

**DRAFT**  
**3/24/14**

**EXCLUSIVE NEGOTIATION AGREEMENT BY AND BETWEEN  
THE CITY OF ALAMEDA  
AND**

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This EXCLUSIVE NEGOTIATION AGREEMENT (“Agreement”) is entered into by and between the City of Alameda, a municipal corporation (“City”), and [Insert official name of entity], a [Insert legal type of entity] (“Developer”), as of the Effective Date (defined in Section 1 below). The City and the Developer sometimes are referred to collectively as the “Parties” and either individually as a “Party.”

**RECITALS**

A. The City is the owner of certain real property located within the City of Alameda, State of California commonly referred to as the former Alameda Naval Air Station, now known as Alameda Point. The property that is the subject of this Agreement is [Insert identification of property subject to this Agreement] which is depicted for convenience in Exhibit A (the “Property”).

B. The Developer has demonstrated to the City its experience with successfully developing properties similar to the Property, as demonstrated by its statement of qualifications submitted to the City on [Insert date of submittal], and provided in Exhibit B and seeks to develop the Property with [Insert brief description of proposed development] (the “Project”).

D. The City and the Developer seek to negotiate a transfer of the Property from the City to the Developer for development of the Project. The Parties intend to negotiate mutually acceptable terms and conditions for the transfer and development of the Project in a Disposition and Development Agreement (“DDA”).

E. In February 2014 the Alameda City Council approved a Master Infrastructure Plan, General Plan Amendment, Zoning Ordinance Amendment and certified an Environmental Impact Report (collectively referred to as the “Planning Documents”) all related to potential development at Alameda Point. The Developer understands that any proposed Project must be consistent with those Planning Documents.

NOW, THEREFORE, in consideration of the foregoing and the promises, covenants, and provisions set forth below, the receipt and adequacy of which consideration is acknowledged, the Developer and the City agree as follows.

**AGREEMENT**

1. Term. The term of this Agreement shall commence on the date the City Council approves this Agreement (the “Effective Date”), and shall extend for six months thereafter unless sooner terminated or extended as herein provided (the “Initial Term”).

2. Extended Term. The Initial Term plus any and all extensions of the Initial Term under this Section 2 are referred to collectively as the “Term.” The Initial Term may be extended two times for up to three months each time at the sole discretion of the City Manager or his or her designee.

3. Termination. If the Developer fails to deposit with the City the amount required by Section 6.1 within five (5) business days of the Effective Date, this Agreement shall immediately terminate with no further action required by either Party.

4. Negotiation of the DDA. During the Term, the Parties shall negotiate the proposed terms of the DDA for submittal to the City Council for its consideration. The DDA will establish the essential business terms and framework for the transfer and development of the Property, and will define the financial, legal, operational and administrative mechanisms to implement such transfer and development. The DDA shall include a Development Plan for the Project as more fully described in Alameda Municipal Code Section 30-4.13 (“Development Plan”). A summary of non-binding key terms to be included in the DDA is attached as Exhibit C. The Developer understands and agrees that the City Manager shall have right to determine in his/her reasonable discretion if the proposed DDA is complete and sufficiently consistent with the intent described in this Section 4 to be placed on a City Council agenda. At the end of the Term, if (a) a proposed DDA, including a proposed Development Plan, is not placed on a City Council agenda; or (b) the City Council does not approve a proposed DDA, including a proposed Development Plan, then this Agreement shall expire and the Parties shall have no further rights and obligations one to another pursuant to this Agreement.

5. City Responsibilities. During the Term, the City shall do the following to further the negotiation process:

5.1 Exclusive Negotiations. The City shall negotiate exclusively with the Developer regarding the Project, the Property, and the terms of the DDA and shall not solicit, market to, or negotiate with any other person or entity regarding the Project or the Property or solicit or entertain bids or proposals to do so.

5.2 Retention of Discretionary Authority. The City shall negotiate in good faith with the Developer during the Term. The Developer understands and agrees that by entering into this Agreement the City is making no commitment that it will approve a DDA, including a Development Plan, for the Project with the Developer. The City specifically retains the right to approve or deny a proposed DDA, including a Development Plan, or to approve an alternative or to impose any conditions or mitigation measures upon the Project in its sole discretion.

6. Developer Responsibilities. During the Term, Developer shall do the following at its sole expense to further the negotiation process:

- 6.1 Non-Refundable Deposit to Offset City Expenses. Within five (5) business days of the Effective Date, Developer must wire transfer to the City a non-refundable deposit of \$150,000. If payment is not received by the City within that time period, this Agreement shall immediately terminate. The deposit will assist the City in offsetting City staff and outside legal and consultant expenses associated with this Agreement and negotiation of the DDA; however, the Developer understands and agrees that the deposit is non-refundable and not intended as reimbursement.
  - 6.2 Further Entitlements. Developer shall seek further entitlements, as needed, for development of the Project, including but not limited to, preparation of a proposed Development Plan. Developer understands and agrees that the Project will be required to conform to City's approval processes and be consistent with the City's Zoning Ordinance, General Plan, Master Infrastructure Plan, and other specific plans as now approved, as may be approved and as may be amended from time to time.
  - 6.3 Transportation Demand Management Compliance Strategy. Developer shall prepare a Transportation Demand Management ("TDM") Compliance Strategy in compliance with the Alameda Point TDM Plan.
  - 6.4 Financing and Project ProForma. Developer shall prepare a Financing Plan for the proposed Project, including a proforma, for review and approval by the City that includes sources and uses of funds for financing the Project and any rate of return requirements.
  - 6.5 Project Team. Developer shall identify key individuals on its Project Team who will be dedicated to working with the City during implementation of the DDA. Additionally, Developer shall provide the City with a list of its intended consultants, including but not limited to, architectural, engineering, legal, financial, and construction.
  - 6.6 Reports. At any time requested by the City, but not more frequently than monthly, Developer shall make oral and summary form written progress reports advising the City on all progress being made on the responsibilities listed in this Section 6.
7. Meetings. Developer and City staff, as needed, shall meet or hold a conference call on average every two weeks during the Term to discuss the status of activities and tasks related to the negotiations and the Project, the accomplishment of such activities and tasks, and other such matters.
8. Representations and Warranties.
- 8.1 Duly Formed and Validly Existing. Developer represents and warrants that [*Insert name of entity*] is a [*insert type of legal entity*] is duly formed and validly existing under the laws of the State of California.

8.2 Developer Authority. Developer represents and warrants that the person executing this Agreement on behalf of Developer has the full right, power, and authority to execute this Agreement and to bind Developer hereunder. Developer agrees to provide City with evidence of this authority upon request.

8.3 City Authority. The City represents and warrants that the person executing this Agreement on behalf of the City has the full right, power, and authority to execute this Agreement and to bind the City hereunder.

9. No Assignment. The City is entering into this Agreement with Developer based on Developer's development experience and track record with similar developments. Developer may not sell, assign, or transfer any of its rights or obligations under this Agreement.

10. Notices. All notices required or permitted under this Agreement shall be delivered in person; by facsimile, email or overnight courier with written confirmation of receipt, or by registered or certified mail, postage prepaid, return receipt requested, to such Party at its address shown below, or to such other address designated in writing by such Party:

Notices to the City:

City of Alameda  
2263 Santa Clara Avenue  
Alameda, CA 94501  
Attn: City Manager  
Chief Operating Officer - Alameda Point  
Telephone: 510.747.7400  
Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_

With copies to:  
City of Alameda  
2263 Santa Clara Avenue  
Alameda, CA 94501  
Attn: City Attorney  
Telephone: 510.747.4750  
Facsimile: \_\_\_\_\_  
Email: \_\_\_\_\_

Notices to Developer:

[Insert Contact Information]

Telephone:

Facsimile:

Email:

With copies to:

[Insert Contact Information]

Telephone:

Facsimile:

Email:

Notice shall be deemed received and effective on delivery, if delivered personally or upon receipt of confirmation if by facsimile, email or overnight courier; or three days after deposit into the United States mail if delivered by registered or certified mail.

11. Limitations of this Agreement.

11.1 Limitations of the City's Commitment. The City is not, by entering this Agreement, committing itself to or agreeing to undertake any other acts or activities requiring the subsequent independent exercise of discretion by the City or any agency or department thereof. This Agreement is merely an agreement to enter exclusive negotiations with respect to the Property according to the terms hereof, with all final discretion and approval remaining with the City Council as to any DDA, including Development Plan, and all proceedings and decisions in connection therewith. If negotiations under this Agreement result in a proposed DDA, City Council approval thereof may occur only after compliance, as may be required, with all applicable laws and ordinances including, without limitation, CEQA.

11.2 Effect of Expiration or Termination. If the DDA has not been approved by the City Council by the date this Agreement expires or is terminated under Section 3, neither Party shall have any further rights, obligations, or liability to the other Party under this Agreement.

12. Miscellaneous Provisions.

12.1 Entire Agreement. This Agreement is the entire agreement as understood by the Parties with respect to the matters set forth herein.

12.2 Amendments. This Agreement may be amended only in a writing signed by all Parties and approved by the City Council.

- 12.3 Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of California. Any action to enforce or interpret this Agreement shall be brought in a court of competent jurisdiction in Alameda County or, in the case of any federal claims, in federal court for the Northern District of California.
- 12.4 Limitation on Remedies. In any action or other legal or administrative proceeding to enforce this Agreement, or that otherwise may arise out of this Agreement, neither the City nor Developer shall be entitled to any damages or monetary relief. It is understood and agreed by the Parties that this Agreement is solely to enable the Parties to negotiate the terms of a proposed DDA, including Development Plan, on an exclusive basis for the Term. There is no commitment that any DDA, including Development Plan, will be approved and no damages, monetary relief or specific performance shall be available to Developer if a DDA, including Development Plan, is not approved during the Term.
- 12.5 Attorneys' Fees. In any action or other legal or administrative proceeding to enforce this Agreement, or that otherwise may arise out of this Agreement, each Party shall pay its own attorneys' fees and costs.
- 12.6 Headings. The section headings in this Agreement are for convenience only; they do not explain, modify, or add to the meaning of this Agreement.
- 12.7 Interpretation. This Agreement is the result of the combined efforts of the Parties. If any provision is found ambiguous, the ambiguity will not be resolved by construing this Agreement in favor of or against either Party, but by construing the terms according to their generally accepted meaning.
- 12.8 Time Periods. Any time period to be computed under this Agreement shall be computed by excluding the first day and including the last day. If the last day falls on a Saturday, Sunday, or legal holiday, the last day will be extended until the next day the City is open for business. All references to days in this Agreement shall mean calendar days unless otherwise expressly specified. The City offices are closed on Fridays and therefore any reference to business days shall mean Monday through Thursday unless one of those days is a holiday observed by the City.
- 12.9 Severability. The provisions of this Agreement are severable. The invalidity or unenforceability of any provision in this Agreement will not affect the other provisions.
- 12.10 Successors and Assigns. This Agreement is binding on and will inure to the benefit of the Parties and their respective successors. This Agreement cannot be transferred or assigned.

- 12.11 Independent Capacity. Nothing in this Agreement is intended to or does establish the Parties as partners, co-venturers, or principal and agent with each another.
- 12.12 Conflict of Interest. No officer or employee of the City shall hold any interest in this Agreement (California Government Code § 1090).
- 12.13 Authorization to Execute Agreement. Each individual executing this Agreement represents and warrants he or she is duly authorized to execute and deliver this Agreement on behalf of the Party named herein and this Agreement is binding upon said Party in accordance with its terms.
- 12.14 Counterparts. This Agreement may be executed in counterparts, each of which will be deemed an original, but all of which together will constitute one and the same agreement.
- 12.15 Exhibits. The following exhibits are attached to this Agreement and incorporated herein as though set forth in full for all purposes:

- Exhibit A: Diagram of the Property  
Exhibit B: Developer Statement of Qualifications  
Exhibit C: Summary of Non-Binding Key Terms for the DDA

**CITY:**

CITY OF ALAMEDA,  
a California municipal corporation

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: City Manager

**APPROVED AS TO FORM:**

\_\_\_\_\_  
City Attorney

By: \_\_\_\_\_

**DEVELOPER:**

\_\_\_\_\_  
a \_\_\_\_\_

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: Chief Executive Officer