

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Google - Diridon/DW - DA Exh D Edits for 430 call
Date: Tuesday, May 18, 2021 11:34:00 AM
Attachments: [GM Notes on Exhibit D City's 5-10-21 updated version.docx](#)

From: Miller, Gregg <gmler@coblenzlaw.com>
Sent: Tuesday, May 11, 2021 4:24 PM
To: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Subject: Google - Diridon/DW - DA Exh D Edits for 430 call

[External Email]

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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 Schedule 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 Sections 5.08.570 and Sub-Section F of Section 5.08.610 of the IHO, the City Manager has determined that this Affordable Housing Program represents an acceptable alternative method of meeting the City's inclusionary housing requirements because, based on its terms, it will provide as much or more affordable housing at the same or lower income levels, and of the same or superior quality of design and construction, and will otherwise provide greater public benefit, than compliance with the express requirements of the IHO and any existing or future City guidelines for inclusionary housing. See Schedule D2 for IHO Implementation Guidelines applicable to this Affordable Housing Program for the administrative procedures related to IHO compliance.

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.

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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 2.15 acres, to the City (or its Designee, [as defined below](#)) for use in the production of affordable housing. See Schedule 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.2 above, results in 5.88% of the first 3,400 residential units being restricted units at 100% of AMI).
4. Developer's payment of IHO in-lieu fees (either \$18.70 per rentable square foot ("rsf", as defined in the "Applying the In-lieu Fee on a Square Footage Basis" section of the IHO Supplemental Memo to San Jose City Council, dated February 22, 2021 and attached here at Schedule D5) 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)("IHO Fee") for all residential developments in the Project area pursuant to the IHO, subject to credits for the value of the H1, H5 and H6 Properties as listed in the table below that are transferred to the City or an affordable housing developer, designated by the City, [that is an "Affordable Housing Developer" as defined in the IHO and has entered into a contract with the City for development of affordable housing on the applicable Property](#) ("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

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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 2.15 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 (Schedule 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.

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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 ~~value~~ cost of performing the Early H5 Work and Early H6 Work and transferring the H6 and H5 Properties is \$19,300,000 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 \$19,300,000, of the CLF that would be due with respect to the first and any subsequent office buildings in the Project comprising \$10,100,000 (which amount represents the sum of the land value of \$8.8 million and the \$1.3 million value of Early H6 Work) to accelerate dedication of the H6 Property ("**H6 Early Work CLF Amount**") and \$9,200,000 (which

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amount represents the sum of the land value of \$6.1 million and the \$3.1 million value of Early H5 Work 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 demolition and removal of the existing buildings, rough grading of the H6 Property, street and sidewalk improvements, and other work comprising the early H6 work will be further described in an exhibit to the Transfer Agreement for the H6 Property (“**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 Temporary Certificate of Occupancy 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, Developer will transfer the H6 Property per the H6 Transfer Agreement but in no event will the Closing Date for the transfer of the H6 Property be later than the date that is fifteen (15) months from the date on which Developer’s obligation to perform the Early H6 Work is triggered, as may be extended as more specifically set forth in the Transfer Agreement for the H6 Property. 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 as set forth in Section III.C.4 below, and (b) be obligated to re-pay the H6 Early Work CLF Amount at Temporary Certificate of Occupancy of the office building that results in delivery of the cumulative amount of 2,500,000 sf of office development completed by Developer. Notwithstanding the foregoing, (1) if the circumstances set forth in Section 19.2(a) of the Transfer Agreement for the H6 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H6 Work until the Transferor’s Work has been Completed (as such terms are defined in the Transfer Agreement) or (2) if the circumstances set forth in Section 19.2(b) of the Transfer Agreement for the H6 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H6 Work regardless of whether the Transferor’s Work is eventually Completed (as such terms are defined in the Transfer Agreement) pursuant to said Section 19.2(b). ~~Note: depending on where we land in 19.2 of the Transfer Agreements, need to add language here re not getting full CLF credit for undone Early Work.~~

The demolition and removal of the existing buildings, rough grading of the H5 Property, street and sidewalk improvements, and other work comprising the early H5 work will be further described in an exhibit to the Transfer Agreement for the H5 Property (“**Early H5 Work**”).

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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, but no earlier than the Commencement of Construction of the affordable housing development on the H6 Property 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 Temporary Certificate of Occupancy 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, Developer will transfer the H5 Property per the H5 Transfer Agreement, but in no event will the Closing Date for the transfer of the H5 Property be later than twelve (12) months from the date of the H5 Notice, as such 12-month deadline may be extended as more specifically set forth in the Transfer Agreement for the H5 Property. 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 set forth in Section III.C.3 below as the H5 Early Work CLF Amount,~~ and (b) be obligated to re-pay the H5 Early Work CLF Amount at Temporary Certificate of Occupancy of the office building that delivers the cumulative amount of 3,500,000 sf completed by Developer. Notwithstanding the foregoing, (1) if the circumstances set forth in Section 19.2(a) of the Transfer Agreement for the H5 Property arise, then Developer shall not receive a credit against its CLF payment in the amount of the costs of the Early H5 Work until the Transferor's Work has been Completed (as such terms are defined in the Transfer Agreement) or (2) if the circumstances set forth in Section 19.2(b) of the Transfer Agreement for the H6 Property arise, then the amount of Developer's credit against its CLF payment with respect to costs of the Early H6 Work shall be limited to the costs of such portion of the Early H6 Work that Developer has completed as of the Closing. ~~[Note: depending on where we land in 19.2 of the Transfer Agreements, need to add language here re not getting full CLF credit for undone Early Work.]~~

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If the triggers described above (Permit and H5 Notice) in conjunction with the time intervals to complete the respective Early Work and close the transfers of the Properties have not resulted in the Early Work being completed and closings of the transfers occurring to generate enough IHO credits to process a TCO for an additional residential unit, then Developer shall be required to transfer H6, and then H5, to generate enough IHO credit to cover the TCO requirements on the next residential building.

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

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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 [Schedule D5: 5.08.525](#).

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, as such deed-restrictions are set forth in Schedule D3 attached hereto.

c. The Restricted Units shall be integrated into market rate housing, in accordance with the dispersion requirements of Section 5.08.470 of the IHO and this Affordable Housing Program, 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,

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approved by the City's Director of Housing, 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 the applicable relocation provisions of Municipal Code Section 20.170-400 thru 20.170-460 as in effect on the Effective Date, whereupon the unit may be sold to a qualified buyer at the then-applicable sales price for 100% AMI buyers per the City's IHO for-sale procedures. 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.

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

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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 (as defined in Schedule D-4) 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 \$22,034,898. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$22,034,898 at \$18.70/rsf equals 1,179,337 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 \$9,226,561. The amount of the credit and the amount of the IHO Fee shall be subject to Annual Increases. [Example: \$9,226,561 at \$18.70/rsf equals 493,399 sf of credit for residential rentable sf (including market rate and 100% AMI units).]

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6. Unavailability or Insufficient Amount of IHO Fee Credits. If Developer has (i) not accrued sufficient 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 lieu of providing all of the required on-site units 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 provided that Developer's sale(s) of any such excess IHO Fee Credits must close and be utilized as part of an approved Affordable Housing Compliance Plan, so long as the City does not unreasonably withhold approval of the Affordable Housing Compliance Plan, within five (5) years after the expiration or termination of the Term.

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; number of units broken down by unit type (e.g., studio, one bedroom); the leasing and marketing plan for below-market rate units and a description of the access to amenities and the types of fixtures for the market rate units and the below-market rate units, consistent with the Guidelines attached hereto at Schedule D2. 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 Housing Department of Developer's application submittal in order to provide the Housing Department's production 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.

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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 D3 (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 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

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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

This Affordable Housing Program shall be subject to modification pursuant to the Development Agreement's provisions regarding acquisition by DISC Agencies or Other Transit Agencies, as applicable.

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. "**CLF Resolution**" means the City of San José Resolution No. 79705, adopted September 1, 2020, Establishing the Amounts of Commercial Linkage Fee in Accordance with Chapter 5.11 of Title 5 of the San Jose Municipal Code, a copy of which is attached to the Development Agreement at [Exhibit Q](#).

3. "**Commercial Linkage Fee**" or "**CLF**" means the commercial linkage fee adopted by the City Council as set forth in Chapter 5.11 of Title 5 of the San José Municipal Code in effect on the Effective Date of this Development Agreement, and as further set forth in the CLF Resolution.

4. "**Fund**" means the Community Stabilization and Opportunity Pathways Fund described in [Exhibit H](#) to the Development Agreement.

5. "**H1 Property**" means that property as generally shown on [Schedule D1](#) attached to this Affordable Housing Plan.

6. "**H5 Property**" means that property as generally shown on [Schedule D1](#) attached to this Affordable Housing Plan.

7. "**H6 Property**" means that property as generally shown on [Schedule D1](#) attached to this Affordable Housing Plan.

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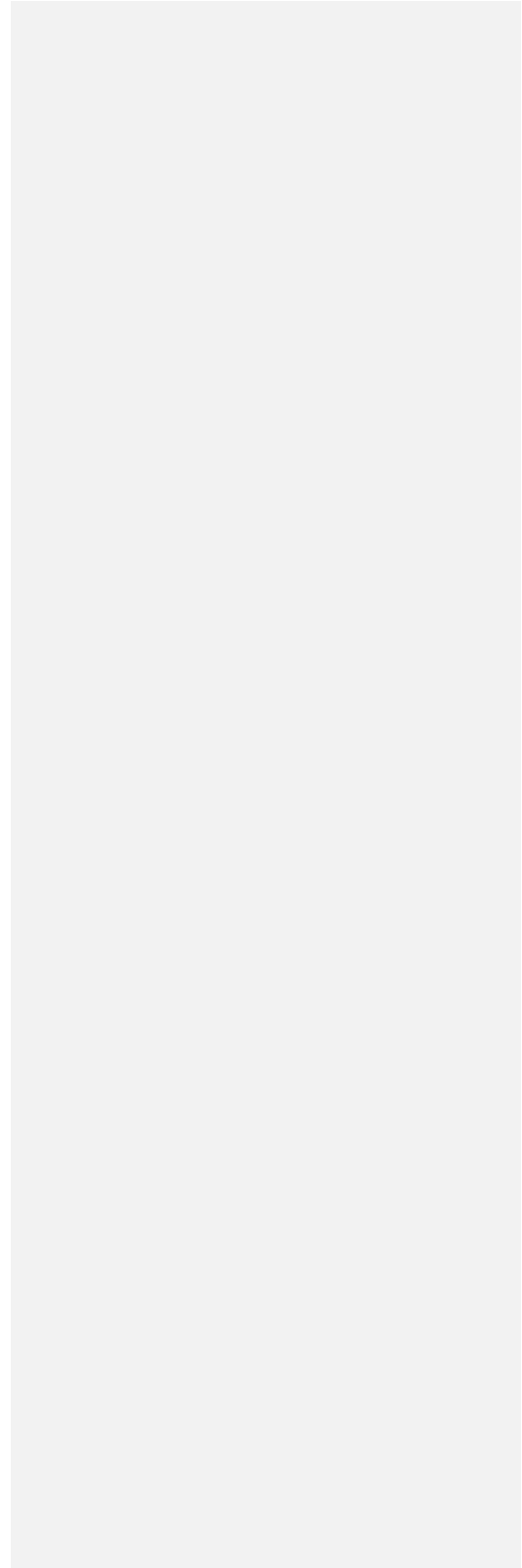
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8. **"Inclusionary Housing Ordinance"** or **"IHO"** means the City of San José Inclusionary Housing Ordinance as set forth in Chapter 5.08 of Title 5 of the San José Municipal Code, adopted by Ordinance No. 30538, dated March 9 2021, related Resolutions No. 79903 and _____, and Supplemental Memo to San Jose City Council, dated February 22, 2021, copies of which are attached hereto at Schedule D5.

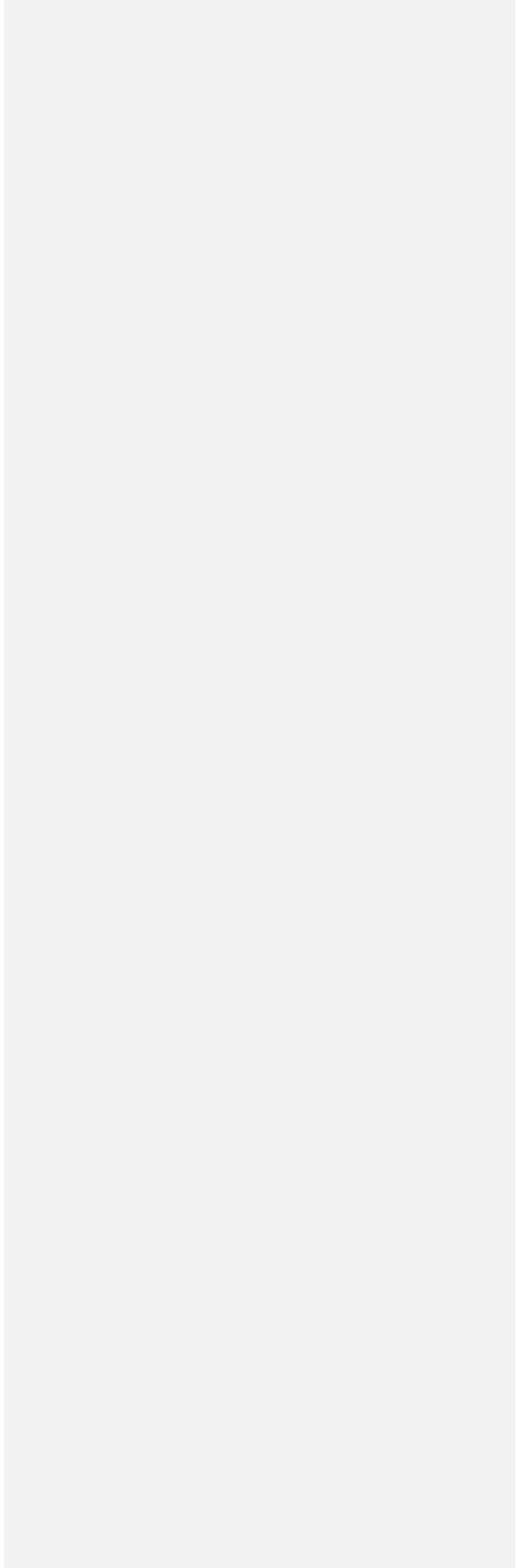
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Schedule D2



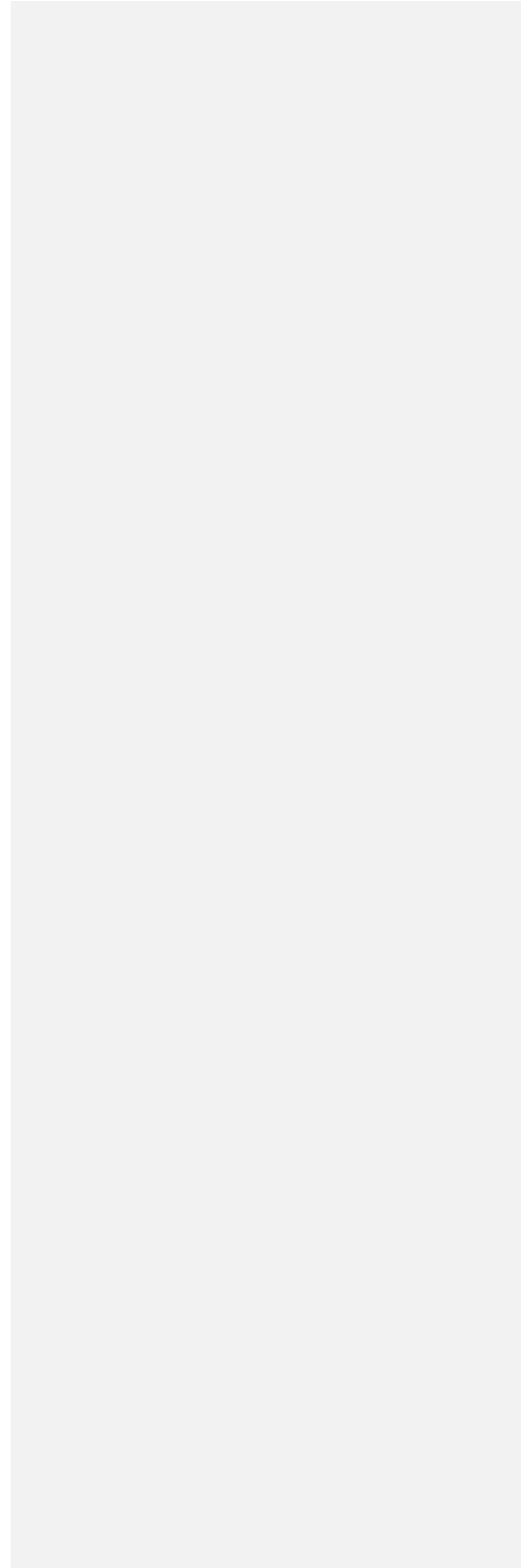
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Schedule D3



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Schedule D4



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Schedule D4 to Affordable Housing Program

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

Land Dedication – Key Terms of Transfer Agreements for Parcels H1, H5 and H6

In the event that there is a conflict between this Schedule D4 and the Transfer Agreements, then the Transfer Agreements shall prevail. [Note: City reviewing]

A. **Land Dedication.**

Developer shall dedicate the H1, H5 and H6 Properties, consisting of a total of approximately 2.15 acres of real property, to the City or the City's ~~designated affordable housing developer ("Designee")~~ pursuant to separate Transfer Agreements between Developer and the City. Below are the key terms to be included in the respective Transfer Agreements.

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B. **H1 Property.**

1. **Transfer Agreement:** Concurrently with entering into the Development Agreement, Developer and City shall enter into a separate Transfer Agreement for the transfer of the H1 Property to City in accordance with the terms and conditions set forth below and the terms and conditions of **Attachment A** attached hereto and incorporated herein (the "**H1 Transfer Agreement**"). The H1 Transfer Agreement will not be attached to the Development Agreement as an Exhibit. Any initially capitalized term used but not defined herein shall have the meaning given it in **Attachment A**.

2. **Legal Description of H1:** The indicative site plan of the property to be transferred shall be set forth in the H1 Transfer Agreement, and legal description to be provided prior to the Closing Date (as defined below) in accordance with Developer's Final Map or after the Closing Date, if mutually agreed upon with the City.

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

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

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b. **Construction Right of Entry:** Effective as of the closing, City shall grant Developer such construction right of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H1 Property.

c. **Remediation Easement:** Effective as of the closing, City shall grant Developer such remediation easements, licenses or access agreements as are necessary for Developer to implement any Groundwater Work as provided in **Attachment A**, subject to the terms and limitations set forth in **Attachment A** provided the work does not prevent the City from building a building from property line to property line and that the access does not interfere with the VIMS system.

4. **Closing Date:** The closing under the H1 Transfer Agreement shall occur on a date selected by Developer on at least sixty (60) days' prior written notice to City ("**Closing Date**"). Subject to satisfaction of the closing conditions, the H1 Closing Date shall occur after the H5 Property and the H6 Property have been transferred to the City and on or before the issuance of a Temporary Certificate of Occupancy on the next residential unit that triggers payment of the IHO Fee after exhaustion of all IHO Fee Credits from the transfer of the H6 and H5 Properties.

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5. **Due Diligence:**

a. **Access:** City shall be entitled to the right of access to the H1 Property to conduct its due diligence on the terms and conditions set forth in the H1 Transfer Agreement. City shall complete its due diligence within ninety (90) days after execution of the Transfer Agreement ("**Diligence Period**"). Subject to the terms and conditions of the H1 Transfer Agreement (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence shall include site inspections only, given Developer's obligations as set forth in **Attachment A**.

b. **Title:** City shall review and approve title to the Property during the Diligence Period. Developer shall provide City with a then current title report for the H1 Property on or before execution of the Transfer Agreement.

6. **Conditions to Closing:**

a. **City Conditions:** In addition to the closing conditions specifically set forth in Sections B.3 above and **Attachment A**, the following shall be conditions to the closing under the H1 Transfer Agreement, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H1 Transfer Agreement but which shall include any exceptions recorded in connection with obtaining the Approvals or required in order to satisfy the Approvals, as well as any exceptions recorded in connection with the development pursuant to the Approvals consistent with the Approvals); and (ii) Developer shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period.

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The City's ability to secure funds or other commitments to enable the construction of affordable housing on the H1 Property shall not be a condition to closing; provided, however, that the City shall have the right to extend ("Extension") the Closing Date two (2) times for periods of one hundred eighty (180) days each (each, an "Extension Period", the first such extension of the Closing Date being the "Extended Closing Date" and the second such extension of the Closing Date being the "Outside H1 Closing Date") if the City has not identified the Designee by the scheduled Closing Date or Extended Closing Date, as applicable, by providing Developer with written notice of the exercise of the extension together with a status report of City's efforts to identify the Designee together with documentation evidencing City's Good Faith Efforts to identify and select the Designee. If the City has identified the Designee by the Extended Closing Date, or has extended closing a second time, then by the Outside H1 Closing Date, the Grant Deed shall identify the Designee as the transferee/grantee of the H1 Property. If City has not identified and selected the Designee by the Extended Closing Date or Outside H1 Closing Date, as applicable, then there will be no further extensions of the closing and City shall take title to the H1 Property in City's name or be in default of the H1 Transfer Agreement. In addition, if, as set forth in the H1 Transfer Agreement, City elects to defer the transfer of title of H1 Property to City (or its Designee) to the Extended Closing Period or Outside H1 Closing Date, as applicable, then the City shall reimburse Developer for property taxes payable with respect to such Property during the deferral period and Developer's costs to light, fence, insure, and maintain the property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) described in this section to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s). Developer shall provide the City with reasonable documentation of such taxes and costs.

b. Developer Conditions: In addition to the closing conditions specifically set forth in **Attachment A**, the following shall be conditions to the closing under the H1 Transfer Agreement, for Developer's benefit: (i) the City shall not be in default under the H1 Transfer Agreement beyond any applicable notice and cure period, and (ii) Developer is obligated to transfer the H1 Property in order to satisfy its affordable housing requirements equal to the value of the IHO Fee Credit (as defined below) for the H1 Property (i.e., see Section B.8) as a result of the amount of market rate units being developed.

c. Pad-Ready Condition. Provided that the conditions set forth in **Attachment A** are satisfied, Developer shall cause the H1 Property to be delivered at closing in rough-graded, pad-ready condition for City's affordable housing development, based on the scope included as an exhibit to the H1 Transfer Agreement.

d. Assignment: Following the closing, City may assign its rights and obligations under **Attachment A** that expressly survive the closing to a developer of affordable housing.

8. IHO Fee Credits: As of the Effective Date, the amount of the IHO Fee Credit for the H1 Property shall be \$22,034,898 (the "**H1 Transfer IHO Fee Credits**"). \$22,034,898

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IHO Fee Credit at \$18.70/rsf equals 1,178,337 sf of credit for market rate rentable sf (including 100% AMI units). IHO Fee Credits are earned at time of closing or, if the City exercises its option(s) described in Section 6(a) above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City's exercise of its Extension right(s).

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

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

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

12. **Default:**

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

b. **Default by Developer:** If Developer defaults under the H1 Transfer Agreement and fails to perform the obligations thereunder, City's sole and exclusive remedy shall be to terminate the H1 Transfer Agreement, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence in which case Developer would not receive any H1 Transfer IHO Fee Credits and Developer shall 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 condominium-izing a portion of a high rise residential project for affordable housing. The payment of 150% of the IHO Fees due shall be made in full to the City within thirty (30)

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days ~~of the Developer's default~~ after City's election to receive 150% of the IHO Fees, and Developer shall receive IHO Fee Credits for 100% of the IHO Fees but no credit for the additional 50% owed as a result of the default.

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C. **H5 and H6 Properties.** The H5 and H6 Properties will be transferred separately to the City. Developer anticipates that it will transfer the H6 Property first. Prior to such transfers, Developer will perform the Early H5 and H6 Work, as more specifically described in Section III.A of Exhibit D to the Development Agreement (the "**Early H5 and H6 Work**"), in order to help accelerate the development of affordable housing on the H5 and H6 Properties. Developer will retain ownership of the mid-block crossing between the H5 and H6 Properties and shall provide to City a construction easement over the mid-block crossing for the time period covering construction on the H5 Property, H6 Property, or combination thereof, plus an additional six (6) months after the issuance of the last Temporary Certificate of Occupancy for a building on the H5 and H6 Properties.

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

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

a. **Parcelization Condition:** City acknowledges that the H5 and H6 Properties are not legal parcels as of the Effective Date. It shall be an unwaivable condition to the closing, for Developer's and City's benefit, that the H5 and H6 Properties shall be legal parcels for conveyance prior to the closing which legal separation shall be accomplished at Developer's cost.

b. **Early H5 and H6 Work:** Developer shall perform the Early H5 and H6 Work using the Early Work CLF Amount (as such term is defined in Section III.A. of Exhibit D to the Development Agreement) prior to the respective closings of the transfers of the H6 Property and the H5 Property. The description of the Early H5 and H6 Work, will be included as an exhibit to the H5 and H6 Transfer Agreements, respectively.

c. **Construction of Private Street.** Developer shall construct a private street serving the H block parcels, including the H5 and H6 Properties as part of the Early H5 Work. The City shall give notice to the Developer not later than twelve (12) months prior to the City's

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anticipated date of receiving a temporary certificate of occupancy (“TCO”) for the H6 Property (the “TCO Notice”). City or its Designee will coordinate in a timely manner with Developer for noticing, access and other construction coordination necessary for Developer to construct and complete the private road. Details on this work will be included as an exhibit to each of the H5 and H6 Transfer Agreements.

3. Leases: It shall be a condition to the closing under each of the H5 and H6 Transfer Agreements, for City's benefit, that Developer shall transfer the H5 and H6 Properties unencumbered by and free of any leases, unless City otherwise waives such condition in writing.

4. Closing Date: The closing under the H6 Transfer Agreement shall occur following Completion of the Early H6 Work, on a date selected by Developer on at least sixty (60) days' prior written notice to City but in no event will the Closing Date for the transfer of the H6 Property be later than the issuance of a Temporary Certificate of Occupancy for the first residential building that triggers payment of the IHO Fee (subject to City-caused delays or if City has requested to defer the closing as more specifically set forth in Section C.6.a below)(“**H6 Closing Date**”). The closing under the H5 Transfer Agreement shall occur following Completion of the Early H5 Work, on a date selected by Developer on at least sixty (60) days' prior written notice to City but in no event will the Closing Date for the transfer of the H5 Property be later than the sooner of (1) issuance of a Temporary Certificate of Occupancy on the next residential unit that triggers payment of the IHO Fee after exhaustion of all IHO Fee Credits from the transfer of the H6 Property, and (2) twelve months after the H6 Development Anticipated TCO Notice (as defined in the H5 Transfer Agreement) (“**H5 Closing Date**”). As used in this Section 4, “**Completion**” shall mean that the H5 or H6 Early Work, as applicable, has been completed in accordance with the building permit(s) issued with respect to such work and the City Building Division has completed its final inspection of the work.

a. Ongoing Property Condition: During the escrow period, Developer may record documents in connection with the Approvals. Following each closing, City or its Designee shall be responsible to keep the H5 and H6 Properties in good, clean and safe condition. In connection therewith, City or Designee shall be responsible to maintain attractive fencing and to provide for adequate lighting and security prior to and during development and construction of the H5 and H6 Properties. This requirement shall also be set forth as a restriction in the Grant Deed(s) for the H5 and H6 Properties, which deed restriction shall run with the land of each of the H5 and H6 Properties.

b. Construction Right of Entry: Effective as of the closing, City shall grant Developer such construction rights of entry as may be reasonably necessary for the construction of Developer's overall project, provided that such rights of entry do not materially interfere with City's development and use of the H5 and H6 Properties. In addition, the H5 and H6 Transfer Agreements shall contain provisions whereby the City (or its Designee) and the Developer agree to coordinate construction activities and schedules to ensure timely construction of the private road, as more specifically described in Section C.2(c) above required for mutual benefit of the H5 Property, the H6 Property and the other H block market rate residential parcels, and such provisions shall survive the closing or may be in form of an easement or other agreement.

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5. Due Diligence:

a. Access: City shall be entitled to the right of access to the H5 and H6 Properties to conduct its due diligence on the terms and conditions set forth in the Access Agreements. City shall complete its due diligence within ninety (90) days after execution of the applicable Transfer Agreement ("**Diligence Period**"). Subject to the terms and conditions of the Transfer Agreements (including but not limited to Developer's approval rights and coordination with Developer's contractors, as set forth therein), such due diligence may include site testing, including but not limited to testing related to environmental conditions and mitigation or remediation requirements for use of the property for residential purposes.

b. Title: City shall review and approve title to the Property during the Diligence Period. Developer shall provide City with a then current title report for the H5 and H6 Properties on or before execution of the Transfer Agreement for each property.

6. Conditions to Closing:

a. City Conditions: In addition to the closing conditions specifically set forth in Sections C.2(a) and C.3(a) above, the following shall be conditions to the closing under the H5 and H6 Transfer Agreements, for City's benefit: (i) the title company shall have committed to issue to City a title insurance policy subject only to the permitted exceptions (to be more particularly defined in the H5 and H6 Transfer Agreements but which shall include any exceptions recorded in connection with obtaining the Approvals or required in order to satisfy the Approvals, as well as any exceptions recorded in connection with the development pursuant to the Approvals and consistent with the Approvals); (ii) Developer shall not be in default under the respective H5 and H6 Transfer Agreements beyond any applicable notice and cure period; and (iii) there shall have been no material adverse change in the environmental condition of the H5 Property or the H6 Property since the date of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively.

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City shall have no right to terminate the H5 Transfer Agreement or the H6 Transfer Agreement if City is unable to secure funds or other commitments to enable the construction of affordable housing on either or both of the H5 Property or the H6 Property; provided, however, that City shall have the right to extend ("**Extension**") the closing under each of the H5 Transfer Agreement and the H6 Transfer Agreement, respectively, two (2) times for periods of one hundred eighty (180) days each (each, an "**Extension Period**", the first such extension of the Closing Date being the "**Extended Closing Date**" and the second such extension of the Closing Date being the "**Outside H5/H6 Closing Date**") if the City has not identified the City's Designee by the scheduled Closing Date or Extended Closing Date, as applicable, for that property by providing Developer with written notice of the exercise of the extension with the status of City's efforts to identify the Designee together with documentation evidencing City's Good Faith Efforts to identify and select the Designee. If the City has

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identified the Designee by the Extended Closing Date (or has extended a second time, then by the Outside H5/H6 Closing Date, as applicable) the Grant Deed shall identify the Designee as the transferee/grantee of the H5 Property or H6 Property, as applicable. If City has not identified and selected the Designee by the Extended Closing Date or Outside H5/H6 Closing Date, as applicable, then there will be no further extensions of the closing and City shall take title the H5 Property or the H6 Property, as applicable, in City's name or be in default of the H5 Transfer Agreement or the H6 Transfer Agreement, as applicable. In addition, if, as set forth in the H5 Transfer Agreement or the H6 Transfer Agreement, City elects to defer the transfer of title of the H5 Property or the H6 Property from Developer to City (or its Designee), then the City shall reimburse Developer for property taxes payable with respect to such Property(ies) during the deferral period and Developer's costs to light, fence, insure, and maintain the subject property in a clean and safe manner during the deferral period within thirty (30) days after receipt of Developer's request. Developer shall provide the City with reasonable documentation of such taxes and costs. IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) in this section to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

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

7. Environmental:

a. Environmental Indemnity: If the H5 Property and/or the H6 Property is transferred to the City or Designee, as applicable, Developer shall indemnify, defend, and hold harmless City and City Indemnitees against any and all third party actions or claims for death or personal injury to the extent such actions or claims are caused by exposure to environmental contamination existing at the H5 Property under the H5 Transfer Agreement and the H6 Property under the H6 Transfer Agreement which exposure occurred prior to the closing date of that property and such actions or claims first accrued prior to the Closing Date for that property, which indemnity and defense obligation of Developer shall survive the transfer of the H5 Property or H6 Property to City, as applicable. Notwithstanding the foregoing, in no event shall such indemnity and defense obligation of Developer apply to any actions or claims that arise from the negligence or willful misconduct of City or Designee.

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

8. IHO Fee Credits: As of the Effective Date, the amount of the IHO Fee Credit for the H5 Property shall be \$9,226,561 (the "**H5 Transfer IHO Fee Credits**"). \$9,226,561 IHO Fee Credit at \$18.70/rsf equals 493,399 sf of credit for market rate rentable sf (if the required

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100% AMI units are constructed). As of the Effective Date, the amount of the IHO Fee Credit for the H6 Property shall be \$10,079,062 (the "**H6 Transfer IHO Fee Credits**"). \$10,079,062. IHO Fee Credit at \$18.70/rsf equals 538,987 sf of credit for market rate rentable sf (if the required 100% AMI units are constructed). IHO Fee Credits are earned at time of closing, or, if the City exercises its option(s) described in Section C.6.a above to extend the Closing Date, then such credits shall be earned on the date on which the closing would have occurred but for the City exercise of its Extension right(s).

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

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

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

12. Default:

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

b. Default by Developer: If Developer defaults under either the H5 Transfer Agreement, the H6 Transfer Agreement or both, as applicable and the transfers to the City of such properties fails to close accordingly, City's sole and exclusive remedy shall be to terminate

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the respective H5 Transfer Agreement and or H6 Transfer Agreement, as applicable, and Developer shall reimburse City for City's reasonable out-of-pocket costs and expenses in connection with its due diligence, in which case Developer would not receive any IHO Fee Credits with respect to the H5 Property or H6 Property, as applicable, and would therefore satisfy its IHO obligations by identifying a site or sites in the DSAP which can accommodate at least (a) 120 affordable units in the case of H5 Property, and (b) 180 affordable units in the case of the H6 Property, or Developer pays 150% of the IHO Fees due for applicable property, or at mutual agreement of the Developer and City, Developer works with the City to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing. The payment of 150% of the IHO Fees due shall be made in full to the City within thirty (30) days ~~of the Developer's default~~ after City's election to receive 150% of the IHO Fees, and Developer shall receive IHO Fee Credits for 100% of the IHO Fees but no credit for the additional 50% owed as a result of the default.

Commented [ds9]: This change was agreed upon in discussion with Google 4-20-21, but was not included in Google revisions.

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ATTACHMENT A TO H1 TRANSFER PROVISIONS

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

1. 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.
2. Developer will seek approval of a new Remedial Action Plan ("**RAP**") from the Department of Environmental Health or other environmental regulatory 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).
3. 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.
4. The RAP will provide that Developer will excavate and dispose of VOCs and COCs 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 shall be accessed from outside the property line and not disturb the vapor barrier or the other elements of the VIMS. 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**").

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5. 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 Thirty Thousand Dollars (\$6,130,000) (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 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 condominium-izing 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.
6. 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.
7. 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.
8. 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.
 1. 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.
 2. 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

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Property Closing and the City shall hold and invest the Excess Costs in trust to pay the Excess Costs as they accrue over time.

9. 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.
10. 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.
11. Developer will pay all agency oversight and permitting costs associated with the RAP and obtaining the NFA.
12. 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.
13. 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.
14. 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.