



Office of the City Manager

CONSENT CALENDAR
September 28, 2021

To: Honorable Mayor and Members of the City Council
 From: Dee Williams-Ridley, City Manager
 Submitted by: Scott Ferris, Director, Parks Recreation & Waterfront
 Subject: Exclusive Negotiating Agreement with Innovation Properties Group for 199 Seawall Drive

RECOMMENDATION

Adopt a Resolution authorizing the City Manager or her designee to execute an Exclusive Negotiating Agreement (ENA) with Innovation Properties Group (IPG) to develop a pre-development agreement that could lead to a long-term lease of City property at 199 Seawall Drive and a short-term license for a portion of the adjacent parking lot.

FISCAL IMPACTS OF RECOMMENDATION

There are no direct fiscal impacts associated with this recommendation. IPG has requested this ENA in order to secure funding to perform the feasibility studies during phase 2 (pre-development).

CURRENT SITUATION AND ITS EFFECTS

On April 5, 2021, IPG submitted a letter of interest for a long-term lease of 199 Seawall Drive, the City-owned building formerly known as Hs Lordships Restaurant at the Berkeley Waterfront. IPG's proposal has several components: activation of a three to five-year food truck village and outdoor recreation space in a portion of the adjacent parking lot, improvements to the building and building's outdoor spaces, and operation of a restaurant and indoor event space.

Since April, IPG and the City have worked to develop a plan for a potential long-term lease of the building that involves three phases: (1) an Exclusive Negotiating Agreement; (2a) License Agreement for a temporary outdoor food/recreation space (2b) a Predevelopment Agreement; and (3) a Master Lease Agreement.

Phase 1: Exclusive Negotiating Agreement

A three to six-month Exclusive Negotiating Agreement (ENA) is necessary in order for IPG to obtain funding and partners to work on the subsequent phases of the project. During the ENA period, the City would agree not to entertain any other offers for 199 Seawall, and would work with IPG towards developing the

phase 2a and 2b Agreements. At this time, only the ENA is being considered for Council approval.

Phase 2a: License Agreement

In the second phase of the project, a license agreement would authorize IPG to activate a portion of the parking lot for a food truck village and outdoor recreation space similar to a food truck village/recreation garden in San Francisco. The license agreement would be for three-to-five years and could be modified if any potential ferry service becomes available.

Phase 2b: Pre-Development Agreement

The second phase of the project would also involve a Pre-Development Agreement that would authorize IPG to conduct feasibility studies, including conceptual design, permitting, financial analysis, and marketing to determine if a viable long-term master lease agreement could be undertaken. This agreement would be for approximately one to two years.

Phase 3: Master Lease Agreement

If the results of the studies conducted during Phase 2 indicate that a long-term project is viable, a Master Lease agreement would be developed for Council consideration.

The ENA being considered here in Phase 1 would be for a period of three months, and could be extended for up to three additional months with the City Manager's authorization. In addition, the ENA includes a "non-circumvention" clause, which would preclude the City from separately engaging with the specific contacts provided by IPG for a period of 12-months after the date of this Agreement. Based on Council feedback, the ENA also states the expectation that any future lease would include labor provisions that the operator would not interfere with workers' rights to organize, and that former employees of Hs Lordships would be offered opportunities to apply for positions in the new operation.

The ENA for Phase 1 of this project does not commit the City to any future agreements.

BACKGROUND

In 1967, the City and Specialty Restaurant Corporation entered into a 50-year ground lease to develop a restaurant and event space that opened in 1969 as "Hs. Lordships". While the lease was set to expire in August, 2019, Specialty Restaurant Corporation terminated their lease 13-months early and Hs. Lordships closed its doors on July 1, 2018. On August 9, 2018, the City entered into an agreement with Collier's Parish International, a provider of real-estate services, to help the City find entities to lease the space (Contract Number 10960). To-date, the building has remained unleased for over three years.

This ENA and the three phases of the project were discussed by Council in Closed Session on June 3, 2021.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE CHANGE

There are no environmental impacts associated with the Exclusive Negotiating Agreement.

RATIONALE FOR RECOMMENDATION

If adopted, the attached ENA would set the City on a path toward leasing the building at 199 Seawall Drive and activating an underutilized parking area on a short-term basis.

CONTACT PERSON

Scott Ferris, Director, Parks, Recreation and Waterfront, 981-6700

Christina Erickson, Deputy Director, Parks, Recreation and Waterfront, 981-6703

Ali Endress, Waterfront Manager, Parks, Recreation and Waterfront, 981-6737

Attachments:

1: Resolution

Exhibit A: Exclusive Negotiating Agreement

Exhibit B: Potential Term Sheet for Future Master Lease

RESOLUTION NO. ##-###

AUTHORIZING AN EXCLUSIVE NEGOTATING AGREEMENT WITH INNOVATION PROPERTIES GROUP, INC. (IPG) FOR CITY PROPERTY AT 199 SEAWALL DRIVE

WHEREAS, City received a grant of state tidelands to be held in trust for uses that include wharves, docks, piers, slips, commercial and industrial purposes, aviation facilities, transportation and utility facilities, public buildings, parks, playgrounds, marinas, snack bars, cafes, restaurants, and motels, including but not limited to the property located at 199 Seawall Drive, Berkeley; and

WHEREAS, on April 5, 2021, IPG submitted a letter of interest for a long-term lease of 199 Seawall, the City-owned building formerly known as Hs Lordships Restaurant at the Berkeley Waterfront; and

WHEREAS, IPG's proposal has several components: activation of a three to five-year food truck village and outdoor recreation space in a portion of the adjacent parking lot, improvements to the building and building's outdoor spaces, and operation of a restaurant and indoor event space; and

WHEREAS, since April, IPG and the City have worked to develop a plan for a potential long-term lease of the building that involves three phases: (1) an Exclusive Negotiating Agreement; (2a) License Agreement for a temporary outdoor food/recreation space (2b) a Predevelopment Agreement; and (3) a Master Lease Agreement.

NOW, THEREFORE BE IT RESOLVED, that the City Council of the City of Berkeley hereby authorizes the City Manager to execute the Exclusive Negotiating Agreement with IPG described in Exhibit A.

Exhibits

A: Exclusive Negotiating Agreement

B: Potential Term Sheet for Future Master Lease

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).
 - 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

Exhibit B: Potential Term Sheet for Future Master Lease

The following is a summary of draft terms between the City of Berkeley and Innovation Properties Group (IPG) for a potential future Master Lease Agreement for the property at 199 Seawall Drive at the Berkeley Waterfront:

Use:	The premises shall be used primarily as a restaurant and event space, and may include ancillary culinary and innovation space.
State Tidelands:	Tenant acknowledges that the premises is located on State of California Tidelands and must be used in a manner consistent with the Public Trust Doctrine.
Term:	45 years with two 10-year tenant options to extend.
Parking Lot:	Following execution of a license agreement during the predevelopment period, Tenant shall operate a food truck area and outdoor event space in the southern half of the 199 Seawall parking lot. Use of the parking lot shall not extend beyond 2026 without written consent from the City.
Rent:	The NNN Base rate shall be \$15,000/ month + 6% of Gross Sales accrued within the Premises. Base rent shall increase 3% annually.
Condition of Delivery:	The landlord will deliver the premises in as-is condition.
Improvements:	Tenant will fund all necessary improvements to upgrade the facility.
Sublease & Assignment:	Tenant shall have the right to Sublease all or any portion of the Premises provided that sublessees comply with State Lands Commission requirements for tidelands. Subleasing must be approved by the Landlord with prior written consent, which shall not be unreasonably withheld.
Non-Binding:	This term sheet is only a proposal to negotiate and is neither an offer nor a contract.
Approval/Execution :	<p>This Term Sheet is only a list of the above terms and conditions that may or may not become a part of the final Master Lease. This Term Sheet is not intended to be binding or to impose any obligations whatsoever on either party, including any obligation to bargain in good faith. No covenants are implied. The parties do not intend to be bound by an agreement until both parties have executed a formal written License Agreement, Pre-development Agreement, or Master Lease contract.</p> <p>In addition, this Term Sheet is subject to review and acceptance of the final terms and conditions of the Master Lease and related documents. Nothing contained herein shall be binding on either party unless and until such documents are approved, fully executed and exchanged by both parties. Either party is free to terminate the negotiations at any time, and will not by doing so incur any additional obligations or liability.</p>

