

RESOLUTION NO. 2007-006

Adopted by the Redevelopment Agency
of the City of Sacramento

January 23, 2007

**APPROVAL OF EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT
WITH KK RAPHEL PROPERTIES, LLC FOR DEL PASO NUEVO
TOWN CENTER RETAIL/COMMERCIAL SITE AT NORWOOD
AVENUE AT SILVER EAGLE ROAD**

BACKGROUND

- A. The Redevelopment Agency of the City of Sacramento (“Agency”) has adopted the Del Paso Heights Redevelopment Plan (“Redevelopment Plan”) and a 2003 – 2007 Implementation Plan for the Del Paso Heights Project Area (“Project Area”).
- B. Agency owns certain real property in the Project Area generally described as being located at the intersection of Norwood Avenue and Silver Eagle Road in the Del Paso Nuevo master-planned community (APNs 250-0200-046; 250-0200-049; 250-0200-050; 250-0200-051) (“Property”).
- C. The Del Paso Nuevo Special Planning District (“SPD”) calls for the Property to be used for commercial and public or quasi-public purposes.
- D. A development team led by KK Raphel Properties, LLC (“Developer”) has submitted a development proposal for the Property and desires to enter into an Exclusive Right to Negotiate agreement with the Agency for the parties to further define the scope of the project for the Property, conduct environmental review, and negotiate the terms of a Disposition and Development Agreement.

**BASED ON THE FACTS SET FORTH IN THE BACKGROUND, THE
REDEVELOPMENT AGENCY OF THE CITY OF SACRAMENTO RESOLVES AS
FOLLOWS:**

Section 1. The Exclusive Right to Negotiate (ERN) agreement (Exhibit A) is hereby approved and the Executive Director or her designee is authorized to execute the ERN.

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Exhibit A – Agreement for Exclusive Right to Negotiate Del Paso Nuevo Town Center

Adopted by the City of Sacramento Redevelopment Agency on January 23, 2007 by the following vote:

Ayes: Members Cohn, Fong, Hammond, McCarty, Pannell, Sheedy, Tretheway, Waters.

Noes: None.

Abstain: None.

Absent: Chair Fargo.


Vice Chair, Kevin McCarty

Attest:


Shirley Concolino, Secretary

**AGREEMENT FOR EXCLUSIVE RIGHT TO NEGOTIATE
DEL PASO NUEVO TOWN CENTER**

THE REDEVELOPMENT AGENCY OF THE CITY OF SACRAMENTO ("Agency") and KK RAPHEL PROPERTIES, LLC, ("Developer"), have entered into this Agreement for Exclusive Right to Negotiate ("Agreement") as of _____, 2007 ("Effective Date") upon the follow terms:

1. **RECITALS.** This Agreement is based upon the following recitals, facts and understandings of the Parties:

a. Developer desires to negotiate with Agency to develop certain real property located in the City of Sacramento encompassing Assessor Parcel Numbers 250-0200-046, 049, 050, and 051 ("Property") located along Ford Road, Norwood Avenue and Paseo Nuevo Street near the intersection of Norwood Avenue and Silver Eagle Road. The four parcels comprise approximately 3.79 acres.

b. The Property is within Del Paso Heights Redevelopment Project Area ("Project Area") and is owned by the Agency. The development of the Property ("Project") consistent with Del Paso Heights Redevelopment Project Plan ("Redevelopment Plan") and its implementing documents, has been identified by the Agency as important to the furtherance of the Project Area and the elimination of blighting conditions in the Project Area.

c. Developer submitted a proposal dated May 10, 2006 ("Proposal"), that proposes to develop the Property for retail commercial use ("Project") which is the initial basis of the negotiation. Three of the parcels comprising the Property are zoned Limited Commercial Special Planning District and the fourth parcel is zoned Single Family Alternative Zone. The Property may have to be rezoned to accommodate the Project. In addition, it may be desirable for the City of Sacramento to abandon a portion of Hayes Avenue and Ford Road to improve the site design of the Project. The parties desire to investigate these issues and other related land use entitlement issues, prepare preliminary site design plans, identify potential tenants, assess the financial feasibility of the Project, and to negotiate the terms of a Disposition and Development Agreement ("DDA") for the transfer, financing and development of the Property for the Project.

d. The development of the Property for the Project and the fulfillment generally of this Agreement are for the purpose of community improvement and welfare, for the benefit of the Project Area and in accord with the public purposes and provisions of any applicable federal, state and local laws and requirements under which the Project is to be undertaken.

2. **IDENTITY OF PARTIES.** The legal identities of the parties to this Agreement and their addresses are as follows:

a. Developer is KK Raphael Properties, LLC, a limited liability company, organized and doing business in the State of California. The principal office of Developer is located at 3300 Douglas Blvd., Ste 385 Roseville CA 95661. Developer shall make full disclosure to Agency of the identity of all principals, officers, stockholders, partners, joint venturers, and entities comprising the Developer. Initially, the principals of Developer are Stephen M. Kirkpatrick, Fred M. Katz, and Michael Raphael.

b. Agency is the Redevelopment Agency of the City of Sacramento, a public body, corporate and politic, organized under California law and functioning within the jurisdiction of the City of Sacramento. The principal office of Agency for purposes of this agreement is located at 630 I Street, Sacramento, California 95814.

c. Notices to any party shall be personally delivered or sent by first class mail to its principal office address. Notices to Agency shall be clearly marked "Attention: Del Paso Nuevo Town Center".

3. **EXCLUSIVE NEGOTIATION.** During the term of this Agreement, the parties shall negotiate exclusively with each other, and in good faith, regarding the Property and the Project. The parties acknowledge and agree that neither party is obligated by this Agreement or otherwise to undertake development of the Project or any other project on the Property, and that no party has a cause of action against the other arising under this Agreement for failure to approve the DDA or undertake the Project.

4. **TERM.** This Agreement shall be effective as of the Effective Date, and shall terminate upon the earlier of completion of all obligations or September 30, 2007, unless extended by written agreement of the parties.

5. **LEGISLATIVE ACTION.** Agency and Developer acknowledge that the Agency must exercise its independent legislative authority in making any and all findings and determinations required of them by law concerning the Project. This Agreement does not restrict the legislative authority of the Agency in any manner, whatsoever, and does not obligate the Agency to enter into the DDA or to take any course of action with respect to the Project.

a. Except as expressly stated in this Agreement, if this Agreement terminates without execution of a DDA, each party shall bear its own costs related to this Agreement.

b. Developer acknowledges that Agency and the City of Sacramento are separate legal entities, and that the Project is also subject to independent review by the City in proper exercise of its jurisdiction, including without limitation, review by the City's Planning Department, Design Review/Preservation Board and Building Department. If the Proposal is disapproved by final action of the governing bodies of the Agency after the final resolution of any appeals Developer elects to pursue, as a result of CEQA review or otherwise as may be required in this Agreement or by law, this Agreement shall terminate as of the date of such disapproval.

6. **CEQA REVIEW.** In accordance with the California Environmental Quality Act ("CEQA"), Agency as lead agency shall prepare the environmental documentation at Developer's expense and consider the environmental effects of the Project prior to considering action to approve the proposed DDA.

a. Nothing in this Agreement shall be construed to limit the application of CEQA to the Project or to changes in the Project or to control the actions of Agency in meeting its respective CEQA obligations. In fulfilling its obligations under CEQA, the Agency shall act independently and without regard to its respective obligations under this Agreement. Agency shall not be liable, in any respect, to Developer or any third party beneficiary of this Agreement for their action or inaction in fulfilling their respective CEQA obligations.

b. Agency will not consider the approval of the Project unless and until it has fully reviewed and considered the environmental impacts of the proposed Project in accordance with CEQA. After CEQA review, Agency is not, and shall not be considered to be, obligated by this Agreement, or otherwise, to approve a DDA or any other agreement. After CEQA review, Agency is not obligated, by this Agreement or otherwise, to adopt findings of overriding considerations for the approval of the Project or take any other action in support of the proposed Project. After CEQA review, Agency is not precluded, by this Agreement or otherwise, from rejecting the Project or from imposing mitigation measures as a condition of Project approval, which measures mitigate or avoid direct or indirect environmental effects of the Project.

c. Upon Agency request, Developer shall supply data and information both to determine the impact of the development of the Project on the environment and to assist in the preparation of the environmental documents for the proposed Project.

7. **SCHEDULE OF PERFORMANCES.** The parties shall perform the following stated obligations at the times specified in the following schedule ("Schedule of Performances"):

Responsible Party	Action	Due Date
Developer	Submit Deposit.	Within ten (10) days following the Effective Date
Developer and Agency	Meet and confer concerning progress of the Property due diligence, Project site plans, CEQA review, City entitlements, securing potential tenants, development financing, and related actions; Developer to submit progress reports at each meeting.	At least once each month during the term of this Agreement, as it may be extended, commencing not later than twenty (20) days of the Effective Date
Developer	Submit information as requested by Agency and City staff for review of Developer's proposed Project, for environmental review, and inclusion in presentation to governing bodies.	Within ten (10) days of request, or as deemed reasonable by the parties

8. **OTHER EXTENSION.** Upon written request of Developer, Agency shall reasonably consider an extension of the initial term of this Agreement 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 DDA.

9. **DEPOSIT FEE.** Developer shall deliver to Agency a deposit of Ten Thousand Dollars and No Cents (\$10,000.00) ("Deposit") in accordance with the foregoing Performance Schedule.

a. Prior to execution of the DDA for the Project or termination of negotiations between Agency and Developer, Agency may expend the Deposit solely for payment of all third-party fees, costs and expenses (the "Third Party Costs") for predevelopment activities for the Project incurred by Agency, including, without limitation, costs related to preparation of the environmental documentation for the Project and supporting studies, and excluding fees for Agency outside legal counsel for

the negotiation or preparation of documents for the transactions contemplated by this Agreement. Fifteen days prior to any such expenditures, Agency shall provide the Developer with a schedule of anticipated expenditures on the Third Party Costs. The parties anticipate that Third Party Costs will not exceed the amount of the Deposit. If the actual expenditures exceeds the Deposit, the parties shall meet and confer with respect to the budget for such costs, and Agency is not obligated to continue with the Project until Developer has deposited such additional funds as may reasonably be needed to pay such remaining Third Party Costs. It is agreed and understood that the required Deposit is a deposit only, and that to the extent that the Third Party costs of the analysis of the Project exceed the Deposit, Developer is responsible for the payment of any and all such additional costs.

b. If the Agency fails to approve a proposed DDA that has been negotiated under this Agreement, which is duly before it for consideration and which has been executed by the Developer, Agency will refund to Developer the Deposit remaining after such Third Party Costs are paid will be refunded to the Developer.

c. If Developer and Agency agree in writing to terminate the negotiations, the Deposit remaining after such Third Party Costs are paid will be refunded to the Developer

d. If the terms of the DDA are otherwise not finalized during the negotiation period due to the inability of the parties to reach a mutual agreement, the Deposit remaining after such Third Party Costs are paid will be refunded to the Developer.

10. **DEFAULTS.** Either of the Agency or the Developer shall be in default of this Agreement if it: (a) fails to fulfill its obligations when due, which failure is not caused by the other party, (b) does not negotiate the DDA in good faith and upon the terms stated in this Agreement, (c) does not reasonably cooperate with the other in fulfilling the other's obligations under this Agreement, or (d) refuses to execute the DDA when negotiations are completed and deposit any funds then required of it for the DDA (except if the Agency has disapproved the Project after public hearing in exercise of its legislative authority or in accordance with CEQA in exercise of its independent review).

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. Should the Agency be in default, the Developer is entitled to the unencumbered remainder of the Deposit, if any. In the event of such a default by Developer, Agency may retain the Deposit and may terminate the Agreement.

a. After termination of this Agreement for default of Developer, Developer shall have no rights under this Agreement to participate in the development of the Project, and the Agency shall have the absolute right to pursue development of the Project, in any manner it deems appropriate.

b. The remedies contained in this Section 10 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, contingent, consequential or otherwise.

11. **DISPOSITION AND DEVELOPMENT AGREEMENT.** In addition to other provisions stated in this Agreement, the DDA may address, without limitation, the following provisions: (a) use covenants to run with the land; (b) payment and performance bonding and other completion assurances; (c) insurance and indemnities, including hazardous materials indemnities; (d) anti-discrimination provisions; (e) performance assurances such as the deposit; (f) limitation on transfers prior to Project completion; (g) compliance with CEQA mitigation; (h) Agency's rights to revest the Property upon Developer default; (i) Agency's Art in Public Places requirements; (j) extension fees for delay in construction, and liquidated damages; (k) Agency's rights to cure defaults, assume loans and complete construction; (l) delayed transfer of title to land; (m) loan guarantees and additional securities; and (n) the issuance by the Agency of partial certificates of completion for completed portions of the Project.

12. **PREDEVELOPMENT COSTS.** Developer shall bear all predevelopment costs relating to actions of Developer under this Agreement including, but not limited to, costs for planning, environmental, architectural, engineering and legal services, and other costs associated with preparation of Developer's Proposal, plans for the Project, and the DDA.

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

14. **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.

15. **ATTORNEYS' FEES.** In the event of any dispute between the parties, whether or not such dispute results in litigation, the prevailing party shall be reimbursed by the other party for all reasonable costs and expenses, including, without limitation, reasonable attorneys' fees, witness and expert fees and investigation costs. A party receiving an award after arbitration or an order or judgment after hearing or trial shall not be considered a prevailing party if such award, order or judgment is not substantially greater than the other party's offer of settlement made in advance of the arbitration, hearing or trial.

EXECUTED as of the date first written above, in Sacramento, California.

AGENCY: REDEVELOPMENT AGENCY OF THE CITY OF SACRAMENTO

By: _____
Anne M. Moore, Executive Director

DEVELOPER: KK Raphael Properties, LLC

By: Stephen and Lynda Kirkpatrick Family Trust,
its Managing Member

By:  _____
Stephen M. Kirkpatrick, Trustee

Approved as to form:

Agency Counsel

Approved as to form:

By:  _____
Counsel for Developer