

**EXCLUSIVE NEGOTIATING AGREEMENT BETWEEN CITY OF LOS ANGELES AND
BERGAMOT STATION, LTD. REGARDING DISPOSITION, REHABILITATION, AND
REUSE OF
WAREHOUSE NOS. 9 & 10 AT THE PORT OF LOS ANGELES**

THIS EXCLUSIVE NEGOTIATING AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 20____, by and between THE CITY OF LOS ANGELES, a municipal corporation ("City"), acting by and through its Board of Harbor Commissioners ("Board"), and BERGAMOT STATION, LTD., a California Limited Partnership (General Partner: Shoshana Wayne Gallery, a California Corporation), 2525 Michigan Avenue, Santa Monica, CA 90404 ("Developer").

RECITALS

WHEREAS, Board has possession, management and control of the Harbor District, and all harbor and port improvements, works and facilities therein, including but not limited to the improvements commonly known as Warehouse Nos. 9 and 10, described in Section 3 below ("Site");

WHEREAS, in September of 2009, Board certified an environmental impact report for the project commonly known as the "San Pedro Waterfront Project," which project may occur, in part, in the area in which the Site resides;

WHEREAS, aspects of the San Pedro Waterfront Project, once more fully conceived, may require additional environmental review and analysis pursuant to the applicable law beyond that undertaken in the aforementioned certified environmental impact report;

WHEREAS, in November of 2011, City's Harbor Department ("Department") published a Request for Interest ("RFI") to invite expressions of interest from the development community regarding the potential rehabilitation and reuse of the Site;

WHEREAS, staff of Department, following completion of its RFI selection process, recommended that Board select Developer as the RFI awardee based on Developer's qualifications and proposed plan to redevelop the Site as a visitor-serving arts and craft public marketplace and tourist attraction with studio space, a restaurant and incidental specialty commercial uses ("Proposed Site Redevelopment");

WHEREAS, staff of Department and Developer now desire to perform due diligence and investigation to determine the feasibility of the Proposed Site Redevelopment, and then, subject to the existence both of such feasibility and of compliance with all applicable laws, including but not limited to the procurement of all necessary entitlements, to negotiate a term sheet, option agreement and ground lease for Board's review and approval; and

WHEREAS, this Agreement shall not be construed as a direct or indirect commitment by City or any other entity to take or to not take any action, whether under the California Environmental Quality Act ("CEQA"), the National Environmental Policy

Act (“NEPA”), the California Coastal Act or otherwise under the applicable law, and shall not guarantee final approval of the Proposed Site Redevelopment or any other proposed project related to the Site;

NOW, THEREFORE, City and Developer agree as follows.

1. RECITALS

The recitals to this Agreement, above, are incorporated herein and made a part hereof.

2. PURPOSE OF AGREEMENT

The purpose of this Agreement is to provide a framework and guidelines for negotiations to generate a term sheet, option agreement, and ground lease document between City and Developer providing for, among other things, the following: (a) disposition of the Site by City to Developer for the Proposed Site Redevelopment; (b) provision and operation of associated parking; (c) planning, design, construction and operation of the Site in a manner consistent with current and planned surrounding uses, including the 22nd Street Park, Cabrillo Marina, contemplated developments of the Southern California Marine Institute, and the redevelopment of Ports O’ Call Village; and (d) financing of the development and operation of the Proposed Site Redevelopment, including but not limited to the financial terms of the anticipated ground lease.

In connection with the foregoing, Department will provide all relevant documents to Developer, including but not limited to: all engineering and design drawings for Warehouse Nos. 9 and 10 (mechanical, structural, electrical, etc.), the Port’s Leasing Policy and Draft Design Guidelines.

3. DESCRIPTION OF SITE

Warehouse Nos. 9 and 10 are adjacent to each other in the Outer Harbor area of the Port of Los Angeles on a 9.1-acre parcel, including area for approximately 600 parking spaces. Warehouse Nos. 9 and 10 are bounded by Crescent Avenue to the north, the newly upgraded and landscaped Miner Street to the east, 22nd Street Park to the west, and a public parking lot and 22nd Street to the south.

Warehouse No. 9 is a rectangular, one-story, wood-frame structure measuring approximately 390 ft. by 150 ft. and is set on a 3-foot-high concrete foundation. Warehouse No. 9 is approximately 58,500 sq. ft. and includes a wooden beam and post roof structure.

Warehouse No. 10 is a rectangular, one-story, wood-frame structure measuring approximately 507 ft. by 150 ft. and is set on a 3-foot-high concrete foundation. Loading docks are located at the north and south sides of the building, spanning the full horizontal length of the building. The rail tracks have been removed or paved over along the southern and northern elevations. Warehouse No. 10 is approximately 76,050 sq. ft. and includes a wooden beam and post roof structure. Posts are located throughout the floor of the warehouse.

The Site is depicted on the aerial photograph attached hereto as Exhibit "A."

4. DEVELOPER

Developer is Bergamot Station, Ltd., a California Limited Partnership (General Partner: Shoshana Wayne Gallery, a California Corporation). Developer shall be responsible for any and all obligations of Developer under this Agreement. Developer may change or include additional persons or organizations on its development team, subject to the prior written approval of Department's Executive Director.

5. EXCLUSIVE RIGHT TO NEGOTIATE

- A. City hereby grants to Developer and Developer hereby accepts this Agreement for a period of one hundred and twenty (120) days commencing on the date this Agreement becomes effective pursuant to City's Charter and Administrative Code, and continuing in full force and effect until expiration or earlier termination pursuant to Sections 9 or 10 ("Exclusivity Period"). The length of the Exclusivity Period and the deadlines set forth in Section 5(C) may be extended by mutual written agreement executed by Department's Executive Director and Developer; however, neither party is obligated in any way to agree to an extension.
- B. During the Exclusivity Period, Developer and City shall negotiate diligently and in good faith to prepare (1) a term sheet for a ground lease document for development of the Proposed Site Redevelopment Site and (2) an option agreement, both for Board's review and approval. During the Exclusivity Period, City shall not negotiate for the development of the Site, or any portion thereof, with any party other than Developer, or approve or conduct a public hearing for any other development of the Site, or any portion thereof. Also during the term of this Exclusivity Period, Developer shall not negotiate with any other party at any other property for uses similar to the Proposed Site Redevelopment and in Developer's response to RFI, a copy of which is attached hereto as Exhibit "B."
- C. The specific duties and responsibilities of City and Developer during the Exclusivity Period are as follows:
 - 1. During the first sixty (60) days of the Exclusivity Period:
 - a. Developer, at its sole cost and expense, shall:
 - i. Refine the Proposed Site Redevelopment, including but not limited to providing forecasted visitor and peak traffic numbers to facilitate City's ability to perform CEQA analysis;
 - ii. Complete physical due diligence in connection with the Site, including utility capacity analysis, structural analysis, roof assessment and construction cost estimates;

- iii. Complete entitlement and permitting due diligence;
- iv. Complete a tenant demand analysis;
- v. Develop an initial business plan, which shall include a capital plan, construction costs and revenue and expense analysis;
- vi. Plan and initiate execution of public outreach effort.

b. City shall:

- i. Perform financial due diligence, including review of Developer's financial references;
- ii. Develop and begin to populate a financial feasibility model;
- iii. Assist Developer in performing entitlement and permitting due diligence;
- iv. Coordinate the planning of the public outreach effort with Developer;
- v. Develop draft term sheet for anticipated ground lease document;
- vi. Based on Developer-provided visitor and traffic data, determine need for additional CEQA analysis, if any.

2. During the second sixty (60) days of the Exclusivity Period:

a. Developer, at its sole cost and expense, shall:

- i. Finalize conceptual design, including design of on-site improvements and identification of necessary off-site improvements;
- ii. Finalize operational plans, including for special events and other programming;
- iii. Complete refined business analysis and capital plan, including required term of ground lease and suggested payment structure;
- iv. Complete anticipated schedule for development, leaseup and operations.

b. City shall:

- i. Continue to assist Developer in execution of community outreach;
- ii. Refine feasibility analysis;

- iii. Prepare draft term sheets for Option Agreement and Ground Lease;
 - iv. Prepare draft of Option Agreement.
3. Following the expiration of the second sixty (60) days of the Exclusivity Period, Department staff shall provide recommendations to Board regarding whether to move forward with the Proposed Site Redevelopment. If Department staff recommends moving forward with the Proposed Site Redevelopment, it shall also recommend that Board authorize it to commence negotiations of a term sheet for ground lease document for development of the Proposed Site Redevelopment Site and an Option Agreement. Board shall possess full discretion to act in whatever manner it deems appropriate at that time. Nothing in this Agreement is intended to or shall limit or otherwise alter the discretion Board possesses pursuant to City's Charter and the applicable law.

6. TERMS

City and Developer hereby agree to the following terms.

- A. Rights to Additional Information. City and Developer may, during the term of this Agreement, request additional information and data from one another necessary for review and evaluation of the Proposed Site Redevelopment. City and Developer shall provide such additional information or data, if reasonably available, in a timely manner.
- B. No Commitment. Notwithstanding Board's 2009 certification of an environmental impact report for the "San Pedro Waterfront Project," City and Developer acknowledge that any undertaking of the Proposed Site Redevelopment is uncertain and that the activities contemplated by this Agreement do not suggest that such project ever may commence. Pursuit of the Proposed Site Redevelopment, including issuance of a ground lease for the Site to Developer, is expressly conditioned upon a fully executed term sheet for ground lease document for development of the Proposed Site Redevelopment Site and an option agreement, as well as prior procurement of all entitlements required by, and compliance with, the applicable law. Nothing herein shall obligate or be deemed to obligate City to take or refrain from any action, including without limitation, further environmental assessment under CEQA, specific project approval, the approval or certification of any environmental review of the Proposed Site Redevelopment and/or the issuance to Developer of an option agreement or ground lease document for the Site.
- C. Developer Responsible for Own Costs. Developer acknowledges and agrees that all expenses and costs of Developer arising from this Agreement or the performance of Developer's obligations hereunder shall be the sole responsibility of Developer, with no reimbursement from City of any kind.

- D. Department Responsible for CEQA Compliance. City, at the sole cost and expense of Developer, shall undertake CEQA compliance, if any, required beyond the certified environmental impact report for the "San Pedro Waterfront Project." Promptly after the effective date of this Agreement, if required in Department's sole reasonable discretion and with Developer's prior approval of the estimated costs, Department shall engage the services of consultants ("Outside Consultants") to enable Department to comply with CEQA (including causing any environmental impact report, negative declaration or mitigated negative declaration to be prepared and issued) in connection with the Site and the Proposed Site Redevelopment. Developer shall reimburse Department within thirty (30) days after receipt of written request from Department for the full cost of the services provided by the Outside Consultants. Developer shall cooperate fully and in a timely manner with any requests for information from the Outside Consultants. If any of Developer's obligations under this Agreement are terminated, Developer shall not be liable for any costs incurred by the Outside Consultants following such termination.
- E. Pre-Existing Environmental Conditions. Any study of the environmental condition of the Site performed prior to the effective date of the ground lease document, if any, shall be undertaken by City and its sole cost and expense. Any environmental conditions at the Site which exist on or before the effective date of the ground lease document, if any, shall be, as between City and Developer, the sole responsibility of City.
- F. Option Agreement to Supersede this Agreement. If ultimately entered into, the option agreement shall supersede this Agreement following Developer's execution of such option agreement and City's approval thereof in the manner required by law.
- G. Developer Right of Entry. During the term of this Agreement, Developer may, subject to the issuance of a temporary entry and use permit or other document issued by Department's Executive Director and the provision of insurance certificates in forms satisfactory to Department's Risk Manager, enter onto the Site to conduct tests and studies, at Developer's sole cost and expense, to determine the suitability of the Site for the proposed development.
- H. Assignments, Ownership Changes. Developer acknowledges that City's consent to issue this Agreement is based on the prior experience and qualifications of Developer. Therefore, Developer shall not assign, sell or otherwise transfer any rights under this Agreement without the prior written approval of City in its sole and absolute discretion.
- I. Conflicts of Interest. The parties to this Agreement have read and are aware of the provisions of Section 1090 et seq. and Section 87100 et seq. of the California Government Code relating to conflict of interest of public officers and employees, as well as the Conflict of Interest Code of Department. All

parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of 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, City may immediately terminate this Agreement by giving written notice thereof.

7. TERMS TO BE NEGOTIATED

City and Developer shall meet regularly with one another to negotiate a proposed option agreement and term sheet to include, without limitation, the following provisions:

- A. Development concept
- B. Development schedule
- C. Capital plan
- D. Operations plan
- E. Determination of the means of conveyance and the legal entity of the developer
- F. Determination of performance guarantees, liquidated damages, and good faith deposit
- G. Lease term
- H. Commencement date
- I. Base rent

8. LIMITATION ON REMEDIES FOR BREACH OR DEFAULT AND RELEASE OF CLAIMS

- A. City would not have agreed to any part of this Agreement if it were to be potentially or actually liable to Developer for any amount of monetary damages or other remedies. Accordingly, Developer acknowledges and agrees that its exclusive right and remedy upon any breach or default of City to negotiate in good faith as set forth in this Agreement is to terminate this Agreement.
- B. Developer acknowledges that there is a risk that, subsequent to the execution of this Agreement, it will discover, incur or suffer loss, damages or injuries which are unknown or unanticipated at the time that this Agreement is executed. Developer hereby assumes this risk and understands that this Agreement shall apply to all unknown or unanticipated losses, damages or injuries related to the matters released above, as well as those known and anticipated. Developer is familiar with Section 1542 of the California Civil Code which provides:

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

Developer understands and acknowledges the significance and consequence of this specific waiver of Section 1542. Having the opportunity to consult with legal counsel, Developer expressly waives and relinquishes any and all rights and benefits which it may have under Section 1542 of the Civil Code to the full extent that such rights and benefits may be lawfully waived pertaining to the subject matter of this Agreement.

- C. Subject to the last sentence of this Section, Civil Code Section 1542 notwithstanding, it is the parties' intent to be bound by the limitation of remedies set forth in this Section, and Developer hereby releases City and City's former, present and future boards, 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 Site and/or the Proposed Site Redevelopment ("Released Claims"), whether or not such Released Claims were known or unknown to Developer as of its entry into this Agreement. Notwithstanding the foregoing, the parties understand, acknowledge and agree that such release does not apply to any claims which may arise from a fully approved and executed option agreement and/or ground lease document.

9. TERMINATION BY CITY

City shall have the right to terminate this Agreement in the event that:

- A. The Proposed Site Redevelopment is not approved.
- B. If the Proposed Site Redevelopment is determined by City in its sole and absolute discretion to be infeasible.
- C. Developer fails to perform any of its obligations under this Agreement.

10. TERMINATION BY DEVELOPER

Developer shall have the right to terminate this Agreement in the event that:

- A. City fails to perform.

- B. Developer determines that the Site is infeasible to undertake the Proposed Site Redevelopment.
- C. City does not approve the Proposed Site Redevelopment.

11. NOTICES

- A. Any notice, request, approval or other communication to be provided by either party shall be in writing and dispatched by first class mail, registered or certified mail, postage prepaid, return-receipt requested, or by electronic facsimile transmission followed by delivery of a "hard" copy, or by personal delivery (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service), to the addresses of Department and Developer set forth below. Such written notices, requests, approvals or other communication may be sent in the same manner to such other addresses as either party may from time to time designate.
- B. Any notice that is transmitted by electronic facsimile transmission, followed by delivery of a "hard" copy, shall be deemed delivered upon its transmission; any notice personally delivered, (including by means of professional messenger service, courier service such as United Parcel Service or Federal Express, or by U.S. Postal Service), shall be deemed received on the documented date of receipt; and any notice that is sent by registered or certified mail, postage prepaid, return-receipt requested shall be deemed received on the date of receipt thereof.
- C. If to Department:

Port of Los Angeles
425 South Palos Verdes Street
San Pedro, CA 90731
Attn: Geraldine Knatz, Ph.D.

With a copy to:

Los Angeles City Attorney's Office
425 South Palos Verdes Street
San Pedro, CA 90731
Attn: Steven Y. Otera, Esq.

- D. If to Developer:

Bergamot Station, Ltd., a California Limited Partnership (General Partner: Shoshana Wayne Gallery, a California Corporation)
2525 Michigan Avenue
Santa Monica, CA 90404
Attn: Wayne S. Blank, President

12. NO WARRANTY AS TO SITE/IMPROVEMENT CONDITIONS

No warranty or representation of any kind is made by City with respect to the condition of the Site or any improvements thereon.

13. ADDITIONAL CITY AND DEVELOPER OBLIGATIONS

City and Developer agree to:

- A. Refrain from any act that frustrates the purposes of this Agreement
- B. Respond timely
- C. Endeavor to convey specific concerns in writing
- D. Meet in good faith regarding key issues and concerns
- E. Provide timely access to all available records and reports

14. NO THIRD PARTY BENEFICIARIES

This Agreement shall not benefit any persons or entities not signatory to this Agreement including, without limitation, any brokers, agents or finders. Neither City nor Developer shall be liable for any real estate commissions or brokerage fees which may arise herefrom. City and Developer represent and warrant that neither has engaged a broker, agent or finder in connection with the Site and the Proposed Project.

15. INDEMNITY

Developer releases and discharges City and City's former, present and future boards, 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 Site and/or the Proposed Site Redevelopment.

16. GOVERNING LAW

This Agreement is made and entered into in the State of California and shall in all respects be construed, interpreted, enforced and governed under and by the laws of the State of California, without reference to choice of law rules. Any action or proceeding arising out of or related to this Agreement shall be filed and litigated in the state or federal courts located in the County of Los Angeles, State of California, in the judicial district mandated by applicable court rules.

17. MODIFICATION IN WRITING

This Agreement may be modified only by written agreement of all parties. Any such modifications are subject to all applicable approval processes required by, without limitation, City's Charter and City's Administrative Code.

18. CONSTRUCTION OF AGREEMENT

This Agreement shall not be construed against the party preparing the same, shall be construed without regard to the identity of the person who drafted such and shall be construed as if all parties had jointly prepared this Agreement and it shall be deemed their joint work product; each and every provision of this Agreement shall be construed as though all of the parties hereto participated equally in the drafting hereof; and any uncertainty or ambiguity shall not be interpreted against any one party. As a result of the foregoing, any rule of construction that a document is to be construed against the drafting party shall not be applicable.

19. INTEGRATED AGREEMENT

This Agreement contains the entire understanding and agreement between the parties hereto with respect to the matters referred to herein. No other representations, covenants, undertakings, or prior or contemporaneous agreements, oral or written, regarding such matters which are not specifically contained, referenced, and/or incorporated into this Agreement by reference shall be deemed in any way to exist or bind any of the parties. Each party acknowledges that it has not been induced to enter into the Agreement and has not executed the Agreement in reliance upon any promises, representations, warranties or statements not contained, referenced, and/or incorporated into the Agreement. THE PARTIES ACKNOWLEDGE THAT THIS AGREEMENT IS INTENDED TO BE, AND IS, AN INTEGRATED AGREEMENT.

20. STATE TIDELANDS GRANT

This Agreement is entered into in furtherance of and as a benefit to the State Tidelands Grant and the trust created thereby. Therefore, this Agreement is at all times subject to the limitations, conditions, restrictions and reservations contained in and prescribed by the Act of the Legislature of the State of California entitled "An Act Granting to the City of Los Angeles the Tidelands and Submerged Lands of the State Within the Boundaries of Said City", approved June 3, 1929 (Stats. 1929, Ch. 651), as amended, and provisions of Article VI of the Charter of the City of Los Angeles relating to such lands. Tenant agrees that any interpretation of this Agreement and the terms contained herein must be consistent with such limitations, conditions, restrictions and reservations.

21. COUNTERPARTS

This Agreement may be executed in multiple counterparts, each of which shall be deemed an original, and all of which shall constitute one agreement to be effective on the date first above written.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the date to the left of their signatures.

THE CITY OF LOS ANGELES, by
its Board of Harbor Commissioners

Dated: _____

By _____
Executive Director

Attest: _____
Board Secretary

BERGAMOT STATION, LTD., a California
Limited Partnership (General Partner:
Shoshana Wayne Gallery, a California
Corporation)

Dated: _____

By _____

(Print/type Name and Title)

Attest: _____

(Print/type Name and Title)

APPROVED AS TO FORM
_____, 20_____
CARMEN A. TRUTANICH, City Attorney

By _____
STEVEN Y. OTERA, Deputy

SYO/dls
05/31/11