

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - Diridon/DW - H1, H5 and H6 land transfer parcels - key terms
Date: Tuesday, April 6, 2021 2:37:00 PM
Attachments: [Key Terms for H1 H5 and H6 Properties Transfer Agreements-c.docx](#)

From: Miller, Gregg <gmler@coblentzlaw.com>
Sent: Thursday, February 18, 2021 1:18 PM
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Subject: Google - Diridon/DW - H1, H5 and H6 land transfer parcels - key terms

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Affordable Housing Program

Terms for Transfer of Parcels H1, H5 and H6 Pursuant to Transfer Agreements between
Developer and City or City's Designated Affordable Housing Developer

Land Dedication – Key Terms of Transfer Agreements for Parcels H1, H5 and H6

A. Land Dedication.

Developer shall dedicate the H1, H5 and H6 Properties, consisting of a total of approximately 2.16 acres of real property, to the City or the City's designated affordable housing developer ("Designee") pursuant to separate Transfer Agreements between Developer and the City. Below are the key terms to be included in the respective Transfer Agreements. The City and Developer agree that Developer shall have the right to propose the transfer to the City (or its Designee) of an alternative property or properties under Developer's control and located within the DSAP.

B. H1 Property.

1. **Transfer Agreement:** Concurrently with entering into the Development Agreement, Developer and City shall enter into a separate Transfer Agreement for the transfer of the H1 Property to City in accordance with the terms and conditions set forth below (the "H1 Transfer Agreement").

2. **Legal Description of H1:** The indicative site plan of the property to be transferred shall be set forth in the H1 Transfer Agreement, and legal description to be provided prior to the closing in accordance with Developer's Final Map or post-closing, if mutually agreed upon with the City.

3. **Leases:** It shall be a condition to the closing under the H1 Transfer Agreement, for City's benefit, that Developer shall transfer the H1 Property unencumbered by and free of any leases, unless City otherwise waives such condition.

a. **Ongoing Property Condition:** Following the closing, City or its Designee shall be responsible to keep the H1 Property in good, clean and safe condition. In connection therewith, City shall be responsible to install and maintain attractive fencing, and to provide for adequate lighting and security. This requirement shall also be set forth as a restriction in the Grant Deed for the H1 Property, which deed restriction shall run with the land of the H1 Property.

b. **Construction Easements:** Effective as of the closing, City shall grant Developer such construction easements as may be reasonably necessary for the construction of Developer's overall project, provided that such easements do not materially interfere with City's development and use of the H1 Property.

c. **Remediation Easement:** Effective as of the closing, City shall grant Developer such remediation easements, licenses or access agreements as are necessary for Developer to implement any post-Closing RAP work as provided in Section B.7(e) below.

4. **Closing Date:** The closing under the H1 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("Closing Date").

5. **Due Diligence:**

a. **Access:** Prior to entering into the H1 Transfer Agreement, upon delivering to Developer a commercially reasonable Access Agreement signed by City, City shall be entitled to the right of access to the H1 Property to conduct its due diligence on the terms and conditions set forth in the Access Agreement. Subject to the terms and conditions of the Access Agreement (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence shall include site inspections only, given Developer's obligations under Section B.7 below. City shall waive due diligence prior to entering into the H1 Transfer Agreement, and City shall have no right to terminate the H1 Transfer Agreement based on the results of the due diligence.

b. **Title:** Promptly after the City's request, Developer shall provide City with a then current title report for the H1 Property.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections B.3(c) above and B.7(b) below, the following shall be conditions to the closing under the H1 Transfer Agreement, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H1 Transfer Agreement); (ii) Developer shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period; and (iii) there shall have been no material adverse change in the environmental condition of the H1 Property since the date of the H1 Transfer Agreement, subject to Section B.7 below.

The City's ability to secure funds or other commitments to enable the construction of affordable housing on the H1 Property shall not be a condition to closing; provided, however, that the City shall have the right to extend ("Extension") the Closing two (2) times for periods of one hundred eighty (180) days each (each, an "Extension Period", the first such extension of the Closing being the "Extended Closing Date" and the second such extension of the Closing being the "Outside H1 Closing Date") if the City has not identified the Designee by the scheduled Closing or Extended Closing Date, as applicable, by providing Developer with written notice of the exercise of the extension together with a status report of City's efforts to identify the Designee together with documentation evidencing City's good faith efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date, or has extended closing a second time, then by the Outside H1 Closing Date, the Grant Deed shall identify the Designee as the transferee/grantee of the H1 Property. If City has not identified and selected the Designee by the Extended Closing Date or Outside H1 Closing Date, as applicable,

then there will be no further extensions of the Closing and City shall take title the H1 Property in City's name or be in default of the H1 Transfer Agreement. In addition, if, as set forth in the H1 Transfer Agreement, City elects to defer the transfer of title of H1 Property to City (or its Designee) to the Extended Closing Period or Outside H1 Closing Date, as applicable, then the City shall reimburse Developer for property taxes payable with respect to such Property during the deferral period and Developer's costs to light, fence, insure, and maintain the property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. Developer shall provide the City with reasonable documentation of such taxes and costs.

The occurrence of any casualty or condemnation shall not affect the City's obligation to close.

b. **Developer Conditions:** In addition to the closing condition specifically set forth in Section B.7(b) below, the following shall be conditions to the closing under the H1 Transfer Agreement, for Developer's benefit: (i) the City shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period, (ii) Developer is obligated to transfer the H1 Property in order to satisfy its affordable housing requirements equal to the value of the IHO fee credit for the H1 Property (i.e., see Section C.8) as a result of the amount of market rate units being developed, and (iii) Developer has elected to satisfy some or all of such affordable housing requirements by means of the IHO fee credits resulting from the transfer of the H1 Property pursuant to the H1 Transfer Agreement.

7. **Environmental:**

a. **Remedial Action Plan:** The Santa Clara County Department of Environmental Health (the "County") approved a Remedial Action Plan dated March 22, 2019 related to the H1 Property (the "Original RAP"). Developer will be submitting an updated Remedial Action Plan to the County that will supersede the Original RAP ("New RAP"). Developer shall demolish the existing building on the H1 Property, excavate the environmentally impacted soil under the building on the H1 Property to the extent required by the County for a podium-style residential development of the H1 Property, implement the continued monitoring of groundwater and commence remediation of groundwater, if and only to the extent required by the County, to be more particularly described in the H1 Transfer Agreement (collectively, the "Pre-Closing RAP Work"). Implementation of the New RAP will require monitoring wells on the H1 Property and one or more injection wells and possibly a groundwater remediation treatment system to be located on the H1 Property (the "Remediation Equipment") until decommissioning of such Remediation Equipment is approved by the County and decommissioning is complete. City will provide access to Developer to perform this post-Closing RAP work ("Post-Closing RAP Work") pursuant to either an easement, license or access agreement with Developer, at Developer's election. The Post-Closing RAP Work will be detailed in an exhibit to the H1 Transfer Agreement.

b. **Closing Condition:** Developer shall use commercially reasonable efforts to perform and complete the Pre-Closing RAP Work. It shall be a condition to the closing under the H1 Transfer Agreement, for both Developer's and City's benefit, that Developer causes the Pre-

Closing RAP Work to be completed. If Developer is unable to timely perform or complete the Pre-Closing RAP Work for reasons beyond Developer's control, then the Closing Date shall be delayed until such time as Developer is able to perform and complete the Pre-Closing RAP Work. If for reasons beyond Developer's control, Developer is ultimately unable to complete the Pre-Closing RAP Work, then such inability to complete shall not be a Developer default and Developer shall satisfy its IHO obligations by other means. The Pre-Closing RAP Work will be detailed in an exhibit to the H1 Transfer Agreement.

c. **Environmental Indemnity:** If the H1 Property is transferred to the City, Developer shall indemnify, defend, and hold harmless City and City Indemnitees against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by exposure to environmental contamination existing at the H1 Property which exposure occurred prior to the H1 Property Closing Date and such actions or claims first accrued prior to the H1 Property Closing Date, which indemnity and defense obligation of Developer shall survive the transfer of the H1 Property to City. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims that arise from the negligence or willful misconduct of City, or any exacerbation by City of any pre-existing condition on the H1 Property. For the avoidance of doubt, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims first accruing on or after the H1 Property Closing Date, including, without limitation, any claims of future residential occupants of the H1 Property.

d. **Pad-Ready Condition.** Developer shall cause the H1 Property to be delivered at closing in rough-graded, pad-ready condition for City's affordable housing development, based on specifications to be provided by City and agreed to by Developer prior to execution of the H1 Transfer Agreement. Details on this pre-closing work will be included as an exhibit to the H1 Transfer Agreements.

e. **City Obligations:** Following the closing, City shall either (i) construct all of its improvements "podium" style such that no elements of the improvements are slab-on-grade, or (ii) install then-current industry standard vapor intrusion mitigation systems, the cost, liability and responsibility of which shall be borne solely by City (or its successors-in-interest), provided that if the County or any other applicable governmental agency requires a combination of clauses (i) and (ii) above and/or any additional construction requirements for residential construction, then City shall also comply with such additional construction requirements. This requirement shall survive the transfer of the H1 Property to the City. This requirement shall also be set forth as a restriction in the deed for the H1 Property, which deed restriction shall run with the land of the H1 Property.

f. **Developer Post-Closing Obligations:** Following the H1 Property Closing, Developer shall have no responsibility or liability for the H1 Property other than the Post-Closing RAP Work. This requirement shall survive the transfer of the H1 Property to City. Developer shall have no obligations for any further soil remediation or removal and no obligations with respect to soil vapor. If all of the work under the New RAP has not been completed as of the H1 Property closing such that there is Post-Closing RAP Work remaining to be implemented, the deed for the H1 Property shall also include a reservation of access rights for Developer and its

contractors to complete that work and to maintain the Remediation Equipment, which reservation shall run with the land of the H1 Property or the parties shall enter into a separate easement, license or access agreement, at Developer's election.

g. **Assignment:** Following the closing, City may assign its rights and obligations under this Section B.7 that expressly survive the closing to a developer of affordable housing.

8. **IHO Fee Credits:** As of the Effective Date, the amount of the IHO fee credit for the H1 Property shall be \$21,346,347 (the "H1 Transfer IHO Fee Credits"). \$21,346,347 IHO Fee Credit at \$18.70/rsf equals 1,141,516 sf of credit for market rate rentable sf (including 100% AMI units) which is approximately 1,792 units. IHO Fee Credits are earned at time of Closing or, if the City exercises its option(s) described in Section 6.a above to extend the Closing Date, then such credits shall be earned on the date on which the Closing would have occurred but for the City's exercise of its extension right(s).

9. **No Assignment:** Except as set forth in Section B.7(f) above, City may not assign its rights or obligations under the H1 Transfer Agreement. As more specifically set forth in Section 6.a, above, the City may identify a Designee to take title to the H1 Property at Closing and in such event, Developer shall provide for the H1 Property to be deeded to the Designee at Closing.

10. **Purchase Price:** The purchase price for the H1 Property shall be \$1.00. Closing costs shall be split per local custom.

11. **AS IS Sale:** Except for the environmental obligations as set forth in Section B.7 above that expressly survive the closing, at the closing, Developer shall transfer the H1 Property to City in its AS IS, WHERE IS condition and City shall waive and release all claims against Developer related to the physical and environmental condition of the H1 Property.

12. **Default:**

a. **Default by City:** If City defaults under the H1 Transfer Agreement and fails to close, Developer shall have the right to terminate the H1 Transfer Agreement, and in such event, City shall continue to recognize the H1 Transfer IHO Fee Credits that Developer would have received if the H1 Agreement not been terminated due to City's default.

b. **Default by Developer:** If Developer defaults under the H1 Transfer Agreement and fails to close, City's sole and exclusive remedy shall be to terminate the H1 Transfer Agreement, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence (subject to a market-standard cap) in which case Developer would not receive any H1 Transfer IHO Fee Credits and would therefore satisfy its obligations under the IHO by paying the applicable fee.

C. H5 and H6 Properties. H5 and H6 properties may be transferred separately or concurrently at Developer's discretion.

1. **Transfer Agreement:** Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the transfer of the H5 Property and the H6 Property, respectively, to City in accordance with the terms and conditions set forth below (individually the "H5 Transfer Agreement" and the "H6 Transfer Agreement" and sometimes collectively the "H5 and H6 Transfer Agreements"). The H5 Transfer Agreement and the H6 Transfer Agreement will not be attached to the Development Agreement as Exhibit(s).

2. **Legal Description of H5 and H6:** An indicative site plan of the H5 Property and the H6 Property (collectively, the "H5 and H6 Properties") will be attached to the H5 and H6 Transfer Agreements, with legal descriptions to be provided. As set forth in Section c.2.a below, the legal descriptions may be modified prior to the closing of each property in accordance with Developer's Final Map or post-closing, if mutually agreed upon with the City.

a. **Parcelization Condition:** City acknowledges that the H5 and H6 Properties are not currently legal parcels. It shall be an unwaivable condition to the closing, for Developer's and City's benefit, that the H5 and H6 Properties shall be legal parcels for conveyance prior to the closing which legal separation shall be accomplished at Developer's cost.

b. **Pad-Ready Condition:** Developer shall cause the H5 and H6 Properties to be delivered at Closing in rough-graded, pad-ready condition for City's affordable housing development, based on specifications to be provided by City and agreed to by Developer prior to execution of the H5 Transfer Agreement and the H6 Transfer Agreement. Details on this pre-closing work will be included as an exhibit to the H5 and H6 Transfer Agreements.

c. **Developer Post-Closing Obligations: Construction of Private Street.** Developer shall construct a private street serving the H block parcels, including the H5 and H6 Properties. The City shall give notice to the Developer not later than six (6) months prior to the City's anticipated date of receiving a temporary certificate of occupancy ("TCO") for the first lot (H5 Property or H6 Property) to be completed (the "TCO Notice") so that vacating the private street area, in two phases, can commence. The Developer will construct the private street in two phases - the east-west portion and the north-south portion. Within a commercially reasonable time of providing the TCO Notice to Developer, the City shall vacate all construction equipment from the first phase in order to allow Developer to construct that portion of the street, including associated sidewalk and streetscape. During this period, Developer may use the alternate portion of the street for ongoing construction access. On completion of the first phase of the street, the Developer will give notice to the City that the first portion of the street is available for construction access, and the second portion is to be vacated within a commercially reasonable time after the date of Developer's notice. On completion of the second phase, the Developer will give notice to the City that both portions are complete and available for access and use. Details on this work will be included as an exhibit to each of the H5 and H6 Transfer Agreements.

3. **Leases:**

a. **Closing Condition:** It shall be a condition to the closing under each of the H5 and H6 Transfer Agreements, for City's benefit, that Developer causes all leases to be terminated prior to the closing. The H5 and H6 Properties shall be transferred unencumbered by and free of any leases, unless City otherwise waives such condition.

4. **Closing Date:** The closing under each of the H5 and H6 Transfer Agreements shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City. The H5 Property and the H6 Property may be transferred separately or concurrently, at the Developer's discretion.

a. **Ongoing Property Condition:** Following each closing, City shall be responsible to keep the H5 Property or H6 Property conveyed at that closing in good, clean and safe condition. In connection therewith, City shall be responsible to install and maintain attractive fencing and to provide for adequate lighting and security. This requirement shall also be set forth as a restriction in the Grant Deed(s) for the H5 and H6 Properties, which deed restriction shall run with the land of each of the H5 and H6 Properties.

b. **Construction Easements:** Following the closing, City shall grant Developer such construction easements as may be reasonably necessary for the construction of Developer's overall project, provided that such easements do not materially interfere with City's development and use of the H5 and H6 Properties. In addition, the H5 and H6 Transfer Agreements shall contain provisions whereby the City (or its Designee) and the Developer agree to coordinate construction activities and schedules to ensure timely construction of the private road, as more specifically described in Section C.2.c above required for mutual benefit of the H5 Property, the H6 Property and the other H block market rate residential parcels, and such provisions shall survive the Closing or may be in form of an easement or other agreement.

5. **Due Diligence:**

a. **Access:** Prior to entering into the H5 and H6 Transfer Agreements, upon delivering to Developer a commercially reasonable Access Agreements signed by City, City shall be entitled to the right of access to the H5 and H6 Properties to conduct its due diligence on the terms and conditions set forth in the Access Agreements. Subject to the terms and conditions of the Access Agreements (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence may include site testing, including but not limited to testing related to environmental conditions and mitigation or remediation requirements for use of the property for residential purposes. City shall waive due diligence prior to entering into the H5 and H6 Transfer Agreements, and City shall have no right to terminate the H5 and H6 Transfer Agreements based on the results of the due diligence.

b. **Title:** Promptly after the City's request, Developer shall provide City with a then current title report for the H5 and H6 Properties.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections C.2(a) and 3(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer Agreements, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H5 and H6 Transfer Agreements); (ii) Developer shall not be in default under the respective H5 and H6 Transfer Agreements beyond any applicable notice and cure period; (iii) there shall have been no material adverse change in the environmental condition of the H5 Property or the H6 Property since the date of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively; and (iv) all historical restrictions related to the existing building(s) located on the larger parcel of which the H5 Property and H6 Property are currently a part shall be terminated with respect to the H5 Property and the H6 Property.

City shall have no right to terminate the H5 Transfer Agreement or the H6 Transfer Agreement if City is unable to secure funds or other commitments to enable the construction of affordable housing on either or both of the H5 Property or the H6 Property; provided, however, that City shall have the right to extend ("Extension") the Closing under each of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively, two (2) times for periods of one hundred eighty (180) days each (each, an "Extension Period", the first such extension of the Closing being the "Extended Closing Date" and the second such extension of the Closing being the "Outside H5/H6 Closing Date") if the City has not identified the City's Designee by the scheduled Closing or Extended Closing Date, as applicable, for that property by providing Developer with written notice of the exercise of the extension with the status of City's efforts to identify the Designee together with documentation evidencing City's good faith efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date (or has extended a second time, then by the Outside H5/H6 Closing Date, as applicable) the Grant Deed shall identify the Designee as the transferee/grantee of the H5 Property or H6 Property, as applicable. If City has not identified and selected the Designee by the Extended Closing Date or Outside H5/H6 Closing Date, as applicable, then there will be no further extensions of the Closing and City shall take title the H5 Property or the H6 Property, as applicable, in City's name or be in default of the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable. In addition, if, as set forth in the H5 Transfer Agreement or the H6 Transfer Agreement, City elects to defer the transfer of title of the H5 Property or the H6 Property from Developer to City (or its Designee), then the City shall reimburse Developer for property taxes payable with respect to such Property(ies) during the deferral period and Developer's costs to light, fence, insure, and maintain the subject property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. Developer shall provide the City with reasonable documentation of such taxes and costs.

Further, City shall have no right to terminate the H5 Transfer Agreement or the H6 Transfer Agreement in the event of a casualty or condemnation.

b. **Developer Conditions:** In addition to the closing condition specifically set forth in Section C.2(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer Agreements, for Developer's benefit: (i) City shall not be in default under the H5 and

H6 Transfer Agreements beyond any applicable notice and cure period; (ii) Developer is obligated to transfer the H5 Property and the H6 Property in order to satisfy its affordable housing requirements equal to the value of the IHO fee credit for the H5 Property and the H6 Property (i.e., see Section C.8) as a result of the amount of market rate units being developed, and (iii) Developer has elected to satisfy some or all of such affordable housing requirements by means of the IHO fee credits resulting from the transfer of the H5 Property and or the H6 Properties pursuant to the H5 Transfer Agreement and the H6 Transfer Agreement.

7. **Environmental:**

a. **Environmental Indemnity:** If the H5 Property and/or the H6 Property is transferred to the City, as applicable, Developer shall indemnify, defend, and hold harmless City and City Indemnitees against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by exposure to environmental contamination existing at the H5 Property under the H5 Transfer Agreement and the H6 Property under the H6 Transfer Agreement which exposure occurred prior to the closing date of that property and such actions or claims first accrued prior to the closing date for that property, which indemnity and defense obligation of Developer shall survive the transfer of the H5 Property or H6 Property to City, as applicable. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims that arise from the negligence or willful misconduct of City, or any exacerbation by City of any pre-existing condition on the H5 Property and or the H6 Property. For the avoidance of doubt, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims first accruing on or after the closing date of the H5 Property and or the H6 Property, respectively, including, without limitation, any claims of future residential occupants of the either or both of the H5 Property and or the H6 Property.

b. **Assignment:** Following the closing of the H5 Property and/or H6 Property, as applicable, City may assign its rights and obligations under this Section C.7 that expressly survive the closing to a developer of affordable housing.

8. **IHO Fee Credits:** As of the Effective Date, the amount of the IHO fee credit for the H5 Property shall be \$7,647,054 (the "H5 Transfer IHO Fee Credits"). \$7,647,054 IHO Fee Credit at \$18.70/rsf equals 408,933 sf of credit for market rate rentable sf (including 100% AMI units) which is approximately 642 units. As of the Effective Date, the amount of the IHO fee credit for the H6 Property shall be \$10,734,294 (the "H6 Transfer IHO Fee Credits"). \$10,734,294 IHO Fee Credit at \$18.70/rsf equals 574,026 sf of credit for market rate rentable sf (including 100% AMI units) which is approximately 901 units. IHO Fee Credits are earned at time of Closing, or, if the City exercises its option(s) described in Section 6.a above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its extension right(s).

9. **No Assignment:** Except as set forth in Section C.7(b) above, City may not assign its rights or obligations under the H5 and H6 Transfer Agreements. As more specifically set forth in Section 6.a, above, the City may identify a Designee to take title to the H1 Property at Closing and in such event, Developer shall provide for the H1 Property to be deeded to the Designee at Closing.

10. **Purchase Price:** The purchase price for the H5 Property and for the H6 Property shall be \$1.00 per property. Closing costs shall be split per local custom.

11. **AS IS Sale:** Except for the Developer's obligations as set forth in Section C.2(b) above and C.7(a) above, at the closing of each of the H5 Property and the H6 Property, Developer shall transfer the H5 Property and the H6 Property to City each in its AS IS WHERE IS condition and City shall waive and release all claims against Developer related to the physical and environmental condition of the property so conveyed. City shall bear all construction costs related to the affordable housing project on the H5 Property and the H6 Property.

12. **Default:**

a. **Default by City:** If City defaults under either the H5 Transfer Agreement, the H6 Transfer Agreement and fails to close, Developer shall have the right to terminate the H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and in such event, City shall continue to recognize the affordable housing credits Developer would have received as a result of the transfer of the H5 Property, the H6 Property or both (as applicable) to City but for the termination of the respective H5 Transfer Agreement, H6 Agreement or both due to City's default.

b. **Default by Developer:** If Developer defaults under either the H5 Property, the H6 Property Agreement or both, as applicable and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate the respective H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence (subject to a market-standard cap), in which case Developer would not receive any IHO Fee Credits with respect to the H5 Property or H6 Property, as applicable, and would therefore satisfy its obligations under the IHO by paying the applicable fee.