EXCLUSIVE NEGOTIATING AGREEMENT

**FOR DEVELOPMENT AT THE ASHBY BART STATION**

This Exclusive Negotiating Agreement (the “Agreement”), effective as of this \_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2025 (the “Effective Date”), is entered into by and between the San Francisco Bay Area Rapid Transit District, a rapid transit district established pursuant to Public Utilities Code Section 28500, et seq. ("BART"), and \_\_\_\_[name]\_\_\_\_\_, a \_\_\_\_\_[state of registration] [entity type]\_\_\_\_\_ (“Developer”). Developer and BART are together referred to as the “Parties.”

**RECITALS**

1. BART controls approximately 4.4 acres at the west parking lot of the Ashby BART Station comprised of station facilities and parking (the “Property”). The Property consists of two parcels, Assessor’s Parcel Number 053-1597-039-04 as well as an unassessed second parcel, “R9-2,” and is bounded by Ashby Avenue to the north, Adeline Street to the east, and Martin Luther King, Jr. Way to the west.
2. On \_\_\_\_\_\_\_\_, BART and the City of Berkeley (“City”) entered into the Ashby BART Station Transit-Oriented Development Exchange Agreement (“Exchange Agreement”). Pursuant to the terms of the Exchange Agreement, the City will quitclaim any rights, title, and interest in the Property within ten days of the Effective Date.
3. On May 22, 2025, the BART Board of Directors authorized the General Manager of BART to execute an Exclusive Negotiating Agreement (“ENA”) with the Developer for development at the Property, with a term of twenty-four (24) months and an option to extend an additional twelve (12) months. The Board further authorized BART to pursue development with the second ranked team from the competitive process if the terms of this ENA are not substantially met by the Developer.
4. BART and the Developer desire to enter into this Agreement to assess the possibility of developing the Property with a mix of residential and non-residential uses (the “Project”). Certain minimum requirements for the Project are described in **Exhibit 1**, the “Minimum Project Requirements.”
5. The purpose of this Agreement is to allow the Parties to determine the feasibility of the Project and to negotiate the terms of an option agreement for one or more long-term ground lease(s) of the Property ("Option Agreement"). BART generally does not intend to lease areas containing its transit infrastructure or that are otherwise necessary for its transit operations or maintenance; the Developer will be responsible for undertaking parcel subdivision(s) in order to separate the area to be leased from the remainder of the Property.

NOW THEREFORE, the Parties agree as follows:

1. **NEGOTIATIONS**
   1. Length of Negotiation Period; Extension

Unless extended by mutual agreement, or as otherwise provided herein, the period for negotiation of the terms and conditions of the Option Agreement shall be twenty-four (24) months, commencing on the Effective Date and terminating twenty-four (24) months thereafter (the “Negotiation Period”); provided, however, that the Negotiation Period may be terminated earlier pursuant to the termination provisions of this Agreement.

Upon a request by the Developer and payment of a fee in the amount of One Hundred Thousand Dollars ($100,000) (“Extension Fee”), BART may, in its sole discretion, agree to amend this agreement to extend the Negotiation Period for up to an additional twelve (12) month period. The Extension Fee will be applied to additional BART Costs, as defined below.

* 1. Good Faith Negotiations

The Parties shall negotiate diligently and in good faith during the Negotiation Period toward an Option Agreement. Assuming successful negotiation of the Option Agreement and that the activities listed in Section 3 are completed within the Negotiation Period and any extension thereof, the Option Agreement would give the Developer an option to lease the Property upon satisfaction of certain terms and conditions to be included in the Option Agreement, and according to the terms of the ground lease or leases attached to the Option Agreement (such ground lease or leases of the Property, or any portion thereof, being defined collectively as the “Ground Lease”).

Because BART has a growing portfolio of TOD projects on its property, and in the interest of being able to efficiently manage that portfolio, it is BART’s expectation that, except with respect to the agreed-to particulars of the project and site improvements, the Option Agreement and Ground Leases will be generally consistent with BART’s previously executed ground lease option agreements and ground leases. Among other terms, the Option Agreement will provide for commercially reasonable option fees as well as Developer’s payment of BART’s ongoing staff review costs and outside counsel and consultant bills related to the Project within thirty (30) days after being invoiced therefor, other than those that have been fully paid under Section 2, BART Fees and Costs.

An non-binding Initial Summary of Terms reflecting certain initial terms and conditions of Option Agreement is attached to this Agreement as **Exhibit 2**, Subject to revisions as mutually agreed by BART and Developer during the Negotiation Period, **Exhibit 2** will be used by BART and Developer as a general basis for negotiating key terms and provisions of the Option Agreement and Ground Lease. BART and Developer acknowledge that **Exhibit 2** is subject to modifications for reasons that may include, but are not limited to, matters discovered during Developer’s due diligence or raised during the community engagement process and changed facts and circumstances regarding the Project, its environmental clearance, and its financial feasibility.

Negotiations will commence following full execution of this Agreement and shall continue during the term of this Agreement while the Developer conducts due diligence on the Property and the Project, the Developer submits certain information to BART, the Parties undertake preliminary planning and analysis of the Project, and the Developer pursues entitlements for the Project.

* 1. Exclusive Negotiations

BART shall not negotiate the development of the Property with any other person or entity or solicit or entertain bids or proposals to do so, during the Negotiation Period.

1. **BART FEES AND COSTS**

2.1 Exclusivity Fee

In consideration for BART entering into this Agreement the Developer shall make an initial, non-refundable payment of Seventy-Five Thousand Dollars ($75,000) to BART within 30 days after the Effective Date, which payment, together with the Twenty-Five Thousand Dollar ($25,000) deposit received with the Developer’s proposal, for a total aggregate amount of One Hundred Thousand Dollars ($100,000), is defined as the “Exclusivity Fee.” Payment of the Exclusivity Fee shall be in the form of a check or wire to the San Francisco Bay Area Rapid Transit District. The Exclusivity Fee will be used by BART to compensate it for the BART Costs (as defined below).

"BART Costs" are defined as those costs incurred by BART with respect to negotiating and preparing documents for the Option Agreement and the Ground Lease(s) of the Property, including financial consultant costs, outside legal counsel, surveys, engineering, appraisals, studies, and other services in connection with this Agreement, which costs are subject to the terms and conditions of this Section 2.

An estimated budget showing anticipated BART Costs during the Negotiation Period is attached to this Agreement as **Exhibit 3** (the "ENA Budget"). All third-party consultant costs, legal fees, and labor costs incurred by BART will be paid at cost by the Developer if they are within the cost categories shown on the ENA Budget. If BART anticipates that BART Costs will exceed the amount provided in the ENA Budget, BART will notify Developer and will provide Developer an updated budget. Developer understands and acknowledges that the ENA Budget is provided as a courtesy. BART Costs can vary significantly depending on the progression of negotiations and the particulars of the project. In no event shall the ENA Budget constitute a cap on BART Costs.

BART shall first apply the Exclusivity Fee toward payment of BART Costs. When and if the remaining Exclusivity Fee decreases to Thirty-Five Thousand Dollars ($35,000) or less, BART shall, on an ongoing basis, furnish the Developer with a statement showing how the funds have been applied to BART Costs, which statements will show the actual payments made by BART, as well as costs incurred but not yet paid by BART. As the Exclusivity Fee account is drawn down to incur and pay for the BART Costs, within thirty (30) days after being informed by BART that the balance of the Exclusivity Fee is $35,000 or less, Developer shall, on an ongoing basis, provide additional payment to BART in an amount sufficient to restore the balance of the account to $100,000.

2.2 Access Plan Fee

In addition to the Exclusivity Fee, the Developer shall pay for the costs of completing a Station Access Plan, as further described in Section 3.3, by making an additional initial non-refundable deposit (the “Access Plan Fee”) of \_\_\_\_[AMOUNT]\_\_\_\_ Dollars ($\_\_,\_\_\_), within thirty (30) days after the Effective Date. BART shall use this Access Plan Fee to cover consultant and labor expenses associated with the completion of a two-phase Access Plan, to determine the station access infrastructure improvements associated with the development. The Developer shall submit payment within thirty (30) days after being invoiced therefor of any additional Access Plan Fee. Payment of the Access Plan Fee shall be in the form of a check or wire to the San Francisco Bay Area Rapid Transit District.

2.3 Refund of Fees Upon Termination

The Exclusivity Fee and Access Plan Fee (“the Fees”) shall be non-refundable except that (i) if this Agreement is terminated due to a BART default, the Developer shall be entitled to receive, within forty-five (45) days of such default, a refund of the unused portion of the Fees or unused portion of any additional deposits, but shall not receive a refund of any BART Costs that have been incurred or paid at the time of said default, and (ii) if this Agreement is terminated voluntarily by the Developer, the Developer shall be entitled to receive, within forty-five (45) days of such voluntary termination, a refund of the unused portion of the Access Plan Fee, and the unused portion of the Exclusivity Fee, except that BART shall retain a portion of the Exclusivity Fee equal to Twenty-Five Thousand Dollars ($25,000) as well as any amounts that BART has incurred, but not paid at the time of said Developer termination.  If this Agreement is terminated due to a default by the Developer, BART will retain the Exclusivity Fee and any Extension Fee that has been paid, and the Developer shall be entitled to receive, within thirty (30) days of termination, a refund of any unused portion of the Access Plan Fee.

1. **SCHEDULE OF PERFORMANCE**

The Developer shall perform the activities delineated in this section, including but not limited to submitting the specified information, during the Negotiation Period and within the time periods set forth in a schedule of performance mutually agreeable to all Parties

The initial schedule of performance (the “Schedule of Performance”) is attached hereto and incorporated herein by this reference as **Exhibit 4**. Developer may request in writing an extension of the date of any delivery in the schedule, to be reasonably approved by BART staff, so long as the extension does not exceed the term of the Agreement.

* 1. Developer Information

Developer shall provide the following information for BART review:

3.1.1 An updated written description of the specific and general roles, responsibilities, and obligations of Developer, Developer’s members or partners, and any other entity participating in the legal entities established by Developer for purposes of developing each component of the Project. Additionally, the written description of roles, responsibilities, and obligations shall identify the principals and other personnel, to the extent identified, from each participating party by name, title or position, and areas of responsibility within the development entity.

3.1.2 Copies of balance sheets and income/loss statements prepared in accordance with generally accepted accounting principles, and other financial documentation as reasonably requested by BART covering the last two years of Developer, Developer’s members or partners, and any other entity having a direct interest in Developer or in any SPE (as that term is defined below) created in connection with developing the Property.

3.1.3 A written statement concerning any litigation in which Developer or Developer’s partners or members are a party. Developer shall provide to BART copies of any filed litigation documents in connection with any litigation listed in such written statement within five (5) business days of BART’s written request.

3.1.4 All documents related to Developer’s not for profit, corporate, LLC, or partnership status, and the status of its members or partners having a direct interest in Developer or in any SPE (as that term is defined below) created in connection with developing the Property.

3.2 Community Engagement

3.2.1 Within 45 days of the Effective Date, Developer shall submit to BART for its review a Community Engagement Program (“CEP”). The CEP identifies community stakeholders, includes a narrative description of Developer’s approach to engagement, specifies a schedule for public meetings, workshops, or charrettes, and describes work products to summarize community feedback and priorities for public benefits. The CEP will also include a description of Developer’s process to engage with BART, the City of Berkeley (“City”), and other public agencies as needed.

3.2.2 Developer shall provide a summary of community engagement activities and stakeholder feedback during the Agreement as part of Developer’s quarterly progress reports, as well as a description of the project public benefits package.

3.3 Access Plan

A transportation planning consultant, contracted to BART, shall conduct an Access Plan funded by the Access Plan Fee. This Access Plan is in addition to, and not replacing, any City-required access or circulation studies for the entitlement or environmental review process. The scope, budget, and timeline for the Access Plan is provided in **Exhibit 5**.

* 1. Objective Design Standards
     1. The City is leading a process of preparing Objective Design Standards for the Property (“ODS”) for adoption by the City. In order to allow for a more accurate analysis of Project design options, Developer shall make good faith efforts to cooperate with the City in the development of ODS so that they can be brought forward for review and adoption.
     2. The Project shall adhere to the ODS adopted by the City for the Property provided that the ODS meet the requirements in **Exhibit 6,** ODS Requirements(Schedule 9.2.1 from the Exchange Agreement).
     3. In no event shall Developer submit a planning, entitlement or development permit application to the City prior to the earlier of (a) the City’s adoption of ODS or (b) the date that is 9 months from the date of this Agreement (or, in the event of force majeure impacting the City’s ability to adopt ODS, no more than 30 additional days later if such extension is mutually agreed by BART’s General Manager and the City Manager).
  2. Project Development and Financing Plan
     1. Developer shall prepare a Preliminary Development Plan (“PDP”), including a master site plan, conceptual architectural designs, preliminary financial feasibility information, a preliminary financing plan, and key financial terms for the transaction with BART.
        1. The preliminary financial feasibility information shall include market analysis, achievable rents/sales prices, construction cost trends, and an estimated absorption schedule of the elements included in the Project description reasonably acceptable to BART. The transactional terms shall reasonably satisfy BART that the Project is feasible based on market conditions.
        2. Developer shall provide a list of lenders and investors who will be approached for financing the Project (which list may be supplemented or amended by the Developer from time to time), accompanied by letters of interest and/or intent from debt and equity partners, if any, expressing willingness to provide Project financing.
        3. Developer shall also provide one or more preliminary project development pro formas for each component of the Project with the sources (including anticipated potential grant sources) and uses of funds, a 20-year cash flow analysis, and an annotated operating budget for the mixed-use elements of the Project to a level of detail reasonably acceptable to BART.
     2. Developer shall submit a Community Benefits Plan that summarizes the Project’s public benefits and details the costs of the benefits. The Community Benefits Plan will also include a rationale for those benefits not required by BART, as they relate to identified community needs and priorities. Developer will do a “reality check” to provide a private-sector assessment of estimated capital and operating costs attributable to each of the desired elements, along with potential funding sources, including anticipated potential grant sources.
     3. Developer shall submit a Final Development Plan (“FDP”), including schedule, refined financial feasibility assessment, refined project budget, cash flow and operating budget, and refined transaction with BART for each component of the Project. The FDP shall include:
        1. Detailed and itemized project pro formas linked to the schedule for construction and leasing of each component of the Project. Pro formas shall include a Project development budget, a statement describing the sources and uses of funds including equity contributions, a 20-year cash flow analysis, and an annotated operating budget to a level of detail reasonably acceptable to BART.
        2. Detailed Project development schedule, which shall include construction phasing and leasing/absorption of all phases of the Project.
        3. An updated market feasibility study performed by an economic consultant or qualified Real Estate Broker that analyzes the market feasibility, achievable rents, and estimated absorption schedule of the entire Project elements included in the Project description.
        4. Letters of interest and/or intent from lenders and equity partners expressing willingness to provide Project financing.
  3. Funding Applications

At least 10 business days prior to applying for any public source of funds requiring submission of a project proforma, Developer shall submit to BART for its review the application proforma to ensure that the Project acquisition cost is represented consistently with the transaction terms most recently submitted to BART as part of Developer’s proposal, PDP, or FDP.

* 1. Entitlement Process
     1. If applicable, Developer will select, fund and contract with an environmental consultant and submit a project description to the City, as the CEQA lead agency, for environmental review under CEQA.
     2. Developer will prepare and submit all applicable planning, entitlements, and development permit applications to City. Developer shall not submit any such application without prior written approval from BART.
     3. Developer will work with the City to complete any necessary environmental impact studies under CEQA if applicable.
     4. Developer will seek City Planning Commission action for all necessary environmental, design, and zoning approvals.
  2. Negotiated Documents
     1. Developer will submit a Proposed Option Agreement Term Sheet that provides financial terms, a preliminary schedule of performance for the entirety of the Project, and other relevant transactional elements.
     2. Developer and BART shall negotiate a Draft Term Sheet that provides financial terms, a preliminary schedule of performance for the entirety of the Project, and other relevant transactional elements.
     3. Developer and BART shall negotiate a Final Term Sheet.
     4. Assuming that BART and Developer are successful in negotiating a Final Term Sheet, BART staff shall seek approval of the Final Term Sheet by the BART Board of Directors and authorization to prepare and execute the Option Agreement and related transactional documents.
     5. Upon Board Authorization of the Final Term Sheet, Developer and BART staff shall negotiate a final execution version of the Option Agreement(s).
     6. Developer affirms that it has reviewed the Exchange Agreement between BART and the City, and acknowledges that all negotiated documents must be consistent with the Exchange Agreement.
  3. Components of the Project. BART and the Developer acknowledge and agree that the Project will consist of multiple components. The Developer anticipates that each such component will be structured with a single purpose entity owning the applicable component, and each such single purpose entity will be controlled by the Developer (each single purpose entity so controlled is an “SPE”). The Developer intends that each component will be the subject of a separate Ground Lease under the Option Agreement, with BART as the ground lessor and the applicable SPE as the ground lessee. For purposes of this Section 3.7 “controlled by” means a SPE in which the Developer acts as a general partner or managing member of such SPE. Developer acknowledges that: (i) nothing in this Section shall abridge the discretion of the BART Board of Directors pursuant to Section 10 of this Agreement, and (ii) the Option Agreement may impose additional limitations or preconditions with respect to SPEs having a vested right to execute a ground lease.

1. **REPORTS**

4.1 Quarterly Progress Reports

Upon full execution of this Agreement, Developer shall provide BART with written progress reports after each calendar quarter on all material matters pertaining to the Project. The progress reports shall include, but not be limited to, updates on the following areas: key milestones achieved and those expected to be achieved in the next quarter, financing, schematic design, entity organizing documents, market analysis, community engagement activities, and any alterations to the Project program and design, or changes to the proforma previously submitted to BART.

4.2 Small Business Enterprise Utilization Report

Developer shall maintain records to verify Small Business (SB) participation in the activities undertaken in connection with this Agreement. Such records shall show the name and business address of each SB participating in the Agreement and the total dollar amount actually paid each SB and the date of payment. A report based on these records and certified to be correct by Developer shall be submitted quarterly. Developer shall include with the quarterly report any other efforts made which are relevant to meeting the SB participation goal commitment. Developer shall submit with the first quarterly report copies of all SB subcontracts and purchase orders that have been entered into or issued in connection with the Agreement and shall submit with subsequent quarterly reports copies of any new such subcontracts or purchase orders. The quarterly report shall include copies of all invoices submitted by each SB during the reporting period. BART will verify with each SB the amount actually paid to the SB. SB participation will not be counted toward Developer’s SB goal commitment until the SB has been paid.

1. **SITE ACCESS AND COOPERATION**

BART shall reasonably cooperate with Developer or Developer’s consultants in obtaining access to the Property for performing any tests, surveys and inspections deemed reasonably necessary or appropriate by Developer to assess the feasibility of the Project (“Inspections”). Developer or its consultants must apply for, execute, and comply with the terms of a BART “Permit to Enter,” substantially in the form attached as **Exhibit 7**, as a condition of entering the Property.

BART shall reasonably cooperate with Developer in the provision of information and assistance in the filing, processing and obtaining of regulatory approvals, and, to the extent required by law, join with the Developer as a co-applicant in the filing for such regulatory approvals; provided, however, that BART shall have sole and absolute discretion to determine reasonable cooperation and the necessity of BART being a co-applicant on such approvals.

BART shall reasonably cooperate with Developer by providing documents in BART’s possession that would assist Developer with the due diligence activities required in this Agreement. Relevant staff from Developer’s team may require security clearance from BART in order to access security sensitive information.

1. **OBLIGATIONS OF BART**

During the Negotiation Period, BART shall act in good faith in all dealings with the Developer. BART shall also reasonably assist the Developer in conducting meetings with the community and stakeholders, and in the entitlement process, including CEQA compliance. However, the Developer shall retain sole responsibility for meeting all requirements set forth in this Agreement except for those specifically established for BART or within the sole control of BART.

BART shall reasonably cooperate with Developer to seek external funding to support BART-related infrastructure needs from funding sources that support TOD such as Affordable Housing & Sustainable Communities (“AHSC”), Infill Infrastructure Grants (“IIG”), and Transit and Inter-City Rail Corridor Program (“TIRCP”). BART will take priority on use of IIG and TIRCP funding for station access infrastructure. Any available IIG funding not needed for station access costs will be available for affordable housing infrastructure. BART shall have sole and absolute discretion to determine reasonable cooperation with respect to seeking external funding and may, in its determination, consider whether and to what extent any conditions that may be imposed in connection with such funding are consistent with BART’s operation. The intent of this paragraph is to identify and cooperate in seeking grants and similar, alternative sources of project funding, and is not intended to apply to Developer’s efforts to obtain commercial mortgage loans.

1. **BART APPROVAL OF DEVELOPER** **SUBMISSIONS**

7.1 Communication

The primary point of contact at BART for receipt of all correspondence and for coordinating, interacting with, and requesting approvals from various departments shall be Shannon Dodge, Principal Property Development Officer, at sdodge@bart.gov, or 510-464-6936, or at the address noted in Section 14, Notices, below.

7.2  Submissions Acceptance and Rejections

Unless another time is specifically stated in this Agreement, within thirty (30) days after BART receives any information or documents required to be submitted by Developer pursuant to this Agreement, BART shall inform Developer of its acceptance or rejection of the submission. BART may approve those portions of a submission that are satisfactory and reject those portions that are not or may approve all a submission subject to conditions requiring further submissions for BART review and approval. If BART rejects all or any part of a submission BART shall provide to the Developer written notice of the reasons for such rejection within said thirty (30) days, Developer shall then have thirty (30) days to correct or supplement its submission. The time limits in this Section shall not apply to the CEQA review process.

BART will make every effort to respond to Developer’s submittals within the time periods specified herein. Failure to do so, however, shall not be deemed as approval of a submittal.

7.3 Basis of Design

Developer will include a Basis of Design document with all drawing submittals to BART. This document will be initially provided by BART, and will provide an ongoing record of how the Developer’s drawings have been modified to address critical BART operational, maintenance, and access issues. The document shall be submitted to BART in a format showing previous and current versions, to reflect the evolution of the projects with BART and the Developer’s agreements as they pertain to design.

BART and the Developer agree that as the development program is refined, the Basis of Design document may be modified to reflect new concerns that emerge with more detailed drawings.

7.4Community and Public Information

Developer shall present to BART staff any material to be utilized in external public communications for advance review within ten (10) business days before release to the public. Such material includes but is not limited to meeting agendas, presentations, marketing collateral, and project reports. If Developer fails to provide previous notice as described in this section more than five (5) times without BART staff waivers or authorization, BART has the right to terminate this Agreement due to Developer default.

1. **EFFECT OF NEGOTIATIONS**

Developer understands and acknowledges that BART execution of a negotiated Option Agreement and attachments, including without limitation, any form(s) of ground lease attached thereto, is subject to prior approval by BART’s Board of Directors, at its sole and absolute discretion, and that the Draft and Final Term Sheets are non-binding. If the terms of a mutually satisfactory Option Agreement have not been negotiated during the Negotiation Period, or if BART’s Board of Directors declines to authorize execution of Option Agreement for any reason, then, without further action, this Agreement shall automatically terminate and neither Party shall have any further rights or obligations, except with regard to the Exclusivity Fee as set forth in Section 2.

1. **TERMINATION AND EXTENSIONS**

9.1 Time of the Essence

Time is of the essence in this Agreement. Any Party's failure to timely perform according to the terms and conditions of this Agreement shall be considered a material breach of this Agreement, subject to notice and cure periods provided in this Agreement.

* 1. Notice to Developer of Breach

In the event that Developer fails to materially perform any of Developer’s obligations pursuant to the terms and conditions of this Agreement within the time herein specified, BART shall promptly give Developer written notice of such default. Developer shall have a period of fifteen (15) business days from receipt of such written notice from BART to Developer with respect to monetary defaults, or thirty (30) business days from receipt of such written notice from BART to Developer with respect to non-monetary defaults, within which to cure such default if such default is capable of being cured by the Developer. Provided, however, that with respect to any default capable of being cured by the Developer but which cannot be cured by Developer within such initial period, the default shall not be deemed to be uncured if Developer commences to cure within such initial period and diligently prosecute the cure to completion, and that the time required to prosecute such cure to completion will not require an extension of the Agreement. Cure periods related to any permit to enter provided by BART will be subject to the provisions of said permit.

* 1. Termination Upon Developer Default

If Developer fails to cure any material default during the cure period described above, BART shall have the right to terminate this Agreement upon written notice of termination to Developer, and thereafter neither of the Parties shall have any further rights or obligations hereunder, except as to the Exclusivity Fee as set forth in Section 2. In no event shall BART be entitled to any damages, of any kind or character, from Developers, except as to the Exclusivity Fee and Extension Fee.

* 1. BART’s Discretion to Extend Time for Performance

Without limiting the right of BART staff to extend the date of any delivery in the schedule of performance or to approve a revised schedule of performance pursuant to Section 3 of this Agreement as long as any such extension is within the twenty-four (24) month Negotiation Period, BART may, subject to any necessary approval by the Board of Directors, determine that it is in BART’s best interest, to extend the time for the Developer’s performance of any of the terms and conditions of this Agreement. Any extension shall be granted in BART’s sole and absolute discretion, and in no event shall this provision or any other provision of this Agreement be construed as conveying any right or entitlement to an extension.

* 1. Default by BART

In the event that BART fails to materially perform any of its obligations under this Agreement, Developer shall have the right to terminate this Agreement by written notice to BART. Upon termination of this Agreement, neither of the Parties shall have any further rights or obligations hereunder, except that the remaining Exclusivity Fee shall be returned to Developer as set forth in Section 2. In no event shall Developer be entitled to any damages, of any kind or character, from BART.

* 1. Termination by Developer

Developer shall have the right to terminate this Agreement if at any time following the Effective Date the Developer determine the Project is economically infeasible or for any other reason in the Developer’ sole and absolute discretion. Upon termination of this Agreement, none of the Parties shall have any further rights or obligations hereunder, except as to the Fees as set forth in Section 2.

1. **LIMITATIONS**

The BART Board of Directors shall have the sole and absolute discretion to approve or disapprove execution of the Option Agreement with Developer and to make appropriate findings under CEQA. No Option Agreement will be brought to the Board for approval prior to completion of the required environmental process and City approvals. Any costs incurred by Developer, Developer’s members or partners, or other members of the Project development team to comply with its obligations under this Agreement or to negotiate documents shall be the sole responsibility of Developer, and in no event shall BART have any responsibility to pay for or reimburse Developer for any of said costs.

In addition, notwithstanding any other provision herein, BART, in the exercise of its independent judgment as a responsible agency pursuant to CEQA, retains the sole and absolute discretion to (i) request modification of the Project to reduce or avoid significant environmental impacts; (ii) select feasible mitigation measures and/or alternatives to reduce or avoid significant environmental impacts; (iii) balance the benefits of the Project against any significant environmental impacts that cannot be avoided, prior to taking any final action, and/or (iv) select the “no project alternative” and determine not to proceed with the Project.

Developer understands and acknowledges that BART is subject to the California Public Records Act, and will therefore make information regarding the Property, the Project, Developer , and this Agreement available to the public upon request as required by said law. Notwithstanding the foregoing, Developer may request that financial and other information proprietary to Developer that is delivered to BART’s consultants be treated, to the extent legally permissible, as confidential information. Whether said treatment is legally permissible shall be in BART’s sole discretion. Developer agrees to indemnify and hold BART harmless and, at BART’s option, provide legal defense for BART from all claims and demands, including attorneys’ fees, assessed against BART that result from BART refusing to make public documents that Developer have designated as proprietary or confidential.

1. **NO ASSIGNMENT**

This Agreement is personal to Developer and is not assignable to any other person or entity without the prior written consent of BART, which may be given or withheld in BART's sole discretion. Any attempt to assign this Agreement or any part of the Agreement without the prior written consent of BART shall constitute a breach of this Agreement and shall be void and of no force and effect.

1. **INFORMATION**

Within thirty (30) days of the Effective Date, BART shall promptly furnish to Developer all material information within its possession or control concerning the Property, including without limitation, copies of all topographical surveys, environmental reports, engineering studies, soil-bearing test data, and any similar reports and studies with respect to the Property.

1. **SEVERABILITY**

In the event any section or portion of this Agreement is determined to be unenforceable or invalid for any reason, the remaining provisions shall remain in effect, and the Parties shall take further actions as may be reasonably necessary and available to them to effectuate the intent of the Parties as to the remaining portions of the Agreement.

1. **NOTICES**

All notices under this Agreement shall be in writing and shall be deemed to have been duly given (i) if delivered by hand and receipted for by the party to whom said notice or other communication shall have been directed, or (ii) mailed by certified or registered mail with postage prepaid, on the third (3rd) business day after the date on which it is so mailed, or (iii) if emailed, when the recipient, by an email sent to the email address for the sender or by a notice delivered by another method in accordance with this section acknowledges having received that email, with an automatic “read receipt” not constituting acknowledgment of an email. All notices under this Agreement shall be addressed to:

DEVELOPER: Entity Name

Address

Attn:\_\_\_\_\_\_\_

Email:\_\_\_\_\_\_\_\_

BART: BART Property Development Department

2150 Webster Street, 9th floor

Oakland, CA 94612

Attn: Shannon Dodge, Principal Property Development Officer

Email: [sdodge@bart.gov](mailto:sdodge@bart.gov)

and to:

BART Office of the General Counsel

2150 Webster Street, 10th floor

Oakland, CA 94612

Attn: Stephen Muzio, Attorney

Email: [smuzio@bart.gov](mailto:smuzio@bart.gov)

1. **GOVERNING LAW**

This Agreement shall be construed in accordance with the laws of the State of California, except for those provisions preempted by federal law.

1. **COUNTERPARTS**

This Agreement may be signed in multiple counterparts which, when signed by all parties, shall constitute a binding agreement.

(Signatures on following page)IN WITNESS WHEREOF, this Exclusive Negotiating Agreement has been executed by the Parties on the dates indicated below.

“BART”

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, a rapid transit district established pursuant to Public Utilities Code Section 28500, et seq.

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dated: , 2025

Kasheica McKinney

Its: Director of Transit-Oriented Development

“DEVELOPER”

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

[Name]

Its: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ Dated: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_, 2025

**Exhibits**:

1. Minimum Project Requirements
2. *Form of Memorandum of Covenants*
3. *Framework for Determining Financial Return from Affordable Housing*
4. Non-Binding Term Sheet
5. ENA Budget
6. Schedule of Performance
7. Access Plan Scope, Budget, and Schedule
8. Objective Design Standards Requirements
9. Form of Permit to Enter

EXHIBIT 1

**MINIMUM PROJECT REQUIREMENTS**

1A. **FORM OF MEMORANDUM OF COVENANTS**

1B. **FRAMEWORK FOR DETERMINING FINANCIAL RETURN FROM AFFORDABLE HOUSING**

EXHIBIT 2

**INITIAL SUMMARY OF TERMS**

*[TO BE COMPLETED FOLLOWING DEVELOPER SELECTION] The following is an initial summary of terms that is non-binding and subject to further negotiation between BART and the development team.*

**Residential Units & Bedrooms**: # units; # bedrooms

**Affordability**: % market rate

% restricted as affordable for the duration of ground lease

% affordable to households with incomes up to…AMI\*

% affordable to households with incomes up to… [etc.]

**Community-serving, Non-leasable uses**: # SF; proposed uses

**Retail/Commercial/Nonresidential Leasable Space**: Market Rate: # SF

<50% of market rent: # SF

**Public Benefits Provided & Maintained by Developer**: [List]

**Public Benefits Provided by Developer & Maintained by BART or City as specified**: [List]

**Parking:** Residential parking ratio at Building A: # spaces : # unit

Residential parking ratio at Building B: # spaces : # unit [etc.]

# dedicated parking for non-residential uses (if any)

Garage will accommodate # spaces parking for BART riders

During buildout, project to be phased to maintain agreed minimum of BART parking

**Small Business Participation:** % commitment

**Project Phasing and Schedule**

|  |  |  |  |
| --- | --- | --- | --- |
| Phase | Program | Construction start (quarter & year) | Occupancy (quarter & year) |
| 1 |  |  |  |
| etc. |  |  |  |

**Lease Term:**

**Lease Payments:** [reference exhibit in submitted RFP proposal]

**Financing Structure Summary:**

**Conditions Precedent to Long Term Lease Execution:** Completion of the ENA’s conditions and requirements. Receipt of all City permits and all required BART permits and approvals. Receipt of proof of financing.

\* Area Median Income for Alameda County, as published annually and adjusted for household size

EXHIBIT 3

**ENA BUDGET**

ANTICIPATED BART COSTS FOR 24-MONTH E.N.A. PHASE[[1]](#footnote-2)

|  |  |  |
| --- | --- | --- |
| **Category** | **Purpose** | **Estimated Budget** |
| BART Staff: Property Development[[2]](#footnote-3) | Property Development staff time for coordination to advance project through BART process | $TBD |
| BART Staff: Planning | Planning staff time to manage Access Plan, and conduct and coordinate plan review with respect to access | $TBD |
| Design review[[3]](#footnote-4),[[4]](#footnote-5) | Civil, Structural, Infrastructure Delivery, Safety, Customer Access, Police, and any other department required to review design proposals and plans in Pre-Entitlement stage, and to coordinate with City | $TBD |
| Outside Consultant:  Economic Analysis (EPS) 4 | Support BART with term sheet negotiation and  pro forma analysis | $TBD |
| Outside Counsel4 | Negotiate and prepare documents for Option Agreement and Ground Lease(s) | $TBD |
| Appraisal | Perform appraisal of the TOD parcels to support term sheet negotiation | $TBD |
| Community Outreach | BART staff and/or consultant support for developer-led community outreach | $TBD |
| ***Total*** | | $TBD |

EXHIBIT 4

**Schedule of Performance**

*[To be provided by developer]*

EXHIBIT 5

**Access Plan Scope, Budget, and Schedule**

*[To be prepared by BART’s consultant and provided following developer selection]*

EXHIBIT 6

**OBJECTIVE DESIGN STANDARDS (ODS) REQUIREMENTS**

EXHIBIT 7

**Form of Permit to Enter**

[See PDF, provided]

1. Budget is estimate only. Changes to Schedule of Performance and multiple design, term

   sheet/pro forma, or legal iterations may require additional budget and/or addition of new budget categories. [↑](#footnote-ref-2)
2. Property Development staff budget will be a fixed fee for the 24-month ENA period; this line item is capped and reflects only a fraction of BART’s actual cost. [↑](#footnote-ref-3)
3. Assumes up to 3 reviews of conceptual design elements followed by 1 full preapplication package review. If additional pre-entitlement design review is required, costs may be subject to increase beyond anticipated budget. During ENA phase, this work is expected to be performed in-house by BART staff, but outside consultants may be utilized for review as needed. [↑](#footnote-ref-4)
4. All external costs for consultants and outside counsel shall be reimbursed at cost. BART will notify developer if cost is estimated to exceed the anticipated budget for those costs. [↑](#footnote-ref-5)