**CITY OF SAN DIEGO**

**EXCLUSIVE NEGOTIATION AGREEMENT**

**(**[**TO BE DETERMINED**]**)**

THIS EXCLUSIVE NEGOTIATION AGREEMENT (“Agreement”) is dated as of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ (“Effective Date”), and is entered into between THE CITY OF SAN DIEGO, a California municipal corporation (“City”), and [**TO BE DETERMINED**] (“Developer”). City and Developer (each individually, a “Party” and, collectively, the “Parties”) enter into this Agreement with reference to the following facts:

RECITALS

A. As of February 1, 2012, the former Redevelopment Agency of the City of San Diego, a public body, corporate and politic (“Former RDA”) dissolved by operation of law, at which time the City, solely in its capacity as the designated successor agency to the Former RDA (“Successor Agency”), assumed all of the Former RDA’s assets, obligations and assets under the California Redevelopment Law.

B. On February 19, 2016, the Successor Agency conveyed the Property to the City. As a result, the City is the current owner of that certain real property generally located at [**TO BE DETERMINED**], within the [**TO BE DETERMINED**] Neighborhood of the [**TO BE DETERMINED**] Community Planning area, and more specifically described in Exhibits A and B attached to this Agreement (“Site”).

C. Developer proposes to purchase the Property from the City and develop the Property as a [**TO BE DETERMINED**] (“Project”).

D. On [**TO BE DETERMINED**], City issued a Request for Proposals (“RFP”) for redevelopment of the Property.

E. On [**TO BE DETERMINED**], Developer submitted a proposal to City in response to the RFP in which Developer proposed to construct the Project on the Property with certain financing and within certain timeframes (“Developer’s Proposal”).

F. The Parties desire to pursue negotiation of an agreement for the future purchase, sale, and redevelopment of the Site.

NOW, THEREFORE, in consideration of the promises of City and Developer included in this Agreement, City and Developer agree as follows:

AGREEMENT

1. Negotiation of DDA. During the Negotiation Period (defined in Section 3), and subject to the terms and conditions of this Agreement, both City and Developer shall proceed diligently and in good faith in negotiation and documentation of potential terms, conditions, covenants, restrictions and agreements of a future Disposition and Development Agreement (“DDA”) to be entered into between them for Developer to purchase the Site from City and redevelop the Site with the Project. City and Developer shall generally cooperate with each other and supply such documents and information as may be reasonably requested by the other to facilitate the conduct of the negotiations. Both City and Developer shall exercise reasonable efforts to complete discussions relating to the terms, conditions, covenants, restrictions or agreements of a DDA, all as may be mutually acceptable to both City and Developer in their respective sole and absolute discretion. The exact terms and conditions of a DDA, if any, shall be determined during the course of these negotiations. Nothing in this Agreement shall be interpreted or construed to be a representation or agreement by either City or Developer that a mutually acceptable DDA will be produced from negotiations under this Agreement. Nothing in this Agreement shall impose any obligation on either Party to agree to a definitive DDA in the future. Nothing in this Agreement shall be interpreted or construed to be a guaranty, warranty or representation that any proposed DDA that may be negotiated by City staff and Developer will be approved by City’s City Council. Developer acknowledges and agrees that City’s consideration of any DDA is subject to the retained and reserved sole and absolute discretion of City’s City Council and any and all legally required public hearings, public meetings, notices, factual findings and other determinations and procedures required by law.
2. Agreement Not to Negotiate with Others. City agrees to negotiate exclusively with Developer with respect to the future purchase, sale, and redevelopment of the Site during the Negotiation Period. Notwithstanding the preceding provisions of this Section 1, City shall have the right to receive and retain unsolicited offers regarding purchase, sale, or redevelopment of the Site from persons other than Developer, but shall not negotiate with the proponent of any such offer during the Negotiation Period. Nothing in this Agreement shall prevent or prohibit City from discussing or disclosing the fact that City is a Party to this Agreement or providing any information in City’s possession or control that would customarily be furnished to persons requesting information from City concerning City’s activities, goals, matters of a similar nature, or as required by law to be disclosed, upon request or otherwise.
3. Negotiation Period. The “Negotiation Period” shall begin on the Effective Date and shall expire at 5:00 p.m. Pacific Time on the 180th calendar day after the Effective Date, unless extended under this Section 3 or earlier terminated under Section 23.2. This Agreement shall terminate upon the earliest to occur of the following events: (a) the expiration of the Negotiation Period; or (b) the occurrence of an Event of Default (defined in Section 23.1) under this Agreement by Developer; or (c) entry into a DDA by both City and Developer. Notwithstanding anything to the contrary contained in this Agreement, City’s Mayor or designee, in his or her sole and absolute discretion, may administratively extend the Negotiation Period by up to 180 calendar days in one or more extensions that, collectively, do not exceed 180 calendar days in total. Any such administrative extension of the Negotiation Period shall be evidenced by a letter signed by the Mayor or designee.
4. Developer Acknowledgments. Developer acknowledges and agrees that: (a) under this Agreement, City is not committing itself or agreeing to enter into a DDA, undertake any exchange, sale, lease or other transfer of real property or real property interest to Developer, approve any land use entitlements, or undertake any other acts or activities regarding real property; (b) no provision of this Agreement shall be deemed to be an offer by City, nor an acceptance by City of any offer or proposal from Developer, for City to convey any estate or interest in the Site to Developer or for City to provide any financial or other assistance to Developer for development of the Project or the Site; (c) Developer has not acquired, nor will acquire, by virtue of the terms of this Agreement, any legal or equitable interest in real or personal property from City; and (d) further efforts by either Party to perform due diligence, arrange or obtain financing, or carry out other acts in contemplation of the possible acquisition, transfer or development of the Site or the Project shall not be deemed evidence of intent by either Party to be bound by any terms, conditions, covenants, restrictions or agreements relating to acquisition, transfer or development of the Site or the Project.
5. Good Faith Deposit. Concurrent with Developer signing and delivering this Agreement to City, Developer shall deposit with City One Hundred Thousand Dollars ($100,000.00) in the form of an unconditional, irrevocable letter of credit, cashier's check, certified check or other form that is acceptable to the Mayor or designee, in his or her sole and absolute discretion, naming City as beneficiary or payee, as applicable, to provide assurance to City that Developer will proceed diligently and in good faith to perform all of Developer's obligations under this Agreement (“Good Faith Deposit”). If the Good Faith Deposit is in the form of a letter of credit, the term of the letter of credit shall be at least 180 days, and if this Agreement is still in effect beyond such initial 180 day period, shall be renewed at least 30 days prior to its expiration for a like period, or City may draw on the letter of credit and hold the proceeds as the Good Faith Deposit. Any interest accrued on the Good Faith Deposit shall be the property of City and shall be retained by City. If Developer has negotiated diligently and in good faith and performed its obligations under this Agreement, including attending all necessary project meetings, responding to information requests by City, and willingly providing all appropriate concepts, drawings, plans or architectural information requested by City in furtherance of negotiations and project development, the Good Faith Deposit will be returned to Developer upon expiration or termination of this Agreement or may be applied towards any deposit or earnest money required to be paid by Developer under a future DDA between the Parties. If an Event of Default by Developer occurs, the Good Faith Deposit will be retained by City in accordance with Section 20.3.
6. Negotiation Payment. Concurrent with Developer signing and delivering this Agreement to City, Developer shall also submit a negotiation payment in the amount of Fifty Thousand Dollars ($50,000.00) in the form of a cashier’s check or certified check (“Negotiation Payment”), naming City as beneficiary or payee, as applicable. The Negotiation Payment shall be made in consideration of City entering into this Agreement and shall be used by City to cover expenses incurred by City in connection with this Agreement or negotiation of a future DDA, including legal expenses, financial analysis expenses, administrative and staff expenses, materials, and labor (“Expenses”). The Negotiation Payment shall be fully earned by City on the Effective Date and shall be non-refundable to Developer. If the Negotiation payment is insufficient to cover all Expenses, upon receipt from City of a notice that additional funds are necessary to cover Expenses and an accounting of Expenses already incurred, Developer shall submit such additional funds to City, which additional funds will be part of the Negotiation Payment. City will endeavor to provide 30 calendar days’ notice to Developer of the need for such additional funds. Developer waives any claim or right to any refund of the Negotiation Payment or any interest accrued thereon.
7. Developer Representations and Warranties. Developer represents, warrants and covenants to and for the benefit of City, as of the Effective Date and at all times during the Negotiation Period, as follows:
   1. **Authority**. Developer has all requisite power and authority to enter into and perform this Agreement. The entry into and delivery of this Agreement by Developer have been duly and validly authorized by all necessary action of Developer and others. This Agreement is a legal, valid and binding obligation of Developer, enforceable against Developer in accordance with its terms.
   2. **No Limitation on Ability to Perform**. Developer is not a party to or bound by any contract, agreement, indenture, trust agreement, note, obligation or other instrument that could prohibit, limit or otherwise affect Developer’s entry into or performance of this Agreement. To the best of Developer’s knowledge, no consent, authorization or approval of, or other action by, and no notice to or filing with, any governmental authority, regulatory body or any other person or entity is required for the entry into, delivery or performance by Developer of this Agreement or any of the terms or covenants contained in this Agreement. There is no pending or threatened suit or proceeding or undischarged judgment affecting Developer before any court, governmental agency, or arbitrator that might materially adversely affect the enforceability of this Agreement, the ability of Developer to perform Developer’s obligations under this Agreement or the business, operations, assets or condition of Developer.
   3. **Meeting Financial Obligations; Material Adverse Change**. Developer is meeting Developer’s current liabilities as they mature, no federal or state tax liens have been filed against Developer and Developer is not in default or claimed default under any agreement for borrowed money. Developer shall immediately notify City of any material adverse change in the financial condition of Developer.
   4. **Conflicts of Interest**. Developer is familiar with Section 87100, et seq., of the California Government Code, which provides that no member, official or employee of City, may have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement that affects his or her personal interest or the interests of any corporation, partnership or association in which he or she is interested directly or indirectly. Developer does not know of any facts that constitute a violation of such provisions.
   5. **Skill and Capacity**. Developer has the skill, resources and financial capacity to acquire, manage and fully develop the Site with the Project.
   6. **Not Prohibited from Doing Business**. Developer has not been debarred or otherwise prohibited from doing business with any local, state or federal governmental agency.
8. Principals and Employees of Developer. Developer’s employees or representatives designated to negotiate the DDA with City and engage in the activities necessary to determine the feasibility of the Project are as follows: [**TO BE DETERMINED**].
9. Negotiation Frame of Reference. Developer’s Proposal provided a general design concept for the Project including, at a minimum, [**TO BE DETERMINED**]. City and Developer acknowledge and agree that the Project, pro forma and financing structure, all as described in Developer’s Proposal, including any information provided by Developer to City relating to the Project prior to the Effective Date, is the intended subject matter of the future DDA that the Parties intend to negotiate towards under this Agreement. Subject to completion of negotiation of all of the terms, conditions, covenants, restrictions and agreements of a future DDA and approval of any such DDA by the City Council, Developer further acknowledges that Developer’s purchase of the Site under such a DDA will, at a minimum, be: (a) conditioned on Developer first providing City with documentary evidence of Developer’s financing to complete both the acquisition of the Site and construction of the Project, among other conditions; (b) conditioned on Developer first providing City with documentary evidence of Developer’s receipt of all necessary governmental and private approvals and permits for construction of the Project on the Site, among other conditions; and (c) “as is,” without representation or warranty of any kind.
10. Developer’s Submittals. Developer shall develop and present to City, for review, all of the following:
    1. **Submittal Package 1**. Within 60 calendar days after the Effective Date, Developer shall submit to City:
       1. *Owners and Consultants*. A list of the identities of Developer’s principals, shareholders, partners, members, joint venturers, employees, agents, consultants, and design professionals. The identities of Developer’s principals, shareholders, partners, members, joint venturers, employees, agents, consultants, and design professionals are subject to the reasonable approval of the City’s Mayor or designee. Approval of any of Developer’s principals, shareholders, partners, members, joint venturers, employees, agents, consultants, and design professionals shall not be unreasonably withheld, unless the Mayor or designee reasonably determines that such person does not have sufficient financial or operational capability or experience to complete the purchase of the Site or construction of the Project or such person is reasonably believed not to be of good character or reputation; and
       2. *Site Purchase Offer*. Developer’s offer to purchase the Site addressing, at least, each of the following: (a) purchase price; (b) timing and method(s) of payment of the purchase price; and Developer’s expectations from City relative to the Project, if any.
    2. **Submittal Package 2 - Architectural Program**. Within 100 calendar days after the Effective Date, submit to City an architectural program developed with an architect, including site plan, floorplate and elevation studies, building sections, and preliminary structural and HVAC analysis and a complete development application;
    3. **Submittal Package 3 - Schematic Package**. Within 130 calendar days after the Effective Date, submit to City a Project schematic package, including refinement of the submittals required by Section 10.2, parking, presentation drawings, cost analysis and financial proforma.
    4. **Submittal Package 4**. Within 150 calendar days after the Effective Date, Developer shall submit to City:
       1. *Project Financing Plan*. Developer’s proposed construction and long-term financing plans for acquisition of the Site and construction of the Project, identifying financing sources for acquisition of the Site and construction of all private and public improvements proposed for the Project, including partners, joint ventures, lenders, and other financial partners;
       2. *Financial Statements*. Developer shall submit its financial statements to the City, as requested by the City, for the purpose of evaluating Developer’s ability to perform its obligations under a future DDA. Subject to Section 13, Developer acknowledges that any document or information submitted to the City is a public record subject to public disclosure, unless a specific exemption in the California Public Records Act applies; and
       3. *Bank and Other Financial References*. Bank and other financial references for Developer satisfactory to City for the purpose of evaluating Developer’s ability to perform its obligations under a future DDA.
11. Community Outreach. Prior to finalizing the Project site plan and the end of the Negotiation Period, Developer will conduct a series of public outreach meetings (minimum of two) to present details of the Project to the public. The costs of these public outreach meetings shall be borne solely by Developer.
12. No City Approval. Nothing in this Agreement, nor any comments provided by City staff, nor any failure of City staff to provide comments to any submittal under or under this Agreement shall: (1) modify or replace any land use entitlement process of City applicable to the Site or the Project, (2) limit the police power land use jurisdiction of City relative to the Site or the Project, (3) constitute an approval of all or any portion of the Project by City under the police power land use jurisdiction of City, or (4) constitute any approval of all or any portion of a future DDA with Developer by City. City is the land use authority regarding the Site. City is not obligated to expedite any reviews, approvals, notices, meetings, or any other related matters, and nothing contained in this Agreement shall be construed to limit City’s discretion in its activities relating to this Agreement, the Site, or the Project, or cause City to incur any liability or obligation in connection with any delay in obtaining or failure to obtain land use entitlements or approvals for development of the Project on the Site. Nothing contained in this Agreement shall constitute a waiver, amendment, promise or agreement by City (or any of its departments or boards) as to the granting of any approval, permit, consent or other entitlement in the exercise of City's regulatory capacity or function.
13. City Due Diligence; Public Records. City reserves the right to reasonably obtain further information, data and commitments to ascertain the ability and capacity of Developer to purchase, lease, develop or operate the Site or the Project. Developer acknowledges that Developer may be requested to make certain financial disclosures to City, City staff, legal counsel or other consultants, as part of the financial due diligence investigations of City relating to the potential sale of the Site and development of the Project on the Site by Developer. Any document or information submitted to the City is a public record subject to disclosure unless a specific exemption in the California Public Records Act applies, in which case the City shall invoke such exemption to the fullest extent permitted by law with respect to documents or information submitted by Developer in connection with this Agreement. However, it will be the responsibility of Developer to provide to the City the specific legal grounds on which the City can rely in withholding information requested under the CPRA should the City choose to withhold such information. General references to sections of the CPRA will not suffice. Developer must provide a specific and detailed legal basis, including applicable case law, that clearly establishes the requested information is exempt from disclosure under the CPRA. If Developer does not provide a specific and detailed legal basis for requesting the City to withhold Developer’s confidential or proprietary information at the requested time, City will release the information as required by the CPRA and Developer will hold the City, its elected officials, officers, and employees harmless for release of this information. It will be Developer’s obligation to defend, at Developer’s expense, any legal actions or challenges seeking to obtain from the City any information requested under the CPRA withheld by the City at Developer’s request. Developer shall indemnify and hold harmless the City, its elected officials, officers, and employees from and against any claim or liability, and defend any action brought against the City, resulting from the City’s refusal to release information requested under the CPRA which was withheld at Developer’s request. Nothing in this Agreement creates any obligation on the part of the City to notify Developer or obtain Developer’s approval or consent before releasing information subject to disclosure under the CPRA.
14. Developer’s Findings, Determinations, Studies, and Reports. From time-to-time, as requested by City, Developer agrees to make reasonable oral and written progress reports, and to submit to City reports and analyses, advising City on all matters related to the Project, including financial feasibility analyses, construction cost estimates, marketing studies and similar due diligence matters. Should negotiations not result in a DDA between City and Developer, Developer shall submit to City all information, plans, studies, reports, and drawings prepared by or for Developer with respect to development alternatives, financial feasibility analyses, construction cost estimates, marketing or proforma studies and similar due diligence matters (collectively, “Materials”), and subject to the terms of Section 13, the City may use the Materials provided by the Developer in any way deemed by City to be of benefit to the redevelopment of the Property. Information to be reported to or submitted to City shall include any due diligence materials prepared by or for any prospective development partner, joint venture, or management entity. All costs incurred by Developer in the preparation and presentation of such findings, determinations, studies, reports or other requests by City under this Agreement shall be at the sole cost and expense of Developer.
15. Formation of New Development Entity. City acknowledges that Developer may form a new entity controlled by Developer that will be the party to the DDA in place of Developer. City shall have the right to review and approve the organizational documents of such entity and the entities comprising such entity. Prior to Developer’s delivery of the signed DDA to City, Developer shall submit a copy of any signed joint venture formation documents (e.g., limited liability company operating agreement, partnership agreement, etc.), as well as all organizational documents of each entity participating in the joint venture, for approval by City, which approval shall not be unreasonably withheld. Each such document may be redacted to remove financial terms or other confidential information, provided that such redactions do not limit City’s ability (as determined by City, in its sole discretion) to complete a comprehensive evaluation of the organizational structure of all of the subject entities.
16. Costs and Expenses. All fees or expenses of engineers, architects, financial consultants, legal, planning or other consultants or contractors, retained by Developer for any study, analysis, evaluation, report, schedule, estimate, environmental review, planning or design activities, drawings, specifications or other activity or matter relating to the Site or the Project or negotiation or documentation of a future DDA that may be undertaken by Developer during the Negotiation Period, under or in reliance upon this Agreement or in Developer’s discretion, regarding any matter relating to this Agreement, a future DDA, the Site or the Project, shall be the sole responsibility of and undertaken at the sole cost and expense of Developer and no such activity or matter shall be deemed to be undertaken for the benefit of, at the expense of or in reliance upon City. City shall not be obligated to pay, reimburse or refund any expenses, fees, charges or costs incurred by Developer in pursuit of any study, analysis, evaluation, report, schedule, estimate, environmental review, planning or design activities, drawings, specifications or other activity or matter relating to this Agreement, the Site, the Project or negotiation or documentation of a future DDA that may be undertaken by Developer during the Negotiation Period, whether or not this Agreement is, eventually, terminated or extended or a DDA is entered into between City and Developer, in the future.
17. Real Estate Commissions. Developer represents and warrants that Developer did not engage or deal with any broker or finder in connection with this Agreement and no person is entitled to any commission or finder’s fee regarding this Agreement or Developer’s potential future purchase of the Site on account of any agreement or arrangement made by Developer. Developer shall indemnify, defend and hold harmless City against any breach of the representation and warranty set forth in the immediately preceding sentence.
18. Environmental Review Assistance. Developer acknowledges that certain federal, State of California or local environmental review requirements may be applicable to City’s consideration of a future DDA, including the National Environmental Policy Act or the California Environmental Quality Act. Developer agrees to supply necessary reports, documents or information to City for preparation of all required environmental review documents, as determined by City in its sole and absolute discretion, for City’s consideration of a future DDA. All costs of City’s environmental review related to a future DDA shall be at Developer’s sole cost and expense.
19. Compliance with City’s Equal Employment Opportunity Program. Developer shall comply with City’s Equal Employment Opportunity Program, set forth in San Diego Municipal Code (“SDMC”) sections 22.2701 – 22.2708. Developer shall not discriminate against any employee or applicant for employment on any basis prohibited by law. Developer shall provide equal opportunity in all employment practices. Developer shall ensure that its subcontractors comply with this program. Nothing in this Section 19 shall be interpreted to hold Developer liable for any discriminatory practice of its subcontractors.
20. Non-Discrimination in Contracting.Developer shall comply with City’sNondiscrimination in Contracting Ordinance, codified in SDMC sections 22.3501 – 22.3517.Developer shall not discriminate on the basis of race, color, gender, gender expression, gender identity, religion, national origin, ethnicity, sexual orientation, age, or disability in the solicitation, selection, hiring, or treatment of subcontractors, vendors, or suppliers. Developer shall provide equal opportunity for subcontractors to participate in subcontracting opportunities. Developer agrees and understands that violation of this Section 20 shall be considered a material breach of this Agreement and may result in termination of this Agreement, debarment or other sanctions.
    1. Within 60 calendar days after notice from City requesting such information, Developer shall provide City a truthful and complete list of the names of all subcontractors, vendors, and suppliers that Developer has used in the past five years on any of its contracts that were undertaken within the County of San Diego, including the total dollar amount paid by Developer for each subcontract or supply contract. Developer shall fully cooperate in any investigation conducted by City, under City’s Nondiscrimination in Contracting Ordinance, codified in SDMC sections 22.3501 – 22.3517.
21. Americans with Disabilities Act. Developer shall comply with City Council Policy 100‑04, as adopted by City Council Resolution R-282153, relating to the federally‑mandated Americans with Disabilities Act.
22. Employment of City Staff**.** Under City Council Policy 300-11, if Developer employs an individual, who, within 12 months immediately preceding such employment, did, in the individual’s capacity as a City officer or employee, participate in, negotiate with, or otherwise have an influence on the recommendation made to City Council in connection with the entry into this Agreement, City, in its sole and absolute discretion, shall have the right to unilaterally and immediately terminate this Agreement by notice to Developer.
23. Developer Events of Default and City Remedies.
    1. **Developer Events of Default**. The occurrence of any of the following shall constitute an “Event of Default” by Developer under this Agreement:
       1. *Misrepresentation*. Any material breach of any representation or warranty made by Developer in this Agreement that is not cured within 30 calendar days after written notice from City to Developer of such breach.
       2. *Failure to Make Deposit*. Developer’s failure to deliver either the Good Faith Deposit or the Negotiation Payment to City as and when required by this Agreement.
       3. *Failure to Make Submittal.* Developer’s failure to deliver any item described in Section 10 to City as and when required by this Agreement.
       4. *Other Material Breach*. The occurrence of any other event constituting a material breach of this Agreement by Developer, if such breach is not cured within 15 calendar days after City sends written notice to Developer of such breach.
    2. **City Remedies**. If there is an Event of a Default by Developer, City may, in City’s sole and absolute discretion, terminate this Agreement by sending written notice of termination to Developer, retain the Good Faith Deposit as liquidated damages under Section 16.3, or exercise any other remedies available to City at law or in equity regarding such Event of Default by Developer.
    3. **City Liquidated Damages**. UPON THE OCCURRENCE OF AN EVENT OF DEFAULT BY DEVELOPER, CITY SHALL RETAIN THE GOOD FAITH DEPOSIT AS LIQUIDATED DAMAGES. THE AMOUNT OF THE GOOD FAITH DEPOSIT IS THE REASONABLE ESTIMATE BY THE PARTIES OF THE DAMAGES CITY WOULD SUFFER FROM AN EVENT OF DEFAULT BY DEVELOPER, IT BEING AGREED THAT IT IS EXTREMELY DIFFICULT, IF NOT IMPOSSIBLE AND IMPRACTICABLE, TO FIX THE EXACT AMOUNT OF DAMAGE THAT WOULD BE INCURRED BY CITY AS A RESULT OF AN EVENT OF DEFAULT BY DEVELOPER.

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1. LIMITATION ON DEVELOPER REMEDIES AND DAMAGES.
   1. **EXCLUSIVE DEVELOPER REMEDY**. DEVELOPER ACKNOWLEDGES AND AGREES THAT CITY WOULD NOT HAVE ENTERED INTO THIS AGREEMENT, IF CITY WERE TO BE LIABLE TO DEVELOPER FOR ANY MONETARY DAMAGES, MONETARY RECOVERY OR ANY REMEDY IN THE EVENT OF A BREACH OR DEFAULT UNDER THIS AGREEMENT BY CITY, OTHER THAN TERMINATION OF THIS AGREEMENT AND AN ACTION TO RECOVER THE NEGOTIATION PAYMENT. ACCORDINGLY, DEVELOPER AGREES THAT DEVELOPER’S SOLE AND EXCLUSIVE RIGHT AND REMEDY DURING OR FOLLOWING BREACH OR DEFAULT UNDER THIS AGREEMENT BY CITY IS TO TERMINATE THIS AGREEMENT AND BRING AN ACTION TO RECOVER THE NEGOTIATION PAYMENT. UNDER NO CIRCUMSTANCES SHALL CITY BE LIABLE TO DEVELOPER AS A RESULT OF A BREACH OR DEFAULT BY CITY UNDER THIS AGREEMENT FOR ANY AMOUNT EXCEEDING THE AMOUNT OF THE NEGOTIATION PAYMENT OR FOR ANY SPECULATIVE, CONSEQUENTIAL, COLLATERAL, SPECIAL, PUNITIVE OR INDIRECT DAMAGES OR FOR ANY LOSS OF PROFITS SUFFERED OR CLAIMED TO HAVE BEEN SUFFERED BY DEVELOPER. DEVELOPER WAIVES ANY RIGHT TO PURSUE ANY REMEDY, OTHER THAN TERMINATION OF THIS AGREEMENT AND AN ACTION TO RECOVER THE NEGOTIATION PAYMENT, AS A RESULT OF ANY BREACH OR DEFAULT UNDER THIS AGREEMENT BY CITY. UNDER NO CIRCUMSTANCE SHALL DEVELOPER BE ENTITLED TO RECEIVE DAMAGES ARISING FROM AN ACTUAL OR ALLEGED BREACH OR DEFAULT UNDER THIS AGREEMENT BY CITY EXCEEDING THE AMOUNT OF THE NEGOTIATION PAYMENT.
   2. **DEVELOPER 1542 ACKNOWLEDGMENT**. DEVELOPER ACKNOWLEDGES THAT IT IS AWARE OF THE MEANING AND LEGAL EFFECT OF CALIFORNIA CIVIL CODE SECTION 1542, WHICH PROVIDES:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

* 1. **DEVELOPER 1542 WAIVER**. CALIFORNIA CIVIL CODE SECTION 1542 NOTWITHSTANDING, IT IS THE INTENTION OF DEVELOPER TO BE BOUND BY THE LIMITATION ON DAMAGES AND REMEDIES SET FORTH IN THIS SECTION 24 AND DEVELOPER WAIVES AND RELEASES ANY AND ALL CLAIMS AGAINST CITY FOR MONETARY DAMAGES, MONETARY RECOVERY OR OTHER LEGAL OR EQUITABLE RELIEF RELATED TO ANY DEFAULT OR BREACH OF THIS AGREEMENT BY CITY BEYOND THE RECOVERY EXPRESSLY ALLOWED IN SECTION 17.1, WHETHER OR NOT ANY SUCH RELEASED CLAIMS WERE KNOWN OR UNKNOWN TO DEVELOPER AS OF THE EFFECTIVE DATE OF THIS AGREEMENT. DEVELOPER SPECIFICALLY WAIVES THE BENEFITS OF CALIFORNIA CIVIL CODE SECTION 1542 AND ALL OTHER STATUTES AND JUDICIAL DECISIONS (WHETHER STATE OR FEDERAL) OF SIMILAR EFFECT WITH REGARD TO THE LIMITATIONS ON DAMAGES OR REMEDIES AND WAIVERS AND RELEASES OF ANY SUCH DAMAGES OR REMEDIES CONTAINED IN THIS SECTION 24.

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| \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  Initials of Authorized  Developer Representative |

1. Notices. Any and all notices submitted by either Party to the other Party under or as required by this Agreement shall be proper, if in writing and sent by messenger for immediate personal delivery, nationally recognized overnight (one business day) delivery service (i.e., United Parcel Service, Federal Express, etc.) or by registered or certified United States mail, postage prepaid, return receipt requested, to the address of the recipient Party, as designated below in this Section 25. Notices may be sent in the same manner to such other addresses as either Party may from time to time designate by notice in accordance with this Section 25. Notice shall be deemed received by the addressee, regardless of whether or when any return receipt is received by the sender or the date set forth on such return receipt, on the day that the notice is sent by messenger for immediate personal delivery, the next day on which the overnight delivery service makes deliveries after the day of delivery of the notice to a nationally recognized overnight delivery service, or 3 calendar days after the notice is placed in the United States mail in accordance with this Section 25. Any attorney representing a Party may give any notice on behalf of such Party. The notice addresses for the Parties, as of the Effective Date, are as follows:

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| To Developer: | [**TO BE DETERMINED**] |
| To City: | [**TO BE DETERMINED**] |

1. General Provisions.
   1. **Amendments**. This Agreement may be amended or modified only by a written instrument signed by both City and Developer.
   2. **Severability**. If any provision of this Agreement, or its application to any person or circumstance, is held invalid by any court of competent jurisdiction, the invalidity or inapplicability of such provision shall not affect any other provision of this Agreement or the application of such provision to any other person or circumstance, and the remaining portions of this Agreement shall continue in full force and effect, unless enforcement of this Agreement as so modified by and in response to such invalidation would be unreasonable or grossly inequitable under all of the circumstances or would frustrate the fundamental purposes of this Agreement.
   3. **No Implied or Continuing Waiver**. No waiver made by either Party with respect to the performance, or manner or time of performance, or any obligation of the other Party or any condition to its own obligation under this Agreement will be considered a waiver with respect to the particular obligation of the other Party or condition to its own obligation beyond those expressly waived, to the extent of such waiver, or a waiver in any respect in regard to any other rights of the Party making the waiver or any other obligations of the other Party. All waivers regarding this Agreement must be in writing and signed by the Party making the waiver.
   4. **Successors and Assigns; No Third Party Beneficiaries**. This Agreement shall inure to the benefit of and bind the respective successors and assigns of City and Developer, provided, however, that neither Party shall have any right to assign this Agreement. This Agreement is for the exclusive benefit of the Parties to this Agreement and not for the benefit of any other person and shall not be deemed to have conferred any rights, express or implied, upon any other person.
   5. **Governing Law**. City and Developer acknowledge and agree that this Agreement was negotiated, entered into and is to be fully performed in the City of San Diego, California. City and Developer agree that this Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the substantive and procedural laws of the State of California, without application of conflicts of laws statutes or principles.
   6. **Interpretation of Agreement**. No inference in favor of or against any Party shall be drawn from the fact that such Party has drafted any part of this Agreement. The Parties have both participated substantially in the negotiation, drafting, and revision of this Agreement, with advice from legal and other counsel and advisers of their own selection. A word, term or phrase defined in the singular in this Agreement may be used in the plural, and vice versa, all in accordance with ordinary principles of English grammar, which shall govern all language in this Agreement. The words “include” and “including” in this Agreement shall be construed to be followed by the words: “without limitation.” Each collective noun in this Agreement shall be interpreted as if followed by the words “(or any part of it),” except where the context clearly requires otherwise. Every reference to any document, including this Agreement, refers to such document, as modified from time to time (excepting any modification that violates this Agreement), and includes all exhibits, schedules, addenda and riders to such document. The word “or” in this Agreement includes the word “and.” Every reference to a law, statute, regulation, order, form or similar governmental requirement refers to each such requirement as amended, modified, renumbered, superseded or succeeded, from time to time. Headings at the beginning of each section or sub-section of this Agreement are solely for the convenience of reference of City and Developer and are not a part of this Agreement. Whenever required by the context of this Agreement, the singular shall include the plural and the masculine shall include the feminine and vice versa. Unless otherwise indicated, all references to sections are to this Agreement. All exhibits referred to in this Agreement are attached to and incorporated into this Agreement, unless otherwise specified.
   7. **Entire Agreement**. This Agreement (including the attachments and exhibits) contains all of the representations of and the entire agreement between the Parties with respect to the subject matter of this Agreement. Any prior correspondence, memoranda, agreements, warranties or representations relating to such subject matter are superseded in total by this Agreement. No prior drafts of this Agreement or changes from those drafts to the signed version of this Agreement shall be introduced as evidence in any litigation or other dispute resolution proceeding by either Party or any other person and no court or other body shall consider those drafts in interpreting this Agreement.
   8. **Time for Performance**.
      1. *Expiration*. All performance, expiration or termination dates (including cure dates) in this Agreement expire at 5:00 p.m., Pacific Time, on the specified date.
      2. *Weekends and Holidays*. A date that falls on a Saturday, Sunday or City holiday is deemed extended to the next day on which the City is open for performance of general City functions with regular City personnel.
      3. *Days for Performance*. All periods for performance specified in this Agreement in terms of days shall be calendar days, and not business days, unless otherwise expressly provided in this Agreement.
      4. *Time of the Essence*. Time is of the essence with respect to each provision of this Agreement.
   9. **Counterparts**. This Agreement may be signed in multiple counterpart originals, each of which shall be deemed an original, but all of which taken together shall constitute one and the same agreement.
   10. **Approvals and Consents**. Unless this Agreement otherwise expressly provides or unless applicable law requires otherwise, all approvals, consents or determinations to be made by or on behalf of: (a) City under this Agreement shall be made by City’s Mayor or designee; and (b) Developer under this Agreement shall be made by [**TO BE DETERMINED**] (“**Developer Representative**”). Unless otherwise provided in this Agreement, whenever approval, consent or satisfaction is required of a Party under this Agreement, such approval, consent or satisfaction shall not be unreasonably withheld, conditioned or delayed and any reasons for disapproval shall be stated in reasonable detail in writing. Approval by Developer or City of any act or request by the other shall not be deemed to waive or render unnecessary approval of any similar or subsequent acts or requests.
   11. **Survival of Agreement**. All of the provisions of this Agreement shall be applicable to any dispute between the Parties arising from this Agreement, whether prior to or following expiration or termination of this Agreement, until any such dispute is finally and completely resolved between the Parties, either by written settlement, entry of a non-appealable judgment or expiration of all applicable statutory limitations periods and all terms and conditions of this Agreement relating to dispute resolution, indemnity or limitations on damages or remedies shall survive any expiration or termination of this Agreement.
   12. **Relationship of the Parties**. The subject of this Agreement is a private development with neither Party acting as the agent of the other Party in any respect. None of the provisions in this Agreement shall be deemed to render City a partner in Developer’s business, or joint venturer or member in any joint enterprise with Developer.
   13. **Venue**. City and Developer agree that any legal actions taken in connection with or arising out of this Agreement must be instituted in the Superior Court of the State of California in and for the County of San Diego, State of California, or in the United States District Court for the Southern District of California.
   14. **Conflict of Interest**. No member, official, or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official, or employee participate in any decision relating to the Agreement which affects his or her personal interests or the interests of any corporation, partnership, or association in which he or she is, directly or indirectly, interested. Developer warrants that it has not paid or given, and will not pay or give, directly or indirectly, any City employee or official, any money or other consideration at all, whether or not connected in any way with the subject matter of this Agreement. Further, Developer warrants that it has no knowledge of any financial interest of any City employee or official in Developer, directly or indirectly, or in any person or entity affiliated with Developer, or in any transaction in which Developer has been involved.
   15. **Use of Information by City**. If negotiations do not result in a DDA between City and Developer, City may use any information provided by Developer in any way deemed by City to be of benefit to the sale and development of the Site.
   16. **Incorporation of Recitals**. The Recitals of fact set forth above are true and correct and are incorporated into this Agreement, in their entirety by this reference.

[*Remainder of page intentionally blank. Signatures appear on the immediately following page.*]

**SIGNATURE PAGE**

**TO**

**EXCLUSIVE NEGOTIATION AGREEMENT**

**(** [**TO BE DETERMINED**] **)**

Developer and City sign and enter into this Agreement by and through the signatures of their respective authorized representatives as follows:

|  |  |
| --- | --- |
| **CITY:**  THE CITY OF SAN DIEGO, a California municipal corporation  By:  [**TO BE DETERMINED**] | **DEVELOPER:**  [**TO BE DETERMINED**]  By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_  [**TO BE DETERMINED**] |
| APPROVED AS TO FORM  on \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_.  HEATHER FERBERT  City Attorney  By:  Katherine A. Malcolm  Senior Deputy City Attorney |  |

**EXHIBIT A**

**TO**

**EXCLUSIVE NEGOTIATION AGREEMENT**

**(** [**TO BE DETERMINED**] **)**

**SITE MAP**

(To be attached behind this cover page)

**EXHIBIT B**

**TO**

**EXCLUSIVE NEGOTIATION AGREEMENT**

**(**[**TO BE DETERMINED**]**)**

**LEGAL DESCRIPTION**

[**TO BE DETERMINED**]