

EXCLUSIVE NEGOTIATION AGREEMENT

by and between

City of Fresno

and

Tutelian & Company, Inc.

For

North Fulton Mall Development Opportunities

EXCLUSIVE NEGOTIATION AGREEMENT

This EXCLUSIVE NEGOTIATION AGREEMENT ("ENA") is dated _____, 2018, and is entered between the City of Fresno, a municipal corporation, herein referred to as CITY and Tutelian & Company, Inc., a California corporation, herein referred to as DEVELOPER, upon 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. The CITY, on October 20, 2016, approved the Fulton Corridor Specific Plan (the "Fulton Plan").

B. Implementation of the Fulton Plan envisions a development strategy driven by private investors, and a plan development focused on retail, employment, shared parking, and livable neighborhoods. (Fulton Plan, page 1:2).

C. The Fulton Plan also acknowledges that, though direct City financial assistance for private projects is not a sustainable blanket strategy, public investments in infrastructure that reduce costs and uncertainty for individual projects will allow private developers to operate at the volume and speed necessary to revitalize the Plan Area. (Fulton Plan, page 6:3).

D. The Fulton Plan confirms that the north end of the Fulton District is currently flanked by two parking lots, and the remnants of the loop road developed as part of the Gruen Plan for the Fulton Mall, commonly referred to as the Tuolumne Reversal. (Fulton Plan, page 5:6). The Fulton Plan thereby identifies the Tuolumne Reversal in the vicinity of Van Ness Avenue and Tuolumne Street as underutilized lands owned by the CITY that may provide opportunity in attaining objectives of the Fulton Plan in those environs.

E. The Fulton Plan includes conceptual layouts of desirable redevelopment of properties in the North Fulton District, in the vicinity of Tuolumne Reversal. Those conceptual layouts reflect midrise mixed-use development, which includes a parking garage lined with ground floor retail uses. (Fulton Plan, page 5:6).

F. DEVELOPER has a proven record of completing mixed use development projects in Downtown Fresno, and further has a proven record of investment and rehabilitation of important historic resources in Downtown Fresno in the immediate adjacent of the North Fulton District within the Fulton Plan.

G. DEVELOPER has further invested significant time and money in completing engineered drawings and infrastructure plans that are consistent with the goals and objectives of the Fulton Plan's North Fulton District.

H. During the Negotiation Period (defined below), the DEVELOPER proposes to determine the feasibility of a project in the Fulton Plan's North Fulton District that may utilize elements of the Tuolumne Reversal and/or other lands owned by the CITY (or subsequently acquired by the CITY) (the "City's North Fulton District Real Estate Resources") to facilitate the facilities and structures envisioned in the Fulton Plan's concepts for the North Fulton District. Such feasibility evaluations shall include jointly identifying with the CITY the extent and potential of public infrastructure development needed to attain the objectives of the Fulton Plan.

I. The CITY wishes to enter into an ENA granting the DEVELOPER exclusive rights to negotiate terms for a subsequent Disposition and Development Agreement ("DDA") that may include the conveyance, at fair market value, of some or all of the City's North Fulton District Real Estate Resources for development of a proposed Project.

J. After execution of the ENA, the Parties intend to negotiate mutually acceptable terms and conditions in a DDA and such other ancillary agreements as may be necessary (collectively the "North Fulton District Agreements"), that will define the Parties' rights, obligations and development of the City's North Fulton District Real Estate Resources.

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. Good Faith Negotiations. The Parties, during the negotiation period defined in Section 3 below, and only for so long as the DEVELOPER timely meets its obligations under this ENA, shall negotiate exclusively and in good faith regarding the proposed development of the City's North Fulton District Real Estate Resources 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 the development of a project concept including components described in Recitals "H" and "I" above.

3. Negotiation Period. The Parties will negotiate for two hundred seventy (270) days from the date the CITY executes this ENA (the "Negotiation Period"), unless negotiations are terminated sooner as provided herein. In addition, the City Manager is authorized to exercise her discretion to extend the Negotiation Period for an additional one-hundred eighty (180) days. When the Negotiation Period expires, this ENA shall automatically terminate unless, before expiration of the Negotiation Period, the

DEVELOPER prepares and delivers a status report to the City Council demonstrating to the CITY's satisfaction that the DEVELOPER is then in material compliance with this ENA, and that the DEVELOPER has made and is then making good faith efforts to timely complete all its obligations hereunder, and explaining why the DEVELOPER has been unable to complete its obligations hereunder, despite such good faith efforts; and the City Council approves the extension of the Negotiation Period and the DEVELOPER and the CITY execute an amendment to the ENA to implement extending the Negotiation Period.

If, on expiration of the Negotiation Period, including any extensions, the City Council has not made the requisite findings and approved a DDA, then this ENA shall automatically terminate unless the City Council has approved, and the DEVELOPER and the CITY have entered, a written extension of the term of this ENA. On termination of this ENA, the CITY may thereafter deal with the City's North Fulton District Real Estate Resources and negotiate with others concerning the City's North Fulton District Real Estate Resources as the CITY in its sole and absolute discretion.

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 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 a DDA. The DDA shall detail the Parties' respective rights and obligations for developing a project consistent with the visions set forth in the Fulton Plan on the City's North Fulton District Real Estate Resources.

5. Developer's Principals and Legal Status. The DEVELOPER shall disclose such information to the CITY regarding its principals, legal status and project experience as the CITY may reasonably request. At a minimum, the DEVELOPER shall disclose the following: (a) its principals, shareholders, members and/or partners, (b) its directors, officers, and key staff, project manager (c) its parent company, subsidiaries and affiliates, if any, and (d) all other pertinent information concerning DEVELOPER and its legal structure.

The 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 the DEVELOPER during the Negotiating Period of this ENA will be subject to the written approval of the CITY.

6. Financial and Other Information. The DEVELOPER shall promptly provide the CITY with financial and other information, data, and commitments the CITY may reasonably request to ascertain the DEVELOPER's or its partners' performance capabilities to expeditiously complete a project consistent with the visions set forth in the Fulton Plan on the City's North Fulton District Real Estate Resources. In any event, no later than fifteen days before the end of the Negotiation Period, including any extension thereof, the DEVELOPER shall submit to the CITY, in reasonable detail, the DEVELOPER's proposed plan to finance the construction costs for development of the Project.

7. Assignment Prohibited. The 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.

8. Additional DEVELOPER Responsibilities. Without limiting any other provision of this ENA, the 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 for information:

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

8.2 Rights of Entry. Before entering upon any the City's North Fulton District Real Estate Resources, whether for site assessment or other due diligence, the DEVELOPER shall first obtain a right of entry from the CITY. The right of entry shall be in form and content reasonably acceptable to the CITY, including required insurance/indemnity provisions.

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

10. Compliance with Laws/Conditions Precedent. If the negotiations result in a DDA, the City Council approval thereof may occur only after compliance, as may be required, with all applicable laws and ordinances.

An objective during the Negotiation Period is to establish a Project scope and description sufficient to include in a California Environmental Quality Act assessment (CEQA). Responsibility for the cost of the CEQA compliance for the Project shall be commissioned by the DEVELOPER.

Any DDA prepared as a result of this ENA shall become effective only if and after the DDA has been approved by the City Council at a public hearing called for such purpose.

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 writing and signed by both 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 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 both Parties are equally responsible for authorship 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 not be executed in counterparts.

12. Nondiscrimination. The DEVELOPER covenants and agrees 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 City's North Fulton District Real Estate Resources, nor shall the DEVELOPER or any person claiming under or through the 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, homebuyers, subtenants or vendees as a result of any development by DEVELOPER of any portion of City's North Fulton District Real Estate Resources

13. Notices. All notices required or permitted hereunder shall be delivered in person, U.S. mail, 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 of Fresno
City Manager
2600 Fresno St.
Fresno, CA 93721-3605

DEVELOPER: Tutelian & Company, Inc.
Attention: Cliff Tutelian
1401 Fulton Street Suite 210
Fresno, CA 93721

Notice shall be deemed received on delivery, if delivered personally, and one day after if delivered by courier and three days after if deposited into the U.S. mail or registered or certified mail.

14. Agreement Limitations. Neither Party by entering into this ENA is committing itself to or agreeing to undertake any other acts or activities requiring the subsequent independent exercise of discretion by any other agency thereof. This ENA is merely an agreement to enter into exclusive negotiations with respect to the City's North Fulton District Real Estate Resources according to the terms hereof, with all final discretion and approval remaining with the City Council 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. The 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 Exhibits or attachments conflict, the terms in the body of this ENA control. Any term or condition in any Exhibits or attachments 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 seven above, 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 Independent Capacity. The CITY shall not become or be deemed a partner or joint venturer with the DEVELOPER or associate in any such relations with the DEVELOPER by reason of the provisions of this ENA. The DEVELOPER shall not for any purpose be considered an agent, officer or employee of the CITY.

15.9 Conflict of Interest. No officer or employee of the CITY shall hold any interest in this ENA.

The effective date of this ENA shall be the date first written above that the CITY executes this ENA, following City Council approval. Each Party acknowledges this ENA has been executed by its duly authorized representative(s) on the dates shown below.

CITY

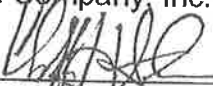
CITY OF FRESNO, a municipal corporation

By: _____
Name: Wilma Quan-Schechter
Title: City Manager

Dated: _____, 2018

DEVELOPER

Tutelian & Company, Inc., a Californai corporation

By:  _____
Cliff Tutelian, Its President

ATTEST:

YVONNE SPENCE, CMC
City Clerk

By: _____
, Deputy

Dated: _____, 2018

APPROVED AS TO FORM:
DOUGLAS T. SLOAN
City Attorney

By:  _____
Deputy City Attorney
Assistant

Dated: _____, 2018