

OHLONE COMMUNITY COLLEGE DISTRICT
BOARD RESOLUTION NO. 23/06-07

RESOLUTION OF INTENTION TO LEASE SCHOOL
PROPERTY NOT NEEDED FOR SCHOOL CLASSROOM
BUILDINGS AND FIXING THE TIME AND PLACE AT
WHICH BIDS TO LEASE SHALL BE CONSIDERED

The Board of Trustees of the Ohlone Community College District, in regular and open meeting, finds and resolves as follows:

WHEREAS, the Ohlone Community College District (sometimes herein called the "District") owns real property located in the City of Fremont, County of Alameda, State of California, consisting of **[need description of the subject property, whether each separate parcel or all of them (the "Property"),]** located on the eastern side of Mission Boulevard, Fremont, California (hereinafter called "Surplus District Property" or the "Property"), which Surplus District Property is more particularly described in a document entitled the "Site Property Description" which is on file and available for inspection at District Administrative Services, located at Room 1145, Building 1, Ohlone College, 43600 Mission Boulevard, Fremont, CA; and

WHEREAS, this Board has previously found that the Surplus District Property is not now, and will not at the time of delivery of possession be needed by the District for school classroom buildings; and

WHEREAS, this Board has determined that it is in the best interest of the District to lease the Surplus District Property to a responsible bidder;

NOW, THEREFORE, BE IT RESOLVED, that this Board hereby declares its intention to commence the process necessary to lease the Surplus District Property in accordance with applicable law on terms and conditions which are hereinafter set forth; and

BE IT FURTHER RESOLVED, that Notice is hereby given that all sealed, written proposals (bids) for the lease of the Surplus District Property must be delivered to Mike Calegari, Vice President, Administrative Services, Room 1145, Building 1, Ohlone College, 43600 Mission Boulevard, Fremont, CA 94539, prior to 5:00 p.m. on Wednesday, October 10, 2007. No sealed bids will be accepted after 5:00 p.m.; and

BE IT FURTHER RESOLVED, that this Board hereby authorizes Mike Calegari, Vice President, Administrative Services, to receive and open sealed proposals to lease and to call for oral bids; and

BE IT FURTHER RESOLVED, that Notice is hereby given that this Board fixes 7:00 p.m. on Wednesday, October 10, 2007, at Ohlone College Child Development Center (Fremont Main Campus), 43600 Mission Boulevard, Fremont, CA 94539, as the time, date, and place for opening, examining, declaring, and considering the sealed bids which have been received, and for the calling for and considering of oral bids; and

BE IT FURTHER RESOLVED, that the Surplus District Property may be leased under the following additional terms and conditions:

1. The Property may be leased as more particularly hereinafter set forth. The District prefers a single tenant to master lease and develop the entire Surplus District Property but may consider separate bids from prospective tenants to develop only retail or only residential housing on a portion of the Property.

2. Each written bid must be submitted on the District's Bid Form, available upon application at the Ohlone Community College District from Mike Calegari, Vice President, Administrative Services, Room 1145, Building 1, Ohlone College, 43600 Mission Boulevard, Fremont, CA 94539. Each bidder, either prior to or at the time of submission of its bid, must deliver to District a certified check or cashier's check in the amount of Twenty Five Thousand Dollars (\$25,000.00), as an initial bid deposit ("Deposit") payable to the Ohlone Community College District. The Deposit shall not be placed in escrow but shall be held by the District. The completed bid form (and initial deposit if not previously delivered to District) must be placed in a sealed envelope marked "Bid for the Surplus District Property".

3. At the time and place above mentioned for the opening and examination of bids, upon a call for oral bids at said session, any responsible person, upon submitting to Mike Calegari, Vice President, Administrative Services, Room 1145, Building 1, Ohlone College, 43600 Mission Boulevard, Fremont, CA 94539, a certified check or cashier's check in the amount of Twenty Five Thousand Dollars (\$25,000.00), may offer to lease the Surplus District Property upon the terms and conditions set forth in this resolution and notice for a price exceeding by at least five (5%) percent of the highest of said written proposals submitted. No final acceptance of an oral bid shall be made until the oral bid is reduced to writing, and signed by the offerer, and accompanied by an initial bid and deposit and submitted to the District.

4. The final acceptance or rejection by the Board of a written or oral bid may be made during a regular session of this Board to be held on Friday, October 19, 2007, or as otherwise determined by this Board. After acceptance of a bid (the "Bid Award"), the District and the successful bidder shall enter into negotiations of a ground lease for the Property consistent with the provisions of the accepted bid and containing other provisions as the District may require ("Lease").

5. This Board reserves the right to reject any and all bids, written or oral, and to withdraw the Property from being leased. This Board also reserves the right to waive any and all defects in bids and to waive technicalities. The Board reserves the right to

determine who is a responsible bidder, and to accept a bid that may not be the highest bid, based upon multiple factors that may be considered by the Board to the extent the California Community College Board of Governors allows such factors to be considered. If the District accepts a bid, the District may accept the highest bid made by a responsible bidder that materially conforms to the terms and conditions specified in this Resolution, or it may accept a bid that is not necessarily the highest bid pursuant to the District's Request for Waiver of Education Code Section 81370(b) allowing the District to accept such a bid, which Request has been made to the California Community College Board of Governors.

6. Time is of the essence in all terms and conditions of the Lease as set forth herein.

7. The Lease shall be made without warranty, express or implied and subject to all liens, easements, and encumbrances, whether of record or not.

8. The bidder is responsible for inspecting the Property prior to submitting a bid. The District makes no warranties whatsoever concerning the exact area of the site, or the condition of the site, or any of the improvements thereon. Tenant, at its expense, shall be responsible for obtaining any subdivision of the Surplus District Property from the rest of the District's lands sufficient to create legal parcels consistent with the property descriptions contained herein.

9. Upon final acceptance by the District, if any, of a bid, the deposits of the unsuccessful bidders will be returned to them.

10. The bidder acknowledges the City of Fremont's current land use and zoning designation on the Property.

11. The time within which any obligation set forth herein is to be performed may be extended by the District at the sole option of the District. The District is under no obligation to grant any said extension other than those specifically set forth in the following paragraphs. Said extension, if any, shall be granted in the District's absolute discretion where said extension would, in the District's absolute discretion, be of benefit to the District.

12. The bidder's rights and obligations shall not be assignable without the prior written consent of the District. Said consent may be granted or withheld at the District's sole discretion.

13. In the event any legal action or litigation is undertaken by the District to enforce the provisions of the bid and agreement to lease, the bidder agrees to pay reasonable attorney fees incurred by the District.

14. A leasehold interest to the Property shall be conveyed in accordance with the terms hereof by a written lease to be written and subject to all liens, encumbrances, or other cloud on title that may affect the Property.

15. The Deposit shall become non-refundable and shall belong to the District without further action upon final acceptance of the bid by the Board, at which time the successful bidder shall deposit with Mike Calegari, Vice President, Administrative Services, Room 1145, Building 1, Ohlone College, 43600 Mission Boulevard, Fremont, CA 94539, within three (3) business days, an additional sum equal to Five Thousand Dollars (\$5,000.00) multiplied by the total number of acres being bid upon (“Additional Deposit”), which shall immediately become non-refundable and shall be released from escrow, provided, however, that the successful bidder shall have seventy-five (75) days commencing on the date the Additional Deposit is made (the “Due Diligence Period”) to satisfy itself that the City of Fremont (the “City”) would be willing to allow the successful bidder’s contemplated project to go forward. In the event the successful bidder fails to deliver notice to Mike Calegari, Vice President, Administrative Services, Room 1145, Building 1, Ohlone College, 43600 Mission Boulevard, Fremont, CA 94539, of its intention not to proceed with the Lease of the Property prior to the end of the Due Diligence Period, the Additional Deposit shall immediately become non-refundable. In the event the successful bidder fails to execute the Lease and consummate the transaction as described herein, the Deposit and the Additional Deposit shall be forfeited by the bidder and retained by the District as liquidated damages for the period the Property has been kept off the market due to the acceptance of said successful bid. The foregoing is without limitation or waiver of all other equitable and legal rights and remedies of the District with respect to said successful bidders’ failure to execute the lease and consummate the transaction, including without limitation an action at law for damages. A security deposit for the Lease will also be required, with the amount and terms to be negotiated with the successful bidder. Further, District shall have the right, in its sole and absolute discretion, to terminate negotiations with the successful bidder at any time after the one hundred eightieth (180th) day after the Bid Award in the event a Lease has not been signed by that day. In such an event, the Deposit and the Additional Deposit shall be kept by the District.

16. The transaction shall be consummated through an escrow to be opened by the parties. The parties may waive the use of an escrow if mutually approved. All escrow and other costs shall be the responsibility of the successful bidder.

17. The Lease shall be subject to such other terms and conditions as the District may require, including but not limited to District’s review and approval of the status of the entity making the bid. District’s acceptance of a bid shall not constitute a binding agreement with District for the lease of the Property, and any such binding obligation to lease shall occur, if at all, upon the execution of the Lease. In the event District and the successful bidder are not able to agree on all terms of the Lease, then the District may terminate negotiations with the successful bidder and/or request new bids to lease. All deposits held by District shall be retained by District to the extent each such deposit has become non-refundable. If negotiations are terminated by the District as

provided herein, such termination shall be without penalty or liability of the District to the successful Bidder.

18. The minimum basic terms to be included in the Lease are as follows (the successful bidder shall henceforth be referred to herein as “Tenant”):

- A.
 - i. The term of the Lease shall be for fifty (50) years (“Initial Term”), with one (1) renewal option (“Option Term”) for an additional ten (10) years or any combination of an Initial Term plus an option which does not exceed sixty (60) years. The rent for said Option Term shall be negotiated by the parties prior to executing the Lease. District may require one or more guaranties of the Tenant’s obligations under the Lease. Each bidder should submit the name of each proposed guarantor and a financial statement of each such guarantor. Terms of any such guaranty shall be negotiated prior to executing the Lease.
 - ii. Annual Base Rent shall be determined prior to execution of the Lease, and shall be equal to the appraised fair market value of the Property per square foot multiplied by at least an eight percent (8%) rate of return. Base Rent shall be paid in advance in equal monthly installments. The appraised fair market value of the Property shall be determined based on the specific use intended for the Property, but without entitlements. The District would prefer a fixed rent as described herein but would consider a combination of a fixed rent and a participation rent, the combination of which would result in a higher return to the District than the minimum fixed rent described herein with said combined return reflective of the increased risk to the District in accepting the uncertainty of participation rent. Commencement of Base Rent shall occur upon the execution of the Lease. Full Base Rent shall be payable upon completion of the first building on the Property or upon expiration of two (2) years after execution of the Lease, whichever occurs first. Partial Base Rent shall be payable prior to completion of said first building in amounts to be negotiated by the parties prior to execution of the Lease.
 - iii. During the term of the Lease, including any option extensions, Base Rent shall be increased on a periodic basis. The frequency and the amount of the increase shall be negotiated by the parties prior to execution of the Lease.

iv. During the term of the Lease, Base Rent will be recalculated on a periodic basis from the date of execution of the Lease. Base Rent at the time of each recalculation shall be based upon the then appraised fair market value of the Property, based upon the then current use of the Property, multiplied by at least an eight percent (8%) return, but in no event shall Base Rent be less than Base Rent in the prior year. The frequency of the increase shall be negotiated by the parties prior to execution of the Lease. In the event of any option term extensions, Base Rent shall be recalculated on a periodic basis from the date of the commencement of the option term, which recalculation shall be based upon the then appraised fair market value of the Property, based upon the highest and best use of the Property, multiplied by at least an eight percent (8%) return, but in no event shall Base Rent be less than Base Rent in the prior year.

B. Tenant's obligation to lease the Property shall be subject to the following conditions, which must be satisfied or waived within the time periods set forth below:

1. Tenant shall have seventy-five (75) days commencing upon delivery to the District of the Additional Deposit ("Due Diligence Period") to satisfy itself as to the following conditions:

- a. Approval of the condition of title to the Property;
- b. Approval of the physical condition of the Property, including without limitation: soil and ground water conditions; the presence of hazardous materials on the Property or the potential for migration of hazardous materials onto the Property from other properties; and archeological and geological matters;
- c. Satisfaction that the Property is currently feasible for Tenant's intended use in all respects, including without limitation, all matters with respect to zoning, access, availability of utilities and infrastructure and any other matters deemed appropriate by Tenant.

2. After the Due Diligence Period, no conditions shall exist to Tenant's performance under the Lease, except that the

Lease shall be subject to final approval by the City of all necessary land use/planning, zoning, environmental and building approvals for development of the Property.

3. Should the Lease be terminated or not executed because of the occurrence of any of the conditions precedent set forth in Paragraphs 18.B(1) or 18.B(2) above, District shall retain all deposits and rents received from Tenant up to said time of termination or cessation of negotiations.
 4. Upon the Bid Award, Tenant or its agents and contractors will have the right to enter the Property to inspect it and conduct tests subject to a Right of Entry Agreement between the parties. Tenant will indemnify District against any losses resulting from such entry or inspection (which indemnity will survive termination of negotiations), though not from diminution in value due to discovered defects. Upon the Bid Award, District will deliver documents, records, reports, surveys, governmental approvals, and other documentary information in District's possession that relate to the use, occupancy, or condition of the Property.
- C. District's obligations to lease the Property will be subject to the following conditions:
1. Accompanying the submission of a bid, Tenant shall provide District with information regarding the financial condition of Tenant and Tenant's guarantor(s), including but not limited to: information demonstrating the overall financial strength of the development team and demonstrating the ability to provide necessary capital for funding predevelopment activities, securing construction and permanent loan financing, providing required equity either directly and/or with capital partners, and providing funding for ongoing operations (including maintenance, reserves, etc.). The information shall also demonstrate Tenant's involvement in financing structures for projects similar to the proposed Project and provide any information which would indicate a current relationship with financial resources who have demonstrated an interest in financing the proposed Project. This information may include current prospectuses, financial statements, balance sheets and income statements.
 2. District shall have ten (10) days from its receipt of such information in which to review such information and to

either approve or reject the financial condition of Tenant or Tenant's guarantor(s).

3. Accompanying the submission of a bid, Tenant shall be responsible for submitting a proposal to the District for the relocation of the existing parking areas on the Property (the "Existing Parking Lots"), and for assisting the District with the relocation of the Existing Parking Lots to new locations on the College campus (the "New Parking Lots"). The terms and conditions of Tenant's proposal and assistance for the relocation of the Existing Parking Lots and the location of the New Parking Lots shall be negotiated by the parties prior to the execution of the Lease. Prospective bidders should contact Mike Calegari to obtain information regarding the District's current plans as to the location and nature of the New Parking Lots.
- D. Upon Lease execution, Tenant shall have a right of entry onto the Property for the purpose of pursuing the development of the Property. Possession shall be delivered to Tenant ten (10) business days after Tenant has obtained a building permit for the Project. Tenant shall covenant and warrant to use its best efforts to secure building permits.
- E. Tenant shall, in all respects, accept the Property in its current "as-is" condition, including the presence of any hazardous materials on the Property, if any, subject to limited representations and warranties as follows: District will represent that, to District's current actual knowledge, (i) District has not received any written notice that the Property is in violation of applicable laws, (ii) there are no pending or threatened condemnation proceedings, governmental investigations or any other litigation that affect the Property, and (iii) District has not received any written notice of and is not aware of the presence of any hazardous materials on, in, under or adjacent to the Property except for permitted hazardous materials used in conjunction with District operations or as otherwise disclosed.
- F. All light, heat, power and utilities to be paid by Tenant, except as otherwise provided herein.
- G. Tenant is to pay all taxes and assessments during the Lease term and all costs associated with Tenant's activities concerning the Property.

- H. Any possessory interest tax, or any real property or personal property tax, or a non-use payment assessed as a result of the Lease of the Property, will be the responsibility of the Tenant.
- I. Tenant to pay all insurance charges during the lease term, including liability insurance in an amount to be mutually agreed upon by the parties and District shall be named as an additional insured.
- J. Tenant may construct improvements. Tenant acknowledges that all improvements and their design shall be subject to approval by the District and the City. The design of all improvements shall be subject to District's reasonable approval and shall be submitted to District for review and approval prior to Tenant's submission to the City of its application for entitlements. The District's desires for the specific areas and types of uses to be developed by Tenant, include retail and housing with an upscale grocery store and at least 40,000 square feet of additional retail space which might include a bookstore and/or food service tenants. The proposed project shall include at least 50,000 square feet of retail space and at least 200 housing units. The number and type of affordable housing units shall be as required by the City of Fremont Inclusionary Housing Program. The position of buildings shall enhance visibility corridors from Mission Boulevard to the upper campus of the District Property where feasible, as well as provide desired visual exposure for retail tenants. The olive tree lanes along Mission Boulevard and running east and west to the upper campus of the District Property shall be preserved. The construction shall be all at Tenant's cost in accordance with permissible lease use, District's approval (which shall not be unreasonably withheld), and applicable laws. All improvements to be constructed by or on behalf of Tenant shall feature an aesthetically-pleasing, upscale, attractive, high-quality, first-class appearance and design. The development shall include a vibrant, active mixed-use "Village Center", including community/neighborhood serving retail uses and services and housing all designed to compliment and enhance the historic character of the Historic Mission San Jose District. The development should also include active pedestrian plazas oriented to Mission Boulevard incorporating the historic olive promenade as a key design element and community amenity and include pedestrian linkages to the core campus area. A new, compelling entry to Ohlone College through architectural, landscape, signage and graphic elements is desired as part of the development. Tenant acknowledges that the process for approval of the design of the improvements may include public review, comment and advice.

- K. Tenant shall be responsible, at its cost, for obtaining all necessary entitlements. Tenant shall pay all expenses associated with the development and use of the Property. Tenant shall indemnify, defend and hold District harmless from any expense or liability arising from or with respect to the development, construction, improvements, possession and/or use of the Property.
- L. Tenant shall defend and hold District harmless with respect to mechanics' and materialmen's liens in connection with improving the Property. Tenant and District shall negotiate regarding further assurance concerning protecting District and District's interest from mechanics' and materialmen's lien claims.
- M. Tenant shall perform all maintenance and repairs on the Property at Tenant's cost. Once the improvements are built, Tenant shall maintain the improvements in good and first class condition repair at all times at Tenant's cost.
- N. Improvements shall remain the property of Tenant, except that on expiration or termination of the Lease, such improvements become the property of the District, at no cost or expense of District except as otherwise specifically provided in the Lease.
- O. Tenant, at its sole cost and expense, shall remove all improvements, at District's option, upon expiration or termination of the Lease, except as otherwise specifically provided in the Lease.
- P. The Lease shall also contain clauses, concerning without limitation, hypothecation, eminent domain, prorations, quiet enjoyment, District's right of inspection, memorandum of lease, waste, surrender, notice, District's remedies, interpretation of documents, and force majeure.
- Q. Tenant shall have the right to sublease portions of the improvements to individual subtenants, and shall have discretion with regard to the selection of the subtenants. Notwithstanding the foregoing, Tenant agrees to work with District to negotiate tenancies that may encourage a mutually beneficial relationship between the District and Tenant. Tenant shall not assign or transfer its interest in the Lease without the prior written consent of Landlord who shall establish standards in the Lease for the financial strength, experience and reputation of the proposed transferee, unless such assignment or transfer is to an affiliate of Tenant that is owned or controlled by Tenant or whose obligations

are personally guaranteed by an individual previously agreed to be satisfactory to Landlord, in which case Landlord's prior written consent shall not be required. An affiliate of Tenant shall be deemed to be owned or controlled by Tenant if Tenant is a managing member or managing partner in such entity and holds greater than a fifty percent (50%) ownership interest in such related entity. In no event shall any assignment to an affiliate of Tenant release Tenant of any liability arising under the Lease. If a non-affiliate assignee (approved by Landlord) is of equal or greater financial strength of Tenant (as reasonably determined by Landlord), then Tenant may be released from liability under the Lease after the expiration of two (2) years from the date of assignment if the assignee has not defaulted during that period.

- R. All mineral rights shall be reserved to the District.
- S. Tenant acknowledges that District shall not be liable for any brokerage commissions and Tenant will indemnify District against any claims for brokerage commissions or finder's fees arising from the transaction contemplated by Tenant's bid and/or the subsequent Lease.
- T. The fee interest in the Property shall not be subordinated to the leasehold interest in the Property. Tenant may encumber the leasehold interest but in no event shall the fee interest in the Property be subordinated to any leasehold mortgage.
- U. The Lease shall contain customary provisions, including but not limited to assignment, amendment, alteration, casualty, condemnation, mortgages, and lender's provisions for default notice and opportunity to cure, estoppels, nondisturbance and attornment, provided that such terms are consistent with the terms contained in the accepted bid, as well as such other terms and conditions as District and Tenant may agree.

BE IT FURTHER RESOLVED, that the amounts paid by Tenant and designated as non-refundable, are reasonable estimates of the damages that at the time might be otherwise difficult to fix and ascertain. The Tenant agrees that by submission of a bid, that said amounts are reasonable estimates of damages and agrees that said amounts shall be retained by the District as liquidated damages, and not as penalty.

BE IT FURTHER RESOLVED, that the Secretary of this Board is hereby directed to post copies of this Resolution and Notice signed by the President of this Board in three public places in the District not less than fifteen (15) days before the date of said public meeting referred to above, and to publish a copy of this Resolution and Notice not

less than once a week for three (3) successive weeks before the date of said public meeting in a newspaper of regular circulation in the District.

PASSED AND ADOPTED by the Governing Board of the Ohlone Community College District by the vote of not less than two-thirds (2/3) of its members on the ____ day of _____, 2007 as follows:

AYES:

NOES:

ABSENT:

I, Douglas Treadway, Secretary of the Board of Trustees of the Ohlone Community College District, do hereby certify the foregoing is a full, true and correct copy of a resolution adopted by the Board of Trustees at a regular meeting thereof held at its regular place of meeting at the time and by the vote stated above, which resolution is on file in the office of the Board of Trustees.

Douglas Treadway, Secretary,
Board of Trustees, Ohlone
Community College District

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