

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google Diridon/DW - DA Exhibits re Affordable Housing
Date: Tuesday, April 6, 2021 2:44:27 PM
Attachments: [Redline - Affordable Housing Program Exhibit - CPDB Draft 3-4 vs City Comments 2-26-c.pdf](#)
[Affordable Housing Program Exhibit CPDB Draft 3-4-21-c.docx](#)
[Redline - Key Terms for H1 H5 and H6 Properties Transfer Agreements- CPDB 3-4 vs City Comments - 2-26-c.pdf](#)
[Key Transfer Terms re H1 H5 and H6 Transfer Agreements - CPDB Draft 3-4-21-c.docx](#)

From: Miller, Gregg <gmliller@coblentzlaw.com>
Sent: Thursday, March 4, 2021 10:09 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Straka, Stephanie <SStraka@coblentzlaw.com>
Subject: Google Diridon/DW - DA Exhibits re Affordable Housing

[External Email]

Johnny: attached are redlined and clean versions of the Affordable Housing Program and Key Terms re Transfer of H1, H5 and H6. The redlines show the changes we have made in response to the City's comments from Feb 26. Please note that I have not had the opportunity to carefully proofread these exhibits so please excuse any typos. The attached remain subject to Google's review. Thanks,

Gregg Miller

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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. Pursuant to Sub-Section F of Section 5.08.610 of the IHO, the City Manager has determined that this Affordable Housing Program represents an acceptable alternative method of meeting the City's inclusionary housing requirements because, based on its terms, it will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of the IHO and the Inclusionary Housing Guidelines.

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 Section VI below or 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 is based on the assumption that development of 3,400 market rate

and 100% AMI units at an average unit size of 637 rentable square feet will occur) and consists of the following elements, which are summarized here and discussed in more detail in Sections III and IV 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~~ Designee) for use in the production of affordable housing. See Exhibit D1 for Site Plan.

2. Developer's performance of certain utility and site work with respect to the H5 Property earlier than Developer would otherwise be obligated to perform such work.

3. ~~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.

4. ~~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).

5. ~~4.~~ Developer's payment of in-lieu fees (either \$18.70 per rentable square foot (rsf) if Developer provides 5% of the residential units as inclusionary units or \$43.00 per rsf if Developer does not provide 5% of the residential units as inclusionary units) for all residential developments in the Project area, subject to credits for the value of the H1, 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.. [redacted]~~ as more specifically set forth below.

6. ~~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.

7. ~~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~~ Commercial Linkage Fees 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.~~

[A3]: Subject to continued discussions as to how this will be structured; goal is earmark of \$3/sf

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.)~~

[A4]: The section needs to be revised to require dedication of at least one of the properties prior to the issuance of any building permits for residential development within the project, so that Google will have IHO Fee credits to use for the residential development.

III. Inclusionary Housing Ordinance Compliance

A. Land Dedication; Early H5 Work; Availability of District Systems.

Developer shall dedicate Properties H1, H5 and H6, consisting of a total of approximately 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~~ respect to each of the properties. ~~The value will~~ If, due solely to Developer's actions, any Property is reduced in size by (i) five percent (5%) or less from its current size as shown on the attached Site Plan (Exhibit D1), then the credits associated with such site shall 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 and (ii) more than five percent (5%). If a reduction in size of any one piece of property exceeds five percent, then Developer shall have to right to (5%) provide a replacement site shall be provided to the City, which site shall be acceptable to the City's Director of Housing in its ~~his or her~~ sole and absolute discretion or (b) if no such site is available, as reasonably determined by Developer, then Developer shall pay the in-lieu fee of [\$43.00 per rsf]. The City will use Good Faith efforts to ~~deliver 600 units; in total on the dedicated Properties.~~ The actual number of units to be constructed on the ~~dedication sites~~ dedicated Properties will be determined through the City's affordable housing development process, including input from potential affordable housing partners.

[A5]: Still confirming if this is possible.

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 Transfer Agreement" 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.]

[Note: Early H5 Work language remains subject to Developer review.] In response to the City's desire to cause the dedication of the H5 Property earlier than it is required to be dedicated, (which is not anticipated to occur until the 888th residential unit has been delivered), Developer is willing to perform certain work with respect to the H5 Property earlier than necessary. Specifically, in order to prepare the H5 Property for dedication, approximately [\$2.3M] in utility and related site work, as more specifically set forth in Schedule D6 ("Early H5 Work") would need to be undertaken at a time when it is anticipated that there would be approximately [\$3.7M] in IHO Fee Credits already available to Developer as a result of the dedication of the H6 Property. Developer could perform the Early H5 Work by using a credit of [\$2.3M] of CLF from

the first office development (anticipated to be Block F1) to fund the Early H5 Work. Accordingly, in return for Developer's performance of the Early H5 Work, the City and Developer agree that the first office development will receive a credit against the CLF in the amount of [\$2.3M] which credit Developer shall use to pay for the costs of performance of the Early H5 Work (the "Early H5 Work CLF Funds Amount"). Promptly following issuance of the Final Certificate of Occupancy for the first office development, Developer will commence preparation of the plans and specifications for the Early H5 Work and submit for required building permits. Promptly following receipt of such permits, Developer shall commence construction of the Early H5 Work and thereafter cause such work to be completed. In consideration of the inclusion of the [\$2.3M] value of the Early H5 Work in the [\$8.4M] value of the IHO Fee credits for the H5 Property at the time it is dedicated to the City, Developer will pay the amount of the Early H5 Work CLF Funds Amount to the City (subject to actual verification of the rentable square footage and related unit count at each Conformance Review). Developer shall make such payment at the Final Certificate of Occupancy for the next office building constructed after the Final Certificate of Occupancy for the 888th residential unit. If Developer does not make such payment at such time, then City would have the same remedies against Developer with respect to that office building for failure to make such payment as if such Developer had failed to pay the CLF due for that office building. The City and Developer agree that the costs of performing the Early H5 Work is [\$2.3M] as of the Effective Date of the Development Agreement. Such costs shall be subject to Annual Escalations.

~~If constructed,~~ District Systems ~~would~~ are anticipated to be made available to the ~~H1, H5~~ and H6 Properties, ~~and in which case~~ those ~~developments~~ Properties would have the right to connect to the District Systems subject to any required regulatory ~~approvals~~ requirements and supply agreements consistent with other residential development being supplied by the District Systems. The timing of delivery and commissioning of the District Systems may not be such that they are available to the H5 and H6 Properties at the time they are being constructed, and Developer makes no representations as to when and if they will be made available in any specific timeframe. In the event they are made available to one or both of the properties, then City may elect to connect at its sole cost and expense. ¶

¶
~~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 following applicable provisions of the IHO attached at Exhibit D5: [DISCUSS with City: referencing specific sections of the IHO that we want to use and otherwise this Affordable Housing Plan controls.] All inclusionary units will comply with the City's Guidelines for Implementation of the Inclusionary Housing Ordinance attached hereto at Exhibit D5. [DISCUSS with City: when will Guidelines be ready?]

1. Inclusionary Units. 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

Section III.B.1(d), 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~~^{up} 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 Section III. B.1, the City Manager 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 of the market rate units for each unit by bedroom type (for example, 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. IHO Fees

Provided This Affordable Housing Program assumes compliance with the IHO's "Mixed Compliance Fee" provisions, such that so long as Developer restricts not less than 5.00% 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., which is 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"). Pursuant to Schedule D-4, IHO Fee Credits are earned at time of Closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the Closing would have occurred but for the City's exercise of its Extension right(s).

1. ~~Increased IHO Fee Rate. (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~~ The Mixed Compliance Fee provision requires 5% on-site inclusionary units at 100% AMI, Developer shall be obligated to pay an increased IHO and payment of the in-lieu fee of \$43.00 18.70 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 Therefore, if Developer fail to does not provide 5.0 such 5% of the on-site inclusionary units at 100% AMI, Developer shall be obligated to pay an increased IHO in-lieu fee, then the "In-Lieu Fee" option under the IHO applies at the rate of \$43.00 per rentable square foot for each market rate of residential unit and each Restricted Unit. development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1(d)) in which case the \$18.70 fee shall apply. [Note to City: .88% extra units is discussed above in Onsite Inclusionary Units section below.]

2. Land Dedication (H1 Property) - IHO Fee Credit. [All \$\$ amounts are OPEN]
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 the earlier of (i) the closing and of the transfer of the H1 Property to the City (or its Designee) pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement.~~ As of the Effective Date, the value of the credit for the H1 Property is

~~[\$21,572,34621,346,347]. The amount of the credit shall accrue for Developer's use in satisfying IHO Fee payment obligations, and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$21,572,34621,346,347 at \$18.70/rsf equals 1,153,6011,141,516 sf of credit for market rate residential rentable sf (including market rate and 100% AMI units).]~~

3. Land Dedication (H5 ~~and H6~~ Property) - IHO Fee Credit. [All \$\$ amounts are OPEN] Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H5 ~~and H6 Properties~~ 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~~ the earlier of (i) the closing of the transfer of the H5 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. The IHO Fee credits that Developer ~~satisfies all preconditions~~ receives for ~~closing and the~~ transfer of the H5 ~~and H6 Properties to City (or Designee)~~ Property shall include the ~~[\$2.3M] value of the Early H5 Work.~~ As of the Effective Date, the value of the credit for the H5 ~~and H6 Properties~~ Property is ~~[\$18,155,3498,352,883]. The amount of the credit shall accrue for Developer's use in satisfying IHO Fee payment obligations and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$18,155,3498,352,883 at \$18.70/rsf equals 970,874 [446,678]sf of credit for market rate net residential rentable sf (including market rate and 100% AMI units).]~~

¶

4. ~~¶~~

¶

¶

4. Land Dedication (H6 Property) - IHO Fee Credit. [All \$\$ amounts are OPEN] Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H6 Property to the City (or its Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H6 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H6 Property is \$10,582,222. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$10,582,222 at \$18.70/rsf equals 565,894 sf of credit for residential rentable sf (including market rate and 100% AMI units).]¶

¶

5. Land Dedication - IHO Fee Credit and Prepayment Summary. The table below provides a summary of how the Project proposes to satisfy and exceed the IHO Fee requirements by means of land dedication and payments, as set forth above in this Affordable Housing Program, assuming development of 3,400 residential units. [All \$\$ amounts are OPEN]¶

¶

Affordable Land Dedication	Credits
H1	\$21.3M
H5	\$8.3M
H6	\$10.6M
Total Credits	\$40.3M

<u>IHO Fee Due (when Credits are exhausted)</u>	<u>\$200k</u>
<u>Total IHO Requirement</u>	<u>\$40.5M</u>

¶

The table above has been provided to illustrate IHO Fee Credits and IHO Fees owed on 3,400 residential units. Total IHO Fee Credits amount to \$40.3M and when all IHO Fee Credits are exhausted, an IHO Fee in the amount of \$200,000 is due based on \$18.70 rsf. For any residential units in excess of 3,400, Developer will satisfy its obligations under the IHO through the Mixed Compliance Option, whereby 5% of the units are on-site inclusionary affordable units and in-lieu fee payment of \$18.70/rsf is made, including as set forth in Section 6 below. If Developer does not provide such 5% on-site inclusionary units, then the “In-Lieu Fee” option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1(d)) in which case the \$18.70 fee shall apply.

6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) has not accrued any IHO Fee credits or (ii) Developer 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 (ia) \$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 Section III.B.1 above~~ (in addition to providing 5% on-site inclusionary units at 100% AMI) or (ib) \$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. t Developer does not provide the 5% on-site inclusionary units.~~¶

7. Excess IHO Fee Credits. If there are excess IHO Fee credits at the end of the Term, then Developer would have the right to monetize the excess IHO Fee credits by selling them to other developers needing credits to satisfy their inclusionary housing obligations.

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

1. Data Chart with Application. ~~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 Agreement.— 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, including the number of market rate units and below-market rate units, including applicable AMI percentage; 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-unit type (e.g., studio, one bedroom-units, 40 2 bedroom units, 20 3 bedroom units); [0.010.01] 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. Notices Regarding the H1, H5 and H6 Properties. Developer will provide City with advance notice of the anticipated closing date for dedication of each of the H1, H5 and H6 Properties per the terms of the Transfer Agreement. Developer will also include in the Conformance Review checklist a requirement that the Planning Department notify the Building Department of Developer's application submittal in order to provide the Building Department's housing division with notice of the initiation of the Early H5 Work. Developer will also notify the City after a ground lease with, or transfer to, Lendlease or a Lendlease Affiliate has been executed/has occurred for the first residential building.

3. ~~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~~ Restricted 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. Payment of CLF. Developer shall pay the Commercial Linkage Fee ("CLF") 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. As set forth in Section III.A above, the City and Developer agree that the first office development will receive a credit against the CLF in the amount of the Early H5 Work CLF Funds Amount which Developer will pay at a later date as set forth in Section III.A. [Note: attached copy of CLF as an exhibit]

2. Allocation of CLF. 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~~ those dedicated 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 pre-development 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 (Final Certificate of Occupancy of office building). Such pre-development 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 and/or the 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)~~ has achieved the 25% affordable housing goal in DSAP, then- City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide.-

[A6]: Global Comment – City suggests that all the DISC adjustment provisions be combined in a section in the main body of the DA, rather than having different provisions in the Parkland Agreement and Housing Programs (or any other impacted aspects of the project).¶
¶ At end of day on 2/24, City received an exhibit showing location of the private road and relationship of H5, H6, and parkland. City is in the process of reviewing that information to determine the likelihood that DISC would impact the City's intended uses of those properties.

B. Community Stabilization Fund. 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 Exhibit H (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~~

[A7]: Note: in the DISC provisions in the Parkland Agreement MTC is not listed—

~~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.~~

[Note: DISC language is OPEN.]

VI. Definitions

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.

[A8]: Defined in Definition Section of DA.

~~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.

53. "Fund" means the Community Stabilization and Opportunity Pathways Fund described in Exhibit H to the Development Agreement.

64. "H1 Property" means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

75. "H5 Property" means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

86. "H6 Property" means that property as generally shown on Schedule A 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.~~

[1](#)
[7.](#) "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]~~ ¶

, adopted by Ordinance No. _____, dated _____ 2021.

[A9]: Global-
Comment –
Consider-
relabeling-
attachments to-
DA Exhibits to-
reflect the-
Exhibit to which
they are-
attached, to-
avoid confusion-
and multiple-
documents with
the same label-
(e.g. – Schedule-
A) – ¶
¶
Call them-
Schedule D-1,-
D-2, etc. –

Schedule AD1 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 BD2 to Affordable Housing Program

II

City's Guidelines for Implementation of the Inclusionary Housing Ordinance

Schedule CD3 to Affordable Housing Program

City's Form of Affordability Restrictions for Deed

Schedule D4 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 ED5 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

1

Schedule D6 to Affordable Housing Program

Description of the Early H5 Work

[A10]: Schedule A Exhibits need to be revised to include latest map from Google with private road location and related dimensions. AFTER city has reviewed and confirmed sufficiency of that information. Schedule A also needs to incorporate an Autumn Street site exhibit

[A11]: Note: Schedule B exhibit 1 (City's AH Compliance Guidelines) is no longer appropriate given the adoption of the new IHO ordinance, and will be deleted. Cite to and follow Updated IHO.

Document comparison by Workshare 10.0 on Thursday, March 4, 2021 10:02:36 PM

Input:	
Document 1 ID	netdocuments://4837-6082-7359/1
Description	City 2-26-21 Comments on Affordable Housing Program Exhibit
Document 2 ID	netdocuments://4840-1661-4623/1
Description	Affordable Housing Program Exhibit CPDB Draft 3-4-21
Rendering set	CPDB Set

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	181
Deletions	149
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	330

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. Pursuant to Sub-Section F of Section 5.08.610 of the IHO, the City Manager has determined that this Affordable Housing Program represents an acceptable alternative method of meeting the City's inclusionary housing requirements because, based on its terms, it will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of the IHO and the Inclusionary Housing Guidelines.

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 Section VI below or 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 is based on the assumption that development of 3,400 market rate

and 100% AMI units at an average unit size of 637 rentable square feet will occur) and consists of the following elements, which are summarized here and discussed in more detail in Sections III and IV 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 Exhibit D1 for Site Plan.

2. Developer's performance of certain utility and site work with respect to the H5 Property earlier than Developer would otherwise be obligated to perform such work.

3. 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.

4. 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).

5. Developer's payment of in-lieu fees (either \$18.70 per rentable square foot (rsf) if Developer provides 5% of the residential units as inclusionary units or \$43.00 per rsf if Developer does not provide 5% of the residential units as inclusionary units) for all residential developments in the Project area, subject to credits for the value of the H1, H5 and H6 Properties that are transferred to the City or an affordable housing developer designated by the City ("Designee") as more specifically set forth below.

6. 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.

7. Subject to City Council appropriation of funding, the City's commitment to (i) implement the affordable housing priorities for the DSAP that are 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 Commercial Linkage Fees 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.

8. Housing contribution of community benefits to the Community Stabilization fund, as further described in Section IV B. below.

III. Inclusionary Housing Ordinance Compliance

A. Land Dedication; Early H5 Work; Availability of District Systems.

Developer shall dedicate Properties H1, H5 and H6, consisting of a total of approximately 2.16 acres of real property to the City (or its Designee) pursuant to separate transfer agreements between the Developer and the City, with respect to each of the properties. If, due solely to Developer's actions, any Property is reduced in size by (i) five percent (5%) or less from its current size as shown on the attached Site Plan (Exhibit D1), then the credits associated with such site shall be adjusted pro-rata and (ii) more than five percent (5%), then Developer shall have to right to (a) provide a replacement site to the City, which site shall be acceptable to the City's Director of Housing in his or her sole and absolute discretion or (b) if no such site is available, as reasonably determined by Developer, then Developer shall pay the in-lieu fee of [\$43.00 per rsf]. The City will use Good Faith efforts to deliver 600 units in total on the dedicated Properties. The actual number of units to be constructed on the dedicated Properties 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, H5 and H6 Properties to City (the "H1 Transfer Agreement", "H5 Transfer Agreement" 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.*]

[Note: Early H5 Work language remains subject to Developer review.] In response to the City's desire to cause the dedication of the H5 Property earlier than it is required to be dedicated, (which is not anticipated to occur until the 888th residential unit has been delivered), Developer is willing to perform certain work with respect to the H5 Property earlier than necessary. Specifically, in order to prepare the H5 Property for dedication, approximately [\$2.3M] in utility and related site work, as more specifically set forth in Schedule D6 ("Early H5 Work") would need to be undertaken at a time when it is anticipated that there would be approximately [\$3.7M] in IHO Fee Credits already available to Developer as a result of the dedication of the H6 Property. Developer could perform the Early H5 Work by using a credit of [\$2.3M] of CLF from the first office development (anticipated to be Block F1) to fund the Early H5 Work. Accordingly, in return for Developer's performance of the Early H5 Work, the City and Developer agree that the first office development will receive a credit against the CLF in the amount of [\$2.3M] which credit Developer shall use to pay for the costs of performance of the Early H5 Work (the "Early H5 Work CLF Funds Amount"). Promptly following issuance of the Final Certificate of Occupancy for the first office development, Developer will commence preparation of the plans and specifications for the Early H5 Work and submit for required building permits. Promptly following receipt of such permits, Developer shall commence construction of the Early H5 Work and thereafter cause such work to be completed. In consideration of the inclusion of the [\$2.3M] value of the Early H5 Work in the [\$8.4M] value of the IHO Fee credits for the H5 Property at the time it is dedicated to the City, Developer will pay the amount of the Early H5 Work CLF Funds Amount to the City (subject to actual verification of the rentable square footage and related unit count at each

Conformance Review). Developer shall make such payment at the Final Certificate of Occupancy for the next office building constructed after the Final Certificate of Occupancy for the 888th residential unit. If Developer does not make such payment at such time, then City would have the same remedies against Developer with respect to that office building for failure to make such payment as if such Developer had failed to pay the CLF due for that office building. The City and Developer agree that the costs of performing the Early H5 Work is [\$2.3M] as of the Effective Date of the Development Agreement. Such costs shall be subject to Annual Escalations.

District Systems are anticipated to be made available to the H5 and H6 Properties, in which case those Properties would have the right to connect to the District Systems subject to any required regulatory requirements and supply agreements consistent with other residential development being supplied by the District Systems. The timing of delivery and commissioning of the District Systems may not be such that they are available to the H5 and H6 Properties at the time they are being constructed, and Developer makes no representations as to when and if they will be made available in any specific timeframe. In the event they are made available to one or both of the properties, then City may elect to connect at its sole cost and expense.

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 following applicable provisions of the IHO attached at Exhibit D5: [DISCUSS with City: referencing specific sections of the IHO that we want to use and otherwise this Affordable Housing Plan controls.] All inclusionary units will comply with the City's Guidelines for Implementation of the Inclusionary Housing Ordinance attached hereto at Exhibit D5. [DISCUSS with City: when will Guidelines be ready?]

1. Inclusionary Units. 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 Section III.B.1(d), 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 up 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. [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 Section III. B.1, the City Manager 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 of the market rate units for each unit by bedroom type (for example, 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. IHO Fees

This Affordable Housing Program assumes compliance with the IHO's "Mixed Compliance Fee" provisions, such that so long as Developer restricts not less than 5.00% of the market rate units of a building as 100% AMI Restricted 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 which is 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"). Pursuant to Schedule D-4, IHO Fee Credits are earned at time of Closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the Closing would have occurred but for the City's exercise of its Extension right(s).

1. IHO Fee Rate. The Mixed Compliance Fee provision requires 5% on-site inclusionary units at 100% AMI and payment of the in-lieu fee of \$18.70 per rentable square foot. Therefore, if Developer does not provide such 5% on-site inclusionary units, then the "In-Lieu Fee" option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1(d)) in which case the \$18.70 fee shall apply. [Note to City: .88% extra units is discussed above in Onsite Inclusionary Units section below.]

2. Land Dedication (H1 Property) - IHO Fee Credit. [All \$\$ amounts are OPEN] 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 the earlier of (i) the closing of the transfer of the H1 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit for the H1 Property is [\$21,346,347]. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$21,346,347 at \$18.70/rsf equals 1,141,516 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

3. Land Dedication (H5 Property) - IHO Fee Credit. [All \$\$ amounts are OPEN] Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H5 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 the earlier of (i) the closing of the transfer of the H5 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. The IHO Fee credits that Developer receives for the transfer of the H5 Property shall include the [\$2.3M] value of the Early H5 Work. As of the Effective Date, the value of the credit for the H5 Property is [\$8,352,883]. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$8,352,883 at \$18.70/rsf equals [446,678]sf of credit for residential rentable sf (including market rate and 100% AMI units).]

4. Land Dedication (H6 Property) - IHO Fee Credit. [All \$\$ amounts are OPEN] Subject to all conditions herein, Developer shall receive IHO Fee credits for the transfer of the H6 Property to the City (or its Designee) against any IHO Fees owed or that may come due, which credit shall accrue to Developer's benefit at the earlier of (i) the closing of the transfer of the H6 Property to the City or its Designee pursuant to the Transfer Agreement or (ii) the date on which such closing would have occurred but for the City's request to defer the closing as more specifically set forth in the Transfer Agreement. As of the Effective Date, the value of the credit

for the H6 Property is \$10,582,222. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$10,582,222 at \$18.70/rsf equals 565,894 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

5. Land Dedication - IHO Fee Credit and Prepayment Summary. The table below provides a summary of how the Project proposes to satisfy and exceed the IHO Fee requirements by means of land dedication and payments, as set forth above in this Affordable Housing Program, assuming development of 3,400 residential units. **[All \$\$ amounts are OPEN]**

Affordable Land Dedication	Credits
H1	\$21.3M
H5	\$8.3M
H6	\$10.6M
Total Credits	\$40.3M
IHO Fee Due (when Credits are exhausted)	\$200k
Total IHO Requirement	\$40.5M

The table above has been provided to illustrate IHO Fee Credits and IHO Fees owed on 3,400 residential units. Total IHO Fee Credits amount to \$40.3M and when all IHO Fee Credits are exhausted, an IHO Fee in the amount of \$200,000 is due based on \$18.70 rsf. For any residential units in excess of 3,400, Developer will satisfy its obligations under the IHO through the Mixed Compliance Option, whereby 5% of the units are on-site inclusionary affordable units and in-lieu fee payment of \$18.70/rsf is made, including as set forth in Section 6 below. If Developer does not provide such 5% on-site inclusionary units, then the “In-Lieu Fee” option under the IHO applies at the rate of \$43.00 per rentable square foot of residential development in the market rate building, unless City has previously agreed to a lower percentage of 100% AMI units pursuant to clustering (described above in Section III.B.1(d)) in which case the \$18.70 fee shall apply.

6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) has not accrued any IHO Fee credits or (ii) Developer exhausted all the credit attributable to the dedication of H1, H5 and H6, then Developer shall pay IHO Fees in the amount of (a) \$18.70 per rentable square foot for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per rentable square foot if Developer does not provide the 5% on-site inclusionary units.

7. Excess IHO Fee Credits. If there are excess IHO Fee credits at the end of the Term, then Developer would have the right to monetize the excess IHO Fee credits by selling them to other developers needing credits to satisfy their inclusionary housing obligations.

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

1. Data Chart with Application. Developer’s obligations in this Affordable Housing Program are subject to Developer proceeding with development, 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 Agreement. 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, including the number of market rate units and below-market rate units, including applicable AMI percentage; the location of the market rate units and below-market rate units; and number of units broken down by unit type (e.g., studio, one bedroom). 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. Notices Regarding the H1, H5 and H6 Properties. Developer will provide City with advance notice of the anticipated closing date for dedication of each of the H1, H5 and H6 Properties per the terms of the Transfer Agreement. Developer will also include in the Conformance Review checklist a requirement that the Planning Department notify the Building Department of Developer's application submittal in order to provide the Building Department's housing division with notice of the initiation of the Early H5 Work. Developer will also notify the City after a ground lease with, or transfer to, Lendlease or a Lendlease Affiliate has been executed/has occurred for the first residential building.

3. 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 Restricted 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. Payment of CLF. Developer shall pay the Commercial Linkage Fee ("CLF") 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. As set forth in Section III.A above, the City and Developer agree that the first office development will receive a credit against the CLF in the amount of the Early H5 Work CLF Funds Amount which Developer will pay at a later date as set forth in Section III.A. [Note: attached copy of CLF as an exhibit]

2. Allocation of CLF. Subject to annual appropriation and compliance with applicable laws, the City shall make good faith efforts to allocate Developer-paid CLF 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 those dedicated parcels, 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 pre-development 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 (Final Certificate of Occupancy of office building). Such pre-development 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, and/or the City has achieved the 25% affordable housing goal in DSAP, then City shall prioritize the use of any CLF generated from development in the Project Site to affordable projects Citywide.

B. Community Stabilization Fund. 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 Exhibit H (Community Stabilization and Opportunity Pathways Fund) to the Development Agreement.

V. DISC Adjustments

[**Note:** *DISC language is OPEN.*]

VI. Definitions

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. "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.

3. "Fund" means the Community Stabilization and Opportunity Pathways Fund described in Exhibit H to the Development Agreement.

4. "H1 Property" means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

5. "H5 Property" means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

6. "H6 Property" means that property as generally shown on Schedule A attached to this Affordable Housing Plan.

7. "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, adopted by Ordinance No. _____, dated _____ 2021.

Schedule D1 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 D2 to Affordable Housing Program

City's Guidelines for Implementation of the Inclusionary Housing Ordinance

Schedule D3 to Affordable Housing Program

City's Form of Affordability Restrictions for Deed

Schedule D4 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 D5 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

Schedule D6 to Affordable Housing Program

Description of the Early H5 Work

Schedule D4 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

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 for the first property dedication have been exhausted.)~~

B. H1 Property.

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

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

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

a. **Ongoing Property Condition:** Following the closing, City or its Designee shall be responsible to keep the H1 Property in good, clean and safe condition. In connection therewith, City or Designees, as applicable, shall be responsible to install and maintain attractive fencing, and to provide for adequate lighting and security prior to and during development and construction of the H1 Property. 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.

[A1]: The terms regarding land dedication should be integrated into Exhibit D of the Development Agreement, as also noted in that document.

[A2]: NOTES —
1) Autumn Street Site needs to be reflected in this document.
2) City is reviewing documentation sent by Google regarding the internal roadway and relationship to H5, H6, and the park to the west / northwest. City is confirming that there is enough land available for (1) the housing sites, (2) the park, (3) the DISC construction easement, (4) the DISC final alignment.

[A3]: See DA Exhibit D regarding IHO Fee Credits for H1 / H5 and H6 only when conditions precedent for transfer to City have been met.

[A4]: The concurrent timing the Transfer Agreements and DA require further discussion; City may not be able to complete all due diligence in time for that, in which case there will need to be a period of time after the DA to complete the transfer agreements.

b. **Construction Right of Entry:** 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. **Remediation Easement:** Effective as of the closing, City shall grant Developer such remediation easements, licenses or access agreements as are necessary for Developer to implement any ~~post~~Post-Closing RAP ~~work~~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~~system as may be required for development of the property.

4. **Closing Date:** The closing under the H1 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("**Closing Date**"). Subject to satisfaction of the closing conditions, the Closing Date shall occur on or before issuance of a Final Certificate of Occupancy for the Developer's first residential unit after all existing IHO Fee Credits have been exhausted.

5. **Due Diligence:**

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

b. ~~(Title: Promptly after the City's request~~At least ten (10) days prior to the Closing Date, Developer shall provide City with a then current title report for the H1 Property.).....

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections B.3(c) above and B.7(b) below, the following shall be conditions to the closing under the H1 Transfer Agreement, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H1 Transfer Agreement); (ii) Developer shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period; and (iii) Developer shall have completed implementation of the ~~approved Remedial Action Plan~~Pre-Closing RAP Work for the property, as discussed in section B.-7: below, ~~sufficient to allow use of the property~~

[A5]: In order to waive DD and allow for entering transfer agreement concurrent with DA City will need title reports, Alta Surveys, and other relevant information asap. ¶ City also needs to see the transfer agreements

[A6]: The City needs a current title report ASAP, and will also need one prior to close to ensure that there are not new encumbrances on title that did not exist as of February /March 2021, which needs to be included as a condition to closing.

~~for residential purposes~~ and shall submit ~~proof of a report from Developer's consultant~~
~~evidencing such 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. ¶

[A7]: City requests that this be addressed by making it an assignable transfer agreement rather than dealing with it through the grant deed approach provided here.

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

b. **Developer Conditions:** In addition to the closing condition specifically set forth in Section B.7(b) below, the following shall be conditions to the closing under the H1 Transfer Agreement, for Developer's benefit: (i) the City shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period, 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:**

a. **Remedial Action Plan:** The Santa Clara County Department of Environmental Health (the "County") approved a Remedial Action Plan dated March 22, 2019 related to the H1 Property (the "**Original RAP**"). Developer will be submitting an updated Remedial Action Plan to the County that will supersede the Original RAP ("**New RAP**"). Developer shall demolish the existing building on the H1 Property, excavate the environmentally impacted soil under the 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 complete any and all other work necessary to meet all regulatory standards to allow residential ~~use~~construction ~~of~~on the property conditioned upon City's development "podium style" or with installation of vapor intrusion systems(s) acceptable to the regulatory agencies (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.

[A8]: City will need a remedy in the event that the Post-Closing RAP Work does impact City's ability to develop and use the property for residential purposes.

[A9]: Need clear language in DA that all affordable land dedicated must meet applicable regulatory requirements for residential uses. Also, need clear language that any on-going monitoring and reporting environmental requirements and liability remain with Google. City cannot indemnify or step in for Google for existing issues.

b. **Closing Condition:** Developer shall use commercially reasonable efforts to perform and complete the Pre-Closing RAP Work. It shall be a condition to the closing under the H1 Transfer Agreement, for both Developer's and City's benefit, that Developer causes the Pre-Closing RAP Work to be completed to meet applicable regulatory standards for residential ~~use of construction to be undertaken on~~ the property ~~and provides documentation to City of compliance from~~ either "podium style" or with implementation of vapor intrusion mitigation system(s) acceptable to the regulatory authority or authorities agencies, each of which shall be the obligation of the City at City's cost. If Developer is unable to timely perform or complete the Pre-Closing RAP Work for reasons beyond Developer's control or if the costs of implementing the Pre-Closing RAP Work are equal to or greater than one hundred fifty percent (150%) of the Developer's estimated costs of the Pre-Closing RAP Work as of the date of the H1 Transfer Agreement ("Catastrophic Cost Increase"), then, at Developer's election, the Closing Date shall be delayed until such time as Developer is able to perform and complete the Pre-Closing RAP Work or Developer may decide not to transfer the H1 Property to City. If for reasons beyond Developer's control, Developer is ultimately unable to complete the Pre-Closing RAP Work or in the event of a Catastrophic Cost Increase, then such inability to complete shall not be a Developer default and Developer shall satisfy its IHO obligations by either (1) paying the IHO fees or (2) by providing the City with an alternate property or properties in the DSAP acceptable to the City that is/are: (i) of equivalent size and capacity for a similar number of residential units, (ii) located in Downtown West, (iii) without contamination or ~~cleaned~~remediated by Developer to meet all regulatory standards to allow for residential ~~use~~construction of that property; either "podium style" or with implementation of vapor intrusion mitigation system(s) acceptable to the regulatory agencies, both of which shall be the obligation of the City, and (iv) with no structures or encumbrances thereon. The Pre-Closing RAP Work will be detailed in an exhibit to the H1 Transfer Agreement.

c. **Environmental Indemnity:** If the H1 Property is transferred to the City 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 or the Designee.

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

e. **City Obligations:** Following the closing, City shall either (i) construct all of its improvements "podium" style [such that no elements of the improvements intended for human occupancy 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 at City's cost. 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.

[A10]: Clarify what this requires—two levels of concrete? or that we need to excavate for the foundation?

f. **Developer Post-Closing Obligations:** Following the H1 Property Closing, Developer shall have no responsibility or liability for the H1 Property other than the Post-Closing RAP Work. —This requirement shall survive the transfer of the H1 Property to City or Designee. Developer shall have no obligations for any further soil remediation or removal and no obligations with respect to soil vapor. If all of the work under the New RAP has not been completed as of the H1 Property closing such that there is Post-Closing RAP Work remaining to be implemented, the deed for the H1 Property shall also include a reservation of access rights for Developer and its contractors to complete that work and to maintain the Remediation Equipment, which reservation shall run with the land of the H1 Property or the parties shall enter into a separate easement, license or access agreement, provided, however, that in no event shall the reservation preclude development of the property for residential uses so long as that development is constructed "podium" style or with vapor intrusion mitigation systems acceptable to the regulatory agencies or impact the ability to install and maintain a then industry standard vapor intrusion mitigation system.

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

8. **IHO Fee Credits:** [Note: all \$\$ amounts are open.] As of the Effective Date, the amount of the IHO fee credit for the H1 Property shall be ~~\$21,572,346.25~~ 21,346,347 (the "**H1 Transfer IHO Fee Credits**"). ~~\$21,572,346.25—21,346,347~~ IHO Fee Credit at \$18.70/rsf equals

[A11]: This provision needs to be revised to allow for assignment of the H-1 Transfer Agreement provided Designee accept all benefits and burdens.

~~1,153,601~~ 1,141,516 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~~ Closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the Closing would have occurred but for the City's exercise of its Extension right(s).

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

10. **Purchase Price:** The purchase price for the H1 Property shall be \$1.00. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H1 Property being transferred directly to the Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the H1 Property was deeded directly to City), then City or the Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H1 Property (to be mutually agreed upon in the H1 Transfer Agreement), notwithstanding that the purchase price for the H1 Property is \$1.00.

¶

~~11.9~~

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

12. **Default:**

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

b. **Default by Developer:** If Developer defaults under the H1 Transfer Agreement and fails to close, City's sole and exclusive remedy shall be to terminate the H1 Transfer Agreement, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due ~~diligence~~ diligence in 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~~ by paying the applicable IHO fee.¶

[A12]: Many of the comments on H1 apply equally to the H5/H6 section as well.

C. **H5 and H6 Properties.** ~~The H5 and H6 properties will be~~ Properties will be transferred ~~concurrently~~ separately to the City. Developer anticipates that it will transfer the H6 Property first. However, Developer will perform the Early H5 Work, as more specifically described in Exhibit D, in order to help accelerate the development of affordable housing on the H5 Property. 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~~ Property, H6 ~~property~~ 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~~ Properties.

[A13]: Same comment as for H-1 regarding information needed to complete due diligence and feasibility of completing this for concurrent DA and Transfer Agreement execution.

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

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

a. **Parcelization Condition:** City acknowledges that the H5 and H6 Properties are not ~~currently~~ legal parcels as of the Effective Date. 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.

[A14]: The timing of construction is a topic of continued discussion as the City requests that the Private Street and utilities therein be completed prior to mobilization for construction on either H5 or H6. City would complete sidewalk construction as part of the development of H5 and H6.

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

c. **Developer Post-Closing Obligations: Construction of Private Street.** Developer shall construct a private street serving the H block parcels, including the H5 and H6 Properties. ~~The~~ If any such work needs to be performed after the Early H5 Work has been complete, then the City shall give notice to the Developer not later than six (6) months prior to the City's anticipated date of receiving a temporary certificate of occupancy (“TCO”) for the ~~first lot (H5 Property or (H6 Property) to be completed~~ (the “TCO Notice”) so that vacating the

private street area, in two phases, can commence. The Developer will construct the private street in two phases - the east-west portion and the north-south portion. Within a commercially reasonable time- of providing the TCO Notice to Developer, the City shall vacate all construction equipment from the first phase in order to allow Developer to construct that portion of the street, including associated sidewalk and streetscape. During this period, Developer may use the alternate portion of the street for ongoing construction access. On completion of the first phase of the street, the Developer will give notice to the City that the first portion of the street is available for construction access, and the second portion is to be vacated within a commercially reasonable time after the date of Developer's notice. On completion of the second phase, the Developer will give notice to the City that both portions are complete and available for access and use. Details on this work will be included as an exhibit to each of the H5 and H6 Transfer AgreementAgreements.¶

3. **Leases:**

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

4. **Closing Date:** The closing under ~~each of the H5 and~~ H6 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City. ~~Subject to satisfaction of the closing conditions, the Closing Date for the H6 Property shall occur on or before the issuance of a Final Certificate of Occupancy for the Developer's first residential building . The closing under the H5 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("H5 Closing Date"). Subject to satisfaction of the closing conditions, the Closing Date for the H5 Property shall occur on or before the issuance of a Final Certificate of Occupancy for the Developer's first residential unit after all existing IHO Fee Credits, including those from the dedication of H6, have been exhausted.~~

[A15]: Global Comment— language needs to be updated to reflect City's ability to assign the transfer agreement to a Designee, similar to H1 revisions above.

a. **Ongoing Property Condition:** 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 prior to and during development and construction of the H5 and H6 Properties. This requirement shall also be set forth as a restriction in the Grant Deed(s) for the H5 and H6 Properties, which deed restriction shall run with the land of each of the H5 and H6 Properties.

b. **Construction Right of Entry:** 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 AgreementAgreements shall contain provisions whereby the City (or its Designee) and the Developer agree to coordinate construction activities and schedules to ensure timely construction of the private road, as more specifically described in Section C.2-(c) above required for mutual

benefit of the H5 Property, the H6 Property and the other H block market rate residential parcels, and such provisions shall survive the Closing or may be in form of an easement or other agreement.

5. **Due Diligence:** *

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

b. **Title:** ~~Promptly after the City's request~~At least ten (10) days prior to the Closing Date, Developer shall provide City with a then current title report for the H5 and H6 Properties. ¶

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections C.2(a) and 3(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer ~~Agreement~~Agreements, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H5 and H6 Transfer ~~Agreement~~Agreements); (ii) Developer shall not be in default under the respective H5 and H6 Transfer ~~Agreement~~Agreements beyond any applicable notice and cure period; (iii) ~~Developer there~~ shall have completed all necessary site cleanup as further described in Section C. 7 below; and been no material adverse change in the environmental condition of the H5 Property or the H6 Property since the date of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively; (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; and (v) the Early H5 Work shall have been completed.

City shall have no right to terminate the H5 ~~and~~Transfer Agreement or the H6 Transfer Agreement if City is unable to secure funds or other commitments to enable the construction of affordable housing on either or both of the H5 Property or the H6 Property; provided, however, that City shall have the right to extend (“**Extension**”) the Closing under each of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively, two (2) times for periods of one hundred eighty (180) days each (each, an “**Extension Period**”, the first such extension of the Closing being the “**Extended Closing Date**” and the second such extension of the Closing being the “**Outside H5/H6 Closing Date**”) if the City has not identified the City’s

Designee by the scheduled Closing or Extended Closing Date, as applicable, for that property by providing Developer with written notice of the exercise of the extension with the status of City's efforts to identify the Designee together with documentation evidencing City's good faith efforts to identify and select the Designee. ~~If the City has identified the Designee by the Extended Closing Date (or has extended a second time, then by the Outside H5/H6 Closing Date, as applicable) the Grant Deed shall identify the Designee as the transferee/grantee of the H5 Property or H6 Property, as applicable.]~~ If City has not identified and selected the Designee by the Extended Closing Date or Outside H5/H6 Closing Date, as applicable, then there will be no further extensions of the Closing and City shall take title the H5 Property or the H6 Property, as applicable, in City's name or be in default of the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable. In addition, if, as set forth in the H5 Transfer Agreement or the H6 Transfer Agreement, City elects to defer the transfer of title of the H5 Property or the H6 Property from Developer to City (or its Designee), then the City shall reimburse Developer for property taxes payable with respect to such Property(ies) during the deferral period and Developer's costs to light, fence, insure, and maintain the subject property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. Developer shall provide the City with reasonable documentation of such taxes and costs.

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

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

[A16]: Same comment as above as to H1 property

[A17]: This section needs to be revised to incorporate Google obligations to either 1) complete Phase 1 and Phase 2 work necessary to show that the sites don't have contamination above MTCA clean-up levels (or contamination that would trigger a state or local requirement for clean-up in order to meet any regulatory standard for residential use of the property) or 2) clean the sites similar to the provisions in Section B7 for H1 property to meet all regulatory standards for residential use.

Site conditions will also need to be confirmed prior to close.

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

8. **IHO Fee Credits:** [Note: all \$\$ are open.] As of the Effective Date, the amount of the IHO fee credit for the H5 ~~and H6 Properties~~Property shall be ~~[\$18,155,349]~~\$8,352,883 (the "~~H5 and H6 Transfer IHO Fee Credits~~"). ~~[\$18,155,349]~~\$8,352,883 IHO Fee Credit at \$18.70/rsf equals ~~970,874~~[446,678] sf of credit for market rate rentable sf (including 100% AMI units). As of the Effective Date, the amount of the IHO fee credit for the H6 Property shall be \$10,582,222 (the "H6 Transfer IHO Fee Credits"). \$10,582,222. IHO Fee Credit at \$18.70/rsf equals 565,894 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 of Closing, or, if the City exercises its option(s) described in Section 6.a above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

9. **No Assignment:** Except as set forth in Section C.7(b) above, City may not assign its rights or obligations under the H5 and H6 Transfer ~~Agreement~~Agreements. As more specifically set forth in Section 6-(a), above, the City may identify a Designee to take title to the ~~H45 or H6~~ Property at Closing and in such event, Developer shall provide for the ~~H45~~ Property or H6 Property, as applicable, to be deeded to the Designee at Closing.]

[A18]: Same comment as above for H1 Assignment. Also, unclear why there is a reference to H1 closing here.

10. **Purchase Price:** The purchase price for the H5 Property and for the H6 Property shall be \$1.00 per property. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H5 Property and/or H6 Property being transferred directly to the applicable Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the subject property was deeded directly to City), then City or the applicable Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H5 Property or H6 Property, as applicable (to be mutually agreed upon in the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable), notwithstanding that the purchase price for the H5 Property and H6 Property is \$1.00.

¶

~~H1-¶~~

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

12. **Default:**

a. **Default by City:** If City defaults under either the H5 Transfer Agreement or the H6 Transfer Agreement and fails to close, Developer shall have the right to terminate the H5 Transfer Agreement and/or H6 Transfer Agreement, as applicable, and in such event, City

shall continue to recognize the affordable housing credits Developer would have received as a result of the transfer of the H5 ~~and~~Property, the H6 ~~Properties~~Property or both (as applicable) to City but for the termination of the respective H5 and Transfer Agreement, H6 Agreement or both due to City's default.

b. **Default by Developer:** If Developer defaults under either the H5 ~~and~~Property, the H6 Property Agreement or both, as applicable and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate the respective H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence-, 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~~at Developer's election either (1) paying the applicable fee or (2) providing the City with an alternate property or properties in the DSAP 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 remediated by Developer to meet all regulatory standards to allow for residential construction of that property, (iv) with no structures or encumbrances thereon.

Document comparison by Workshare 10.0 on Thursday, March 4, 2021 10:00:08 PM

Input:	
Document 1 ID	netdocuments://4814-4242-5823/1
Description	Key Terms for H1 H5 and H6 Properties Transfer Agreements-City Comments - 2.26.21
Document 2 ID	netdocuments://4845-9234-8383/1
Description	Key Transfer Terms re H1 H5 and H6 Transfer Agreements - CPDB Draft 3-4-21
Rendering set	CPDB Set

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	141
Deletions	126
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	267

Schedule D4 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

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.

B. H1 Property.

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

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

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

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

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

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 system as may be required for development of the property.

4. **Closing Date:** The closing under the H1 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("**Closing Date**"). Subject to satisfaction of the closing conditions, the Closing Date shall occur on or before issuance of a Final Certificate of Occupancy for the Developer's first residential unit after all existing IHO Fee Credits have been exhausted.

5. **Due Diligence:**

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

b. **Title:** At least ten (10) days prior to the Closing Date, Developer shall provide City with a then current title report for the H1 Property.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections B.3(c) above and B.7(b) below, the following shall be conditions to the closing under the H1 Transfer Agreement, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H1 Transfer Agreement); (ii) Developer shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period; and (iii) Developer shall have completed implementation of the Pre-Closing RAP Work for the property, as discussed in section B.7 below, and shall submit a report from Developer's consultant evidencing such completion.

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

the Designee. If the City has identified the Designee by the Extended Closing Date, or has extended closing a second time, then by the Outside H1 Closing Date, the Grant Deed shall identify the Designee as the transferee/grantee of the H1 Property. If City has not identified and selected the Designee by the Extended Closing Date or Outside H1 Closing Date, as applicable, then there will be no further extensions of the Closing and City shall take title the H1 Property in City's name or be in default of the H1 Transfer Agreement. In addition, if, as set forth in the H1 Transfer Agreement, City elects to defer the transfer of title of H1 Property to City (or its Designee) to the Extended Closing Period or Outside H1 Closing Date, as applicable, then the City shall reimburse Developer for property taxes payable with respect to such Property during the deferral period and Developer's costs to light, fence, insure, and maintain the property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. Developer shall provide the City with reasonable documentation of such taxes and costs.

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

b. **Developer Conditions:** In addition to the closing condition specifically set forth in Section B.7(b) below, the following shall be conditions to the closing under the H1 Transfer Agreement, for Developer's benefit: (i) the City shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period, 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:**

a. **Remedial Action Plan:** The Santa Clara County Department of Environmental Health (the "**County**") approved a Remedial Action Plan dated March 22, 2019 related to the H1 Property (the "**Original RAP**"). Developer will be submitting an updated Remedial Action Plan to the County that will supersede the Original RAP ("**New RAP**"). Developer shall demolish the existing building on the H1 Property, excavate the environmentally impacted soil under the 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 complete any and all other work necessary to meet all regulatory standards to allow residential construction on the property conditioned upon City's development "podium style" or with installation of vapor intrusion systems(s) acceptable to the regulatory agencies (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. **Closing Condition:** Developer shall use commercially reasonable efforts to perform and complete the Pre-Closing RAP Work. It shall be a condition to the closing under the H1 Transfer Agreement, for both Developer's and City's benefit, that Developer causes the Pre-Closing RAP Work to be completed to meet applicable regulatory standards for residential construction to be undertaken on the property either "podium style" or with implementation of vapor intrusion mitigation system(s) acceptable to the regulatory agencies, each of which shall be the obligation of the City at City's cost. If Developer is unable to timely perform or complete the Pre-Closing RAP Work for reasons beyond Developer's control or if the costs of implementing the Pre-Closing RAP Work are equal to or greater than one hundred fifty percent (150%) of the Developer's estimated costs of the Pre-Closing RAP Work as of the date of the H1 Transfer Agreement ("**Catastrophic Cost Increase**"), then, at Developer's election, the Closing Date shall be delayed until such time as Developer is able to perform and complete the Pre-Closing RAP Work or Developer may decide not to transfer the H1 Property to City. If for reasons beyond Developer's control, Developer is ultimately unable to complete the Pre-Closing RAP Work or in the event of a Catastrophic Cost Increase, then such inability to complete shall not be a Developer default and Developer shall satisfy its IHO obligations by either (1) paying the IHO fees or (2) by providing the City with an alternate property or properties in the DSAP acceptable to the City that is/are: (i) of equivalent size and capacity for a similar number of residential units, (ii) located in Downtown West, (iii) without contamination or remediated by Developer to meet all regulatory standards to allow for residential construction of that property either "podium style" or with implementation of vapor intrusion mitigation system(s) acceptable to the regulatory agencies, both of which shall be the obligation of the City, and (iv) with no structures or encumbrances thereon. The Pre-Closing RAP Work will be detailed in an exhibit to the H1 Transfer Agreement.

c. **Environmental Indemnity:** If the H1 Property is transferred to the City 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 or the Designee.

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

e. **City Obligations:** Following the closing, City shall either (i) construct all of its improvements "podium" style such that no elements of the improvements intended for human occupancy 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 at City's cost. This requirement shall survive the transfer of the H1 Property to the City. This requirement shall also be set forth as a restriction in the deed for the H1 Property, which deed restriction shall run with the land of the H1 Property.

f. **Developer Post-Closing Obligations:** Following the H1 Property Closing, Developer shall have no responsibility or liability for the H1 Property other than the Post-Closing RAP Work. This requirement shall survive the transfer of the H1 Property to City or Designee. Developer shall have no obligations for any further soil remediation or removal and no obligations with respect to soil vapor. If all of the work under the New RAP has not been completed as of the H1 Property closing such that there is Post-Closing RAP Work remaining to be implemented, the deed for the H1 Property shall also include a reservation of access rights for Developer and its contractors to complete that work and to maintain the Remediation Equipment, which reservation shall run with the land of the H1 Property or the parties shall enter into a separate easement, license or access agreement, provided, however, that in no event shall the reservation preclude development of the property for residential uses so long as that development is constructed "podium" style or with vapor intrusion mitigation systems acceptable to the regulatory agencies or impact the ability to install and maintain a then industry standard vapor intrusion mitigation system.

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

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

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

10. **Purchase Price:** The purchase price for the H1 Property shall be \$1.00. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H1 Property being transferred directly to the Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the H1 Property was deeded directly to City), then City or the Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H1 Property (to be mutually

agreed upon in the H1 Transfer Agreement), notwithstanding that the purchase price for the H1 Property is \$1.00.

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

12. **Default:**

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

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

C. **H5 and H6 Properties.** The H5 and H6 Properties will be transferred separately to the City. Developer anticipates that it will transfer the H6 Property first. However, Developer will perform the Early H5 Work, as more specifically described in Exhibit D, in order to help accelerate the development of affordable housing on the H5 Property. 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. **Transfer Agreement:** Concurrently with entering into the Development Agreement, Developer and City shall enter into separate Transfer Agreements for the transfer of the H5 Property and the H6 Property, respectively, to City in accordance with the terms and conditions set forth below (individually the "**H5 Transfer Agreement**" and the "**H6 Transfer Agreement**" and sometimes collectively the "**H5 and H6 Transfer Agreements**"). The H5 Transfer Agreement and the H6 Transfer Agreement will not be attached to the Development Agreement as Exhibit(s).

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

a. **Parcelization Condition:** City acknowledges that the H5 and H6 Properties are not legal parcels as of the Effective Date. 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. **Early H5 Work; Pad-Ready Condition:** Developer shall perform the Early H5 Work (as defined in Exhibit D) using the Early H5 CLF Funds Amount. Developer shall cause the H5 and H6 Properties to be delivered at Closing in rough-graded, pad-ready condition for City's affordable housing development, based on specifications to be provided by City and agreed to by Developer prior to execution of the H5 Transfer Agreement and the H6 Transfer Agreement. Details on this pre-closing work will be included as an exhibit to the H5 and H6 Transfer Agreements.

c. **Developer Post-Closing Obligations: Construction of Private Street.** Developer shall construct a private street serving the H block parcels, including the H5 and H6 Properties. If any such work needs to be performed after the Early H5 Work has been complete, then 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 (H6 Property (the "TCO Notice") so that vacating the private street area, in two phases, can commence. The Developer will construct the private street in two phases - the east-west portion and the north-south portion. Within a commercially reasonable time of providing the TCO Notice to Developer, the City shall vacate all construction equipment from the first phase in order to allow Developer to construct that portion of the street, including associated sidewalk and streetscape. During this period, Developer may use the alternate portion of the street for ongoing construction access. On completion of the first phase of the street, the Developer will give notice to the City that the first portion of the street is available for construction access, and the second portion is to be vacated within a commercially reasonable time after the date of Developer's notice. On completion of the second phase, the Developer will give notice to the City that both portions are complete and available for access and use. Details on this work will be included as an exhibit to each of the H5 and H6 Transfer Agreements.

3. **Leases:**

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

4. **Closing Date:** The closing under the H6 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("H6 Closing Date"). Subject to satisfaction of the closing conditions, the Closing Date for the H6 Property shall occur on or before the issuance of a Final Certificate of Occupancy for the Developer's first residential building . The closing under the H5 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("H5 Closing Date"). Subject to satisfaction of the closing conditions, the Closing Date for the H5 Property shall occur on or before

the issuance of a Final Certificate of Occupancy for the Developer's first residential unit after all existing IHO Fee Credits, including those from the dedication of H6, have been exhausted.

a. **Ongoing Property Condition:** 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 prior to and during development and construction of the H5 and H6 Properties. This requirement shall also be set forth as a restriction in the Grant Deed(s) for the H5 and H6 Properties, which deed restriction shall run with the land of each of the H5 and H6 Properties.

b. **Construction Right of Entry:** 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 Agreements shall contain provisions whereby the City (or its Designee) and the Developer agree to coordinate construction activities and schedules to ensure timely construction of the private road, as more specifically described in Section C.2(c) above required for mutual benefit of the H5 Property, the H6 Property and the other H block market rate residential parcels, and such provisions shall survive the Closing or may be in form of an easement or other agreement.

5. **Due Diligence:**

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

b. **Title:** At least ten (10) days prior to the Closing Date, Developer shall provide City with a then current title report for the H5 and H6 Properties.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections C.2(a) and 3(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer Agreements, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H5 and H6 Transfer Agreements); (ii) Developer shall not be in default under the respective H5 and H6 Transfer Agreements beyond any applicable notice and cure period; (iii) there shall have been no material adverse change in the environmental condition of the

H5 Property or the H6 Property since the date of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively; (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; and (v) the Early H5 Work shall have been completed.

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

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

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

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

8. **IHO Fee Credits:** [Note: all \$\$ are open.] As of the Effective Date, the amount of the IHO fee credit for the H5 Property shall be [\$8,352,883 (the "**H5 Transfer IHO Fee Credits**"). [\$8,352,883 IHO Fee Credit at \$18.70/rsf equals [446,678] sf of credit for market rate rentable sf (including 100% AMI units). As of the Effective Date, the amount of the IHO fee credit for the H6 Property shall be \$10,582,222 (the "**H6 Transfer IHO Fee Credits**"). \$10,582,222. IHO Fee Credit at \$18.70/rsf equals 565,894 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time of Closing, or, if the City exercises its option(s) described in Section 6.a above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

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

10. **Purchase Price:** The purchase price for the H5 Property and for the H6 Property shall be \$1.00 per property. Closing costs shall be split per local custom. If there are any closing costs charged as a result of the H5 Property and/or H6 Property being transferred directly to the applicable Designee (e.g., documentary transfer tax or recording fees, where there would otherwise be none if the subject property was deeded directly to City), then City or the applicable Designee shall be responsible for such closing costs. Additionally, in such event, such closing costs shall be determined based on the market rate for the H5 Property or H6 Property, as applicable (to be mutually agreed upon in the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable), notwithstanding that the purchase price for the H5 Property and H6 Property is \$1.00.

11. **AS IS Sale:** Except for the Developer's obligations as set forth in Section C.2(b) above and C.7(a) above, at the closing of each of the H5 Property and the H6 Property, Developer shall transfer the H5 Property and the H6 Property to City each in its AS IS WHERE IS condition

and City shall waive and release all claims against Developer related to the physical and environmental condition of the property so conveyed. City shall bear all construction costs related to the affordable housing project on the H5 Property and the H6 Property.

12. **Default:**

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

b. **Default by Developer:** If Developer defaults under either the H5 Property, the H6 Property Agreement or both, as applicable and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate the respective H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence, 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 at Developer's election either (1) paying the applicable fee or (2) providing the City with an alternate property or properties in the DSAP 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 remediated by Developer to meet all regulatory standards to allow for residential construction of that property, (iv) with no structures or encumbrances thereon.