

**FIRST AMENDMENT
TO THE
EXCLUSIVE NEGOTIATION AGREEMENT
FOR
CIVIC CENTER AND DOWNTOWN WEST END GATEWAY PROJECT
BETWEEN
THE CITY OF NAPA AND
PLENARY PROPERTIES NAPA LLC**

THIS FIRST AMENDMENT TO THE EXCLUSIVE NEGOTIATION AGREEMENT (this "First Amendment") is entered into this _____, 2019 ("Effective Date"), by and between the CITY OF NAPA, a California charter city (the "City"), and PLENARY PROPERTIES NAPA LLC, a Delaware limited liability company (the "Developer"). The City and Developer are sometimes referred to herein individually as "Party" and collectively as "Parties."

RECITALS

- A. The City and the Developer entered into an **Exclusive Negotiation Agreement** for Civic Center and Downtown West End Gateway Project ("ENA") on September 5, 2017, to establish the terms by which the Parties agreed to negotiate the "Project Agreements" to consummate the transactions described in the ENA, and develop the "Project" as defined in the ENA.
- B. The ENA requires each of the Parties to perform certain duties and obligations towards the furtherance of the Project within particular timeframes during the "Negotiating Period," including submission of materials and advancement of design for the Project (see the Performance Milestones described in ENA Section 4). Each party has documented its understanding of the status of compliance with the terms of the ENA in various writings, including the Developer's submittal of monthly progress reports to the City, and the City's transmittal of a letter from the City Manager dated December 7, 2018.
- C. At a public meeting of the City Council, on December 11, 2018, City staff summarized information that had been learned during the Parties' good faith negotiations during the Negotiating Period, including external factors outside the control of either Party, that created challenges to the Project, and City staff presented alternative approaches that could be considered by City Council in order to achieve the City's goals for the Project.
- D. At that same City Council meeting on December 11, 2018, representatives from the Developer identified a willingness to negotiate amendments to the Project that could address the concerns summarized during the meeting, and the City Council directed City staff to negotiate with the Developer to amend the Project defined in the ENA to address the concerns summarized during the meeting. The potential for changes to the Project is contemplated by ENA Section 8.
- E. In a letter from the City Manager dated January 3, 2019, the City documented its understanding of the steps that would be taken by the City and the Developer to implement the negotiations that were identified during the Council meeting on December 11, 2018, including: (1) there are no ongoing services being performed by the Developer in accordance with the conditions of approval of the schematic design for the Project, and (2) the parties will discuss the process by which amendments to the ENA (including the basis of design and schematic design) will be negotiated.

- F. On April 30, 2019, the City and the Developer entered into a “Tolling Agreement” for the ENA (pursuant to ENA Section 18.8) to clarify the rights and obligations of the parties under the ENA during the “Tolling Period” (initially defined in the Tolling Agreement, and amended herein), to provide an opportunity for the parties to evaluate the feasibility of: (1) potential changes to the Project which are mutually acceptable and beneficial to both Parties, and (2) corresponding potential amendments to the ENA (“First Amendment to the ENA”).
- G. The City and the Developer desire to enter into this First Amendment to the ENA, pursuant to ENA Section 18.19, and consistent with the expectations set forth in the Tolling Agreement, to further extend the term of the Tolling Period (initially defined in the Tolling Agreement), and to correspondingly extend the terms of other timing rights and obligations of the parties under the ENA, to provide an opportunity for the parties to further evaluate the feasibility of: (1) potential changes to the Project which are mutually acceptable and beneficial to both Parties, and (2) corresponding potential amendments to the ENA (“Second Amendment to the ENA”).

NOW, THEREFORE, in consideration of the mutual covenants and agreements contained in this First Amendment, the receipt and adequacy of which are hereby acknowledged, City and Developer agree as follows:

1. Incorporation of the ENA by Reference.

The terms and conditions of the ENA, including the recitals of the ENA, are expressly incorporated herein by reference and made a part of this First Amendment, except as specifically modified herein.

2. Extension of the Negotiating Period. Under ENA Section 2.4,1, the “Negotiating Period” commenced on the Effective Date of the ENA (September 5, 2017), and ends two years thereafter (September 5, 2019), subject to an extension by the City Manager of up to 180 calendar days.

2.1. In accordance with ENA Section 2.4.1, the City Manager executed the Tolling Agreement by which (among other things), the City Manager determined that, by taking actions in accordance with the terms of the Tolling Agreement, the Developer is exercising good faith and diligent efforts toward completion of the Project Agreements. Thus, under the Tolling Agreement, the City Manager extended the Negotiating Period for 180 calendar days, so that the Negotiating Period would have ended on March 3, 2020.

2.2. By this First Amendment, the City and the Developer hereby mutually agree to extend the Negotiating Period to a date that is 270 calendar days after the end of the Tolling Period (as defined by this First Amendment).

2.3. Any other/further extension of the Negotiating Period shall require approval by the City Council and the Developer, pursuant to ENA Section 18.19.

3. Tolling Period Rights and Obligations

The Parties hereby establish a “Tolling Period” which began on December 11, 2018 (in accordance with the terms of the Tolling Agreement), and which ends on January 31, 2020, unless terminated earlier as provided herein. During the Tolling Period:

- 3.1. Each Party shall make good faith efforts to develop and evaluate potential changes to the Project (as described in the Recitals of this First Amendment); and both Parties shall reasonably negotiate terms by which the changes to the Project will be incorporated into the Second Amendment to the ENA, subject to the review and approval of both Parties. The City shall propose in good faith one or more Changes to the Project (consistent with ENA Sections 8.1 and/or 8.3), if any. The Developer shall cooperate in good faith to review any Changes to the Project and propose equitable adjustments as may be required.
- 3.2. The obligation of either Party to provide a notice of default (in accordance with ENA Section 16) for an alleged Event of Default that occurred prior to the Tolling Period shall be tolled during and for the number of days of the Tolling Period. No party may terminate or give notice to terminate the ENA under ENA Section 16 during the Tolling Period.
- 3.3. All timeframes related to automatic termination as described in ENA Section 2.4.2 shall be tolled during and for the number of days of the Tolling Period.
- 3.4. All timeframes related to the timing outlined in Exhibit C-1 (the “Civic Center Project Milestones”) and in Exhibit C-2 (the “Private Development Project Milestones”) as described in ENA Section 2.4.3 shall be tolled during and for the number of days of the Tolling Period.
- 3.5. Each Party’s obligation under ENA Section 4.1 to diligently pursue to completion the respective Performance Milestones for the Civic Center Project and Private Development Project in accordance with the schedules set forth in Exhibits C-1 and C-2 in the manner and in the times set forth therein, and any additional Performance Milestones mutually agreed upon by the Parties shall be tolled during and for the number of days of the Tolling Period.
- 3.6. The Developer’s obligation to use diligent good faith efforts to perform the obligations listed in ENA Sections 5.1.1 and 5.1.2 are hereby temporarily suspended during the Tolling Period and Developer shall cease all activities in furtherance of those obligations during the Tolling Period, except as may be agreed by the Parties.
- 3.7. The City’s obligation to use diligent good faith efforts to perform the obligations listed in ENA Section 5.2.1 through 5.2.8 are hereby temporarily suspended during the Tolling Period.

- 3.8. On or before the end of the Tolling Period, the City Manager will present a report, at a public meeting of the City Council, regarding the status of efforts made during the Tolling Period, and the City Manager and the Developer will present alternative actions to be taken by the City Council, including alternatives to: (a) enter into a revised ENA or other Project Agreements as negotiated by the Parties, (b) authorize the City Manager to extend the Tolling Period, with a corresponding extension to the Negotiating Period subject to agreement by the Developer, or (c) allow the Tolling Period to terminate, after which the rights and obligations of the Parties shall be as defined by the ENA (with an extension of the Negotiating Period, as defined by this First Amendment).

4. Termination of Tolling Period

- 4.1. Either Party may terminate the Tolling Period if: (a) the other Party has materially defaulted in its obligations set forth in the Tolling Period, (b) the terminating Party has provided the defaulting Party with a written notice documenting the nature of the default and the actions required to cure the default, and (c) the defaulting Party has failed or refused to cure the default within fifteen calendar days of receipt of the written notice.
- 4.2. Upon termination of the Tolling Period (either by passage of time under First Amendment Section 3, or pursuant to First Amendment Section 4.1), the rights and obligations of the Parties shall be as defined by the ENA (with an extension of the Negotiating Period, as defined by this First Amendment).

5. Miscellaneous

- 5.1. Reservation of Rights. Unless specifically waived pursuant to this First Amendment, each Party reserves its respective rights to make or assert all demands, claims, and causes of action of any kind or nature, known or unknown, arising out of or in any way relating to the ENA, and reserves all the rights to make or assert any defenses thereto. Unless specifically waived pursuant to this First Amendment, each Party expressly agrees it is not releasing any claims of any kind or nature, including but not limited to claims for damages, obligations, causes of action, liabilities, losses, or costs related to the ENA.
- 5.2. Waiver of Rights. Pursuant to ENA Section 18.8, each Party hereby waives any claim of default against the other Party (under ENA Section 16) to the extent that the claim arises from any action or inaction by the other Party during the Tolling Period that is consistent with the terms of this First Amendment. This waiver does not include the rights of either Party that arose prior to the commencement of the Tolling Period, or that arise after the ending of the Tolling Period.
- 5.3. First Amendment Controls. To the extent that the terms of this First Amendment are in conflict with the ENA, the terms of this First Amendment shall control.

[***Signatures on Page 6 of 6.***]

ATTACHMENT 2

IN WITNESS WHEREOF, the City and the Developer have signed this FIRST AMENDMENT TO THE EXCLUSIVE NEGOTIATION AGREEMENT on the date first written above.

CITY:
CITY OF NAPA,
a California charter city

DEVELOPER:
PLENARY PROPERTIES NAPA LLC
a Delaware limited liability company

By: _____
Steve Potter, City Manager

By: _____

Name: _____

Its: _____

ATTEST:

By: _____

Name: _____

Its: _____

Tiffany Carranza, City Clerk

COUNTERSIGNED:

Desiree Brun, City Auditor

APPROVED AS TO FORM:

Michael W. Barrett, City Attorney