

EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

5890, 5900 and 6150 Christie Avenue, Emeryville, California

THIS EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT (the “**Agreement**”) is entered into effective as of _____, 2022 (the “**Effective Date**”) by and between the **City of Emeryville**, a municipal corporation (“**City**”), and _____, a California Corporation (the “**Developer**”), each a “**Party**,” and collectively referred to as the “**Parties**” herein, on the terms and conditions set forth below.

Recitals

A. The City is the owner of the real properties commonly referred to as 5890, 5900 and 6150 Christie Avenue, Emeryville, CA, which are legally described in Exhibit A, attached hereto (“**Property**”).

B. The Property was acquired using low and moderate-income housing funds by the former Emeryville Redevelopment Agency and are therefore an “affordable housing asset” that was transferred to the City pursuant to the Dissolution Act (Assembly Bills x1 26 and 1484).

C. On June 21, 2022, the City Council adopted Resolution No. 22-081 declaring the Property Exempt Surplus Land pursuant to Government Code Section 54221(f)(1)(F)(ii) which provides that a mixed-use development that is more than one acre in area, that includes not less than 300 housing units, and that restricts at least 25 percent of the residential units to lower-income households is Exempt Surplus Land. On August 18, 2022, the California Department of Housing and Community Development (“HCD”) issued a letter to the City confirming HCD’s concurrence that the Property is Exempt Surplus Land

D. On June 21, 2022, the City Council adopted Resolution No. 22-082 authorizing the release of a Request for Proposals (“**RFP**”) for the redevelopment of the Property with a minimum of 300 housing units, of which a minimum of 25 percent were to be affordable housing units, and subsequently, on June 22, 2022, the City issued the RFP to solicit a developer interested in designing and redeveloping the Property.

E. Developer submitted a timely response to the RFP proposing the development of [insert project description] (“**Project**”).

F. On November 15, 2022, the City Council adopted Resolution No. 22-____, which authorized City staff to execute an exclusive right to negotiate agreement with Developer for the development of the Property.

G. The City and Developer now desire to enter into this Agreement in order to set forth the terms and conditions under which the City and Developer shall exclusively negotiate the terms and conditions of a proposed Lease Disposition and Development

Agreement (“**LDDA**”) providing for the environmental cleanup of the Property as may be required by the appropriate regulatory agencies and the City, planning and design, entitlement, financing, construction, stabilization and operation of the Property.

Agreement

1. Negotiations.

- 1.1. **Good Faith Negotiations.** The City and the Developer, acknowledging that time is of the essence, agree for the Negotiation Period set forth below to negotiate diligently and in good faith to prepare the LDDA to be considered for execution between the City and the Developer, in the manner set forth herein, with respect to the redevelopment of the Property. The City agrees that during the Negotiation Period it will not negotiate with any other person or entity regarding the redevelopment of the Property or any portion thereof.
- 1.2. **Term Sheet.** The City and Developer agree to negotiate the contents of a Term Sheet which includes but is not limited to the business terms for the Developer, the definition of Project including Project development program, environmental clean-up as required, Project amenities, and Christie Park expansion, which shall form the basis for the negotiation of the LDDA.
- 1.3. **Termination of Negotiations by the City.** In the event the Developer has not continued to negotiate diligently and in good faith, the City shall give written notice thereof to the Developer who shall then have ten (10) business days to commence negotiating in good faith. Following the receipt of such notice and the failure of the Developer to thereafter commence negotiating in good faith within such ten (10) business days, this Agreement may be terminated by the City. In the event of such termination by the City, neither party shall have any further rights against, or liability to, the other under this Agreement.
- 1.4. **Termination of Negotiations by the Developer.** In the event the City has not continued to negotiate diligently and in good faith, the Developer shall give written notice thereof to the City which shall then have ten (10) business days to commence negotiating in good faith. Following the receipt of such notice and the failure of the City to thereafter commence negotiating in good faith within such ten (10) business days, this Agreement may be terminated by the Developer. In the event of such termination by the Developer, neither party shall have any further rights against, or liability to, the other under this Agreement.

2. Duration of this Agreement.

- 2.1. **Negotiation Period.** The duration of this Agreement shall commence as of the Effective Date of this Agreement and expire 180 calendar days from the Effective Date (the “**Negotiation Period**”).

- 2.2. Extension of the Negotiation Period. If upon expiration of the Negotiation Period the Developer has not signed and submitted a LDDA to the City, as approved as to form by the City Attorney, then this Agreement shall automatically terminate unless this Agreement has been extended in writing by the City and the Developer. The City Manager may approve an extension of the Negotiation Period for up to an additional one hundred eighty (180) calendar days if they determine in their sole discretion that the Developer has made substantial progress. If a LDDA, as approved as to form by the City Attorney, is so signed and submitted by the Developer to the City on or before expiration of the Negotiation Period, then this Agreement and the Negotiation Period herein shall be extended without further action by the Parties for sixty (60) calendar days from the date of such submittal during which time the City shall take all steps legally necessary to: (1) consider the terms and conditions of the proposed LDDA; (2) if appropriate, take any actions necessary to authorize the City to enter into the LDDA, including but not limited to compliance with the California Environmental Quality Act (Public Resources Code, § 21000, et seq.) (“**CEQA**”); and (3) if such terms and conditions are acceptable to the City, as determined by the City Council at a noticed public meeting in its sole and absolute discretion, execute the LDDA. If the City has not executed the LDDA by such 60th calendar day or any extension of such period, then this Agreement shall automatically terminate, unless the 60 calendar day period has been mutually extended by the City and the Developer in writing.
- 2.3. Effect of Termination. Upon termination of this Agreement, neither Party shall have any further rights against or liability to the other under this Agreement except as provided in Section 6.11 of this Agreement, which obligations shall survive expiration or termination of this Agreement. If a LDDA has been executed by the City and the Developer, the LDDA shall thereafter govern the rights and obligations of the Parties with respect to the Property.

3. Developer Responsibilities.

- 3.1. Full Disclosure. Developer is required to make full disclosure in writing to the City of its principals, officers, members, joint ventures and its directly involved negotiators, development managers, consultant entities and managerial employees (collectively “**Developer Parties**”), and all other material information concerning Developer. Developer shall update City in writing within ten (10) business days of any change in the identity of the Developer Parties. Developer shall make and maintain full disclosure to the City of its proposed methods of financing to be used in the redevelopment and operation of the Property.
- 3.2. Developer’s Findings, Determinations, Studies and Reports. Upon reasonable notice, as from time-to-time requested by the City, the Developer agrees to make timely oral and/or written reports based on City’s request advising the

City of the status on all studies/reports (e.g., environmental reports) being made by the Developer related to the Project. City shall have access to any and all studies/reports performed by Developer.

- 3.3. Operations. Within ninety (90) calendar days of the Effective Date, Developer shall identify the entity and individuals responsible for the management of the construction of the Project and management of the operations once the Project opens ("Key Individuals"). Within ten (10) calendar days following any changes in the entity or Key Individuals, Developer shall notify City in writing.
- 3.4. Developer Financials. Within thirty (30) calendar days of the Effective Date, Developer shall submit to the City all evidence of Developer's financial status including, but not limited to, two previous years' audited financial statements, current year-to-date unaudited financial statements, Developer's by-laws and Articles of Incorporation, and evidence of Developer's nonprofit organization 501 (c)(3) status, and/or as applicable Developer's organization form and state as a for-profit entity.
- 3.5. Financial Updates. Submit to the City an updated preliminary budget and financing pro forma for the Project and each of its phases within sixty (60) calendar days of the Effective Date of this Agreement. The information provided shall be divided by predevelopment, construction, and permanent phases, and shall include all anticipated hard and soft costs (including but not limited to payment of prevailing wages for construction, development impact fees, school impact fees, planning and building permit fees, the construction of the Project, landscaping improvements, and anticipated public infrastructure improvements including but not limited to the expansion of Christie Park, and mitigation measures including but not limited to the environmental clean-up of the Property as may be required by the appropriate regulatory agencies and City), sources and uses of funds by Phase, the operating budget and a thirty-year cash flow for each Phase of the Project. This information shall be updated and submitted to the City every thirty (30) calendar days thereafter. During the Negotiation Period, the Developer shall be responsible for preparing and submitting applications for funding proposed from outside (or "Non-Agency") financing sources to the extent such applications are due during the Negotiation Period.
- 3.6. CEQA Determination. Reasonably cooperate with the City in preparing CEQA documents by supplying necessary technical data and other related information and/or development plans concerning the proposed development on the Site.
- 3.7. Geotechnical Reports. Within ninety (90) calendar days after the Effective Date, the Developer shall undertake an update of the existing geotechnical investigation of the Site, including but not limited to, the stability of soil and the location of the water table. The Developer shall submit to the City a copy of any and all reports generated.

- 3.8. Committee Input. The Developer will seek design input from the Housing Committee, Parks and Recreation Committee, Bicycle/Pedestrian Advisory Committee; and meet with the City Public Art Coordinator and the Public Art Committee to discuss proposed Public Art requirements for the Property within 60 days from the Effective Date of the agreement. The developer will seek design input from the Planning Commission in no less than two study sessions, within 120 days from the Effective Date of the agreement. Developer shall conduct a minimum of two community meetings and provide notice to property owners and occupants as determined by the City. One of the two community meetings shall be held prior to the first Planning Commission study session for the Project. Developer and their design consultants, inclusive of architect, engineers and others, will develop alternative site, park, architectural, amenities, and public art plans for use in securing input from the above referenced Committees, Planning Commission and City staff. All plans produced through the direct efforts of the Developer or through consultants retained by the Developer in connection with the aforementioned meetings shall be the property of the City. Developer shall secure written consent from its consultants for the assignment of documents to the City and for the City's use of such documents in the form provided by the City.
- 3.9. Entitlements. Developer shall not submit an application for any Project entitlements to the Community Development Department, including any zoning compliance review, until after the execution of the LDDA.
- 3.10. Communications with the City. Developer shall prepare and submit to City monthly written activity reports in a form agreed to by the Parties, that advises the City on the status of all activities being performed by the Developer with respect to this Agreement, and development of the Project. In addition, Developer shall participate in meetings, as may be requested by City staff, following submittal of each written activity report to discuss Developer's activities with respect to this Agreement and the development of the Project.
- 3.11. Insufficiency of Submittals. Upon submission by the Developer to the City of the items required under this Section 3, the City Manager or her designee shall have fifteen (15) business days to reasonably determine whether the information submitted is acceptable or not and to notify the Developer in writing of its determination. If the determination is that the information submitted is insufficient, then the City shall specify in detail why such information is insufficient and what additional information is required to make such information sufficient, if possible, and the Developer shall have thirty (30) calendar days from receipt of the City's notice to submit the additional information required by the City. If the Developer does not submit the additional information required within the thirty (30) calendar days, such failure to provide such additional information shall be considered a default, and the City may terminate the Agreement as set forth in Section 6.3.2.

3.12. Non-refundable Deposit. Upon execution of this Agreement, Developer shall make a nonrefundable payment to the City in the amount of one hundred thousand dollars and no cents (\$100,000.00).

4. City's Responsibilities.

4.1. Environmental Documents. The City shall prepare any and all environmental documents required for the proposed development under **CEQA**. The Developer shall cooperate with the City in preparing environmental documents by supplying necessary technical data and other related information and/or development plans concerning the proposed development on the Property. The City shall make reasonable efforts to notify Developer whether preparation of any environmental document will be required under CEQA and, if so, the nature of such environmental document.

4.2. Cooperation. The City shall cooperate fully in providing the Developer with appropriate information and assistance for redevelopment of the Property. Upon Developer's request, the City will provide the Developer with all environmental reports available on the Property and Building within 30 calendar days of the Effective Date of this Agreement. Any financial assistance requested by the Developer, which is authorized under the law and approved by the City Council, will only be provided if the City will derive a prudent benefit or return on its funds, as determined by the City Council in its sole and absolute discretion. Further, Developer is advised that the provision of financial assistance by the City will require Developer to comply with provisions of the California Labor Code Section 1770, et seq., regarding the payment of prevailing wage rates for redevelopment of the Property.

5. Right of Entry. The Developer agrees that before entering the Property for the purposes of conducting surveys, collecting soil samples, and performing other studies necessary for determining the suitability of the Property for redevelopment, the Developer shall obtain written prior approval from the City by executing a Right of Entry Permit and provide the City with information regarding the purpose of the entry, the location of any sampling to be performed and the time such sampling will occur.

6. General Provisions.

6.1. Real Estate Commissions. The City shall not be liable for any real estate commission or brokerage fees which may arise herefrom. The City represents that it has engaged no broker, agent, or finder in connection with this transaction, and the Developer agrees to indemnify, defend and hold the City harmless from any claim by any broker, agent, or finder retained by the Developer.

6.2. Ownership of Work Product. In the event of termination of this Agreement and without any representation or warranty by the Developer, any work product produced through the direct efforts of the Developer or through consultants retained by the Developer and provided and submitted to the City shall be the property of the City, excepting any financial information or data of a confidential nature provided by the Developer to the City. The Developer shall be entitled to retain a copy of all such materials that become the property of the City.

6.3. Defaults and Remedies.

6.3.1. Default. Failure by either Party to negotiate in good faith or otherwise perform as provided in this Agreement shall constitute an event of default hereunder. The non-defaulting Party shall give written notice of a default to the defaulting Party, specifying the nature of the default and the required action to cure the default. If a default remains uncured ten (10) days after receipt by the defaulting Party, the non-defaulting Party may exercise the remedies set forth in Sub-section 6.3.2.

6.3.2. Remedies. Except as provided herein, in the event of an uncured default by either Party, the Parties' sole remedy is to terminate the Agreement. Neither Party shall have any liability to the other for any actual, consequential, special or punitive damages, lost profits, or otherwise for any default by the other Party. Except as provided otherwise, each Party specifically waives and releases any such rights or claims it may otherwise have at law or in equity.

6.4. California Law and Attorneys' Fees. This Agreement shall be construed and enforced in accordance with the laws of the State of California. Should any legal action be brought by a party for breach of this Agreement or to enforce any provision herein, each party to such action shall be solely responsible for their own attorneys' fees, court costs, and such other costs as may be incurred in such action. The exclusive venue for any legal action taken pursuant to this Agreement shall be the State of California Superior Court for the County of Alameda or the United States District Court for the Northern District of California.

6.5. Limitations of this Agreement. Notwithstanding the approval and execution of this Agreement by the City, the Developer hereby acknowledges that it understands that the City is not committing or agreeing to undertake: (1) acquisition of land; (2) disposition of land, including the Property, to Developer or any other entity; or (3) any other acts or activities requiring the subsequent independent exercise of discretion by the City, specifically including: (i) the adoption or certification of an environmental assessment as required by CEQA; (ii) the adoption of a statement of overriding considerations in accordance with Public Resources Code Section 21081(b) if significant effects on the environment cannot be mitigated; (iii) approval of land use entitlements needed for the Project; or (iv) approval of a LLDA between the City and Developer. Furthermore, Developer hereby acknowledges and agrees that the City retains its sole

6.6. Notices. Any approval, disapproval, demand or other notice which either Party may desire to give to the other Party under this Agreement must be in writing and may be given by any commercially acceptable means, including first class mail, personal delivery, or overnight courier, to the party to whom the notice is directed at the address of the party as set forth below, or at any other address as that Party may later designate by notice.

with a copy to:

6.8. Modifications. Any alteration, change or modification of or to this Agreement, in order to become effective, shall be approved by resolution of the City Council, made in writing and in each instance signed on behalf of each Party.

- 6.9. Severability. If any term, provision, condition or covenant of this Agreement or its application to any Party or circumstances shall be held, to any extent, invalid or unenforceable, the remainder of this Agreement, or the application of the term, provision, condition or covenant to persons or circumstances other than those as to whom or which it is held invalid or unenforceable, shall not be affected, and shall be valid and enforceable to the fullest extent permitted by law.
- 6.10. No Assignment. The qualifications and identity of Developer and the Developer Parties are of particular concern to City. It is because of those unique qualifications and identity that City has entered into this Agreement with Developer. Accordingly, Developer may not assign its right to negotiate exclusively with City to any other person or entity without the City's prior written approval, which the City may withhold in its sole discretion, and any purported voluntary or involuntary assignment of Developer's exclusive negotiation rights shall be null and void.
- 6.11. Indemnity. Except as otherwise set forth expressly herein, Developer shall indemnify, defend (with counsel reasonably acceptable to City), protect and hold City, and its officers, employees, contractors, agents, volunteers and representatives, harmless from, all third-party claims, demands, damages, defense costs or liability of any kind or nature (collectively, "**Claims**") arising directly or indirectly from the approval or implementation of this Agreement and/or Developer's investigation or acquisition activities related to the redevelopment of the Property, including damages to property or injuries to persons, accidental death, and reasonable attorneys' fees and costs, whether such activities or performance thereof be by Developer or by anyone directly or indirectly employed or contracted with by Developer and whether such damage shall be discovered before or after expiration or termination of this Agreement. Developer's indemnity obligations under this Section shall not extend to Claims for property damage, bodily injury or death to the extent occasioned by the sole negligence or willful misconduct of City, or its or their officers, employees, contractors, agents, volunteers or representatives. Developer's indemnity obligations under this Section shall survive expiration or termination of this Agreement, and the City may seek any and all legal and equitable remedies in the event that the Developer is in default of its obligations under this Section, after providing notice of default pursuant to Section 6.3.1 of this Agreement. The City reserves the right to pursue all remedies at law or equity in the event of a default of this Section 6.11.
- 6.12. Counterparts. This Agreement may be signed in multiple counterparts which, when signed by both parties, shall constitute a binding agreement.
- 6.13. Interpretation. As used in this Agreement, masculine, feminine or neutral gender and the singular or plural number shall each be deemed to include the

others where and when the context so dictates. The word "including" shall be construed as if followed by the words "without limitation." This Agreement shall be interpreted as though prepared jointly by both parties. Titles and captions are for convenience of reference only and do not define, describe or limit the scope or the intent of this Agreement or any of its terms.

- 6.14. Authority. If Developer is a corporation, limited liability company, partnership, trust, association or other entity, Developer and each person executing this Agreement on behalf of Developer does hereby covenant and warrant that (1) Developer is duly incorporated or otherwise established or formed and validly existing under the laws of its state of incorporation, establishment or formation, (2) Developer has and is duly qualified to do business in California, (3) Developer has full corporate, partnership, trust, association or other power and authority to enter into this Agreement and to perform all of Developer's obligations hereunder, and (4) each person (and all of the persons if more than one signs) signing this Agreement on behalf of Developer is duly and validly authorized to do so.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date set opposite their signatures. The Effective Date of this Agreement shall be the date this Agreement is signed by the City.

APPROVED AS TO FORM BY:

John Kennedy, City Attorney

_____ 2022

CITY OF EMERYVILLE

By: _____
Adam Politzer, Interim City Manager

DEVELOPER

_____ 2022

By: _____
Name: _____
Its: _____

List of Exhibits:

Exhibit A: Legal Description