

Attachment B

AMENDED ENA KEY TERMS

Below is a summary of key terms and conditions for a template Exclusive Negotiation Agreement (ENA). Any ENA that deviates from or is inconsistent with this summary will require Board approval for execution. For purposes of this document, “Developer” means the Developer selected from the Developer Bench following the issuance of an RFP for the joint development of a 10K Site. “Project” means the housing project proposed by the Developer; and “Project Site” refers to the 10K Site, provided that on some projects, the Project Site may also include adjacent property owned or controlled by the Developer. Metro and Developer may be referred to individually as “Party” or collectively as “Parties” in this summary.

1. **Term.** The initial term of the ENA is twelve (12) months (Term). The Term may be extended by Metro staff in twelve (12) month increments if Developer is making substantial progress toward completing the transaction, not to exceed a total of sixty (60) months.
2. **Right to Terminate.** The ENA may be terminated early by either Party in limited circumstances, including: (i) the transaction is not reasonably likely to be completed; (ii) the Project is infeasible or cannot be financed; (iii) the Project is not likely to be constructed in a reasonable timeframe; (iv) the non-terminating party is in default under the ENA; or (v) certain title issues are present. Additionally, Metro may terminate without cost or penalty if Metro staff determines that the process followed to enter into the ENA or Developer’s proposed Project does not comply with the Surplus Land Act.
3. **ENA Administration Fee.** Developer must pay a nonrefundable fee to Metro prior to the ENA’s effective date to cover Metro’s costs during the Term and to compensate Metro for exclusively negotiating with the Developer. The nonrefundable fee will be \$50,000 or more, depending on project size and complexity.
4. **Agreement to Negotiate Exclusively in Good Faith; No Metro Commitment to Any Project or Funding.**
 - The Parties will exclusively negotiate in good faith during the Term. The ENA itself does not establish the terms of a future ground lease, joint development agreement (JDA) or any other Project-related agreements (Project Agreements) necessary to convey and develop the Project Site with the Project.
 - The ENA does not commit Metro to approving the Project, approving other proposed improvements to the Project Site or to entering into any of the Project Agreements. Metro retains absolute sole discretion to request modifications to the Project, to impose mitigation measures, to evaluate Project alternatives (including the no project alternative), and to reject the Project as may be necessary to comply with CEQA.
 - The ENA also does not commit Metro to funding, subsidizing, or otherwise financially contributing to the Project. Metro will retain its full discretion as to approval of the Project contemplated by the ENA.

5. **Documents to be Negotiated; Metro Retained Rights.**

- The Parties will negotiate key terms for a JDA and form of ground lease (Term Sheet) for consideration by Metro's Board of Directors (Board). The Term Sheet will include the key terms and conditions that will be incorporated into the Project Agreements. Metro must receive Board authorization to execute the Project Agreements and such authorization will not be requested until all of the following have occurred: (i) the Term Sheet and the form of the JDA are agreed upon by the Parties; (ii) Metro staff has determined that all necessary CEQA-related documents have been prepared; and (iii) Metro staff has secured any required approval or concurrence of the Project (or the execution of the Project Agreements) by all applicable governmental or other funding entities.
- Each Party may decline to enter into any subsequent agreement (including any of the Project Agreements) if the Parties fail to agree upon mutually satisfactory terms. Except as provided in the ENA, neither Party has any duty, obligation, or liability under the ENA if the Parties fail to timely agree upon and execute the Project Agreements.
- If the Parties proceed with the transaction and the Project Agreements, Metro will retain certain rights with respect to the property to be ground leased (subject to limitations) throughout the life of the Project, as may be required by Federal Transit Administration funding. Those rights include, but are not limited to: (i) the right to install, operate and maintain public transit facilities; (ii) the right to install and maintain informational signage; (iii) the right to utilize sidewalks and common areas for pedestrian access and operations related to transit activities; (iv) inspection rights; and (v) all other rights not expressly granted to Developer in the ground lease.

6. **Schedule of Performance.** The ENA's Schedule of Performance contains key milestones for moving the Project forward. The milestones include, but are not limited to, public outreach requirements, title work, submittal of designs, CEQA compliance, entitlement submittal and Project proforma/financing plan submittal. Subject to a Valid Unavoidable Delay (discussed in Section 17 below), time is of the essence with respect to each Party's obligations under the Schedule of Performance. Failure of a Party to meet the milestones set forth in the Schedule of Performance shall constitute a breach under the ENA.

7. **Environmental Review.** Developer is responsible for all costs associated with CEQA compliance. Developer is responsible for preparing and submitting all Project-related CEQA documents (CEQA Documents) to the governmental agency with legal authority to issue entitlements for the Project (Entitling Authority), subject to Metro staff's advance review and approval. Metro will exercise its independent judgment and analysis in connection with any Project-related environmental reviews and will make its own determination as to what is required for Metro to satisfy the requirements of CEQA. Accordingly, Metro may require Developer to complete alternative CEQA studies and/or an alternative method to comply with CEQA than the Entitling Agency. These costs shall also be borne entirely by Developer.

8. **Project Entitlements.** Developer must prepare and submit all Project-related entitlement applications (Entitlement Applications) to the Entitling Authority, subject to Metro staff's advance review and approval. Developer is responsible for all costs associated with the Entitlement Applications. If Developer abandons an Entitlement Application for any reason, Metro may take over such application and Developer will cooperate with Metro to complete the entitlement process started by Developer. If the Project is not built, Developer will cooperate with Metro to remove any Project-related entitlements and/or encumbrances affecting Metro's property.

9. **Provision of Development Documents.** In addition to the CEQA Documents and the Entitlement Applications, Developer shall prepare at its sole cost and expense, but subject to Metro staff's independent review and judgment, all plans (including schematic design drawings) and other reports, investigations, studies, and related documents with respect to the Project Site, the Project, and Developer's intended use of the Project Site (collectively, Development Documents). In addition to the foregoing, Developer shall include in its contractors' and consultants' contracts, the right of Developer to assign the Development Documents to Metro.
10. **Ethics.** Developer (and Developer team members, as required by Metro Ethics) must remain in full compliance with: (i) Titles 4 (Procurement) and 5 (Ethics) of the Metro Administrative Code (Admin Code); (ii) all applicable provisions of Government Code sections 1090 and 87100 et seq.; and (iii) regulations governing campaign contributions to Board members imposed by Public Utilities Code section 130051.20, Government Code section 84300 et seq., and the Admin Code. Developer must also submit updated ethics declarations as required by Metro.
11. **Coordination.** Developer shall notify Metro regarding substantive meetings with governmental authorities concerning the Project, and Metro may participate in such meetings, at its discretion. The Parties will coordinate with each other and hold progress meetings to ensure compliance with the ENA.
12. **Development Team and Project Partners.** Developer will report quarterly on Community-Based Development Organizations (CBDO), community-based organizations, Small Business Enterprises (SBE), Disadvantaged Business Enterprises (DBE), and Disabled Veterans Business Enterprises (DVBE) participation in the delivery of projects.
13. **Community Outreach Plan.** Developer will perform community outreach in accordance with a Metro-approved community outreach plan attached to the ENA.
14. **Inspections.** Developer may conduct such due diligence inspections as the Parties deem necessary during the course of the Term to determine the condition of the Project Site and/or the Project's feasibility. Developer's entry onto the Project Site for such inspections will be in accordance with the terms and conditions of a right of entry agreement executed between the Parties. If the Project Site includes Developer-controlled property, Developer will similarly grant Metro with access to such property to conduct inspections.
15. **Title & Survey Review.** The Parties will conduct survey and title review for the Project Site. Specified title issues may be grounds for the ENA's early termination.
16. **Design Review.**
 - The design of the Project shall be at Developer's sole cost and expense.
 - Developer shall prepare and submit to Metro staff the initial set of schematic design drawings for the Project, which represents a Logical Evolution of Developer's conceptual plan. Within this context, "Logical Evolution" means the further development, refinement, or amplification of the conceptual plan that flows logically, naturally, and foreseeably from the conceptual plan, and reflects (among other things) good architectural and engineering design, and complies with the terms of the ENA and all legal requirements. The schematic design drawings must be prepared by a qualified and licensed architect and/or engineer, as applicable.
 - Metro staff shall have the right to review and approve, disapprove, or request changes to the schematic design drawings, Project development schedules, and proposed methods of construction for all Project improvements. During this process, any Metro staff determination

regarding possible impacts on Metro's Development Related Concerns (as defined) shall be made in Metro's sole and absolute discretion. Among other things, Metro's Development Related Concerns include: (i) Metro's operations, including its ability to install, inspect, operate, maintain, repair, and replace public transit facilities; (ii) Metro's exercise of rights retained under the ENA; (iii) public health and safety; and (iv) access to and from Metro's property.

17. Indemnity & Insurance.

- Except for claims arising solely from Metro's gross negligence or willful misconduct, Developer will indemnify, defend (with counsel approved by Metro) and hold harmless Metro and the Metro Parties (as defined) from specified Project-related liability, claims, losses, costs, expenses or damages arising from or caused by Developer and the Developer Parties (as defined).
- Developer must obtain for itself, and the Developer Parties, insurance in accordance with Metro's requirements.

18. Breach & Default.

- A Party is in breach under the ENA if it fails to: (i) perform any obligation, or to comply with any covenant, restriction, term or condition in the ENA; or (ii) meet the milestones set forth in the Schedule of Performance.
- Subject to limited exceptions, a breach will become a default if the aggrieved Party provides written notice to the Party committing the breach and the breaching Party thereafter fails to cure within a specified time period. The breaching Party can extend its time to cure if there is a "Valid Unavoidable Delay," which is a delay agreed upon by both Parties as being valid and unavoidable, in accordance with a process provided under the ENA (e.g., this may include a force majeure event). Notwithstanding, the deadline to cure a breach may not be extended due to a Valid Unavoidable Delay by more than sixty (60) days; nor may the Term be extended due to a Valid Unavoidable Delay.

19. Upon Termination of ENA; Limitation on Metro Damages & Remedies.

- If the ENA expires or terminates and the Parties have not executed a JDA, then: (i) any rights or interest Developer may have under the ENA shall cease without notice; (ii) any Development Documents will become Metro's personal property; and (iii) Metro may use, develop (alone or with another entity) or dispose of the Project Site as it determines appropriate in its sole discretion.
- If Metro defaults under the ENA (i.e., fails to perform an obligation as described in Section 17), Metro will pay Developer liquidated damages in an amount equal to not to exceed two hundred and fifty thousand (\$250,000.00) (Liquidated Damages Amount). The Liquidated Damages Amount will be Developer's sole and exclusive remedy (inclusive of any attorneys' fees and costs) arising from Metro's default. Upon such a default and Metro's payment of the Liquidated Damages Amount, the ENA will terminate.

20. **Assignment.** Except as otherwise agreed to by Metro staff, Developer may not assign its rights or duties under the ENA to any other person or entity. Notwithstanding, Developer's shareholders, partners, members or other equity holders may transfer, sell, exchange, assign, or divest themselves of any interest they have in Developer so long as a change of Control (as defined) of Developer does not occur.