

From: [Phan, Johnny](#)
To: [Downtown West Project](#)
Subject: FW: Followup on H6/H5 Transfer Agreements
Date: Tuesday, May 18, 2021 12:07:01 PM

From: David Snow <DSnow@rwglaw.com>
Sent: Tuesday, May 11, 2021 9:04 AM
To: Andes, Pam <PAndes@allenmatkins.com>; 'gmiller@coblenzlaw.com' <gmiller@coblenzlaw.com>
Cc: Phan, Johnny <Johnny.Phan@sanjoseca.gov>
Subject: Followup on H6/H5 Transfer Agreements

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Gregg and Pam,

Below are some additional follow-up thoughts on the Transfer Agreement/ Early work issues discussed last night:

1. We need to get rid of the concept of bifurcating the land IHO credit from the early work IHO credit, because we may be unable to finish the improvements and actually use the land parcels.
 - a. The penalties for non-performance (150% of the remaining work) are now so small, that they would not cover the WHOLE cost of demo-ing the buildings, or building the road, if Google didn't do it,
 - b. As a practical matter, if they don't tear down the Osh buildings or build the road, we CAN'T tear them down or build the road, since they are substantially on land we don't own.

2. The transfer agreements and the DA appendix D4 (about transfers) both contain this default provision:

17.1 Default by Transferor. If Transferor fails to perform any of the obligations of Transferor set forth in this Agreement and fails to cure the same within ten (10) days after delivery of written notice from Transferee (provided that no such notice and cure period shall be applicable to Transferor's failure to deliver any documents or funds required for the Closing as set forth in Section 4 above), then as Transferee's sole and exclusive remedy, Transferee may terminate this Agreement upon written notice to Transferor and Escrow Holder. If Transferee elects to terminate this Agreement, then this Agreement shall automatically terminate, Transferor shall reimburse Transferee for the reasonable third party costs and expenses actually incurred by Transferee in performing the inspections and testing set forth in Section 3.1 above, and Transferor would not receive any IHO Fee credits for the Property and instead Transferor shall

satisfy its IHO obligations by (a) identifying a site or sites in the Diridon Station Area Plan which can accommodate at least one hundred eighty (180) affordable housing units as anticipated on the Property, (b) paying one hundred fifty percent (150%) of the IHO Fees due (the "IHO Fee Premium"), or (c) upon mutual agreement of Transferor and Transferee, Transferor shall work with Transferee to maintain yield by condominium-izing a portion of a high rise residential project for affordable housing. If Transferor satisfies its IHO obligations by the payment of the IHO Fee Premium pursuant to clause (b) above, the payment of the IHO Fee Premium shall be made in full to Transferee within thirty (30) days after Transferor's election of clause (b) above, and Transferor shall receive IHO Fee credits for that portion of the IHO Fee Premium equal to one hundred percent (100%) of the IHO fees due, but no credit for that portion of the IHO Fee Premium equal to the additional fifty percent (50%) owned as a result of the default.

The way section 19.2 is written, it is not clear how we enforce this default provision.

3. As a solution to both (1) and (2) we suggest re-writing 19.2 as follows:

19.2 Transferor's Work.

Notwithstanding anything in this Agreement to the contrary:

(a) If despite Transferor using its commercially reasonable efforts in accordance with Section 4.5.2.4, Transferor's Work is not Completed by the Closing as a result of any delays caused by Transferee or Force Majeure, then Transferee shall have no right to terminate this Agreement and Transferor shall have 2 additional 60-day periods to extend closing *[ok with 4 of these periods on H6, but only 2 of them on H5]*, provided that they continue to diligently pursue the work, and that the extension is no more than the day for day impact of Force Majeure or Transferee delay. After these extensions, the Default provisions of 17.1 shall apply, and in addition City may require Transferor to diligently pursue and Complete the H5 Early Work necessary to open and operate the H6 affordable housing building (and received 2.5M of credit for this work) or be in default under the DA.

(b) If at 6 months before Closing, Transferee determines that Transferor is not exercising commercially reasonable efforts to complete Transferor's Work based on the provisions in (c) below, then Transferee shall provide notice to Transferor that that they have six months to complete the work, or else be in Default, in which case the provisions of 17.1 shall apply, and in addition City may require Transferor to diligently pursue and Complete the H5 Early Work necessary to open and operate the H6 affordable housing building (and received 2.5M of credit for this work) or be in default under the DA.

(c) Since the H5 Early Work is critical to the successful operation of H6, the Parties agree that every three (3) months from the date of the H5 Notice (as defined in the DA) the Parties shall meet, and Transferor shall provide an update on the H5 Early Work. *(These regular updates shall also occur on the H6 Early Work)*. If in its reasonable discretion Transferee concludes that there is no way for Transferor to finish H5 Early Work before TCO on the H6 Affordable housing building *(or H6 work before H6 Closing)*, the City shall be able to exercise the mechanisms described in (a) or (b) above depending on whether Developer is diligently pursuing the work, or not.

4. If we do all these things, we should no longer need the provision in D-4 that causes the transfer agreements to superseded D-4

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