

FIRST AMENDED AND RESTATED
EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

Between

THE CITY OF RIALTO
a California municipal corporation

and

NEWMARK MERRILL COMPANIES, Inc.
a California Limited Liability Company

Approved: December 8, 2020
Amended: June 22, 2021
Amended and Restated: October 12, 2021

1. PARTIES AND EFFECTIVE DATE; PARTIES.

This First Amended and Restated Exclusive Right to Negotiate Agreement (Agreement”) is made this 12th day of October 2021 and is effective as of the 8th day of December 2020, being the approval date of the Exclusive Right to Negotiate Agreement amended and restated herein (“Effective Date”), by and between the City of Rialto, a California municipal corporation (“City”), and NewMark Merrill Companies, Inc. and/or its approved assignee, (“Developer”). For purposes of this Agreement, City’s principal address is 150 South Palm Avenue, Rialto, California, 92376. Developer’s principal address is 5850 Canoga Avenue, Suite 650, Woodland Hills, CA 91367. City and Developer are sometimes referred to individually as “Party” and collectively as “Parties” throughout this Agreement.

2. RECITALS.

2.1 The Parties hereby agree that the following Recitals are true and correct and by this reference makes them a part hereof.

(a) The City is a municipal corporation exercising powers and organized and existing under the California Constitution.

(b) The Successor Agency to the Redevelopment Agency of the City of Rialto (“RSA”) owns approximately 15.09 acres of land located on Riverside Avenue and Willow Avenue, between Valley Boulevard and San Bernardino Avenue. The property consists of seven (7) parcels (“Site”). The RSA’s approved Long Range Property Management Plan designates the Site for “transfer to the City for future development”. The Site is generally comprised of the property illustrated in **Exhibit A**.

(c) The Parties understand the Site is currently exempt from the Surplus Land Act (Government Code Section 54220, et seq.) but that in order to continue to qualify for this exemption, disposition of the Site must be completed by December 31, 2022.

(d) Pursuant to a Purchase and Sale Agreement by and between the RSA and the City approved on September 11, 2018, Rialto acquired from RSA approximately 3 acres that was previously a portion of the Site for development of a fire station and community center on the Willow Avenue frontage (“Fire Station Site”), with the approximately 15.09 acre Site remaining to be conveyed for economic development purposes.

(e) After completion of a Request for Proposal process, on May 9, 2017, the City Council recommended selection of the Developer for exclusive negotiations to develop the Site and selected Developer as the recommended Developer for that purpose.

(f) The Parties entered into an Exclusive Negotiating Agreement dated June 27, 2017 (“Original Agreement”) terminating on January 23, 2018 which was amended several times to extend the term to complete negotiation and enter into a binding agreement. The Parties subsequently entered into an Exclusive Negotiation Agreement dated December 8, 2020, as amended on June 22, 2021, terminating on December 31, 2021, which this Agreement amends and restates.

(g) Concurrently with the execution of this Agreement, the RSA approved a Purchase and Sale Agreement by and between the RSA and Developer (“PSA”) pursuant to which the RSA proposes to convey the Site to Developer, consistent with the intent of the City to pursue economic development on the site as authorized by the Long Range Property Management Plan. The PSA provides that the parties shall commence the California Environmental Quality Act (“CEQA”) process prior to opening escrow for the sale of the Site to Developer, and that escrow shall not close unless and until the CEQA process has been completed, and any required CEQA documents have been approved by the City.

(h) In order to encourage the conveyance of the Site by the RSA pursuant to the PSA and to further the economic development goals established by the Long Range Property Management Plan, City and Developer agree that the object of their negotiations is the preparation of entitlements to permit the proposed future development of the Site in accordance with the Gateway Specific Plan and, as a precondition thereto, the City intends to cause preparation of a document compliant with CEQA analyzing the environmental impacts of the project described by the entitlements (the “Project”).

3. TERMS.

3.1 Term of Agreement.

The term of this Agreement shall commence on the Effective Date, and shall continue thereafter until terminated pursuant to Section 3.5 below.

3.2 Good Faith Negotiations.

For the term of this Agreement, City and Developer agree to negotiate diligently and in good faith the terms of development of the Site following Developer’s acquisition of the Site pursuant to the PSA. During the term of this Agreement, City may not negotiate with any other person or entity for acquisition and development of the Site, except as hereinafter set forth. The term “negotiate” as used in this Section 3.2 shall preclude City from accepting proposals to acquire and develop the Site from the City by any persons or entities other than Developer.

City shall not be precluded by anything in this Agreement from furnishing to other persons or entities unrelated to Developer information related to the Site, however during the term of this Agreement shall not do anything to circumvent the successful marketing of the Project to prospective tenants, investors or lenders. City will refer to Developer all tenant inquiries, and confirm Developer’s exclusive right to negotiate during the Term. City may also furnish any information concerning the Project or the Site, with the exception of confidential personal or financial information of the Developer pursuant to Section 3.4.3, which it is required by law to furnish or which it would otherwise normally furnish to persons requesting information from the City concerning its activities, goals or matters of a similar nature.

3.3 Obligations during the Negotiating Period.

During the term of this Agreement, the Parties shall cooperate and work in good faith towards the goal of negotiating a mutually acceptable development plan for the Site. Nothing herein shall be deemed a representation by either City or Developer that a mutually acceptable

development will be produced. Nothing herein shall be deemed a guarantee or representation that the City Council will approve any proposed development. Developer acknowledges that City's approval of any proposed development is subject to the appropriate public hearing, notices and factual findings required by law, including compliance with CEQA and other relevant legal provisions.

By its execution of this Agreement, the City is not committing itself to or agreeing to undertake (a) any acquisition and disposition of land to the Developer; or (b) any other acts or activities requiring the subsequent independent exercise of discretion by the City, the City, or any City or department thereof. This Agreement does not constitute a disposition of property or exercise of control over property by the City and does not require a public hearing. Execution of this Agreement by the City is merely an agreement to enter into a period of exclusive negotiations according to the terms hereof, reserving final discretion and approval by the City as to any entitlements for a proposed development and all proceedings and decisions in connection therewith.

3.4 Scope of Negotiations/Schedule of Performance.

City and Developer acknowledge that the basic scope of negotiations and schedule of performance that shall control the development of plans by Developer is described in **Exhibit B** attached hereto.

(a) Identity of Developer. City and Developer acknowledge and agree that the qualifications and identity of Developer are of particular concern to City, and it is because of such qualifications and identity that the City is negotiating a proposed development with the Developer. For the purposes of this Agreement, the Developer shall be NewMark Merrill Companies, Inc., NJM Rialto, LLC and/or Pacific Retail Partners or any affiliate who uses substantially the same personnel of these Companies ("Developer Affiliate"). No voluntary or involuntary successor-in-interest of the Developer shall acquire any rights or powers under this Agreement except as expressly set forth herein. The Developer may not assign or transfer all or any part of this Agreement without the prior written approval of City, which may be given or withheld in City's sole and absolute discretion, however if to a Developer Affiliate no approval is required.

(b) Environmental Review, Analysis, and Documentation. The City and Developer will jointly work on the due diligence and CEQA approval for the proposed development. The City will contract with the applicable consultants for the required due diligence and CEQA documentation. The due diligence and CEQA related costs shall be paid by the City. Developer will take lead in oversight for the entitlement of both pieces. Developer will reimburse the City for their 50% share of the costs subject to the City obtaining a cross access agreement with the Gateway/Pacifica parcel to the south, and the reimbursement will occur concurrent with the Close of Escrow on the land. The required due diligence and CEQA documentation referenced above includes the following: (i) Geotechnical Report; (ii) Initial Study (Mitigated Negative Dec); (iii) Traffic Study and Scoping Agreement; (iv) Air Quality/Greenhouse Gas Study; (v) Cultural Resources Study; (vi) Health Risk Assessment (if required); (vii) Noise Study; (viii) Tribal Consultation for AB52.

(c) Developer Financial Disclosures. The Developer acknowledges that it may be requested to make certain confidential financial disclosures to the City, its staff or legal

counsel, as part of the financial due diligence investigations of the City relating to the potential disposition of the Site to the Developer. The parties recognize that such financial disclosures may contain sensitive information relating to other business transactions of the Developer that the disclosure of such information to third parties could impose commercially unreasonable and/or anti-competitive burdens on the Developer and, correspondingly, diminish the value or fiscal benefit that may accrue to the City upon the disposition of the Site to the Developer, if terms for such disposition are mutually agreed upon. Accordingly, the City agrees to maintain the confidentiality of any business records described in Government Code Section 6254.15, as may be provided by the Developer to the City or its consultants, to the maximum extent permitted by law. The City shall not provide a copy of any business record protected from disclosure under Government Code Section 6254.15 to a third party, unless the Developer first consents to such disclosure in writing or, unless a court of competent jurisdiction compels disclosure.

(d) Project Financing and Commitment. City does not intend to provide construction or development financing for the Project. Developer shall arrange for its own construction and development financing. During negotiations, Developer shall prepare such studies, reports, and analysis as shall be necessary to permit Developer to determine the feasibility of acquisition and development of the Site. As part of the proposed development negotiations, and prior to the termination of this Agreement, Developer shall demonstrate to City that Developer can have appropriate and adequate financing in place prior to the Site conveyance.

Developer shall disclose to City, in writing, the proposed financing of the Project by Developer including, but not limited to, the terms and conditions of any construction or permanent financing. Developer shall also submit to City all financing documents if and when requested, including but not limited to, land acquisition financing documents, applicable to the Project. Developer shall also fully disclose to City all information necessary to show tenant availability and interest, the nature of the proposed tenants, and the financial strength and resources of the tenants.

(e) Entitlements. Prior to the disposition of the Site to the Developer under the terms of the PSA, the Developer shall prepare and process at Developer's sole expense all necessary development plans required to submit development applications. Developer shall have the discretion to determine the scope of the entitlement application, including whether to submit Conditional Development Permit(s) and/or a Precise Plan(s) of Design as part of the entitlement application request. The City, using its independent judgment, shall determine the form of environmental analysis required to comply with CEQA Easements.

The City will grant to Developer a temporary grading easement and permanent access easement for a road connecting the development to Willow Avenue on terms mutually agreeable to City and Developer and will use commercially reasonable efforts to obtain the additional easement agreements described as conditions to close of escrow for the benefit of Developer in the PSA. The alignment of the road and easement will be jointly agreed on by the City and Developer.

(f) City Obligations. The City will provide to Developer the following documentation at its sole cost: (i) Phase I and Phase II environmental studies; (ii) ALTA and

Topo Survey; (iii) title report; and (iv) Biological Resources Study (including the fly study), and a survey and other documentation required for the Parcel Mergers (Lot Line Adjustments).

3.5 Termination.

This Agreement shall terminate upon the earliest to occur of the following:

- (a) On December 31, 2022.
- (b) At any time, upon written notice to the other Party by the Party electing to terminate, upon the terminating Party's good faith determination that further negotiations would be unproductive; or
- (c) At any time, upon written notice to the other Party by the Party electing to terminate, upon the terminating Party's good faith determination that the other Party has failed to negotiate in good faith in accordance with the terms of this Agreement or has otherwise materially breached any term of this Agreement; or
- (d) The City terminates this Agreement pursuant to Section 3.6(b) because the City's eligible Third Party Costs exceed Fifteen Thousand Dollars (\$15,000) and Developer has not deposited additional funds.

3.6 Good Faith Deposit.

Concurrently with the execution of the Original Agreement, Developer submitted to City a good faith deposit in the amount of Fifteen Thousand Dollars (\$15,000) ("Good Faith Deposit") to ensure that Developer will proceed diligently and in good faith to fulfill its obligations under this Agreement and as consideration for City to enter into this Agreement and forego negotiations with parties unrelated to Developer for the term hereof. The Good Faith Deposit has been deposited in general City accounts and any interest earned shall not be added to the Good Faith Deposit, but may be retained and expended by City. The Good Faith Deposit has been fully expended by the City and no further amounts are due from Developer to City.

3.7 Limitation on Remedies for Breach and Release of Claims.

City and Developer both acknowledge that they would not have entered into this Agreement if they were to be liable to the other for an unknown amount of monetary damages or other remedies. Accordingly, each Party acknowledges and agrees that its exclusive right and remedy upon the breach of this Agreement by the other Party is to terminate this Agreement, without cost, expense, or liability to either Party.

Each Party acknowledges that it is aware of the meaning and legal effect of California Civil Code Section 1542, which provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him would have materially affected his settlement with the debtor."

Civil Code Section 1542 notwithstanding, it is City's and Developer's intention to be bound by the limitation on damages and remedies set forth in this Section 3.7, and each Party hereby releases any and all claims against the other for monetary damages or other legal or equitable relief related to such breach, whether or not such released claims were known or unknown to the Parties as of their entry into this Agreement. City and Developer each hereby waive, but only as to the claims released under this Section 3.7, the benefits of Civil Code Section 1542 and all other statutes and judicial decisions (whether state or federal) of similar effect.

3.8 Solicitation and Conflicts of Interest.

Developer represents and warrants that it has not employed or retained any company or person, other than a bona fide employee working solely for Developer or a licensed real estate broker, to solicit or secure this Agreement. Further, Developer warrants it has not paid nor has it agreed to pay any company or person, other than a bona fide employee working solely for Developer or a licensed real estate broker, any fee, commission, percentage, brokerage fee, gift or other consideration contingent upon or resulting from the making of this Agreement. For any breach or violation of this warranty, City shall have the right to rescind this Agreement without liability.

For the term of this Agreement, no member, officer, or employee of City, during the term of his or her service with City, shall have any direct or indirect interest in this Agreement or obtain any present or anticipated material benefit arising therefrom.

3.9 Disclosures and Cooperation.

City and Developer shall generally cooperate with each other and supply such documents and information as may be reasonably requested by the other to facilitate the conduct of the negotiations. Without limiting the generality of the foregoing, City particularly reserves the right to obtain further information, data, and commitments to ascertain the ability and capacity of Developer to acquire the Site and develop the Project. Unless precluded by law, City shall keep confidential all proprietary information provided by Developer to City.

City shall prepare such public notices and schedule such public hearings, in accordance with applicable law, as may be necessary for the City's governing board and the City Council's consideration of any proposed development that may be agreed upon between City staff and Developer. Developer expressly acknowledges and agrees that City will not be bound by any statement, promise or representation made by City staff during the course of negotiations of a proposed development and that the City shall be legally bound only upon the approval of the proposed development entitlements by the City Council of the City, in accordance with applicable law.

3.10 Attorney's Fees.

In the event that either Party brings any legal action to interpret or enforce any provision of this Agreement, the prevailing Party in that action shall be entitled to receive, in addition to all other relief available to it, its costs of litigation and reasonable attorneys' fees, including costs

and fees incurred on appeal and in enforcing any judgment which may be rendered on the underlying action.

3.11 Governing Law; Jurisdiction and Venue.

This Agreement shall be interpreted and enforced in accordance with the law of the State of California in effect at the time it is executed, without regard to conflicts of law provisions. Any action brought concerning this Agreement shall be brought in the appropriate court for the County of San Bernardino, California. Each Party hereby irrevocably consents to the jurisdiction of said court. Developer hereby expressly waives all provisions of law providing for a change of venue due to the fact that City or the City may be a Party to such action, including, without limitation, the provisions of California Code of Civil Procedure Section 394. Developer further waives and releases any right it may have to have any action concerning this Agreement transferred to Federal District Court due to any diversity of citizenship which may exist between City and Developer or due to the fact that a federal question or right is alleged or involved in such action.

3.12 No Third Party Beneficiaries.

City and Developer expressly acknowledge and agree that they do not intend, by their execution of this Agreement, to benefit any persons or entities not signatory to this Agreement, including, without limitation, any brokers representing the Parties to this transaction. No person or entity not a signatory to this Agreement shall have any rights or causes of action against either City or Developer arising out of or due to City's and Developer's entry into this Agreement.

3.13 Counterpart Originals.

This Agreement may be executed in two (2) counterpart originals which, when taken together, shall constitute but the same instrument.

[SIGNATURES ON FOLLOWING PAGES]

SIGNATURE PAGE TO
EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

CITY:

THE CITY OF RIALTO

By: _____
DEBORAH ROBERTSON
Mayor

Date: _____

ATTEST

BARBARA MCGEE,
City Clerk

**APPROVED AS TO LEGAL FORM:
BURKE, WILLIAMS & SORENSEN, LLP**

ERIC S. VAIL, ESQ.
Interim City Attorney

ACCEPTED AND AGREED AS TO THE PROVISIONS RELATED TO CONVEYANCE OF
THE SITE TO DEVELOPER

RSA:

RIALTO SUCCESSOR AGENCY

By: _____
DEBORAH ROBERTSON
Mayor

Date: _____

:

SIGNATURE PAGE TO
EXCLUSIVE RIGHT TO NEGOTIATE AGREEMENT

DEVELOPER:

NEWMARK MERRILL COMPANIES, Inc.

By: _____
[NAME], [TITLE]

Date: _____

EXHIBIT A

Site



EXHIBIT B

Scope of Negotiations/Schedule of Performance

The goal of the negotiations is to prepare a development proposal acceptable to both parties that will then be submitted to the City Council for consideration.

The Project Goals

The City encourages development of the Site into a high quality commercial and mixed-use project with commercial components that will maximize tax revenues to the City, create more housing opportunities, create a significant number of job opportunities, and provide goods and services currently lacking in the community and that is consistent with the uses, purposes and intent of the Gateway Center Specific Plan. The Developer shall seek cooperation from the property owners to the north and south of the Site to create integrated shopping centers, with reciprocal rights of ingress/egress and parking.

Site development may be phased and include commercial pads that are structured for sale or for lease. The Project shall be of highest quality of design and must or exceed all current City development and design standards.

The Project will require some level of environmental compliance under CEQA. The Parties desire that the environmental review obligations will be performed by the City as a condition precedent to the close of escrow under the PSA.

Responsibilities/Schedule of Performance

The Developer shall complete the following tasks during the Exclusive Negotiation Period:

1. Conduct community meeting(s) to receive public input of Site uses.
2. Prepare a market analysis of potential commercial uses based on the community meeting, City priorities, and general market conditions.
3. Prepare and submit a site plan, preliminary development plans and building elevations to City for the Project. The Developer shall revise and resubmit the site plan and building elevations as required satisfying the Project Goals as noted above.
4. Submit preliminary commitment letters from major tenants and restaurants.
5. Identify the critical infrastructure currently available to the Site and any improvements needed to support the Project. Provide preliminary cost estimates for the public improvements related to the Project.
6. Provide the City with proformas detailing the value of the various development parcels and the associated public and private improvement costs to produce finished parcels ready for development. This should also include an estimate of governmental fees to be paid.

7. Provide the City with other cost/benefit information to enable its consultants to prepare a fiscal benefit analysis for presentation to the City Council. This analysis typically includes the number of construction jobs created, the number of permanent jobs created, the cost to maintain the public improvements upon dedication, the value of the completed development, and the various tax revenues associated with development operations.
8. Provide a tentative schedule for acquisition and development of the Project.
9. Because it is a necessary condition precedent to the closing of escrow under the PSA, the Developer shall submit an application for environmental review by the City. .