

**EXCLUSIVE NEGOTIATING AGREEMENT BY AND BETWEEN
THE CITY OF FULLERTON
AND
NFRED LLC**

THIS EXCLUSIVE NEGOTIATING AGREEMENT ("Agreement") is entered into this ____ day of _____, 2020 ("Effective Date"), by and between the CITY OF FULLERTON, a California municipal corporation (the "City"), and NFRED, a California limited liability company ("Developer"), on the terms and provisions set forth below. The City and Developer may sometimes be referred to herein individually as "Party" and collectively as "Parties."

RECITALS

The following recitals are a substantive part of this Agreement:

A. Developer intends to pursue the proposed development of a Public Market, small format retail, restaurants with outdoor amenities on multiple parcels of land owned by the City and Successor Agency totaling approximately 3.23 acres, identified as APNs 029-033-38 & 39/932-41-506 thru 510 APNs 029-033-09, 27, & 28 APNs 029-033-03 thru 06 and APN 029-032-21, commonly referred to as the Fox Block, Pomona Parking Lot and Triangle Lot ("Properties").

B. The purpose of this Agreement is to provide for a period of exclusive negotiations during which the City and Developer will prepare a plan for the development of the Properties. Additionally, the plan for the development of the Properties may include the participation of parcel and business owners located adjacent to the Properties, the general public, and other interested organizations.

COVENANTS

Now, therefore, based on the foregoing recitals, which are incorporated herein by this reference, and for good and valuable consideration, the receipt and sufficiency of which is acknowledged by both Parties, the City and Developer agree as follows:

I. SCOPE OF AGREEMENT

During the Total Negotiation Period defined in Section II, City and Developer shall negotiate in good faith pursuant to the terms herein a Disposition and Development Agreement ("DDA") or other form of agreement or agreements between the City and Developer concerning the development of the Properties. City shall not negotiate with any other person or entity regarding the development of the Properties during the Total Negotiation Period without the consent of the Developer. Nothing in this Agreement shall be deemed a covenant, promise, or commitment by the City with respect to the acquisition or disposition of any real property, the approval of development, or the terms of a DDA or any other agreement. The City's acceptance of this Agreement is merely an agreement

to enter into a period of exclusive negotiations according to the terms herein, reserving final discretion and approval by the City as to any actions required of it.

II. NEGOTIATION PERIOD

City and Developer agree to negotiate for an initial period of twelve (12) months ("Initial Negotiation Period"), commencing upon the Effective Date of this Agreement. The Initial Negotiation Period may be automatically extended for two additional six (6) month periods, if the Developer meets the Initial Negotiation Period Milestones described in Section III (A). In the event that the Developer does not meet the Initial Negotiation Period Milestones within the Initial Negotiation Period, then the Agreement shall automatically terminate and Developer shall have no further rights regarding the subject matter of this Agreement or the Properties, and the City shall be free to negotiate with any other persons or entities with regard to the Properties. In no event shall the period comprised of the Initial Negotiation Period and any six (6) month extension authorized herein (the "Total Negotiation Period") exceed two (2) year without the approval of the Fullerton City Council.

III. OBLIGATIONS OF DEVELOPER

A. Initial Negotiation Period and Total Negotiation Period Milestones.

During the Initial Negotiation Period, the Developer shall accomplish the following Initial Negotiation Period Milestones:

- i) Developer will work with the City/Successor Agency regarding the required appraisals on the Properties; and
- ii) Prepare and submit preliminary Project plans, including Site, Floor, Landscape, and Elevation plans; and
- iii) Prepare and submit a Project Description, adequate in scope to assess the type of environmental analysis that will be required for the Project; and
- iv) Initiate preparation of preliminary financial feasibility analysis, including development costs and a development pro-forma; and
- v) Prepare and submit all required Development / Land-use entitlement applications, including a Major Site Plan and any Conditional Use Permit, Variance or other Project-specific entitlements; and
- vi) Provide a written progress report to the Community and Economic Development Department on the actions taken by the Developer to meet the Initial Negotiation Period Milestones.

During the Total Negotiation Period, the Developer shall be responsible for the following:

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- i) Commence the required environmental analysis necessary for the Project CEQA determination, if necessary; and
- ii) Finalize and submit a preliminary financial feasibility analysis, including development costs and a development pro-forma; and
- iii) Prepare and submit to the City a draft Disposition and Development Agreement (DDA) or other form of agreement or agreements between the City and Developer concerning the development of the Properties; and
- iv) Submit to the City sufficient evidence that the Developer has the required equity and/or loan commitments, and letters of interest to complete the development of the Property, provided however, that the City understands and acknowledges the proprietary nature of the information contained in the Developer's financial statements and agrees, to the extent permitted by law (including by not limited to the Public Records Act (Government Code Section 6250 *et seq.*)), not to disclose said information contained therein to any person or entity other than representatives of the City or their consultants; and
- v) Provide oral and written reports as requested by City regarding Developer's progress toward meeting its obligations under this Agreement.

B. Restrictions Against Change in Ownership, Management, and Control of Developer and Assignment of Agreement.

The qualifications and identity of Developer and its principals are of particular concern to the City. It is because of these qualifications and identity that the City has entered into this Agreement with the Developer.

1. During the Total Negotiation Period, no voluntary or involuntary successor-in-interest of Developer shall acquire any rights or powers under this Agreement. Developer shall not assign all or any part of this Agreement or any rights in or under this Agreement without the prior written approval of the City, which approval may be given or withheld in the City's sole and absolute discretion. Any assignment without prior City approval shall be void, and the City shall have the right to terminate this Agreement without liability by sending written notice of termination to the Developer referencing Subsection B of Section III of this Agreement.

2. Developer shall promptly notify the City in writing of any and all changes whatsoever in the identity of the business entities or individuals either comprising of, or in control of Developer, as well as any and all changes in the interest of the degree of control of Developer by any such entities or individuals, of which information Developer or any of its members, partners, or officers are notified or may otherwise have knowledge or information. Upon the occurrence of any change, whether voluntary or involuntary, in membership, ownership, management, or control of Developer (other than any such change that is occasioned by the death or incapacity of any individual) that has not been

approved by the City, the City may terminate this Agreement without liability by sending written notice of termination to the Developer referencing Subsection B of Section III of this Agreement.

C. Press Releases.

Developer agrees to obtain the approval of the City Manager or his designee prior to the publication or dissemination of any press releases the Developer may propose relating to the planning, disposition, or development of the Property.

The City agrees to obtain the approval of the Developer prior to the publication or dissemination of any press releases the City may propose relating to the planning, disposition, or development of the Property.

D. Acknowledgments and Reservations.

1. The City and Developer agree that, if this Agreement expires or is terminated for any reason, or a future DDA or other agreement is not executed by both the City and Developer, for any reason, neither the City nor Developer shall be under any further obligation to each other regarding the disposition or development of the Property.

2. Developer acknowledges and agrees that no provision of this Agreement shall be deemed to be either an offer by the City, or an acceptance by the City of any offer or proposal from Developer, to convey any interest in the Property, or for the City to provide any financial or other assistance to Developer for development of the Property.

3. Developer acknowledges and agrees that neither the Developer nor any affiliate of the Developer has acquired, nor will acquire, by virtue of the terms of this Agreement, any legal or equitable interest in real or personal property from the City.

E. Nondiscrimination.

Developer shall not discriminate against nor segregate any person, or group of persons on account of race, color, creed, religion, sex, marital status, handicap, national origin or ancestry in undertaking its obligations under this Agreement.

IV. OBLIGATIONS OF CITY

A. Review and Assistance to Developer.

During the Total Negotiation Period, the City shall use its good faith efforts to:

1. Negotiate exclusively through its staff, and contract exclusively, with Developer in connection with the development of the Properties;

2. Review the development plans and determine consistency with the General Plan, Fullerton Municipal Code, and other relevant land use regulations on the proposed

DDA

Properties;

3. Provide Developer with documents in the City's possession that would assist Developer with the due diligence activities described in this Agreement;

4. Assist in the identification of existing deficiencies in the public infrastructure in the vicinity of the Properties, the actual fiscal impacts of the development on municipal services, and the financial and other assistance the City will provide to address the same;

5. Identify the necessary steps that will be undertaken to process and cause the Properties to accommodate the development;

6. Respond on a timely basis to all submittals by Developer made pursuant to this Agreement;

7. Work with Developer to establish a reasonable time schedule, consistent with the terms of this Agreement, for negotiation of a DDA or other agreement and the completion of all necessary approvals and permits to implement the development of the Properties; and

8. Provide reasonable cooperative assistance to Developer in preparation for and during any presentation before regulatory or advisory panels in connection with any applications for land use permits, and/or design review, which may be required. Such cooperation by City staff shall not in any way pre-commit the City to any decision or course of action relative to the proposed development of the Properties.

B. Authorized Expenses.

Except as otherwise agreed to by the City in writing prior to costs or expenses being incurred, the City shall have no obligation to pay or reimburse the Developer for any costs or expenses incurred as a result of this Agreement, the preparation and submittal of the development plan, the negotiation of a DDA or other agreement, the retention of any consultant, the development of the Properties, or any other matter concerning the Properties.

V. REMEDIES

A. Limitation on Remedies for Breach and Release of Claims.

1. The Parties acknowledge and agree that neither the City nor Developer would have entered into this Agreement if either Party were to be liable to the other for monetary damages or other remedies. Accordingly, the City and Developer each acknowledge and agree that their respective sole and exclusive right and remedy upon the breach of this Agreement by the other Party is to terminate this Agreement without any other cost, expense, or liability to either Party except as otherwise provided in Section IV(B) which shall survive the termination of this Agreement or the expiration of the Total Negotiation Period and any extensions thereof.

2. Each Party acknowledges that it is aware of the meaning and legal effect of California Civil Code Section 1542, which provides:

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

California Civil Code Section 1542 notwithstanding, it is the intention of both the City and Developer to be bound by the limitations on damages and remedies set forth in this Section V, and the City and Developer hereby release any and all other claims against each other for monetary damages or other legal or equitable relief related to any breach of this Agreement, whether or not any such released claims were known or unknown to either the City or Developer as of the date of this Agreement. The City and Developer each waive the benefits of California Civil Code Section 1542 and all other statutes and judicial decisions (whether state or federal) of similar effect with regard to the limitations on damages and remedies.

3. Default; Right to Terminate.

Failure or delay by either Party to timely perform any material term or provision of this Agreement shall constitute a default under this Agreement. If the Party who is claimed to be in default by the other Party commences to cure, correct, or remedy the alleged default within ten (10) calendar days after receipt of written notice specifying such default and thereafter diligently completes such cure, correction, or remedy, such Party shall not be in default under this Agreement. If the Party in default fails to commence to cure the default within ten (10) calendar days following written notice thereof and thereafter diligently prosecutes such cure to completion, a "breach" of this Agreement by the defaulting party shall have occurred. Upon a breach of this Agreement, the sole and exclusive remedy of the Party who is not in default shall be to terminate this Agreement by serving written notice thereof to the Party in breach.

The Party claiming that a default has occurred shall give written notice of default to the Party claimed to be in default, specifying the alleged default. Delay in giving such notice shall not constitute a waiver of any default nor shall it change the time of default. However, the injured Party shall have no right to exercise any remedy for a default under this Agreement without first delivering written notice of the default.

In no event shall the City's disapproval of the development plans, DDA or other agreement, CEQA review, or any other entitlements for the Properties, or the City's disapproval or conditional approval of any other matters that require the City's discretionary approval pursuant to this Agreement or applicable law, constitute a breach of or default under this Agreement.

VI. MISCELLANEOUS

1. Compliance with Law.

Developer acknowledges that any future DDA or other agreement, if approved by the City, will require Developer (among other things) to carry out the development of the Properties in conformity with all applicable laws, including all applicable building, planning, and zoning laws, environmental laws, safety laws and federal and state labor and wage laws.

2. The City's Reservation of Discretion and Required Approvals.

No DDA or other agreement between the City and Developer shall have any force or effect, nor shall the City be deemed to be a party to any agreement for the acquisition of or disposition of real or personal property, until the terms and conditions of any future agreement are considered and approved by the governing body of the City, in the City governing body's sole and absolute discretion, following the conclusion of a duly noticed public hearing, as required by law. Developer expressly acknowledges and agrees that the City will not be bound by any statement, promise, or representation made by the City staff, consultants, or board or commission members during the course of negotiations of any agreement, and that the City shall only be legally bound upon the approval of any agreement by the governing body, in the City governing body's sole and absolute discretion, following a duly noticed public hearing, as required by law.

3. No Third-Party Beneficiaries.

None of the terms or provisions of this Agreement are intended to benefit any person or entity other than the City and Developer. No affiliate of Developer has any rights pursuant to this Agreement.

4. Governing Law.

The City and Developer acknowledge and agree that this Agreement was negotiated and entered into in the City of Fullerton, County of Orange, State of California. The City and Developer agree that this Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the internal laws of the State of California, without application of conflicts of law principles.

5. Partial Invalidity.

If any term or provision set forth in this Agreement or the application thereof to any Party or circumstance shall, to any extent, be invalid or unenforceable, the remainder of this Agreement, or the application of such term or provision or portion thereof to the Parties or circumstances other than those as to which it is held invalid or unenforceable, shall not be affected thereby, and each such term and provision of this Agreement shall be valid and enforced to the fullest extent permitted by law.

6. Waiver.

No waiver of any breach of any covenant, term or provision contained in this Agreement shall be deemed a waiver of any preceding or succeeding breach or such provision, or of any other covenant or provision contained in this Agreement. No extension of the time for performance of any obligation, or act or any waiver of any provision of this Agreement, shall be enforceable against the City or Developer unless made in writing and executed by both the City and Developer.

7. Construction.

Headings at the beginning of each Section and Subsection of this Agreement are solely for the convenience of reference of the City and Developer and are not a part of this Agreement. Whenever required by the context of this Agreement, the singular shall include the plural and the masculine shall include the feminine and vice versa. This Agreement shall not be construed as if it had been prepared by one or the other of the City or Developer, but rather as if both the City and Developer prepared this Agreement. Unless otherwise indicated, all references to Sections are to this Agreement. All exhibits referred to in this Agreement are either attached to this Agreement or incorporated into this Agreement by reference. If the last date by which the City or Developer is required to take any action pursuant to the terms of this Agreement is not a business day, the deadline for taking such action shall be extended until the next succeeding business day.

8. Entire Agreement.

This Agreement sets forth the entire agreement between the Parties with respect to the subject matter set forth herein and supersedes all prior discussions and negotiations between the Parties with respect thereto. No amendment to this Agreement shall be effective unless set forth in a writing signed by an authorized signatory of each Party.

9. Notices.

All notices under this Agreement shall be effective upon delivery to the respective Parties as follows, or such other address or addresses as the Parties may from time to time designate in writing:

CITY:

City of Fullerton
Attn: Kenneth Domer, City Manager
303 W. Commonwealth Avenue
Fullerton, CA 92832

DEVELOPER:

NFRED LLC
Attn: Dan Almquist, Managing Partner
610 Newport Center Drive Suite 1520
Newport Beach, CA 92660

10. Time of the Essence.

Time is of the essence in this Agreement and of each and every term and provision hereof, it being understood that the Parties hereto have specifically negotiated the dates or time limits for the completion of each obligation herein.

11. Duplicate Originals, Counterparts and Copies.

This Agreement may be executed in any number of duplicate originals, all of which shall be of equal legal force and effect. The Parties may execute this Agreement in two (2) or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. The Parties specifically agree that facsimile signatures on this Agreement shall be legally binding and that each Party is entitled and authorized to rely on the facsimile signature of the other hereon as if it were an original signature and that a fully-signed copy of this Agreement shall be just as valid and effective as if it was an original.

WHEREFORE, the Parties have executed this Agreement as of the date first written above.

"CITY"

CITY OF FULLERTON

By: _____
Kenneth Domer, City Manager

APPROVED AS TO FORM:

 for
Richard D. Jones, City Attorney

"DEVELOPER"

NFRED LLC

By: 
Dan Almquist, Manager

