From: Phan, Johnny

**Downtown West Project** To:

Subject: FW: Preliminary Drafts - Comments and Redline Changes to Exhibits and Key Terms

Date: Tuesday, April 6, 2021 2:40:36 PM

Attachments: Google - DW - Exhibits to Development Agreement 2.26.21.docx

Key Terms for H1 H5 and H6 Properties Transfer Agreements-2.26.21.docx

EXHIBIT D Schedule A AH site plan-city edits.pdf

From: Phan, Johnny

Sent: Friday, February 26, 2021 5:35 PM

**To:** Miller, J. Gregg <gmiller@coblentzlaw.com>

Subject: Preliminary Drafts - Comments and Redline Changes to Exhibits and Key Terms

# Johnny V. Phan

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City Draft 2-26-21 Negotiation Period Privilege; CPRA Confidential Treatment Request; Not for Public Release – CPRA Exempt; Confidential and Proprietary Business-Siting Information

# NOTE: ALL EXHIBITS PENDING NEGOTIATION

# Exhibit A

Project Site Legal Descriptions [not included]

# Exhibit B

**Project Boundaries** [separate pdf]

# Exhibit C

# **Public Benefits**

# Exhibit C1

**Public Benefits Matrix** [not included]

# Exhibit C2

Community Benefits Schedule [not included]

# Exhibit D

# Affordable Housing Program

# I. Intro/Recitals

The Downtown Mixed-Use Plan ("Project") provides for the development of a substantial amount of residential units to help address the City's housing crises related to both market rate and affordable housing. This Affordable Housing Program, which assumes 4,000 residential units, furthers Developer's and City's shared goal that development within the Diridon Station Area Plan ("DSAP") results in twenty-five percent (25%) of all residential units as affordable housing. Consistent with this goal, in October 2020, the City designated the Diridon Station Area as a prioritized growth area in the City-wide Affordable Housing Investment Plan for the development of affordable housing and use of affordable housing funds to encourage and assist in such development.

This Affordable Housing Program will enable the Project to provide financial and other commitments sufficient to (i) satisfy Developer's obligations under the City's adopted Inclusionary Housing Ordinance ("IHO") as set forth in San José Municipal Code Chapter 5.08 in effect on the Effective Date of the Development Agreement, a copy of which is attached hereto as Exhibit D5; and (ii) substantially further achievement of the twenty-five percent (25%) affordable housing goal within the DSAP.

This Affordable Housing Program is provided in order to satisfy and exceed the requirements under the IHO.

As set forth in this Affordable Housing Program, Developer will fulfill its obligations through land dedication, monetary contributions, and production of on-site moderate income (100% AMI) affordable residential units, and the City will through good faith efforts direct affordable housing funds generated by the Project to affordable housing projects on the land Developer dedicates to the City pursuant to this Affordable Housing Program for that purpose.

Terms that are used but not defined in this Affordable Housing Program shall have the meanings given such terms in the body of the Development Agreement to which this Affordable Housing Program is attached.

# II. Summary of the Affordable Housing Program

This Affordable Housing Program applies to all housing developed pursuant to the Development Agreement and consists of the following elements, which are summarized here and discussed in more detail in <u>Sections III</u> and <u>IV</u> below:

1. Developer's transfer of three parcels of real property, currently identified as Properties H1, H5 and H6, totaling approximately 2.16 acres, to the City (or its designee) for use in the production of affordable housing. See <u>Exhibit D1</u> for Site Plan.

- 2. Developer's production of a minimum of one hundred and seventy (170) inclusionary housing units at 100% of Area Median Income ("AMI"), which units must be provided within the market rate buildings at a rate of 5% of the total number of units, consistent with the IHO Mixed Compliance Option.
- 3. Developer's production of a minimum of an additional thirty (30) inclusionary housing units at 100% of AMI as a community benefit, which units must be provided within the market rate buildings at a rate of 0.88% for the first 3,400 units (which, when added to the inclusionary units described in paragraph II.b above, results in 5.88% of the first 3,400 residential units being restricted units at 100% AMI).
- 4. Developer's payment of in-lieu fees (either \$18.70 per rentable square foot (rsf) or \$43.00 per rsf) for all residential developments in the Project area1, H5 and H6 Properties that are transferred to the City or an affordable housing developer designated by the City ("Designee") which credits accrue for Developer's use upon Developer meeting all conditions precedent for the transfer of the respective property.
- 5. Developer's payment of fees on the Project's office development pursuant to the City's adopted Commercial Linkage Fee Ordinance set forth in San José Municipal Code Chapter 5.11.
- 6. Subject to City Council appropriation of funding, the City's commitment to (i) implement the affordable housing priorities for the DSAP that are anticipated to be set forth in the City's Affordable Housing Investment Plan, which reinforces that the DSAP is a priority area for the City's available affordable housing funds, and (ii) use Good Faith efforts to direct CLF generated from commercial development within the Project Site to the production of affordable housing on land transferred from Developer to the City for that use and then to affordable housing production within the DSAP's Boundaries.
- 7. Housing "top up" from the community benefits, which shall be administered by the City's Housing Department.
- 8. Housing contribution of community benefits to the Community Stabilization fund, as further described in Section IV B. below.

Additional community benefits land contribution (the Autumn Street property dedication, which property acquisition agreement shall be entered into concurrently with the Development Agreement, and which shall include a condition that any future use by the City will be subject to separate review pursuant to the California Environmental Quality Act.)

# III. Inclusionary Housing Ordinance Compliance

#### A. Land Dedication.

Developer shall dedicate Properties H1, H5 and H6, consisting of a total of 2.16 acres of real property to the City (or its designee) pursuant to separate transfer agreements between the Developer and the City, with one transfer agreement for the H1 property and a second transfer agreement for the H5 and H6 properties. The value will be adjusted on a pro-rata basis if the sites dedicated turn out to be smaller, provide that such reduction in size is no greater than five percent (5%). If a reduction in size of any one piece of property exceeds five percent (5%) a replacement

site shall be provided to the City, which site shall be acceptable to the City's Director of Housing in its sole and absolute discretion. The City will use Good Faith efforts to deliver 600 units, . The actual number of units to be constructed on the dedication sites will be determined through the City's affordable housing development process, including input from potential affordable housing partners.

Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the eventual transfers of the H1 and together the H5 and H6 Properties to City (the "H1 Transfer Agreement", "H5 and H6 Transfer Agreement", respectively, and collectively, the "Transfer Agreements"). [Note to City: The Transfer Agreements would not be attached to the Development Agreement as an Exhibit but would be kept on file with the City.]

If constructed, District Systems would be available to the H1, H5 and H6 Properties, and those developments would have the right to connect to the District Systems subject to any required regulatory approvals.

1. [Import text from Key Terms for H1, H5 and H6 document here]

# B. On-Site Inclusionary Units.

Developer shall provide on-site inclusionary units as part of the market rate residential development in the Project in compliance with this Section 3 and the IHO's "Mixed Compliance Option" as described herein and in the IHO attached at <u>Exhibit D5</u>. All inclusionary units will comply with the City's Guidelines for Implementation of the Inclusionary Housing Ordinance attached hereto at Exhibit D5.

- 1. <u>Inclusionary Units</u>. In fulfillment of its IHO obligations, Developer shall produce a minimum of 5% on-site inclusionary units at 100% AMI within the market rate buildings, subject to Developer's right to obtain approval for clustering, as set forth in <u>Section III.B.1(d)</u>, below. Assuming a total of 3,400 Developer constructed residential units across the Project, one hundred seventy (170) on-site inclusionary residential units within the Project Site would be provided as deed-restricted units that are limited to occupancy by households with incomes up to 100% of the AMI, as published annually by the City (hereafter "Restricted Units").
- a. As a Community Benefit, Developer shall provide, within the first three-thousand four hundred (3,400) residential units developed, an additional thirty (30) Restricted Units limited to occupancy by households with incomes equal to 100% of AMI. The additional 30 units will be provided on a prorata basis with the required 5%, with the result that the market rate buildings are anticipated to contain 5.88% Restricted Units.
- b. Each Restricted Unit shall be deed-restricted consistent with the City's standard affordable housing forms for occupancy by income qualified households for the term provided in the Inclusionary Housing Ordinance as of the Effective Date. Rents for the deed-restricted units will be limited to rent increases of 5% annually. [Note: City please provide City's

template of the deed restriction, including language related to the term of the restriction, so it can be attached to this Exhibit.]

- c. The Restricted Units shall be integrated into market rate housing, in accordance with the dispersion requirements of the IHO, and shall not be concentrated in a single building, block, or geographic area of the Project. In the case of a project of ten (10) stories or more of mass timber (CLT) or Type 1 (concrete and steel) construction, the Restricted Units, may be dispersed through the lowest 50% of the building as measured by floor (for example: in a 20 story building, the lowest 50% is floors 1-10; for any fraction, the floor count is rounded up, e.g., if the building is 19 stories, then units would be provided in floors 1-10 stories).
- d. Notwithstanding the foregoing provisions of this <u>Section III. B.1</u>, the City may approve (i) a market rate building that clusters Restricted Units in a wing of a building or (ii) placing all of the units in another building (on the same parcel or otherwise in the vicinity of the applicable market rate building(s)) if Developer submits a proposal with a satisfactory explanation of clustering benefits through the Conformance Review Process.
- e. The Restricted Units shall consist of a mix of unit sizes that is substantially the same as the mix of unit sizes in each respective building (i) in which the Restricted Units are integrated or, (ii) in the case of clustering or location of the Restricted Units in a separate building, with respect to which the Restricted Units are built. The Restricted Units shall have a comparable square footage and the same bedroom count and bedroom count ratio as the market rate units. The number of bedrooms in each unit and the average size of the units in each respective building shall be considered in determining whether the mix and size of Restricted Units is substantially the same as the overall mix and size of units in a building. Square footage will be considered comparable if the total average square footage of the Restricted Units is at least 85% of the total average square footage for 1-bedroom Restricted Units must be at least 85% of the average square footage for 1-bedroom Restricted Units must be at least 85% of the average square footage for 1-bedroom market rate units).
- f. The quality of the exterior design of any building consisting entirely of Restricted Units and overall quality of construction of the Restricted Units must be consistent with the exterior design of comparable buildings containing market rate units. Restricted Units may have different interior finishes and features than the market rate units in the market rate building, as long as the finishes and features are functionally equivalent to the market rate units and are durable and of good quality. Functional equivalency includes the architectural style, detailing, and the quality of materials and the size of structures.

#### C. <u>IHO Fees</u>

Provided that Developer restricts not less than 5.88% of the market rate units of a building as 100% AMI Restricted Units up to 3,400 and not less than 5.0% of all market rate units constructed above 3,400 units, then, unless City has previously approved a lower percentage of 100% AMI units per Section III.B.1.(d) above, Developer shall be obligated to pay an IHO in-lieu fee of \$18.70 per rentable square foot of each market rate residential unit and each Restricted Unit. All fees and credits under this Section II.C shall escalate in lockstep based on the City's

methodology for escalating the IHO Fee (e.g., based on the change in the Engineering News Record (ENR) Construction Cost Index (CCI) per the Mixed Compliance Option of the IHO code) ("Annual Increases").

- 1. Increased <u>IHO Fee Rate</u>. (i) For the first 3,400 residential units: Should the total of all residential units permitted or constructed throughout the Project at any given time—fail to include 5.88% of the units at 100% AMI, Developer shall be obligated to pay an increased IHO in-lieu fee of \$43.00 per rentable square foot for each market rate residential unit and each Restricted Unit. .(ii) For all residential construction above 3,400 units: Should the Developer fail to provide 5.0% of the units at 100% AMI, Developer shall be obligated to pay an increased IHO in-lieu fee of \$43.00 per rentable square foot for each market rate residential unit and each Restricted Unit.
- 2. <u>Land Dedication (H1 Property) IHO Fee Credit</u>. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H1 Property to the City (or Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at such time as Developer satisfies all preconditions for closing and transfer of the H1 Property to City (or Designee). As of the Effective Date, the value of the credit for the H1 Property is \$21,572,346. The credit shall accrue for Developer's use in satisfying IHO Fee payment obligations . [Example: \$21,572,346 at \$18.70/rsf equals 1,153,601 sf of credit for market rate rentable sf (including 100% AMI units).]
- 3. <u>Land Dedication (H5 and H6 Property) IHO Fee Credit</u>. Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H5 and H6 Properties to the City (or Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at such time as Developer satisfies all preconditions for closing and transfer of the H5 and H6 Properties to City (or Designee). As of the Effective Date, the value of the credit for the H5 and H6 Properties is \$18,155,349. The credit shall accrue for Developer's use in satisfying IHO Fee payment obligations.[Example: \$18,155,349 at \$18.70/rsf equals 970,874 sf of credit for market rate net rentable sf (including 100% AMI units).]

4.

6. <u>Unavailability or Insufficient Amount of IHO Fee Credits</u>. If Developer has exhausted all the credit attributable to the dedication of H1, H5 and H6, then any remaining residential SF developed by Developer shall pay the IHO fee, Developer shall pay IHO Fees in the amount of (i) \$18.70 per rentable square foot for each residential unit with respect to any residential building (a) where developer has satisfied 5.88% of 100% units across the project up to 3400 units, and (b) where developer has satisfied 5% of 100% AMI units across all units produced after 3401 units, pursuant to <u>Section III.B.1</u> above or (ii) \$43.00 per rentable square foot if the threshold of 100% units has not been met. All IHO fees paid after the credit has been exhausted for H1, H5, and H6 shall escalate annually from the amounts listed above in 2021 values, by the annually reported ENR Construction Cost Index.

# D. Process; Tracking and Reporting of Developer's Compliance

- <u>Data Chart with Application</u>. Some of Developer's obligations in this Affordable Housing Program are subject to Developer's proceeding with development (with some exceptions, such as the upfront land dedication site (Autumn Street) and such obligations shall be satisfied pro-rata on a building-by-building basis, as and when development proceeds, in accordance with this Affordable Housing Program and the other applicable provisions of the Development As such, in order to track Developer's compliance with the Affordable Housing Program, Developer shall submit a data chart with each Vertical Conformance Review Application that contains information addressing the following: the total rentable square footage of residential development proposed as part of each Vertical Conformance Review Application; the location of the market rate units and below-market rate units; number of bedrooms and number of units broken down by bedroom count (for example, a 100 unit building consisting of 40 one bedroom units, 40 2 bedroom units, 20 3 bedroom units); [OBJOB] and the total cumulative number of market rate units and below-market rate units towards the 3,400 total. The Affordable Housing Program information required to be submitted with each Vertical Conformance Review Application is further described in the Downtown West Conformance Review Implementation Guide.
- 2. Affordability Restrictions. As a condition precedent to the City's issuance of a Building Permit for development of a residential building in which any inclusionary units are to be constructed, Developer shall record the affordability restrictions attached hereto as Schedule C (the "Affordability Restrictions") against the real property on which any affordable housing unit is to be constructed. The term of the Affordability Restrictions for rental units shall be per the IHO. The City may consent to subordinate the Affordability Restrictions but only in order to allow for the commitment of other affordable housing financing and pursuant to the City's Inclusionary Housing Policy in effect on the Effective Date a copy of which is attached hereto as Exhibit D5. The Affordability Restrictions shall provide that upon Developer's or owner's written request at any time following expiration, the City shall provide a release of the Affordability Restrictions in a form reasonably acceptable to the owner within thirty (30) days after such request.

# IV. Other Fees and Fee Credits.

#### A. Commercial Linkage Fee Provisions.

- 1. <u>Payment of CLF</u>. Developer shall pay the Commercial Linkage Fee in accordance with the adopted Commercial Linkage Fee Ordinance in effect on the Effective Date of the Development Agreement, subject to Annual Increases as described in the Commercial Linkage Fee Ordinance.
- 2. <u>Allocation of CLF.</u> Subject to annual appropriation and compliance with applicable laws, the City shall make good faith efforts to allocate Developer-paid CLF Fees to support the development of affordable housing on land that Developer dedicates for such purpose. Provided, however, if the City demonstrates the commitment of other funding sources for development of affordable housing on other parcels within the DSAP's Boundaries, then Developer-paid CLF shall be used to support affordable housing production within the DSAP's Boundaries. Good faith efforts include (i) the City's Housing Department making recommendations to the Mayor and City

Council to provide any necessary annual budgetary approvals or authorizations that would allow such allocation of the Developer-paid CLF Fees, , and (ii) an agreement to commence predevelopment activity with respect to one or more Developer-dedicated properties previously transferred to City or for which Developer has satisfied all conditions precedent to City closing, promptly following Developer's submittal of (x) an office building construction permit application that contains information about the total square footage of such building, and (y) information to the City regarding the expected timing of payment of the CLF for such office building. Such predevelopment activity would include identifying potential qualified, experienced affordable housing developers for the Developer-dedicated affordable housing site or sites and identifying a pre-development loan with anticipation of CLF funding for the additional gap loan required. The City's agreement to allocate CLF generated from development within the Project Site to the Developer-dedicated properties shall not constitute use of City's funds to assist Developer since such funds will be used to accelerate production of affordable housing on the Developer-dedicated properties following their transfer to the City. Nothing in this program shall preclude the City from providing financial assistance for additional affordable housing units beyond those required by this Agreement. If no sites have been provided by Developer, or all the sites provided to date have been developed and/or have begun construction, then City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide. In addition, once all the sites to be dedicated by Developer (H1, H5, H6 and any others identified in the Development Agreement), then City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide.

**B.** <u>Community Stabilization Fund.</u> Office Development in the Project Site will result in contributions to the Fund that the City can then make available to housing stabilization efforts, all as more specifically described in <u>Exhibit H</u> (Community Stabilization and Opportunity Pathways Fund) to the Development Agreement.

# V. DISC Adjustments

Note: final wording of DISC language is under discussion; see proposed general section in main DA, Section 3.5.] City and Developer acknowledge and understand that the Project and the affordable housing commitments described herein may be subject to subsequent proceedings initiated by any of the DISC Partner Agencies (California High-Speed Rail Authority; Valley Transportation Agency; Caltrain; and MTC) to acquire one or more portions of the Project Site, including any portion of City-dedicated affordable housing parcels H5 and/or H6. If any DISC Partner Agency initiates proceedings to acquire any portion of the Project Area for an approved alignment and expansion of the rail right-of-way, Developer may be unable to proceed in the manner described herein. If a DISC Partner Agency initiates acquisition of all (or a portion greater than 5%) of the H5 or H6 affordable housing parcels prior to transfer of that property to the City and recordation of the grant deed for that property, Developer shall identify and dedicate additional area(s) of equal or greater size as the area to be acquired by the DISC Partner Agency subject to approval by the Director of the City's Housing Department and Director of PBCE. If a DISC Partner Agency initiates acquisition of all or a portion of the H5 of H6 affordable housing parcels after the transfer of that property to the City and recordation of the grant deed for that property, Developer shall have no obligation to provide replacement affordable housing property. Reconfiguration and/or Project redesign also may be necessary in the event Developer is prohibited

from building to the maximum heights reflected in the DWDSG as a result of City's adoption of a construction tower crane policy that prohibits or impacts Developer's ability to construct to such maximum heights. Any reconfiguration or redesign has the potential to have a negative impact on Developer's master planning efforts, thereby lessening the amount of square footage for both commercial and residential uses, and potentially reducing the number of residential units or the amount of office space that may be developed within the Plan Area. If a lower SF of residential or commercial is developed, all City fee programs such as IHO or CLF, which are administered on a per SF basis will remain unchanged and will be applied to the developed SF. If residential or commercial development capacity is significantly impacted by such changes, then community benefits may be impacted, as further described in the Community Benefits Schedule.

# VI. <u>Definitions</u>

1. "Area Median Income" or "AMI" means the annual median income for Santa Clara County, adjusted for household size, as published periodically in the California Code of Regulations, Title 25, Section 6932, or its successor provision, or as established by the City of San José in the event that such median income figures are no longer published periodically in the California Code of Regulations.

2.

- 3. "Commercial Linkage Fee" or "CLF" means the commercial linkage fee adopted by the City Council as set forth in Chapter 5.11 of Title 5 of the San José Municipal Code in effect on the Effective Date of this Development Agreement.
- 5. "Fund" means the Community Stabilization and Opportunity Pathways Fund described in Exhibit H to the Development Agreement.
- 6. "H1 Property" means that property as generally shown on <u>Schedule A</u> attached to this Affordable Housing Plan.
- 7. "H5 Property" means that property as generally shown on <u>Schedule A</u> attached to this Affordable Housing Plan.
- 8. "H6 Property" means that property as generally shown on <u>Schedule A</u> attached to this Affordable Housing Plan.
- 9. "IHO Fee" means the in-lieu fee under the IHO at the applicable rate of either \$18.70 per rsf or \$43.00 per rsf.
- 10. "Inclusionary Housing Ordinance" or "IHO" means the City of San José Inclusionary Housing Ordinance as set forth in Chapter 5.08 of Title 5 of the San José Municipal Code in effect on the Effective Date.



[Note: schedules to be obtained/created and attached]

# Schedule A to Affordable Housing Program [separate pdf]

Project Site Plan Generally Depicting Location of H1, H5 and H6 Properties H1, H5 and H6 Site Maps

# **Schedule B to Affordable Housing Program**

City's Guidelines for Implementation of the Inclusionary Housing Ordinance

# **Schedule C to Affordable Housing Program**

City's Form of Affordability Restrictions for Deed

# **Schedule D to Affordable Housing Program**

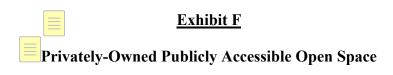
Terms for Transfer of Parcels H1, H5 and H6 Pursuant to Transfer Agreements between Developer and City or City's Designated Affordable Housing Developer

# Schedule E to Affordable Housing Program

Copies of the (i) IHO and (ii) the City's Inclusionary Housing Policy, each as in effect on the Effective Date

# Exhibit E

# Parkland Agreement





# Exhibit F1

# Public Access Agreement [not included]

#### Exhibit F2

# Rules Regarding Public Access and Private Events/Temporary Closures

# 1. Hours of Operation

Except as set forth in Section 2 herein, each of the Privately-Owned Publicly Accessible Open Spaces, excluding the Los Gatos Creek Riparian Corridor, shall be open to the general public every day from sunrise until midnight (12:00 a.m.), except that The Meander shall be open to the general public every day from Sunrise until 10:00 p.m.

# 2. Private Events/Temporary Closures

Excluding semi-public open space (as defined in the DWDSG) under lease by a business, the Los Gatos Creek Riparian Corridor, and limited- access mid-block passages (as defined in the DWDSG), all spaces are publicly accessible, subject to the following limitations:

- a. All private events require prior Developer/owner permission, and Developer/owner has the authority in its sole discretion to determine whether a private event is permitted, consistent with the rules and limitations for private events and/or temporary closures set forth in this Exhibit F2 and Exhibit F3.
- b. Notwithstanding the limitations regarding partial closures set forth below, each individual Privately-Owned Publicly Accessible Open Space may be closed in its entirety a maximum of six (6) times per year, not to exceed eight (8) hours in any month, except for reasonable maintenance and repair. Developer or Owner shall provide notice to the public and City of each planned closure allowed under this paragraph at last thirty (30) days in advance of the closure informing the public of the planned closure.

- c. No more than one entire Privately-Owned Open Space's reservable area may be reserved for a private event at any one time, except for five (5) days per year, when all Privately-Owned Open Space reservable areas may be reserved for no more than five (5) consecutive days, provided that prior notification to the general public via posted signage, and written notification to the City Department of Parks, Recreation & Neighborhood Services ("PRNS") and other stakeholders. During such closures, public access to all City Dedicated Park spaces and trails shall be provided unless closure of such City Dedicated Park space is expressly approved in writing by PRNS.
- d. Private events held in Privately-Owned Open Space reservable areas shall be limited to no more than five (5) consecutive days in one location.
- e. Events shall be assigned to specific venues within the Privately-Owned Open Space network appropriate to the size and nature of the event and where the event will impose the least impact to the level of service on the Privately-Owned Publicly Accessible Open Space or the public's use therefore, as determined by Developer/owner in its sole discretion.
- f. Non-reservable event areas shall remain open and accessible to the public during private events, the private event shall maintain a clear public path of travel around the event and through the Privately-Owned Publicly Accessible Open Space, including a safe path of travel marked in accordance with ADA standards.
- g. Private events held during business hours Monday through Thursday shall be encouraged to avoid high public use hours, as determined by Developer/owner.
- h. Private events held during evenings, weekends, and holidays high public use hours limited in order to avoid high public use hours, as determined by Developer/owner.

- i. Private events held weekends shall be limited to one weekend per month per Privately-Owned Publicly Accessible Open Space. As much as possible, as determined by Developer/owner, the event should allow the public to hear, see, or otherwise appreciate the event.
- j. Unless otherwise approved by Developer/owner, event support structures and furnishings shall be located on hardscape areas and shall be selected and arranged with a high regard for the visual and aesthetic quality of the Privately-Owned Publicly Accessible Open Space.
- k. Events involving animal acts, petting zoos, carnival rides, hot air balloons, or helicopter landings to specified areas of the Privately-Owned Publicly Accessible Open Spaces shall not be permitted.
- Vehicle access though the Privately-Owned Publicly Accessible Open Spaces is prohibited, except that vehicle access for the limited purpose of setting up or dismantling furnishings, decor, or other items associated with a private event may be permitted with prior approval of Developer/owner.
- m. Special Events involving celebratory activities, such as music, dance, theater, or similar activities, are permitted with prior Developer/owner permission. Special Events are permitted pursuant to the requirements specified in the Downtown West Planned Development Zoning District and General Development Plan.
- n. Privately-Owned Publicly Accessble Open Spaces may be closed, at Developer/owner's reasonable discretion, on short-notice or at any time for security or safety needs, and for maintenance or repair. Any security or safety-related closure longer than three (3) days shall require written approval from City.

Each of the following Privately-Owned Publicly Accessible Open Spaces may be partially closed for private events as described below (by percentage of total open space, and duration), subject to the rules and conditions above:

- a. Los Gatos Creek Park: A maximum of twenty-five percent (25%) of Los Gatos Creek Park is reservable by the public for private event use for each event zone depicted on Figure 1 for up to fifty-four (54) days per year (15%) from Sunrise to 12am. The same is reservable by Developer for private event use for each event zone depicted on Figure 1 for up to seventy-three (73) days per year (20%) from Sunrise to 12am.
- b. Meander: A maximum of fifty-five percent (55%) of the total Privately-Owned Publicly Accessible Open Space within The Meander is reservable by the public for event use for each event zone depicted on Figure 2 for up to fifty-four (54) days per year (15%) from Sunrise to 10 pm. The same is reservable by Developer for private event use for each event zone depicted on Figure 2 for up to seventy-three (73) days per year (20%) from Sunrise to 12:00 am.
- c. Creekside Walk at South Autumn Street: A maximum of thirty-five percent (35%) of the total Privately-Owned Publicly Accessible Open Space within Creekside Walk at South Autumn Street is reservable by the public for event use for each event zone up depicted on Figure 3 for up to fifty-four (54) days per year (15%) from Sunrise to 12:00 am. The same is reservable by Developer for private event use for each event zone depicted on Figure 3 for up to one hundred twenty-seven (127) days per year (35%) from Sunrise to 12:00 am.
- d. The Gateway and Los Gatos Creek East: A maximum of thirty-five percent (35%) of the total Privately-Owned Publicly Accessible Open Space within the Gateway and Los

Gatos Creek East is reservable by the public for event use for each event zone depicted on <u>Figure 4</u> for up to fifty-four (54) days per year (15%) from Sunrise to 2:00 am. The same is reservable by Developer for private event use for each event zone depicted on Figure 4 for up to seventy-three (73) days per year (20%) from Sunrise to 2:00 am.

e. Northend Park: A maximum of fifty percent (50%) of the total Privately-Owned Open Space within Northend Park is reservable by the public for event use for each event zone depicted on Figure 5 for up to fifty-four (54) days per year (15%) from Sunrise to 10 pm. The same is reservable by Developer for private event use for each event zone depicted on Figure 5 for up to seventy-three (73) days per year (20%) from Sunrise to 12am.



# Figures 1 through 5 [separate pdf]



#### Exhibit F3

#### **Code of Conduct For Public Use**

# Public use and enjoyment of the Privately-Owned Publicly Accessible Open Space is subject to the following rules and code of conduct:

The public is welcome to access the Privately-Owned Publicly Accessible Open Spaces for the following general uses:

- to enjoy the park during the hours of operation ("park hours")
- to enjoy open spaces during park hours, other than those times reserved for private events or necessary closing
- to engage in commercial activity and revenue generating activities with permission of the Developer/owner
- to enjoy and participate in public, community curated events that do not require payment, which will happen a minimum 6 times annually
- to enjoy the gardens, naturalized areas, and landscaping without entering flowerbeds or damaging vegetation
- to sit on a park chair or one seat on a bench designed for sharing
- to deposit waste in trash or recycling receptacles
- to walk dogs on a leash so long as the person walking the dog cleans up after the dog and deposits waste into appropriate receptacles
- to take souvenir photos; commercial photography by Developer/owner permission only
- to apply to the Developer/owner to host private events, i.e., corporate events, protests, or other special events

The following activities are prohibited within the Privately-Owned Publicly Accessible Open Spaces:

- Engaging in commercial activity, except by permission of the Developer/owner of the Privately-Owned Open Space
- Use of vehicles, including parking at any time without specific authorization
- Blocking of entry and exit doors, building entrances, and access to or from stairs, ramps, escalators and elevators, including sitting on any stair or escalator handrails
- Performing, entertaining, large gatherings, or exhibiting, except by permission and/or permit
- Amplified sound, except by permission and/or permit
- Feeding or tampering with wildlife
- Use of illegal drugs
- Use of alcohol, outside of designated areas
- Riding or operating motorized devices, except by persons with a mobility impairment
- Carrying, concealing, or using weapons, including, but not limited to firearms, knives, or any similar object(s)
- Carrying, concealing, or using fireworks
- Defacing, graffitiing, damaging, vandalizing, or destroying any property

- Littering or unauthorized dumping
- Immediate solicitation of money or contributions
- Visitors must be fully clothed, and may not wear clothing that is likely to provoke a disturbance, that uses or displays obscenities, "fighting words," sexually explicit language, pornography, or material or images defined as obscene under applicable law
- Fighting, or use of threatening comments or gestures, obscene language or gestures, or racial, religious, or ethnic slurs
- Yelling or creating noise of sufficient volume (including by sound amplification devices)
  that disrupts or interferes with the site or its normal business operations, or those of
  nearby businesses or buildings
- Dogs off-leash, except in designated areas where posted
- Outdoor fires
- Use of powered model airplanes, boats, cars, rockets, or drones
- Distribution of food or clothing, except by permission and/or permit
- Skateboarding, rollerblading, or other similar activity, or any activity that impedes, obstructs, or interferes with the free flow of pedestrian or vehicular traffic, or on park structures, furniture, or hard courts, except in designated areas
- Organized sports, except in designated areas
- Camping (which includes any overnight sleeping or parking) in any open spaces including but not limited to plazas, mid-block passages, green spaces, or naturalized areas
- Golf or Practice of Golf
- Tampering with pest/bait stations
- Violation of any federal, state or local law or ordinance
- Use of temporary play equipment such as "Air Jumpers", "Bounce Houses" or "Inflatable Houses," except by permission
- Sale of products and services, or distribution of commercial advertising or promotional material of any kind, other than in connection with the site's business or those of tenants or other businesses at or adjacent to the site
- Photographing, video recording for commercial purposes without prior consent of the Developer/owner, or recording activity of any kind

# Exhibit G

# CONTINUED DISCUSSION





#### Exhibit H

#### Community Stabilization and Opportunity Pathways Fund

Establishment of Fund; Initial Funding. The City intends to establish a fund to provide financial support to community stabilization efforts and employment opportunity pathways within the City (the "Fund"). Google shall make regular contributions to the fund during the term of the Development Agreement. The Fund is intended to support grantees and program activities serving the neighborhood areas in and near the Diridon Station Area as well as the Greater Downtown, East San Jose, and other areas and disadvantaged populations citywide impacted by rising costs and seeking economic mobility.

- 1. <u>Contributions by Google LLC</u>. Google shall make payments in the amount of \$22.12 per gross square foot of office development, excluding any related or similar prepayment amounts identified in <u>Exhibit C2</u> (subject to CPI escalation not to exceed three percent (3%) per year), with payment to be made at Certificate of Occupancy. The amount of the payment shall be established at the time the building permit for construction of the office Building is issued. This money will be held in trust in a dedicated/restricted fund in the City budget for use by the Fund. Payments made by Google will be deposited in the Fund
- 2. <u>Allocation of Funds</u>. The purpose of the Fund is to advance equitable development with intent to maximize opportunities for local youth and adults to participate and benefit from job opportunities ("opportunity pathways") and to minimize potential negative impacts on people and place, including from rising costs ("community stabilization"). The City intends to establish the Fund in such manner as to authorize the allocation of Fund monies to the following two major program categories, with initial allocation in the following percentages:
  - a. Community Stabilization (50% allocation of total funds)

Community Stabilization includes prevention of displacement and homelessness, preservation of affordable housing, homeless services, housing innovation research, and stabilization of small local businesses.

b. Opportunity Pathways (50% allocation of total funds)

Opportunity Pathways includes adult and youth occupational skills training, college/post-secondary scholarships, career exploration for middle and high school youth, early childhood education, and small business and entrepreneurship programming.

The City intends that the Fund will provide for periodic review and adjustment of the percentage allocations between the two major categories, but monies could not be directed to programs outside the two main categories or for other uses.

The City intends that grantees could include nonprofit organizations, education institutions and public agencies.

In addition to making monetary contributions to the Fund, Google will explore with the City opportunities to work together in ways that are aligned with the Fund's objectives and Google's corporate social responsibility objectives.

- 3. <u>Fund Administration</u>. Two key aspects of the Fund's administration would be a third party fund manager and a community advisory board.
- a. Third Party Fund Manager. It is the City's intention that a third party fund manager would manage the Fund to ensure opportunities to leverage additional monies from external parties, to facilitate community involvement, and to ensure strategic impact over time. The City intends to use a solicitation process to select a qualified third party fund manager with experience managing grant programs that are both similar in amount of money under management and purpose as the Fund. The City intends that the fund manager will receive compensation for its management duties from the Fund . The agreement with the fund manager may include soliciting and managing grant programs supported by contributions from other companies and philanthropic organizations.
  - b. Community Advisory Board. The City intends that the Fund's charter will include the establishment of a community advisory board, comprised of San Jose residents with the lived experience of communities affected by development (7 seats), subject matter experts in the Fund's priority areas from San Jose and the Bay Area (4 seats), representatives from the City and major funders (4 seats) (the "Board"). The purpose of the Board would be to make recommendations on (i) grantees/recipients of Fund monies and (ii) use of fund monies for costs related to community engagement and consultant and technical assistance, in all cases consistent with the purpose of the Fund and its funding priorities. Google will engage with the Board to the extent approved by City Council in the Fund Implementation Plan, which could include serving on the Board as a voting or ex officio member.

Fund Implementation Plan. Within 180 days from expiration of all applicable statute of limitations for any challenges to project approval or from when any lawsuits have been resolved, whichever is later, tThe City Administration will prepare an Implementation Plan for the Fund, to be approved by the City Council, further specifying Fund structure, governance, and operations, including but not limited to the criteria for selecting and compensating the third-party fund manager; the number and composition of Board members, the specific roles, authority, relationships, and accountability of the City Council, Community Advisory Board and third party fund manager; the initial set of desired outcomes for the first five years of Fund operations; a plan to solicit contributions from other funders; City staff oversight of the Fund Manager; and community engagement guidelines.

# Exhibit I

# Infrastructure Plan (including Reimbursement Costs Sheet and Maintenance Matrix)

#### Exhibit J

# Framework for City Provided Electric Service to Google's Downtown West Project

This Exhibit provides a framework for Developer and the City to follow to first confirm the viability of an electrical Microgrid as a key component of the Project, and then, subject to their respective actions and approvals, enter into a Business Relationship addressing development, ownership and operation of the Microgrid.

# 1. Electric Microgrid Overview

1.1. Developer is developing district systems as a key tool to achieve the Project's environmental objectives and to increase the Project's resilience in the face of power and other system outages. One of the principal district systems is the electrical microgrid ("Microgrid"). The grid-tied Microgrid will be developed to supply electricity to the Project area. The Microgrid will be fed by a primary transmission level electricity supply – 115kV from PG&E – before transforming to 12kV or 21kV distribution supply via a dedicated Project substation. In the event of a failure of PG&E's primary supply, the system will be switched to island mode, meaning that it will operate in isolation from the PG&E network, and then utilize its embedded renewable energy systems, backup generation and storage to manage electrical supply to the Project.

- 1.2. The City and Developer are evaluating the option of City-provided electric service to all buildings and future customers within the Project area, subject to Council approval and applicable law.
  - a. Developer has funded a preliminary study and cost of service analysis by the City, to confirm the viability of the City-owned system. The results of this preliminary study indicate that the Project is viable.
  - b. Developer and the City have submitted applications for interconnection to PG&E.
  - c. Both parties acknowledge that City-provided electric service has potential mutual benefits, and have agreed to further develop the financial and legal basis for proceeding with the City ownership and operation of the Microgrid following the issuance of Project entitlements, including negotiation of a Business Relationship.

# 2. Relationship to Project Approvals

2.1. The Microgrid is a component of the Project that was evaluated in the Project's Final Environmental Impact Report, and which is part of the Project's Infrastructure as reflected both in the Infrastructure Plan and in the Downtown West Planned Development Permit and its implementing components, including the Downtown West

- Improvement Standards, Conceptual Infrastructure Plan Sheets and the Downtown West Design Standards and Guidelines.
- 2.2. The City and Developer are evaluating the option of City-provided electric service, which may be effectuated through future City actions, approvals, and/or agreements with Developer or any of its successors or assigns under the Development Agreement, shall not require amendment to the Agreement, the Downtown West Planned Development Permit, or any other Approval.

# 3. Condition(s) Precedent

The City and Developer, prior to entering into a Business Relationship for City provided electric service to the Project area, shall satisfy the following conditions precedent:

- 3.1. City shall complete a preliminary cost of service analysis to determine economic feasibility of City provided electric service.
- 3.2. City shall make a determination whether to participate with the Developer in the continued evaluation of City provided electric service to the Project area.
- 3.3. City and Developer shall make a determination whether to proceed with the City's Wholesale Transmission Interconnection Application to PG&E as reasonably practical and feasible, including any discussions, actions, approvals and/or agreements with PG&E regarding PG&E's System Impact Study, Facilities Study, interconnection facilities required to connect the Microgrid to the PG&E transmission grid, and/or Interconnection Agreement.
- 3.4. As soon as reasonably practicable and feasible, the City shall take all steps necessary under applicable federal, state and local law to organize as an entity qualified to provide electrical energy service to meet the electrical loads of end-users within the Project, and to meet its other obligations under a prospective Business Relationship with Developer; City shall confirm completion of such steps in writing to Developer.
- 3.5. Developer shall confirm in writing to the City that it has the legal authority to meet its obligations under a prospective Business Relationship.
- 3.6. City and Developer shall negotiate and determine whether to execute the terms of the Business Relationship, including but not limited to the following:
  - 3.6.1. City adopted Microgrid design standards and process.
  - 3.6.2. Development and installation of the Microgrid by Developer.
  - 3.6.3. Ownership, operation and maintenance of the Microgrid, including but not limited to City acquisition of the Microgrid; necessary leases, easements, and licenses from the Developer for the City to operate and maintain the Microgrid on Developer-owned land; Developer ownership, and operation and maintenance of non-distribution system facilities such as behind the meter components.

- 3.6.4. Alterations and/or reconfigurations of the Microgrid, including but not limited to good faith efforts by the City to allow such alterations and/or reconfigurations determined to be beneficial by Developer.
- 3.6.5. Energy Services, including but not limited to the supply of energy to the Microgrid and establishment of fair and equitable cost-based rates.
- 3.6.6. Customer relations with the City, including but not limited to response to customer inquiries, adjudication of customer complaints, and billing.

3.6.7.

3.7.

3.8. The City will develop and obtain Council approval for cost-based rates..

#### Exhibit K

# Downtown West Parking Requirement

#### **Downtown West Parking Requirements**

Developer and the City anticipate the replacement of approximately 2,850 existing available surface parking spaces on property that will be redeveloped as part of the Downtown West project, and the development of up to 1,950 additional spaces (for a total of up to 4,800 publicly available parking spaces) to ensure the long-term sustainability of the SAP Center. This does not include up to 2,360 residential parking spaces. Terms that are used but not defined in this Exhibit shall have the meanings given such terms in the body of the Development Agreement to which this Exhibit is attached.

- 1. Overall Requirements: Over the course of the development of the Project, Developer shall be required to provide publicly accessible off-street parking spaces serving new office development at a cumulative ratio between 0.5 and 0.645 spaces for each 1,000 square feet of Floor Area (which shall mean eighty-five percent (85%) of the total gross floor area) of such office buildings (the "Required Parking Ratio"). At the point of full build out, the Required Parking Ratio shall be 0.645 spaces.
  - a. Once 4,000 publicly available parking spaces are operational and in compliance with these terms, the Required Parking Ratio will no longer apply.
  - b. Developer may construct up to 4,800 publicly available parking spaces at its discretion; this parking would be reviewed as part of the Conformance Review process.
  - c. The Required Parking Ratio represents a reduction from standard City parking requirements, which would require as many as 15,500 spaces at Downtown Commercial parking ratios (2.5 spaces per 1,000 square feet of Floor Area), or 6,600 spaces with application of available standard parking reductions (1.06 spaces per 1,000 square feet of Floor Area). The Required Parking Ratio of 0.645 spaces per 1,000 square feet of Floor Area is warranted given the area's rich transit and mixed-use environment, sustainability and air quality imperatives, traffic reduction and City's multimodal goals, and transportation demand management requirements.
  - d. The Required Parking Ratio is critical to serve the needs of the Project, as well as to replace parking currently utilized by transit riders and SAP Center patrons. With this in mind, the commercial parking spaces will be publicly-available and priced to allow for maximum efficiency to support the SAP Center, as well as the multimodal goals of the City and Project.
    - i. The project targets at least 85% of the commercial parking spaces to be available for SAP event use after 6:30 pm on event days.
  - e. If, over the course of the Development Agreement, some parking is found to be no longer warranted, the Director of PBCE may, in its sole discretion, reduce the Required Parking Ratio and/or overall amount without requiring an amendment to the Development Agreement or to this Exhibit.

- f. Today, the Project Site contains 2,850 parking spaces available to the public at 6:30 pm on event days. In order to at a minimum replace those spaces, the parking requirement must be satisfied in part through at least 2,850 publicly available spaces within the Project Site; including existing parking spaces, 2,850 spaces must be maintained as publicly available within the Project Site during any given phase of construction.
- g. As an option to satisfy the replacement parking for the 2,851 to 4000 replacement parking spaces set forth above, Developer may deliver the remaining required parking either within the 1/3-mile radius of the SAP Center or through an Alternative Parking Arrangement.
  - i. Alternative Parking Arrangement: If Developer determines that it will not provide any number of the remaining required parking spaces within the Project Site, then, in order to meet the Required Parking Ratio, the City shall have the right to designate additional land owned by the City and within ½ of a mile of the Project Site (the "Additional Parking Property") for Developer to build additional parking spaces; Developer would then be required to build additional spaces on the Additional Parking Property, subject to obtaining appropriate environmental clearance and any discretionary approvals; provided, however, in no event would Developer be required to build parking spaces on the Additional Parking Property that, when aggregated with the spaces located within the Project boundary, would exceed the Required Parking Ratio or 4,000 total spaces, as described above.
- h. The City's Department of Transportation will review the design of parking facilities as part of the Subsequent Review and future Focused LTA processes and make recommendations designed to facilitate access, egress, and safety.
- 2. <u>Phasing:</u> The requirements below are to ensure that sufficient parking exists, at any given specific time, for the continued operational needs of the SAP Center, as well as the multimodal goals of the City and Project.
  - a. Compliance with this requirement shall be evaluated during the Conformance Review process for each office Building, and verified prior to issuance of Building Permits for each office Building.
    - i. Proposed parking spaces included as part of a previously approved Conformance Determination shall be counted to determine whether the Required Parking Ratio will be satisfied upon construction of the office building that is the subject of a Conformance Review. Surface parking spaces in the Project also shall be counted during the Conformance Review process to determine whether the Required Parking Ratio will be satisfied. For clarity, this means that, to determine whether the Required Parking Ratio will be satisfied, each Conformance Review for an office building shall account for (i) surface parking spaces in the Project, (ii) proposed parking spaces included in a previously approved Conformance Determination that have not yet been constructed, (iii) parking spaces already constructed as part of the Project, and (iv) the parking spaces

Ex. K-2

included in the subject Conformance Review application. In the event a proposed office building or buildings would result in the elimination of existing surface parking spaces, the Conformance Review Application for that building shall not be denied for the temporary failure to satisfy the Required Parking Ratio during construction of the building or buildings if the Project would continue to provide a ratio of 0.5 spaces [TO BE CONFIRMED] for each 1,000 square feet of Floor Area, and so long as the Required Parking Ratio is satisfied upon issuance of a Certificate of Occupancy for that office building or buildings.

- ii. During the Conformance Review process, the Project will also be required to confirm the availability of at least 2,850 parking spaces available to the public at 6:30 pm on event days.
- b. If the Project will result in a temporary failure to satisfy the Required Parking Ratio, as described in Section 2.a.i, that exceeds five (5) years, Developer shall develop and obtain agreement from the City for one or more interim parking management strategies as part of the Parking Delivery Plan during construction.
- c. To the extent the Option Agreement for Lots A/B/C is exercised prior to 2040, the Developer must be in compliance with the Required Parking Ratio, subject to Section 2(a)(i), prior to beginning vertical development on Lots A/B/OBLOC. To the extent the AMA is terminated earlier than 2040 or at its scheduled expiration in 2040, section 1d.i. shall no longer apply.





#### Exhibit L

## **List of Approvals**

- 1. Certification of Environmental Impact Report for Downtown West Mixed-Use Project
- 2. Overruling the Airport Land Use Commission's Inconsistency Determination
- 3. Amendment to Envision San Jose 2040 General Plan
- 4. Amendment to Diridon Station Area Plan
- Rezone to Planned Development Zoning District and approval of Downtown West
   General Development Plan
- 6. Amendment of Title 20 of the City of San Jose Municipal Code
- 7. Approval of Downtown West Planned Development Permit, including the Downtown West Design Standards and Guidelines, the Downtown West Infrastructure Standards, the Conceptual Civil Infrastructure Plan Sheets, and Conformance Review Implementation Guide
- 8. Development Agreement for Downtown West Mixed-Use Plan
- 9. Approval of Parkland Agreement
- 10. Vesting Tentative Map for Downtown West
- 11. Major Encroachment Permit for District System
- 12. Major Encroachment Agreement for District System
- 13. District Systems Encroachment Diagram
- 14. Construction Impact Mitigation Plan (Framework)
- 15. Amendment of Historic Preservation Permit
- 16. Landmark Designation Approval for Adjustment to San Jose Water Building
- 17. Landmark Designation Approval for Adjustment to Southern Pacific Depot

18. Street Vacation for Portions of North Montgomery Street, Delmas Avenue, Bird Avenue, Park Avenue, Cinnabar Street, Cottage Lane, and South Montgomery Street



## Exhibit M

## **List of Applicable Impact Fees**

- 1. Commercial Linkage Fee set forth in San Jose Municipal Code Chapter 5.11 as of the Effective Date
- 2. Affordable Housing In-Lieu Fee (see Affordable Housing Program at Exhibit D above);
- 3. School Impact Fee on residential development;
- 4. Construction Taxes on commercial and residential development pursuant to San Jose Municipal Code Chapter Chapters 4.46, 4.47, 4.54, 4.64;
- 5. Sewer Connections and Storm Drainage Fees pursuant to San Jose Municipal Code Chapter 15.16, subject to capacity which will be confirmed through the subsequent approval process; and
- 6. Utility Undergrounding Fees pursuant to San Jose Municipal Code Chapter 15.26.

The following Impact Fees are applicable to the Project, but Developer shall satisfy the obligations through actual construction or other methods, as indicated:

- Diridon Station Infrastructure Fee shall be satisfied in full through construction of in-kind infrastructure, as described in Exhibit I;
- Parkland Dedication requirements pursuant to Chapter 19.38 shall be satisfied in full through a combination of methods as described in <u>Exhibit E</u>.



# Exhibit N

# Form of Notice of Completion and Termination

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:	
[address]	
_	
Attn:	
	(Space above this line reserved for Recorder's use only)
"Notice") dated for reference purposes only as oby and between the CITY OF SAN JOSE, a poli	LDING AND COMMUNITY BENEFITS (this of this, 20, is made itical subdivision and municipal corporation of the, a] ("Developer") .
of, 20 and recorded in the C, as Document Number	into that certain Development Agreement dated as Official Records of the County of Santa Clara on (Book No, Reel No) erms used in this Notice that are not defined shall opment Agreement.
have been completed and all of the associated obligations and requirements (collectively "Obli	community Benefits, Public Benefits, and other gations") tied to those specific Buildings have also oper's request, to execute and record a notice of ang.
described in the attached Exhibit A (the "Affect tied to that Building through the Development Subsequent Approvals) granted by the City for with the Development Agreement, which Oblig survive Building completion, and continue to be and any and all parties having or later acquiring	ding known as, located on the property red Property"), together with all of the Obligations Agreement and any and all Approvals (including the Project, have been completed in accordance rations may, in part or in whole, run with the land, be binding as to the Building and Affected Property, g any interest in the Affected Property even after interest in the Affected Property have the right to
CITY:	Approved as to form:
CITY OF SAN JOSE, a municipal corporation	[], City Attorney

By:_		By:	By:	
<i>-</i>	Director of Planning, Building and Code Enforcement	Deputy City Attorney		

# Exhibit A

[attach legal description of Affected Property]



## **Exhibit O**

# Form of Assignment and Assumption Agreement

RECORDING REQUESTED BY CITY CLERK
OF THE CITY OF SAN JOSE
(Exempt from Recording Fees
Pursuant to Government Code
Section 27383)
AND WHEN RECORDED MAIL TO:
Г
[] City Clerk, City of San José
200 E. Santa Clara Street, 14th Floor
San José, CA 95113
ASSIGNMENT AND ASSUMPTION AGREEMENT
RELATIVE TO DEVELOPMENT AGREEMENT FOR []
THIS ASSIGNMENT AND ASSUMPTION AGREEMENT (hereinafter, the "Assignment") is
("Assignor") and
entered into this day of, 20, by and between, a
RECITALS
A. , a and the City of San José, a
A, a and the City of San José, a political subdivision and municipal corporation of the State of California (the "City"), entered
into that certain Development Agreement (the "Development Agreement") dated as of
20 for reference purposes, with respect to certain real property owned by Assignor, as such
property is more particularly described in the Development Agreement (the "Project Site"). The
Development Agreement was recorded in the Official Records of the County of Santa Clara on
as Document No
[add recital to document any previous transfer of the Transferred Property, with recording information]
B. The Development Agreement provides that, subject to the terms and requiremen

B. The Development Agreement provides that, subject to the terms and requirements set forth therein, including, without limitation, Section 12 (Transfer or Assignment) Developer (Assignor) has the right to: (i) Transfer all or a portion of the Project Site, (ii) assign all of its rights, title, interest and obligations under the Development Agreement to a Transferee with respect to the portions of the Project Site transferred to the Transferee, and (iii) upon the execution and delivery of an approved Assignment and Assumption Agreement, to be released from any prospective liability or obligation under the Development Agreement.

- C. Assignor intends to convey certain real property as more particularly identified and described on Exhibit A attached hereto (hereafter the "Transferred Property") to Assignee. The Transferred Property is subject to the Development Agreement.
- D. Assignor desires to assign and Assignee desires to assume Assignor's right, title, interest, burdens and obligations under the Development Agreement with respect to and as related to the Transferred Property, as more particularly described below.

#### ASSIGNMENT AND ASSUMPTION

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Assignor and Assignee hereby agree as follows:

- 1. <u>Defined Terms</u>. Initially capitalized terms used herein and not otherwise defined shall have the meaning ascribed to them in the Development Agreement.
- 2. <u>Assignment of Development Agreement</u>. Assignor hereby assigns to Assignee, effective as of Assignor's conveyance of the Transferred Property to Assignee, all of the rights, title, interest, burdens and obligations of Assignor under the Development Agreement with respect to the Transferred Property, including any Community Benefits that are tied to Buildings on the Transferred Property [all as more specifically set forth on <u>Schedule A</u> to this Agreement](the "Assigned and Assumed Obligations"). Assignor retains all the rights, title, interest, burdens and obligations under the Development Agreement with respect to (i) the Transferred Property that are not Assumed and Assigned Obligations and (ii) all other portions of the Project Site owned by Assignor.
- 3. <u>Assumption of Development Agreement</u>. Assignee hereby assumes, effective as of Assignor's conveyance of the Transferred Property to Assignee, and all of the Assigned and Assumed Obligations with respect to the Transferred Property, including its associated Community Benefits, and agrees to observe and fully perform, and to be subject to, all of the Assumed and Assigned Obligations. The parties intend that, upon the execution of this Assignment and conveyance of the Transferred Property to Assignee, Assignee shall become the "Developer" under the Development Agreement with respect to the Transferred Property and the Assigned and Assumed Obligations.
- 4. <u>Reaffirmation of Indemnifications</u>. Assignee hereby consents to and expressly reaffirms any and all indemnifications of the City set forth in the Development Agreement, including without limitation Section of the Development Agreement.
- 5. <u>Housing Obligations</u>. Assignee has read and understands the obligations set forth in Exhibit D (Affordable Housing Program) of the Development Agreement as they relate to the Transferred Property. Without limiting the foregoing, Assignee agrees (1) to the terms and provisions of such Exhibit D, including the indemnities, waivers and releases set forth therein, and (2) that the Development Agreement falls within the express exception to the Costa-Hawkins Act, Section 1954.52(b) because it is a contract with a public entity in consideration for contributions and other forms of assistance specified in Chapter 4.3 (commencing with Section 65919 of Division 1 of Title 7 of the California Government Code). Assignee understands that

the City would not have been willing to enter into the Development Agreement without the provisions of such Exhibit D.

- 6. <u>Assignee's Covenants</u>. Assignee hereby covenants and agrees that: (a) Assignee shall not challenge the enforceability of any provision or requirement of the Development Agreement; (b) Assignee shall not sue the City in connection with any and all disputes between Assignor and Assignee arising from this Assignment or the Development Agreement, including any failure to complete all or any part of the Project by any party; and (c) Assignee shall indemnify the City and its officers, agents and employees from, and if requested, shall defend them against any and all Losses resulting directly or indirectly from any dispute between Assignor and Assignee arising from this Assignment or the Development Agreement.
- 7. <u>Binding on Successors</u>. All of the covenants, terms and conditions set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

8.	Notices.	The notice address for Assignee under Se	ection of the Development
Agreement s	hall be:	_	
		Attn:	
With	copy to:		
	FJ		
		Attn:	

- 8. <u>Counterparts</u>. This Assignment may be executed in as many counterparts as may be deemed necessary and convenient, and by the different parties hereto on separate counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same instrument.
- 9. <u>Governing Law.</u> This Assignment and the legal relations of the parties hereto shall be governed by and construed and enforced in accordance with the laws of the State of California, without regard to its principles of conflicts of law.

IN WITNESS HEREOF, the parties hereto have executed this Assignment as of the day and year first above written.

# **ASSIGNOR:**

[insert signature block]

# **ASSIGNEE:**

[insert signature block]

Schedule A to Assignment & Assumption Agreement - Detailed List of Assigned and

**Assumed Obligations** 

# 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. Developer shall complete all conditions precedent set forth herein for the transfer of either the H1 Property or the H5 and H6 Properties prior to the issuance of any building permit for a residential building within the Project Site. Developer shall complete all conditions precedent set forth herein for the transfer of the remaining property or properties prior to the issuance of any building permit after the IHO Fee Credits for the first property dedication have been exhausted.

# B. H1 Property.

- 1. <u>Transfer Agreement</u>: <u>Con</u>currently 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. <u>Legal Description of H1</u>: 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. <u>Leases</u>: 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. <u>Ongoing Property Condition</u>: 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. <u>Construction Right of Entry</u>: Effective as of the closing, City shall grant Developer such construction right of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H1 Property.
- c. <u>Remediation Easement</u>: 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, provided that any such easements, licenses or access agreements shall not preclude the City from developing and using the site for the intended residential purposes or adversely impact the City's ability to install a then-current industry standard vapor intrusion mitigation systems as may be required for development of the property.
- 4. <u>Closing Date:</u> 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. <u>Due Diligence</u>:

- a. <u>Access</u>: 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.
- b. <u>Title</u>: 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. <u>City Conditions</u>: 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) Developer shall have completed implementation of the approved Remedial Action Plan for the property, as discussed in section B. 7. below, sufficient to allow use of the property for residential purposes and shall submit proof of completion, such as a no further action letter.

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.

b. <u>Developer Conditions</u>: 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, and (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 B.8) as a result of the amount of market rate units being developed.

#### 7. **Environmental**:

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 existing building(s) on the H1 Property to the extent required by the County for a future 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, and any and all other work necessary to meet all regulatory standards to allow residential use of the property (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, provided, however, that no Post-Closing RAP Work shall adversely impact City's planned residential development and use of the

Property. The Post-Closing RAP Work will be detailed in an exhibit to the H1 Transfer Agreement.

- b. <u>Closing Condition</u>: 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 to meet applicable regulatory standards for residential use of the property and provides documentation to City of compliance from the regulatory authority or authorities. 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 providing the City with an alternate property acceptable to the City that is: (i) of equivalent size and capacity for a similar number of residential units, (ii) located in Downtown West, (iii) without contamination or cleaned to meet all regulatory standards to allow for residential use of that property, (iv) with no structures or encumbrances. The Pre-Closing RAP Work will be detailed in an exhibit to the H1 Transfer Agreement.
- c. <u>Environmental Indemnity</u>: If the H1 Property is transferred to the City or Designee, Developer shall indemnify, defend, and hold harmless City and City Indemnitees or Designee 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 or Designee. 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.
- d. <u>Pad-Ready Condition</u>. 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 Agreement.
- e. <u>City Obligations</u>: 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. <u>Developer Post-Closing Obligations</u>: Following the H1 Property Closing, Developer shall have no responsibility or liability for the H1 Property other than the Post-Closing RAP Work. 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, provided, however, that in no event shall the reservation preclude development of the property for residential uses or impact the ability to install and maintain a then industry standard vapor intrusion mitigation system.
- g. <u>Assignment</u>: 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. <u>IHO Fee Credits</u>: As of the Effective Date, the amount of the IHO fee credit for the H1 Property shall be \$21,572,346.25 (the "H1 Transfer IHO Fee Credits"). \$21,572,346.25 IHO Fee Credit at \$18.70/rsf equals 1,153,601 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time Developer satisfies all preconditions for closing.
- 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. <u>Purchase Price</u>: The purchase price for the H1 Property shall be \$1.00. Closing costs shall be split per local custom.

11.

# 12. **Default**:

- a. <u>Default by City</u>: 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. <u>Default by Developer</u>: 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 diligencein which case Developer would not receive any H1 Transfer IHO Fee Credits and would therefore satisfy its obligations under the IHO dedicating other clean and unencumbered property of similar size which property shall be acceptable to the City in its sole and absolute discretion.

- C. <u>H5 and H6 Properties</u>. H5 and H6 properties willbe transferred concurrently to City. Developer will retain ownership of the mid-block crossing between the H5 and H6 properties and shall provide to City a construction easement over the mid-block crossing for the time period covering construction on the H5 property, H6 property, or combination thereof, plus an additional six (6) months after the issuance of the last Temporary Certificate of Occupancy for a building on the H5 and H6 properties.
- 1. <u>Transfer Agreement</u>: Concurrently with entering into the Development Agreement, Developer and City shall enter a Transfer Agreement for the transfer of the H5 Property and the H6 Property together to City in accordance with the terms and conditions set forth below (the "H5 and H6 Transfer Agreement").
- 2. <u>Legal Description of H5 and H6</u>: 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 Agreement, 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. <u>Parcelization Condition</u>: 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. <u>Pad-Ready Condition</u>: 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 preclosing work will be included as an exhibit to the H5 and H6 Transfer Agreement.
- 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 the H5 and H6 Transfer Agreement.

#### 3. Leases:

- a. <u>Closing Condition</u>: It shall be a condition to the closing of the H5 and H6 Transfer Agreement, 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. <u>Closing Date</u>: The closing under each of the H5 and H6 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days prior written notice to City.
- a. <u>Ongoing Property Condition</u>: Following each closing, City or Designee shall be responsible to keep the H5 and H6 Properties in good, clean and safe condition. In connection therewith, City or Designee 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. <u>Construction Right of Entry</u>: Following the closing, City shall grant Developer such construction rights of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H5 and H6 Properties. In addition, the H5 and H6 Transfer Agreement 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. <u>Due Diligence</u>: \*

- a. Access: Prior to entering into the H5 and H6 Transfer Agreement, 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.
- b. <u>Title</u>: 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:**

**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 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 H5 and H6 Transfer Agreement); (ii) Developer shall not be in default under the respective H5 and H6 Transfer Agreement beyond any applicable notice and cure period; (iii) Developer shall have completed all necessary site cleanup as further described in Section C. 7 below; 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 and 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. <u>Developer Conditions</u>: 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 Agreement, for Developer's benefit: (i) City shall not be in default under the H5 and H6 Transfer Agreement beyond any applicable notice and cure period; and (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.

### 7. **Environmental**:

- a. Environmental Indemnity: If the H5 Property and/or the H6 Property is transferred to the City or Designee, 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..
- b. <u>Assignment</u>: Following the closing of the H5 and H6 Properties, City may assign its rights and obligations under this Section C.7 that expressly survive the closing to a developer of affordable housing.
- 8. <u>IHO Fee Credits</u>: As of the Effective Date, the amount of the IHO fee credit for the H5 and H6 Properties shall be \$18,155,349 (the "H5 and H6 Transfer IHO Fee Credits"). \$18,155,349 IHO Fee Credit at \$18.70/rsf equals 970,874 sf of credit for market rate rentable sf (including 100% AMI units).. IHO Fee Credits are earned at time Developer satisfies all preconditions for closing.
- 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 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. <u>Purchase Price</u>: The purchase price for the H5 and H6 Property shall be \$1.00 per property. Closing costs shall be split per local custom.

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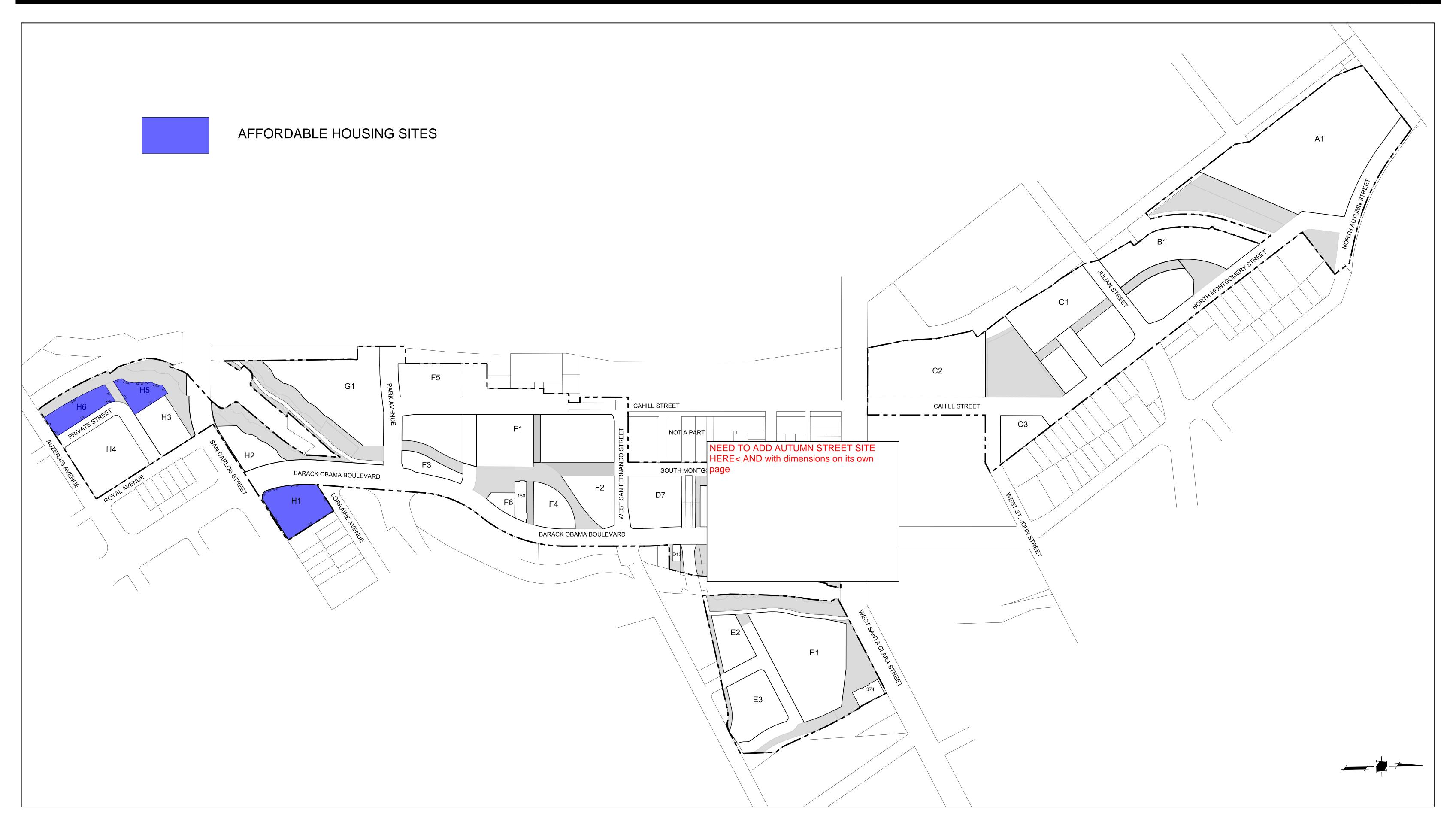
#### 12. **<u>Default</u>**:

a. <u>Default by City</u>: If City defaults under the H5 H6 Transfer Agreement and fails to close, Developer shall have the right to terminate the H5 and H6 Transfer Agreement 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 and H6 Properties to City but for the termination of the H5 and H6 Agreement or both due to City's default.

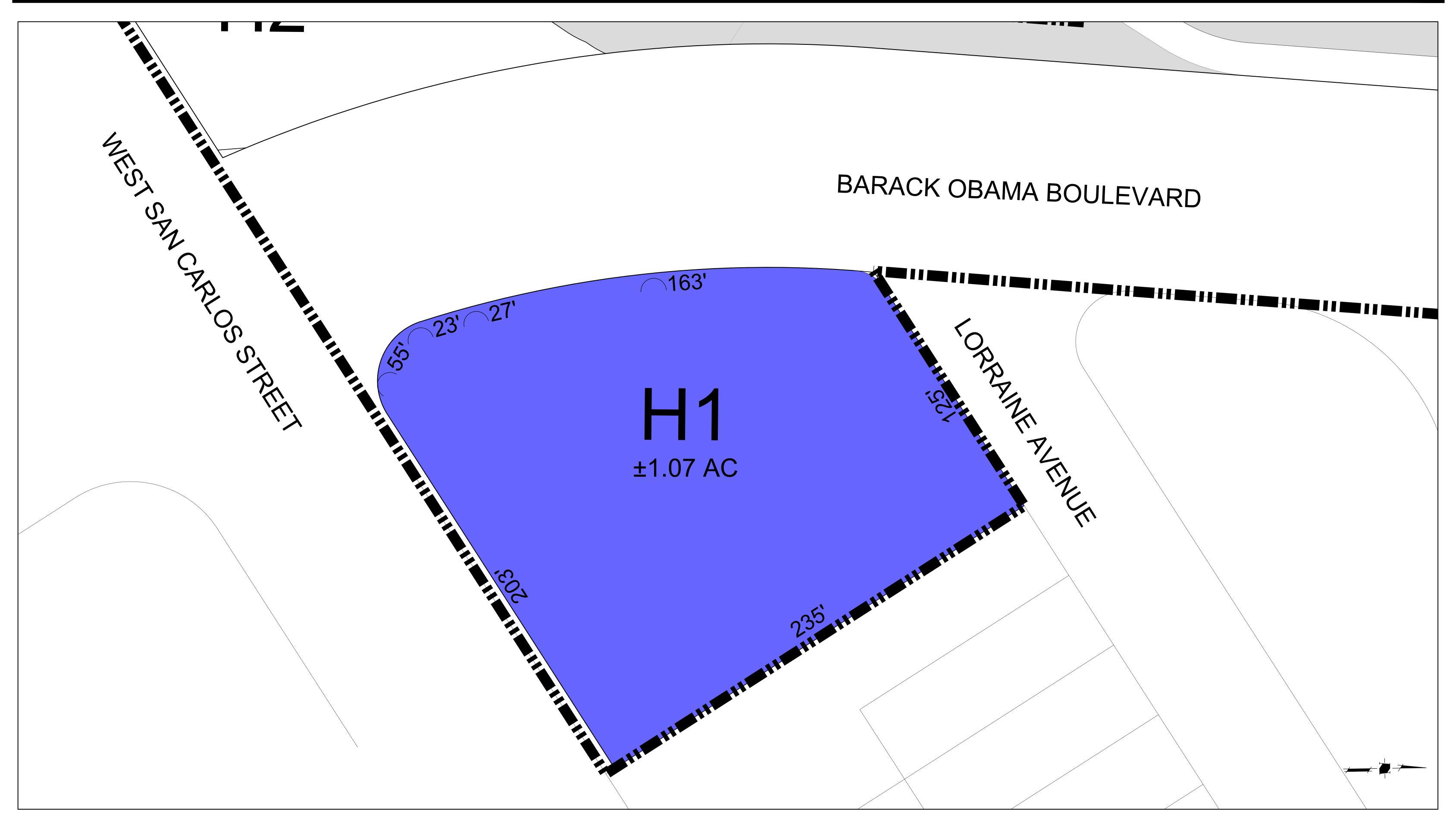
Business-Siting Information

b. <u>Default by Developer</u>: If Developer defaults under the H5 and H6 Property Agreement and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate the H5 and H6 Transfer Agreement and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence, 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 dedicating other clean and unencumbered property of similar size which property shall be acceptable to the City in its sole and absolute discretion.

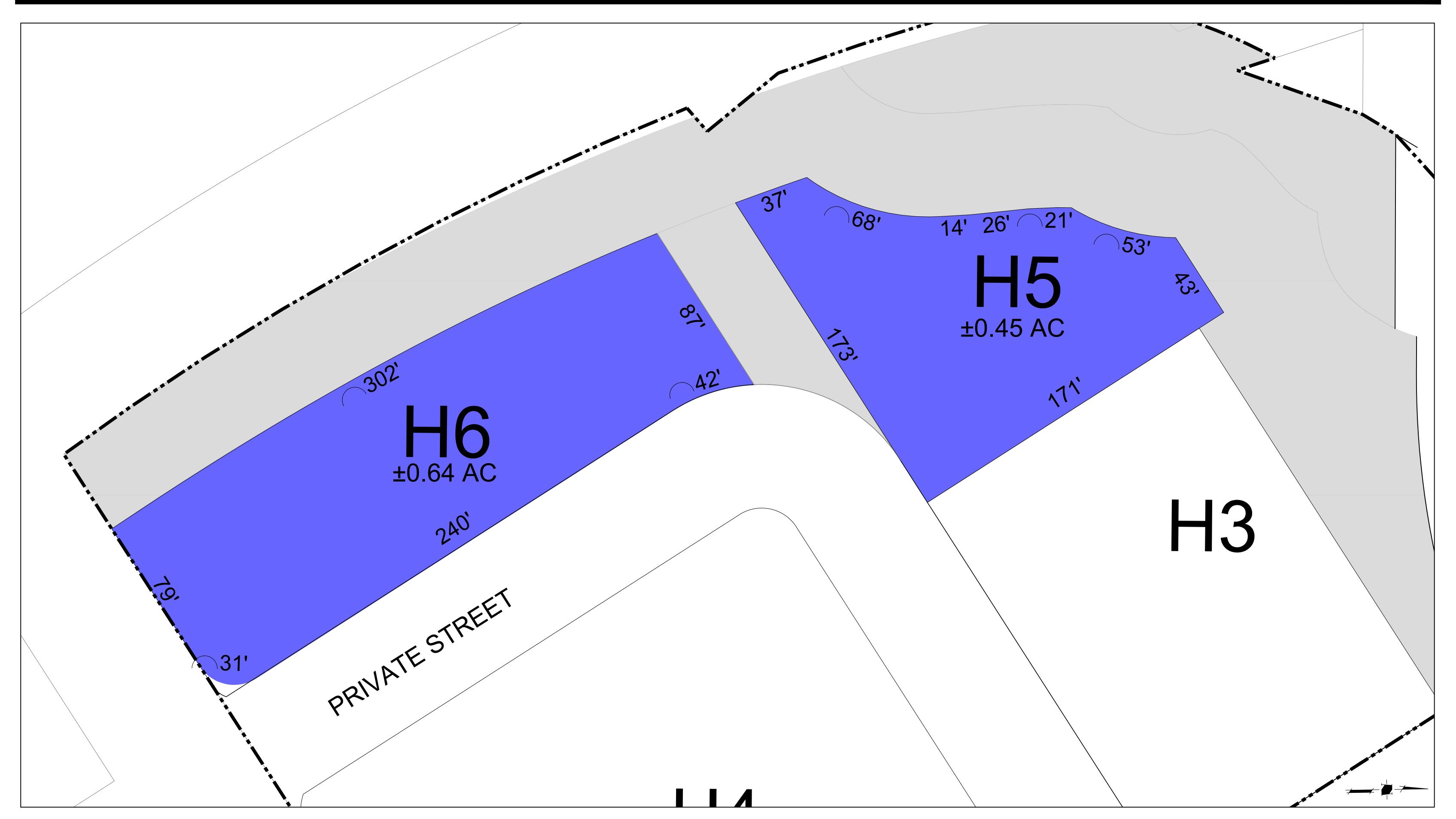






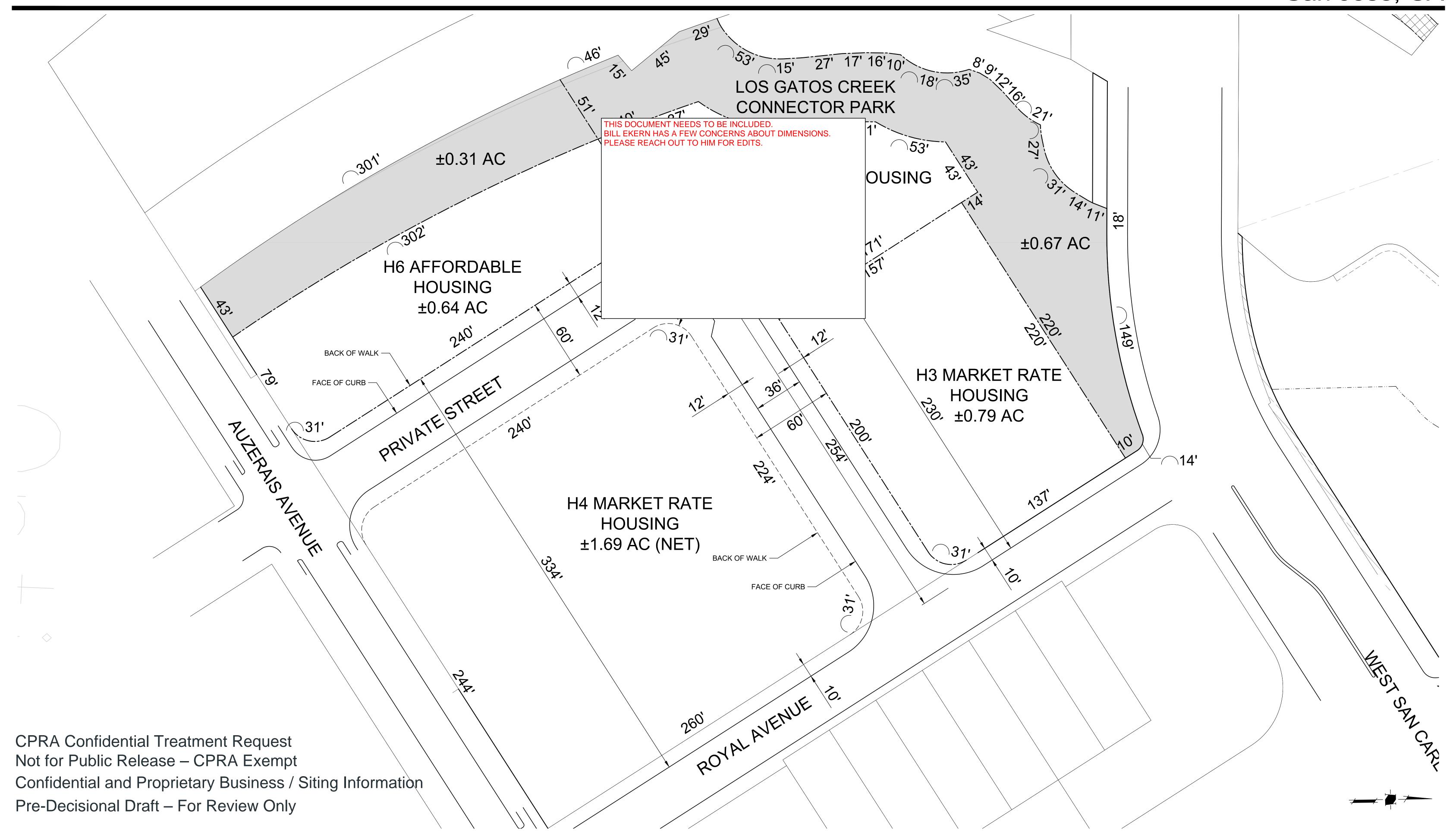








AFFORDABLE HOUSING SITES H5 & H6





HBLOCK
Scale: 1" = 30'
Drawn: DM| Reviewed: DM
HMH#5719.00 | 02/11/21