

EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

4300 San Pablo Avenue, Emeryville, California

THIS EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT (the “**Agreement**”) is entered into effective as of 10/29/2020 (the “**Effective Date**”) by and between the **City of Emeryville**, a municipal corporation (“**City**”), and EAH, Inc., a California Nonprofit 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 property commonly referred to as 4300 San Pablo Avenue, Emeryville, CA, which is legally described in **Exhibit A**, attached hereto (the “**Property**”).

B. On September 17, 2019, the City Council designated the Property as an affordable senior or intergenerational rental housing development, and subsequently, on September 24, 2019, the City issued a Request for Qualifications/Proposals (the “**RFQ/P**”) to solicit a developer interested in designing and redeveloping the Property as affordable senior or intergenerational housing.

C. Developer submitted a timely response to the RFQ/P.

D. On July 21, 2020, the City Council adopted Resolution No. 20-85, which authorized City staff to execute an exclusive right to negotiate agreement with Developer for the development of the Property.

E. 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 (the “**LDDA**”) providing for the construction, establishment and operation of the Property through the development of an inter-generational community containing no less than 68 rental residential units affordable to tenants whose incomes are no greater than 80% AMI, along with other compatible and acceptable uses as the Parties agree to pursuant to this Agreement (the “**Project**”).

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. Within ninety (90) calendar days of the Effective Date, the Parties agree to prepare an initial, non-binding Term Sheet to use as a general basis for negotiating key terms and provisions of the LDDA (the "Term Sheet").

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 one hundred eighty (180) 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 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 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, Developer’s by-laws and Articles of Incorporation, and evidence of Developer’s nonprofit organization 501 (c)(3) status.

- 3.5. Financial Updates. Submit to the City an updated preliminary budget and financing pro forma for the Project 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, if required, for construction, traffic impact fees, school impact fees, planning and building permit fees, the construction of the Project, landscaping improvements, and anticipated public infrastructure improvements and mitigation measures, to the extent Developer has received such estimates from the City), sources and uses of funds by phase, the operating budget and a thirty-year cash flow. 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 Project ("**CEQA Determination**").
- 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 Property, 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. Entitlements. Improvements to the Property are anticipated to require discretionary entitlements from various public agencies with oversight and approval authority, including from the City of Emeryville. The cumulative approvals, including CEQA Determination, necessary to obtain the right to construct the proposed development on the Property are called the Project entitlements ("Entitlements"). Developer and City shall collaborate to reach a decision on the most reasonable means to process and obtain the Entitlements. Should the Parties choose to process the Entitlements consistent with Section 65913.4 of the Government Code ("**SB35**"), then Developer agrees to not submit an application for Entitlements to the City's Community Development Department, including any zoning compliance review, until after the execution of the LDDA. Should the Parties choose to process the Entitlements consistent with the City's municipal planning process and without engaging SB35, then Developer and City will cooperate to determine whether the Entitlements may be reasonably processed in tandem with LDDA negotiations.
- 3.9. 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.

- 3.10. 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 Project's CEQA Determination. 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, including exemptions, if any, that the Project is eligible to obtain under CEQA guidelines.
- 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 within thirty (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 public benefit return 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. Developer and City will cooperate to determine whether financial assistance by the City to the Project, if any, may be reasonably processed in tandem with LDDA negotiations.

5. Right of Entry. Developer acknowledges that the Property is currently occupied by a third-party, who is operating the Property as a temporary shelter for families experiencing homelessness (the “**Operator**”), and any entry upon the Property by the Developer will need to be coordinated with the Operator and through the City.. Developer and the City recognize and acknowledge that this Agreement establishes specific terms and obligations of Developer which can only be performed if Developer is provided reasonable and timely Right of Entry access to the Property to carry out the Developer Responsibilities stipulated in the Agreement. 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 provide a written notice to the City which specifies the purpose of the entry, the location of any sampling to be performed and the time such sampling will occur (the “Developer Notice”) and execute a Right of Entry permit. The City shall notify Developer in writing of City and Operator approval within seven (7) calendar days of receiving the Developer Notice. Prior to any entry onto the Property, Developer must obtain and maintain, at Developer’s sole cost and expense, insurance coverage and limits as provided in Exhibit B to the Right of Entry permit. Developer agrees to indemnify and hold the City harmless from any claim for liabilities, costs, expenses (including, without limitation, reasonable attorneys’ fees actually incurred) damages or injuries arising out of, or resulting from, the inspection of the Property by Developer or its agents.

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 material reason(s) for the default and the required action to cure the default. If a default remains uncured fifteen (15)

working 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 LDDA 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, LDDA, 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 LDDA 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: EAH
22 Pelican Way
San Rafael, CA 94901
ATTN: Welton Jordan

with a copy to: Bocarsly Emden Cowan Esmail & Arndt LLP
633 West Fifth Street
64th Floor
Los Angeles, CA 90071
ATTN: Nicole Deddens

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. The City acknowledges that the Project will require formation of a limited partnership consistent with the requirements of the CA Low Income Housing Tax Credit Program (the "Limited Partnership"), which may be formed prior to the execution of the LDDA, in which case this Agreement and the LDDA will be assigned to the Limited Partnership
- 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 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:

DocuSigned by:

Andrea Visweswara

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for Michael Guina, City Attorney

10/29/2020

CITY OF EMERYVILLE

DocuSigned by:

By:

Christine Daniel

B023DA190D204E2...

Christine S. Daniel, City Manager

DEVELOPER

EAH Inc., a California nonprofit corporation

DocuSigned by:

By:

Welton Jordan III

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Name: Welton Jordan

Its: Chief Real Estate Development Officer

List of Exhibits:

Exhibit A: Legal Description

Exhibit B: Right of Entry Permit

The land referred to in this report is situated in the state of California, County of ALAMEDA, and is described as follows:

CITY OF EMERYVILLE

THE WESTERLY 100 FEET OF LOT 1, AND A PORTION OF THE WESTERLY 100 FEET OF LOT 2, BLOCK 1, MAP OF SUBDIVISIONS OF A PORTION OF PLOT #6 AS PER KELLERSBERGER'S SURVEY OF THE RANCHOS OF V. & D. PERALTA, FILED DECEMBER 16, 1876, MAP BOOK 2, PAGE 6, ALAMEDA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

COMMENCING AT THE POINT OF INTERSECTION OF THE NORTHERLY LINE OF 43RD STREET WITH THE EASTERLY LINE OF SAN PABLO AVENUE, AS SAID STREET AND AVENUE ARE SHOWN ON SAID MAP; THENCE EASTERLY ALONG SAID NORTHERLY LINE OF SAID 43RD STREET, 100 FEET; THENCE AT RIGHT ANGLES NORTHERLY 104.25 FEET; THENCE AT A RIGHT ANGLES WESTERLY 100 FEET TO SAID EASTERLY LINE OF SAID SAN PABLO AVENUE; THENCE AT RIGHT ANGLES SOUTHERLY ALONG SAID EASTERLY LINE OF SAN PABLO AVENUE 104.25 FEET TO THE POINT OF COMMENCEMENT.

ASSESSOR'S PARCEL NO. 049-1079-014-01

The land referred to in this report is situated in the state of California, County of ALAMEDA, and is described as follows:

TOWN OF EMERYVILLE

PARCEL 1:

BEING PORTIONS OF LOTS 2 AND 3, BLOCK 1, "MAP OF THE SUBDIVISION OF A PORTION OF PLOT 6, AS SHOWN ON KELLERSBERGER'S SURVEY OF THE RANCHOS OF V. & D. PERALTA," FILED DECEMBER 16, 1876, MAP BOOK 2, PAGE 6, ALAMEDA COUNTY RECORDS, DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT ON THE EASTERLY LINE OF SAN PABLO AVENUE DISTANT THEREON NORTHERLY 104.25 FEET FROM THE INTERSECTION THEREOF WITH THE NORTHERLY LINE OF 43RD STREET, AS SAID AVENUE AND STREET ARE SHOWN ON THE MAPS HEREIN REFERRED TO; THENCE NORTHERLY ALONG SAID EASTERLY LINE OF SAID SAN PABLO AVENUE, 51.75 FEET TO THE SOUTHERN LINE OF THE PARCEL OF LAND DESCRIBED IN THE DEED BY M. DOWN TO ALBERT HAMMARBERG AND GERTRUDE HAMMARBERG DATED JULY 16, 1945, RECORDED JULY 19, 1945, UNDER RECORDERS' SERIES #SS/45761; THENCE ALONG THE LAST MENTIONED LINE EASTERLY 100 FEET, THENCE SOUTHERLY PARALLEL WITH SAID EASTERN LINE OF SAN PABLO AVENUE 51.75 FEET; THENCE WESTERLY PARALLEL WITH SAID NORTHERN LINE OF 43RD STREET 100 FEET TO POINT OF BEGINNING.

PARCEL 2:

THE WESTERN 100 FEET OF LOT 4, BLOCK 1, "MAP OF THE SUBDIVISION OF A PORTION OF PLOT 6, AS SHOWN ON KELLERSBERGER'S SURVEY OF THE RANCHOS OF V. & D. PERALTA," FILED DECEMBER 16, 1876, ALAMEDA COUNTY RECORDS, MAP BOOK 2, PAGE 6.

ASSESSOR'S PARCEL NO. 049-1079-017-01

EXHIBIT B

RIGHT OF ENTRY PERMIT

ISSUED TO: EAH, Inc. ("**Permittee**")
22 Pelican Way
San Rafael, CA 94901
Attention: Welton Jordan

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 4300 San Pablo Avenue, 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**"). Permittee acknowledges that East Oakland Community Project ("**Licensee**") holds a license from the Owner to use the Property to operate a temporary emergency shelter for families and office space to provide support services to individuals experiencing homelessness ("**Licensed Use**").

2. Purpose. This nonexclusive and temporary Right of Entry Permit is limited to the following non-invasive and non-destructive purposes: conducting surveys, collecting soil samples, and performing other non-invasive and non-destructive studies necessary for determining the suitability of the Property for redevelopment as an affordable housing project.

Owner and Licensee agree 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 and Licensee 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.

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- d. Permittee's personnel may occupy/enter Property on weekdays between the hours of 9 a.m. and 5 p.m. only, and shall not interfere with the Licensed Use.
- e. Seven (7) business days before Permittee desires entry upon the Property, Permittee shall first give written notice to and receive written confirmation from:

Valerie Bernardo
Economic Development & Housing Department
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608
Phone: 510-596-4357
Email: vbernardo@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. 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 its access and activities on the Property.

3. Term. This Right of Entry Permit shall become effective upon execution by the Owner Permittee, and Licensee 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 when the Exclusive Right to Negotiate Agreement dated ____ between Permittee and Owner expires or is otherwise terminated. 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 Owner and Licensee and their

Right of Entry Permit
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respective 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 and Licensee 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 Owner and Licensee and their respective 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 or Licensee. 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.

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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": EAH, Inc.

By: _____

Date: _____

Its: _____

"Owner": City of Emeryville

By: _____
Christine S. Daniel, City Manager

Date: _____

Approved as to form:

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Michael A. Guina, City Attorney

“Licensee”: East Oakland Community Project

By: _____
Its: _____

Date: _____