
Revision to ASR and/or Exhibits/Attachments

Date: October 26, 2012

To: Susan Novak, Clerk of the Board of Supervisors

Cc: County Executive Office

From: Ignacio G. Ochoa, P.E., Interim Director, OC Public Works

Item(s) # S37A for the October 30, 2012 Board Meeting

Subject: Exclusive Negotiating Agreement with Lowe Enterprise, Inc.

Explanation:

OC Public Works is requesting to include the complete document for Exhibit A.

Revised Exhibits/Attachments (attached)

Complete Document for Exhibit A

Exhibit A

EXCLUSIVE NEGOTIATION AGREEMENT

THIS EXCLUSIVE NEGOTIATION AGREEMENT (the "**Agreement**") is entered into this ____ day of _____, 2012 ("**Agreement Date**"), between the **COUNTY OF ORANGE**, a political subdivision of the State of California ("**County**") as Owner, and **LOWE ENTERPRISES REAL ESTATE GROUP**, a California corporation ("**Developer**"). County and Developer are collectively referred to as the "**Parties.**"

In consideration of the mutual covenants contained herein, County and Developer agree as follows:

Section 1. Negotiations. This Agreement is intended to be an exclusive right to negotiate only and is not a final agreement for the sale, lease or development of the Site (as such term is defined below). The Parties do not intend this Agreement to be a lease, purchase agreement, option or similar contract or to be bound in any way by this Agreement, other than to establish a period of negotiations, as set forth hereafter.

1.1 Good Faith Negotiations. County and the Developer agree for the Term (as hereinafter set forth) to negotiate diligently and in good faith to prepare the necessary agreements and complete the matters set forth in Section 3, below, which the Parties have deemed necessary to accomplish the development of certain vacant real property owned by the County at the former Marine Corps Air Station at El Toro, located in the City of Irvine, Orange County (the "**Site**"). The Site is shown on the "Map of the Site," attached hereto as Exhibit A and incorporated herein by reference.

1.2 Exclusive. During the Term, County agrees not to enter into any binding negotiations with any other person or entity regarding the sale, development and/or control of the Site (and all portions thereof) or solicit or entertain bids or proposals to do so.

Section 2. Term. The "**Term**" of this Agreement shall be one (1) year commencing on the Agreement Date, unless extended in writing by mutual agreement of the Parties or earlier terminated in accordance with the provisions of this Agreement. This Term may be extended by mutual agreement of the Parties for up to three (3) additional periods of ninety (90) days each ("**Extension Periods**"), subject to approval of the Director, OC Public Works or designee.

Section 3. Tasks to be Completed within the Term of the ENA.

3.1 Tasks. During the Term, County and the Developer shall utilize their collective good faith efforts and due diligence to negotiate a developer contract for the master planning, entitlement and development of the Site, along with associated agreements, which may include, but not be limited to, a master ground lease, replacement ground lease and purchase agreement, as determined by the Parties through the negotiations. It is recognized by the Parties that the final form of the agreement and any additional agreements will be determined through the course of the negotiation process.

Exhibit A

3.2 Delivery of Documents and Reports. Developer shall provide County with copies of all reports, studies, analyses, correspondence, and similar documents, prepared or commissioned by the Developer with respect to this Agreement and the Site, promptly upon their completion and internal review by the Developer. County shall provide the Developer with copies of all reports, studies, analyses, correspondence, and similar documents prepared or commissioned by County with respect to this Agreement and the Site promptly upon their completion and internal review by County.

Section 4. Termination. This Agreement shall terminate upon the occurrence of any of the following circumstances:

4.1 The Agreement may be terminated in writing by the non-defaulting party upon the occurrence of an Event of Default (as set forth in Section 5 below) and the expiration of any period of a right to cure without such cure occurring.

4.2 Developer determines, in its reasonable discretion that the project contemplated by this Agreement is not economically feasible and provides thirty (30) days notice of such determination to County, along with supporting documentation for such determination.

4.3 The Parties come to an agreement on a long-term development agreement, and associated agreements, as contemplated by Section 3.1.

4.4 Expiration of the Term, including extensions thereto as provided in Section 2.

Section 5. Events of Default.

5.1 Default of Developer. In the event the Developer fails to negotiate in good faith, County may give written notice (“**County Default Notice**”) thereof to the Developer specifying in reasonable detail the grounds for County's determination that the Developer has failed to negotiate in good faith. Following the receipt of such notice, the Developer and County shall have ten (10) working days to resolve the dispute identified in the County Default Notice. If such dispute is not resolved to the reasonable satisfaction of County within such time period, this Agreement may be terminated pursuant to section 4.1 herein by delivery of written notice (“**Termination Notice**”) from County to Developer which shall state the grounds for County's determination that such dispute remains unreconciled.

5.2 Default of County. In the event County fails to negotiate in good faith, the Developer shall give written notice (“**Developer Default Notice**”) thereof to County specifying in reasonable detail the grounds for the Developer's determination that County has failed to negotiate in good faith. Following the receipt of such notice, County and the Developer shall have ten (10) working days to resolve the dispute identified in the Developer Dispute Notice. If such dispute is not resolved to the reasonable satisfaction of Developer within such time period, this Agreement may be terminated pursuant to Section 4.1 herein by deliver of written notice (“**Termination Notice**”) from the Developer to County which shall state the grounds for Developer's determination that said dispute remains unreconciled.

Exhibit A

Section 6. Limitations of this Agreement/Termination. By executing this Agreement, County is not committing itself to, or agreeing to undertake disposition or leasing of the Site to the Developer. This Agreement does not constitute a commitment to a disposition or exchange of the Site by the County. Execution of this Agreement by County is merely an agreement to enter into a period of exclusive negotiations according to the terms herein, reserving final discretion and approval by the County, of any other agreement(s) contemplated in this Agreement and all proceedings and decisions in connection therewith.

Section 7. Hold Harmless and Indemnity. Developer hereby waives all claims and recourse against County including the right of contribution for loss or damage of persons or property arising from, growing out of or in any way connected with or related to this Agreement, or Developer's actions pursuant to this Agreement with respect to the Site, except claims arising from the concurrent active or sole negligence of County, its officers, agents, and employees. Developer hereby agrees to indemnify, hold harmless, and defend County, its officers, agents, and employees, with counsel reasonably approved by County, against any and all claims, loss, demands, damages, cost, expenses or liability arising out of or in any way connected with or related to this Agreement, or Developer's actions pursuant to this Agreement, and/or Developer's exercise of the rights under this Agreement, except for liability arising out of the willful misconduct, or active or sole negligence of County, its officers, agents, or employees, including the cost of defense of any lawsuit arising therefrom. In the event County is named as co-defendant with Developer, Developer shall notify County of such fact and shall represent County, with counsel reasonably approved by County, in such legal action unless County undertakes to represent itself as co-defendant in such legal action, in which event Developer shall pay to County its reasonable litigation costs, expenses and attorneys' fees. In the event judgment is entered against County and Developer because of the concurrent active negligence of County and Developer, their officers, agents, or employees, an apportionment of liability to pay such judgment shall be made by a court of competent jurisdiction. Neither party shall request a jury apportionment. Notwithstanding anything to the contrary provided herein, Developer's indemnification obligations set forth herein shall not apply with respect to any claims, damages, costs, liabilities and losses arising out of the mere discovery of facts related to, or a condition of, the Site.

Section 8. Notices. Formal notices, demands and communications between the Parties shall be sufficiently given if, and shall not be deemed given unless, dispatched by certified mail, postage prepaid, return receipt requested, or sent by an express delivery or overnight courier service that maintains written delivery records, to the office of the Parties shown as follows, or such other address as the Parties may designate in writing from time to time:

County: County of Orange
OC Public Works/ Land Development
300 North Flower Street
Santa Ana, CA 92703
Attention: James Campbell

With a copy to: County of Orange
Office of the County Counsel
10 Civic Center Plaza, 4th Floor

Exhibit A

333 West Santa Ana Blvd.
Santa Ana, CA 92701
Attention: Thomas (Mat) Miller

Developer: Lowe Enterprises Real Estate Group
5555 Overland Avenue, Suite 2311
San Diego, CA 92123
Attention: Michael McNerney

and

Lowe Enterprises
11777 San Vicente Blvd, Suite 900
Los Angeles, CA 90049
Attention: Corporate Counsel

and

Manatt, Phelps & Phillips
11355 W. Olympic Blvd.
Los Angeles, CA 90064
Attention: Timi A. Hallem, Esq.

Such written notices, demands, and communications shall be effective on the date shown on the written delivery record as the date delivered or the date on which delivery was refused. Notwithstanding the foregoing, either party may respond to the other party's request for information by delivering requested information to the address of the requesting representative set forth above.

Section 9. Entry On Site.

9.1 Developer's representatives, agents and designees will have the right, at reasonable times and upon not less than one (1) business days prior written notice to the County, to enter upon the Site; provided, however, no such party shall go on to the Site before a Certificate of Insurance and endorsements are delivered to the County, as described below:

Prior to entry onto the Site, as permitted by this paragraph, the Developer agrees to purchase all required insurance at Developer's expense and to deposit with the County Certificates of Insurance, including all endorsements required herein, necessary to satisfy the County that the insurance provisions of this Agreement have been complied with and to keep such insurance coverage and the certificates therefore on deposit with the County during the entire term of this Agreement. In addition, all subcontractors performing work on behalf of Developer pursuant to this Agreement shall obtain insurance subject to the same terms and conditions as set forth herein for Developer.

All self-insured retentions (SIRs) and deductibles shall be clearly stated on the Certificate of Insurance. If no SIRs or deductibles apply, indicate this on the Certificate of

Exhibit A

Insurance with a 0 by the appropriate line of coverage. Any SIR or deductible in an amount in excess of \$25,000 (\$5,000 for automobile liability), shall specifically be approved by the County Executive Office (CEO)/Office of Risk Management.

If the Developer fails to maintain insurance acceptable to the County for the full term of this Agreement, the Developer may not access the Site.

Qualified Insurer

The policy or policies of insurance must be issued by an insurer licensed to do business in the state of California (California Admitted Carrier) or have a minimum rating of A- (Secure A.M. Best's Rating) and VIII (Financial Size Category as determined by the most current edition of the Best's Key Rating Guide/Property-Casualty/United States or ambest.com.

If the insurance carrier is not an admitted carrier in the state of California and does not have an A.M. Best rating of A-/VIII, the CEO/Office of Risk Management retains the right to approve or reject a carrier after a review of the company's performance and financial ratings.

The policy or policies of insurance maintained by the Developer shall provide the minimum limits and coverage as set forth below:

<u>Coverage</u>	<u>Minimum Limits</u>
Commercial General Liability	\$1,000,000 per occurrence \$2,000,000 aggregate
Automobile Liability including coverage for owned, non-owned and hired vehicles	\$1,000,000 per occurrence
Workers' Compensation	Statutory
Employers' Liability Insurance	\$1,000,000 per occurrence
Professional Liability Insurance	\$1,000,000 per claims made or per occurrence

Required Coverage Forms

The Commercial General Liability coverage shall be written on Insurance Services Office (ISO) form CG 00 01, or a substitute form providing liability coverage at least as broad.

Exhibit A

The Business Auto Liability coverage shall be written on ISO form CA 00 01, CA 00 05, CA 0012, CA 00 20, or a substitute form providing coverage at least as broad.

Required Endorsements

The Commercial General Liability policy shall contain the following endorsements, which shall accompany the Certificate of insurance:

- 1) An Additional Insured endorsement using ISO form CG 2010 or CG 2033 or a form at least as broad naming the County of Orange, its elected and appointed officials, officers, employees, agents as Additional Insureds.
- 2) A primary non-contributing endorsement evidencing that the Developer's insurance is primary and any insurance or self-insurance maintained by the County of Orange shall be excess and non-contributing.
- 3) The Workers' Compensation policy shall contain a waiver of subrogation endorsement waiving all rights of subrogation against the County of Orange, and members of the Board of Supervisors, its elected and appointed officials, officers, agents and employees.

All insurance policies required by this Agreement shall waive all rights of subrogation against the County of Orange and members of the Board of Supervisors, its elected and appointed officials, officers, agents and employees when acting within the scope of their appointment or employment.

If Developer's Professional Liability policy is a "claims made" policy, Developer shall agree to maintain professional liability coverage for two years following the termination of this Agreement.

The Commercial General Liability policy shall contain a severability of interests clause also known as a "separation of insureds" clause (standard in the ISO CG 0001 policy).

County expressly retains the right to require Developer to increase or decrease insurance of any of the above insurance types throughout the term of this Agreement which shall be mutually agreed upon. Any increase or decrease in insurance will be as deemed by County of Orange Risk Manager to be appropriate to reasonably protect County.

County shall notify Developer in writing of changes in the insurance requirements. If Developer does not deposit copies of acceptable certificates of insurance and endorsements with County incorporating such changes within thirty (30) days of receipt of notice of required changes, this Agreement may be in breach without further notice to Developer, and Developer may not access the Site.

The procuring of such required policy or policies of insurance shall not be construed to limit Developer's liability hereunder nor to fulfill the indemnification provisions and requirements of this Agreement, nor act in any way to reduce the policy coverage and limits available from the insurer.

Exhibit A

9.2 Developer and County agree that:

9.2.1 Developer shall be permitted to perform investigations on the Site;

9.2.2 the persons or entities performing all Site visits will be properly licensed and qualified; and

9.2.3 Developer will schedule all Site visits during normal business hours whenever feasible unless otherwise requested by the County.

Section 10. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of California. In the event of any legal action to enforce or interpret this Agreement, the sole and exclusive venue shall be a court of competent jurisdiction located in Orange County, California, and the parties hereto agree to and do hereby submit to the jurisdiction of such court, notwithstanding Code of Civil Procedure Section 394. Furthermore, the parties specifically agree to waive any and all rights to request that an action be transferred for trial to another county.

Section 11. Entire Agreement. This Agreement contains the entire agreement of the Parties regarding the Site. This Agreement may be modified only by written agreement signed by the parties hereto.

Section 12. Captions. Captions at the beginning of each section of this Agreement are for reference only and shall in no way define or interpret any provision hereof.

Section 13. Confidentiality. Developer agrees to maintain the confidentiality of all County and Country-related records and information pursuant to all statutory laws relating to privacy and confidentiality that currently exist or exist at any time during the term of this Agreement. All such records and information shall be considered confidential and kept confidential by Developer and Developer's staff, agents and employees.

Section 14. Conflict of Interest. The County of Orange Board of Supervisors policy prohibits its employees from engaging in activities involving a conflict of interest. Developer shall not, during the period of this contract, employ any County employee for any purpose.

Section 15. Construction. The provisions of this Agreement have been jointly drafted by the Parties and shall be constructed as to the fair meaning and not for or against any Party based upon any attribution of such Party as the sole source of the language in question.

Section 16. Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original but all of which together shall constitute one and the same agreement.

Exhibit A

IN WITNESS WHEREOF, the parties, who have had the opportunity to consult with their attorneys with respect hereto and who fully and completely understand the terms and provisions hereof, have executed this Agreement as of the date set opposite their signatures. The effective date of this Agreement shall be the date the Agreement is signed by the last party to sign.

COUNTY:

THE COUNTY OF ORANGE, a political subdivision of the State of California

By: _____
Chairman of the Board of Supervisors

Date: _____

DEVELOPER:

LOWE ENTERPRISES REAL ESTATE GROUP, a California corporation

By: _____

Its: _____

Date: _____

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD PER GC § 25103, RESO. 79-1535

By: _____
Clerk of the Board of Supervisors, County of Orange, California

APPROVED AS TO FORM:

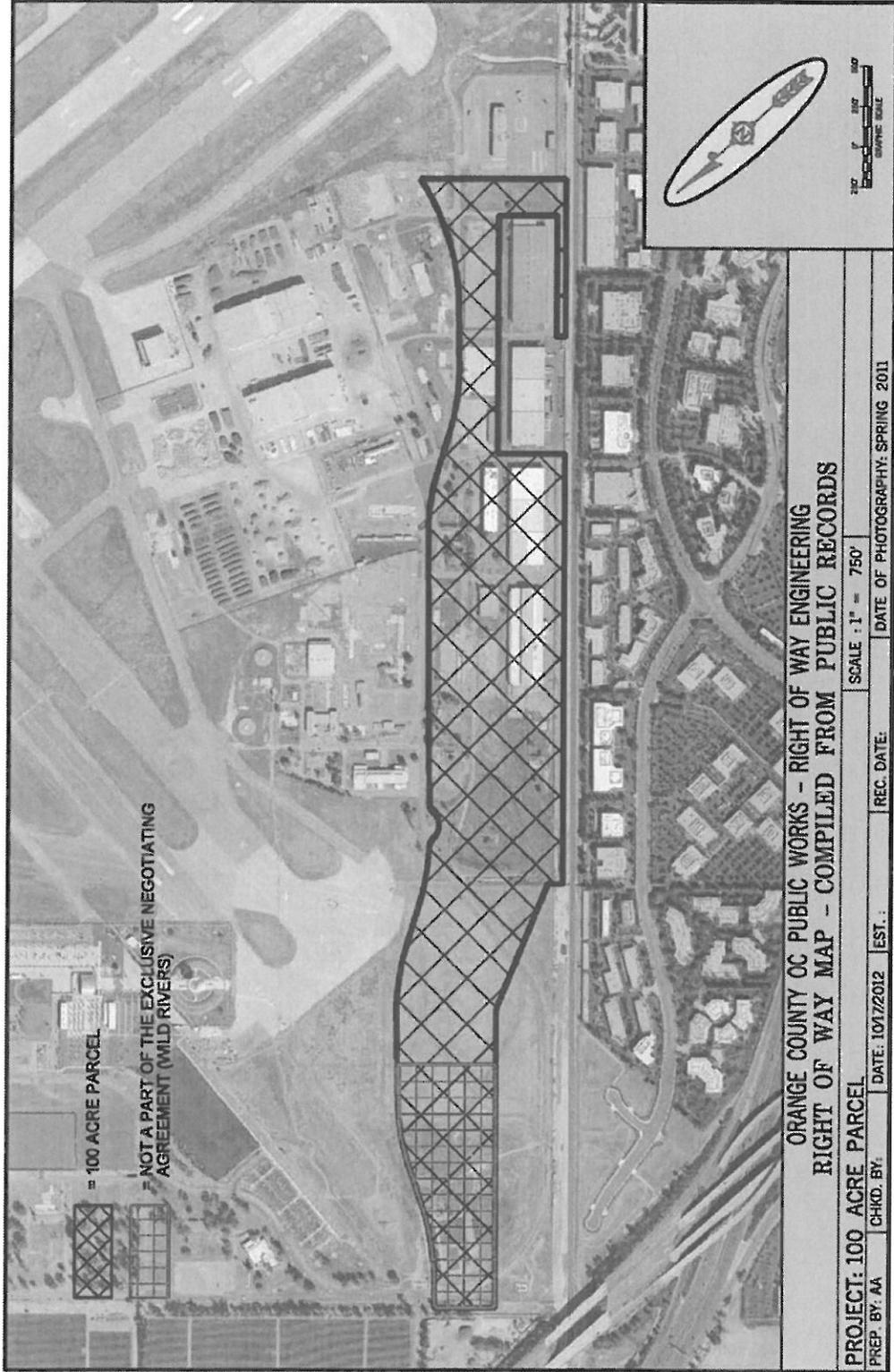
OFFICE OF COUNTY COUNSEL
ORANGE COUNTY, CALIFORNIA

By: Thomas A. Mill
Deputy

Exhibit A

EXHIBIT A

MAP OF THE SITE





S37A

County Executive Office
Memorandum

October 25, 2012

To: Susan Novak, Clerk of the Board

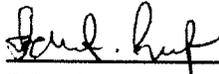
From: Robert J. Franz, Interim County Executive Officer

Subject: Exception to the Rule 21

The County Executive Office is requesting a supplemental for the October 30, 2012 Board Hearing Meeting.

Agency: OC Public Works
Subject: Exclusive Negotiating Agreement with Lowe Enterprise, Inc.
District: 3rd

Reason for supplemental: To assist in the negotiating process with Lowe Enterprise, Inc.

Concur:  For JMW
John M. W. Moorlach, Chairman, Board of Supervisors

cc: Rob Richardson, County Executive Office

RECEIVED
2012 OCT 25 PM 4:13
CLERK OF COUNTY BOARD OF SUPERVISORS



SUPPLEMENTAL AGENDA ITEM
AGENDA STAFF REPORT

ASR Control

MEETING DATE: 10/30/12
LEGAL ENTITY TAKING ACTION: Board of Supervisors
BOARD OF SUPERVISORS DISTRICT(S): 3
SUBMITTING AGENCY/DEPARTMENT: OC Public Works
DEPARTMENT CONTACT PERSON(S): Ignacio Ochoa (714) 667-3213
James Campbell (714) 667-9673

SUBJECT: Exclusive Negotiating Agreement with Lowe Enterprise, Inc.

CEO CONCURRENCE

[Signature]

COUNTY COUNSEL REVIEW

[Signature]

CLERK OF THE BOARD
Discussion

Budgeted: N/A Current Year Cost: N/A Annual Cost: N/A
Staffing Impact: N/A # of Positions: N/A Sole Source: N/A
Current Fiscal Year Revenue: N/A
Funding Source: N/A

Prior Board Action: 07/24/2012 #25; 11/08/2011 #29

RECOMMENDED ACTION(S)

- 1. Find that the recommended actions is Categorical Exempt from CEQA pursuant to Section 15301, as this action involved the permitting or licensing of an existing facility.
2. Approve the Exclusive Negotiating Agreement (ENA) with Lowe Enterprise Inc. (Lowe), and authorize the Chair of the Board to execute the ENA.
3. Authorize the OC Public Works Director, or designee to sign all necessary documents related to the provisions of the ENA necessary to carry out its terms.

SUMMARY:

Approval of this ENA will allow the County and Lowe to negotiate diligently and in good faith to prepare a developer contract for the master planning, entitlement and development of the 100-Acre parcel.

BACKGROUND INFORMATION:

On November 8, 2011, your Board directed OC Public Works to continue pursuing viable development options for the County parcels at the former MCAS El Toro that would generate long term County revenue. Staff was also directed to issue a Request for Statements of Qualifications (SOQ) to select a developer to aid the County in developing a master development plan and infrastructure-phasing plan for

the highest and best use of the 100-Acre parcel at MCAS El Toro that the County will receive as part of the base closure process and secure entitlements.

On July 24, 2012, your Board approved the selection of Lowe as the primary contractor to develop the 100-Acre parcel. On July 24, 2012, your Board also approved the selection of Shea Properties Management Company Inc. as the alternate contractor.

With the selection of the Lowe, staff began negotiations with Lowe and developed an ENA. The ENA provides for a 365-day period (Term) to negotiate a developer contract for the master planning, entitlement and development of the 100-Acre parcel, all associated agreements, which may include, but are not limited to, a master ground lease, replacement ground lease and purchase agreement. This Term may be extended by mutual agreement by the County and Lowe for up to 3 additional periods of 90 days each, subject to approval by the OC Public Works Director or designee.

This ENA is intended to establish a period of exclusive negotiations between the County and Lowe, reserving final discretion and approval by your Board of any agreements contemplated as a result of this ENA. This ENA shall not be construed as binding the Board to approve such agreements upon presentation.

During the Term of this ENA, the County and Lowe are agreeing to negotiate diligently and in good faith to prepare the necessary agreements and complete all matters that are necessary to accomplish the development of 100-Acre parcel. The County is agreeing not to enter into any binding negotiations with any other person or entity regarding the sale, development and/or control of the 100-Acre parcel. The ENA period will also allow Lowe to investigate possible financing for the project and to start locating potential tenants.

Compliance with CEQA: Find that the recommended actions is Categorical Exempt from CEQA pursuant to Section 15301, as this action involved the permitting or licensing of an existing facility.

FINANCIAL IMPACT:

N/A

STAFFING IMPACT:

N/A

REVIEWING AGENCIES:

N/A

EXHIBIT(S):

Exhibit A - Exclusive Negotiating Agreement with Lowe

IN WITNESS WHEREOF, the parties, who have had the opportunity to consult with their attorneys with respect hereto and who fully and completely understand the terms and provisions hereof, have executed this Agreement as of the date set opposite their signatures. The effective date of this Agreement shall be the date the Agreement is signed by the last party to sign.

COUNTY:

THE COUNTY OF ORANGE, a political subdivision of the State of California

By: _____
Chairman of the Board of Supervisors

Date: _____

DEVELOPER:

LOWE ENTERPRISES REAL ESTATE GROUP, a California corporation

By: _____

Its: _____

Date: _____

SIGNED AND CERTIFIED THAT A COPY OF THIS DOCUMENT HAS BEEN DELIVERED TO THE CHAIRMAN OF THE BOARD PER GC § 25103, RESO. 79-1535

By: _____
Clerk of the Board of Supervisors, County of Orange, California

APPROVED AS TO FORM:

**OFFICE OF COUNTY COUNSEL
ORANGE COUNTY, CALIFORNIA**

By: Thomas A. Mill
Deputy