

EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT
(APN 224-37-068)

This Exclusive Negotiating Rights Agreement (this “Agreement”) is entered into as of this _____, 2018 by and between the **City of Santa Clara** (the “City”) and **Freebird Development Company, LLC** (the “Developer”). City and Developer may be referred to individually as a “Party” or collectively as the “Parties” or the “Parties to this Agreement.”

RECITALS

A. The City is the owner of a 2.474 acre parcel of real property in the City of Santa Clara located at 2330 Monroe Street (APN 224-37-068), as shown on the map attached to this Agreement as Exhibit A and incorporated herein by this reference (the “Property”).

B. After redevelopment agencies (RDA) were dissolved on February 1, 2012, the City, as Housing Successor to the dissolved RDA, was designated to assume all housing assets (including land) of the former redevelopment agency and these assets were placed into a Housing Successor Fund. The Housing Successor must initiate development activities on any land that it obtained from the former RDA consistent with the intent to provide housing that is 100% affordable to persons and families of low and moderate income.

C. On March 31, 2018, a Request for Proposals (RFP) was issued for the development of 2330 Monroe Street. On September 11, 2018, City Council noted and filed staff’s recommendation of Freebird Development Company for development of the site and directed staff to draft an Exclusive Negotiations Agreement for Council consideration.

D. The Developer has proposed to develop the Property with 55-70 units of affordable housing, including a 20% set-aside of units targeted to persons with developmental disabilities (the “Project”). The entire project is proposed to be affordable to households with income between 30% and 120% Area Median Income (AMI).

E. The City is interested in exploring the feasibility of the Project and has selected the Developer as a potential developer of the Project. The City will retain long-term ownership of the Property through a ground lease structure and is considering offering a maximum subsidy of \$75,000 per affordable housing unit to facilitate project financing.

F. The site is currently zoned as Single Family (R1-6L). The land is designated as right-of-way on the General Plan Land Use diagram. Redevelopment of the site for new housing will subsequently require City Council and/or Planning Commission approvals of a General Plan Amendment, Rezoning, Architectural Review and California Environmental Quality Act (CEQA) and potentially National Environmental Policy Act (NEPA) review.

G. The development of this Project will allow the City to meet its obligations as Housing Successor to provide low and moderate income housing on the Property and meet the deadline required by the State to commence development of the site within five years after the Department of Finance confirmed the Property as a housing asset.

H. The purpose of this Agreement is to establish procedures and standards for the negotiation by the City and the Developer of a Disposition and Development Agreement (the “DDA”) pursuant to which the Developer will conduct specified development activities related to the Property. As more fully set forth in Section 21, the Developer acknowledges and agrees that this Agreement in itself does not grant the Developer the right to develop the Project, nor does it obligate the Developer to any activities or costs to develop the Project, except for the preliminary analysis and negotiations contemplated by this Agreement.

AGREEMENT

The Parties mutually agree as follows:

EXCLUSIVE NEGOTIATIONS RIGHT

1. Good Faith Negotiations. The City and the Developer shall negotiate diligently and in good faith, during the Negotiating Period described in Section 2, the terms of a DDA for the development of the Project on the Property. During the Negotiating Period, the Parties shall use good faith efforts to accomplish the respective tasks outlined herein in Exhibit B to facilitate the negotiation of a mutually satisfactory DDA.

Among the issues to be addressed in the negotiations are the physical and land title conditions of the Property and remediation of any adverse conditions, the development schedule for the Project, and financing of the Project.

2. Negotiating Period. The negotiating period (the “Negotiating Period”) under this Agreement shall be eighteen (18) months, commencing on the date this Agreement is fully executed, which may be extended for a period of an additional two periods of six (6) months each upon presentation of a written request from the Developer together with a schedule of tasks to be accomplished during the additional period. Granting of such extension(s) shall be at the discretion of the City Manager and shall only be effective upon the execution of an amendment to the Agreement.

If a DDA has not been executed by the City and the Developer by the expiration of the Negotiating Period, then this Agreement shall terminate and neither Party shall have any further rights or obligations under this Agreement, except as set forth in Section 4 and Section 23. If a DDA is executed by the City and the Developer then, upon such execution, this Agreement shall terminate, and all rights and obligations of the Parties shall be as set forth in the executed DDA.

3. Exclusive Negotiations. During the Negotiating Period, the City shall not negotiate with any entity, other than the Developer, regarding development of the Property, or solicit or entertain bids or proposals to do so.

4. City Consultant Costs Deposit. The Developer acknowledges that the City shall expend resources in the negotiation of the DDA and performance of the tasks provided in Exhibit B. In order for this Agreement to remain in effect, the Developer and the City shall agree on an amount that the Developer shall submit to the City as a good faith and initial third-party consultant costs deposit, the sum of TWENTY-FIVE THOUSAND Dollars (\$25,000) (the “Deposit”) to be paid within thirty (30) days following execution of this Agreement by the City

and the Developer. The Deposit shall be provided in the form of a cashier's check made to the order of the City and be placed in a separate City deposit account. Any interest earned on the Deposit and any subsequent deposits shall be added to the total Deposit amount and may be used in accordance with this Agreement.

The City shall have no obligation to begin the negotiation of the DDA or to retain third-party consultants until the Developer delivers the Deposit to the City. For the period of six (6) months following the date of the Agreement ("Due Diligence Period"), the Deposit shall be fully refundable, except for any costs incurred by the City as described below.

The Deposit may be used by the City to pay for the City's third party consultant costs and expenses in negotiating and preparing the DDA (collectively, the "Transaction Documents"). Such costs may include, but are not limited to reasonable fees and services of third party consultants and attorneys, selected by the City at its sole discretion, relating to the Project and the preparation of the Transaction Documents ("Consultant Costs"). Prior to incurring any Consultant Costs, the City shall submit an outline budget for use of the Deposit describing the general scope of work, cost and timing of expenditure.

Following the Due Diligence Period, the Developer shall be responsible for all of the City's Consultant Costs subject to the restrictions contained in this Section 4. Prior to the City incurring Consultant Costs in excess of the Deposit, the City shall provide the Developer with a schedule of the Consultant Costs incurred to date and an estimate of the additional Consultant Costs anticipated to be incurred. The Developer shall reasonably approve or disapprove the Consultant Costs within seven (7) days following the City's submittal of the anticipated Consultant Costs. If Developer disapproves the City's Consultant Costs, the City and Developer will meet and in good faith evaluate the estimate and attempt to reach a compromised budget acceptable to both parties. The Developer shall deposit with the City the amount of the additional Consultant Costs as approved by the Developer within fourteen (14) days of such approval. The additional amount shall be added to the Deposit. The City shall be reimbursed for all additional Consultant Costs approved by the Developer and incurred by the City prior to the date of the termination of this Agreement. To the extent this Agreement is terminated prior to or as of the end of the Negotiating Period and the City has incurred Consultant Costs that are less than the Deposit, and Developer has negotiated in good faith and is not in breach of this Agreement, the City shall return the unexpended balance of the Deposit to the Developer along with an accounting of the Consultant Costs incurred by the City.

If this Agreement is terminated by the City due to a failure by the Developer to negotiate in good faith under this Agreement the Deposit and any interest earned thereon shall be retained by the City, as more fully provided in Section 25. Conversely, if this Agreement is terminated by the Developer due solely to a City default, the Deposit and any interest earned thereon shall be returned to the Developer.

5. Identification of Developer Representative. The Developer's representative to negotiate the DDA with the City is: Robin Zimble.

GENERAL PROVISIONS

6. Limitation on Effect of Agreement. This Agreement shall not obligate either the City or the Developer to enter into a DDA or to enter into any particular DDA. By execution of this Agreement, the City is not committing itself to or agreeing to undertake acquisition, disposition, or exercise of control over any property. Execution of this Agreement by the City is merely an agreement to conduct a period of exclusive negotiations in accordance with the terms hereof, reserving for subsequent City and City Council action the final discretion and approval regarding the execution of a DDA and all proceedings and decisions in connection therewith. Any DDA resulting from negotiations pursuant to this Agreement shall become effective only if and after such DDA has been considered and approved by the City.

7. Notices. Formal notices, demands and communications between the City and the Developer shall be sufficiently given if, and shall not be deemed given unless, dispatched by certified mail, postage prepaid, return receipt requested, or sent by express delivery or overnight courier service, to the office of the Parties shown as follows, or such other address as the Parties may designate in writing from time to time:

City:	City of Santa Clara 1500 Warburton Avenue Santa Clara, CA 95050 Attention: City Manager
Developer:	Freebird Development Company, LLC 1111 Broadway Oakland, CA 94607 Attention: Robin Zimble

Such written notices, demands and communications shall be effective on the date shown on the delivery receipt as the date delivered.

8. Costs and Expenses. Except for the Developer's obligation to fund certain City consultant costs under Section 4, above, each Party shall be responsible for its own costs and expenses in connection with any activities and negotiations undertaken in connection with this Agreement, and the performance of each Party's obligations under this Agreement.

9. No Commissions. The City shall not be liable for any real estate commissions or brokerage fees that may arise from this Agreement or any DDA that may result from this Agreement. The City represents that it has engaged no broker, agent or finder in connection with this transaction, and the Developer shall defend and hold the City harmless from any claims by any broker, agent or finder retained by the Developer.

10. Defaults and Remedies.

(a) Default. Failure by either Party to negotiate in good faith as provided in this Agreement shall constitute an event of default hereunder. Failure of the City to comply with its obligations under Section 3 shall constitute an event of default by the City hereunder. The non-defaulting Party shall give written notice of a default to the defaulting Party, specifying the nature of the default and the required action to cure the default. If a default remains uncured

thirty (30) days after receipt by the defaulting party of such notice, the non-defaulting Party may exercise the remedies set forth in subsection (b).

(b) Remedies. In the event of an uncured default by the City, the Developer's sole remedy shall be to terminate this Agreement, upon which termination the Developer shall be entitled to the return of the uncommitted portion of the Deposit, as set forth in Section 4, and any interest earned thereon. Following such termination and the return of the appropriate amount of the Deposit and any interest earned thereon, neither party shall have any further right, remedy or obligation under this Agreement; provided, however, that the Developer's indemnification obligation pursuant to Section 25 shall survive such termination.

In the event of an uncured default by the Developer, the City's sole remedy shall be to terminate this Agreement and to retain any unexpended funds remaining in the Deposit and any interest earned thereon. Following such termination, neither Party shall have any right, remedy or obligation under this Agreement; provided; however, that the Developer's indemnification obligation pursuant to Section 24 shall survive such termination.

Except as expressly provided above, neither party shall have any liability to the other for damages or otherwise for any default, nor shall either party have any other claims with respect to performance under this Agreement. Each party specifically waives and releases any such rights or claims they may otherwise have at law or in equity.

11. Developer's Obligation to Indemnify City. Developer shall defend, indemnify, and hold harmless the City from and against all suits and causes of action, claims, losses, demands and expenses, including, but not limited to, reasonable attorneys' fees and costs of litigation, damage or liability of any nature whatsoever, arising directly or indirectly, in whole or in part, are caused by, arise in connection with, result from, relate to, or are alleged to be caused by, arise in connection with performance of this Agreement on the part of the Developer or any contractor or subcontractor of the Developer. The Developer shall pay immediately upon the City's demand any amounts owing under this indemnity. The duty of the Developer to indemnify includes the duty to defend the City, at the City's choosing, to pay the City's costs of its defense in any court action, administrative action, or other proceeding brought by any third Party arising in any manner by reason of or incident to the performance of this Agreement on the part of the Developer or any contractor or subcontractor of the Developer. The City shall have the right to approve any attorneys retained by the Developer to defend the City pursuant to this Section 23 and shall have the right to approve any settlement or compromise. The Developer's duty to indemnify the City shall survive the termination of this Agreement. Notwithstanding the above, the Developer shall have no obligation to defend, indemnify or hold harmless the City, for any and all suits and causes of action, claims, losses, demands and expenses caused by, arising from, or related in any part to, any gross negligence, fraud or misconduct on the part of the City or its employees, agents, assigns, officers, or officials.

12. Compliance with Laws. Developer shall comply with all applicable laws and regulations of the federal, state and local government, including but not limited to "The Code of the City of Santa Clara, California" ("SCCC"). In particular, Developer's attention is called to the regulations regarding Campaign Contributions (SCCC Chapter 2.130), Lobbying (SCCC Chapter 2.155), Minimum Wage (SCCC Chapter 3.20), Business Tax Certificate (SCCC section

3.40.060), and Food and Beverage Service Worker Retention (SCCC Chapter 9.60), as such Chapters or Sections may be amended from time to time or renumbered. Additionally Developer has read and agrees to comply with City's Ethical Standards (<http://santaclaraca.gov/home/showdocument?id=58299>).

13. Nonliability of Officials, Officers, Members, and Employees. No member, official, officer, or employee of the City shall be personally liable to the Developer, or any successor in interest, in the event of any default or breach by the City or for any amount which may become due to the Developer or to its successor, or on any obligations under the terms of this Agreement.

No member, officer, or employee of the Developer shall be personally liable to the City, or any successor in interest, in the event of any default or breach by the Developer or for any amount which may become due to the City or to its successor, or on any obligations under the terms of this Agreement.

14. Assignment. The Developer shall not assign its rights or responsibilities under this Agreement, in whole or in part, except with the written consent of the City. Any attempted assignment without such prior written consent shall be invalid and void.

15. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California.

16. Entire Agreement. This Agreement, including the Exhibits, contains all the agreements, representations and understandings of the Parties, and supersedes and replaces any previous agreements, representations and understandings, whether oral or written.

17. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same agreement.

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The Parties acknowledge and accept the terms and conditions of this Agreement as evidenced by the following signatures of their duly authorized representatives.

APPROVED AS TO FORM:

Dated: _____

BRIAN DOYLE
City Attorney

DEANNA J. SANTANA
City Manager
1500 Warburton Avenue
Santa Clara, CA 95050
Telephone: (408) 615-2210
Fax: (408) 241-6771

“CITY”

FREEBIRD DEVELOPMENT COMPANY, LLC

Developer

Dated: _____

By: _____

Name: Robin Zimble

Title: Founder

Local Address: 1111 Broadway

Oakland, CA 94607

Email Address: robin@freebirddev.com

Telephone: 510-319-6959

Fax: _____

“CONTRACTOR”

EXHIBIT A
PROPERTY MAP
(APN: 224-37-068)

Prepared by City of Santa Clara

EXHIBIT B

NEGOTIATION PERIOD & TENTATIVE WORK PLAN

NEGOTIATION PERIOD

1. **Overview.** To facilitate negotiation of the DDA, the Parties shall use reasonable good faith efforts to accomplish the tasks set forth in Exhibit B in a timeframe that will support negotiation and execution of a mutually acceptable DDA prior to the expiration of the Negotiating Period. Within the first thirty (30) days of this Agreement, the Parties will agree upon a work plan for tasks to be accomplished.

2. **Site Plan.** The Developer shall prepare and submit to the City a proposed site plan identifying the size and shape of the parcels which comprise the Property (the “Development Parcels”) and the location of the Project improvements to be constructed on each of the Development Parcels.

3. **Developer Cooperation and Coordination with Adjacent Parcels.** Developer acknowledges the adjacent parcels and shall plan the site to be sensitive to these neighborhoods.

4. **Financing and Costs of Development.** The Developer shall provide the City with a detailed financial pro forma for the Project containing, among other matters, a detailed development budget setting forth the costs of the tasks to be undertaken by the Developer. The financial pro forma will be used to evidence the financial feasibility of the Project and to assist in the negotiation of terms regarding payment of costs of land and development.

5. **Documents.** Prior to execution of a DDA, the Developer shall provide the City with its organizational documents as well as organization chart outlining key personnel’s roles and responsibilities. Developer shall also submit to the City for its approval, copies of all operating agreements, joint venture agreements or other agreements between the members of the development entity, and such financial statements or tax returns reasonably required by the City to determine the Developer’s financial capability, excluding confidential or proprietary information.

6. **Environmental Review.** The City shall prepare or cause to be prepared any environmental documentation required by the California Environmental Quality Act (“CEQA”) for consideration of approval of the DDA; if any, provided, that nothing in this Agreement shall be construed to compel the City to approve or make any particular findings with respect to such environmental documentation. The Developer shall provide such information as may be required to enable the City to prepare or cause preparation and consideration of any CEQA-required document, and shall otherwise generally cooperate with the City to complete this task. The Developer shall be responsible for all costs associated with the preparation of the required CEQA documentation.

7. **Due Diligence.** During the Negotiating Period, the Developer shall conduct the following due diligence activities:

(a) Property Adequacy Determination. The Developer shall determine whether the Property is suitable for development of the Project, taking into account the geotechnical and soils conditions, the presence or absence of toxic or other hazardous materials, the zoning of the Property, the massing of the proposed Project improvements and the parking requirements imposed on projects of this type and the other environmental and regulatory factors that the Developer deems relevant. If, in the Developer's judgment based on such investigations and analyses, the Property is not suitable for development, the Developer may notify the City in writing prior to the expiration of the Negotiating Period of its determination. Upon such timely notification by the Developer, the remaining balance of the Deposit shall be immediately refunded to the Developer and this Agreement shall be terminated without further action of either Party, and thereafter neither Party shall have any further duties, obligations, rights, or liabilities under this Agreement; except as set forth in Section 24 and Section 25.

(b) Objections to Title. Promptly following the execution of this Agreement, the Developer shall cause Old Republic Title Company at 675 N. 1st St., #900, San Jose, California, to issue a Preliminary Title Report (the "Report") on the Property to the Developer and the City. If the Developer objects to any exception appearing on the Report or should any title exception arise after the date of the Report, the Developer may object to such exception, provided such objection is made to the City in writing on or before 5:00 P.M. on the thirtieth (30th) day following the date the Developer and the City receive the Report. If the Developer objects to any exception to title, the City, within fifteen (15) days of receipt of Developer's objection shall notify Developer in writing whether City elects to (i) cause the exception to be removed off record, (ii) obtain a commitment from Old Republic Title Company for an appropriate endorsement to the policy of title insurance to be issued to the Developer, insuring against the objectionable exception, or (iii) terminate this Agreement, unless the Developer elects to take title subject to such exception. If either Party elects to terminate this Agreement pursuant to this subsection, the remaining balance or the Deposit shall be immediately refunded to the Developer and neither Party shall thereafter have any obligations to or rights against the other hereunder, except as set forth in Section 24 and Section 25. If the Developer fails to provide any notification to the City regarding this matter prior to expiration of the time period set forth herein, the condition set forth in this subsection shall be deemed satisfied and this Agreement shall continue in effect. Notwithstanding the foregoing, City shall use good faith best efforts to keep the Property free and clear of any new liens or encumbrances during the Negotiating Period.

8. Site Access. No later than ten (10) days following execution of this Agreement, Developer and the City will enter into a separate agreement to provide Developer and its consultants with rights to enter, examine and conduct tests on the Property.

9. Reports. The Developer shall provide the City with copies of all reports, studies, analyses, correspondence and similar documents, but excluding confidential or proprietary information, prepared or commissioned by the Developer with respect to this Agreement and the Project, promptly upon their completion. The City shall provide the Developer with copies of all reports, studies, analyses, correspondence and similar documents (collectively, "documents") prepared or commissioned by the City with respect to this Agreement and the Project, promptly following execution of this Agreement with respect to documents then in its possession or under

its reasonable control, and promptly upon their completion with respect to any subsequently prepared documents.

While desiring to preserve its rights with respect to treatment of certain information on a confidential or proprietary basis, the Developer acknowledges that the City will need sufficient, detailed information about the proposed Project (including, without limitation, the financial information described in Section 10) to make informed decisions about the content and approval of the DDA. The City will work with the Developer to maintain the confidentiality of proprietary information subject to the requirements imposed on the City by the Public Records Act (Government Code Sections 6253, et seq.). The Developer acknowledges that the City may, subject to the limitations set forth in the preceding sentence, share information provided by the Developer of a financial and potential proprietary nature with third party consultants and City Council members as part of the negotiation and decision making process. If this Agreement is terminated without the execution of a DDA, the City shall return to the Developer any information submitted by the Developer under this Agreement.

10. Schedule of Performance. During the Negotiating Period, the Developer and City will complete initial work and studies as described in Exhibit B. Following the Negotiating Period, the Developer shall provide the City with a detailed schedule of performance for the Project which shall include, but not be limited to: a plan setting forth the proposed timeline for the preparation of development concepts, community outreach, and planning and environmental review/approval.

11. Progress Reports. Each Party on a monthly basis shall make oral or written progress reports advising the other party on studies being made and matters being evaluated by the reporting Party with respect to this Agreement and the Project.

TENTATIVE WORK PLAN

CITY

- Begin environmental documentation required by the California Environmental Quality Act (“CEQA”);
- Facilitate meeting to review submittal for Planned Development Zoning, Planning and Development Permits and Tentative Map Application and circulation of Draft CEQA Analysis;
- Provide confirmation of all applicable City fees and waivers, including parks fees;
- Arrange meetings for the negotiation of the DDA;
- Schedule Planning Commission Hearing;
- Schedule City Council Hearing;
- Provide City financing documentation for public finance applications; and
- Other tasks as appropriate to meet project goals.

DEVELOPER

- Prepare a Scope of Development and Proposed Site Plan describing location and land uses of the proposed Project;
- Prepare detailed Schedule of Performance for the Project and key partners;
- Submit a detailed pro forma and begin negotiating a Term Sheet to discuss and evaluate the financial and operational components, including any requirements pertaining to the applicability of any prevailing wage requirements;
- Provide the City with organizational documents as well as an organization chart outlining key personnel’s roles and responsibilities;
- Preliminary Analysis of toxic and hazardous waste conditions throughout the Property;
- Preliminary Analysis of geotechnical conditions of site surface and subsurface;
- Preliminary Assessment of traffic and parking issues/constraints that may affect site development;
- Assessment of major public and private utility capacities and connections for providing service to the Project;
- Assessment of site drainage and waterway issues that may affect site development;
- Determine form of payments for the City’s financial benefits from the Project;
- Discuss with the City any subsequent deposits necessary, to offset the costs for retention of further consultants;
- Identify key stakeholders; Conduct and document Project Community Meetings for public input on site design and operations;
- Review of any site easements or other use restrictions that may affect site development;
- Review of Title as it may affect site development and financing of development;
- Process planning applications and obtain Planning and Development permits and tentative map;
- Create Design development drawings;
- Pursue necessary financing commitments; and
- Other tasks as appropriate to meet project goals.