

ACCESS AND DUE DILIGENCE AGREEMENT

33667

This **Access and Due Diligence Agreement** ("Agreement") is entered into as of the 8th day of January, 2015 (the "Effective Date"), by and between the **CITY OF LONG BEACH** ("City"), and **PLENARY EDGEMOOR CIVIC PARTNERS, LLC**, a Delaware limited liability company ("Preferred Proposer"), with respect to the following facts and intentions:

A. The City and the Preferred Proposer have executed that certain Exclusive Negotiating Agreement dated as of even date herewith ("ENA") pursuant to which the City and the Preferred Proposer shall negotiate the terms and conditions of the future development of certain real property defined in the ENA as the "Project Site".

B. The "Property" which is the subject of this Agreement shall be the "Project Site" as defined in the ENA.

C. The City has agreed to permit the Preferred Proposer to enter the Property to examine, inspect and perform investigations on the Property to evaluate the physical and environmental condition of the Property and to perform other investigations and inspections, but only on the terms and conditions set forth below.

NOW, THEREFORE, The City and the Preferred Proposer agree as follows:

1. **Investigation Period.** For purposes of this Agreement, the term "Investigation Period" means the period from the Effective Date until the earlier of (i) receipt by the City of written notice from the Preferred Proposer to the City terminating this Agreement, which decision shall be made in the Preferred Proposer's sole discretion, (ii) the Preferred Proposer's completion of the Investigations (as defined below), as determined by the Preferred Proposer in its sole discretion, (iii) the termination of the ENA, (iv) the date of written notice from the City to the Preferred Proposer terminating this Agreement, which notice may be given in the City's sole discretion, or (v) Financial Close of the transaction contemplated pursuant to Exhibit A of the ENA.

2. **Limited Access.** The City grants a license to the Preferred Proposer and its agents, contractors, engineers, surveyors, attorneys, and employees (collectively, "Consultants") during the Investigation Period (as defined below) to enter onto the Property and make such reasonable investigations, studies and tests as the Preferred Proposer deems necessary or advisable. The Preferred Proposer shall conduct all such investigations, studies and tests strictly in accordance with the following procedures:

2.1. To conduct and make any and all customary studies, tests, examinations, inspections, or investigations (collectively, the "Investigations") of or concerning the Property (including without limitation, engineering, environmental, and feasibility studies and surveys, including topographical surveys); provided, however, that the Preferred Proposer shall not sample or test groundwater without the specific written consent of the City;

2.2. To confirm any and all matters which the Preferred Proposer may reasonably desire to confirm with respect to the Property;

2.3. To ascertain and confirm the suitability of the Property for the Preferred Proposer's intended use;

2.4. To review all due diligence materials, if any, with respect to the Property as delivered or made available by the City to the Preferred Proposer. The Preferred Proposer agrees to promptly deliver the foregoing due diligence materials and other Confidential Information (as defined below) to the City upon the termination of this Agreement;

2.5. The Preferred Proposer's Investigations shall be conducted during normal business hours, unless the City otherwise approves in writing, which approval may be given or withheld in the City's sole discretion. The Preferred Proposer shall provide to the City a notice (which may be sent via email) of the Preferred Proposer's intent to enter the Property at least three (3) days prior to the intended date of entry, which notice shall include a general description of the activities to be conducted;

2.6. A representative of the City shall have the right, but not the obligation, to be present during the Preferred Proposer's Investigations; and

2.7. Neither the Preferred Proposer nor its Consultants shall take any action which interferes with the use, occupancy or enjoyment rights of any tenants or occupants of the Property or of such tenant's or occupant's employees, contractors, customers or guests.

3. Indemnity by The Preferred Proposer. The Preferred Proposer shall indemnify, hold harmless and, if requested by the City (in the City's sole discretion), defend (with counsel approved by the City) the City, together with the City's affiliates, parent and subsidiary entities, successors, assigns, partners, managers, employees, officers, elected officials, counsel, and agents (collectively, including the City, "the City's Indemnified Parties"), from and against any and all damages, liabilities, losses, demands, actions, causes of action, claims, costs and expenses (including, without limitation, reasonable attorneys' fees, including the cost of in-house counsel and appeals) (collectively, "Losses") arising from or related to the Preferred Proposer's or any of its Consultants entry onto the Property, and any Investigations or other matters performed by or for the Preferred Proposer with respect to the Property.

4. Confidentiality. All information made available by the City to the Preferred Proposer or its Consultants in accordance with this Agreement, all information obtained by the Preferred Proposer or its Consultants in the course of its Investigations and the results of all tests, surveys, studies, investigations and assessments conducted or obtained by the Preferred Proposer (collectively, "Confidential Information") shall be treated as confidential information by the Preferred Proposer, and the Preferred Proposer shall not divulge or disclose, and shall cause its Consultants to not divulge or disclose, such information to any third parties, except (a) as required by law, or (b) to the Preferred Proposer's lenders, attorneys and accountants who need to know such information for the sole purpose of evaluating the Preferred Proposer's intended use of the Property and who are advised not to divulge such information. If required by law to disclose any Confidential Information, the Preferred Proposer shall promptly deliver written notice to the City (at the address listed below) of such fact. Within two (2) business days following the City's written request, the Preferred Proposer shall provide the City with the names of the persons to whom any Confidential Information has been communicated in accordance with this paragraph. The Preferred Proposer shall be liable for any breach of this paragraph by it or any of its Consultants. All Confidential Information shall be held by the Preferred Proposer in strict confidence solely for the purpose of assisting the Preferred Proposer in assessing the suitability of the Property for the Preferred Proposer's intended use. In providing any such Confidential Information to the Preferred Proposer, the Preferred Proposer acknowledges and agrees that the City makes no representation or warranty, express, written, oral, statutory, or implied, and all such representations and warranties are hereby expressly excluded. The Preferred Proposer shall not in any way be entitled to rely upon the accuracy of such information. Notwithstanding anything in this Agreement to the contrary, the Preferred Proposer agrees that the covenants, restrictions and agreements of the Preferred Proposer contained in any confidentiality agreement executed by the Preferred Proposer prior hereto shall survive the execution of this Agreement and shall not be superseded hereby.

5. Property Documents. The City has previously made, or will make, available to the Preferred Proposer and its Consultants for their review, certain items and information pertaining to the Property (collectively referred to as the "Property Documents"). The Property Documents have been and shall be made available (to the extent made available) to Preferred Proposer without representation or warranty by, or recourse against, the City, it being agreed that the Preferred

Proposer shall not rely on such documents and shall independently verify the truth, accuracy and completeness of said information and/or items contained therein. The Property Documents shall not include any internal memoranda or correspondence of the City relating to the Preferred Proposer's intended use of the Property (i.e., strategy or negotiation oriented memoranda or correspondence), documents which constitute attorney work product or which are subject to the attorney-client privilege.

6. Investigation Documents. On or prior to the expiration of the Investigation Period pursuant to Section 1, the Preferred Proposer agrees to deliver to the City, without any representation or warranty whatsoever, copies of any and all reports, studies, environmental audits, environmental assessments, or other documents or information prepared by or for the Preferred Proposer or obtained by or for the Preferred Proposer with respect to the Property, at no cost or expense to the City, other than the Stipend and/or the Termination Payment, if applicable. Notwithstanding the foregoing, the Preferred Proposer shall not be required to deliver to City any information, reports or analyses that are developed by the Preferred Proposer based on information it obtains from its due diligence of the Property and which contain financial, marketing, land planning or trade secret information or other information that is proprietary or confidential to the Preferred Proposer.

7. Restrictions. Notwithstanding anything in this Agreement to the contrary, the City shall have the right in its sole and absolute discretion, without limitation, to disapprove any and all entries, surveys, tests (including, without limitation, a Phase II environmental study of the Property), investigations and other matters that in the City's sole judgment could result in any permanent injury to the Property or material breach of any contract, or expose the City to any Losses or violation of applicable law, or otherwise materially and adversely affect the Property or the City's interest therein, and the Preferred Proposer shall obtain the City's prior written consent, which the City shall issue or deny promptly after receiving a written request from the Preferred Proposer, to any such entries, surveys, tests, investigations or other matters that are invasive on the Property. The Preferred Proposer shall use best efforts to minimize disruption to operations at the Property in connection with the Preferred Proposer's or its Consultants' activities pursuant to this Agreement. No consent by the the City to any such activity shall be deemed to constitute a waiver by the City or assumption of liability or risk by the City. The Preferred Proposer hereby agrees to promptly restore, at the Preferred Proposer's sole cost and expense, the Property to the same condition existing immediately prior to the Preferred Proposer's exercise of its rights pursuant to this Agreement.

8. Insurance. The City shall have no liability, responsibility or duty of care to the Preferred Proposer or to any of its Consultants on the Property. The Preferred Proposer acknowledges that the Preferred Proposer and its Consultants enter and occupy the Property at their own risk. Prior to accessing the Property pursuant to this Agreement, the Preferred Proposer shall maintain and cause its Consultants to maintain the following insurance coverages:

8.1 Professional Liability Insurance. Professional or errors and omissions liability insurance in an amount not less than \$2,000,000 per claim.

8.2. Workers Compensation Insurance. Insurance to protect the Contractor and its subcontractors from all claims under California Workers Compensation and Employers Liability Acts, including Long Shoremans and Harbor Workers Act. Such coverage shall be maintained, in the type and amount, in strict compliance with all applicable State and Federal statutes and regulations.

8.3. Commercial General Liability Insurance. Commercial general liability insurance for bodily injury (including death), personal injury, property damage, owned and non-owned equipment, blanket contractual liability, completed operations, explosion, collapse, underground excavation and removal of lateral support covering Contractor's performance, which coverage shall be at least as broad as Insurance Services Office (ISO) Occurrence form CG 0001,

and with a limit in an amount of not less than Two Million Dollars (\$2,000,000). If insurance with a general aggregate limit or products-completed operations aggregate limit is used, either the general aggregate limit shall apply separately with the ISO CG 2503, or ISO CG 2504, or insurer's equivalent endorsement or the general aggregate limit and products-completed operations aggregate limit shall be twice the required occurrence limit.

8.4. Automobile Liability Insurance. Insurance to protect against claims arising from death, bodily or personal injury, or damage to properties resulting from actions, failures to act, operations of equipment of the insured, or by its employees, agents, and consultants or by anyone directly or indirectly employed by the insured. The amount of insurance shall not be less than two Million Dollars (\$2,000,000) combined single limit per acts of coverage applied to bodily and personal injury and property damage. Coverage shall include all owned, non-owned and hired vehicles.

8.5. General Provisions. The above insurance coverages shall be subject to the City's reasonable approval. The City shall be provided with copies of the certificate of insurance evidencing the above insurance coverages. The City shall be named as the additional insured on the commercial general liability and automobile liability insurance policies. Each policy of insurance shall require thirty (30) days advance written notice to the City of any change or cancellation of insured. The Preferred Proposer shall require that all subconsultants and contractors which the Preferred Proposer uses in the performance of its services maintain insurance in compliance with this Section unless otherwise agreed in writing by the City's Risk Manager or designee. The above insurance coverage shall be primary as respects the interest of the additional insured, include a cross liability and severability of interest endorsement, a waiver of any and all transfer rights of recovery (subrogation) against the additional insured. In addition, the above insurance requirements shall not limit the indemnification obligations of the Preferred Proposer.

9. Preferred Proposer Actions; Comply with Law. The Preferred Proposer shall take all necessary actions and implement all protections necessary to ensure that all actions taken in connection with the Investigations or other matters performed by the Preferred Proposer with respect to the Property, and all equipment, materials and substances generated, used or brought onto the Property pose no material threat to the safety of persons or the environment and cause no damage to the Property or other property of the City or other persons. The Preferred Proposer shall conduct itself on the Property according to, and all of the Preferred Proposer's Investigations performed pursuant to this Agreement shall be performed in compliance with all applicable laws and regulations. Without limiting the previous sentence, the Preferred Proposer shall deal with any hazardous materials and substances at the Property in such a manner that fully complies with all applicable environmental laws and regulations.

10. Termination. This Agreement shall automatically terminate without further notice or execution of any documentation by the City and/or the Preferred Proposer upon the expiration of the Investigation Period as described in Section 1.

11. No Additional Rights Granted. The Preferred Proposer acknowledges and agrees that the City's execution of this Agreement shall in no way constitute a binding contract related to the Property or an obligation to enter into or to negotiate the Agreements (as defined in the ENA), and no such agreement shall exist unless and until a separate contract has been executed by the City and the Preferred Proposer. The Preferred Proposer acknowledges it has no interest in the Property whatsoever.

12. General Provisoins.

12.1. Applicable law; Venue. The laws of the State of California shall govern the interpretation and enforcement of this Agreement. The Superior Court of the County of Los Angeles shall be the site and have jurisdiction for the resolution of all such actions.

12.2. Notices, Demands and Communications Between the Parties. Written notices, demands, and communications between the City and the Preferred Proposer shall be given either by: (i) personal service; (ii) delivery by reputable document delivery service such as Federal Express that provides a receipt showing date and time of delivery; or, (iii) by mailing in the United States mail, certified mail, postage prepaid, return receipt requested, addressed to:

To City: Patrick H. West
Office of the City Manager
City of Long Beach
333 West Ocean Blvd., 13th Floor
Long Beach, CA 90802

With copy to: Charles Parkin
Office of the City Attorney
333 West Ocean Blvd., 13th Floor
Long Beach, CA 90802

To the Preferred Proposer: Plenary Edgemoor Civic Partners
10100 Santa Monica Blvd., Suite 410
Los Angeles, CA 90067
Attn.: Stuart Marks

With copy to: Edgemoor Infrastructure and Real Estate
7500 Old Georgetown Road, 3rd Floor
Bethesda, MD 20814
Attn.: Frank Baltz

Notices personally delivered, sent by United States mail or delivered by document delivery service shall be deemed effective upon receipt. Notices sent solely by mail in the manner provided above shall be deemed effective on the second business day following deposit in the United States mail. Such written notices, demands, and communications shall be sent in the same manner to such other addresses as either Party may from time to time designate by mail.

12.3. Interpretation. The terms of this Agreement shall be construed in accordance with the meaning of the language used and in accord with Section 12.9. The part and paragraph headings used in this Agreement are for purposes of convenience only, and shall not be construed to limit or extend the meaning of this Agreement.

12.4. Counterparts. This Agreement may be executed in counterparts, each of which, after all the Parties hereto have signed this Agreement, shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.

12.5. Successors. This Agreement shall be binding upon and shall inure to the benefit of the successors of each of the Parties hereto.

12.6. Severability. In the event any section or portion of this Agreement shall be held, found, or determined to be unenforceable or invalid for any reason whatsoever, the remaining provisions shall remain in effect, and the Parties hereto shall take further actions as may be reasonably necessary and available to them to effectuate the intent of the Parties as to all provisions set forth in this Agreement.

12.7. Time is of the Essence. Time is of the essence for each of the Parties' obligations under this Agreement.

12.8. Assignment. This Agreement shall not be assignable without the prior written consent of the City, who shall have the sole discretion to consent or not to consent to any proposed assignment. Any attempted assignment without the approval of the City shall be void.

12.9. Construction. The provisions of this Agreement should be liberally construed to effectuate its purposes. The language of all parts of this Agreement shall be construed simply according to its plain meaning and shall not be construed for or against either Party, as each Party has participated in the drafting of this document and had the opportunity to have their counsel review it. Whenever the context and construction so requires, all words used in the singular shall be deemed to be used in the plural, all masculine shall include the feminine and neuter, and vice versa.

12.10. Several Obligations. Except where specifically stated in this Agreement to be otherwise, the duties, obligations, and liabilities of the Parties are intended to be several and not joint or collective. Nothing contained in this Agreement shall be construed to create an association, trust, partnership, or joint venture or impose a trust or partnership duty, obligation, or liability on or with regard to either Party. Each Party shall be individually and severally liable for its own obligations under this Agreement.

12.11. Attorneys' Fees. If any legal proceeding (lawsuit, arbitration, etc.), including an action for declaratory relief, is brought to enforce or interpret the provisions of this Agreement, the prevailing Party shall be entitled to recover actual attorneys' fees and costs, which may be determined by the court in the same action or in a separate action brought for that purpose. The attorneys' fees award shall be made as to fully reimburse for all attorneys' fees, paralegal fees, costs and expenses actually incurred in good faith, regardless of the size of the judgment, it being the intention of Parties to fully compensate for all attorney fees, paralegal fees, costs and expenses paid or incurred in good faith by the prevailing Party.

12.12. Authority. The individuals executing this Agreement represent and warrant that they have the authority to enter into this Agreement and to perform all acts required by this Agreement, and that the consent, approval or execution of or by any third-party is not required to legally bind either Party to the terms and conditions of this Agreement.

12.13. Survival. The provisions of this Section and Sections 3, 4, 6 and 8 shall survive the termination of this Agreement.


12.14. Entire Agreement. This Agreement contains the entire understanding and agreement of the Parties, and supersedes all prior agreements and understandings, oral and written, between the Parties. There have been no binding promises, representations, agreements, warranties or undertakings by any of the Parties, either oral or written, of any character or nature, except as stated in this Agreement. This Agreement may be altered, amended or modified only by an instrument in writing, executed by the Parties to this Agreement and by no other means. Each Party waives its future right to claim, contest or assert that this Agreement was modified, canceled, superseded or changed by any oral agreement, course of conduct, waiver or estoppel.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the City and the Preferred Proposer have entered into this Agreement as of the date first written above.

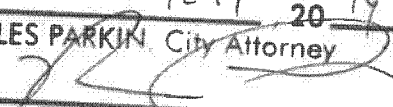

The City:

CITY OF LONG BEACH

By: 
Patrick H. West
City Manager
Assistant City Manager

EXECUTED PURSUANT
TO SECTION 301 OF
THE CITY CHARTER.


APPROVED AS TO FORM

12-19 2014

CHARLES PARKIN City Attorney
By: 
RICHARD ANTHONY
DEPUTY CITY ATTORNEY

Dated: 12/19/14

The Preferred Proposer:

PLENARY EDGEMOOR CIVIC PARTNERS, LLC,
a Delaware limited liability company

By: 
Stuart Marks
Manager
12/19/14