

**EXCLUSIVE NEGOTIATING AGREEMENT BY AND BETWEEN  
THE CITY OF FULLERTON  
AND  
BOYS AND GIRLS CLUB**

THIS EXCLUSIVE NEGOTIATING AGREEMENT ("Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2021 ("Effective Date"), by and between the CITY OF FULLERTON, a California municipal corporation (the "City"), and BOYS AND GIRLS CLUB OF FULLERTON, a California non-profit 501C3 ("Club"), on the terms and provisions set forth below. The City and Club 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. Club intends to pursue the proposed relocation and renovation of Independence Park Gym and Racquetball Courts and adjacent park area for the Club's activities on a parcel of land owned by the City located at 801 S. Valencia Drive ("Buildings").

B. The purpose of this Agreement is to provide for a period of exclusive negotiations during which the City and Club will prepare a plan for the relocation of the Club and renovation of the Buildings. Additionally, the plan for the Buildings may include adjacent park area.

**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 Club agree as follows:

**I. SCOPE OF AGREEMENT**

During the Total Negotiation Period defined in Section II, City and Club shall negotiate in good faith pursuant to the terms herein a Lease Agreement ("Lease") or other form of agreement or agreements between the City and Club concerning the use and renovation of the Buildings. City shall not negotiate with any other person or entity regarding the use of the Buildings during the Total Negotiation Period without the consent of the Club. Nothing in this Agreement shall be deemed a covenant, promise, or commitment by the City with respect to the Lease or renovation of any real property, the approval of Lease development, or the terms of a LEASE 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 Club agree to negotiate for an initial period of six (6) months ("Initial Negotiation Period"), commencing upon the Effective Date of this Agreement. The Initial Negotiation Period may be automatically extended for one additional six (6) month period, if the Club meets the Initial Negotiation Period Milestones described in Section III (A). In the event that the Club does not meet the Initial Negotiation Period Milestones within the Initial Negotiation Period, then the Agreement shall automatically terminate and Club shall have no further rights regarding the subject matter of this Agreement or the Buildings, and the City shall be free to negotiate with any other persons or entities with regard to the Buildings. In no event shall the period comprised of the Initial Negotiation Period and six (6) month extension authorized herein (the "Total Negotiation Period") exceed one (1) year without the approval of the Fullerton City Council.

## III. OBLIGATIONS OF CLUB

### A. Initial Negotiation Period and Total Negotiation Period Milestones

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

- i) Club will work with the City regarding the phased renovation of the Buildings; and
- ii) Prepare and submit preliminary Project plans, including Site, Floor, and Landscape plans; and
- iii) Initiate preparation of preliminary financial feasibility analysis, including renovation costs; and
- iv) Prepare and submit a timeframe of the project renovations and Club's relocation; and
- v) Provide a written progress report to the City Manager on the actions taken by the Club to meet the Initial Negotiation Period Milestones.

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

- i) Commence the required architectural review and design of the Buildings; and
- ii) Submit the renovation plans; and
- iii) Submit timeframe of project and relocation; and
- iv) Finalize and submit a preliminary financial feasibility analysis, including development costs; and
- v) Provide oral and written reports as requested by City regarding Club's progress toward meeting its obligations under this Agreement.

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

The qualifications and identity of Club 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 Club.

1. During the Total Negotiation Period, no voluntary or involuntary successor-in-interest of Club shall acquire any rights or powers under this Agreement. Club 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 Club referencing Subsection B of Section III of this Agreement.

2. Club 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 Club, as well as any and all changes in the interest of the degree of control of Club by any such entities or individuals, of which information Club 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 Club (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 Club referencing Subsection B of Section III of this Agreement.

C. Press Releases

Club agrees to obtain the approval of the City Manager or his designee prior to the publication or dissemination of any press releases the Club may propose relating to the planning or renovations of the Buildings.

The City agrees to obtain the approval of the Club prior to the publication or dissemination of any press releases the City may propose relating to the planning or renovations of the Buildings.

D. Acknowledgments and Reservations

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

2. Club 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 Club, to convey any interest in the Property, or for the City to provide any financial or other assistance to Club for development of the Buildings.

3. Club acknowledges and agrees that neither the Club nor any affiliate of the Club 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

Club 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 Club

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

1. Negotiate exclusively through its staff, and contract exclusively, with Club in connection with the renovations of the Buildings;
2. Review the plans and determine consistency with the General Plan, Fullerton Municipal Code, and other relevant land use regulations on the proposed Properties;
3. Provide Club with documents in the City's possession that would assist Club with the activities described in this Agreement;
4. Assist in the identification of existing deficiencies in the public infrastructure in the vicinity of the Properties;
5. Identify the necessary steps that will be undertaken to process and cause the Buildings to accommodate the renovations;
6. Respond on a timely basis to all submittals by Club made pursuant to this Agreement;
7. Work with Club to establish a reasonable time schedule, consistent with the terms of this Agreement, for negotiation of a Lease or other agreement and the completion of all necessary approvals and permits to implement the development of the Buildings; and

8. Provide reasonable cooperative assistance to Club in preparation for and during any presentation before regulatory or advisory panels in connection with any applications for 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 Buildings.

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 Club for any costs or expenses incurred as a result of this Agreement, the preparation and submittal of the development plan, the negotiation of a Lease or other agreement, the retention of any consultant, the development of the Buildings, or any other matter concerning the Buildings.

V. REMEDIES

A. Limitation on Remedies for Breach and Release of Claims

1. The Parties acknowledge and agree that neither the City nor Club 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 Club 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 Club to be bound by the limitations on damages and remedies set forth in this Section V, and the City and Club 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 Club as of the date of this Agreement. The City and Club 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, Lease or other agreement, or any other permits for the Buildings, 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

Club acknowledges that any future Lease or other agreement, if approved by the City, will require Club (among other things) to carry out the renovation and relocation of the Buildings in conformity with all applicable laws, including all applicable buildings, 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 Lease or other agreement between the City and Club 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. Club 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 Club. No affiliate of Club has any rights pursuant to this Agreement.

### 4. Governing Law

The City and Club 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 Club 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 Club unless made in writing and executed by both the City and Club.

### 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 Club 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 Club, but rather as if both the City and Club 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 Club 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  
303 West Commonwealth Avenue  
Fullerton, CA 92832

CLUB:

Boys & Girls Clubs of Fullerton  
340 W. Commonwealth Ave  
Fullerton, CA 92832

#### 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: \_\_\_\_\_

APPROVED AS TO FORM:

  
\_\_\_\_\_ for  
Richard D. Jones  
City Attorney

BOYS & GIRLS CLUB

By:   
\_\_\_\_\_  
CEO      3/18/21  
Brett Ackerman