

**From:** [Phan, Johnny](#)  
**To:** [Downtown West Project](#)  
**Subject:** FW: Google - Diridon/DW - AFH Exhibit  
**Date:** Tuesday, April 6, 2021 3:04:45 PM  
**Attachments:** [Redline Affordable Housing Program Exhibit CPDB Draft 3-4-21 - AFH + KEY TERMS EXHIBIT \(CPDB Draft 3-24-21\)-c.pdf](#)  
[AFH + KEY TERMS EXHIBIT \(CPDB Draft 3-24-21\)-c.docx](#)

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**From:** Miller, Gregg <[gmliller@coblentzlaw.com](mailto:gmliller@coblentzlaw.com)>  
**Sent:** Wednesday, March 24, 2021 1:23 PM  
**To:** Phan, Johnny <[Johnny.Phan@sanjoseca.gov](mailto:Johnny.Phan@sanjoseca.gov)>  
**Subject:** FW: Google - Diridon/DW - AFH Exhibit

[External Email]

Johnny: here is the revised Affordable Housing Program, as well as a redline against the last draft we sent to you. Most of the action is in the section re potential early delivery of H5 + H6, which, at this stage is just a proposal and part of the discussions on H1. All of this remains subject to Google's review and comment. 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 [Note to City: when will the newly adopted IHO be added to the Muni Code to replace the old 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~~ any existing or future City guidelines for inclusionary housing.

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% ~~AMH~~ of Area Median Income (as such term is defined below)) affordable residential units, and the City will through ~~good faith efforts~~ 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.¶

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## 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.~~

2. ~~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.

3. ~~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% of AMI).

4. ~~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 and improvements that are transferred to the City or an affordable housing developer designated by the City ("**Designee**") as more specifically set forth below.

5. ~~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 et seq.

6. ~~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~~ Efforts to direct ~~Commercial Linkage Fees~~ CLF generated from commercial development within the Project Site to the production of affordable housing on land transferred from Developer to the City for that use, and then to affordable housing production within the DSAP's Boundaries. ¶

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7. Developer's performance of the Early H6 Work and the Early H5 Work earlier than Developer would otherwise be obligated to perform such work.

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

### III. Inclusionary Housing Ordinance Compliance

#### A. Land Dedication; Early H5 and H6 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/or~~ (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 or if the City rejects that site, then Developer shall pay the in-lieu fee of ~~[\$43.00 per rsf]~~. The City will use Good Faith ~~efforts~~ 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 888<sup>th</sup> 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 888<sup>th</sup> 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.~~**H5 & H6 Early Work**

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In response to the City’s desire to cause the dedication of the H6 and H5 Properties to occur earlier than required, Developer is willing to perform certain work with respect to those properties earlier than necessary subject to the terms herein below. The City and Developer agree that the cost of performing the Early H5 Work and Early H6 Work is [\$19.1M] as of the Effective Date of the Development Agreement. Such costs shall be subject to Annual Increases until the date of transfer of the H6 Property and the H5 Property respectively. As such, the City agrees that Developer may utilize a portion, in the amount of [\$19.1M], of the CLF that would be due with respect to the first and any subsequent office buildings in the Project comprising [\$10.63M] to accelerate dedication of the H6 Property (“H6 Early Work CLF Amount”) and [\$8.49M] to accelerate dedication of the H5 Property (“H5 Early Work CLF Amount”, and collectively with the H6 Early Work CLF Amount, the “Early Work CLF Amount”). As set forth in more detail below, Developer will repay the Early Work CLF Amount as CLF; provided, however, that if Developer has not repaid all of the Early Work CLF on or before the expiration of the time period in which Developer must satisfy the Ten Year Development Obligation, then Developer shall pay the then-remaining balance of the Early Work CLF prior to the expiration of such time period.

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The Early H6 Work is further described in Schedule D6 (“Early H6 Work”). Developer’s obligation to perform such work will be triggered by approval of the Vertical Improvement superstructure permit associated with the first office building (“Permit”), at which time the H6 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Final COO of the first and, if applicable, any subsequent office buildings will be reduced by the H6 Early Work CLF Amount. On receipt of the Permit, Developer will begin necessary drawings and permitting work associated with demolition of the buildings included in the Early H6 Work. Once the Early H6 Work is complete (anticipated to occur within twelve (12) months of permit approval for the necessary building demolition on H6), Developer will transfer the H6 Property per the H6 Transfer Agreement, and upon (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, Developer will (a) receive an IHO credit in the same amount as the H6 Early Work CLF Amount, and (b) be obligated to re-pay the H6 Early Work CLF Amount at Final Certificate of Occupancy ("Final COO") of the office building that results in delivery of the cumulative amount of 2,500,000 rsf of office development completed by Developer. ¶

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The Early H5 Work is further described in Schedule D7 ("Early H5 Work"). Developer's obligation to perform such work will be triggered by the City's notification to Developer (the "H5 Notice") of the occurrence of either of the following, whichever is earlier, that (i) the H5 affordable housing developer has been selected and a funding commitment for predevelopment has been made or (ii) it is the City's reasonable expectation that the Temporary Certificate of Occupancy for the affordable housing development on the H6 Property will be issued approximately twelve (12) months from the date of such notice. The H5 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Final COO of the first and, if applicable any subsequent office buildings will be reduced by the H5 Early Work CLF Amount. On receipt of the H5 Notice, Developer will begin necessary drawings and permitting work associated with the Early H5 Work. Once the Early H5 Work is complete (anticipated to occur within 9 months of permit approval for the road work component of the Early H5 Work), Developer will transfer the H5 Property per the H5 Transfer Agreement, and upon (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, Developer will (a) receive an IHO credit in the same amount as the H5 Early Work CLF Amount, and (b) be obligated to re-pay the H5 Early Work CLF Amount at Final Certificate of Occupancy ("Final COO") of the office building that delivers the cumulative amount of 3,500,000 rsf completed by Developer. ¶

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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) Developer-constructed 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 Section [ ] 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~~Director of PBCE 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. ¶

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g. If Developer pursues and obtains a residential condominium map for any residential building but operates such building's residential units as rental housing, then the rental housing IHO section applies as described in Section III.B.1. At any such time that all or any portion of the mapped rental units become a for-sale unit, then the Restricted Units shall remain restricted, on a for-sale basis, at the same affordability levels. Existing tenants of the Restricted Units shall have first right of refusal to purchase their units and all subsequent sales of the Restricted Unit shall follow the City's IHO for-sale procedures. If the existing tenant does not exercise its first right of refusal, then the Developer shall make necessary relocation accommodations under [XXXX] of the [City/State] Relocation Law. A Restricted Unit shall remain subject to the applicable regulatory agreement for the full term of the applicable restrictions, and if such form of regulatory agreement changes due to the unit becoming a for-sale unit, then the amount of time as a rental Restricted Unit shall count against the for sale restricted term. [Note: Need to review City's regulatory agreement forms/provisions. City please provide.]

### 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~~<sup>rsf</sup> of each market rate residential unit and each Restricted Unit. All fees and credits under this Section II.C are in the amounts in effect in 2021 and 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)~~for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication 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 for all units. 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]~~ See Section B On-site Inclusionary Units section below. for discussion of Community Benefits units at 100% AMI, an additional 0.88% will be provided at that time of the 5% on-site inclusionary (subject to clustering in Section III.B.1(d)). Should the Developer propose a condominium, for-sale project, then the applicable in-lieu fee rate applies which is \$25/rsf, subject to applicable fee increases per IHO Code.

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]~~ 22,092,373. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: ~~\$21,346,347~~ 22,092,373 at \$18.70/rsf equals ~~1,141,516~~ 1,181,410 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]~~ 8,484,179. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: ~~\$8,352,883~~ 8,484,179 at \$18.70/rsf equals ~~[446,678]~~ 453,753 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~~10,626,206. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$~~10,582,222~~10,626,206 at \$18.70/rsf equals ~~565,894~~568,246 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 ~~an illustrative~~ 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].

<u>This table is provided for illustrative purposes only and the dollar amounts included in the table are approximate numbers based on the assumptions described in this Section C.5, all of which may change as development proceeds based on the actual development program.</u>	
<b>Affordable Land Dedication</b>	<b>IHO Credits</b>
H1	\$ <del>21.3</del> <u>22.1</u> M
H5	\$ <del>8.3</del> <u>8.5</u> M
H6	\$10.6M
<b>Total Credits</b>	<b>\$<del>40.3</del><u>41.2</u>M</b>
<del>IHO Fee Due (when Credits are exhausted)</del>	<del>\$200k</del>
<b>Total IHO Requirement</b>	<b>\$40.5M</b>

The table above ~~has been provided to illustrate~~illustrates potential IHO Fee Credits ~~and IHO Fees owed~~(in 2021 dollars) on 3,400 Developer-constructed 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~~If Developer is developing for-sale units, then the applicable fee is due based on \$18.70 - \$25/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 rsf 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~~rsf for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per ~~rentable square foot~~rsf 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 respective 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 H6 Work and Early H5 Work, as applicable. 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~~ IHO. 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. Subject to Section III.A above regarding the Early H5 Work and the Early H6 Work. 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 (a copy of the CLF is attached to the Development Agreement at Exhibit Q, 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~~ 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~~ 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:refer to DISC language ~~is OPEN~~Section in DA.]

## 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, a copy of which is attached hereto as ~~Exhibit D5~~at Exhibit \_\_\_\_\_.

~~**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¶

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**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

**END OF AFH EXHIBIT**

## KEY TERMS - TRANSFER AGREEMENT TO FOLLOW



Document comparison by Workshare 10.0 on Wednesday, March 24, 2021  
12:21:13 PM

Input:	
Document 1 ID	netdocuments://4840-1661-4623/1
Description	Affordable Housing Program Exhibit CPDB Draft 3-4-21
Document 2 ID	netdocuments://4822-9367-5490/1
Description	AFH + KEY TERMS EXHIBIT (CPDB Draft 3-24-21)
Rendering set	CPDB Set

Legend:	
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Deleted cell	
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Split/Merged cell	
Padding cell	

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Moved to	4
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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 [**Note to City**: *when will the newly adopted IHO be added to the Muni Code to replace the old 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 any existing or future City guidelines for inclusionary housing.

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% of Area Median Income (as such term is defined below)) 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 production of a minimum of one hundred and seventy (170) inclusionary housing units at 100% of AMI, which units must be provided within the market rate buildings at a rate of 5% of the total number of units, consistent with the IHO Mixed Compliance Option.
3. Developer's production of a minimum of an additional thirty (30) inclusionary housing units at 100% of AMI as a community benefit, which units must be provided within the market rate buildings at a rate of 0.88% for the first 3,400 units (which, when added to the inclusionary units described in paragraph II.b above, results in 5.88% of the first 3,400 residential units being restricted units at 100% of AMI).
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 and improvements that are transferred to the City or an affordable housing developer designated by the City (“**Designee**”) as more specifically set forth below.
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 et seq.
6. 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 CLF generated from commercial development within the Project Site to the production of affordable housing on land transferred from Developer to the City for that use, and then to affordable housing production within the DSAP's Boundaries.
7. Developer's performance of the Early H6 Work and the Early H5 Work earlier than Developer would otherwise be obligated to perform such work.

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

### **III. Inclusionary Housing Ordinance Compliance**

#### **A. Land Dedication; Early H5 and H6 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 or (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 or if the City rejects that site, 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**").

#### **H5 & H6 Early Work**

In response to the City's desire to cause the dedication of the H6 and H5 Properties to occur earlier than required, Developer is willing to perform certain work with respect to those properties earlier than necessary subject to the terms herein below. The City and Developer agree that the cost of performing the Early H5 Work and Early H6 Work is [\$19.1M] as of the Effective Date of the Development Agreement. Such costs shall be subject to Annual Increases until the date of transfer of the H6 Property and the H5 Property respectively. As such, the City agrees that Developer may utilize a portion, in the amount of [\$19.1M], of the CLF that would be due with respect to the first and any subsequent office buildings in the Project comprising [\$10.63M] to accelerate dedication of the H6 Property ("**H6 Early Work CLF Amount**") and [\$8.49M] to accelerate dedication of the H5 Property ("**H5 Early Work CLF Amount**", and collectively with the H6 Early Work CLF Amount, the "**Early Work CLF Amount**"). As set forth in more detail below, Developer will repay the Early Work CLF Amount as CLF; provided, however, that if Developer has not repaid all of the Early Work CLF on or before the expiration of the time period in which Developer must satisfy the Ten Year Development Obligation, then Developer shall pay the then-remaining balance of the Early Work CLF prior to the expiration of such time period.

The Early H6 Work is further described in Schedule D6 (“**Early H6 Work**”). Developer’s obligation to perform such work will be triggered by approval of the Vertical Improvement superstructure permit associated with the first office building (“**Permit**”), at which time the H6 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Final COO of the first and, if applicable, any subsequent office buildings will be reduced by the H6 Early Work CLF Amount. On receipt of the Permit, Developer will begin necessary drawings and permitting work associated with demolition of the buildings included in the Early H6 Work. Once the Early H6 Work is complete (anticipated to occur within twelve (12) months of permit approval for the necessary building demolition on H6), Developer will transfer the H6 Property per the H6 Transfer Agreement, and upon (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, Developer will (a) receive an IHO credit in the same amount as the H6 Early Work CLF Amount, and (b) be obligated to re-pay the H6 Early Work CLF Amount at Final Certificate of Occupancy (“**Final COO**”) of the office building that results in delivery of the cumulative amount of 2,500,000 rsf of office development completed by Developer.

The Early H5 Work is further described in Schedule D7 (“**Early H5 Work**”). Developer’s obligation to perform such work will be triggered by the City’s notification to Developer (the “**H5 Notice**”) of the occurrence of either of the following, whichever is earlier, that (i) the H5 affordable housing developer has been selected and a funding commitment for predevelopment has been made or (ii) it is the City’s reasonable expectation that the Temporary Certificate of Occupancy for the affordable housing development on the H6 Property will be issued approximately twelve (12) months from the date of such notice. The H5 Early Work CLF Amount will be credited to Developer against its CLF payment obligation for the first and, if applicable, any subsequent office buildings such that the cash payment of CLF owed at Final COO of the first and, if applicable any subsequent office buildings will be reduced by the H5 Early Work CLF Amount. On receipt of the H5 Notice, Developer will begin necessary drawings and permitting work associated with the Early H5 Work. Once the Early H5 Work is complete (anticipated to occur within 9 months of permit approval for the road work component of the Early H5 Work), Developer will transfer the H5 Property per the H5 Transfer Agreement, and upon (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, Developer will (a) receive an IHO credit in the same amount as the H5 Early Work CLF Amount, and (b) be obligated to re-pay the H5 Early Work CLF Amount at Final Certificate of Occupancy (“**Final COO**”) of the office building that delivers the cumulative amount of 3,500,000 rsf completed by Developer.

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: [REDACTED].

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) Developer-constructed 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 Section [REDACTED] 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 Director of PBCE 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.

g. If Developer pursues and obtains a residential condominium map for any residential building but operates such building's residential units as rental housing, then the rental housing IHO section applies as described in Section III.B.1. At any such time that all or any portion of the mapped rental units become a for-sale unit, then the Restricted Units shall remain restricted, on a for-sale basis, at the same affordability levels. Existing tenants of the Restricted Units shall have first right of refusal to purchase their units and all subsequent sales of the Restricted Unit shall follow the City's IHO for-sale procedures. If the existing tenant does not exercise its first right of refusal, then the Developer shall make necessary relocation accommodations under [XXXX] of the [City/State] Relocation Law. A Restricted Unit shall remain subject to the applicable regulatory agreement for the full term of the applicable restrictions, and if such form of regulatory agreement changes due to the unit becoming a for-sale unit, then the amount of time as a rental Restricted Unit shall count against the for sale restricted term. **Note:** *Need to review City's regulatory agreement forms/provisions. City please provide.*

### 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 rsf of each market rate residential unit and each Restricted Unit. All fees and credits under this Section II.C are in the amounts in effect in 2021 and 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 for the San Francisco Urban area published by McGraw Hill on January 1 of every year, or its successor publication 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 for all units. 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. See Section B On-site Inclusionary Units for discussion of Community Benefits units at 100% AMI, an additional 0.88% will be provided at that time of the 5% on-site inclusionary (subject to clustering in Section III.B.1(d)). Should the Developer propose a condominium, for-sale project, then the applicable in-lieu fee rate applies which is \$25/rsf, subject to applicable fee increases per IHO Code.

2. Land Dedication (H1 Property) - IHO Fee Credit. 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 \$22,092,373. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$22,092,373 at \$18.70/rsf equals 1,181,410 sf of credit for residential rsf (including market rate and 100% AMI units).]

3. Land Dedication (H5 Property) - IHO Fee Credit. 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. As of the Effective Date, the value of the credit for the H5 Property is \$8,484,179. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$8,484,179 at \$18.70/rsf equals 453,753sf of credit for residential rentable sf (including market rate and 100% AMI units).]

4. Land Dedication (H6 Property) - IHO Fee Credit. 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 \$10,626,206.

The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$10,626,206 at \$18.70/rsf equals 568,246 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

5. Land Dedication - IHO Fee Credit.

The table below provides an illustrative 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.

This table is provided for illustrative purposes only and the dollar amounts included in the table are approximate numbers based on the assumptions described in this Section C.5, all of which may change as development proceeds based on the actual development program.	
Affordable Land Dedication	IHO Credits
H1	\$22.1M
H5	\$8.5M
H6	\$10.6M
<b>Total Credits</b>	<b>\$41.2M</b>
<b>Total IHO Requirement</b>	<b>\$40.5M</b>

The table above illustrates potential IHO Fee Credits (in 2021 dollars) on 3,400 Developer-constructed residential units. If Developer is developing for-sale units, then the applicable fee is \$25/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 rsf fee shall apply.

6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) not accrued any IHO Fee credits or (ii) 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 rsf for each residential unit (in addition to providing 5% on-site inclusionary units at 100% AMI) or (b) \$43.00 per rsf 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 respective 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 H6 Work and Early H5 Work, as applicable. 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 IHO. 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. Subject to Section III.A above regarding the Early H5 Work and the Early H6 Work, Developer shall pay the CLF in accordance with the adopted Commercial Linkage Fee Ordinance in effect on the Effective Date of the Development Agreement (a copy of

the CLF is attached to the Development Agreement at Exhibit Q, subject to Annual Increases as described in the Commercial Linkage Fee Ordinance.

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**:refer to DISC language Section in DA.]

## **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, a copy of which is attached hereto at Exhibit \_\_\_\_.

**END OF AFH EXHIBIT**

**KEY TERMS - TRANSFER AGREEMENT TO FOLLOW**