



Office of the City Manager

CONSENT CALENDAR
November 19, 2024

To: Honorable Mayor and Members of the City Council
 From: Paul Buddenhagen, City Manager
 Submitted by: Scott Ferris, Director, Parks Recreation & Waterfront
 Subject: Exclusive Negotiating Agreement with TSA Holdings, LLC, for the Property at 199 Seawall Drive

RECOMMENDATION

Adopt a Resolution authorizing the City Manager or his designee to execute an Exclusive Negotiating Agreement (ENA) with TSA Holdings, LLC (TSA) to develop a lease agreement for the lease of City property at 199 Seawall Drive.

FISCAL IMPACTS OF RECOMMENDATION

There are no direct fiscal impacts associated with this recommendation. The City would continue to carry the same costs for the unleased building as it would without this ENA. The ENA provides a path to revenue for the Marina Fund, but does not require either party to enter into a lease. Any studies, drawings and evaluations performed by TSA during the ENA period will be provided to the City.

CURRENT SITUATION AND ITS EFFECTS

In September 2024, TSA submitted a proposal for a long-term lease of 199 Seawall Drive, the City-owned building formerly known as Hs Lordships Restaurant at the Berkeley Waterfront. TSA's proposal includes a comprehensive renovation of the building at 199 Seawall Drive, and the operation of a restaurant and event space.

During the ENA period, TSA will conduct studies, develop a conceptual design, complete as-builts of the 199 Seawall Drive building, and negotiate a lease agreement for Council consideration.

The proposed duration of the ENA is for six (6) months, with a possible extension of up to three (3) additional months with the City Manager's authorization. The ENA includes the expectation that any future lease would include labor provisions that the operator would not interfere with workers' rights to organize, and that former employees of Hs Lordships would be offered opportunities to apply for positions in the new operation.

The ENA for the property does not commit the City to any future agreements, but provides a path to a Lease agreement for 199 Seawall.

BACKGROUND

In 1967, the City and Specialty Restaurant Corporation entered into a 50-year ground lease to develop a restaurant and event space that opened in 1969 as “Hs Lordships”. While the lease was set to expire in August 2019, Specialty Restaurant Corporation terminated their lease 13-months early and Hs Lordships closed its doors on July 1, 2018. The building has remained unleased for over six years.

On August 9, 2018, the City entered into an agreement with Colliers Parish International, a provider of real-estate services, to help the City find entities to lease the space (Contract number 10960). Five proposals were received between 2018 and 2021. None of these prospective tenants were able to reach a lease agreement with the City. Issues cited included: structural uncertainty about the building, uncertainty over permitting, the high investment required, COVID-19, and the economy.

In 2022, the City entered into a 6-month ENA with Innovation Properties Group (IPG) that was extended later that year by an additional 15 months, (Council resolutions 70,043-N.S. and 70,481-N.S.). IPG created a vision, renderings, toured numerous prospective tenants through the building. They direct-marketed the project to restauranteurs from across the state and nation that they deemed to be a good fit for the property, contacted potential partners, and reached out via email to potential restauranteurs. IPG brought forward two proposals. Neither resulted in a lease agreement, for reasons cited above, plus uncertainty over the remote location, rising interest rates, and challenges with large, indoor restaurants in the post-COVID economy.

In recent months, the City directly received three proposals, all requesting varying lengths of exclusivity to complete due diligence and negotiate a lease. Council reviewed the proposals in Closed Session on October 21, 2024, and directed staff to negotiate an Exclusive Negotiating Agreement with TSA, and return to City Council for approval in open session.

ENVIRONMENTAL SUSTAINABILITY AND CLIMATE IMPACTS

There are no environmental impacts associated with the Exclusive Negotiating Agreement.

RATIONALE FOR RECOMMENDATION

If adopted, the attached ENA would set the City on a path toward leasing the building at 199 Seawall Drive. In the event that the ENA does not result in a lease agreement, the City will have the benefit of the information gathered and produced by TSA, including as built structural drawings of the building.

CONTACT PERSON

Scott Ferris, Director, Parks, Recreation and Waterfront, 981-6700

Attachments:

1: Resolution

Exhibit A: Exclusive Negotiating Agreement

Exhibit B: Potential Term Sheet for Future Master Lease

RESOLUTION NO. ##-###

AUTHORIZING AN EXCLUSIVE NEGOTATING AGREEMENT WITH TSA HOLDINGS.
(TSA) FOR CITY PROPERTY AT 199 SEAWALL DRIVE

WHEREAS, City received a grant of state tidelands to be held in trust for uses that include wharves, docks, piers, slips, commercial and industrial purposes, aviation facilities, transportation and utility facilities, public buildings, parks, playgrounds, marinas, snack bars, cafes, restaurants, and motels, including but not limited to the property located at 199 Seawall Drive, Berkeley; and

WHEREAS, in September 2024, TSA submitted a proposal for a lease at 199 Seawall, the City-owned building formerly known as Hs Lordships Restaurant at the Berkeley Waterfront; and

WHEREAS, TSA's proposal includes a comprehensive renovation of the building at 199 Seawall Drive, and the operation of a restaurant and event space, and requires an Exclusive Negotiating Agreement (ENA) six (6) months, with a possible extension of up to three (3) additional months with the City Manager's authorization; and

WHEREAS, during the ENA period, TSA will conduct studies, develop a conceptual design, complete as-builts of the 199 Seawall Drive building, and negotiate a lease agreement for Council consideration;

NOW, THEREFORE BE IT RESOLVED, that the City Council of the City of Berkeley hereby authorizes the City Manager to execute the Exclusive Negotiating Agreement with TSA described in Exhibit A.

Exhibits

A: Exclusive Negotiating Agreement

B: Potential Term Sheet for Future Master Lease

**EXCLUSIVE NEGOTIATING AGREEMENT BETWEEN THE CITY OF BERKELEY
AND TSA HOLDINGS, LLC REGARDING A LEASE OF THE PROPERTY AT 199
SEAWALL DR.**

This Exclusive Negotiating Agreement (“Agreement”) is made and entered into this ____ day of _____, 2024 (“Effective Date”), by and between the City of Berkeley, a municipal corporation (“City”) and TSA Holdings, LLC, a California Corporation (“TSA”).

RECITALS

WHEREAS, the City was granted certain tidelands in the Berkeley Marina to be held in trust for uses that include the establishment, improvement and conduct of small boat harbors, marinas, aquatic playgrounds and similar recreational facilities, and for all works, buildings, facilities, utilities, structures and appliances incidental, necessary or convenient for the promotion and accommodation of any such uses, including but not limited to snack bars, cafes, restaurants, motels, launching ramps and hoists, storage sheds, boat repair facilities with cranes and marine ways, administration buildings, public restrooms, bait and tackle shops, chandleries, boat sales establishments, service stations and fuel docks, yacht club buildings, parking areas, roadways, pedestrian ways and landscaped areas, including but not limited to the property located at 199 Seawall Drive, Berkeley (“Property”);

WHEREAS, TSA submitted their qualifications and proposal for a future lease of the Property (“Lease Agreement”), and the City and TSA mutually wish to enter into an ENA to negotiate a Lease for a restaurant and event space at the Property, as outlined in more detail in the proposed Term Sheet, attached;

WHEREAS, the purpose of this Agreement is to establish procedures and standards for the negotiation by the City and TSA of the Lease. As more fully set forth in Section 3.1, the parties acknowledge and agree that this Agreement in itself does not grant TSA the right to lease the Property, nor does it obligate TSA to any activities or costs to lease the Property, other than the activities and costs necessary to discharge TSA’s obligations under this Agreement including the obligation to negotiate in good faith as contemplated by this Agreement.

NOW, THEREFORE, City and TSA agree as follows:

1. RECITALS

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

2. PURPOSE OF AGREEMENT

- a. This Agreement confirms the City’s selection of TSA as the entity with which to exclusively negotiate a mutually acceptable Lease Agreement for a restaurant and event space at the Property.
- b. The purpose of this Agreement is to affirm the mutual intent of TSA and the City to generate a Lease Agreement for the Property.

3. AGREEMENTS

Subject to the terms of this Agreement, City and TSA each hereby agree to negotiate in good faith during the “Exclusivity Period,” as that term is defined in Section 6.a, in order to attempt to cause the execution of a Lease Agreement for the Property.

4. CONFIDENTIALITY

Except where disclosure is required by law, including but not limited to the California Public Records Act (California Government Code section 6250 *et seq.*), TSA and City shall treat as confidential (the “Confidential Information”) (i) all documents, studies, electronic materials and information furnished to the other party by its officers, trustees, executives, employees, agents or representatives (collectively, the “Representatives”) relating to the Property, whether furnished before, on or after the date of this Agreement and whether furnished orally, in writing or by any other medium, and (ii) all reports, studies and other documents and information prepared by or for TSA which contain or reflect any such documents or information furnished by a party’s Representatives or any information obtained through inspection or review of the Property (collectively, the “Evaluation Materials”). Confidential Information does not include the Final Documents, which are subject to public disclosure by the City. The Evaluation Materials shall not include any information which (a) is or becomes generally available to the public other than as a result of disclosure by a party’s Representatives, in breach of this Agreement, (b) was already available to or in the possession of a party prior to its disclosure by the other party’s Representatives, unless obtained from a source which was not permitted to disclose such information, or (c) is or becomes available to a party from a source other than the other party’s Representatives, unless such source was not permitted to disclose such information to TSA. Notwithstanding the provisions of this Section 4, TSA may commence marketing the Project and disclose its selection to potential subtenants and other third parties so long as TSA does not disclose any Confidential Information unless TSA has obtained an appropriate confidentiality agreement from such party), or the written consent of the City.

5. NO REPRESENTATIONS OR WARRANTIES

City makes no express or implied representations or warranties as to the accuracy or completeness of any Evaluation Materials provided by the City. TSA acknowledges and agrees that neither City nor any of City’s Representatives has or will have any liability to TSA or any other person resulting from any use of the Evaluation Materials by TSA or TSA’s Representatives. Only those representations or warranties, if any, made to TSA in Final Documents, if executed, and subject to the limitations specified therein, shall have any legal effect.

6. EXCLUSIVE NEGOTIATIONS

- a. City and TSA agree that this Agreement shall be effective for a period of six (6) months commencing on the Effective Date, and continuing in full force and effect until expiration or earlier termination pursuant to Section 10 (“Exclusivity Period”). The City Manager is authorized to extend this Agreement by an additional three (3) months with the consent of TSA.

- b. During the Exclusivity Period, TSA and the City shall negotiate diligently and in good faith to prepare the Lease Agreement. The execution of the Lease Agreement shall be subject to the approval of the Berkeley City Council. During the Exclusivity Period, the City shall not negotiate for the development of the Property, or any portion thereof, with any party other than TSA, or approve or conduct a public hearing for any other development of the Property, or any portion thereof.

7. DUTIES AND RESPONSIBILITIES DURING THE EXCLUSIVITY PERIOD

- a. During the Exclusivity Period, TSA and the City shall negotiate in good faith to attempt to cause the execution of a Lease Agreement for the Project.
- b. Nothing in this Agreement requires any party to enter into any further agreement or requires the City to commit to any course of action with respect to the future development of the Property. Nothing in this Agreement is intended to or shall be construed as a commitment to approve any project or any subsequent agreement(s) contemplated herein. The approval of any subsequent agreement negotiated pursuant to this Agreement shall be subject to approval of the Berkeley City Council, and nothing in this Agreement shall alter or limit the discretion the Berkeley City Council possesses pursuant to the City's Charter and applicable law to approve, disapprove, or modify any such subsequent agreement.

8. TERMS

City and TSA hereby agree to the following terms.

- a. Due Diligence and Inspection of Property. During the Exclusivity Period, the City shall allow TSA, at TSA's sole cost and expense, to inspect the Property, accompanied by City staff, and review due diligence relating to the Property as made reasonably available to TSA by the City. Such reviews and inspections by TSA shall be conducted in accordance with reasonable restrictions or limitations imposed by the City.
- b. TSA Responsible for Own Costs. TSA acknowledges and agrees that all expenses and costs of TSA arising from this Agreement or the performance of TSA's obligations hereunder shall be the sole responsibility of TSA.
- c. Assignments; Ownership Changes. TSA acknowledges that the City's consent to issue this Agreement is based on the prior experience and qualifications of TSA. Therefore, TSA shall not assign, sell, or otherwise transfer any rights under this Agreement without the prior written approval of the City in its sole and absolute discretion.
- d. Conflicts of Interest. The parties to this Agreement have read and are aware of the provisions of California Government Code sections 1090 *et seq.* and 87100 *et seq.*, relating to conflict of interest of public officers and employees, as well as the conflict of interest provisions in Berkeley City Charter Section 36 and Berkeley

Municipal Code Chapter 3.64. All parties hereto agree that they are unaware of any financial or economic interest of any public officer or employee of the 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, the City may immediately terminate this Agreement by giving written notice thereof.

- e. Labor Peace. TSA understands that it is the City's expectation that any future Master Lease, and any potential sublease agreements, would include provisions that prohibit TSA or any of its tenants or subtenants from engaging in practices that impede any employee's ability to organize or contract with a labor organization for the purpose of collective bargaining (e.g., harassment, intimidation, "captive audience" anti-union meetings or illegal terminations of workers in retaliation for organizing).
- f. Employment Opportunities for Former Hs Lordships Employees. TSA understands that it is the City's expectation that employees of the former Hs Lordships restaurant located at 199 Seawall Drive employed at the time of the restaurant's closure would be offered an opportunity to apply for positions in new business operations conducted on the property.
- g. Insurance. TSA shall maintain at all times during the performance of the Agreement a commercial general liability insurance policy with a minimum occurrence coverage in the amount of \$2,000,000 (two-million dollars); and, if any automobile is used to perform services under this contract, an automobile liability insurance policy in the minimum amount of \$1,000,000 (one-million dollars); and, if any licensed professional performs services under this contract, a professional liability insurance policy in the minimum amount of \$2,000,000 to cover any claims arising out of TSA's performance of services under this Agreement. All insurance, except professional liability, shall name the City, its officers, agents, volunteers and employees as additional insureds and shall provide primary coverage with respect to the City.
 - i. All insurance policies shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said policies except upon thirty (30) days written notice to the City's Contract Administrator; 2) be evidenced by the original Certificate of Insurance, specifying the required coverage and the insurance carrier's standard additional insured form endorsement; and 3) be approved as to form and sufficiency by the City's Contract Administrator. **The original insurance certificates and all extensions to the insurance certificates should be sent to the address identified below.**
 - ii. If the commercial general liability insurance referred to above is written on a Claims Made Form then, following termination of this Agreement, coverage shall survive for a period of not less than five years. Coverage shall also provide for a retroactive date of placement coinciding with the effective date of this Agreement.

- iii. If TSA employs any person, it shall carry workers' compensation and employer's liability insurance and shall provide a certificate of insurance to the City. The workers' compensation insurance shall: 1) provide that the insurance carrier shall not cancel, terminate or otherwise modify the terms and conditions of said insurance except upon thirty (30) days written notice to the City's Contract Administrator; 2) provide for a waiver of any right of subrogation against City to the extent permitted by law; and 3) shall be approved as to form and sufficiency by the Contract Administrator.
- iv. TSA shall forward all insurance documents to:
 - 1. **Department Name:** Parks, Recreation & Waterfront Department
 - 2. **Department Address:** 2180 Milvia St., 3rd Floor, Berkeley, CA 94704
- h. Deliverables. Over the course of the Agreement, TSA will conduct studies, meet with the City and regulatory agencies, and evaluate the feasibility of the project. TSA shall furnish City with all studies, drawings, and evaluations upon completion. Upon the termination of the Agreement, TSA shall furnish the City with all studies, drawings and documents in their complete or most complete state. TSA shall submit as-built drawings of the Property prior to the end of the Agreement.

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

- a. In the event of an uncured default by a party, the non-defaulting party's sole remedy shall be to terminate this Agreement. Following such termination, neither party shall have any further right, remedy or obligation under this Agreement, except that Developer's indemnification obligations pursuant to Section 11 shall survive termination.
- b. In no event shall either party be entitled to damages of any kind in the event of termination of this Agreement. Except as expressly provided in subsection (a) of this Section 9, neither party shall have any liability to the other party for damages arising out of or related to performance under this Agreement or otherwise for any default, nor shall either party have any other claims with respect to performance or default under this Agreement. Each party specifically waives and releases any such rights or claims it may otherwise have at law or in equity.

10. TERMINATION

This Agreement may be terminated by mutual agreement, or as a remedy for an uncured default. Unless terminated by City or TSA pursuant to this Section, this Agreement shall terminate without notice on the earlier of (i) the expiration of the Exclusivity Period; or (ii) the execution by the City and TSA of the Ground Lease.

11. INDEMNITY

TSA releases and discharges, and agrees to defend, indemnify and hold harmless, the City and the City’s former, present and future governing bodies, 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 Property and/or the proposed redevelopment.

12. STATE TIDELANDS GRANT

Tenant acknowledges that the Property is located on State tidelands held by the City of Berkeley in trust pursuant to Chapter 347 of the California Statutes of 1913, as amended (“the Grant”). Tenant agrees that any interpretation of this Agreement and the terms contained herein must be consistent with such limitations, conditions, restrictions and reservations.

13. MISCELLANEOUS

- a. This Agreement together with all exhibits hereto constitutes the entire agreement between the parties with respect to the subject matter hereof. Any amendment or modification of this Agreement must be in writing and signed by all of the parties hereto, and any waiver of any provision of this Agreement must be by written instrument signed by the party charged with the alleged waiver.
- b. This Agreement shall inure to the benefit of and be binding upon the parties and their successors and assigns.
- c. This Agreement shall be construed and enforced in accordance with the laws of the State of California and may be signed in any number of counterparts.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement effective as of the Effective Date.

TSA:

CITY:

TSA Holdings, LLC.,
a California Corporation

City of Berkeley,
a California municipal corporation

By: _____
Owner
Terry Ayyed

By: _____
Paul Buddenhagen,
City Manager

Approved as to form:

Registered by:

City Attorney

City Auditor

Attest:

City Clerk

Exhibit B: Potential Term Sheet for Future Lease

The following is a summary of draft terms between the City of Berkeley and TSA Holdings (TSA) for a potential future Lease Agreement for the property at 199 Seawall Drive at the Berkeley Waterfront:

Use:	The premises shall be used primarily as a restaurant and event space.
State Tidelands:	Tenant acknowledges that the premises is located on State of California Tidelands and must be used in a manner consistent with the Public Trust Doctrine.
Term:	45 years with two 10-year tenant options to extend.
Rent:	<i>Base Rent:</i> Years 1-5: no base rent. Year 6: \$200,000/year. Year 7+: \$350,000/year escalating at 3%/year. <i>Percentage Rent:</i> Years 1-7: No percentage rent. Years 8+: Up to 6% of gross sales (less the \$350k base rent)
Condition of Delivery:	The landlord will deliver the premises in as-is condition.
Improvements :	Tenant will fund all necessary improvements to upgrade the facility.
Sublease & Assignment:	Tenant shall have the right to Sublease all or any portion of the Premises provided that sublessees comply with State Lands Commission requirements for tidelands. Subleasing must be approved by the Landlord with prior written consent, which shall not be unreasonably withheld.
Labor Peace	TSA understands that it is the City’s expectation that any future Lease, and any potential sublease agreements, would include provisions that a hospitality operation at the 199 Seawall Drive property shall be required to provide evidence satisfactory to the City that it is party to a labor peace agreement that protects the City’s proprietary interest in the property.
Employment Opportunities for Former Staff	TSA understands that it is the City’s expectation that employees of the former Hs Lordships restaurant located at 199 Seawall Drive employed at the time of the restaurant’s closure would be offered an opportunity to apply for positions in new business operations conducted on the property.
Non-Binding:	This term sheet is only a proposal to negotiate and is neither an offer nor a contract.
Approval/ Execution:	This Term Sheet is only a list of the above terms and conditions that may or may not become a part of the final Master Lease. This Term Sheet is not intended to be binding or to impose any obligations whatsoever on either party, including any obligation to bargain in good faith. No covenants are implied. The parties do not intend to be bound by an agreement until both parties have executed a formal written Lease contract. In addition, this Term Sheet is subject to review and acceptance of the final terms and conditions of the Lease and related documents. Nothing contained herein shall be binding on either party unless and until such documents are approved, fully executed and exchanged by both parties. Either party is free to terminate the negotiations at any time, and will not by doing so incur any additional obligations or liability.