SUBJECT: Approve an Exclusive Negotiating Agreement (ENA) between the City and MidPen Housing Corporation and Charities Housing Development Corporation as the Developers of an Affordable Housing Project at 620 East Maude Avenue.

REPORT IN BRIEF
At the March 1, 2011 LRA meeting, staff was directed to initiate discussions with MidPen Housing Corporation and Charities Housing Development Corporation on the City’s Armory site, located at 620 E. Maude Avenue, as a possible alternative site for affordable housing. Both homeless housing providers have determined that a joint project on the Armory site may work. To further determine project feasibility, the Board of Directors for each homeless housing provider requires an ENA with the City prior to allocating funds for additional pre-development expenses.

The City and MidPen Housing Corporation and Charities Housing Development Corporation have negotiated the terms of an ENA (Attachment A). Staff recommends approval of an ENA between the City and MidPen Housing Corporation and Charities Housing Development Corporation.

BACKGROUND
In 2005, Onizuka Air Force Station (OAFS) was recommended for closure by the Base Closure and Realignment Commission (BRAC). The LRA received two claims to construct homeless housing at the OAFS site. As discussed at the February 8 LRA study session, constructing housing at the site does not conform to the Moffett Park Specific Plan and is problematic due to the lack of convenient services for residents and the isolated location. At the March 1, 2011 LRA meeting, staff was directed to initiate discussions with the two homeless housing providers on the City’s Armory site as a possible location more suitable for housing. The National Guard relinquished its lease on the site on June 2011.

EXISTING POLICY
2010-2015 Consolidated Plan:

Goal A - Assist in the creation, improvement, and preservation of affordable housing for lower-income and special needs households.

Goal B - Alleviation of Homelessness
Objective: Help people who are currently homeless or at imminent risk of homelessness.
Housing and Community Revitalization Sub-element:
Goal HE-1: Assist in the provision of adequate housing to meet the diverse needs of Sunnyvale’s households of all income levels.

Goal HE-5: Promote equal housing opportunities for all residents, including Sunnyvale’s special needs populations, so that residents can reside in the housing of their choice.

Goal HE-6: Maintain sustainable neighborhoods with quality housing, infrastructure and open space that fosters neighborhood character and the health of residents.

DISCUSSION
With the recent availability of the City-owned Armory site as a potential alternative for the homeless housing obligation on OAFS, the City and MidPen Housing Corporation and Charities Housing Development Corporation have negotiated an ENA (Attachment A). The Board of Directors for each homeless housing provider requires an ENA with the City prior to allocating funds for additional pre-development expenses to prepare design plans and conduct site surveys and studies.

The ENA describes the parameters of the financial and pre-development obligations of all parties prior to entering into a more detailed Legally Binding Agreement (LBA). The initial term of the ENA is for one year and may be terminated by either party. The City Manager will have authority to extend the ENA agreement for up to 180 days upon the mutual agreement of both parties. The ENA does not obligate the City to enter into an agreement to lease or sell the Armory to the homeless housing providers. It is also dependent on executing an LBA on the Onizuka site.

Both developers have provided details of their intended programs and financing capabilities as well as preliminary renderings of their proposed projects. Based on the information received, staff believes that the projects can be completed with some City assistance and a variety of financing options available to non-profit housing developers. The amount of City assistance would be determined in the LBA.

FISCAL IMPACT
Authorization of an ENA would have no fiscal impact to the General Fund. Any City-associated costs for the production of the affordable housing units will be funded by the Housing Mitigation Sub-Fund, which has a balance of $11,344,671 as of July 1, 2011. The Housing Mitigation Sub-fund was created to support the provision of affordable housing within the City.
PUBLIC CONTACT
Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

ALTERNATIVES
1. Approve the Exclusive Negotiated Agreement between the City and MidPen Housing Corporation and Charities Housing Development Corporation for development of affordable housing on the City-owned Armory site.
3. Take no action.

RECOMMENDATION
Staff recommends Alternative 1. Approval of the ENA will allow both homeless housing providers to begin additional pre-development activities at the Armory site. In addition, it also provides an opportunity for development on OAFS to be consistent with the Moffett Park Specific Plan.

Reviewed by:

Hanson Hom, Director, Community Development Department
Prepared by: Ernie DeFrenchi, Affordable Housing Manager

Approved by:

Gary M. Luebbers
City Manager

Attachments
A. Exclusive Negotiating Agreement by and between the City of Sunnyvale and MidPen Housing Corporation and Charities Housing Development Corporation
Attachment A ~
Exclusive Negotiating Agreement by and between the City of Sunnyvale and MidPen Housing Corporation and Charities Housing Development Corporation
EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT

by and between

MIDPEN HOUSING CORPORATION,
a California nonprofit public benefit corporation

and

CHARITIES HOUSING DEVELOPMENT CORPORATION,
a California nonprofit public benefit corporation

and

CITY OF SUNNYVALE,
a municipal corporation
THIS EXCLUSIVE NEGOTIATING RIGHTS AGREEMENT (this “Agreement”) is entered into effective as of ________________ 2011 ("Effective Date") by and between the City of Sunnyvale ("City") and MidPen Housing Corporation, a California nonprofit public benefit corporation ("Developer") and Charities Housing Development Corporation, a California nonprofit public benefit corporation ("Developer"). City and Developers are hereinafter collectively referred to as the "Parties."

RECITALS

A. Pursuant to the homeless screening provisions of the Base Closure Act, MidPen Housing Corporation submitted a Notice of Interest ("NOI") to acquire approximately three (3) acres in the southern portion of the Onizuka Air Force Station, Sunnyvale, California ("AFS") for homeless housing purposes.

B. Pursuant to the homeless screening provisions of the Base Closure Act, Charities Housing Development Corporation submitted a NOI to acquire approximately one and six-tenths (1.6) acres in the northern portion of the Onizuka Air Force State, Sunnyvale, California Homeless Purposes.

C. City of Sunnyvale is the owner of a 2.45 acre parcel of real property (the "City Parcel") located at 620 East Maude Avenue in Sunnyvale, California. The City Parcel has been used by the National Guard as an armory.

D. On December 10, 2008, Developers executed a Legally Binding Agreement ("LBA") to allow the Developers to implement homeless programs at AFS. The Developers and City, acting as the Federally recognized local redevelopment authority for Onizuka Air Force Station ("LRA"), intend to renegotiate a single LBA to allow the Developers to implement the Consolidated Program on the City Parcel.

E. On March 23, 2011, Developers executed a Memorandum of Understanding for Joint Development of the former Armory Site within the City of Sunnyvale ("MOU") and submitted revised NOIs to consolidate their proposed homeless programs to construct permanent supportive housing for the homeless ("Consolidated Program") on approximately four and six-tenths (4.6) acres on the southern portion of the AFS.

F. The affordable housing development will consist of the construction of approximately 123 rental housing units, all of which will be affordable to either homeless, very-low or extremely-low income households, and related improvements (collectively, the "Project"). The allocation of units between households of homeless, very-low income (no more than 50% of median income) and extremely-low income (no more than 30% of median income) shall be subject to the City’s final approval.

G. The Parties acknowledge that the Project scope is preliminary in nature and subject to modification pending CEQA certification, approval of General Plan Amendment and zoning
changes by the City Council, and approval of land use entitlements by the City Planning Commission.

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows.

1. **Good Faith Efforts to Negotiate.** The Parties shall use their best efforts to successfully negotiate a LBA and related documents which shall describe the terms and conditions that will govern the transfer of the City Parcel to the Developers. The Developers shall diligently and in good faith negotiate with the City on the terms and conditions of a ground lease for the City Parcel ("Ground Lease"). Developers acknowledge that the City cannot execute a LBA or an assignment of the Ground Lease without proper approval. In no event shall this Agreement impose any binding obligation on the City to convey the City Parcel to Developers, nor does it obligate the City to grant any approvals or authorizations required for the Project. Without limiting the generality of the foregoing, Parties expressly acknowledge that a LBA and other documents resulting from negotiations contemplated hereby shall become effective only if such documents are approved by the City or LRA following notice and hearing as required by applicable law and compliance with all other requirements of law, including without limitation the California Environmental Quality Act ("CEQA").

1.1 **Legally Binding Agreement.** Subject to the approval of a definitive agreement by the City or LRA, the Parties preliminarily agree to the following items:

1.1.1 **City Financial Contribution.** The Parties shall mutually agree upon the amount of City assistance for the purchase of a long-term Ground Lease of the City Parcel, including possible additional assistance for pre-development costs, property transfers, and costs for site clearance and environmental remediation. If the LRA elects to accommodate each Developer’s NOI by approving such NOI for use of a portion or portions of the AFS Property to carry out each Developer’s Program, the Parties agree that the City is in no way obligated under this Agreement to provide financial contribution.

1.1.2 **Legal Costs.** Each Party shall pay its own legal fees incurred in connection with the negotiation and preparation of the LBA and related documents. The City shall take lead responsibility for the drafting of such documents.

1.1.3 **AS-IS Conveyance.** The City makes no representations or warranties regarding the physical condition of the City Parcel or its suitability for Developers’ use. Developers have been provided with a copy of the Phase I Environmental Site Assessment Report. Developers shall accept the City Parcel in its as-is condition.

1.1.4 **Development Costs.** City financial contributions shall be used for Project costs as outlined in Section 1.1.1.

1.1.5 **Construction and Permanent Financing.** Developers shall be required to demonstrate the financial feasibility of Project construction and operation, and shall be required to provide City with evidence of commitments for Project acquisition, construction and permanent
financing. The LBA and related documents will address the terms and conditions for any construction and/or permanent financing that the City may provide for the Project.

2. **Developers’ Exclusive Right to Negotiate With City.** The City agrees that it will not, during the term of this Agreement (the “Term”) consider or solicit the submission of bids, offers or proposals by any person or entity with respect to the development of the City Parcel, and City shall not engage any broker, financial adviser or consultant to initiate or encourage proposals or offers from other parties with respect to the disposition or development of the City Parcel.

3. **Term.** The Term of this Agreement shall commence on the Effective Date, and shall terminate three hundred and sixty-five (365) days thereafter, unless extended or earlier terminated as provided herein. The City Manager is authorized to extend the Term by up to an additional one hundred eighty (180) days upon the mutual written agreement(s) of the Parties without further approval of the City Council. Further extensions of the Term of this Agreement must be agreed upon by all Parties.

4. **Relationship of Parties.** The Parties agree that nothing in this Agreement shall be deemed or interpreted to create between them the relationship of lessor and lessee, of buyer and seller, or of partners or joint venturers.

5. **Developers Studies.** During the Term, Developers shall use their best efforts to prepare, at Developers’ expense, any studies, surveys, plans, specifications and reports ("Parties Studies") Developers deem necessary or desirable to determine the suitability of the City Parcel for the Project. Such studies may include, without limitation, title investigation, relocation analyses (if applicable), marketing, feasibility, soils, seismic and environmental studies, financial feasibility analyses and design studies. Without limiting the foregoing, the City may require that the Developers obtain, in connection with the City’s negotiation of the Ground Lease or LBA, additional studies or reports reasonably necessary for the assessment of the City Parcel or Project.

6. **Right of Entry.** Developers shall be responsible for obtaining City’s advance written permission for access to the City Parcel as may be necessary to prepare the Parties Studies. In connection with entry onto the City Parcel, Developers shall and hereby agrees to indemnify, defend (with counsel reasonably approved by City, as applicable) and hold harmless the Indemnities (defined in Section 15) from and against all Claims (defined in Section 15) resulting from or arising in connection with entry upon the City Parcel by Developers or Developers’ agents, employees, consultants, contractors or subcontractors. City may require Developers to execute a right of entry agreement satisfactory to City prior to entry onto the City Parcel. Developers’ inspection, examination, survey and review of the City Parcel shall be at Developers’ sole expense. Developers shall provide City with copies of all reports and test results within ten (10) days following completion of such reports and testing, whether or not such reports and test results are completed prior to or after the expiration or earlier termination of this Agreement. Developers shall repair, restore and return the City Parcel to its condition immediately preceding Developers’ entry thereon at Developers’ sole expense. Developers shall at all times keep the City Parcel free and clear of all liens and encumbrances affecting title. Developers’ indemnification obligations to provide reports and studies, and obligations to discharge liens that attach to the City Parcel as set forth in this Section 6 shall survive the expiration or earlier termination of this Agreement.
7. **City’s Reports and Studies.** Within 15 days following the Effective Date, City shall make
available to Developers for review or copying at Developers’ expense all non-privileged and non-
confidential studies, surveys, plans, specifications, reports, and other documents with respect to the
City Parcel that City has in its possession or control.

8. **Developers’ Pro Formas and Evidence of Financing.** During the Term, Developers shall
seek financing commitments from prospective lenders or financing partners for the Project. Prior to
execution of the LBA contemplated by this Agreement, Developers shall provide City with a pro
forma for the Project that confirms the financial feasibility of Developers’ proposed redevelopment
of the City Parcel. Developers shall provide evidence satisfactory to City that Developers have
secured binding commitments, subject only to commercially reasonable conditions, for all financing
necessary for the successful completion of the Project.

9. **Expenses.** Except as otherwise expressly provided in the LBA, all costs and expenses
(including, without limitation, staff, consultant and legal fees and expenses) incurred in connection
with this Agreement and the activities contemplated hereby shall be paid by the Party incurring such
expense.

10. **Confidentiality: Dissemination of Information.** During the Term, each Party shall obtain the
consent of the other Party prior to issuing or permitting any of its officers, employees or agents to
issue any press release or other information to the press with respect to this Agreement; provided
however, no Party shall be prohibited from supplying any information to its representatives, agents,
attorneys, advisors, financing sources and others to the extent necessary to accomplish the activities
contemplated hereby so long as such representatives, agents, attorneys, advisors, financing sources
and others are made aware of the terms of this Section. Nothing contained in this Agreement shall
prevent either Party at any time from furnishing any required information to any governmental entity
or authority pursuant to a legal requirement or from complying with its legal or contractual
obligations.

11. **Execution of Legally Binding Agreement.** If the Parties successfully negotiate a LBA, the
City’s staff will submit the proposed LBA for review by the City Council. The City shall have no
legal obligations to grant any approvals or authorizations in connection with the Project until a final
LBA has been approved by the City Council and duly executed on behalf of the City.

12. **Termination.** This Agreement may be terminated at any time by mutual consent of the
Parties. City shall have the right to terminate this Agreement upon its good faith determination that
Developers are not proceeding diligently and in good faith to carry out its obligations pursuant to this
Agreement. City shall exercise such right by providing at least ten (10) days’ advance written notice
to Developers which notice shall describe the nature of Developers’ default hereunder.
Notwithstanding the foregoing, if either Developer commences to cure such default within such 10-
day period and diligently prosecutes such cure to completion within the earliest feasible time but not
later than ninety (90) days following the date of the notice, this Agreement shall remain in effect.
Either Developer shall have the right to terminate this Agreement, effective upon 10 days’ written
notice to City, if the results of its investigation of the City Parcel are unsatisfactory with respect to
Developers’ desired redevelopment activities or if the Developers are unable to obtain other
necessary approvals, financing, rights or interests. Neither Party shall have the right to seek an award of damages as a result of the termination of this Agreement pursuant to this Section.

13. **Effect of Termination.** Upon termination as provided herein, or upon the expiration of the Term and any extensions thereof without the Parties having successfully negotiated a LBA, this Agreement shall forthwith be void, and there shall be no further liability or obligation on the part of any of the Parties or their respective officers, employees, agents or other representatives; provided however, the provisions of Section 10 (Confidentiality), Section 15 (Hold Harmless) and Section 19 (No Brokers) and any other provisions that expressly so state, shall survive such termination. Provided further, that upon termination or expiration of this Agreement, Developers shall deliver to City, within 15 days of termination or expiration, all reports and studies not previously provided to City.

14. **Notices.** Except as otherwise specified in this Agreement, all notices to be sent pursuant to this Agreement shall be made in writing, and sent to the Parties at their respective addresses specified below or to such other address as a Party may designate by written notice delivered to the other parties in accordance with this Section. All such notices shall be sent by:

(i) personal delivery, in which case notice is effective upon delivery;

(ii) certified or registered mail, return receipt requested, in which case notice shall be deemed delivered on receipt if delivery is confirmed by a return receipt;

(iii) nationally recognized overnight courier, with charges prepaid or charged to the sender's account, in which case notice is effective on delivery if delivery is confirmed by the delivery service; or

(iv) facsimile transmission, in which case notice shall be deemed delivered upon transmittal, provided that (a) a duplicate copy of the notice is promptly delivered by first-class or certified mail or by overnight delivery, or (b) a transmission report is generated reflecting the accurate transmission thereof. Any notice given by facsimile shall be considered to have been received on the next business day if it is received after 5:00 p.m. recipient's time or on a nonbusiness day.

**City:** City of Sunnyvale  
456 West Olive Avenue  
Sunnyvale, CA 94088-3707  
Attn: Gary Luebbers

With a copy to:

**City of Sunnyvale**  
456 West Olive Avenue  
Sunnyvale, CA 94088-3707  
Attn: David Kahn, City Attorney
15. **Indemnification.** Developers hereby covenant, on behalf of itself and their permitted successors and assigns, to indemnify, hold harmless and defend the City and its respective elected and appointed officials, officers, agents, representatives and employees (all of the foregoing, “Indemnitees”) from and against all liability, loss, cost, claim, demand, action, suit, legal or administrative proceeding, penalty, deficiency, fine, damage and expense (including, without limitation, reasonable attorney's fees and costs of litigation) (all of the foregoing, collectively hereinafter “Claims”) arising out of or in connection with this Agreement; provided however, Developers shall have no indemnification obligation with respect to the gross negligence or willful misconduct of any Indemnitee. Developers’ indemnification obligations set forth in this Section 15 shall survive the expiration or earlier termination of this Agreement.

16. **Severability.** If any provision or provisions of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law of any jurisdiction, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby unless the deletion of such provision or provisions would result in such a material change so as to cause completion of the transactions contemplated herein to be unreasonable.

17. **Entire Agreement; Amendments In Writing; Counterparts.** This Agreement contains the entire understanding of the Parties with respect to the subject matter hereof and supersedes all prior and contemporaneous agreements and understandings, oral and written, between the Parties with respect to such subject matter. This Agreement may be amended only by a written instrument executed by the Parties or their successors in interest. This Agreement may be executed in multiple counterparts, each of which shall be an original and all of which together shall constitute one agreement.

18. **Successors and Assigns; No Third-Party Beneficiaries.** This Agreement shall be binding upon and inure to the benefit of the Parties and their respective successors and assigns; provided however, that neither Party shall transfer or assign any of such Party’s rights hereunder by operation of law or otherwise without the prior written consent of the other Party, which may be withheld in such Party’s sole discretion, and any such transfer or assignment without such consent shall be void. Subject to the immediately preceding sentence, this Agreement is not intended to benefit, and shall not run to the benefit of or be enforceable by, any other person or entity other than the Parties and their permitted successors and assigns.
19. **Brokers.** Each Party warrants and represents to the other that no brokers have been retained or consulted in connection with this transaction. Each Party agrees to defend, indemnify and hold harmless the other Party from any claims, expenses, costs or liabilities arising in connection with a breach of this warranty and representation. The terms of this Section shall survive the expiration or earlier termination of this Agreement.

20. **Captions.** The captions of the sections and articles of this Agreement are for convenience only and are not intended to affect the interpretation or construction of the provisions hereof.

21. **Governing Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of California.
IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

CITY OF SUNNYVALE,
a municipal corporation

By: __________________________
Name: _________________________
Title: __________________________

ATTEST:

______________________________
City Clerk

APPROVED AS TO FORM:

______________________________
City Attorney

MIDPEN HOUSING CORPORATION,
a California nonprofit public benefit corporation

By: ____________________________
President

CHARITIES HOUSING DEVELOPMENT CORPORATION,
a California nonprofit public benefit corporation

By: ____________________________
Executive Director