



Office of the City Manager

## REVISED AGENDA MATERIAL

**Meeting Date:** September 28, 2021

**Item Number:** 16

**Item Description:** Exclusive Negotiating Agreement with Innovation Properties Group for 199 Seawall Drive

**Revision Submitted By:** Scott Ferris, Director, Parks Recreation & Waterfront

**“Good of the City” Analysis:**

*The analysis below must demonstrate how accepting this supplement/revision is for the “good of the City” and outweighs the lack of time for citizen review or evaluation by the Council.*

This revision includes one modification to Exhibit A, “Exclusive Negotiating Agreement Between The City Of Berkeley And Innovation Properties Group Regarding The Redevelopment And Reuse Of The Property At 199 Seawall Dr.” The revision states that IPG understands that it is the City’s expectation that any future Master Lease, and any potential sublease agreements, would include provisions that a hospitality operation at the 199 Seawall Drive property shall be required to provide evidence satisfactory to the City that it is party to a labor peace agreement that protects the City’s proprietary interest in the property.

This revised item needs to be accepted so that Council approves the correct version of the agreement.

***Consideration of supplemental or revised agenda material is subject to approval by a two-thirds roll call vote of the City Council. (BMC 2.06.070)***

A minimum of **42 copies** must be submitted to the City Clerk for distribution at the Council meeting. This completed cover page must accompany every copy.

Copies of the supplemental/revised agenda material may be delivered to the City Clerk Department by 12:00 p.m. the day of the meeting. Copies that are ready after 12:00 p.m. must be delivered directly to the City Clerk at Council Chambers prior to the start of the meeting.

Supplements or Revisions submitted pursuant to BMC § 2.06.070 may only be revisions of the original report included in the Agenda Packet.

## Exhibit A

### **EXCLUSIVE NEGOTIATING AGREEMENT BETWEEN THE CITY OF BERKELEY AND INNOVATION PROPERTIES GROUP REGARDING THE REDEVELOPMENT AND REUSE OF THE PROPERTY AT 199 SEAWALL DR.**

This Exclusive Negotiating Agreement (“Agreement”) is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2021 (“Effective Date”), by and between the City of Berkeley, a municipal corporation (“City”) and Innovation Properties Group, Inc., a California Corporation, dba Innovation Properties Group (“IPG”).

#### **RECITALS**

WHEREAS, City was granted certain tidelands in the Berkeley Marina to be held in trust for uses that include the establishment, improvement and conduct of small boat harbors, marinas, aquatic playgrounds and similar recreational facilities, and for all works, buildings, facilities, utilities, structures and appliances incidental, necessary or convenient for the promotion and accommodation of any such uses, including but not limited to snack bars, cafes, restaurants, motels, launching ramps and hoists, storage sheds, boat repair facilities with cranes and marine ways, administration buildings, public restrooms, bait and tackle shops, chandleries, boat sales establishments, service stations and fuel docks, yacht club buildings, parking areas, roadways, pedestrian ways and landscaped areas, including but not limited to the property located at 199 Seawall Drive, Berkeley (“Property”);

WHEREAS, the City and IPG mutually wish to evaluate (A) the construction of improvements to and a master lease of the Property based on IPG’s qualifications and concept to use the Property as a restaurant and event space, and (B) the operation of an outdoor food truck village with recreation components, as outlined in more detail in the attached proposed Term Sheet;

WHEREAS, the City and IPG now desire to perform initial due diligence and explore the feasibility of the proposed project; and negotiate a pre-development agreement for the building and a three- to five-year license agreement for a portion of the parking lot adjacent to the building;

NOW, THEREFORE, City and IPG agree as follows:

1. RECITALS

The recitals to this Agreement, above, are incorporated herein and made a part hereof.

2. PURPOSE OF AGREEMENT

- a. This Agreement confirms the selection of IPG by City to enter into exclusive negotiations with City to determine if IPG can be the developer and master tenant of a restaurant and event space (the “Project”) at the Property.

- b. The purpose of this Agreement is to affirm the mutual intent of IPG and the City to consider generating (A) a pre-development agreement for a master ground lease of 199 Seawall, and (B) a 3-5 year term license agreement for a portion of the parking lot adjacent to 199 Seawall.

### 3. AGREEMENTS

Subject to the terms of this Agreement, City and IPG each hereby agree to negotiate in good faith during the “Exclusivity Period,” as that term is defined in Section 6.a, in order to attempt to cause the execution of written definitive agreements (the “Agreements”), together with such changes and modifications as the parties shall mutually agree. The Agreements shall include, without limitation, (A) a pre-development agreement which shall set forth the procedure and schedule for pre-development activities related to the Project, and (B) a draft license agreement for the short-term use of a portion of the parking lot for three to five years.

### 4. CONFIDENTIALITY

Except where disclosure is required by law, including but not limited to the California Public Records Act (California Government Code section 6250 *et seq.*), IPG and City shall treat as confidential (the “Confidential Information”) (i) all documents, studies, electronic materials and information furnished to the other party by its officers, trustees, executives, employees, agents or representatives (collectively, the “Representatives”) relating to the Property, whether furnished before, on or after the date of this Agreement and whether furnished orally, in writing or by any other medium, and (ii) all reports, studies and other documents and information prepared by or for IPG which contain or reflect any such documents or information furnished by a party’s Representatives or any information obtained through inspection or review of the Property (collectively, the “Evaluation Materials”). Confidential Information does not include the Final Documents, which are subject to public disclosure by the City. The Evaluation Materials shall not include any information which (a) is or becomes generally available to the public other than as a result of disclosure by a party’s Representatives, in breach of this Agreement, (b) was already available to or in the possession of a party prior to its disclosure by the other party’s Representatives, unless obtained from a source which was not permitted to disclose such information, or (c) is or becomes available to a party from a source other than the other party’s Representatives, unless such source was not permitted to disclose such information to IPG. Notwithstanding the provisions of this Section 4, IPG may commence marketing the Project and disclose its selection to potential tenants and other third parties so long as IPG does not disclose any Confidential Information unless IPG has obtained an appropriate confidentiality agreement from such party), or the written consent of the City.

### 5. NO REPRESENTATIONS OR WARRANTIES

City makes no express or implied representations or warranties as to the accuracy or completeness of any Evaluation Materials provided by the City. IPG acknowledges and agrees that neither City nor any of City’s Representatives has or will have any liability to IPG or any other person resulting from any use of the Evaluation Materials by IPG or IPG’s Representatives. Only those representations or warranties, if any, made to IPG in Final Documents, if executed, and subject to the limitations specified therein, shall have any legal effect.

## 6. EXCLUSIVE NEGOTIATIONS

- a. City and IPG agree that this Agreement shall be effective for a period of ninety (90) days commencing on the Effective Date, and continuing in full force and effect until expiration or earlier termination pursuant to Section 10 (“Exclusivity Period”). The City Manager is authorized to extend this Agreement by an additional ninety (90) days with the consent of IPG.
- b. During the Exclusivity Period, IPG and the City shall negotiate diligently and in good faith to prepare the Agreements. The execution of the Agreements shall be subject to the approval of the Berkeley City Council. During the Exclusivity Period, the City shall not negotiate for the development of the Property, or any portion thereof, with any party other than IPG, or approve or conduct a public hearing for any other development of the Property, or any portion thereof.

## 7. DUTIES AND RESPONSIBILITIES DURING THE EXCLUSIVITY PERIOD

- a. During the Exclusivity Period, IPG and the City shall negotiate in good faith to attempt to cause the (A) execution of a pre-development agreement for the Project; and (B) the drafting of a license agreement to allow the use of the Property for outdoor food trucks and events.
- b. Nothing in this Agreement requires any party to enter into any further agreement or requires the City to commit to any course of action with respect to the future development of the Property. Nothing in this Agreement is intended to or shall be construed as a commitment to approve any project or any subsequent agreement(s) contemplated herein. The approval of any subsequent agreement negotiated pursuant to this Agreement shall be subject to approval of the Berkeley City Council, and nothing in this Agreement shall alter or limit the discretion the Berkeley City Council possesses pursuant to the City’s Charter and applicable law to approve, disapprove, or modify any such subsequent agreement.

## 8. TERMS

City and IPG hereby agree to the following terms.

- a. Due Diligence and Inspection of Property. During the Exclusivity Period, the City shall allow IPG, at IPG’s sole cost and expense, to inspect the Property, accompanied by City staff, and review due diligence relating to the Property as made reasonably available to IPG by the City. Such reviews and inspections by IPG shall be conducted in accordance with reasonable restrictions or limitations imposed by the City.
- b. IPG Responsible for Own Costs. IPG acknowledges and agrees that all expenses and costs of IPG arising from this Agreement or the performance of IPG’s obligations hereunder shall be the sole responsibility of IPG.

- c. Assignments; Ownership Changes. IPG acknowledges that the City's consent to issue this Agreement is based on the prior experience and qualifications of IPG. Therefore, IPG shall not assign, sell, or otherwise transfer any rights under this Agreement without the prior written approval of the City in its sole and absolute discretion.
- d. Conflicts of Interest. The parties to this Agreement have read and are aware of the provisions of California Government Code sections 1090 *et seq.* and 87100 *et seq.*, relating to conflict of interest of public officers and employees, as well as the conflict of interest provisions in Berkeley City Charter Section 36 and Berkeley Municipal Code Chapter 3.64. All parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of the City relating to this Agreement. Notwithstanding any other provision of this Agreement, it is further understood and agreed that if such a financial interest does exist at the inception of this Agreement, the City may immediately terminate this Agreement by giving written notice thereof.

~~e. Labor Peace. IPG understands that it is the City's expectation that any future Master Lease, and any potential sublease agreements, would include provisions that prohibit IPG or any of its tenants or subtenants from engaging in practices that impede any employee's ability to organize or contract with a labor organization for the purpose of collective bargaining (e.g., harassment, intimidation, "captive audience" anti-union meetings or illegal terminations of workers in retaliation for organizing).~~ IPG understands that it is the City's expectation that any future Master Lease, and any potential sublease agreements, would include provisions that a hospitality operation at the 199 Seawall Drive property shall be required to provide evidence satisfactory to the City that it is party to a labor peace agreement that protects the City's proprietary interest in the property.

~~e.f. Employment Opportunities for Former Hs Lordships Employees. IPG understands that it is the City's expectation that employees of the former Hs Lordships restaurant located at 199 Seawall Drive employed at the time of the restaurant's closure would be offered an opportunity to apply for positions in new business operations conducted on the property.~~

9. LIMITATION ON REMEDIES FOR BREACH OR DEFAULT AND RELEASE OF CLAIMS

- a. In the event of an uncured default by a party, the non-defaulting party's sole remedy shall be to terminate this Agreement. Following such termination, neither party shall have any further right, remedy or obligation under this Agreement, except that Developer's indemnification obligations pursuant to Section 11 shall survive termination.
- b. In no event shall either party be entitled to damages of any kind in the event of termination of this Agreement. Except as expressly provided in subsection (a) of

this Section 9, neither party shall have any liability to the other party for damages arising out of or related to performance under this Agreement or otherwise for any default, nor shall either party have any other claims with respect to performance or default under this Agreement. Each party specifically waives and releases any such rights or claims it may otherwise have at law or in equity.

#### 10. TERMINATION

Unless terminated by City or IPG pursuant to this Section, this Agreement shall terminate without notice on the earlier of (i) the expiration of the Exclusivity Period; or (ii) the execution of the City and IPG of the Agreements.

#### 11. INDEMNITY

IPG releases and discharges, and agrees to defend, indemnify and hold harmless, the City and the City's former, present and future governing bodies, elected and appointed officials, employees, officers, directors, representatives, agents, departments, assigns, insurers, attorneys, predecessors, successors, divisions, subdivisions and parents, and all persons or entities acting by, through, under or in concert with any of the foregoing from and against any and all rights, claims, demands, damages, debts, liabilities, accounts, liens, attorneys' fees, costs, expenses, actions and causes of action arising from or related to this Agreement, the Property and/or the proposed redevelopment.

#### 12. NON-CIRCUMVENTION

Non-Circumvention. The City shall not propose any transaction, project, or financing to any IPG Associate, affiliates, partners introduced to the City by IPG with respect to a Business Relationship that would interfere with or provide a substitute for any transaction, financing, redevelopment, or project proposed and/or being negotiated by IPG with respect to IPG's interest to the Property and Project, without the prior written consent of IPG. The City agrees not to engage in any such transaction for a period of twelve months from the date of this Agreement. This section shall not apply in the event of breach of contract or wrongdoing by IPG.

#### 13. STATE TIDELANDS GRANT

Tenant acknowledges that the Property is located on State tidelands held by the City of Berkeley in trust pursuant to Chapter 347 of the California Statutes of 1913, as amended ("the Grant"). Tenant agrees that any interpretation of this Agreement and the terms contained herein must be consistent with such limitations, conditions, restrictions and reservations.

#### 14. MISCELLANEOUS

- a. This Agreement together with all exhibits hereto constitutes the entire agreement between the parties with respect to the subject matter hereof. Any amendment or modification of this Agreement must be in writing and signed by all of the parties hereto, and any waiver of any provision of this Agreement must be by written instrument signed by the party charged with the alleged waiver.

- b. This Agreement shall inure to the benefit of and be binding upon the parties and their successors and assigns.
- c. This Agreement shall be construed and enforced in accordance with the laws of the State of California and may be signed in any number of counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the Effective Date.

IPG:

Innovation Real Estate Group, Inc.,  
a California Corporation  
dba Innovation Properties Group, Inc.

CITY:

City of Berkeley,  
a California municipal corporation

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

By: \_\_\_\_\_  
B.D. Williams,  
City Manager

Approved as to form:

Registered by:

\_\_\_\_\_  
City Attorney

\_\_\_\_\_  
City Auditor

Attest:

\_\_\_\_\_  
City Clerk

