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6/17/10

CITY OF FRESNO
City Clerk's Office (Original)

EXCLUSIVE NEGOTIATION AGREEMENT
1.06 +/- Acres of Land at Tulare Avenue and between
"O" Street and "N" Street, City of Fresno, California
APN: 466-094-09T (T-Lot)

THIS EXCLUSIVE NEGOTIATION AGREEMENT (this "Agreement") is made and entered into on [June 23, 2010] ("Effective Date"), by and between the CITY OF FRESNO, a municipal corporation, ("CITY"), and CHILDREN & FAMILIES COMMISSION OF FRESNO COUNTY, an independent governmental agency formed pursuant to California Health & Safety Code section 130100 *et seq.* ("FIRST 5").

RECITALS

WHEREAS, CITY owns approximately 48,000 square feet of real property (Assessor Parcel Number 466-094-09T), as more particularly described in Exhibit "A", attached hereto and incorporated by reference herein, and which is hereinafter for convenience referred to as the "Property"; and

WHEREAS, FIRST 5 has expressed its interest and willingness to purchase the Property for purposes of development and operation of, among other things, an administrative office and daycare facility on the Property ("Project"); and

WHEREAS, the CITY desires to enter this Agreement in furtherance of promoting development in Downtown Fresno; and

WHEREAS, the parties have had preliminary discussions regarding FIRST 5's purchase of the Property, which are described in Section 3(A) herein, and the parties mutually desire to negotiate exclusively and enter into a purchase agreement, in accordance with the terms and conditions of this Exclusive Negotiation Agreement; and

WHEREAS, until such time a purchase and sale agreement is executed during the term of this Agreement, this Agreement expires, or is sooner terminated, CITY shall neither negotiate nor sell the Property to a third-party; and

WHEREAS, the parties agree that any final agreement reached for the purchase of the Property shall be subject to final approval of CITY Council and the FIRST 5 Commission.

NOW, THEREFORE, in consideration of the foregoing, which are hereby incorporated by this reference, and of the covenants, conditions, and promises hereinafter contained to be kept and performed by the respective parties, the parties mutually agree as follows:

- 1. Term of Agreement.

CITY and FIRST 5 shall negotiate exclusively for 12 months (365 calendar days) from the Effective Date (the "Negotiation Period"), unless negotiations are sooner terminated as provided herein. The parties shall devote such personnel, consultants and resources as may be reasonably necessary to complete negotiations within that time limit.

2. Assignment prohibited.

This Agreement is personal to FIRST 5 and there shall be no assignment by FIRST 5 of its rights or obligations under this Agreement without the prior written approval of the City Manager or designee thereof. Any attempted assignment by FIRST 5, its successors or assigns, shall be null and void unless approved in writing by the City Manager or designee thereof.

3. Negotiations.

(A) The parties shall negotiate diligently, exclusively and in good faith to complete the purchase agreement prior to the expiration of the Negotiation Period. During the Negotiation Period, the parties shall meet as frequently as may be necessary and diligently engage in such activities as may be necessary, to accomplish this end. The responsibility for payment of development and entitlement-related costs, including, but not limited to, planning fees, impact fees, and preparation of any studies or documents required for compliance with the California Environmental Quality Act ("CEQA") (hereinafter collectively, "Entitlement Costs") is addressed in Section 5 herein. Notwithstanding the forgoing, the parties acknowledge that their respective staffs have already conducted preliminary negotiations regarding FIRST 5's purchase of the Property. During these negotiations, City staff and First 5 staff have tentatively negotiated the following terms to include in a future Purchase and Sale Agreement: (i) the CITY and FIRST 5 shall each be responsible for fifty percent (50%) of any real estate commissions or brokerage fees arising from, relating to, or in any way connected with, the transactions contemplated by this Agreement; (ii) CITY shall be responsible for installing a sewer line, sufficient to serve the Project and consistent with CITY standards, to the Property boundary line; (iii) the purchase price for the Property shall be \$12.29 per square foot or approximately \$590,000.00 (the parties conducted their own independent appraisals prepared by MAI certified appraisers to ascertain the purchase price stated herein); (iv) the transfer of title to the Property shall occur via escrow with an escrow company acceptable to both parties; and (v) such escrow shall not close until Project entitlements are fully vested and non-appealable. However, final agreement on these terms cannot occur unless and until the City Council and FIRST 5 Commission have approved these terms as part of their approval of any Purchase and Sale Agreement which is contemplated by this Agreement. Each term identified herein is subject to further negotiation by CITY and FIRST 5. Nothing in this Agreement shall preclude the City Council and/or FIRST 5 Commission from exercising their independent discretion to enter into a Purchase and Sale Agreement that may include some or none of these terms.

(B) The parties agree that if the negotiations result in a purchase and sale agreement, such agreement for purchase of the Property shall be subject to final approval by the CITY Council and FIRST 5 Commission. Approval by the CITY Council and the FIRST 5 Commission shall occur only after compliance with all applicable laws and ordinances including, without limitation, CEQA.

(C) Before entering upon the Property, whether for site assessment or other due diligence, FIRST 5 shall first obtain a right of entry from the CITY, which shall not be unreasonably denied.

(D) FIRST 5 and CITY shall timely complete each activity or task set forth in the Project Performance Schedule attached hereto as Exhibit "B" and incorporated herein.

(E) This Agreement shall not prevent the CITY from providing any person or entity requesting information regarding the Property with any information that is a public record. CITY shall, to the extent permitted by law, not distribute or disclose information regarding the Property or FIRST 5 which is of a confidential or proprietary nature.

4. Termination.

(A) This Agreement shall terminate in accordance with Section 1 herein, unless prior to such date:

(i) The parties have extended the term of this Agreement by written amendment; or

(ii) Any party has terminated this Agreement for cause.

(B) For purposes of this provision, any party may terminate this Agreement for cause in the event the other party is in default of this Agreement for failure to negotiate in good faith. Any substantive breach of this Agreement shall constitute a failure to negotiate in good faith.

5. Allocation of Entitlement Costs.

(A) The parties shall each be responsible for fifty percent (50%) of the Entitlement Costs except, however, the CITY'S total contribution to such Entitlement Costs shall not exceed twenty-five thousand dollars (\$25,000.00). CITY shall not engage the services of a consultant without the prior written approval of FIRST 5, which shall not be unreasonably withheld. FIRST 5 acknowledges that CITY must comply with CITY requirements for selection of consultants to obtain such consulting services for the Project.

(B) The procedures for the payment of Entitlement Costs shall be determined through negotiation as described in the Project Performance Schedule, as provided in Exhibit "B", attached hereto and incorporated by reference herein.

6. Agreement Limitations.

By its execution of this Agreement, the CITY is not committing to or agreeing to undertake: (a) any land acquisition or any disposition of land to FIRST 5; or (b) any other acts or activities requiring the subsequent independent exercise of discretion by CITY or any agency or department thereof. This Agreement does not constitute a disposition of property or exercise of control over property by the CITY. Execution of this Agreement by CITY is merely an agreement to enter into the exclusive Negotiation Period according to the terms hereof, reserving final discretion and approval by the CITY and FIRST 5 as to any purchase agreement and all proceedings and decisions in connection therewith.

7. CITY's Reservation of Authority.

The parties agree that: (a) the CITY reserves all of its police powers and/or statutory or other legal powers or responsibilities; and (b) this Agreement shall not be construed to limit the authority or obligation of the CITY to hold necessary public hearings, to limit the discretion of the CITY or any of its officers or officials with regard to rules, regulations, ordinances, laws, and entitlement of use which require the exercise of discretion by the CITY or any of its officers or officials. This Agreement shall not be construed to limit the obligation of the CITY to comply with CEQA or any other federal or state law.

8. Miscellaneous provisions.

(A) Notices. Any notice required or intended to be given to either party under the terms of this Agreement shall be in writing and shall be deemed to be duly given if delivered personally, transmitted by facsimile followed by telephone confirmation of receipt, transmitted by electronic mail followed by telephone confirmation of receipt, or sent by United States registered or certified mail, with postage prepaid, return receipt requested, addressed to the party to which notice is to be given at the party's address set forth on the signature page of this Agreement or at such other address as the parties may from time to time designate by written notice. Notices served by United States mail in the manner above described shall be deemed sufficiently served or given at the time of the mailing thereof.

(B) Compliance With Law. The parties shall at all times comply with all applicable laws of the United States, the State of California and CITY, and with all applicable regulations promulgated by federal, state, regional, or local administrative and regulatory agencies, now in force and as they may be enacted, issued, or amended during the term of this Agreement.

(C) Waiver. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement. No provisions of this Agreement may be waived unless in writing and signed by all parties to this Agreement. Waiver of any one provision herein shall not be deemed to be a waiver of any other provision herein.

(D) Governing Law and Venue. This Agreement shall be governed by, and construed and enforced in accordance with, the laws of the State of California, excluding, however, any conflict of laws rule which would apply the law of another jurisdiction. Venue for purposes of the filing of any action regarding the enforcement or interpretation of this Agreement and any rights and duties hereunder shall be Fresno County, California.

(E) Headings. The section headings in this Agreement are for convenience and reference only and shall not be construed or held in any way to explain, modify or add to the interpretation or meaning of the provisions of this Agreement.

(F) Severability. The provisions of this Agreement are severable. The invalidity, or unenforceability of any one provision in this Agreement shall not affect the other provisions.

(G) Interpretation. The parties acknowledge that this Agreement in its final form is the result of the combined efforts of the parties and that, should any provision of this Agreement be found to be ambiguous in any way, such ambiguity shall not be resolved by construing this Agreement in favor of or against either party, but rather by construing the terms in accordance with their generally accepted meaning.

(H) Attorney's Fees. If either party is required to commence any proceeding or legal action to enforce or interpret any term, covenant or condition of this Agreement, the prevailing party in such proceeding or action shall be entitled to recover from the other party its reasonable attorney's fees and legal expenses.

(I) Exhibits. Each exhibit and attachment referenced in this Agreement is, by reference, incorporated into and made a part of this Agreement.

(J) Cumulative Remedies. No remedy or election hereunder shall be deemed exclusive but shall, wherever possible, be cumulative with all other remedies at law or in equity.

(K) No Third Party Beneficiaries. The rights, interests, duties and obligations defined within this Agreement are intended for the specific parties hereto as identified in the preamble of this Agreement. Notwithstanding anything stated to the contrary in this Agreement, it is not intended that any rights or interests in this Agreement benefit or flow to the interest of any third parties.

(L) Extent of Agreement. Each party acknowledges that they have read and fully understand the contents of this Agreement. This Agreement represents the entire and integrated agreement between the parties with respect to the subject matter hereof and supersedes all prior negotiations, representations or agreements, either written or oral. This Agreement may be modified only by written instrument duly authorized and executed by both CITY and FIRST 5.

(M) No Joint Venture. The CITY shall not become or be deemed a partner or joint venturer with FIRST 5 or associate in any such relationship with FIRST 5 by reason of the provisions of this Agreement. FIRST 5 shall not for any purpose be considered an agent, officer or employee of the CITY.

(N) No Discrimination. FIRST 5 covenants and agrees that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, national origin, ancestry, age, or handicap, in the sale, lease, sublease, transfer, use, occupancy, tenure, or enjoyment of the Property, nor shall FIRST 5 or any person claiming under or through FIRST 5, establish or permit any such practice or practices of discrimination or segregation in the selection, location, number, use or occupancy of tenants, lessees, sublessees, subtenants, or vendees of the Property.

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IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed, the day and year first-above written.

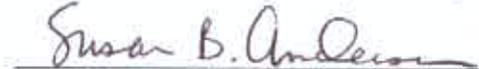
CITY OF FRESNO,
a municipal corporation



BRUCE RUDD
Assistant City Manager

Date: 6/22/10

CHILDREN & FAMILIES COMMISSION
OF FRESNO COUNTY (FIRST 5):



SUSAN B. ANDERSON
First 5 Commission Chair



KENDRA ROGERS
First 5 Executive Director

Date: 6/23/10

ATTEST:

REBECCA E. KLISCH
City Clerk

By: Cindy Bruer
Deputy

Date: 6/23/10

APPROVE AS TO FORM:
KENNETH J. PRICE
Commission Counsel

By: Kenneth J. Price

Date: 6/24/10

APPROVED AS TO FORM:
JAMES C. SANCHEZ
City Attorney

By: Stacy L. Melikian
Deputy

Date: 6/11/10

Addresses:
CITY:

City of Fresno
Attention: Elliott Balch,
Downtown Revitalization Manager
2600 Fresno Street
Fresno, CA 93721
Phone: (559) 621-8366
FAX: (559) 457-1504
E-MAIL: elliott.balch@fresno.gov

FIRST 5:

Children & Families Commission
Attention: Kendra Rogers
Executive Director, First 5 Fresno County
550 E. Shaw Avenue
Fresno, CA 93710
Phone: (559) 241-6515
FAX: (559) 241-6510
E-MAIL: KRogers@first5fresno.org

Attachments:

Exhibit "A": Legal Description

Exhibit "B": Performance Schedule

EXHIBIT "A"

APN 466-094-09T
Grant Deed

Lots 11 through 22, inclusive, in Block 127 of the Town (now City) of Fresno, according to the map thereof recorded June 8, 1876, in Book 1 Page 2 of Plats, Fresno County Records.

2010-050
PLAT 2656
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Exhibit "B"

PERFORMANCE SCHEDULE

1. FIRST 5 Responsibilities.

During the exclusive Negotiation Period, and without limiting any other provision of this Agreement, FIRST 5 shall complete the following tasks, at its sole cost and expense, in furtherance of the negotiation process, by the times stated. The times stated shall run from the Effective Date following complete execution of this Agreement by the parties. Should the parties enter an agreement extending the Negotiation Period and updating this Performance Schedule, the amendment and updated Performance Schedule will supersede this Performance Schedule.

(a) Identify in writing to the CITY, the names of its decision makers, lead negotiators, the authority for the foregoing, design consultants, architect, engineer, legal counsel and any other development team members related to the Project. CITY acknowledges that FIRST 5 must competitively obtain the services of certain consultants, including, but not limited to, architects and engineers for the Project. FIRST 5 will notify CITY when these consultants have been retained.

(b) Perform FIRST 5 responsibilities as identified in Section 3, below.

2. CITY Responsibilities.

During the exclusive Negotiation Period, and without limiting any other provision of this Agreement, the CITY shall complete the following tasks, at its sole cost and expense, all in furtherance of the negotiation process, by the times stated. The times stated shall run from the Effective Date following parties' complete execution of this Agreement. Should the parties extend the Negotiation Period and update the Performance Schedule, the updated Performance Schedule shall supersede this Performance Schedule.

(a) Identify in writing to FIRST 5 the names of CITY Project coordinators, negotiators, and members of its planning and entitlement team.

(b) Provide FIRST 5 with an inventory of existing public infrastructure, its locations, condition and capacity.

(c) Provide or reasonably assist FIRST 5 in obtaining, available and existing public records, such as, plans, studies, reports and documents relating to the Property. Such information may include, without limitation, Environmental Impact Reports, the General Plan, utility plans, architectural historic surveys, Specific Plans, soils reports, and zoning, redevelopment plan or plans, Owner Participation Rules, any CITY adopted policies, or other information that may assist FIRST 5 in evaluating the Property.

- (d) Perform CITY responsibilities as identified in Section 3, below.

3. Mutual Responsibilities.

During the exclusive Negotiation Period, and without limiting any other provision of this Agreement, FIRST 5 and the CITY shall work cooperatively to define the Project and identify the costs and process necessary to entitle the Project. At various points the performance of one party's responsibilities shall be contingent on the other party's performance of its respective responsibilities, as follows:

(a) FIRST 5 shall, at its sole cost and expense, prepare for CITY staff review and comment: (i) a conceptual site plan to include site access, number of and type of structure(s), building setbacks, square footages, uses, floor area ratio, landscaping, and number and type of parking spaces; (ii) a set of exterior elevations; and (iii) identification of any potential Property area boundary modifications.

(b) Upon receipt of FIRST 5's conceptual site plan and exterior elevations, CITY staff shall, at the CITY's sole cost and expense, review the above-referenced conceptual site plan and exterior elevations. There may be several iterations necessary for the conceptual site plan and exterior elevations to reach a satisfactory point for both parties.

(c) Upon CITY approval of conceptual site plan and exterior elevations and after incorporating comments from CITY staff, FIRST 5 shall, at its sole cost and expense, prepare and submit to CITY a complete entitlement application for the Project.

(d) Within twenty (20) days of receipt of the above-referenced complete entitlement application, the CITY shall, at its sole cost and expense, provide FIRST 5 with a summary of the steps necessary to enable the Project to proceed in the timeliest manner. The summary shall include a description and expected timeline of the steps in the entitlement process, the studies or documents required for compliance with CEQA, and the expected Entitlement Costs (as previously defined) for all necessary processes, studies, and documents.

(e) With respect to the above-mentioned description, timeline, and costs identified in subpart (d) of this Section 3, FIRST 5 and the CITY shall meet within twenty (20) days of receipt of the above-referenced complete entitlement application and shall agree upon a procedure to allocate the payment, and possible reimbursement, of Entitlement Costs to the parties.



AGENDA ITEM NO. 9:15am #2B

COUNCIL MEETING 6/17/10

APPROVED BY

DEPARTMENT DIRECTOR

CITY MANAGER

June 17, 2010

FROM: CRAIG SCHARTON, Director
Downtown and Community Revitalization Department

BY: ELLIOTT BALCH, Downtown Revitalization Manager
Downtown and Community Revitalization Department

SUBJECT: APPROVE 12-MONTH EXCLUSIVE NEGOTIATION AGREEMENT BETWEEN THE CITY OF FRESNO AND CHILDREN & FAMILIES COMMISSION OF FRESNO COUNTY ("FIRST 5") FOR THE POTENTIAL SALE OF A PARCEL OF CITY-OWNED REAL PROPERTY IN DOWNTOWN FRESNO (APN 466-094-09T) TO FIRST 5

RECOMMENDATION

Staff recommends that the Council approve the attached Exclusive Negotiation Agreement (Exhibit A) between the City of Fresno and Children & Families Commission of Fresno County ("First 5").

EXECUTIVE SUMMARY

First 5 Fresno County is proposing to develop a child care facility, Family Learning Center, and administrative offices at the present site of City of Fresno Parking Lot "T" in Downtown Fresno.

The proposed Exclusive Negotiation Agreement (ENA) provides for a 12-month period in which to agree to an appropriate design, obtain development entitlements, and determine a price and other terms for the sale of the City-owned land to First 5. The final agreement for the purchase of the property would be subject to approval by the City Council and the First 5 Commission.

Staff recommends approval of the attached ENA.

BACKGROUND

First 5 Fresno County intends to develop a multi-use facility on the City of Fresno's "T Lot" on Tulare Street between N and O Streets. The approximately 48,000 sq. ft. site would accommodate a building of up to three stories with a floor area of between 35,000 to 40,000 sq. ft. First 5's intent is to utilize green building practices. The remaining portion of the parcel would be dedicated to an outdoor play area, parent/employee parking, and other uses.

The first floor of the building would be utilized as a child care center and Family Learning Center. The second/third floors would house First 5 Fresno County staff and conference areas. The building would have approximately 40-50 employees working at any given time.

Presented to City Council

Date 6/17/10

Disposition *Per. approved*

Exclusive Negotiation Agreement with First 5 Fresno County
June 17, 2010

The Family Learning Center, adjacent to the child care center, would include a commercial kitchen, offering the ability to provide instructional workshops on nutrition and benefits of using local farmers produce to provide simple and healthy meals for your family.

The child care center will be designed and licensed for 90 children and is anticipated to employ approximately 20 people.

This project will also convert approximately 9,000-12,000 square feet into an outside play area for the child care facility and community gardens.

The proposed sale price of \$590,000, or \$12.29 per sq. ft., is an aggregation of results from three appraisals performed on the site over the last two years. These and other terms of the transaction remain subject to final approval by the City Council and First 5 Commission upon purchase and sale of the property.

Currently the "T Lot" provides parking primarily for City employees who work in the Police Department complex along N Street. The Lot's 125 stalls are used by 208 permit-holding permanent and temporary employees, spread out over two shifts. Other parking arrangements would be offered to these employees if the site is developed.

FISCAL IMPACT

The fiscal impact of the transaction will be determined by the results of the proposed Exclusive Negotiation Period. Relevant factors will include the final sale price, the cost of installing a sewer line to serve the property, and costs for entitlement such as environmental studies and documents, City impact fees, and other applicable fees. This ENA commits the City to cover the cost of the sewer line and half (up to \$25,000) of the entitlement costs.

Attachments:

Exhibit A — Exclusive Negotiation Agreement between the City of Fresno and Children & Families Commission of Fresno County