ITEM NO. 15

STAFF REPORT

CITY OF OCEANSIDE

DATE: January 5, 2011

TO: Honorable Mayor and City Councilmembers
Chairman and Members, Community Development Commission

FROM: Economic and Community Development Department

SUBJECT: **APPROVAL OF AMENDMENT 1 TO THE DISPOSITION AGREEMENT BETWEEN S.D. MALKIN PROPERTIES AND THE COMMUNITY DEVELOPMENT COMMISSION EXTENDING THE TIME REQUIREMENTS TO EXECUTE THE LEASE**

SYNOPSIS

Staff recommends that the City Council and Community Development Commission approve amendment 1 to the Disposition Agreement between S.D. Malkin Properties and the Community Development Commission, extending the time requirements to execute the lease from January 29, 2011 to January 29, 2012; and authorize the City Manager to execute the amendment.

BACKGROUND

The effective date of the Disposition Agreement (DA) between S.D. Malkin Properties and the Community Development Commission (CDC) was July 29, 2009. Pursuant to the DA, the developer is required to do what is commercially reasonable to obtain financing for the $200 million project in an 18-month period (Section 1.1.56). The developer is eligible for an administrative six-month extension (Section 4.10). After six months, the developer may request and be granted an additional six-month extension if the construction working drawings can be sufficiently completed to obtain a construction loan by the end of the six months (Section 4.10).

ANALYSIS

At this time, there is an unprecedented limitation on access to capital for construction, particularly for a project of this size. While smaller projects in the $20 to $30 million range may with difficulty be able to get financing, all experts have indicated that there is no funding for new construction of this magnitude. Almost eighteen months have passed since the effective date of the DA. While the developer has been in the capital markets, no construction lending for a project of this magnitude is available at this time. It is therefore proposed that an additional twelve months be granted. That extends the initial period from 18 months to 30 months with the time remaining as of January 29, 2011, to be 24 months.

Original Time Frame
Effective Date-July 29, 2009

		Remaining Time	
Secure Financing	18 months	2 months	1/ 29/ 2011
Admin. Extension	6 months	6 months	7/ 29/ 2011
2nd Extension if constr. drawings almost complete	6 months	6 months	1/ 29/ 2012
	30 months	14 months	

Basic Amendment- 12 month extension

	Remaining time	
Obtain financing	12 months	1/29/2012
Admin Extension	6 months	7/29/2012
2nd Extension if construction drawings almost done	6 months	1/29/2013
	30 months	

FISCAL IMPACT

The fiscal impact is both positive and negative. The Transient Occupancy Tax, TOT, from the hotel would be delayed, however, the City cannot compel lending institutions to fund this project and it is also at the mercy of the world economy and lending markets.

The major funding of the City's investment into the project comes from revenue derived from bonding. Currently the municipal bond market is still experiencing difficulties due to the collapse in the credit markets in 2007 and 2008, and the subsequent downturn of the economy. Many projects anticipated to be built in the Redevelopment Project Area have not come to fruition due to the lack of residential market and access to capital. Therefore, this extension gives the Agency more time to build bond capacity. Aligning the DA with the capital markets also aligns the CDC's bonding capacity to what is happening in the capital markets.

On the negative side, as the Agency's ability to have debt is currently anticipated to end in 2018, and can service debt until 2028, the amortization period of anticipated bonds continues to decline.

INSURANCE REQUIREMENTS

Does not apply.

COMMISSION OR COMMITTEE REPORT

The revision to the Disposition Agreement was heard by the Redevelopment Advisory Committee on January 5, 2011, and the Economic Development Commission on December 7, 2010, and both groups concurred.

CITY ATTORNEY'S ANALYSIS

The referenced documents have been reviewed by the City Attorney and approved as to form.

RECOMMENDATION

Staff recommends that the City Council and Community Development Commission approve Amendment 1 to the Disposition Agreement between S.D. Malkin Properties and the Community Development Commission, extending the time requirements to execute the lease from January 29, 2011, to January 29, 2012; and authorize the City Manager to execute the amendment.

PREPARED BY:

Jane McVey
Economic and Community Development Director

SUBMITTED BY:

Peter A. Weiss
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

Michele Lund, Treasury Manager

Teri Ferro, Financial Services Director

COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF OCEANSIDE

FIRST AMENDMENT TO DISPOSITION AGREEMENT

(BEACHFRONT RESORT GROUND LEASE)

THIS FIRST AMENDMENT TO DISPOSITION AGREEMENT (Beachfront Resort Ground Lease) ("**First Amendment**") is dated as of _____, 20___ for reference purposes only, and is entered into by and between the COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF OCEANSIDE, a public body, corporate and politic (the "**Agency**"), and S.D. MALKIN PROPERTIES, INC., a Delaware corporation (the "**Developer**"). The Agency and the Developer enter into this Agreement with reference to the following recited facts (each a "**Recital**"):

RECITALS

A. Agency and Developer are parties to that certain Disposition Agreement (Beachfront Ground Lease), dated, for reference purposes only, as of May 6, 2009 (the "**Agreement**").

B. It is the intent of Agency and Developer, by this First Amendment, to amend and modify the Agreement.

C. It is the intent of Agency and Developer, that except as expressly amended and modified by the First Amendment, the Agreement shall and will remain in full force and effect.

D. Capitalized terms utilized hereon shall have the same meanings as ascribed thereto in the Agreement.

NOW, THEREFORE, FOR GOOD AND VALUABLE CONSIDERATION AND THE PROMISES AND COVENANTS OF THE AGENCY AND THE DEVELOPER SET FORTH HEREIN, THE AGENCY AND THE DEVELOPER AGREE AS FOLLOWS:

COVENANTS

1. Modification. Paragraph 1.1.56(b) of the Agreement is hereby amended and modified to read as follows:

> "(b) the date that is thirty (30) months following the Effective Date, subject to extension pursuant to Section 4.10".

2. Execution in Counterparts. This First Amendment may be executed in multiple counterpart originals, each of which shall be deemed to be an original, but all of which together shall constitute one and the same document.

3. Full Force and Effect. Except as expressly amended and modified by this First Amendment, the Agreement shall and will remain in full force and effect.

4. Estoppel. The Agency and the Developer each acknowledge and agree that, as of the date of this Amendment No. 1, no default exists under the Agreement and no event or

condition has occurred that, with the giving of notice or passage of time or both, would constitute a default by either the Agency of the Developer under the Agreement.

[SIGNATURES ON THE FOLLOWING PAGE]

SIGNATURE PAGE

TO

FIRST AMENDMENT TO DISPOSITION AGREEMENT

(BEACHFRONT RESORT GROUND LEASE)

The Agency and the Developer have signed this First Amendment by and through the signatures of their authorized representative(s) set forth below:

AGENCY:

COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF OCEANSIDE, a public agency, corporate and politic

By:_____
Peter Weiss
Executive Director

Attest:

By:_____
Agency Secretary

APPROVED AS TO FORM:

By: Patricia Hamilton, ASST.
Agency General Counsel

DEVELOPER:

S.D. MALKIN PROPERTIES, INC.,
a Delaware corporation

By:_____
Jeremy Z. Cohen
Vice President

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO)

On December 17, 2010 before me, Susan L. Olson, Notary Public, personally appeared Jeremy Z. Cohen, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Susan L. Olson (Seal)

SUSAN L. OLSON
Commission # 1878286
Notary Public - California
San Diego County
My Comm. Expires Jan 29, 2014