

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: H1 Provisions
Date: Tuesday, April 6, 2021 2:59:52 PM
Attachments: [CLEAN VERSION OF H1 PROVISIONS \(MARCH 19\) \(2\).pdf](#)
[PROPOSED H1 Approach.pdf](#)

From: Andes, Pam <PAndes@allenmatkins.com>
Sent: Sunday, March 21, 2021 4:42 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: sallie@google.com; Miller, J. Gregg <gmiller@coblentzlaw.com>
Subject: H1 Provisions

[External Email]

DRAFT DOCUMENTS
SUBJECT TO DISCUSSION AND NEGOTIATION
NOT FINAL

Hi Johnny. I am attaching two documents for your review. The first called "Clean Version of H1 Provisions" is Google's DRAFT proposed outline of the H1 provisions. **Please note that this document is expressly subject to Google's review and approval so it is subject to change.** The second attachment called "Proposed H1 Approach" is a compare version of the first attachment against what you transmitted to Gregg Miller on March 18. Please circulate this to your team in advance of tomorrow morning's 7:30 a.m. call, as appropriate. Also, we need to discuss the parklands dedications tomorrow morning to be sure we are on the same page! Talk to you tomorrow morning! Thanks.

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PROPOSED H1 Approach

The following sets forth the terms regarding the City's acceptance of the H-1 Property:

- a. Developer will appoint an outside environmental consultant ("**Developer's Environmental Consultant**") with suitable experience in reviewing and overseeing the remediation work to be undertaken on the H1 Property.
- b. Developer will seek approval of a new Remedial Action Plan ("**RAP**") from the Department of Environmental Health ("**DEH**") to address the volatile organic compounds ("**VOCs**") currently present in soil, soil vapor and groundwater at the H1 Property ("**Known Pre-Existing Conditions**") which are the subject of open Geotracker case FORMER TRUE DRIVE-IN CLEANERS (T10000011874).
- c. The RAP will be designed to address the Known Pre-Existing Conditions to allow construction of a slab-on-grade (as opposed to subterranean) concrete foundation structure on the entirety of the H1 Property, with a passive vapor intrusion mitigation system integrated into the foundation system which has the capability of being activated, if needed ("**VIMS**") (collectively, the "**Intended Design**") with the ground floor limited to parking and/or commercial uses and/or resident support/offices/community space only and with residential uses allowed only on the second floor and above (the "**Intended Use**"). The H1 Property will be restricted to the Intended Design and Intended Use in the Land Use Covenant and/or Grant Deed to the H1 Property.
- d. The RAP will provide that Developer will excavate and dispose of off-site VOC- impacted soil to the extent required for the Intended Design and the Intended Use ("**Soil Removal Work**"). The RAP will also include remedial actions to be implemented by Developer for the VOC-impacted groundwater ("**Groundwater Work**"). The RAP (or an associated document such as a Site Development Plan) will also specify that the requirements for the Intended Design and Intended Use with respect to the VOCs are limited to (i) providing access to the areas underneath and/or outside of the building constructed on the Property to Developer and its contractors for the completion of the RAP Groundwater Work (which access shall be limited to the easement or license between Developer and the City), and (ii) the installation, operation, maintenance, repair and monitoring of the VIMS by the City or its Designee (including submittal of any design, installation, completion and/or monitoring reports or financial assurance for same, as required by DEH (or other agency)(collectively, "**VIMS OMM**").
- e. Developer will be responsible for implementing at its cost the Soil Removal Work in a commercially reasonable manner and timeframe, subject to the Catastrophic Cost Increase provisions below. If Developer is unable to timely perform or complete the Soil Removal Work for reasons beyond Developer's control or if the costs of implementing the Soil Removal Work are equal to or greater than one hundred fifty percent (150%) of the Developer's estimated costs of the Soil Removal 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 Soil Removal Work or Developer may decide not to transfer the H1 Property to City. The Soil Removal Work cost estimate is \$4,086,242 for VOC impacted soil remediation, associated soft costs and contingency allowance; 150% of Soil Removal Work is therefore \$6,129,363. If for reasons beyond Developer's control, Developer is ultimately unable to complete the Soil Removal Work or a Catastrophic Cost Increase occurs, then such inability to complete or the occurrence of a Catastrophic Cost Increase shall not be a Developer default and Developer shall satisfy its IHO obligations by identifying a site or sites which neither adversely affects overall yield or financial feasibility of the Project and that can

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accommodate up to the number of affordable units anticipated on the H1 Property or the Developer shall pay the IHO fees due. Developer will be responsible for completing the Groundwater Work after transfer of the H1 Property to the City, at Developer's sole cost and expense, until the lead agency issues a no further action letter ("NFA") for the RAP except that Developer shall not be responsible for the VIMS and the VIMS OMM which are the responsibility and cost of the City or its Designee.

- f. As a condition to the City's acceptance of the H1 Property, Developer's Environmental Consultant shall have issued a report, which may be relied upon by both Developer and the City, confirming that the Soil Removal Work has been completed as required by the RAP for the Intended Design and Intended Use.
- g. Developer shall provide the NFA to the City (or then owner of the building) after receipt, which will occur after the Groundwater Remediation is complete.
- h. The City has estimated **Five Hundred Thousand Dollars (\$500,000) [OPEN]** for the VIMS and VIMS OMM ("**Baseline Costs**"). If the DEH requires more than the VIMS and VIMS OMM for the Intended Design and Intended Use in the approved final RAP or associated documents ("**Additional Requirement**"), then [**OPEN -- DISCUSSION NEEDED**]
- i. Developer will keep the City informed of the timing and status throughout the RAP approval process, including providing the City with the draft and final RAP.
- j. Following the transfer of the H1 Property to City (or its Designee), Developer will respond to any inquiries or orders from the applicable regulatory agency with respect to the Groundwater Work.
- k. Developer will pay all agency oversight and permitting costs associated with the RAP.
- l. The City will pay for all oversight and permitting costs associated with the VIMS and the VIMS OMM and the Additional Requirement(s), if applicable.
- m. To the fullest extent permitted by law, Developer shall defend and indemnify the City for any and all claims for response costs or response actions or offsite third party tort claims associated with the Groundwater Work. 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.
- n. Developer shall have no responsibility or liability for the VIMS or the VIMS OMM, including, without limitation, its installation, its failure, its maintenance, repair, operation or monitoring and no responsibility for any claims arising out of the VIMS, the VIMS OMM, soil vapor, indoor air and/or any claims arising from failure of these systems.
- o. The City and Developer agree that all cost amounts herein are the cost as of the Effective Date of the Development Agreement and shall be subject to Annual Increases.

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PROPOSED H1 Approach

~~In order for~~ The following sets forth the City to accept terms regarding the City's acceptance of the H-1 site, Google must do the following Property:

- a. Developer will appoint an outside environmental consultant ("Developer's Environmental Consultant") with suitable experience in reviewing and overseeing the City will have no more than remediation work to be undertaken on the following obligations: H1 Property.
- ~~a. Google Developer will seek approval of and implement to completion a new Remedial Action Plan ("RAP") and any other documents required by the applicable regulatory agency, which must include the characteristics below.~~
- ~~b. RAP implementation shall result in the site being cleaned to an adequate level, as certified by the applicable regulatory agency, to allow construction and operation of residential uses above the first floor.~~
- ~~c. Google must clean out and dispose of all the contaminated soil to the satisfaction and approval of the applicable regulatory agency.~~
- ~~d. Google has ongoing responsibility for any ongoing remediation and monitoring including but not limited to contaminated groundwater, to the satisfaction and approval of the applicable regulatory agency and Google retains full responsibility and liability for anything related to or resulting from the remediation and monitoring activities.~~
- ~~e. Google has the obligation to deliver:~~
- ~~i. b. Certification from the applicable regulatory agency that the site will be safe for housing use with a proposed passive Department of Environmental Health ("DEH") to address the volatile organic compounds ("VOCs") currently present in soil, soil vapor intrusion (venting) mitigation system after the initial stage of cleanup is complete (before the site is transferred), and (Comment: The regulatory agency will likely not certify site is safe until vapor intrusion mitigation system is installed); and groundwater at the H1 Property ("Known Pre-Existing Conditions") which are the subject of open Geotracker case FORMER TRUE DRIVE-IN CLEANERS (T10000011874).~~
- ~~ii. A certification of fully completed clean up to apartment building owner, once Google receives it.~~
- ~~f. City or housing developer has obligation to install a passive vapor intrusion mitigation system, including a vapor barrier and passive venting system, and is responsible for correct installation to protect inhabitants. There will be no ongoing regulatory/monitoring requirements that are the responsibility of the City or housing developer.~~
- ~~g. Google has responsibility to make sure (when negotiating the RAP) that installation of vapor barrier and passive vapor intrusion mitigation (venting) system is all the City or housing developer needs to do to allow for residential use of the property, and that a passive vapor barrier and passive vapor intrusion mitigation system required by the RAP shall not cost more than \$500K in total at the time the City receives the site. If the agency requires or if Google agrees with the applicable regulatory agency on something more costly, then Google shall pay the difference.~~
- ~~h. Google must conduct all work necessary to obtain regulatory approval to permit commercial uses, services and/or property management uses on the ground floor and residential uses as outlined above.~~
- c. Google must The RAP will be designed to address the Known Pre-Existing Conditions to allow construction of a slab-on-grade (as opposed to subterranean) concrete foundation structure on the entirety of the H1 Property, with a passive vapor intrusion mitigation system integrated into

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- the foundation system which has the capability of being activated, if needed ("VIMS") (collectively, the "Intended Design") with the ground floor limited to parking and/or commercial uses and/or resident support/offices/community space only and with residential uses allowed only on the second floor and above (the "Intended Use"). The H1 Property will be restricted to the Intended Design and Intended Use in the Land Use Covenant and/or Grant Deed to the H1 Property.
- d. The RAP will provide that Developer will excavate and dispose of off-site VOC- impacted soil to the extent required for the Intended Design and the Intended Use ("Soil Removal Work"). The RAP will also include remedial actions to be implemented by Developer for the VOC-impacted groundwater ("Groundwater Work"). The RAP (or an associated document such as a Site Development Plan) will also specify that the requirements for the Intended Design and Intended Use with respect to the VOCs are limited to (i) providing access to the areas underneath and/or outside of the building constructed on the Property to Developer and its contractors for the completion of the RAP Groundwater Work (which access shall be limited to the easement or license between Developer and the City), and (ii) the installation, operation, maintenance, repair and monitoring of the VIMS by the City or its Designee (including submittal of any design, installation, completion and/or monitoring reports or financial assurance for same, as required by DEH (or other agency)(collectively, "VIMS OMM")).
- e. Developer will be responsible for implementing at its cost the Soil Removal Work in a commercially reasonable manner and timeframe, subject to the Catastrophic Cost Increase provisions below. If Developer is unable to timely perform or complete the Soil Removal Work for reasons beyond Developer's control or if the costs of implementing the Soil Removal Work are equal to or greater than one hundred fifty percent (150%) of the Developer's estimated costs of the Soil Removal 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 Soil Removal Work or Developer may decide not to transfer the H1 Property to City. The Soil Removal Work cost estimate is \$4,086,242 for VOC impacted soil remediation, associated soft costs and contingency allowance; 150% of Soil Removal Work is therefore \$6,129,363. If for reasons beyond Developer's control, Developer is ultimately unable to complete the Soil Removal Work or a Catastrophic Cost Increase occurs, then such inability to complete or the occurrence of a Catastrophic Cost Increase shall not be a Developer default and Developer shall satisfy its IHO obligations by identifying a site or sites which neither adversely affects overall yield or financial feasibility of the Project and that can accommodate up to the number of affordable units anticipated on the H1 Property or the Developer shall pay the IHO fees due. Developer will be responsible for completing the Groundwater Work after transfer of the H1 Property to the City, at Developer's sole cost and expense, until the lead agency issues a no further action letter ("NFA") for the RAP except that Developer shall not be responsible for the VIMS and the VIMS OMM which are the responsibility and cost of the City or its Designee.
- f. As a condition to the City's acceptance of the H1 Property, Developer's Environmental Consultant shall have issued a report, which may be relied upon by both Developer and the City confirming that the Soil Removal Work has been completed as required by the RAP for the Intended Design and Intended Use.
- g. Developer shall provide the NFA to the City (or then owner of the building) after receipt, which will occur after the Groundwater Remediation is complete.
- h. The City has estimated **Five Hundred Thousand Dollars (\$500,000) [OPEN]** for the VIMS and VIMS OMM ("Baseline Costs"). If the DEH requires more than the VIMS and VIMS OMM for the

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Intended Design and Intended Use in the approved final RAP or associated documents (“Additional Requirement”), then **OPEN -- DISCUSSION NEEDED**

- i. Developer will keep the City informed of the timing and status throughout the RAP Processapproval process, including providing the City with the draft and final RAP.
- j. Google must Following the transfer of the H1 Property to City (or its Designee), Developer will respond to any inquiries or orders from the applicable regulatory agency to their satisfactionwith respect to the Groundwater Work.
- k. Google must prosecute all work diligently to completion.
- l.k. Google mustDeveloper will pay all agency oversight and permitting costs associated with the above RAP.
- l. The City will pay for all oversight and permitting costs associated with the VIMS and the VIMS OMM and the Additional Requirement(s), if applicable.
- m. To the fullest extent permitted by law, GoogleDeveloper shall defend and indemnify the City for any and all claims or costs incurred arising out of contamination at the site, including but not limited to regulatory orders, enforcement actions, and for response costs or response actions or offsite third party tort claims, but excluding any associated with the Groundwater Work. 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 arising out of the City or housing developer’s 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.
- m.n. Developer shall have no responsibility or liability for the VIMS or the VIMS OMM, including, without limitation, Its installation and, its failure, its maintenance, repair, operation or monitoring and no responsibility for any claims arising out of the passiveVIMS, the VIMS OMM, soil vapor intrusion mitigation system, including a barrier, indoor air and passive venting system, and/or any claims arising from failure of these systems.

The City would like flexibility to use new/innovative building technologies such as Mass Timber which may not require a concrete podium, but is willing to commit to building a concrete slab/foundation on top of the vapor barrier and restrict residential uses to the second floor and higher.

- o. The City and Developer agree that all cost amounts herein are the cost as of the Effective Date of the Development Agreement and shall be subject to Annual Increases

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