

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Proposed Force Majeure and Mortgage Protection Language
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From: Phan, Johnny
Sent: Monday, February 1, 2021 5:36 PM
To: Miller, J. Gregg <gmler@coblenzlaw.com>
Subject: Proposed Force Majeure and Mortgage Protection Language

Hi Gregg – See attached proposed language related to Force Majeure and Mortgage Protection for the Development Agreement.

Thanks. Johnny

Johnny V. Phan

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PRELIMINARY DRAFTS RELATED TO DEVELOPMENT AGREEMENT NEGOTIATIONS
CITY PROPOSAL RE: FORCE MAJEURE AND MORTGAGE PROTECTION

Force Majeure

Upon the request of any party hereto, an extension of time will be granted for the period of delay caused by a Force Majeure Event, as provided in this *[section or paragraph]*, and no party shall be deemed to be in default under this Agreement where delays in performance or failure to perform are caused by a Force Majeure Event and authorized pursuant to this *[section or paragraph]*.

Promptly after learning of the occurrence of a Force Majeure Event that actually causes delay, the affected party shall notify the other party in writing of the occurrence of such Force Majeure Event, the manner in which such occurrence is likely to substantially interfere with the ability of the delayed party to perform under this Agreement, and the anticipated length of delay in performance resulting from the Force Majeure Event. Upon the other party's receipt of such notice, the Term of this Agreement then in effect shall be extended by a period of time equal to the number of days during which performance is substantially and unavoidably delayed due to the specified Force Majeure Event, provided that: (1) the delay authorized for any one Force Majeure Event shall not exceed one (1) year; and (2) the cumulative period of delays for any one party authorized as a result of all Force Majeure Events shall not exceed three (3) years.

"Force Majeure" or "Force Majeure Event" shall mean an act of war or terrorism; insurrection; strikes, walkouts or other labor disturbances; riots or other civil commotion; floods; earthquakes; fires; inclement weather; casualties; acts of God; governmental restrictions imposed or mandated by other governmental entities; enactment of conflicting laws by other governmental entities; the general unavailability of construction materials for projects similar to the Project; and epidemics or pandemics that result in the suspension of development and construction activities. Neither the inability of Developer to obtain construction financing for the Project nor the condition of, or changes in, the real estate market shall constitute a Force Majeure Event.

PRELIMINARY DRAFTS RELATED TO DEVELOPMENT AGREEMENT NEGOTIATIONS
CITY PROPOSAL RE: FORCE MAJEURE AND MORTGAGE PROTECTION

For definitions Section of Development Agreement:

"Mortgage" shall mean a mortgage, deed of trust, or other lien on all or part of the Project Site to secure an obligation made by Developer that is an obligation to repay funds to be used by Developer to improve the applicable property so encumbered in a manner consistent with this Agreement, but shall not include any mortgage, deed of trust or other lien that is also secured by real property that is not part of the Project Site or which secures an obligation to repay funds used to acquire or improve real property that is not part of the Project Site, or which is cross-defaulted with any obligation relating to or secured by real property that is not part of the Project Site.

"Mortgagee" shall mean a person or entity that is not an Affiliate of Developer and that is the holder of, and beneficiary or mortgagee under, a Mortgage.

"Foreclosure Transferee" shall mean any purchaser at a foreclosure sale under a Mortgage and any person or entity which acquires title to all or any portion of the Project Site in lieu of the foreclosure of a Mortgage, except for Developer or an Affiliate of Developer.

Section 10. MORTGAGE PROTECTION

10.1. Mortgage Protection. This Agreement shall be superior and senior to any lien placed upon the Project Site or any portion thereof after the date of recording of this Agreement, including the lien of any deed of trust or mortgage. Notwithstanding the foregoing, no breach hereof shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of any Mortgagee or Mortgage Transferee who acquires title or possession to the Project Site, or any portion thereof.

10.2. Mortgagee Not Obligated; Exception for Community Benefits. Notwithstanding the provisions of Section 10.1 above, no Mortgagee or Mortgage Transferee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion, on the Project Site or applicable portion thereof, except that Community Benefits must nevertheless be completed as set forth in Section 4.1; provided, however, that a Mortgagee or Mortgage Transferee shall not be entitled to devote the Project Site to any use except as permitted by this Agreement, nor to construct any improvements thereon or institute any uses other than those uses or improvements provided for or authorized by this Agreement, or otherwise allowed under the Vested Elements and Approvals. Additionally, notwithstanding that title to or possession of all or any portion of the Project Site shall have been acquired by a Mortgagee or Foreclosure Transferee, a failure to meet any construction deadlines under this Agreement as to any portion of the Project Site shall not relieve Developer of the consequences under this Agreement of, or liability under this Agreement for, the failure of such improvements to be completed.

***PRELIMINARY DRAFTS RELATED TO DEVELOPMENT AGREEMENT NEGOTIATIONS
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10.3. Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any notice of default given Developer hereunder and specifying the address for service thereof and enclosing a copy of its Mortgage, then City agrees to use its best efforts to deliver to such Mortgagee, concurrently with service thereon to Developer, any notice given to Developer with respect to any claim by City that Developer has committed an event of default, and if City makes a determination of noncompliance hereunder, City shall likewise use its best efforts to serve notice of such noncompliance on such Mortgagee concurrently with service thereon on Developer. Each Mortgagee shall have the right during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the event of default claimed or the areas of noncompliance set forth in City's notice. If a Mortgagee shall be required to obtain possession in order to cure any default, the time to cure shall be tolled so long as the Mortgagee is diligently attempting to obtain possession, including by appointment of a receiver or foreclosure, and provides City upon written request from time to time of reasonable evidence of such diligent efforts.