

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: PROPOSED H1 Approach
Date: Tuesday, April 6, 2021 3:06:54 PM
Attachments: [PROPOSED H1 Approach.pdf](#)
[Pam's Rewrite of H1 Provisions \(3\).docx](#)

From: Andes, Pam <PAndes@allenmatkins.com>
Sent: Thursday, March 25, 2021 8:58 AM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Cc: Gregg Miller <gmiller@coblenzlaw.com>
Subject: PROPOSED H1 Approach

[External Email]

Good morning, Johnny. Attached are proposed revisions to the H1 Approach marked against the version we discussed on our all-hands call yesterday. The Word version is the clean version. Talk to you soon!

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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 retain 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. Developer will contract with this consultant and be solely responsible for the work of this consultant.
- b. Developer will seek approval of a new Remedial Action Plan ("**RAP**") from the Department of Environmental Health or other environmental regulatory ~~agencies~~agency(ies) with jurisdiction that Developer may be referred to by the Department of Environmental Health ("**DEH**") to address the volatile organic compounds ("**VOCs**") and any other contaminants of concern to the DEH ("**COCs**") currently present in soil, soil vapor and groundwater at the H1 Property ("**Environmental Conditions**"), including, but not limited to, those which are the subject of open Geotracker case FORMER TRUE DRIVE-IN CLEANERS (T10000011874).
- c. The RAP will be designed to address the Environmental Conditions to allow construction of a concrete foundation structure without an occupiable basement 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 COC impacted soil, to the extent required by DEH for the Intended Design and the Intended Use, at an appropriate disposal facility ("**Soil Removal Work**"). The RAP will also include remedial actions to be implemented by Developer to address DEH requirements for the groundwater ("**Groundwater Work**"). The RAP will be designed to meet all applicable environmental regulatory requirements to allow for the Intended Use in combination with the Intended Design. Any ongoing work of Developer (after the site is transferred to the City) shall not interfere with the City's planned building and ~~needs to~~shall be accessed from outside the property line and not disturb the vapor barrier or the other elements of the VIMS. ~~Developer is solely responsible for any liability associated with the Groundwater Work.~~ The RAP will also provide that the City or its Designee that builds the building on the H1 Property will install, maintain and monitor the passive VIMS (with the ability to convert to an active VIMS through the addition of a fan or motor and shall activate it if and when required by DEH)(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 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 ("Six Million One Hundred Twenty-Nine Thousand Three Hundred Sixty-Three Dollars (\$6,129,363) (such amount being a "Catastrophic~~

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Cap" and such event being a "Catastrophic Cost Increase"), then, Developer may decide not to transfer the H1 Property to City. ~~The Soil Removal Work current 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 ("Catastrophic Cap").~~ If a Catastrophic Cost Increase occurs, then ~~the occurrence of a Catastrophic Cost Increase~~ Developer shall not be a ~~Developer~~ Developer in 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 in the DSAP which~~ can accommodate at least 300 affordable units as anticipated on the H1 Property, or ~~the Developer shall pay~~ pays 150% of the IHO fees due or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominiumizing a portion of a high rise residential project for affordable housing. Developer shall be solely responsible for completing the Groundwater Work after transfer of the H1 Property to the City, at Developer's sole cost and expense, and for obtaining a no further action letter ("NFA") from the ~~lead agency~~ DEH, except as to the responsibility of the City or its Designee for the VIMS and the VIMS OMM as set forth herein.

- 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 Work is complete.
- h. The City will pay a maximum of Five Hundred Thousand Dollars (\$500,000) for the VIMS and VIMS OMM ("**Baseline Costs**"). ~~If cost~~ the costs of the ~~VIMS and VIMS OMM~~ for the Intended Design and Intended Use, any ongoing monitoring, as well as without limitation, DEH oversight and permitting costs, in the approved final RAP (or associated documents ~~results in costs~~) are in excess of Baseline Costs, ~~then the cost beyond Baseline Cost~~ ("**Excess Costs**") ~~shall be~~), as determined immediately prior to the scheduled H1 Property Closing Date by an independent consultant retained by the Developer and acceptable to the City ("**RAP Consultant**"). ~~If the sum of Developer funded") then the following provisions shall apply. The RAP Consultant will estimate costs (e.g. Soil Removal Work, other anticipated Developer clean up both operational and installation hard costs, and Excess Costs) is more than the Catastrophic Cap, then Developer may elect to follow the procedure defined if the Catastrophic Cost Amount is exceeded.) based on unescalated dollars.~~

- i. ~~All costs described above including but not limited to~~ If the Catastrophic cost amount and Excess Costs, plus the Baseline costs of (A) the Soil Removal Work costs and the excess cost shall be inflated at CCI until (B) the time that Consultant makes their determination. Any compensation provided by other anticipated Developer for ongoing clean-up costs shall only increase until such time as ((A) and (B) collectively, "Developer makes that payment Remediation Costs"), are equal to or more than the Catastrophic Cap, then Developer may elect to follow the procedures provided in subsection (e) above for Catastrophic Cost Increases.

If the Excess Costs, plus the Developer Remediation Costs, are less than the Catastrophic Cap, Developer shall fund the Excess Costs to City-

- ii. ~~The at the H1 Property Closing and the~~ City shall hold and invest the Excess Costs so funded by Developer at the H1 Property Closing Date in trust to pay the Excess Costs as

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they accrue over time. ~~Consultant will assume this trust accrues over time in their analysis of Excess Costs.~~

- 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 at its sole cost and expense to any inquiries, orders or actions from any regulatory agency with respect to the Groundwater Work or the Environmental Conditions other than the "Building Conditions". The term "**Building Conditions**" shall mean the conditions inside of the future building and/or parking area in the building, including, without limitation, indoor air conditions.
- k. Developer will pay all agency oversight and permitting costs associated with the RAP and obtaining the NFA.
- l. To the fullest extent permitted by law, Developer shall indemnify, defend and hold harmless the City for any and all claims for response costs or response actions or any third party claims associated with the Groundwater Work or the Environmental Conditions but excluding the Building Conditions. Additionally, 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 alleged 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. The indemnity and defense obligations 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 the extent that any actions or claims arise from the negligence or willful misconduct of City or the Designee.
- m. Developer shall have no responsibility or liability for the Building Conditions, 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 Building Conditions, VIMS, the VIMS OMM, soil vapor, indoor air and/or any claims arising from failure of these systems~~-.2~~.
- n. The City and Developer agree that all cost amounts set forth herein or determined hereafter pursuant to its terms are the cost as of the Effective Date of the Development Agreement and shall be subject to Annual Increases.

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- c. The RAP will be designed to address the Environmental Conditions to allow construction of a concrete foundation structure without an occupiable basement 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.
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- 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 the costs of implementing the Soil Removal Work are equal to or greater than Six Million One Hundred Twenty-Nine Thousand Three Hundred Sixty-Three Dollars (\$6,129,363) (such amount being a "**Catastrophic Cap**" and such event being a "**Catastrophic Cost Increase**"), then, Developer may decide not to transfer the H1 Property to City. If a Catastrophic Cost Increase occurs, then Developer shall not be in default and Developer shall

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satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least 300 affordable units as anticipated on the H1 Property, or Developer pays 150% of the IHO fees due or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominiumizing a portion of a high rise residential project for affordable housing. Developer shall be solely responsible for completing the Groundwater Work after transfer of the H1 Property to the City, at Developer's sole cost and expense, and for obtaining a no further action letter ("**NFA**") from the DEH, except as to the responsibility of the City or its Designee for the VIMS and the VIMS OMM as set forth herein.

- 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 Work is complete.
- h. The City will pay a maximum of Five Hundred Thousand Dollars (\$500,000) for the VIMS and VIMS OMM ("**Baseline Costs**"). If the costs of the VIMS and VIMS OMM for the Intended Design and Intended Use, any ongoing monitoring, as well as without limitation, DEH oversight and permitting costs, in the approved final RAP (or associated documents) are in excess of Baseline Costs ("**Excess Costs**"), as determined immediately prior to the scheduled H1 Property Closing Date by an independent consultant retained by the Developer and acceptable to the City ("**RAP Consultant**") then the following provisions shall apply. The RAP Consultant will estimate costs (both operational and installation hard costs) based on unescalated dollars.
 - i. If the Excess Costs, plus the costs of (A) the Soil Removal Work costs and (B) the other anticipated Developer clean-up costs ((A) and (B) collectively, "**Developer Remediation Costs**"), are equal to or more than the Catastrophic Cap, then Developer may elect to follow the procedures provided in subsection (e) above for Catastrophic Cost Increases.
 - ii. If the Excess Costs, plus the Developer Remediation Costs, are less than the Catastrophic Cap, Developer shall fund the Excess Costs to City at the H1 Property Closing and the City shall hold and invest the Excess Costs in trust to pay the Excess Costs as they accrue over time.
- 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 at its sole cost and expense to any inquiries, orders or actions from any regulatory agency with respect to the Groundwater Work or the Environmental Conditions other than the "Building Conditions". The term "**Building Conditions**" shall mean the conditions inside of the future building and/or parking area in the building, including, without limitation, indoor air conditions.
- k. Developer will pay all agency oversight and permitting costs associated with the RAP and obtaining the NFA.
- l. To the fullest extent permitted by law, Developer shall indemnify, defend and hold harmless the City for any and all claims for response costs or response actions or any third party claims associated with the Groundwater Work or the Environmental Conditions but excluding the Building Conditions. Additionally, 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

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actions or claims are caused by alleged 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. The indemnity and defense obligations 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 the extent that any actions or claims arise from the negligence or willful misconduct of City or the Designee.

- m. Developer shall have no responsibility or liability for the Building Conditions, 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 Building Conditions, VIMS, the VIMS OMM, soil vapor, indoor air and/or any claims arising from failure of these systems.
- n. The City and Developer agree that all cost amounts set forth herein or determined hereafter pursuant to its terms are the cost as of the Effective Date of the Development Agreement and shall be subject to Annual Increases.