

#15-027
1/8/15

EXCLUSIVE NEGOTIATION AGREEMENT

This EXCLUSIVE NEGOTIATION AGREEMENT ("ENA") is dated, for reference purposes, as of the Effective Date (as defined in Section 15.8), and is entered between the CITY OF FRESNO, a municipal corporation, and acting in its capacity as Housing Successor to the Redevelopment Agency ("City"); the SUCCESSOR AGENCY TO THE REDEVELOPMENT AGENCY OF THE CITY OF FRESNO, a public body ("Agency"); THE NOYAN COMPANY, a California corporation; and TFS INVESTMENTS, LLC, a California limited liability company (collectively, the Noyan Company and TFS Investments, LLC are referred to herein as ""Developer"), on the terms, and subject to the conditions, set forth below. The City and Developer are sometimes referred herein collectively as the "Parties," and either individually as a "Party."

CITY OF FRESNO
City Clerk's Office (Original)

RECITALS

A. The City and Agency are the owner of real property located on the southern portion of the Fulton Corridor, Fresno, California, and more specifically described in the attached Exhibit A. Collectively, these properties are referred to herein as the "Site."

B. The Developer proposes to determine the feasibility of developing the Site through a public/private partnership with the City in a mixed use concept (the "Project"). The Developer further proposes to negotiate with the City and Agency the potential terms of a Disposition and Development Agreement (the "DDA").

C. The Parties intend to negotiate mutually acceptable terms and conditions in a Development Agreement and such other ancillary agreements as may be necessary (collectively the "Site Agreements"), that will define the Parties' rights, obligations and development of the Site.

EXCLUSIVE NEGOTIATION AGREEMENT

NOW, THEREFORE, in consideration of the above recitals, which recitals are contractual in nature, the mutual covenants herein contained and such other and further consideration as is hereby acknowledged, and subject to the terms and conditions and provisions hereof, the Parties agree as follows:

1. Exclusive Good Faith Negotiations. The Parties, during the Negotiation Period defined in Section 3 below, and only for so long as Developer timely meets its obligations under this ENA, shall negotiate exclusively and in good faith regarding the proposed development of the Site and the terms of the DDA. Good faith negotiations shall include, without limitation, attending scheduled meetings, directing staff and consultants to cooperate with the other Party to the extent reasonably practicable and necessary to negotiations, providing information reasonably available to the Party and necessary to negotiations, and promptly reviewing and returning any comments on

correspondence, reports, agreements or other documents received from the other Party.

2. Project Concept/Scope. The negotiations under this ENA will be based on a project concept including components described in Recital "B" above.

3. Negotiation Period. The Parties will negotiate for one hundred twenty (120) days from the date that the City executes this ENA (the "Negotiation Period"), unless negotiations are terminated sooner as provided herein. When the Negotiation Period expires, this ENA shall automatically terminate unless, before expiration of the Negotiation Period, Developer prepares and delivers a status report to the Council of the City (the "Council") demonstrating to the City's satisfaction that Developer is then in material compliance with this ENA, and that Developer has made and is then making good faith efforts to timely complete all its obligations hereunder, and explaining why Developer has been unable to complete its obligations hereunder, despite such good faith efforts; and the City Council approves the extension of this ENA and Developer and the City execute an amendment to this ENA to implement extending the Negotiation Period.

If, on expiration of the Negotiation Period, including any extensions, the Council has not made the requisite findings and approved a DDA that the Parties timely execute, then this ENA shall automatically terminate unless the Council has approved, and Developer and the City have entered, a written extension of the term of this ENA. On termination of this ENA, the City and Agency may thereafter deal with the Site and negotiate with others concerning the Site as the City and Agency in its sole and absolute discretion may determine.

Notwithstanding the foregoing, any Party may terminate this ENA for cause in the event the other Party is in default of this ENA for failure to negotiate in good faith. Any substantive breach of this ENA shall constitute a failure to negotiate in good faith. No Party shall terminate this ENA unless the Party seeking to terminate has first provided written notice of its intent to terminate the ENA to the other Party, specifying the cause, and the non-performing party(ies) fail(s) to cure the default or other cause within ten (10) days after receipt of such notice. In the event this ENA is terminated, in accordance with this paragraph, no Party shall have any further rights, obligations, or liability to the other Party as the result of this ENA.

4. Proposed Terms and Conditions for DDA. During the Negotiation Period, including any extensions, the Parties shall negotiate the proposed terms for the DDA. The DDA will detail the Parties' respective rights and obligations for developing the Project on the Site.

5. Developer's Principals and Legal Status. Developer shall disclose such information to the City and Agency regarding its principals, legal status and project experience as the City and/or Agency may reasonably request. At a minimum, Developer shall disclose the following: (a) its principals, shareholders, members and/or partners, (b) its directors, officers, and key employees, (c) its parent company,

subsidiaries and affiliates, if any, and (d) all other pertinent information concerning Developer and its legal structure.

Developer will give the City at least five days' prior notice of any change in the above information during the term of this ENA. Any change in the principals, members or managers of Developer during the Negotiating Period of this ENA will be subject to the written approval of the City.

6. Financial and Other Information. Developer shall promptly provide the City with financial and other information, data, and commitments that the City may reasonably request to ascertain Developer's or its partners' performance capabilities to expeditiously complete the Project on the Sites. In any event, no later than 15 days before end of the Negotiation Period, including any extension thereof, Developer shall submit to the City, in reasonable detail, Developer's proposed plan to finance the construction costs for development of the Project.

Any disclosure under this Section 6 at the City or Agency's request shall be made under reasonable conditions specified by the Developer to protect against, to the fullest extent provided by law, the disclosure to others of personal financial information and other information the Developer identifies as proprietary and confidential ("Developer-identified Information"). The Parties agree that the non-disclosure conditions of this paragraph shall be deemed satisfied by disclosure of the Developer-identified Information at a meeting or meetings of the Developer with the City or Agency's representatives, consultants or legal counsel at which the Developer-identified Information is reviewed and discussed but copies are not retained by the Agency's representatives, consultants or legal counsel. If the Developer provides copies of Developer-identified Information to the City or Agency or consents to the City or Agency or its representatives, consultants or legal counsel retaining copies of such information, then to the extent permitted by law, the City and Agency will use best efforts to comply with the nondisclosure conditions specified by the Developer, except that the City and Agency may disclose the copies to City and Agency representatives, consultants, employees, and officers, and the Agency and/or City shall disclose the copies as any court or other authoritative body may direct or order.

7. Assignment Prohibited. Developer may not assign or otherwise transfer any of its rights or obligations under this ENA without the express written consent of the City and Agency. The City and/or Agency may give or deny consent in its sole and absolute discretion.

8. Additional Developer Responsibilities. Without limiting any other provision of this ENA, Developer shall, during the Negotiation Period, including any extension thereof, do the following at its sole cost and expense in furtherance of the negotiation process, subject to timely responses from the City and Agency for information:

8.1. Performance Schedule. Developer shall timely perform all obligations set forth in the attached Performance Schedule attached hereto as Exhibit B.

8.2. **Reports.** Normally but not more frequently than monthly, but at any time requested by the City Council, Developer shall make oral and summary form written progress reports advising the Agency, City and/or its staff on all progress being made on tasks and other activities undertaken by Developer pursuant to this ENA.

8.3. **Rights of Entry.** Before entering upon any property within the Site, whether for site assessment or other due diligence, Developer shall first obtain a right of entry from the City or Agency and any tenant or occupant. Developer may ask the City to use best efforts to help Developer obtain a right of entry upon private property. The right of entry shall be in form and content reasonably acceptable to the City (including any required insurance/indemnity provisions) and any private property owner.

9. **City and Agency Responsibilities.** During the Negotiation Period, including any extension thereof, in furtherance of the negotiation process the City and Agency will cooperate and assist Developer, as needed, in fulfilling Developer's obligations hereunder.

10. **Compliance with Laws/Conditions Precedent.** If the negotiations result in a DDA, City Council and Agency Board approval thereof may occur only after compliance, as may be required, with all applicable laws and ordinances including, without limitation, CEQA and the Redevelopment Dissolution Law (AB X1 26 and AB 1484, as codified in the California Health and Safety Code (the "Dissolution Law")).

An objective during the Negotiation Period, is to establish a Project scope and description sufficient to include in any NEPA and CEQA review determined to be required. Responsibility for the cost of CEQA compliance for the Project, as determined necessary, shall be negotiated by the Parties in connection with the negotiation of the DDA. Developer shall cooperate with the City in preparation of the environmental documents by, among other things, timely supplying necessary technical data and other related information and/or plans concerning the Project.

Any DDA shall become effective only if and after the DDA has been considered and approved by the City Council and Agency Board at a public hearing called for such purpose, and by the Oversight Board and Department of Finance, as applicable. While this ENA bars City and Agency from negotiating with other parties during its term, the parties understand that the Oversight Board is not bound by this ENA and could direct Agency to liquidate the Site during the term of this ENA pursuant to the Dissolution Law.

11. **Entire Agreement; Attorneys' Fees; Time is of the Essence; Counterparts.** This ENA is the entire agreement as understood by the Parties with respect to the matters set forth herein. This ENA may be amended only in a writing signed by all Parties, and approved by the City Council. If a Party brings an action or files a proceeding in connection with the enforcement of its respective rights or as a consequence of any breach by the other Party, then the prevailing Party(ies) in such action or proceeding shall be entitled to have its reasonable attorneys' fees and costs

and other out-of-pocket expenditures paid by the losing Party. Time is of the essence in this ENA. This ENA is the product of negotiation and all Parties are equally responsible for authorship of this ENA. Section 1654 of the California Civil Code shall not apply to the interpretation of this ENA. Each individual executing this ENA represents and warrants they are duly authorized to execute and deliver this ENA on behalf of the Party named herein and this ENA is binding upon said party in accordance with its terms. This ENA may be executed in counterparts.

12. Nondiscrimination. Developer covenants and agrees that there shall be no discrimination against or segregation of any person or group of persons on account of any basis listed in subdivision (a) or (d) of Section 12955 of the Government Code (race, color, religion, sex, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability or any other basis prohibited by California Civil Code § 51), as those bases are defined in Sections 12926, 12926.1, subdivision (m) and paragraph (1) of subdivision (p) of Section 12955, and Section 12955.2 of the Government Code, in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Site, nor shall Developer or any person claiming under or through Developer 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 Sites.

13. Notices. All notices required or permitted hereunder shall be delivered in person or by facsimile, by overnight courier, or by registered or certified mail, postage prepaid, return receipt requested, to such Party at its address shown below, or to any other place designated in writing by such Party:

City:	City Manager City of Fresno 2600 Fresno St., Room 3070 Fresno, CA 93721-3605
Agency:	Successor Agency Attn: Executive Director 2344 Tulare Street, Suite 200 Fresno, CA 93721
Developer:	The Noyan Company 685 W. Alluvial, Suite 101 Fresno, CA 93711
	TFS Investments, LLC 1411 L Street, Suite M Fresno, CA 93721

Notice shall be deemed received on delivery, if delivered personally or by facsimile; one day after delivery to the courier if delivered by courier; or three days after deposit into the United States mail if delivered by registered or certified mail.

14. Agreement Limitations. Neither Agency nor City is, by entering this ENA, committing itself to or agreeing to undertake any other act or activities requiring the subsequent independent exercise of discretion by the Agency, City or any agency or department thereof. This ENA is merely an agreement to enter exclusive negotiations with respect to the Site according to the terms hereof, with all final discretion and approval remaining with the City Council and Agency Board as to any DDA and all proceedings and decisions in connection therewith.

15. Miscellaneous provisions.

- 15.1. **Governing Law and Venue.** California law governs this ENA. The provisions of this ENA will be construed, and the rights and duties (procedural and substantive) of the Parties hereunder will be determined, according to California laws. Venue for filing any action to enforce or interpret this ENA will be Fresno, California.
- 15.2. **Headings.** The section headings in this ENA are for convenience only; they do not explain, modify or add to the meaning of this ENA.
- 15.3. **Severability.** The provisions of this ENA are severable. The invalidity or unenforceability of any provision in this ENA will not affect the other provisions.
- 15.4. **Interpretation.** This ENA 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 ENA in favor of or against either Party, but by construing the terms according to their generally accepted meaning.
- 15.5. **Precedence of Documents.** If the body of this ENA and any Exhibit or attachment conflict, the terms in the body of this ENA will control. Any term or condition in any Exhibit or attachment that purports to modify the allocation of risk between the Parties is void.
- 15.6. **Successors and Assigns.** Subject to the limitation on assignment in Section 8, this ENA is binding on and will inure to the benefit of the Parties and their respective successors and assigns.
- 15.7. **Duplicate Originals.** The Parties may sign this ENA in duplicate originals, each of which when signed and delivered will be deemed an original, and all of which together will constitute one instrument.
- 15.8. **Effective Date.** The Effective Date of this ENA shall be the date that the City and Agency execute this ENA, following City Council approval.
- 15.9. **Independent Capacity.** The City shall not become or be deemed a partner or joint venturer with Developer or associate in any such relations with Developer by reason of the provisions of this ENA. Developer shall not for any purpose be considered an agent, officer or employee of the City.

15.10. **Conflict of Interest.** No officer or employee of the City shall hold any interest in this ENA (California Government Code Section 1090.)

Each Party acknowledges that this ENA has been executed by its duly authorized representative(s) on the dates shown below.

CITY:

CITY OF FRESNO
A California Municipal Corporation


By: Bruce Rudd, City Manager

Dated: 1/9/15, 2015

AGENCY:

Successor Agency to the Redevelopment
Agency of the City of Fresno,
a public body


By: Marlene Murphey, Executive Director

Dated: 1/15, 2015

ATTEST:

YVONNE SPENCE, CMC
City Clerk

By: Cindy Buer 1/21/15
Deputy

Attachments:

- Exhibit A: Description of Site
- Exhibit B: Performance Schedule

KBD:elb [66597elb/kbd]

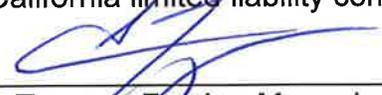
DEVELOPER:

THE NOYAN COMPANY, a California
Corporation


By: Mehmet Noyan, President

Dated: January 6, 2015

TFS INVESTMENTS, LLC,
a California limited liability company


By: Terence Frazier, Managing Member

Dated: 1/6, 2015

APPROVED AS TO FORM:

DOUGLAS T. SLOAN
City Attorney

By: Douglas Sloan
Deputy

EXHIBIT A
Description of Site

- A1) 877 Fulton – APN 468-282-21T
- A2) 835 Fulton – APN 468-282-22T
- A3) 829 Fulton – APN 468-282-05T
- A4) Parking lot at Fulton & Inyo – APN 468-282-23T
- P1) 845 Fulton – APN 468-282-19
- P2) 860 Fulton – APN 468-255-07
- C1) 830 Fulton – APN 468-255-15T
- C2) 801 Van Ness – APN 468-255-11T

EXHIBIT B
Performance Schedule

1. Submit a project description which defines all phases sufficient to define the scope of CEQA requirements and timeline of phasing. **(within 30 days)**
2. Submit a detailed site plan, project description, and financial pro forma for Phase One, including proposal to cover the financial gap. **(within 30 days)**
3. Submit evidence of source and availability of equity capital and potential source(s) of construction and permanent financing for Phase One. **(within 60 days)**
4. Identify CEQA requirements and responsibilities of each party. **(within 45 days)**
5. Meet and confer with the City and Agency to develop and finalize deal points. **(within 60 days)**
6. Meet with the City and Agency to timely and diligently review, negotiate, revise and finalize a draft DDA. **(within 120 days)**
7. Provide within the DDA a performance schedule to meet and confer on timeline and details of future phases. **(within 120 days)**