environmental Impact Report to the Downtown Strategy 2040 Final Environmental Impact Report, File No. H21-012.

HONORABLE MAYOR AND CITY COUNCIL

May 30, 2023

Subject: Actions Related to Project Valley Title and Project Bo Town's Encroachment Agreement

Page 5

PUBLIC SUBSIDY REPORTING

This item does not include a public subsidy as defined in section 53083 or 53083.1 of the California Government Code or the City's Open Government Resolution.

/s/

MATT LOESCH

Acting Director of Public Works

For questions, please contact J. Guevara, Deputy Director Public Works, at j.guevara@sanjoseca.gov or (408) 807-1801.

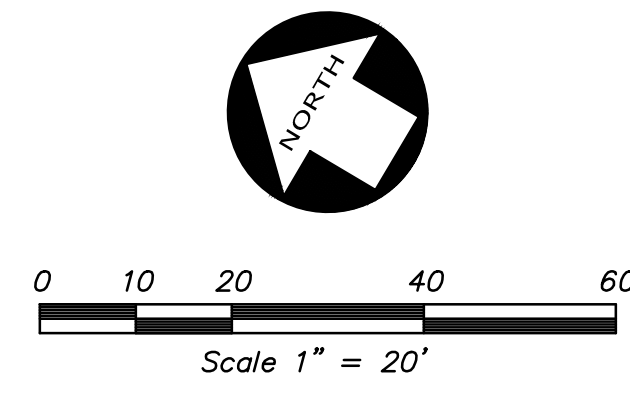
ATTACHMENTS:

Exhibit A – Privately Owned Underground Utilities Conceptual Site Plan

Exhibit B - Plat and Legal Description of Proposed Major Encroachment

Exhibit C - Major Encroachment Agreement

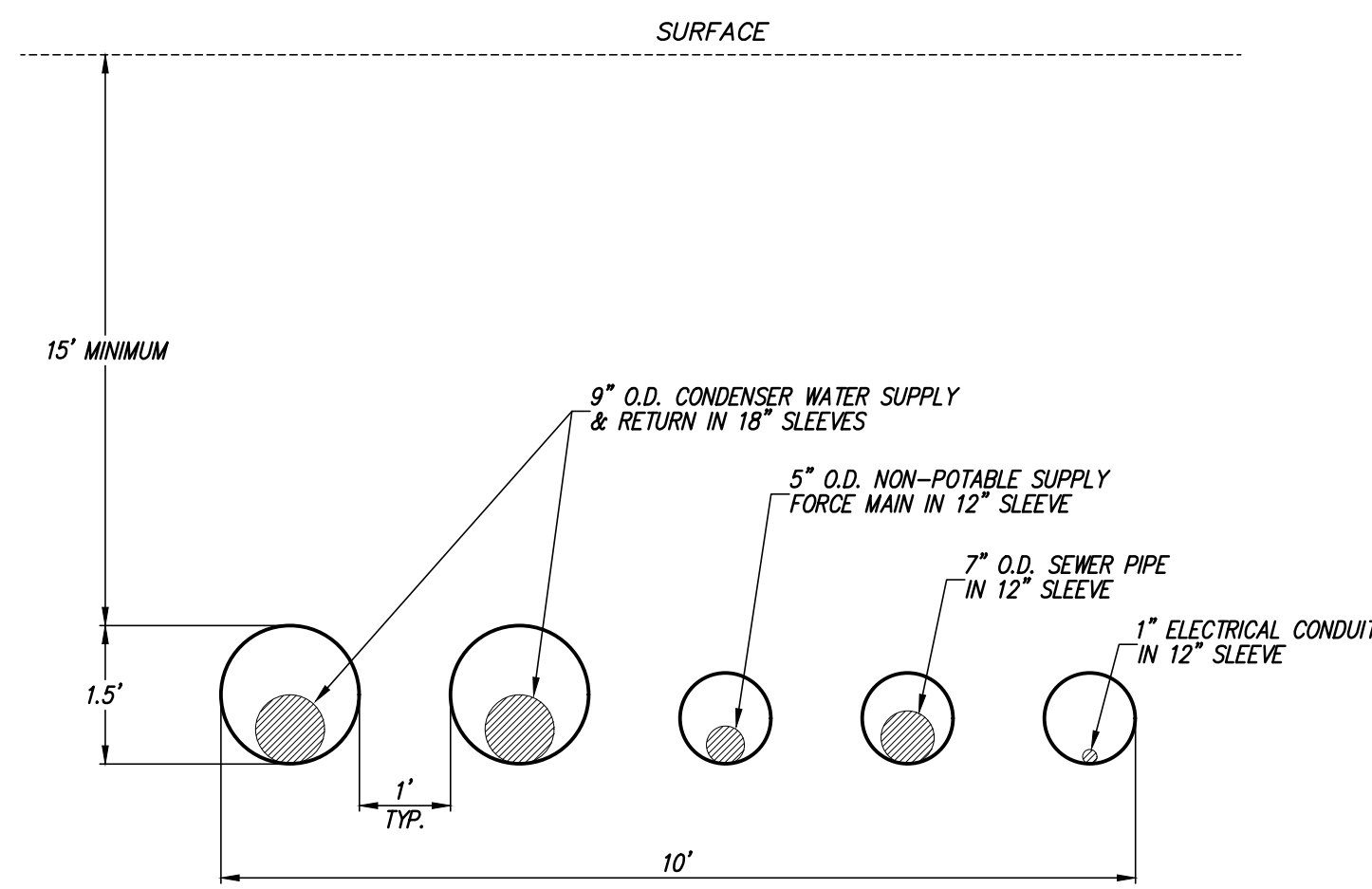
Exhibit A - Privately Owned Underground Utilities Conceptual Site Plan



LEGEND

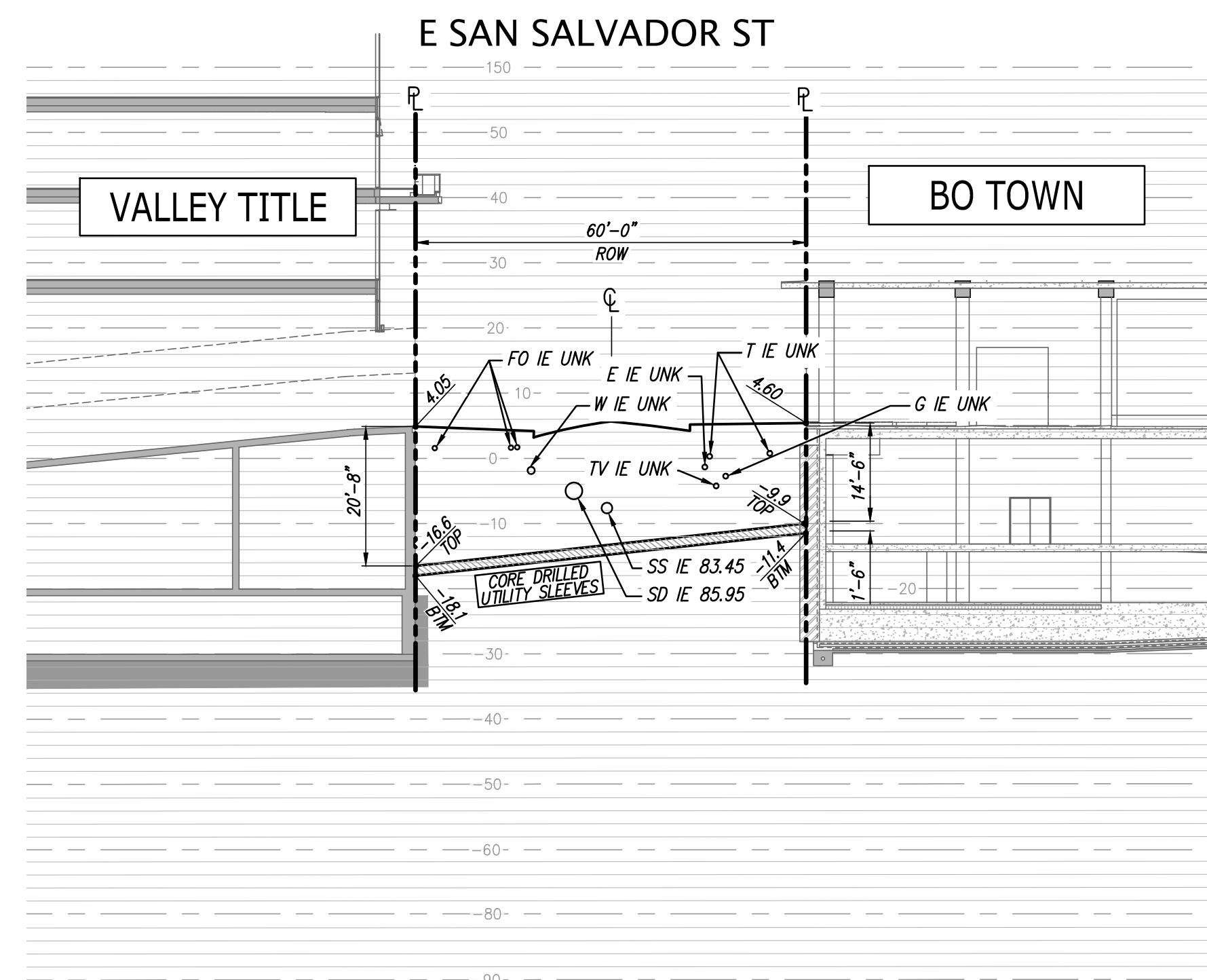
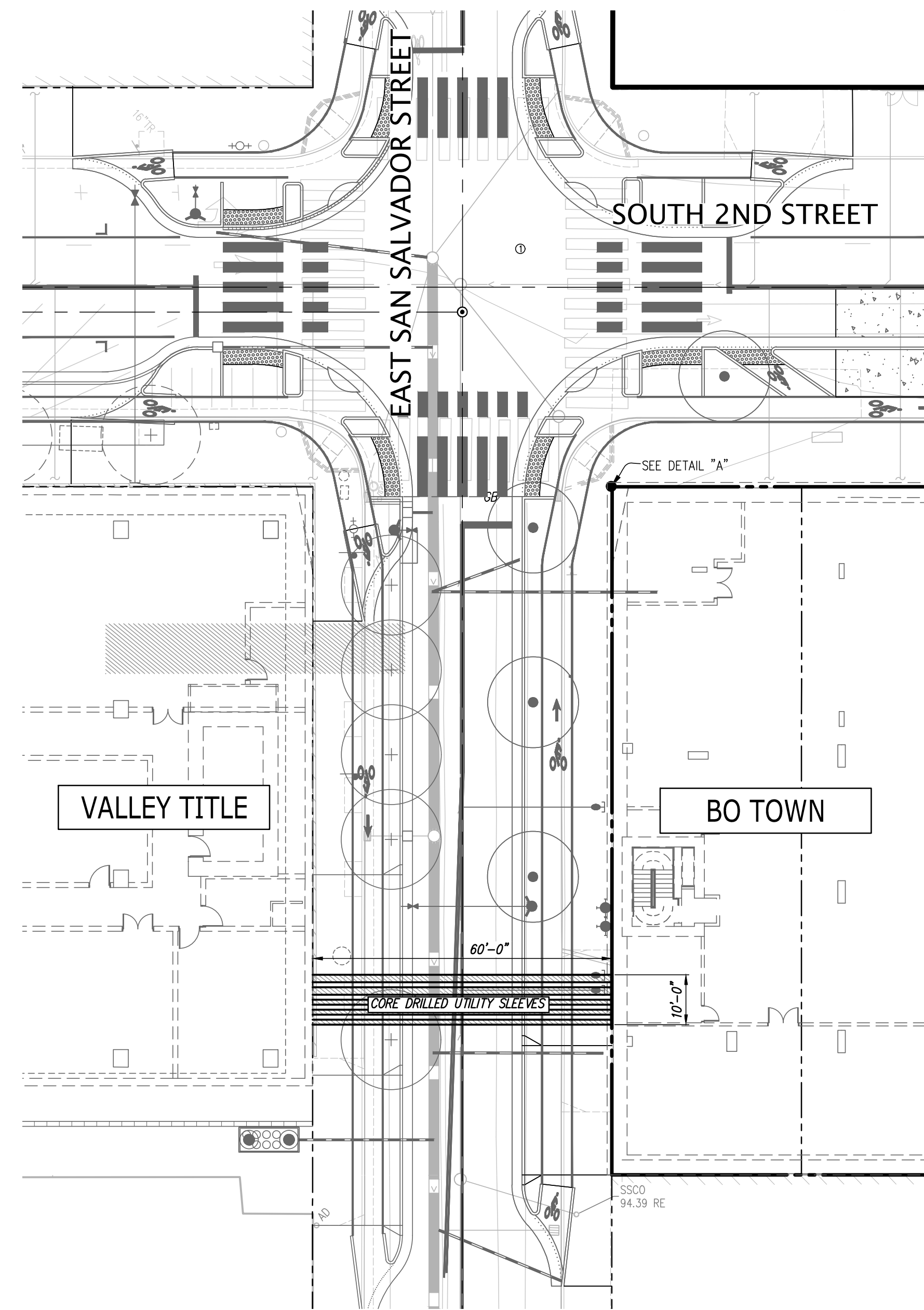
▲	AREA DRAIN	▬	CONCRETE CURB
●	SANITARY SEWER MANHOLE	⦿	FIRE HYDRANT
■	STORM DRAIN CATCH BASIN	⦿	FDC
■	STORM DRAIN JUNCTION BOX	⦿	MEDIA FILTRATION SYSTEM
●	STORM DRAIN MANHOLE	—SS—	SANITARY SEWER
ADJ	ADJUST	23.8	SPOT ELEVATION
BW	BACK OF WALK	X"SD	STORM DRAIN LINE
C	CONCRETE	▬	VALLEY GUTTER
DOM	DOMESTIC	I	WATER VALVE
DWY	DRIVEWAY	---	BASEMENT WALL
EX	EXISTING	---	EASEMENT LINE
FF	FINISH FLOOR	---	PROPERTY LINE
FH	FIRE HYDRANT		
FL	FLOW LINE		
FS	FIRE SERVICE		
LS	LANDSCAPE		
PV	PAVEMENT		
POC	POINT OF CONNECTION		
RE	RIM ELEVATION		
R/W	RIGHT-OF-WAY		
SD	STORM DRAIN		
ST LT	STREET LIGHT		
SS	SANITARY SEWER		
S/W	SIDEWALK		
TC	TOP OF CURB		
TG	TOP OF DRAIN GRATE		
WTR	WATER		

CORE DRILLED UTILITIES WITH SLEEVES



UTILITY CROSSING TRENCH DETAIL

NOT TO SCALE



PRIVATE UTILITY CROSSING PROFILE

SCALE: 1"=20'

date	revisions
11-16-2021	SDP SUBMITTAL 1
05-25-2021	SDP SUBMITTAL 2
09-02-2021	SDP SUBMITTAL 3
12-15-2021	SDP SUBMITTAL 4
05-26-2022	SDP SUBMITTAL 5

notes

James KM Cheng Architects Inc.
Suite 200-77 West Eighth Avenue
Vancouver, B.C. Canada V5Y 1M8
T: 604.673.4333 info@jamescheng.com



3350 Scott Boulevard, Building 22 Phone: (408) 727-6665
Santa Clara, California 95054 www.kierwright.com

seal draw
STAFF

checked
M.A.K.

project

SAN JOSE - BO TOWN

title
BO TOWN / VALLEY TITLE - SAN SALVADOR
UTILITY CROSSING

scale
as shown
project number
A20053
issue date
2022/05/26

drawing number
EX
revision date

FILE NO. H20-038 plotted 2023-02-07 07:53:43 AM

Z:\2020\A20053\DWG\EXHIBITS\PRIVATE UTILITY CORRIDOR - SAN SALVADOR\PRIVATE UTILITY CORRIDOR - SAN SALVADOR\PVT UTIL CORR_SAN SALVADOR.dwg 2-02-23 07:53:43 AM dking

EXHIBIT "B-1"
LEGAL DESCRIPTION
ENCROACHMENT AREA FOR UTILITY CROSSING

A 20.00 FOOT WIDE ENCROACHMENT AREA FOR UTILITY CROSSING SITUATED IN THE CITY OF SAN JOSE, COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, BEING A PORTION OF EAST SAN SALVADOR STREET (60.00 FEET WIDE) AS SHOWN ON THAT CERTAIN RECORD OF SURVEY MAP FILED FOR RECORD ON JULY 22, 1964 IN BOOK 182 OF MAPS AT PAGE 47, SANTA CLARA COUNTY RECORDS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE INTERSECTION OF THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF SOUTH 2ND STREET (80.00 FEET WIDE) AND THE SOUTHEASTERLY RIGHT-OF-WAY LINE OF SAID EAST SAN SALVADOR STREET, SAID POINT ALSO BEING THE NORTHERLY CORNER OF LOT 1, BLOCK IV, RANGE 2, AS SHOWN UPON THE OFFICIAL MAP OF THE CITY OF SAN JOSE, RECORDED IN VOLUME "A" OF MAPS AT PAGES 72 AND 73, SANTA CLARA COUNTY RECORDS;

THENCE ALONG SAID SOUTHEASTERLY RIGHT-OF-WAY LINE OF EAST SAN SALVADOR STREET, SOUTH 59° 20' 10" WEST, 92.86 FEET TO THE **POINT OF BEGINNING**;

THENCE CONTINUING ALONG SAID SOUTHEASTERLY RIGHT-OF-WAY LINE, SOUTH 59° 20' 10" WEST, 20.00 FEET;

THENCE LEAVING SAID LINE, NORTH 30° 39' 50" WEST, 60.00 FEET TO THE NORTHWESTERLY RIGHT-OF-WAY LINE OF SAID EAST SAN SALVADOR STREET;


THENCE ALONG SAID NORTHWESTERLY RIGHT-OF-WAY LINE, NORTH 59° 20' 10" EAST, 20.00 FEET;

THENCE LEAVING SAID LINE, SOUTH 30° 39' 50" EAST, 60.00 FEET TO THE **POINT OF BEGINNING**.

CONTAINING 1,200 SQUARE FEET, MORE OR LESS.

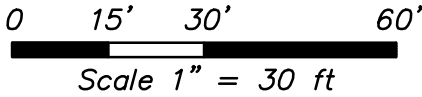
AS SHOWN ON EXHIBIT "B" ATTACHED HERETO AND BY THIS REFERENCE MADE A PART HEREOF.

LEGAL DESCRIPTION PREPARED BY KIER & WRIGHT CIVIL ENGINEERS AND SURVEYORS, INC.


TOMMY J. REYNA, PLS 9754

4/06/2023
DATE





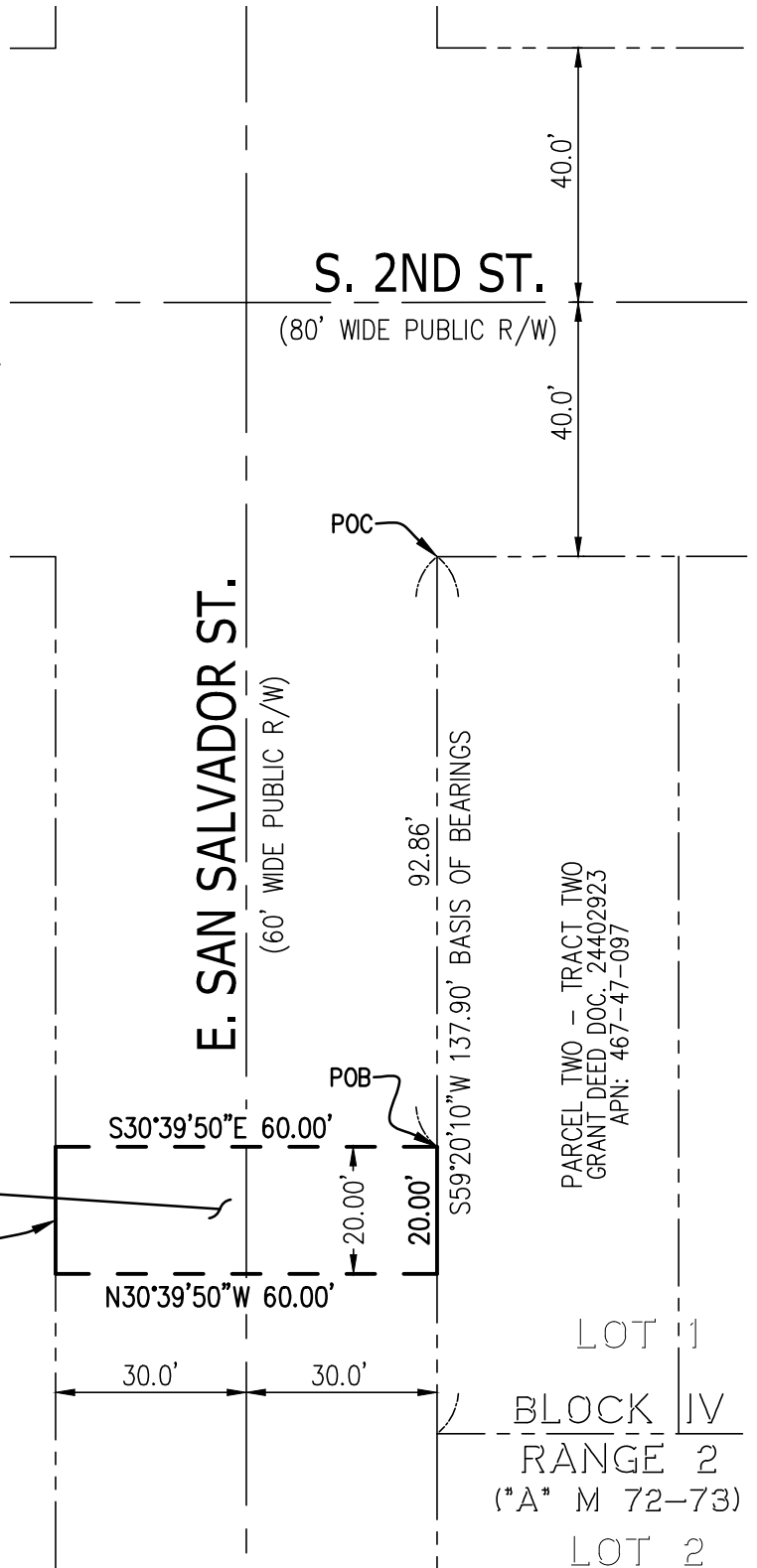
BASIS OF BEARINGS

THE BEARING OF SOUTH 59° 20' 10" WEST TAKEN ON THE SOUTHEASTERLY RIGHT-OF-WAY LINE OF EAST SAN SALVADOR STREET AS SHOWN ON THAT CERTAIN RECORD OF SURVEY MAP FILED FOR RECORD ON JULY 22, 1964, IN BOOK 182 OF MAPS AT PAGES 47, OFFICIAL RECORDS OF SANTA CLARA COUNTY WAS TAKEN AS THE BASIS FOR ALL BEARINGS SHOWN HEREON.

LEGEND

---	CENTER LINES
---	ENCROACHMENT AREA
---	R/W LINES OR LOT LINES
APN	ASSESSORS PARCEL NUMBER
DOC.	DOCUMENT
M	MAPS
OR	OFFICIAL RECORDS
POB	POINT OF BEGINNING
POC	POINT OF COMMENCEMENT
R/W	RIGHT-OF-WAY
SQ. FT.	SQUARE FEET

20.00' WIDE ENCROACHMENT AREA FOR UTILITY CROSSING (1,200± SQ. FT.)



KIER+WRIGHT

3350 Scott Boulevard, Building 22
Santa Clara, California 95054

(408) 727-6665
www.kierwright.com

EXHIBIT "B" ENCROACHMENT AREA FOR UTILITY CROSSING

SAN JOSE,

CALIFORNIA

DATE	APRIL, 2023
SCALE	1" = 30'
BY	TJR
JOB NO.	A20053
SHEET	1 OF 1

Parcel Map Check Report

Client:	Prepared by:
Client	Tommy J. Reyna, PLS 9754
Client Company	Kier+Wright
Address 1	3350 Scott Boulevard
Date: 4/5/2023 10:17:12 AM	

Parcel Name: CLOSURE-AREA - ENCROACH. AREA FOR UTIL. XING

Description:

Process segment order counterclockwise: False

Enable mapcheck across chord: False

North:4,892.34' East:4,551.27'

Segment# 1: Line

Course: S59°20'10"W Length: 20.00'

North: 4,882.14' East: 4,534.07'

Segment# 2: Line

Course: N30°39'50"W Length: 60.00'

North: 4,933.75' East: 4,503.47'

Segment# 3: Line

Course: N59°20'10"E Length: 20.00'

North: 4,943.95' East: 4,520.67'

Segment# 4: Line

Course: S30°39'50"E Length: 60.00'

North: 4,892.34' East: 4,551.27'

Perimeter: 160.00' Area: 1,200.00Sq.Ft.

Error Closure: 0.00 Course: N0°00'00"E

Error North : 0.000 East: 0.000

Precision 1: 160,000,000.00

**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
Project Valley Title LLC and Project Bo Town 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 Project Valley Title LLC and Project Bo Town LLC and their successors in interest (together, the "Permittees"), as of June , 2023 ("Effective Date").

RECITALS

WHEREAS, the Permittees are the owners of certain real property in the City of San José, County of Santa Clara, State of California, described as 345 S. 2nd Street ("Valley Title") and 409 S. 2nd Street ("Bo Town") ("Properties") which are more particularly described in Exhibit A1 and A2, respectively attached hereto and incorporated herein by reference; and

WHEREAS, the Properties are bounded by or subject to that certain public right-of-way or publicly owned or controlled property, commonly known as East San Salvador Street ("Public Property"); and

WHEREAS, the Permittees have requested that the City authorize the Permittees to design, construct, maintain, repair, occupy and use privately-owned, subsurface energy (heating and cooling), wastewater, recycled water, and electrical systems infrastructure ("Encroachment"), which are intended to reside within a portion of East San Salvador Street (the "Subject Premises"), as more particularly described in Exhibit A3 attached hereto and incorporated herein by reference; and

WHEREAS, the City's Director of Planning, Building, and Code Enforcement approved a Site Development Permit (H21-012) on September 28, 2022 and the City Council adopted a resolution approving a Site Development Permit (H20-038) on November 29, 2022 for the Properties; and

WHEREAS, draft plans and specifications for the design and construction of the Encroachment, a true copy of which are attached hereto as Exhibit ___ and are incorporated herein by reference ("Plans"), are on file with the City and final plans will be approved by the Director of Public Works prior to construction; 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 Permittees 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 Permittees, for themselves and all successive owners of the Properties, 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 the Permittees' obligations under the Permit. The Permit shall not be construed to create any property right in the Subject Premises that the Permittees did not possess prior to receiving the Permit. The Permit shall have no value in any proceeding greater than the Permittees' cost to obtain the Permit. The Permittees shall be solely responsible for all costs of complying with their 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 Permittees acknowledge and agree 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 Permittees. The City grants the Permittees 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.
 - a) The City Council may revoke the Permit issued under Authorization if: (i) the City or a regional, County, State or Federal government agency determines to use the Subject Premises for a public purpose; (ii) the City determines that the Encroachment conflicts with the public's current or prospective use of the Public Property; (iii) the City determines that the Encroachment constitutes a public nuisance; or (iv) the Encroachment is declared unlawful by a court of competent jurisdiction.
 - b) The City's revocation shall be effective ninety (90) days after providing Permittee with written notice.

- c) If the City determines to use the Subject Premises for a City project, the City will give the Permittees 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 Permittees, the Director of Public Works or a designee will meet and confer with the Permittees 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 Permittees 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 Permittees' 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.
 - d) In addition, upon written request of the Permittees, not to exceed one meeting every twelve (12) months, the Director of Public Works or a designee will meet with the Permittees at the Permittees sole expense based on time and material rates to discuss any City public works projects planned or under consideration or construction that may impact the Encroachment.
 - e) The foregoing Notice of Public Purpose and Meet and Confer obligations shall not 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 Permittees.
- 7) Removal and Restoration. After revocation or termination of the Permit, the Permittees 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. Within no later than ninety (90) days of the effective date of the revocation or termination and prior to commencing any removal or restoration work, the Permittees 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 Permittees 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 as determined by the Director of Public Works, after the City's approval of the plans. The Permittees' obligations under this section shall not be deemed to have been satisfied until the City records a notice on the Property accepting the Permittees' 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 Permittees shall have no opportunity to cure any failure to comply with the foregoing removal and restoration requirements.

- 8) Default. Permittees shall be in default under this Permit if it breaches, or fails to timely observe and perform any obligation under this 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 Permittees pursuant to the Authorization or otherwise. The Director of Public Works shall notify the Permittees 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, Permittees 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, but in no event shall the Permittees' cure rights extend for a period beyond sixty (60) days from the date of the Director's notice. If the Permittees do not cure the breach or failure to perform to the City's satisfaction within the foregoing cure periods, the Permittees shall be in Default, and the Permittees hereby grant to the

City any consent or right necessary for the City to remedy the Default. The Permittees 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 Permittees' 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 Permittees 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. 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.
- 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 Permittees' expense if the City determines that it represents a dangerous condition or threat of danger to life or property. The Permittees 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 Permittees with one (1) day telephone and email notice. Where the necessary modifications or repairs cannot be completed within ten (10) days, the Permittees 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 Permittees shall have no right to cure its failure to

comply with the obligations in this section. If the City incurs costs pursuant to this section, the Permittee shall reimburse the City for its actual costs within sixty (60) days of the City's invoice therefore.

- 11) Work Schedules. Permittees 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. Permittees 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 Permittees, 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 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 Permittees' reasonable security or building management processes and may include being accompanied by the Permittees or their designee, agent, or representative at all times.

- 13) Public Utilities and Facilities. The Permittees' 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 Permittees shall verify the location of all public and quasi-public utilities and facilities that may be affected by work pursuant to the Permit. The Permittees shall protect and assume all responsibility for loss or damage to such utilities or facilities caused directly or indirectly by Permittees or their 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 Permittees 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 Permittees fails to commence and complete repairs or restoration within the foregoing time periods, the Permittees shall have no right to cure, and the City may perform such repairs or restoration and the Permittees 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, Permittees shall coordinate their work with the owner(s) of such utilities or facilities in advance of their performance of the work and shall pay the owner(s) for all costs incurred due to the Permittees' performance under this Agreement.

- 14) Permittees Responsibility for Encroachment. The Permittees 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 Permittees acknowledge 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. The foregoing provisions of Paragraph 15 shall not apply to any gross negligence or willful misconduct by City Indemnitees.
- 16) Indemnity/Hold Harmless. To the fullest extent permitted by law, Permittees 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 Permittees, their 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 Permittees, their 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 Permittees by the City and continues at all times thereafter.

- 17) Insurance. Permittees shall, at Permittees' 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. Permittees 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. Permittees 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 Properties, the Permittees shall cause their 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 Director of Public Works, whose consent shall not be unreasonably withheld; provided, however, that Permittees may without the City's pre-approval assign the Permit in whole to: (i) an Affiliate (as defined below), (ii) 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, Permittees. 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 Permittees' Improvements. Notwithstanding any other provision of this Agreement, all infrastructure and improvements constructed and maintained pursuant to any Permit shall be the Permittees' sole and exclusive property. Such property of Permittees 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 Permittees.
- 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 Permittees:

Westbank
6th Floor, 1067 West Cordova Street
Vancouver BC, Canada V6C 1C7
Attn: Andrew Jacobson
E-mail: Ajacobson@westbankcorp.com

With a copy to:

Reuben, Junius & Rose LLP
1 Bush Street, Suite 600
San Francisco, CA USA 94104
Attn: Mark Loper
E-mail: mloper@reubenlaw.com

- 23) Compliance with Law. Permittees agree to comply with all applicable laws, ordinances and regulations in their design, construction, maintenance, repair, occupancy, use and removal of the Encroachment.
- 24) Recordation; Agreement Binding on Successor Owners. The Permittees consent to the City's recordation of the Permit against title to the Properties. The Permit shall be binding upon all successor owners of the Properties. Other than by virtue of the sale or transfer of the Properties, Permittees 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 and 29-30 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 Agreement may be amended only by a written instrument executed by the Permittees, 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:

PERMITTEES*

PROJECT VALLEY TITLE LLC,
a Delaware limited liability company

By _____
Name:
Title:

PROJECT BO TOWN LLC,
a Delaware limited liability company

By _____
Name:
Title:

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

EXHIBIT A1-1

**VALLEY TITLE PROPERTY
LEGAL DESCRIPTION**

INSERT DESCRIPTION

EXHIBIT A1-2

**VALLEY TITLE PROPERTY
MAP**

EXHIBIT A2-1

**BO TOWN PROPERTY
LEGAL DESCRIPTION**

All that certain real property situated 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 A2-2

**BO TOWN PROPERTY
MAP**

EXHIBIT A3

**LEGAL DESCRIPTION AND PLAT
OF SUBJECT PERMISES**

[See following pages]

EXHIBIT B

AUTHORIZATION FOR ENCROACHMENT

[See following pages]

EXHIBIT C

ADDITIONAL MAINTENANCE/REPAIR REQUIREMENTS

Permittees' 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 Public Works Development Services Division.
- B.
- 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

INSURANCE REQUIREMENTS. Permittee or its general contractor shall procure and maintain for the duration of the contract at its sole cost and expense, insurance to protect Permittee against claims for injuries to persons or damages to property which may arise from, or in connection with, the performance of the work hereunder by the Permittee or its general contractor and/or subcontractors whether work is performed by Permittee, its general contractor or anyone else for whom the Permittee or its general contractor is legally liable.

D-1 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 CG 0001); 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. Workers' Compensation insurance as required by the Labor Code of the State of California and Employers Liability insurance; and
4. Builders Risk insurance covering property in the course of construction on an 'All Risks' basis; and
5. Contractor's Pollution Liability Insurance for losses arising from the release or escape of pollutants during the duration of the project.

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

D-2 Minimum Limits of Insurance

Permittee or its general contractor shall maintain limits no less than:

1. Commercial General Liability: \$2,000,000 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: \$1,000,000 combined single limit per accident for bodily injury and property damage.
3. Workers' Compensation and Employers Liability: Workers' Compensation limits as

required by the Labor Code of the State of California and Employers Liability limits of \$1,000,000 per accident.

4. Builders Risk: Replacement cost.
5. Contractor's Pollution Liability Insurance: \$1,000,000 per contamination incident.

The foregoing limits of insurance may be met through a combination of primary and umbrella/excess policies written on a follow form basis in excess of the coverages described above.

D-3 Deductibles and Self-Insured Retentions

Any deductibles or self-insured retentions must be declared to, and approved by, the City.

D-4 Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. General Liability

Coverage shall contain ten (10) years products and completed operations extension.

2. General Liability and Automobile Liability Coverages

- a. The City, its officials, employees, and agents are to be covered as additional insureds as respects: liability arising out of activities performed by, or on behalf of, the Permittee or its general contractor; products and completed operations of the Permittee's construction site located at 409 S. 2nd Street, San Jose, CA 95113; or automobiles owned, leased, hired or borrowed by the Permittee or its general contractor. The coverage shall contain no special limitations on the scope of protection afforded to the City, its officials, employees, and agents.
- b. The Permittee's or its general contractor's insurance coverage shall be primary insurance as respects the City, its officials, employees, and agents. Any insurance or self-insurance maintained by the City, its officials, employees, or agents shall be excess of the contractor's insurance and shall not contribute with it.
- c. Any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City, its officials, employees, or agents.
- d. Coverage shall state that the Permittee's or its general contractor'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 a waiver of subrogation in favor of the City, its officials, employees, and agents.

3. Workers' Compensation and Employers' Liability

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, and agents.

4. Builder's Risk Insurance

Coverage shall provide a loss payable clause in favor of the City as its interest may appear.

Coverage shall contain a waiver of subrogation in favor of the City, its officials, employees, and agents.

5. All Coverages

Each insurance policy required by this clause shall be endorsed to state that coverage shall not be suspended, voided, canceled, reduced in coverage or in limits 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.

D-5 Acceptability of Insurance

Insurance is to be placed with insurers acceptable to the City's Risk Manager.

D-6 Verification of Coverage

Permittee or its general contractor shall furnish the City with certificates of insurance and with copies of endorsements affecting coverage required by this clause. 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.

Copies of all the required ENDORSEMENTS shall be attached to the CERTIFICATE OF INSURANCE which shall be provided by the Contractor's insurance company as evidence of the stipulated coverages. This proof of insurance shall provide the Contractor's email and phone number to contact in case of insurance notifications or inquiries.

Proof of insurance shall be emailed in pdf format to: Riskmgmt@sanjoseca.gov:

Certificate Holder
City of San José – Finance
Department Risk Management
200 East Santa Clara St., 14th

Floor Tower San Jose, CA 95113-
1905

D-7 Subcontractors

Permittee shall include all subcontractors as insureds under its policies or shall obtain separate certificates and endorsements for each subcontractor.