

EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

4060 Hollis Street, Emeryville, California

THIS EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT (the “**Agreement**”) is entered into effective as of _____, 2018 (the “**Effective Date**”) by and between the **City of Emeryville**, a municipal corporation (“**City**”), and **Orton Development, Incorporated**, 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. In March 2006, the former Emeryville Redevelopment Agency (“**Agency**”) purchased 4060 Hollis Street, Emeryville, CA, which is depicted in Exhibit A, attached hereto (“**Property**”), for the purpose of adaptive reuse of the existing building located on the Property (“**Building**”) to provide space for the annual Emeryville Celebration of the Arts as well as year-round exhibition and performing arts uses (“**Art Center**”).

B. In 2012, the State of California dissolved all redevelopment agencies statewide, which included the Agency.

C. On September 5, 2017, in accordance with the Long Range Property Management Plan prepared by the City of Emeryville as Successor Agency to the Agency, the Property was transferred to the City.

D. On January 16, 2018, the City Council held a study session regarding the status of constructing the Art Center, and subsequently, on February 12, 2018, the City issued a Request for Qualifications/Proposals (“**RFQ/P**”) to solicit a developer interested in partnering with the City to develop the Art Center.

E. Developer timely responded to the RFQ/P.

F. On September 17, 2018, the City Council adopted Resolution No. 18-130, which authorized City staff to enter into negotiations for an exclusive right to negotiate agreement with Developer for the development and operation of the Art Center.

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 construction, establishment and operation of the Art Center and funding for the Art Center.

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 and operation of the Art Center at 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. **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.
- 1.3. **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 sixty (60) calendar days if she determines in her 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 and pursuant to the Right of Entry Permit, attached hereto as Exhibit B, 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 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 Art Center. 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 Art Center and operations of the Art Center once the Art Center opens. Within ten (10) calendar days following any changes in the entity or key individuals, Developer shall notify City in writing.

3.4. Financial Updates. Within thirty (30) calendar days of the Effective Date, Developer shall prepare and submit to the City updated preliminary budgets and financing plans ("**Financial Update**") for the development and operation of the Art Center. Each Financial Update shall: (a) individually identify all hard and soft costs (including financing costs, contingencies, traffic impact fees, school impact fees, planning and building permit fees, construction costs (including prevailing wages), landscaping costs, fixture, furnishing and equipment costs, and costs of anticipated public infrastructure improvements) related to each of the predevelopment, pre-construction, construction and operational phases ("**Costs**"); (b) present the Costs in a monthly and annual budget; (c) present a capital development budget including sources and uses of funds; and (d) present projected operating budgets and three-year cash flow projections for the Art Center.

3.5. 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 Art Center. 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 Art Center.

3.6. 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.

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 of Emeryville City Council, will only be provided if the City will derive a prudent benefit or return on their 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 may 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 or Building for the purposes of conducting surveys, collecting soil samples, and performing other studies necessary for determining the suitability of the Property and Building for redevelopment, the Developer shall obtain approval from the City by executing a Right of Entry Permit, attached hereto as Exhibit B and incorporated herein, 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. Notwithstanding the foregoing, nothing herein shall be deemed to restrict, and City specifically reserves, the right to allow for entry on the Property by its staff, contractors and other third parties for any purpose, including but not limited to staging material and equipment in connection with construction projects undertaken in the vicinity of the Property, as well as environmental sampling and remediation activities undertaken at City's direction at the Property.

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 here from. 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 and/or the Building, 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 discretion to deny and disapprove any and all such environmental assessments, land use applications, LLDA, and any other discretionary approvals necessary for the implementation of the Project. This Agreement does not constitute a disposition of property or exercise of control over property by the City. Execution of this Agreement by the City is merely an agreement to enter into a period of exclusive negotiations according to the terms

hereof, reserving final discretion and approval by the City as to any LLDA and all proceedings and decisions in connection therewith.

- 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.

To City:	City of Emeryville 1333 Park Avenue Emeryville, CA 94608-3517 Attention: City Manager
with a copy to:	City of Emeryville 1333 Park Avenue Emeryville, CA 94608-3517 Attention: City Attorney
To Developer:	Orton Development, Inc. 1475 Powell Street, Suite 101 Emeryville, CA 94608 Attention: David Dial
with a copy to:	Stice Block 2335 Broadway, Suite 201 Oakland, CA 94612 Attention: Marc D. Stice

Any notice shall be deemed received on the date of delivery if delivered by personal service, three (3) business days after mailing if sent by first class mail, and on the date of delivery or refused delivery as shown by the records of the overnight courier if sent via overnight courier.

- 6.7. Integration. This Agreement contains the entire understanding between the Parties relating to the matters set forth herein. All prior or contemporaneous agreements, understandings, representations and statements, oral or written, are merged in this Agreement and shall be of no further force or effect.

- 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 and Building for the Art Center, 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 neuter 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:



Michael Guina, City Attorney

_____ 2018

CITY OF EMERYVILLE

By: _____
Christine S. Daniel, City Manager

ORTON DEVELOPMENT, INC

10/25 _____ 2018

By:  _____
Name: ~~Nick Orton~~ NICHOLAS ORTON
Its: Partner, Orton Development

List of Exhibits:

Exhibit A: Site Map

Exhibit B: Right of Entry Permit

[illegible]

RIGHT OF ENTRY PERMIT

ISSUED TO: Orton Development, Inc. ("**Permittee**")
 1475 Powell Street, Suite 101
 Emeryville, CA 94608
 Attention: Nicholas Orton

PERMISSION IS GRANTED to Permittee and its contractors, agents and employees to enter upon the "**Property**" (as hereinafter defined) of the City of Emeryville ("**Owner**"), subject to the conditions set forth in this Right of Entry Permit:

1. Property. This Right of Entry Permit is limited to that certain real property located at 4060 Hollis Street, Emeryville, California and more particularly depicted on Exhibit A attached hereto and incorporated herein by this reference, which is improved with a building structure (the "**Property**").

2. Purpose. This nonexclusive and temporary Right of Entry Permit is limited to the following purposes: conducting surveys, collecting soil samples, and performing other studies necessary for determining the suitability of the Property for redevelopment as the Art Center.

Owner agrees to allow Permittee to use the Property in the manner described above on the condition that:

- a. Permittee shall commence any and all work or activities on the Property at its sole cost and expense and Owner shall not incur any cost or expense.
- b. Any and all Mechanic's Liens filed on account of the work performed by Permittee on the Property pursuant to this Right of Entry Permit shall be promptly cured by Permittee's payment thereof and the recording of applicable Release of Mechanic's Liens, or Permittee shall post a statutory mechanic's lien release bond in lieu thereof within seven (7) days after the filing of each such Mechanic's Lien.
- c. At no cost to Owner, Permittee shall promptly provide copies of all studies, surveys, tests and inspections conducted pursuant to this Right of Entry Permit in Permittee's possession to Owner without any representation or warranty as to completeness or accuracy.
- d. Permittee's personnel may occupy/enter Property on weekdays between the hours of 9 a.m. and 5 p.m. only.
- e. Three (3) business days before Permittee desires entry upon the Property, Permittee shall first give written notice to and receive written confirmation from:

Emi Theriault

Exhibit B to Exclusive Right to Negotiate

Economic Development & Housing Department
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608
Phone: 510-596-4357
Email: etheriault@emeryville.org

Any written notice delivered by email between the hours of 5:00 p.m. and 11:59 p.m. shall be deemed to be served the next business day.

- f. At no time shall hazardous materials be handled, brought, or stored on the Property.
- g. Prior to any drilling or other destructive testing or demolition, Permittee shall:
1) obtain any permits required by applicable regulatory agencies including but not limited to Alameda County; and 2) contact Underground Service Alert (USA) to identify the location of all underground utilities on the Property. Upon completion of drilling, all drill sites shall be permanently closed in compliance with applicable federal, state and local laws, regulations and rules.
- h. Permittee agrees to repair any damage to the Property, or replace any improvement on the Property that cannot be repaired related to or arising from from its access and activities on the Property.

3. Term. This Right of Entry Permit shall become effective upon execution by the Owner and Permittee, and submission of required liability insurance to Owner in accordance with Section 6. The Right of Entry Permit will remain in effect until terminated by either party pursuant to the terms provided herein. Notwithstanding any provision contained herein to the contrary, this Right of Entry Permit is revocable immediately upon notice by the Owner to Permittee for any reason whatsoever. Upon notice of revocation, Permittee shall suspend all activity on the Property immediately and will be responsible for the repair of any damage to the Property caused by Permittee, as directed by the Owner. If not revoked, the term of this Right of Entry Permit shall expire ninety (90) calendar days after the date of execution by Owner. At the expiration of the term, Permittee shall immediately repair any damage to the Property caused by Permittee's use of the Property, as directed by Owner.

4. Assumption of Risk and Releases. Each person entering upon the Property under this Right of Entry Permit shall do so at its own risk. On behalf of itself and its agents, representatives, assigns, heirs, spouses, successors-in-interest, executors, administrators, employees, contractors and sub-contractors ("**Releasees**"), Permittee assumes all risk of entering the Property and agrees that the City of Emeryville and Successor Agency to the Emeryville Redevelopment Agency and their officers, agents, employees and volunteers are released and shall not be liable in any manner for injury to or death of Releasees or their respective officers, employees or agents or for damage to property of Releasees arising from any cause. This release applies to all potential future

claims and Permittee on behalf of itself and the Releasees agrees to waive any and all rights pursuant to Section 1542 of the California Civil Code, which reads as follows:

"A general release does not extend to claims that the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor."

5. Indemnification. Permittee agrees that Owner shall not be liable for any bodily injury, sickness, disease or death of any person or damages to any property or any person pursuant to this Right of Entry Permit and that Permittee shall be responsible for any liability, cost, expenses or claim associated with injuries to or death of any person or damage to property related directly or indirectly to any act or failure to act arising from the activities under this Right of Entry Permit. Permittee agrees to indemnify, defend and hold harmless the City of Emeryville and its officers, agents, volunteers and employees (collectively, the "**Indemnitees**"), from any and all actions, claims and liability for any loss or damage, including, but not limited to, bodily injury, sickness, disease or death of any person or damage to any property, tangible or intangible, resulting from the execution of this Right of Entry Permit or the entry upon the Property, and from all costs and expenses, including reasonable attorneys' fees, arising therefrom, except for any claim arising from the sole negligence or willful misconduct of Owner. This indemnification shall survive termination of this Right of Entry Permit.

6. Liability Insurance. This Right of Entry Permit shall not be effective until the evidence of liability insurance as required by Exhibit B, attached hereto and incorporated by reference, is delivered to and approved by Owner. In addition to the requirements set forth in Exhibit B, Permittee's insurance shall cover work by its contractors and subcontractors or the contractors and subcontractors must provide evidence of meeting the insurance requirements set forth above.

7. Assignment. Permittee shall not assign or otherwise transfer any rights under this Right of Entry Permit and any purported assignment or transfer shall automatically revoke such Right of Entry Permit.

8. Compliance with Laws. Permittee shall obtain and maintain all permits and approvals required for the activities under this Right of Entry Permit and shall comply with all laws now in effect or that become effective during the term of this Right of Entry Permit.

Should any discharge, leakage, spillage, emission or pollution of any type occur upon or from the Property due to Permittee's use and occupancy of the Property, then Permittee, at its sole cost, shall clean all affected property to the satisfaction of the Owner and any governmental body having jurisdiction.

9. No Dedication. Nothing contained in this Right of Entry Permit shall be deemed a gift or dedication of any portion of the Property to or for the general public or for any public purpose whatsoever. This Right of Entry Permit shall be strictly limited to and for the purposes expressed within.

10. Rights Limited. This Right of Entry Permit shall not be construed to grant any real property or other rights to Permittee in the Property.

11. Entire Agreement. This Right of Entry Permit constitutes the entire agreement between Owner and Permittee pertaining to Permittee's entry upon the Property.

12. Governing Law; Attorneys' Fees. This Right of Entry Permit shall be construed and enforced in accordance with and governed by the laws of the State of California. In the event that either party institutes any action, suit or other dispute resolution proceeding based on this Right of Entry Permit against the other party, the prevailing party is entitled to receive all costs and expenses, associated therewith including but not limited to reasonable attorneys' fees and courts costs. 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.

13. Counterparts. This Right of Entry Permit may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement.

14. Authority to Contract. Permittee hereby represents and warrants to Owner that in accordance with its by-laws and all operative rules and procedures, it has duly authorized the undersigned officer of Permittee to enter into and execute this Right of Entry Permit and to carry out, fulfill and perform all promises, conditions and obligations contained herein.

"Permittee": Orton Development, Inc.

By: _____

Date: _____

Its: _____

"Owner": City of Emeryville

By: _____
Christine S. Daniel, City Manager

Date: _____

Approved as to form:

Michael A. Guina, City Attorney

Exhibit A: Site Map

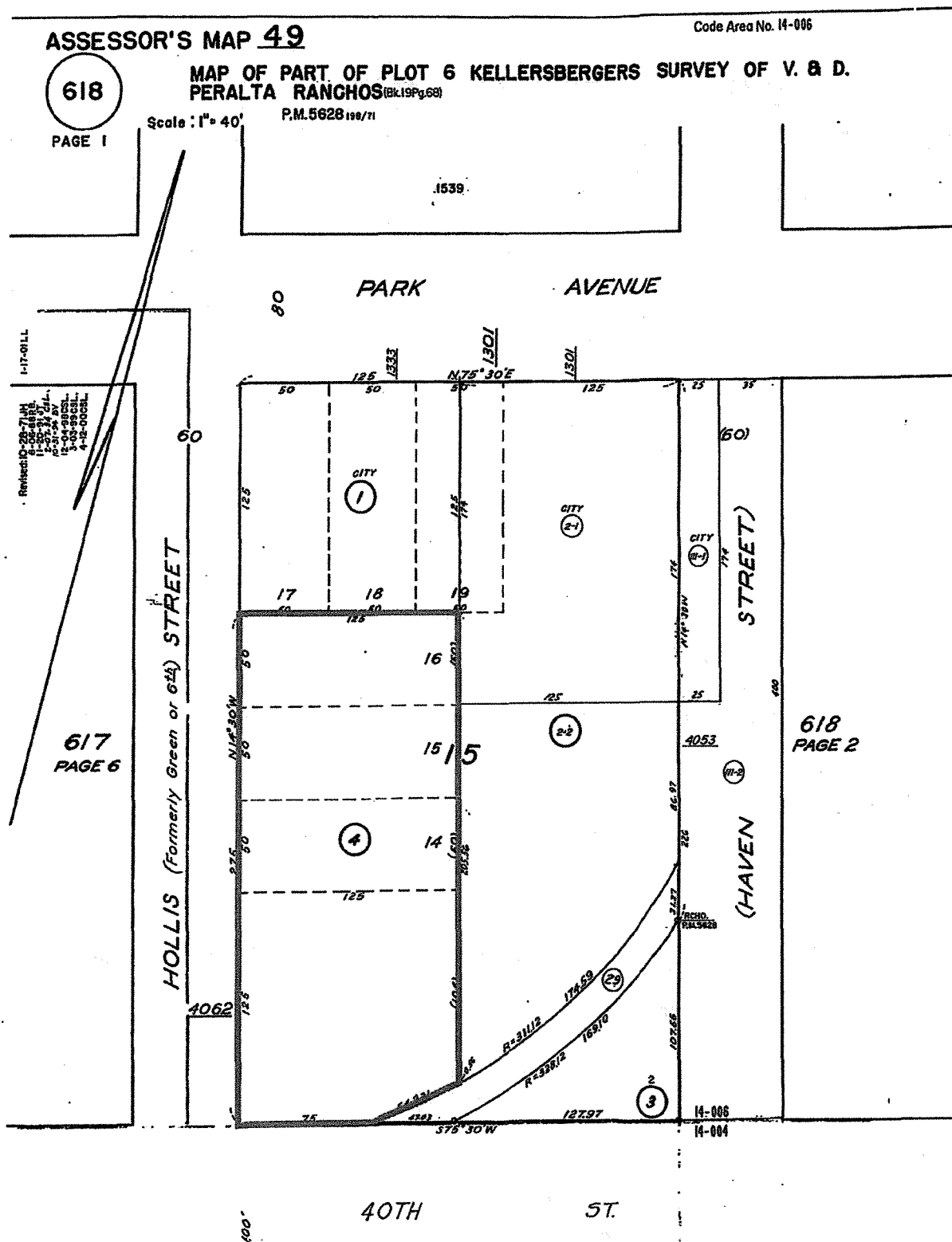


Exhibit B to Exclusive Right to Negotiate

EXHIBIT B INSURANCE REQUIREMENTS

As used in this Exhibit B, Permittee refers to: Orton Development, Inc.

A. Minimum Requirements. Permittee shall, at its expense, procure and maintain for the duration of the Permit insurance against claims for injuries to persons or damages to property which may arise from or in connection with the performance of the activities related to and arising out of the Permit by Permittee, its agents, representatives, employees or subcontractors. Permittee shall also require all of its subcontractors to procure and maintain the same insurance for the duration of the Permit. Such insurance shall meet at least the following minimum levels of coverage, as checked below:

i) Minimum Scope of Insurance. Coverage shall be at least as broad as the latest version of the following:

- X *General Liability:* Insurance Services Office Commercial General Liability coverage (occurrence form CG 00 01);
- X *Automobile Liability:* Insurance Services Office Business Auto Coverage form number CA 00 01, code 1 (any auto) or if Permittee owns no vehicles, this requirement may be met through a non-owned auto endorsement to the General Liability Policy;
- ☐ *Professional Liability/Errors and Omissions:* written on a policy form specifically designed to protect against acts, errors or omissions of the Permittee wherein "Covered Professional Services" as designated in the policy must specifically include activities performed under this Permit; and
- X *Workers' Compensation and Employer's Liability:* Workers' Compensation insurance as required by the State of California and Employer's Liability Insurance. Policies shall not contain exclusions contrary to this Permit.
- X *Pollution Liability Insurance:* Pollution Liability insurance for claims arising from the discharge, dispersal release or escape or any irritant or contaminant into or upon land, any structure, the atmosphere, watercourse or body of water, including groundwater. This shall include on and off-site clean up and emergency response costs and claims arising from above ground and below ground storage tanks.

ii) Minimum Limits of Insurance. Permittee shall maintain limits no less than:

- ☐ *General Liability (All Contract Types):* \$1,000,000 per occurrence and \$2,000,000 aggregate for bodily injury, personal injury and

property damage, including without limitation, blanket contractual liability; and

- X *General Liability (Construction Specific):* \$2,000,000 per occurrence and \$4,000,000 aggregate for bodily injury, personal injury and property damage, including without limitation, blanket contractual liability, and coverage for explosion, collapse and underground property damage hazards; and
- X *Automobile Liability:* \$2,000,000 per accident for bodily injury and property damage; and
- ☐ *Professional Liability/Errors and Omissions:* \$2,000,000 per claim and aggregate; and
- X *Workers' Compensation and Employer's Liability:* Workers' compensation limits as required by the Labor Code of the State of California. Employer's Liability limits of \$1,000,000 each accident, policy limit bodily injury or disease, and each employee bodily injury or disease; and
- X *Pollution Liability Insurance:* \$2,000,000 per occurrence and \$2,000,000 aggregate.

Except for the professional liability/errors and omissions policy, defense costs shall be available in addition to the limits. Notwithstanding the minimum limits specified herein, any available coverage shall be provided to the Parties required to be named as additional insureds pursuant to this Permit.

B. Insurance Endorsements. The insurance policies shall contain the following provisions, if checked, or Permittee shall provide endorsements (amendments) on forms supplied or approved by the City to add the following provisions, if checked, to the insurance policies:

- X General Liability. (1) Such policy shall provide the City, its officials, employees, agents and authorized volunteers additional insured status using ISO endorsements CG20 10 plus CG20 37, or endorsements providing the exact same coverage, with respect to the activities or operations performed by or on behalf of Permittee, including materials, parts or equipment furnished in connection with such work; (2) all policies shall waive or shall permit Permittee to waive all rights of subrogation which may be obtained by the Permittee or any insurer by virtue of payment of any loss or any coverage provided to any person named as an additional insured pursuant to this Permit, and Permittee agrees to waive all such rights of subrogation; and (3) the insurance coverage shall be primary insurance as

respects the City, its officials, employees, agents and authorized volunteers, or if excess, shall stand in an unbroken chain of coverage excess of Permittee's scheduled underlying coverage. Any insurance or self-insurance maintained by the City, its officials, employees, agents and authorized volunteers shall be excess of Permittee's insurance and shall not be called upon to contribute with it.

- X Automobile Liability. (1) Such policy shall provide the City, its officials, employees, agents and authorized volunteers additional insured status with respect to the ownership, operation, maintenance, use, loading or unloading of any auto owned, leased, hired or borrowed by Permittee or for which Permittee is responsible; (2) all policies shall waive or shall permit Permittee to waive all rights of subrogation which may be obtained by the Permittee or any insurer by virtue of payment of any loss or any coverage provided to any person named as an additional insured pursuant to this Permit, and Permittee agrees to waive all such rights of subrogation; and (3) the insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and authorized volunteers, or if excess, shall stand in an unbroken chain of coverage excess of Permittee's scheduled underlying coverage. Any insurance or self-insurance maintained by the City, its officials, employees, agents and authorized volunteers shall be excess of Permittee's insurance and shall not be called upon to contribute with it in any way.
- ☐ Professional Liability Coverage. Any policy inception date, continuity date, or retroactive date must be before the effective date of this Permit and Permittee agrees to maintain continuous coverage through a period no less than three years after termination of the Permit.
- X Workers' Compensation and Employer's Liability Coverage. The insurer shall agree to waive all rights of subrogation against the City, its officials, employees, agents and authorized volunteers for losses paid under the terms of the insurance policy which arise from work performed by Permittee.
- X Pollution Liability Coverage. (1) Such policy shall give the City, its officials, employees, agents and authorized volunteers additional insured status with respect to claims arising from the discharge, dispersal release or escape or any irritant or contaminant into or upon land, any structure, the atmosphere, watercourse or body of water, including groundwater; (2) all policies shall waive or shall permit Permittee to waive all rights of subrogation which may be obtained by the Permittee or any insurer by virtue of payment of any loss or any coverage provided to any person named as an additional insured pursuant to this Permit, and Permittee agrees to waive all such rights of subrogation; and (3) the insurance coverage shall be primary insurance as respects the City, its officials, employees, agents and authorized volunteers, or if excess, shall stand in an unbroken chain of coverage

excess of Permittee's scheduled underlying coverage. Any insurance or self-insurance maintained by the City, its officials, employees, agents and authorized volunteers shall be excess of Permittee's insurance and shall not be called upon to contribute with it in any way.

- ☒ All Coverages. Each insurance policy required by this Permit shall be endorsed to state that: (1) coverage shall not be suspended, voided, reduced or canceled except after thirty (30) days prior written notice by certified mail, return receipt requested, has been given to the City; and (2) any failure to comply with reporting or other provisions of the policies, including breaches of warranties, shall not affect coverage provided to the City, its officials, employees, agents and authorized volunteers.

C. Separation of Insureds; No Special Limitations. All insurance required by this Section shall contain standard separation of insureds provisions. In addition, such insurance shall not contain any special limitations on the scope of protection afforded to the City, its officials, employees, agents and authorized volunteers.

D. Deductibles and Self-Insurance Retentions. Any deductibles or self-insured retentions must be declared to and approved by the City. Permittee shall guarantee that, at the option of the City, either: (1) the insurer shall reduce or eliminate such deductibles or self-insured retentions as respects the City, its officials, employees, agents and authorized volunteers; or (2) the Permittee shall procure a bond or other financial guarantee acceptable to the City guaranteeing payment of losses and related investigation costs, claims and administrative and defense expenses.

E. Acceptability of Insurers. Insurance is to be placed with insurers with a current A.M. Best's rating no less than A:VII, licensed to do business in California, and satisfactory to the City. Exception may be made for the State Compensation Insurance Fund when not specifically rated.

F. Verification of Coverage. Permittee shall furnish City with original certificates of insurance and endorsements effecting coverage required by this Exhibit B to the Permit on forms satisfactory to the City. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf, and shall be on forms supplied or approved by the City. All certificates and endorsements must be received and approved by the City before work commences. The City reserves the right to require complete, certified copies of all required insurance policies, at any time.

G. Subcontractors. All subcontractors of Permittee shall meet the requirements of this Section before commencing any work. Permittee shall furnish separate certificates and endorsements for each subcontractor. Subcontractor policies of General Liability insurance shall name the City, its officials, employees, agents and authorized volunteers as additional insureds using form ISO 20 38 04 13 or endorsements providing the exact same coverage. All coverages for subcontractors shall be subject to all of the requirements stated herein except as otherwise agreed to by the City in writing.

H. Reporting of Claims. Permittee shall report to the City, in addition to Permittee's insurer, any and all insurance claims submitted by Consultant in connection with the activities related to or arising out of this Permit.