

EXCLUSIVE NEGOTIATIONS AGREEMENT

THIS EXCLUSIVE NEGOTIATIONS AGREEMENT (“Agreement”) is made effective as of this 25th day of March, 2022 (“**Effective Date**”), by and between The City of Des Moines, a municipal corporation (“**City**”) and McBride-Cohen Management Group, a Limited Liability Company (“**Developer**”). City and Developer are sometimes referred to herein as a “**Party**” or collectively as the “**Parties**.”

RECITALS:

A. City owns or controls real property located in Des Moines, Washington, which is more particularly depicted on **Exhibit A**, attached hereto and incorporated herein by this reference (“**Property**”).

B. City and Developer desire to re-develop the Property, which consists of a portion of the City’s waterfront, to include, among other things, an approximately 30,000 square foot parcel consisting of retail and commercial uses (“**Commercial Property**”) together with an approximately 45,000 square foot public space parcel commonly known as the “**Marina Steps**” (“**Marina Steps**” and together with the Commercial Property, the “**Project**”).

C. The City now desires to offer Developer the opportunity to exclusively negotiate with the City for the development of the Project.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter set forth, the parties hereby agree as follows:

1. **Good Faith Negotiations.** Subject to all terms and conditions of this Agreement, the City and Developer agree for the time period set forth below to negotiate diligently and in good faith towards the preparation of a development agreement and any other Project agreement (collectively, “**Project Agreement**”) which will involve the acquisition or lease of the Commercial Property and construction of all or a portion of the Marina Steps by the Developer. It is expressly understood and agreed by the Parties that this is a contract regarding negotiations only and does not convey any interest in the Property or a potential agreement or constitute any approval whatsoever of any proposed project. By its execution of this Agreement, the City is not committing to (a) any disposition of land to Developer; (b) the ability to obtain any approvals required from the City to use the Property for the Project or (c) any other acts requiring the subsequent independent exercise of discretion by the City, or its departments. It is further agreed and understood that this Agreement does not imply any obligation on the part of the City or the Developer to enter into any agreement that may result from the negotiations contemplated herein nor shall Developer have any proprietary or intellectual property rights in the Project Agreement or the terms thereof. City agrees, for the Initial Term and any Extended Term (defined below), not to negotiate with, solicit offers or proposals regarding, or respond to inquiries from (other than to notify the inquiring party, person or entity that City is subject to an exclusive negotiation agreement) any other person or entity regarding development, sale, or lease of the Property or any portion thereof.

2. **Good Faith Fee.** As consideration for this Agreement, Developer will pay to City, within five (5) business days following full execution of this Agreement, a payment of \$35,000.00 (“**ENA Fee**”), which will be held by the City during the Initial Term, as extended, and applied as provided herein. In the event that the parties enter into the Project Agreement, \$25,000 of the ENA Fee will be credited toward any payments required in a negotiated Project Agreement or the purchase or lease price should a transaction proceed to closing and the balance shall be retained by City. In the event that the parties do not enter into the Project Agreement, the City will return the ENA Fee to Developer, less \$10,000, which shall be retained by the City.

3. **Term of Agreement.**

A. **Initial Term.** The term of this Agreement shall be for a period of nine (9) calendar months from the Effective Date (“**Initial Term**”) unless earlier terminated or extended as provided in this Section 3 or Section 14.

B. **Extended Term.** The Initial Term may be extended for a period of three (3) additional months (“**Extended Term**”), which shall be granted by the City upon the City Manager’s (“**Manager**”) receipt of a written request from the Developer for such Extended Term, which shall be received by the City Manager not less than thirty (30) days prior to expiration of the Initial Term (“**Notice of Extension**”).

C. **Termination Following Execution of Project Agreement.** If a Project Agreement is executed by the Parties relating to all or part of the Property during the Initial Term or any Extended Term, then this Agreement shall terminate upon execution of said Project Agreement with regard to the portion of the Property subject to said Project Agreement.

4. **Schedule of Performance; Consultants, Vendors, Designers or Contractors.**

A. **Schedule of Performance.** Within the time periods set forth in the Schedule of Performance attached hereto as Exhibit B (“**Schedule of Performance**”), the Parties shall have completed the milestones set forth therein. The City Manager is authorized to agree to extend the date of any task listed in Exhibit B on behalf of the City. Upon request from City from time to time, Developer shall provide City with copies of schematics, designs, surveys, reports, studies or other work product necessary to evidence compliance with the milestones set forth in the Schedule of Performance.

B. **Consultants, Vendors, Designers or Contractors.** To avoid conflicts of interest, Developer shall not hire a consultant, vendor, designer or contractor off the list of consultants, vendors, designers or contractors attached hereto as Exhibit C. Otherwise, Developer shall have the right to select the consultants, vendors, designers or contractors of its choosing for portions of the Project that are exclusively funded by Developer. As Developer identifies any such consultant, vendor, designer or contractor, Developer shall so notify the City and consider any concerns expressed by the City before retaining any particular consultant, vendor, designer or contractor.

5. **Right of Entry.** During the Initial Term or any extension thereof, Developer, its representatives, consultants, contractors, agents and employees shall have the right to enter the

Property at all reasonable times for the purpose of conducting any tests, studies, analysis or other work necessary to perform the milestones set forth above. The Developer shall provide the City with written notice prior to entry on the Property. The Developer shall have access to all data and information on the Property available to the City, but without warranty or representation by the City as to the completeness, correctness or validity of such data and information. Copies of any tests, studies or analysis obtained or made by the Developer on the Property shall be provided to the City. Any preliminary work by the Developer shall be undertaken only after securing any necessary permits from the appropriate governmental agencies.

Prior to entry upon the Property, Developer shall deliver to City evidence reasonably satisfactory to City that Developer has obtained the following insurance with respect to the Property and any entry onto or activities on or about the Property by Developer and any Developer representative (and any others entering onto the Property for or at the request of Developer): (i) commercial general liability, with a limit of \$1,000,000.00 per occurrence and \$2,000,000.00 in the aggregate; and (ii) business automobile liability, with a limit of \$1,000,000.00 combined single limit. The aforesaid coverages shall be maintained throughout the term of this Agreement. Furthermore, any coverage written on a "Claims-Made" basis shall be kept in force, either by renewal or the purchase of an extended reporting period, for a minimum period of one (1) year following the termination of this Agreement. Such insurance shall be issued by an insurer with an A.M. Best financial strength and size rating of "A-/XV" or better. Nothing herein contained shall in any way limit Developer's liability under this Agreement or otherwise. The City shall be listed as additional insureds on the commercial general liability and business automobile insurance policies.

6. **Disposition of Property.** It is expressly acknowledged and agreed by the Parties that, until and unless a Project Agreement is signed by Developer and approved by the City Council, in its sole and absolute sole discretion, any drafts or other communications resulting from performance of this Agreement shall not be used to impose any legally binding obligation on the City or the Developer or as evidence of any oral or implied agreement by the City or the Developer to enter into a legally binding document.

7. **Disclosure of Confidential Information.** Developer understands and acknowledges that the City is a public agency that is subject to the Open Public Meetings Act RCW 42.30 and is subject to the Washington Public Records Act RCW 42.56 and that information and records provided to the City may be subject to public inspection and production in response to public records requests. Developer shall designate as "**Confidential**" any information which Developer provides to the City which Developer desires to keep confidential. If a request for disclosure of any information designated as "Confidential" by Developer is made under the Act, the City shall notify Developer in writing and Developer shall have the opportunity to object to the release of such information. Notwithstanding anything to the contrary in this Agreement, if the Developer or City receives a request to disclose Confidential information under the State of Washington's Public Records Act, Developer or City may assert exemptions to disclosure in their sole discretion. If City receives a request to disclose Confidential information, City agrees to give Developer ten (10) days' notice prior to disclosure so that Developer may contest the disclosure or seek a protective order.

Notwithstanding anything to the contrary contained herein, information designated as “Confidential” shall not, however, include any information that is:

- (1) contained in an unrestricted, generally-available printed publication prior to the date of this Agreement;
- (2) publicly available at the time of disclosure or that becomes publicly available without any wrongful act or failure to act on the part of the recipient;
- (3) is known by either party without any proprietary restrictions at the time of receipt of such confidential information from the discloser or becomes rightfully known to either party without proprietary restrictions from a third-party source;
- (4) is independently developed by the recipient without reference to the confidential information of the discloser; or
- (5) is disclosed by the discloser in an open public meeting.

8. Conflict of Interest.

A. Conflicts of Interest. Developer shall at all times avoid conflict of interest or appearance of conflict of interest under any applicable state, federal or local laws, rules and regulations in the performance of this Agreement. Developer shall disclose any conflict of interest, or potential conflict of interest, which exists or arises at any time during the Term of this Agreement. For purposes of this Section, any conflict of interest of a principal, officer, partner, joint-venturer, or employee of Developer shall be conclusively deemed to be a conflict of interest of Developer.

B. Remedies. City shall have the right to treat any violation of this Section as a material breach of this Agreement, and shall have the right to terminate the Agreement and pursue any and all legal or equitable remedies for said breach of this Agreement.

9. Developer Responsibilities.

A. Development Costs. Developer expressly acknowledges that all expenses and costs it may incur during the Initial Term of or as a result of this Agreement are its sole obligation and responsibility and done at its sole risk, including, but not limited to, any costs associated with any proposed project and any costs incurred to prepare the necessary studies and analysis required for any proposed project. All City fees for processing a development application or any review are due upon submittal of each and every development application to the City.

B. Entitlement Applications. Developer shall cooperate with City in the preparation, processing and submittal of the Project planning and zoning approvals and related environmental documents by supplying necessary information and/or development plans concerning the Project.

C. Progress Reports. Developer shall keep City apprised as to the status of all work to be undertaken by or on behalf of Developer and during the Initial Term or any Extended Term, Developer shall submit to City within ten (10) days following City's request, via email or other reasonable method, a progress update advising City of the status of all work being undertaken by or on behalf of Developer.

D. Developer Representative. Developer appoints Loren Cohen and N/A to act as its representative.

10. City Responsibilities.

A. City Assistance and Cooperation. City shall cooperate with Developer by providing information regarding the development potential of the Property.

B. Entitlement Processing. City shall cooperate with Developer in the preparation, processing and submittal of the Project planning and zoning approvals and related environmental documents by supplying necessary technical data and other related information and/or development plans concerning the Project.

C. Progress Reports. City shall keep Developer apprised as to the status of all work to be undertaken by or on behalf of City and within ten (10) days following Developer's request, which may be made from time to time during the Initial Term or any Extended Term, City shall submit to Developer, via email or other reasonable method, a progress update advising Developer of the status of all work being undertaken by or on behalf of City.

D. City Representative. City appoints Michael Matthias as its representative.

11. Distinction from Regulatory Authority of the City. Developer understands and agrees that this Agreement does not and shall not be construed to indicate or imply that the City, acting as a regulatory or permitting authority, has hereby granted or is obligated to grant any approval or permit required by law for the development of the Project on the Property as contemplated by this Agreement.

12. Public Hearing. If the negotiations contemplated herein culminate in the execution of a Project Agreement, the Project Agreement may be brought forward for consideration by the City Council, provided, however, such Project Agreement shall become effective only after having been considered and approved by the City Council in its sole and absolute discretion following any public hearing or other actions required by law.

13. Non-discrimination. Developer shall not discriminate, in any way, against any person on the basis of age, sex, race, color, religion, sexual orientation, actual or perceived gender identity, disability, ethnicity or national origin in connection with or related to the performance of this Agreement.

14. Termination. Subject to the cure right provided below, if Developer does not comply in a timely and diligent manner with any material obligation of Developer under this Agreement, City,

at its option, may terminate this Agreement at any time by written notice to Developer and failure of Developer to cure the breach within a reasonable period of time following receipt of such notice. The Manager may terminate this Agreement on behalf of the City. The termination shall be effective upon Developer's receipt of City's written notice. If, during the Initial Term or any Extended Term, Developer determines that it is not commercially feasible for Developer to develop the Project, Developer shall have the right to terminate this Agreement upon providing written notice to City. In the event this Agreement is terminated and the parties fail to enter into a Project Agreement, Developer agrees to promptly provide City with copies of any non-proprietary third party reports or studies obtained by Developer, including without limitation, surveys, designs, Phase I and II environmental studies, traffic or engineering reports.

Notwithstanding anything to the contrary contained herein, in the event of a default of this Agreement by either Party, the other Party shall have all rights and remedies available under applicable law. Neither Party shall be deemed to be in default unless and until the other Party has provided the defaulting Party with written notice of such default and such defaulting Party shall have failed to cure such default within the period of thirty (30) days following the giving of such notice from the other Party.

15. **Indemnification.** Subject to the limitations of Section 21 below, Developer shall defend, indemnify and hold harmless the City, and its officers, employees and agents against any claim, loss or liability arising out of this Agreement or resulting in any way from work performed under this Agreement, including any work performed on the Property pursuant to the provisions of Section 5 above, by Developer, its representatives, consultants, contractors, agents or employees. This indemnification shall survive the expiration or other termination of this Agreement.

16. **Notices.** All notices and other communications required or permitted to be given under this Agreement shall be in writing and may be delivered by hand, by facsimile transmission with verification of receipt, or by United States mail, postage prepaid and return receipt requested, addressed to the respective Parties as follows:

To City:

City of Des Moines
21630 11th Avenue S
Suite A
Des Moines, WA 98198
Attention: Michael Matthias, City Manager
Email Address: MMatthias@desmoineswa.gov

With a copy to:

Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, Washington 98110
Attn: Gerry Johnson
Email Address: Gerry.Johnson@pacificallawgroup.com

To Developer:
McBride-Cohen Management Group, LLC
5020 Main Street, Suite H
Tacoma, Washington 98407
Attn: Loren Cohen
Email Address: Loren@mcconstruction.com

With a copy to:

Jack B. Krona, Jr
5020 Main Street, Suite H
Tacoma, Washington 98407
Email address: j_krona@yahoo.com

or to such other address as any party may designate by notice in accordance with this Section. A copy of any notice of a legal nature, including, but not limited to, any claims against City, its officers or employees shall also be served in the manner specified above to the following address:

_____, City Attorney

17. **Waiver of Lis Pendens.** It is expressly understood and agreed by the Parties that no lis pendens shall be filed with respect to this Agreement or any dispute or act arising from it.

18. **Time of Essence.** It is understood and agreed by the Parties that time is of the essence in the performance of the obligations of this Agreement.

19. **Assignment.** Developer may not transfer or assign any or all of its rights or obligations hereunder except with the prior written consent of City which may be granted or withheld in City's sole and absolute discretion, and any such attempted assignment without the prior written consent of City shall be wholly void and of no effect.

20. **No Third Party Beneficiaries.** This Agreement is made and entered into solely for the benefit of the City and Developer and no other person shall have any right of action under this Agreement.

21. **Limitation of Liability.** Notwithstanding anything to the contrary at law or equity, in the event of any breach of this Agreement by the City, the sole and exclusive remedy of Developer hereunder shall be the recovery of Developer's actual out of pocket costs incurred by Developer to third parties to satisfy its obligations under this Agreement. In no event shall Developer be entitled to "expectation damages" i.e., any amounts that Developer would expect to gain were an agreement ever executed, including, without limitation, any amount for potential lost profits.

Neither Party shall be allowed to recover any damages for lost business opportunity, or for any indirect or consequential damages from the other Party.

22. **Waiver.** Developer agrees that waiver by City of any breach or violation of any term or condition of this Agreement shall not be deemed to be a waiver of any other term or condition contained herein or a waiver of any subsequent breach or violation of the same or any other term or condition. The acceptance by City of the performance of any work or services by Developer shall not be deemed to be a waiver of any term or condition of this Agreement.

23. **Governing Law.** The law governing this Agreement shall be that of the State of Washington.

24. **Venue.** In the event that suit shall be brought by either party hereunder, the Parties agree that trial of such action shall be exclusively vested in a state court in the County of King, Washington.

25. **Prior Agreements and Amendments.** This Agreement, including all Exhibits listed below and attached hereto, represents the entire understanding of the parties as to those matters contained herein. No prior oral or written understanding shall be of any force or effect with respect to those matters covered hereunder. This Agreement may only be modified by a written amendment duly executed by the Parties.

Exhibit A- Description of Property

Exhibit B- Schedule of Performance

Exhibit C- List of Prohibited Consultants and Vendors

WITNESS THE EXECUTION HEREOF on the day and year first hereinabove written.

CITY:

DEVELOPER:

City of Des Moines

McBride-Cohen Management Group, LLC

By: 

By: 

Its: City Manager
Michael Matthias

Its: Loren Cohen, Manager

Date: March 24, 2022

Date: March 23, 2022

Approved as to form:

Tim George
City Attorney

EXHIBIT A DESCRIPTION OF PROPERTY

As described in that certain City of Des Moines Request For Qualifications, Development Opportunity at the Des Moines Marina.

PARCEL INFORMATION



The parcel is within Des Moines' Downtown Commercial (D-C) zoning. Key zoning aspects are summarized below:

ZONING SUMMARY

MAXIMUM HEIGHT: 35'

MAXIMUM FAR: 2.50

ALLOWED USES: Commercial, incl:
Office, Retail, Hotel,
Makers Space

The development parcel is currently used for boat storage and surface parking space for automobiles.

The parcel is located just north of the planned Marina Steps and is envisioned as a 30,000 square foot site.

EXHIBIT B
SCHEDULE OF PERFORMANCE

1. Developer shall commence its due diligence within 30 days from the date of the execution of this ENA. Within 90 days of the execution of this ENA, Developer shall have completed at least the following aspects of its primary due diligence:

- Preliminary financial assessment allocating costs for construction of the Marina Steps taking into account land value and cost estimates for construction of the Steps.
- Determine boundaries of parcel or parcels.
- Review of city survey for any additional work necessary.

2. Developer and City shall exchange a first draft of a Project Agreement within 90 days of the execution of this ENA.

3. Within 180 days of this ENA, Developer shall have completed at least the following aspects of its primary due diligence:

- Preliminary design for the Marina Steps including integration with Developer's building.
- Preliminary development timeline.
- Review and evaluate viability of conceptual utilization of Developer's building rooftop for commercial and environmental uses.
- Determine and begin supplemental investigative sitework.
- Preliminary estimated cost to complete the Project, including the Marina Steps.
- Identification of Project team, including its designer(s) and contractor(s).

4. Developer and City shall exchange a second draft of a Project Agreement within 180 days of the execution of this ENA.

5. Within 200 days of the execution of this ENA, the parties will meet in person or via zoom to work out differences on the terms of the Project Agreement, if any.

6. Developer shall have completed its primary due diligence efforts within 180 days of the execution of this ENA unless otherwise agreed upon by the parties. If Developer's due diligence is not completed as required in this Exhibit B, this Agreement shall terminate unless otherwise agreed upon by the Parties.

EXHIBIT C
LIST OF PROHIBITED CONSULTANTS AND VENDORS

The Holmes Group

Skylab

KPFF