



# TRANSWESTERN

---

## **EXCLUSIVE SALES LISTING AGREEMENT**

This Exclusive Sales Listing Agreement (“Agreement”) is made and entered into on this 14th day of February, 2017, by and between **CITY OF BOERNE** (“Owner”) and **TRANSWESTERN PROPERTY COMPANY SW GP L.L.C.** d/b/a Transwestern (“Broker”).

### **1. BASIC AGREEMENT**

- a. Subject to the terms and conditions of this Agreement, Owner grants Broker the exclusive right to market on the terms and conditions set forth in this Agreement, the following property located in Kendall County, Texas (“individually referred to “Property”), as further described in below:

1407 S Main Street  
Boerne, Texas 78006

MENGER – SHUMARD SUBDIVISION LOT PT 2 (REPLAT), 1.0  
ACRES

- b. Broker shall provide the professional services (“Services”) set forth in Paragraph 2 in connection with the marketing of the Property, and Owner shall compensate Broker for these Services, in accordance with the terms and conditions of this Agreement

### **2. BROKER’S SERVICES**

- a. Owner is entering into this Agreement in reliance on Broker’s special and unique abilities with respect to performing the Services. Broker accepts the relationship of trust and confidence established between it and Owner by this Agreement. Broker represents and warrants that Broker will use its best efforts, skill, judgment, and abilities to market and show the Property.
  - i. “Market the Property”, as used in this Agreement, shall mean the methods utilized in marketing the Property. Broker shall notify Owner of the methods Broker proposes to use in marketing the Property, and Owner shall have the right to approve or disapprove such methods. Owner shall make its determination whether to approve or disapprove the marketing methods on the basis of

Owner's personal taste, the industry norm in marketing similar properties, and the potential effect of the proposed marketing on Owner's other properties, if any. Broker shall present to the prospective buyer the current deed restrictions explaining that the parties will work to amend such deed restrictions at the time of closing. Broker will work with the Owner to amend such deed restrictions to accommodate the prospective buyer's use. Broker will explain to all potential buyers that any sale is contingent on use approval and deed restriction amendment approved by Walmart.

- b. Broker represents and warrants that it will further the interests of Owner in accordance with Owner's requirements and procedures, in accordance with the highest professional standards, regulations and canons, and in compliance with all applicable national, federal, state and municipal laws, regulations, codes, ordinances, orders, and with those of any other body having jurisdiction. Specifically, Broker understands that the Property must be marketed on a multiple listing service for a minimum of thirty (30) days prior to accepting any offer to purchase such Property. After such thirty (30) day period has elapsed, the Owner may sell the Property to a ready, willing, and able buyer who submits the highest cash offer.
- c. Broker represents and warrants that there are no obligations, commitments, or impediments of any kind that will limit or prevent performance of the Services. Notwithstanding the foregoing, Owner acknowledges that Broker may represent prospective buyers, and Owner consents to such dual representation so long as Owner is properly notified of such dual representation.
- d. Broker represents and warrants that all of the Services to be furnished by Broker pursuant to this Agreement from its inception until the closing of the sale of the Property shall be of the type, standard and quality that prevail among brokers of superior knowledge and skill engaged in commercial real estate brokerage practice.
- e. Broker represents and warrants that all its agents performing this brokerage listing will be duly licensed under the appropriate real estate licensing acts. The agent(s) primarily responsible for performing services under this listing is (are) **Russell T. Noll**. Broker represents and warrants that it will furnish efficient business administration and superintendence and perform the Services in the best way and in the most expeditious and economical manner consistent with the interests of Owner.
- f. Without limiting the generality of the foregoing, Broker agrees to:

- i. Prepare and present in writing to Owner a marketing program within the first thirty (30) days of this Agreement. Owner reserves the right to edit, alter, change, and otherwise modify the program as it deems appropriate.
- ii. Advertise, as appropriate, in newspapers, trade journals, and other publications as both parties agree in writing, with all advertisements to be approved by Owner prior to commitment.
- iii. Prepare and produce detailed data as required to support and/or supplement the marketing program, which data is to be furnished to prospective purchasers displaying interest in the Property; such data and any modification(s) thereof are to be approved by Owner prior to distribution.
- iv. Provide written and oral reports to Owner on a monthly basis.

### **3. INDEPENDENT CONTRACTOR**

Broker is acting as an independent contractor in its capacity under this Agreement. Nothing contained in this Agreement or in the relationship of Owner and Broker shall be deemed to constitute a partnership, joint venture, employer/employee or any other relationship between Owner and Broker except as limited by the terms of this Agreement. Broker's authority is limited to performing the Services in accordance with the terms in this Agreement. Broker does not have any authority to execute any contracts for or on behalf of Owner.

### **4. TERM**

This Agreement shall be in effect for a period of six (6) months commencing with the execution date first set forth hereinabove; provided, however, Owner or Broker shall have the right and option to cancel this Agreement, with or without cause, by giving written notice to the other party and any such cancellation shall be effective thirty (30) days after the date of delivery of such notice.

Notwithstanding the foregoing, Owner may decide to withdraw the Property before or after the mandatory thirty (30) day listing period is complete. Owner may withdraw the Property immediately upon written notice. Should Owner decide to withdraw the Property from the market, Owner shall pay to Broker a "Cancellation Fee." Such Cancellation Fee shall be equal to Broker's out of pocket expenses, which are properly documented. Such Cancellation Fee shall not to exceed \$5,000.00.

## 5. BROKER COMMISSION

- a. Except as provided below, Owner agrees to pay Broker a sales commission equal to four percent (**4%**) of the gross sales price of the Property. Said commission shall be earned if, during the term hereof (or thereafter as provided in paragraph 5(c) below), the Broker: (1) shows the Property to a prospective buyer who then offers to purchase such Property after completion of the mandatory thirty (30) day listing period; (2) Broker assists the Owner with amending the deed restrictions on the Property to accommodate the prospective buyer's use; (3) a sale to the prospective buyer is subsequently consummated and closed. The provision for the commission to be paid when an outside cooperating broker is involved is detailed in paragraph 5b.
- b. If the sale of the Property is achieved through a cooperating broker, Owner will pay a total commission of six percent (**6%**) of the gross sales price. Owner will compensate the cooperating broker out of the six percent (**6%**) commission paid by Owner at closing. For the purposes of this paragraph, if any agent or broker licensed with Broker (or its affiliate), other than those named in paragraph 2(e) hereinabove, represents the Buyer, such agent or broker shall be deemed to be a cooperating broker. Broker agrees to indemnify, defend and hold Owner harmless from any and all claims and expenses, to the limit of the sales commission, for additional brokers' or finders' fees arising from Broker's dealings in connection with this Agreement. At no time will Owner be required to pay greater than six percent (**6%**) of the gross sales price towards commission.
- c. If within **180** days after the expiration or the earlier termination of this Agreement, all of or any part of the Property is sold, or Owner enters into a contract leading to the sale of all or any portion of the Property, Owner shall pay to Broker the commission specified above, provided (i) that Broker showed the Property to Buyer before the expiration or termination of the Agreement, (ii) that the Buyer was on a list of bona fide prospects furnished by Broker and agreed to by Owner within ten (10) days following the expiration or earlier termination of the Agreement, and (iii) that the sale to such Buyer is actually consummated.
- d. If the Property is sold, the commission provided for hereinabove shall be paid at closing (i.e., upon delivery of all closing documents and the transfer of title from Owner to Buyer) either directly from Owner's proceeds of sale or from other funds provided by Owner at closing. Should any proposed transaction under contract fail to be consummated as provided hereinabove for any reason, Broker shall not be entitled to any commission or other compensation whatsoever.

## **6. DEFAULT AND REMEDIES**

- a. A party's failure or refusal to perform or observe any obligation, covenant, or condition of this Agreement, which failure or refusal is not cured by such party within ten (10) days of its receipt of written notice from the other party detailing the existence and nature thereof, shall constitute an "Event of Default".
- b. Should an Event of Default occur, the non-defaulting party may, at its option, in addition to all other rights and remedies given under this Agreement or by law or in equity, terminate this Agreement immediately.
- c. No failure by a party to insist upon the strict performance of any obligation, covenant, agreement, term, or condition of this Agreement, or to exercise any right or remedy available upon a breach or any subsequent breach of such obligation, covenant, agreement, term, or condition, shall act as a waiver of any rights or remedies of such party under this Agreement. No obligation, covenant, agreement, term, or condition of this Agreement, and no breach of this Agreement shall be waived, altered, or modified, except by written instrument. No waiver of any breach shall affect or alter this Agreement, but each and every obligation, covenant, agreement, term, and condition of this Agreement shall continue in full force and effect with respect to any other then-existing or subsequent breach of this Agreement.

## **7. OWNER'S OBLIGATIONS**

- a. Owner shall provide Broker with such material and information in its possession concerning the Property as is reasonably requested, including, without limitation, any environmental surveys, studies or reports.
- b. Owner shall remain the sole Owner of the Property and shall not be or become a "foreign person", as defined in the Foreign Investment in Real Property Tax Act.
- c. Owner shall (i) refer promptly to Broker all inquiries concerning the Property made directly to Owner by prospective buyers or their cooperating brokers; and (ii) identify in writing any proprietary information furnished to Broker's use only, which is not to be duplicated or shown to any other party.
- d. Owner shall disclose to all prospective buyers of the Property the fact that Broker is the exclusive sales agent on the Property and as such shall have

its name included in any sales contract. Owner shall deliver copies of any and all executed sales contracts to Broker.

**8. NON-DISCLOSURE**

Broker agrees that during the term of this Agreement and thereafter, it will not divulge to third parties without the consent of Owner (unless required by law) any non-public information obtained from or through Owner relating to the Property in connection with this Agreement.

**9. NOTICE**

Any notice in this Agreement provided or permitted to be given, made, or accepted by either party to the other, must be in writing and may be given or serviced by depositing the same in the United States mail, postpaid, registered or certified, return receipt requested, addressed to the party to be notified, or by delivering the same to an officer or agent of such party, or by delivering same by reputable overnight courier service, when appropriately addressed to the party to be notified. Notice deposited in the mail in the manner described in this Section 10 shall be effective from and after the expiration of three (3) days after it is so deposited. Notice given in any other manner shall be effective only if and when received by the party to be notified. For purposes of this Notice, the addresses of the parties, until changes are afterwards provided in writing, shall be as follows:

To Owner: City of Boerne  
P.O. Box 1677  
Boerne, TX 78006  
Attn: Larry Woods  
Fax: 830-248-9511

To Broker: Transwestern Property Company SW GP  
L.L.C. d/b/a Transwestern  
8200 IH-10 West, Suite 800  
San Antonio, TX 78230  
Attn: Robert Gaston  
Fax: 210-377-2797

**10. RECORDS AND AUDIT**

Broker shall keep adequate files, books and records relating to performance of the Services under this Agreement, and all such books and records shall be available at reasonable times to Owner or its designated representatives during a period ending three (3) years following the date of expiration or earlier termination of this Agreement. Owner's representative shall have the right to copy all such files, books and records.

## **11. GOVERNING LAW**

This Agreement, and its interpretation, construction and enforcement, shall be governed by the substantive laws of the state in which the Property is located. Any action concerning the Agreement shall be brought in the courts of County where the Properties are located.

## **12. OFAC REPRESENTATIONS, WARRANTIES, AND INDEMNIFICATION**

Owner represents and warrants that (i) it is not, and none of its partners, members, managers, employees, officers, directors, representatives or agents is, a person or entity with whom U.S. persons or entities are restricted from doing business under regulations of the Office of Foreign Asset Control ("OFAC") of the Department of the Treasury (including those named on OFAC's Specially Designated and Blocked Persons List) or under any statute, executive order (including the September 24, 2001, Executive Order Blocking Property and Prohibiting Transactions with Persons Who Commit, Threaten to Commit, or Support Terrorism), or under any other law, rule, order, or regulation that is enforced or administered by OFAC (such persons and entities each being a "Prohibited Person"); (ii) it is not acting directly or indirectly, for or on behalf of any Prohibited Person; (iii) it is not engaged in this transaction, directly or indirectly, on behalf of, or instigating or facilitating this transaction, directly or indirectly, on behalf of any Prohibited Person; and (iv) it will not contract with or otherwise engage in any dealings or transactions or be otherwise associated with any Prohibited Person.

## **13. BROKER'S LIEN**

Pursuant to the provisions of Chapter 62 of the Texas Property Code, Broker is entitled to, and hereby claims its right to, a broker's lien based upon the terms of this Agreement.

## **14. INTERMEDIARY**

**Owner acknowledges that in some cases Broker may also represent prospective investors who are interested in making investments in the Property. Broker will promptly notify Owner of any such instance, and Owner consents to Broker acting as an intermediary in any such instance.** Broker's commission will be paid in accordance with this Agreement. A real estate broker who acts as intermediary between the parties to a Transaction:

- (a) may not disclose any confidential information or any information a party specifically instructs the real estate broker in writing not to disclose unless otherwise instructed in a separate writing by the respective party or required to disclose such information by the Texas Real Estate License Act or by a court order or if the information materially relates to the condition of the Property;
- (b) shall treat all parties to the Transaction honestly;
- (c) shall comply with the Texas Real Estate License Act; and
- (d) with the parties consent, a broker acting as intermediary between the parties may appoint a person who is licensed under the Texas Real Estate License Act and associated with the broker to communicate with and carry out instructions of one party, and another person who is licensed under the Texas Real Estate License Act and associated with the broker to communicate with and carry out the instructions of the other party.

#### **15. ENTIRE AGREEMENT; BINDING EFFECT**

This Agreement shall constitute the entire agreement between Broker and Owner and no change, modification or amendment shall be effective until and unless made in writing and signed by the parties hereto. This Agreement shall be binding upon any successors or assigns of Broker or Owner. The persons executing this Agreement for Owner and Broker each respectively represent and warrant to the other party that they are duly authorized to do so on behalf of such party.

#### **16. ELECTRONIC SCANNED SIGNATURES**

The parties agree that an electronically scanned signed copy of this Agreement transmitted by one party to the other party(ies) by electronic transmission shall be binding upon the sending party to the same extent as if it had delivered a signed original of this Agreement.

#### **17. COUNTERPARTS**

This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which, together, shall constitute one Agreement.

IN WITNESS WHEREOF, the undersigned parties have executed this Agreement, under seal, as of the date first set forth hereinabove.



**City of Boerne (“Owner”)**

By: \_\_\_\_\_

Name: Ronald C. Bowman

Title: City Manager

**Transwestern Property Company SW GP L.L.C.  
d/b/a Transwestern (“Broker”)**

By: \_\_\_\_\_

Name: Robert Gaston

Title: Executive Vice President