

EXCLUSIVE NEGOTIATION AGREEMENT

This EXCLUSIVE NEGOTIATION AGREEMENT ("ENA") is dated, for reference purposes, as of the Effective Date (as defined in Section 16.8), and is entered between the CITY OF FRESNO, a municipal corporation ("City"), and Fagundes Brothers, LLC, a California limited liability company ("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."

RECITALS

A. Developer currently owns or intends to acquire property generally located within the boundaries of South Brawley, South Marks, West Madison and West Whites Bridge Avenues, and intends to develop the property as a comprehensively planned subdivision consisting of a minimum of four tracts, and tentatively titled "The Oasis" (the "Project").

B. A development of the scale and quality of the Project will provide substantial public benefit to the area.

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

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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 the terms of a Development Agreement and/or other agreements necessary to develop the Project. 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 shall include defining the project scope and features that are agreeable to both parties.

3. **Negotiation Period.** The Parties will negotiate for 90 days from the date that the City executes this ENA (the "Negotiation Period"), unless negotiations are terminated sooner as provided herein. Following the Negotiation Period, this ENA may be administratively extended from month to month to facilitate completion of the Agreements.

4. **Proposed Terms and Conditions for Agreements.** During the Negotiation Period, including any extensions, the Parties shall negotiate the proposed terms for the Agreements. The Agreements will detail the Parties' (and affiliates of Developer's) respective rights and obligations for developing the Project on the Sites.

5. **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. The City may give or deny consent in its sole and absolute discretion.

6. **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:

6.1. **Meetings.** Developer shall meet with City representatives to review and understand the terms of the Agreements governing the improvement and operation of the Sites.

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

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

8. **Compliance with Laws/CEQA.** If the negotiations result in one or more proposed Agreements, City Council approval thereof may occur only after compliance, as may be required, with all applicable laws and ordinances including, without limitation, CEQA. 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. Any Agreement shall become effective only if and after the Agreement has been considered and approved by the City Council at a public hearing called for such purpose.

Developer shall be responsible for the cost of CEQA/NEPA compliance for the Project, as determined necessary. 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.

9. **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.

10. 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.

11. 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

Developer: Fagundes Bros. Dairy
1978 Business Parkway
Merced, CA 95348

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.

12. Agreement Limitations. The City is not, 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 City or any agency or department thereof. This ENA is merely an agreement to enter exclusive negotiations with respect to the Project according to the terms hereof, with all final discretion and approval remaining with the City Council as to any Agreements and all proceedings and decisions in connection therewith.

13. **Miscellaneous provisions.**

- 13.1. **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.
- 13.2. **Headings.** The section headings in this ENA are for convenience only; they do not explain, modify or add to the meaning of this ENA.
- 13.3. **Severability.** The provisions of this ENA are severable. The invalidity or unenforceability of any provision in this ENA will not affect the other provisions.
- 13.4. **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.
- 13.5. **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.
- 13.6. **Successors and Assigns.** Subject to the limitation on assignment herein, this ENA is binding on and will inure to the benefit of the Parties and their respective successors and assigns.
- 13.7. **Effective Date.** The Effective Date of this ENA shall be the date that the City executes this ENA, following City Council approval.
- 13.8. **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.
- 13.9. **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

Wilma Quan-Schechter, City Manager

Dated: _____, 2018

Developer:

Dated: _____, 2018

ATTEST:
YVONNE SPENCE, MMC
City Clerk

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By: _____
Deputy

By: _____
Deputy