

RIGHT OF ENTRY AGREEMENT **GEOTECHNICAL INVESTIGATIONS**

This Right of Entry Agreement (“Agreement”), dated as of July 22, 2021 for reference purposes only, is entered into by and between SANTA CLARA VALLEY TRANSPORTATION AUTHORITY, a California special district (“**LICENSEE**”), and the CITY OF SAN JOSÉ, a California municipal corporation (“**CITY**”), and shall become effective upon execution by the CITY. For the purposes of this Agreement, CITY and LICENSEE are sometimes collectively referred to as “Parties” and individually as “Party”.

RECITALS

- A. CITY is the owner of property described as Assessor’s Parcel Numbers 467-16-091 and 467-16-092, located at 575 and 579 East Santa Clara Street in San Jose, California, more particularly depicted on **Exhibit A-1** attached hereto (“**Property**”); and
- B. LICENSEE desires to enter upon the Property in order to perform environmental site assessments as described in **Exhibits A-2 and A-3**, herein in connection with the BART Phase 2 Project, (hereinafter referred to as “**Project**”); and
- C. CITY is willing to permit LICENSEE to access the Property proposed by LICENSEE for the purposes described herein.

NOW THEREFORE, in consideration of the mutual covenants herein contained, the parties hereto agree as follows:

- 1. **Right of Entry.** CITY hereby grants to LICENSEE a temporary, revocable, non-assignable, and non-exclusive right of entry (“**Right of Entry**”) for the purpose of and upon the terms and conditions hereinafter described subject to all licenses, easements, leases, encumbrances and claims of title affecting the Property.
- 2. **Purpose and Scope of Work.** Subject to the limits herein stated, the Right of Entry granted herein is a right to enter onto the Property for the sole purpose of allowing LICENSEE, including its employees, contractors and subcontractors, to access the Property to perform geotechnical investigations for LICENSEE’s Project. The geotechnical investigations will provide information regarding the soil and groundwater conditions on the Property and assist LICENSEE with designing and constructing the Project. The geotechnical investigations will include drilling for groundwater and soil sampling and subsequent quarterly groundwater monitoring (collectively “Assessments”) at the location described in **Exhibit A-2** and as further described in **Exhibit A-3**.

3. **Limitations on Access.** Unless otherwise agreed by the parties in writing, access to the Property is restricted to LICENSEE's administrative and operations personnel and its designated contractor. LICENSEE shall not allow members of the general public or other individuals or equipment to enter the Property.
4. **Term.** Subject to the termination provision set forth in **Section 6** below, the term of the Right of Entry ("Term") shall begin upon execution of this Agreement by CITY ("Commencement Date") and shall remain in effect until December 31, 2021, and may be extended by Parties if agreed to in writing prior to the expiration date.
5. **Terms and Conditions.** The Right of Entry is given subject to the following terms and conditions:
 - 5.1 Compliance with Laws. LICENSEE shall obtain and maintain all necessary permits, licenses and approvals, from the relevant agencies having jurisdiction and comply with all current laws, ordinances, orders, rules, regulations and permits with respect to its use of the Property pursuant to this Agreement. No entry shall be made until CITY has received and approved a schedule for the proposed work including details of the work to be performed. Except as otherwise specifically set forth herein, in no event shall LICENSEE's use of the Property involve any material alteration thereto and any such alterations undertaken by LICENSEE shall be at its sole cost. No stand-by backup electrical power generation facility is allowed to be installed or constructed on the Property. At all times during the Term, LICENSEE shall maintain the Property in a safe, clean and orderly condition.
 - 5.2 As-Is Condition and Assumption of Risk. LICENSEE accepts the condition of the Property as-is and with all faults and acknowledges that: i) CITY is under no obligation to provide any additional preparations, improvements, utilities or equipment to the Property prior to use by LICENSEE, and ii) LICENSEE's use of the Property is entirely at its own risk. Without limiting the generality of the foregoing, LICENSEE acknowledges that it shall be solely responsible for instituting and carrying out security measures on the Property to prevent vandalism or theft (which measures, if any, shall be subject to the prior written approval of CITY), and that CITY shall not be responsible for providing any security at the Property and shall not be liable for any vandalism or theft that may occur on the Property. For avoidance of doubt, LICENSEE acknowledges that its use of the Property shall be at its own risk and that LICENSEE shall be responsible for all costs, risk or liability that occurs or arises during or as a result of its use or occupancy of the

Property.

- 5.3 Release and Waiver. To the maximum extent permitted by law, LICENSEE on behalf of itself and its employees, owners, members, officers, agents, contractors and invitees (collectively, the “**Licensee Parties**” and each a “**Licensee Party**”), waives and releases CITY and its officers, employees and agents from any and all liability that occurs on the Property that is suffered by LICENSEE or any Licensee Party for any injury suit, action, claim, demand, loss, damage, or liability for damages of any kind or nature, whether for loss of or damage to property, or injury to or death of persons, and whether or not known or suspected (collectively “**Claims**”), which may arise out of use of the Property by LICENSEE or any Licensee Party except to the extent that such loss or damage as is caused by the sole active negligence or willful misconduct of CITY, its officers, employees or agents acting in their official capacities and acting within the scope of their official duties. The foregoing shall include any loss, damage, claim, or liability for damages or injury caused by or resulting from LICENSEE’s or any Licensee Party’s introduction or generation of Hazardous Materials, as defined in **Exhibit B**, on the Property, or the creation of increased hazard to the public from existing materials arising from the use of the Property by LICENSEE or any Licensee Party. However, LICENSEE shall not be responsible for any cleanup of Hazardous Materials not caused, generated or disturbed by LICENSEE or any Licensee Party.
- 5.4 Indemnification. To the maximum extent permitted by law, LICENSEE shall indemnify, defend, and hold harmless CITY and its officers, employees and agents against any and all Claims, resulting from or arising out of LICENSEE’s or any Licensee Party’s use of the Property, including, but not limited to, entries of LICENSEE or any Licensee Party, except such loss or damage as is caused by or the sole active negligence or willful misconduct of CITY, its officers, employees or agents acting in their official capacities and acting within the scope of their official duties. The foregoing shall include, but not be limited to, any Claims resulting from LICENSEE’s or any Licensee Party’s introduction or generation of Hazardous Materials, as defined in **Exhibit B**, on the Property, or the creation of increased hazard to the public from existing materials arising from the entries of LICENSEE or any Licensee Party. However, LICENSEE shall not be responsible for any cleanup of Hazardous Materials not caused, generated or disturbed by LICENSEE or any Licensee Party.
- 5.5 Survival. The provisions of **subsections 5.2, 5.3, 5.4, and 5.9** shall survive expiration or termination of the Right of Entry as to liabilities and other Claims arising out of events that occur prior to the date LICENSEE vacates the Property and restores it to its original condition and free of hazards.

- 5.6 Insurance. During the term of this Right of Entry, LICENSEE shall have and maintain the minimum insurance requirements as set forth in the attached **Exhibit C** unless LICENSEE is self-insured in which case it must maintain the equivalent limits set forth in **Exhibit C**.
- 5.7 No Grant; Limited to Access Area. This Agreement constitutes a revocable license; nothing herein shall be construed as a grant of title or any interest in the Property. LICENSEE's use of the Property shall only include the Access Area.
- 5.8 No Admission of Liability. Nothing herein shall be construed as an admission of liability by CITY of its responsibility as to any Hazardous Materials that may be found on the Property, nor, except as expressly provided herein, as an admission of liability by LICENSEE as to any Hazardous Materials which may be found on the Property.
- 5.9 Restoration of Property. Except as otherwise may be specifically set forth herein, LICENSEE shall fully restore the Property to its pre-existing condition or better upon expiration of the Agreement or upon vacating the Property prior to termination or expiration of the rights granted by this Agreement. If the restoration is not so performed by LICENSEE upon expiration or termination of this Agreement or upon LICENSEE's vacation of the Property prior to termination or expiration, CITY shall have the right, but not the obligation, to perform the necessary restoration after providing no less than thirty (30) days prior written notice to LICENSEE that it will do so. Upon receipt of the notice of restoration costs from CITY, LICENSEE agrees to reimburse CITY for such costs incurred, plus an additional amount equal to twenty percent (20%) thereof for administrative overhead within thirty (30) days. The demand for payment by CITY shall be prima facie evidence that the expense incurred was necessary and reasonable and that such expense was incurred by CITY on behalf of LICENSEE. This provision shall survive expiration or termination of the Right of Entry or this Agreement.
- 5.10 City Access to Property. CITY shall continue to have the right to use and access the Property in its entirety and grant such use and access rights to third parties.
6. **Termination of Right of Entry.** CITY shall have the right to terminate the Right of Entry, without cause, by giving not less than seven (7) days prior written notice of termination to LICENSEE. CITY's Director of Economic Development is authorized to terminate the Right of Entry on behalf of CITY. Notwithstanding anything to the contrary in this Agreement, LICENSEE shall vacate the Property and restore it as provided in **subsection 5.9** by 11:59 p.m. on the date of termination.

7. **No Liens or Encumbrances.** LICENSEE shall not permit or suffer any liens or encumbrances to be imposed upon the Property or any building or structure thereon, as a result of LICENSEE's activities without promptly discharging the liens or encumbrances.
8. **Assignment.** LICENSEE may not assign this Agreement or its rights and obligations hereunder without obtaining CITY's prior written consent. Any assignment without such written consent shall be void. Any assignment by LICENSEE shall not relieve LICENSEE of its indemnification obligations set forth in this Agreement.
9. **Entire Agreement; Amendment.** This Agreement constitutes the entire understanding between the parties hereto with respect to the subject matter hereof, superseding all negotiations, prior discussions and preliminary agreements made prior to the date hereof. This Agreement may not be amended or revised except by a writing executed by both parties hereto.
10. **Execution in Counterparts.** This Agreement may be executed in counterparts such that the signatures may appear on separate signature pages. A copy, facsimile, or an original, with all signatures appended together, shall be deemed a fully executed agreement.
11. **Authority.** Each person signing below warrants and guarantees that s/he is legally authorized to execute this Agreement on behalf of the respective party and that such execution shall bind said party to the terms of this Agreement.
12. **Notices.** All notices given in conjunction with this Agreement shall be written, and shall be effective upon personal delivery to the other party or, if by mail, three (3) days after deposit in the U.S. Mail, first class postage prepaid to the applicable address stated below, or to such other address as the party may designate by written notice:

LICENSEE: Santa Clara Valley Transportation Authority
Real Estate & Transit-Oriented Development
3331 North First St., Bldg. A
San Jose, CA 95134
Attn: Ron Golem

CITY: City of San José
OED – Real Estate Services
200 E. Santa Clara Street, 12th Floor
San Jose, CA 95113
Attn: Real Estate Manager

Or to such other place as either the LICENSEE or CITY may designate by written notice.

Notwithstanding the foregoing, LICENSEE or its representatives will provide CITY and CITY'S tenant(s) with three (3) days' notice of its intent to conduct the Assessments of and at the Property by telephone and/or e-mail. LICENSEE will only provide such notice if CITY inserts its telephone and/or e-mail at the following number/email address:

CITY: Daytime phone no.: _____

E-mail address: _____

If the noticed date is not feasible, the CITY shall provide LICENSEE with an alternative date within forty-eight (48) hours of said notice of intent to use the Property. Notice that an alternate date is required shall be made by CITY by telephone and email as follows:

LICENSEE: Name: Scott Ball, Senior Project Geologist, Mott MacDonald
Daytime phone no.: (408) 204-7188
E-mail address: scott.ball@mottmac.com

or to such other place as LICENSEE may designate.

13. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.
14. **Venue.** In the event that suit shall be brought by either party hereunder, the parties hereto agree that venue shall be exclusively vested in the state courts of California in the County of Santa Clara or if federal jurisdiction is appropriate, exclusively in the United States District Court in the Northern District of California, San José, California.

Signatures inserted on next page.

IN WITNESS WHEREOF, the parties hereto have executed this instrument the day and year written below.

“LICENSEE”

SANTA CLARA VALLEY
TRANSPORTATION AUTHORITY, A
CALIFORNIA SPECIAL DISTRICT

× Evelyn Tran
evelynn.tran@vta.org (7/20/2021)
Email: evelynn.tran@vta.org
By: _____
Evelynn Tran, General Counsel and
Interim General Manager/CEO
Santa Clara Valley Transportation Authority

Date

APPROVED AS TO FORM:

× Victor Pappalardo
victor.pappalardo@vta.org (6/30/2021)
Email: victor.pappalardo@vta.org
By: _____
Victor A. Pappalardo
Senior Assistant Counsel

Date

“CITY”

CITY OF SAN JOSE,
A California Municipal Corporation

× Nanci Klein
Nanci Klein (7/22/2021)
Email: nanci.klein@sanjoseca.gov
By: _____
Nanci Klein
Name

Director of Economic Development
Title

Date

APPROVED AS TO FORM:

Attorney
Cameron Day
Deputy City Attorney IV U
cameron.day@sanjoseca.gov
× Cameron Day - 7-20-21
Cameron Day (7/20/2021)
Email: cameron.day@sanjoseca.gov

By: _____
Cameron Day
Deputy City Attorney

Date

EXHIBIT A-1

Aerial View of Property

(approximate property boundaries)



EXHIBIT A-2

Area Map



EXHIBIT A-3

Scope of Work

A. Drilling for Analysis of Soil and Groundwater Conditions

VTA's designated contractor will drill a borehole to determine subsurface soil and groundwater conditions ("Borehole"). The drilling operation will include a drill rig, a support vehicle for water supply and equipment, and personal vehicles for the field engineer/geologist. Access to the fenced area will be required and will be coordinated with the CITY.

Prior to drilling the Borehole, VTA and/or its designated contractor will cause Underground Service Alert (USA) to mark the location of known underground utilities at or adjacent to the site, and an independent underground utility locating firm will clear the Borehole for utilities.

The Borehole will be approximately five (5) to eight (8) inches in diameter and will be drilled with either a truck-mounted or track-mounted drill rig. The Borehole will be advanced by either rotary-wash or hollow-stem auger drilling techniques.

Soil samples will be extracted from the ground and either tested in the field or transported to a laboratory for further testing (soil type, strength, compressibility, etc.). The field crew for drilling the Borehole will be comprised of approximately two (2) to six (6) personnel.

The investigation-derived waste, including cuttings and drilling fluid, will be collected in stages, captured and sealed in fifty-five (55) gallon steel drums. The drums will be retained on-site temporarily pending proper disposal. Once the field crew has completed the Borehole, a flatbed truck will be used to collect and remove the fifty-five (55)-gallon drums.

Depending on the planned depth of the Borehole (up to 265 feet at this site), the working window, and other issues such as stiffness of the soil, drilling of a Borehole generally will take five (5) to six (6) days to complete, which may not be consecutive.

- Borehole work areas that are left overnight will be cleaned before departure and fitted with a steel plate cover.
- Geophysical instruments may be lowered into and out of the Borehole to test specific soil properties once drilling of the Borehole has been completed.

The Borehole will be fitted with a vibrating wire piezometer to measure groundwater level and pressure and backfilled with a bentonite/cement mix and sealed at the surface with a traffic rated ten (10) to twelve (12) inch diameter well cover to match the existing grade.

At the discretion of the CITY, the drill rig may be parked at the site after work hours and the site will be left in a clean and neat manner, with the rig and drilling area secured. Support vehicles and personal vehicles which are used by the drilling and

monitoring teams will be parked on site and in a manner least likely to interfere with the business operations of the CITY. With the exception of the drill rig referenced above, support and personal vehicles will be removed, on a daily basis, at the conclusion of the work.

B. Future Groundwater Monitoring/Measurements

Future access to the piezometer will be needed on a quarterly basis to take groundwater level and pressure readings. The groundwater monitoring field crew will be comprised of approximately two (2) to four (4) engineers and/or technicians with hand tools, a data meter and a laptop. The field crew will access the property to collect data from the piezometer once quarterly, with advance scheduling and notification to the CITY. Monitoring/measurements will typically take approximately fifteen (15) to thirty (30) minutes. Notwithstanding the foregoing, the piezometer occasionally may require routine maintenance and thus require a longer duration of approximately one (1) hour.

Work hours will generally be from 7:00 a.m. to 5:30 pm PST, unless another time is coordinated between the Parties. Support vehicles and personal vehicles will be parked on site and in a manner least likely to interfere with the business operations of the CITY. Access to the fenced area will be required and will be coordinated with the CITY.

EXHIBIT B

Definition of Hazardous Materials

For the purpose of this Agreement, “**Hazardous Materials**” shall mean any and all: (a) substances, products, by-products, waste, or other materials of any nature or kind whatsoever which is or becomes listed, regulated or addressed under any Environmental Laws; (b) materials, substances, products, by-products, waste, or other materials of any nature or kind whatsoever whose presence in and of itself or in combination with other materials, substances, products, by-products, or waste may give rise to liability under any Environmental Law or any statutory or common law theory based on negligence, trespass, intentional tort, nuisance, strict or absolute liability or under any reported decisions of any state or federal court; and, (c) substances, products, by-products, wastes or other materials which may be hazardous or harmful to the air, water, soil, environment or affect industrial hygiene, occupational, health, safety and/or general welfare conditions, including without limitation, petroleum and/or asbestos materials, products, by-products, or waste.

For the purposes of this Agreement, “**Environmental Laws**” shall mean and include all federal, state, and local laws, statutes, ordinances, regulations, resolutions, decrees, and/or rules now or hereinafter in effect, as may be amended from time to time, and all implementing regulations, directives, orders, guidelines, and federal or state court decisions, interpreting, relating to, regulating or imposing liability (including, but not limited to, response, removal, remediation and damage costs) or standards of conduct or performance relating to industrial hygiene, occupational, health, and/or safety conditions, environmental conditions, or exposure to, contamination by, or clean-up of, any and all Hazardous Materials, including without limitation, all federal or state super-lien or environmental clean-up.

EXHIBIT C

Insurance Requirements

LICENSEE, at LICENSEE's sole cost and expense, shall procure and maintain for the duration of this Agreement insurance against claims for injuries to persons or damages to property which may arise from, or are in connection with, entries onto the Property hereunder by LICENSEE, its officers, employees, agents or contractors. CITY acknowledges that LICENSEE is self-insured for Commercial General Liability and Workers' Compensation.

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; 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 California Labor Code and Employers Liability insurance; and
4. Pollution Liability Insurance, including coverage for all operations, completed operations and professional services.

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

LICENSEE shall maintain limits no less than:

1. Commercial General Liability: \$1,000,000 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; and
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage; and

3. Workers' Compensation and Employers' Liability: Workers' Compensation limits as required by the California Labor Code and Employers Liability limits of \$1,000,000 per accident.
45. Pollution Liability: \$1,000,000 each occurrence/aggregate limit.

C. **Deductibles and Self-Insured Retentions**

Any deductibles or self-insured retentions in excess of \$250,000 must be declared to CITY's Risk Manager.

D. **Other Insurance Provisions**

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

1. Commercial General Liability and Automobile Liability Coverages
 - a. CITY, its officers, employees, agents and contractors are to be covered as additional insureds as respects: Liability arising out of activities performed by or on behalf of, LICENSEE; products and completed operations of LICENSEE; premises owned, leased or used by LICENSEE; and automobiles owned, leased, hired or borrowed by LICENSEE. The coverage shall contain no special limitations on the scope of protection afforded to CITY, its officers, employees, agents and contractors.
 - b. LICENSEE's insurance coverage shall be primary insurance as respects CITY, its officers, employees, agents and contractors. Any insurance or self-insurance maintained by CITY, its officers, employees, agents or contractors shall be excess of LICENSEE's insurance and shall not contribute with it.
 - c. Any failure to comply with reporting provisions of the policies by LICENSEE shall not affect coverage provided CITY, its officers, employees, agents, or contractors.
 - d. Coverage shall state that LICENSEE'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 CITY, its officers, employees, agents and contractors.

2. Workers' Compensation and Employers' Liability

Coverage shall contain waiver of subrogation in favor of CITY, its officers, employees, agents and contractors.

3. All Coverages

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

E. **Acceptability of Insurers**

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

F. **Verification of Coverage**

LICENSEE shall furnish CITY with certificates of insurance or a self-insured letter with endorsements affecting coverage required by this Agreement. 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@sanjoseca.gov,

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

G. **Contractors**

LICENSEE shall include all contractors as insured under its policies or shall obtain separate certificates and endorsements for each contractor.