

Meeting Date: 3/15/2016

Report Type: Consent

Report ID: 2016-00312

Title: Agreement: Exclusive Right to Negotiate With North Natomas Town Center LLC

Location: Northwest corner of Del Paso Road and Via Ingoglia, Council District 1

Recommendation: Pass a Motion authorizing the City Manager or the City Manager's designee to execute an Exclusive Right to Negotiate (ERN) agreement with North Natomas Town Center LLC (Developer) for the sale of a portion of Assessor Parcel Number 225-0040-089 that is surplus park land.

Contact: Bill Sinclair, Facilities and Real Property Superintendent, (916) 808-1905, Department of Public Works; Mary de Beauvieres, Principal Planner, (916) 808-8722, Department of Parks and Recreation

Presenter: None

Department: Public Works Department

Division: Real Estate/Asset Management

Dept ID: 15004551

Attachments:

1-Description/Analysis

2-Exclusive Right to Negotiate Agreement

City Attorney Review

Approved as to Form

Sheryl Patterson

3/9/2016 11:49:54 AM

Approvals/Acknowledgements

Department Director or Designee: Jerry Way - 2/25/2016 3:08:09 PM

Description/Analysis

Issue Detail: An eight acre portion of the North Natomas Regional Park, Assessor Parcel Number 225-0040-089, was dedicated to the City in 2003 for park land credits pursuant to City Code Section 16.64.100. A Community Center/Aquatic Center is proposed on approximately four acres of the northerly portion of the property. The remaining acreage along Del Paso Road is surplus, and the adjacent property owner, Natomas Town Center LLC which is owned by Lewis Management Corp. (Developer), is interested in enlarging its Natomas Town Center parcel to accommodate a tenant which requires additional parking. If the surplus property is sold, under state law and the City Code the City must use the sale proceeds towards park improvements, which could be applied towards the cost of the Community Center/Aquatic Center. The ERN term is for 12 months and can be terminated by either party for convenience if the terms of a Purchase and Sale Agreement cannot be reached.

Policy Considerations: The recommended action does not obligate the City to sell the surplus property to the Developer.

Economic Impacts: None

Environmental Considerations:

California Environmental Quality Act (CEQA): No environmental review is necessary because the ERN is a feasibility study and the potential sale of surplus government property is exempt from environmental review under CEQA Guidelines section 15312.

Sustainability: Not applicable

Commission/Committee Action: None

Rationale for Recommendation: Based on the preliminary site plan, approximately four acres of park land will remain south of the Community Center/Aquatic Center and north of Del Paso Road. This property is recommended to be sold as surplus, and the proceeds may be used to fund a portion of the cost to construct the Community Center/Aquatic Center Project.

The Developer is in the process of designing the next phase of the Natomas Town Center Project and is interested in increasing the development area north of Del Paso Road. The Developer is requesting the execution of an agreement that allows for exclusive negotiations to determine if the City and Developer can reach agreement on the terms for the sale.

Financial Considerations: The Developer has provided a non-refundable \$5,000 deposit to be applied towards the cost of the appraisal and the staff time to negotiate the terms of the Purchase and Sale Agreement.

Local Business Enterprise (LBE): Not Applicable

**AGREEMENT FOR EXCLUSIVE RIGHT TO NEGOTIATE SALE OF
EXCESS NORTH NATOMAS REGIONAL PARK PROPERTY**

THE CITY OF SACRAMENTO, A MUNICIPAL CORPORATION (“City”) and NORTH NATOMAS TOWN CENTER, LLC, A DELAWARE LIMITED LIABILITY COMPANY (“Developer”), collectively “Parties” or singular “party,” have entered into this Agreement for Exclusive Right to Negotiate (“Agreement”) as of January 8, 2016 ("Effective Date") upon the follow terms:

BACKGROUND

This Agreement is based upon the following information, facts and understandings of the Parties:

- A. In 2002, Developer conveyed (or caused to be conveyed by an affiliate) 16+/- acres of real property to the City that became part of the City’s 207 acre North Natomas Regional Park. As part of the consideration for the conveyance, Developer received credit against the parkland dedication requirement per City Code Chapter 16.64 for the benefit of Developer’s Creekside Natomas housing project.
- B. Developer has constructed, owns and manages Phase 1 of the North Natomas Town Center (“NNTC Phase 1”) as a grocery anchored neighborhood shopping center. Developer is in the planning stages for the development of the second phase of the North Natomas Town Center for commercial/office/mixed-use/residential uses (“NNTC Phase 2”). Exhibit “A” depicts the location of both the NNTC Phase 1 and Phase 2 properties. The NNTC Phase 2 property lies adjacent to the North Natomas Regional Park.
- C. Most of the North Natomas Regional Park land was acquired using a combination of bond funds, parkland dedication in-lieu fees and North Natomas development impact fees. The City plans to develop an Aquatic Center on a portion of the North Natomas Regional Park and that project is not yet fully funded. The City has determined that a portion of the North Natomas Regional Park in the amount of approximately 5.2+/- acres is excess land that is not needed for park and recreation purposes (the “Excess Property”). The Excess Property location is depicted in Exhibit “B”.
- D. The City is willing to sell the Excess Property to Developer at its fair market value and to apply those sale proceeds for development of the North Natomas Regional Park, including the Aquatic Center, to benefit the residents in North Natomas which includes the Developer’s Creekside Natomas housing project. State law and City Code allow for the sale of undeveloped parkland as long as the proceeds are applied for development of park facilities within the same service area. The Developer intends to incorporate the Excess Property into its development of NNTC Phase 2.
- E. Subject to compliance with all requirements of the California Environmental Quality Act (“CEQA”) and the laws, regulations and policies of the City with respect to the sale of surplus land to a private party, Developer desires to negotiate with City, and City desires to negotiate with Developer, to develop terms and conditions upon which Developer can acquire the Excess Property from the City.

F. It is the intent of both the City and Developer by entering into this Agreement to establish a limited period of time to negotiate the terms of a Purchase and Sale Agreement (“PSA”) for the sale of the Excess Property by City to Developer.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth below, City and Developer agree as follows:

1. **Notices.** The mailing addresses of the Parties are as follows:

1.1 The principal office of Developer for purposes of this Agreement is 9216 Kiefer Blvd., Sacramento, CA 95826.

1.2 The principal offices of the City is 915 I Street, Sacramento, CA 95814.

1.3 Notices to any party shall be personally delivered or sent by first class mail or by overnight air courier to its principal office address.

1.3.1 Notices to City shall be to City’s principal office and clearly marked, “Attention: Bill Sinclair, Real Estate Department.”

1.3.2 Notices to Developer shall be to Developer’s principal office and clearly marked, “Attention: Douglas V. Mull/Authorized Agent.”

2. **Term of Agreement.**

2.1 **Negotiation Period.** This Agreement shall be in effect for the period of twelve (12) months from the Effective Date (the “Negotiation Period”) unless sooner terminated or extended by written agreement by the Parties.

2.2 **Expiration.** This Agreement shall expire and be of no further force or effect on the earlier of: (1) the expiration of the Negotiation Period; (2) the termination by either party for its convenience; or (3) the execution of the PSA by both the City and Developer.

2.3 **Extension.** Upon written request of Developer, City shall reasonably consider an extension of the Negotiation Period if Developer has acted diligently and in good faith in performing its obligations under this Agreement and if there is a reasonable likelihood that the Parties can negotiate a mutually acceptable PSA.

2.4 **Termination.** Either party may terminate this Agreement for its convenience by providing the other party with thirty (30) days written notice and this Agreement shall then automatically terminate at the expiration of such 30-day period unless both Parties agree in writing to continue the term of the Negotiation Period.

3. **Property Evaluation and Predevelopment Costs.** Developer shall be solely responsible for evaluating the physical condition, value, presence or absence of hazardous substances, use, leasing, operation, tax status, income and expenses of the Excess Property. Developer shall bear all pre-acquisition costs relating to actions of Developer in furtherance of this Agreement, including, without limitation, all fees or expenses of engineers, architects, financial consultants,

legal, planning or other consultants or contractors, retained by Developer, for any study, analysis, evaluation, report, schedule, estimate, environmental review, planning or other activity or matter relating to the evaluation of the Excess Property that may be undertaken by Developer during the Negotiation Period. No pre-acquisition evaluation of the Excess Property shall include any entry or alteration of the Excess Property without a Right of Entry permit executed by both Parties or between City and Developer's consultant.

4. **Obligations of the City.** During the Negotiation Period, the City agrees that City officials and staff shall not negotiate with any other person regarding the use or sale of the Excess Property. The term "negotiate," as used in this Agreement, means engaging in any discussions with a person other than Developer with respect to that person's use or acquisition of the Excess Property to the total or partial exclusion of Developer, without Developer's written consent, which may be withheld in Developer's sole and absolute discretion. City shall nonetheless be entitled to respond to any requests for information regarding the use or sale of the Excess Property in accordance with City's responsibility to release information that is not confidential under the terms of the Public Records Act and other state laws and City ordinances and policies.

5. **Negotiation of PSA.** During the Negotiation Period, the City and Developer shall diligently and in good faith negotiate the terms, conditions, covenants of a PSA. The City and Developer shall reasonably cooperate with each other and supply such existing documents and information as may be available and reasonably requested by the other to facilitate the conduct of the negotiations of the PSA. Developer understands and agrees that any documents and information it desires from City to evaluate development of the Excess Property and its NNTC Phase 2 project may require submittal of a development application and payment of fees to the City's Community Development Department. Both the City and Developer shall exercise reasonable efforts to complete discussions relating to the terms and conditions of a PSA within the Negotiation Period. The exact terms and conditions of a PSA, if any, shall be determined during the course of these negotiations. Nothing in this Agreement shall be interpreted or construed to be a representation or agreement by either the City or Developer that a mutually acceptable PSA will be produced from negotiations under this Agreement. Nothing in this Agreement shall impose any obligation on either party to agree to a definitive PSA in the future. Nothing in this Agreement shall be interpreted or construed to be a guaranty, warranty or representation that any proposed PSA that may be negotiated by City staff and Developer will be approved by the City Council. Developer acknowledges and agrees that the City's consideration of any PSA is subject to the sole discretion of the City Council and all legally required public hearings, public meetings, notices, factual findings and other determinations required by law and the City Code. Except as expressly stated in this Agreement, if this Agreement terminates without execution of a PSA, each party shall bear its own costs related to this Agreement.

6. **Purchase Price.** Promptly following the Effective Date, City shall obtain an independent appraisal of the Excess Property. City's consultant costs for the appraisal and staff costs to review the appraisal are to be funded from the proceeds of the Developer's Deposit, as set out in Section 7, below. City shall share with Developer the appraisal prepared with Developer's Deposit funds. Developer may, but is not obligated to, obtain its own appraisal of the Excess Property and at its election may share that appraisal with City. The Parties intend to use the appraisal report(s) to set the fair market value of the Excess Property for purposes of negotiating the terms of the PSA.

7. **Developer's Deposit.** Developer has delivered to City a non-refundable deposit of Five Thousand Dollars (\$5,000) (the "Deposit") prior to City's execution of this Agreement. The Deposit is to be expended by City for the City Project Manager's costs to evaluate the appraisal and negotiate the terms of the PSA and City's consultant costs to undertake the appraisal. The Deposit includes the amount of (\$1,000) for costs the City Attorney has and will incur in negotiating and drafting this Agreement and the PSA. The Deposit does not include City's processing fees for the NNTC Phase 2 entitlements and permits. If the Excess Property is purchased by Developer, the Developer will receive a credit against the purchase price in the amount of the Deposit under the terms of the PSA.

8. **Legislative Action.** City and Developer acknowledge that this Agreement does not restrict the legislative and discretionary authority of the City in any manner, whatsoever, and does not obligate the City to enter into the PSA or to take any course of action with respect to the sale of the Excess Property for the NNTC Phase 2 project. The City must exercise its independent legislative authority in making any and all findings and determinations required by law concerning the sale of the Excess Property to Developer. Notwithstanding City's approval of this Agreement, City has not made any pre-commitments to approve the NNTC Phase 2 project, the entitlements and permits that may be required for the NNTC Phase 2 project, or the schedule as to when such entitlements and permits may be approved. City, acting as a governmental entity in evaluating the application for the NNTC Phase 2 entitlements and permits, will be acting in its capacity as a municipal land use regulatory authority and shall have no obligation whatsoever to exercise its discretion in any particular manner, and City reserves its full discretion in that regard. This Agreement shall not be construed as a development agreement within the meaning of Government Code Section 65864 *et seq.* City shall not be liable, in any respect, to Developer or any third party beneficiary of this Agreement for City's approval or disapproval of the PSA or any entitlements for the NNTC Phase 2 project.

9. **Acknowledgements.**

9.1 The City and Developer agree that, if this Agreement expires or is terminated for any reason, or a future PSA is not signed by both the City and Developer, for any reason, neither the City nor Developer shall be under any obligation, nor have any liability to each other or any other person regarding the use, sale or other disposition of the Excess Property.

9.2 Developer acknowledges and agrees that no provision of this Agreement shall be deemed to be an offer by the City nor an acceptance by the City of any offer or proposal from Developer for the City to convey any estate or interest in the Excess Property.

9.3 Developer acknowledges and agrees that Developer has not acquired, nor will acquire, by virtue of the terms of this Agreement, any legal or equitable interest in the Excess Property or any other real or personal property from the City.

10. **Waiver of Lis Pendens.** The Parties to this Agreement hereby expressly understand, acknowledge and agree that no lis pendens shall be filed against the Excess Property or any portion of such Excess Property for any claim, action or dispute arising from this Agreement.

11. **Applicable Law; Venue.** This Agreement shall be construed in accordance with the law of the State of California, and venue for any action under this Agreement shall be in Sacramento County, California.

12. **Defaults.** Neither City nor Developer shall be in default of this Agreement unless it: (i) fails to fulfill its obligations when due, which failure is not caused by the other party, (ii) does not negotiate the terms of the PSA in good faith and subject to the preconditions stated in this Agreement, or (iii) does not reasonably cooperate with the other in fulfilling the other's obligations under this Agreement. The defaulting party shall have thirty (30) days to cure the default. Should the defaulting party fail to cure the default within the thirty (30) days, the nondefaulting party may terminate this Agreement by written notice to the defaulting party, and may pursue equitable remedies available to it for such default.

If Developer terminates this Agreement for default by City, City shall refund to Developer the amount of the Deposit that has not been expended, including costs City must pay to the appraiser due to cancellation of the contract. After termination of this Agreement for default of Developer, City shall have the absolute right to pursue the sale of the Excess Property in any manner it deems appropriate. The remedies contained in this Section 12 are the sole exclusive remedies for default of this Agreement, and neither party may claim, as a result of a default of this Agreement, any damages, whether monetary, non-monetary, consequential or otherwise.

13. **Entitlements.** Subject to the limitations and provisions set forth in this Agreement, Developer is permitted to commence entitlement pre-development work with regards to Developer's intended use and/or development of the Excess Property as part of the NNTC Phase 2 project during the Negotiation Period before execution of a PSA and during the escrow period prior to conveyance of the Property to Developer by the City. However, no predevelopment work shall include any entry or alteration of the Excess Property without a Right of Entry permit executed by both Parties or between City and Developer's consultant.

14. **No Third Parties Benefited.** This Agreement is made and entered into for the sole protection and benefit of the City and Developer, and no other person or entity does now or will have any right of action or any rights under or pursuant to this Agreement.

15. **Indemnification.** Developer shall indemnify, defend, protect, and hold City and its officers, employees, agents, and contractors harmless from all liabilities, claims, demands, damages, and costs (including attorneys' fees and litigation costs through final appeal) to the extent that they arise out of or are in any way related to, caused by, or based upon Developer and its officers, employees, agents, and contractors inspection of the Excess Property or contracts with third parties for the evaluation and acquisition of the Excess Property and for the preparation of plans and studies for development of the Excess Property but excluding any claims arising out of the sole active negligence or willful misconduct of the City. In particular and without limiting the foregoing, Developer's indemnification obligation to City shall apply in the event of any disputes among the entities that comprise Developer's limited liability company related to their respective obligations and rights under this Agreement.

16. **Assignment.** This Agreement is not assignable by either party in whole or in part without the prior written consent of the other party.

17. **No Joint Venture.** This Agreement does not create a joint venture, partnership, or any other legal relationship of association among the Parties. Each party is an independent legal entity and is not acting as an agent of the other party in any respect.

18. **Amendments.** Any amendment or modification of this Agreement shall be effective only if set forth in a written document that has been approved by each party and executed by a duly authorized officer of each of the Parties.

19. **Ambiguities.** This Agreement shall be construed as a whole according to its fair language and common meaning to achieve its objectives and purposes. Captions on sections are provided for convenience only and shall not be deemed to limit, amend or affect the meaning of the provision to which they pertain, and shall be disregarded in the construction and interpretation of this Agreement. The Parties have each carefully reviewed this Agreement and have agreed to each term herein. No ambiguity shall be presumed to be construed against either party.

20. **Counterparts; Facsimile Signatures.** This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, but all of which, together, shall constitute but one and the same instrument. A facsimile or pdf signature shall be deemed an original signature.

21. **Entire Agreement.** This Agreement sets forth the Parties' entire understanding regarding the matters set forth. It supersedes all prior or contemporaneous agreements, representations, and negotiations and no other understanding whether verbal, written or otherwise exists among the Parties.

{signature page follows}

City:

City of Sacramento

By: _____
Name: Pamela Sloan _____
Title: Interim Director, Parks and Recreation
Department _____
For: John F. Shirey, City Manager

Developer:

North Natomas Town Center, LLC, a
Delaware limited liability company

By: Lewis Management Corp, a
Delaware corporation, its Sole
Member

By: *John M. Goodman*
John M. Goodman
Executive VP/CEO/CFO

APPROVED AS TO FORM:

By: _____
Senior Deputy City Attorney

ATTEST:

By: _____
Assistant City Clerk

EXHIBIT A
PROPERTY DIAGRAM FOR DEVELOPER'S
NORTH NATOMAS TOWN CENTER PHASE 1 AND 2 PROPERTIES

SEE ATTACHED

Exhibit A

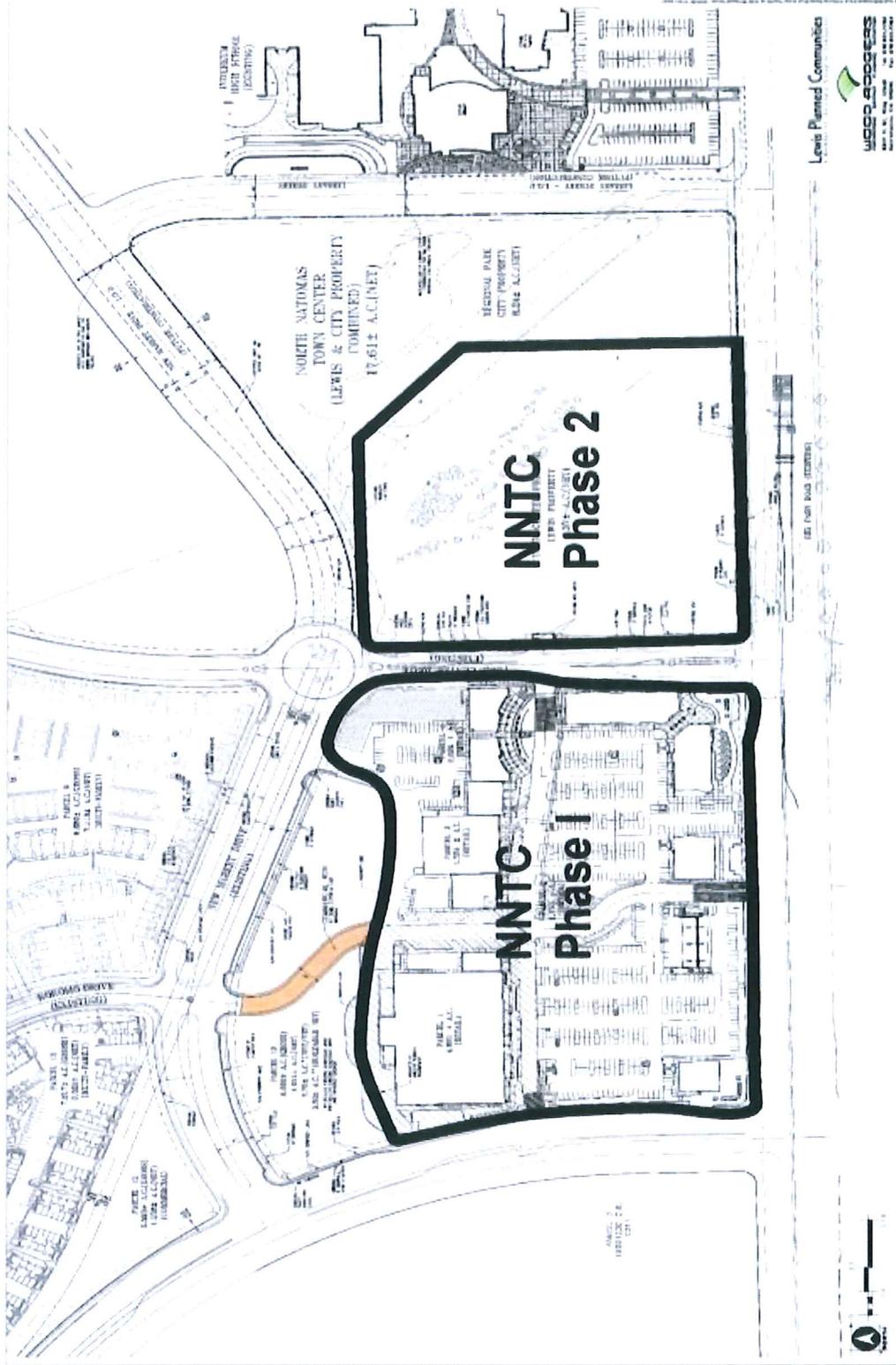


EXHIBIT B
PROPERTY DIAGRAM FOR EXCESS CITY PROPERTY

SEE ATTACHED

Exhibit B

