

**EXCLUSIVE NEGOTIATING AGREEMENT  
(Tower 999, LLC)**

This Exclusive Negotiating Agreement (“Agreement”) is dated as of the 17<sup>th</sup> day of January, 2023, by and between the City of National City (“City”) and Tower 999, LLC, a Nevada limited liability company (“Developer”).

**RECITALS**

A. The City is the owner of certain real property generally located at 921, 925 and 929 National City Boulevard (APN’s 556-471-03 and 556-471-04) (collectively, the “City Property”).

B. Developer is the owner of certain real property generally located at 999 National City Boulevard (APN 556-471-17) (“Developer Property”). The Developer Property is adjacent to the City Property. The Developer Property and City Property are collectively referred to herein as the “Project Property.”

C. Developer desires to acquire the City Property from the City and thereafter develop a seven-story, mixed-use building with approximately 9,294 square feet of ground floor retail/commercial space and 127 residential dwelling units (collectively, the “Project”) on the Project Property.

D. The City and Developer are interested in negotiating an agreement (“Project Agreement”) pursuant to which the City would sell the City Property to the Developer and the Developer would construct the Project on the Project Property.

E. The purpose of this Agreement is to establish a period during which Developer and the City shall exclusively negotiate with one another with respect to: (i) the Developer’s acquisition of the City Property from the City; and (ii) establishment of the terms of a Project Agreement.

NOW, THEREFORE, Developer and the City, hereby agree as follows:

1. Exclusive Negotiating Period. “Exclusive Negotiating Period” means the period of time commencing on the date first set above and ending on July 17, 2023. Notwithstanding the foregoing, upon the written request of the Developer, the City Manager may, in the sole discretion of the City Manager, agree to extend the term of the Exclusive Negotiating Period to October 16, 2023. During the Exclusive Negotiating Period, the City agrees to exclusively negotiate with Developer and Developer agrees to exclusively negotiate with the City regarding: (i) the Developer’s potential acquisition of the City Property from the City; and (ii) establishment of the terms of the Project Agreement. The City and Developer shall negotiate diligently and in good faith to carry out the obligations of this Agreement during the Exclusive Negotiating Period.

2. City Property.

(a) Negotiation of the Price and Terms of Sale. During the Exclusive Negotiating Period, the City and Developer shall negotiate the terms of the Developer's potential acquisition of the City Property from the City, including without limitation, establishment of the purchase price payable by the Developer for the City Property. Closing costs, escrow fees, transfer taxes, and all other costs shall be paid by Developer.

(b) Appraisal. The City's entry into the Project Agreement is contingent upon an appraisal to determine the fair market value of the City Property, i.e., the amount which a buyer would pay for the City Property in an arm's-length transaction. The appraisal shall be performed during the Exclusive Negotiating Period by an appraiser jointly selected by the City and Developer, which appraiser shall hold an MAI designation from the Appraisal Institute and have at least five (5) years of experience in appraising commercial properties in San Diego County. The Developer shall pay all costs of the appraiser and appraisal. The City and Developer acknowledge that the sales price payable by the Developer for the City Property may or may not be equal to the appraised fair market value of the City Property.

(c) Sale Contingent on Approvals From All Taxing Entities. Any sale of the City Property requires approvals from all of the various taxing entities. During the Exclusive Negotiating Period, Developer shall be responsible for obtaining such approvals from the various taxing entities.

(d) Due Diligence. During the Exclusive Negotiating Period, the Developer and its representatives, consultants and attorneys shall have access to the City Property. Developer shall indemnify and defend the City, and shall hold the City, the City's agents and employees and the City Property harmless from, any and all actions, losses, costs, damages, claims and/or liabilities, including but not limited to, mechanics' and materialmen's liens and attorney fees, proximately caused by the actions of Developer and/or its consultants, contractors, subcontractors or agents upon the Property. The Developer shall not permit any mechanics' liens, materialmen's liens, contractors' liens, subcontractors' liens or any other liens arising from any acts, omissions or work done by the Developer or its agents to stand against the City Property. If any such lien shall be filed against the City Property, the Developer shall cause the same to be discharged or bonded by payment, deposit, bond or otherwise within thirty (30) days after actual notice of such filing. The Developer's obligations under this Section 2(d) shall survive the termination or expiration of this Agreement. The Developer shall not perform any invasive testing at the City Property without the City's written consent, which consent may be withheld or granted on conditions in the City Manager's sole discretion. The Developer shall promptly restore the City Property to the condition the City Property was in immediately prior to any tests or inspections conducted pursuant to this Section 2(c), at the Developer's sole cost and expense. The Developer shall provide the City with a complete set of plans, drawings and specifications ("Invasive Testing Plans") that define, to the sole satisfaction of the City Manager, the invasive testing to be performed on the City Property and the names of all environmental and other consultants, contractors, subcontractors and agents who will be performing such invasive testing (collectively "Developer's Consultants"). The Developer shall deliver the names of the Developer's Consultants and the Invasive Testing Plans to the City concurrently with its request to the City to perform invasive testing. Before Developer

or any Developer's Consultants enter onto the City Property, Developer shall furnish to City with evidence of commercial general liability insurance from an insurer authorized to do business in the State of California, which is reasonably acceptable to the City, insuring against claims for bodily injury, death or damage to property in the amount of not less than \$4,000,000 and not less than \$2,000,000 in a single occurrence, endorsed to name the City as an additional insured.

3. Conceptual Development Proposal.

(a) Anticipated Project Design. The Project is currently envisioned as a seven-story, mixed-use building with approximately 9,294 square feet of ground floor retail/commercial space and 127 residential dwelling units. The 127 residential dwelling units are anticipated to be comprised of sixty-three (63) studio dwelling units, fifty-six (56) one-bedroom dwelling units and eight (8) two-bedroom dwelling units. Any changes to the Project from what is currently envisioned, shall be subject to the City Manager's reasonable discretion.

(b) Affordability. Twenty percent (20%) of the dwelling units in the Project shall be restricted as affordable to households with incomes at or below fifty percent (50%) of the area median income. An additional twenty percent (20%) of the dwelling units in the Project shall be restricted as affordable to households with incomes at or below sixty percent (60%) of the area median income. The size, bedroom counts and quality of finishes and appliances of the affordable units shall be the same as the market-rate units and the affordable units shall be distributed evenly throughout the Project. Subject to change based on the Developer's forthcoming agreement with Southwestern College to allocate units for student housing, provided, however, any such change shall be subject to the approval of the City Manager in the City Manager's reasonable discretion. The affordable units shall be restricted for 55 years via affordability covenants in favor of the City, which shall be recorded against fee title to the Project Property senior to all monetary liens. The affordability covenants shall be secured by a deed of trust made by Developer in favor of the City recorded against fee title to the Project Property subordinate to all monetary liens. To the extent the Project Property is transferred to the Developer and the Project has not obtained a certificate of occupancy within two years from the date of transfer, the City shall have the right to foreclose on the deed of trust.

(c) Developer Deliveries. During the Exclusive Negotiating Period, the Developer shall provide to the City:

(1) A proposed schedule for development of the Project.

(2) A financial pro forma which contains: (i) a projected development budget for the Project, (ii) a projected sources and uses analysis, (iii) a 55-year cash flow analysis, (iv) a proposed rent schedule and utility allowance schedule, and (v) a projected operating budget for the Project.

(3) Preliminary evidence (meaning letters of intents from investors and/or lenders, as applicable) that the Developer is financially viable with proposed sources of equity and financing required to complete the development of the Project.

(4) The name and qualifications of the architect which Developer proposes to use. The City Manager will approve or disapprove the proposed architect in the sole and absolute discretion of the City Manager.

(d) Project Refinement. Prior to entry into the Project Agreement, the Developer shall (i) deliver to the City a refined concept schematic design and site plan including elevations; (ii) deliver to the City a detailed Project proforma; (iii) deliver to the City proof of the Developer's financial capacity to complete the Project; and (iv) provide the City with detailed descriptions of the responsibilities, schedule, and financial parameters for the design and development of the Project.

(e) Limitation on City Approvals Hereunder. It is anticipated that the Project will be presented to the City Council for approval. The Developer understands, acknowledges and agrees that the City reserves the right to exercise its sole and absolute discretion as to all matters with respect to Project approval, including, but not be limited to the following:

(1) The City has the complete and unfettered discretion to reject the Project or Project Agreement without explanation or cause.

(2) The City shall not have any duty to convey the City Property without at minimum making all necessary findings and conclusions which the City may be required to make, including all necessary findings and determinations required under CEQA and all applicable State and local land use provisions. As to any matter which the City or City Manager may be required to exercise its unfettered discretion in advancing the Project to completion, neither anything contained in this Agreement, nor to be contained in the Project Agreement shall obligate the City to exercise its discretion in any particular manner, and any exercise of discretion reserved hereunder or required by law, shall not be deemed to constitute a breach of the City's duties under this Agreement.

(3) By its execution of this Agreement, the City is not committing itself to, or agreeing to undertake, any activity requiring the subsequent exercise of discretion by the City, or any department thereof including, but not limited to: (i) approval of the Project or execution of the Project Agreement; (ii) the proposal, amendment, or approval of any land use regulation governing the Project Property; (iii) the provision of any financial assistance for the development of any public or private interest in real property; (iv) the acquisition or disposition of any real property; or (v) any other such activity.

(4) This Agreement does not constitute a disposition of property or exercise of control over property by the City. The City's execution of this Agreement 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 the Project, any proposed use of the Project Property, the Project Agreement and all proceedings and decisions in connection therewith.

4. Costs and Expenses. The Developer shall be responsible for all costs and expenses in connection with all activities and negotiations undertaken by the Developer and/or City in connection with this Agreement. At the time of execution of this Agreement, Developer shall

deposit \$25,000.00 with the City (“Reimbursement Fund”). The initial \$25,000.00 deposit to the Reimbursement Fund shall not be refundable. Upon City’s request, the Developer shall make additional deposits to the Reimbursement Fund to maintain a \$25,000.00 balance in the Reimbursement Fund. Any portion of the Reimbursement Fund above the initial \$25,000 which is not utilized by the City shall be refundable to the Developer. City shall have the right to use the Reimbursement Fund to pay for City’s actual costs, including internal costs and third-party costs, incurred during the ENA and Project Agreement terms until the transfer of the City Property to the Developer.

5. Approval and Negotiation of Project Agreement. If both the City and Developer are satisfied with the design and financial feasibility of the Project, the City and Developer shall seek in good faith to negotiate and draft a mutually acceptable Project Agreement for the development of the Project. However, by entering into this Agreement, neither the City, nor the Developer, is contractually bound to enter into a Project Agreement.

6. Termination/Expiration of Agreement. Except as this Agreement is extended or amended by mutual written agreement of the parties, if at the end of the Exclusive Negotiating Period, the City and Developer have not agreed upon a mutually acceptable Project Agreement, then this Agreement shall terminate, except for any obligations of the Developer set forth herein which specifically survive termination of this Agreement.

7. Nondiscrimination. Developer shall not discriminate against nor segregate, any person, or group or persons on account of race, age, sexual orientation, sexual identity, marital status, color, religion, sex, handicap, or national origin in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the Project, nor shall Developer establish or permit any such practice or practices of discrimination or segregation in the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees of the Project.

8. Environmental Requirements. Certain state and local environmental requirements (including, but without limitation, the California Environmental Quality Act of 1970, Public Resources Code Section 21000, et seq.) may be applicable to the proposed Project. Pursuant to such requirements, certain environmental documents may be required to be prepared and certified for the proposed Project.

9. Notices. All notices under this Agreement shall be in writing and sent (a) by certified or registered U.S. mail, return receipt requested, (b) overnight by a nationally recognized overnight courier such as UPS Overnight or FedEx, or (c) by personal delivery. All notices shall be effective upon receipt (or refusal to accept delivery). All notices shall be delivered to the following addresses or such other addresses as changed by any party from time to time by written notice to the other parties hereto:

To City:	City of National City 1243 National City Boulevard National City, CA 91950 Attn: City Manager
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Copy to: Christensen & Spath LLP  
401 West A Street, Suite 2250  
San Diego, CA 92101  
Attn. Walter F. Spath, Esq.

To Developer: Tower 999, LLC  
10717 Camino Ruiz Suite 246  
San Diego, CA 92126

10. Entire Agreement. This Agreement constitutes the entire understanding and agreement of the parties, integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties or their predecessors in interest with respect to all or any part of the subject matter hereof.
11. Amendment of Agreement. No modification, rescission, waiver, release or amendment of any provision of this Agreement shall be made except by a written agreement executed by the City and Developer.
12. Project Agreement to Supersede this Agreement. To the extent provided in the Project Agreement, this Agreement will be superseded by the Project Agreement, if and when the proposed Project Agreement is executed by Developer and approved and executed by the City in a manner required by law.
13. Assignment Prohibited. In no event shall Developer assign or transfer any portion of Developer's rights or obligations under this Agreement without the prior express written consent of the City Manager, which consent may be withheld in the City Manager's sole and absolute discretion.
14. Time of Essence. Time is of the essence of every portion of this Agreement in which time is a material part.
15. Governing Law; Attorneys' Fees. This Agreement shall be construed in accordance with the laws of the State of California. In the event of a dispute between the parties arising out of or in connection with this Agreement, whether or not such dispute results in arbitration or litigation, the prevailing party (whether resulting from settlement before or after arbitration or litigation is commenced) shall be entitled to have and recover from the losing party reasonable attorneys' fees and costs of suit incurred by the prevailing party.
16. Limited Confidentiality. The Developer acknowledges and agrees that the City is a public entity with a responsibility and, in many cases, legal obligation to conduct its business in a manner open and available to the public. Accordingly, any information provided by the Developer to the City may be disclosed to the public either purposely, inadvertently, or as a result of a public demand or order
17. Signatures and Counterparts. This Agreement may be executed in counterparts, each of which, after all the parties hereto have signed this Agreement, shall be deemed original and such

counterparts shall constitute the same instrument. All individuals signing this Agreement for a party which is a corporation, limited liability company, partnership or other legal entity, or signing under a power of attorney, or as a trustee, guardian, conservator, or in any other legal capacity, covenant to the City that they have the necessary capacity and authority to act for, sign and bind the respective entity or principal on whose behalf they are signing.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date first set forth above.

**DEVELOPER:**

Tower 999, LLC, a Nevada limited liability company

By:   
Print Name: CYRUS F. RAPIÑAN  
Its: MANAGING PARTNER

[SIGNATURES CONTINUED ON FOLLOWING PAGE]

**CITY:**

City of National City

By: \_\_\_\_\_

Brad Raulston, City Manager

**APPROVED AS TO FORM:**

Christensen & Spath LLP

By: \_\_\_\_\_

Walter F. Spath III  
Special Counsel to the City