ITEM NO. 8

STAFF REPORT

CITY OF OCEANSIDE

DATE: October 15, 2008

TO: Chairman and Members, Community Development Commission

FROM: Economic and Community Development Department

SUBJECT: **APPROVAL OF AMENDMENT 5 TO THE NEGOTIATION AGREEMENT BETWEEN S.D. MALKIN PROPERTIES, INC., AND THE COMMUNITY DEVELOPMENT COMMISSION TO EXTEND THE NEGOTIATION PERIOD TO JANUARY 31, 2009**

SYNOPSIS

Staff recommends that the Community Development Commission (CDC) approve Amendment 5 to the Negotiation Agreement with S.D. Malkin Properties, Inc., for the development of the Downtown Beach Hotel, to extend the term of the agreement from October 17, 2008 to January 31, 2009 and authorize the Executive Director to execute the amendment.

BACKGROUND

The Downtown Beach Hotel project by S. D. Malkin proposed to build 289 hotel rooms, 47 boutique hotel rooms and 48 fractional time shares was entitled by the CDC on January 16, 2008. The City's Local Coastal Plan Amendment to make changes to the Redevelopment Area's D District Zoning, including the addition of language for fractional time shares and condo hotel rooms, is still in process by the California Coastal Commission. At this time the Local Coastal Plan Amendment, LCPA, is expected to be heard by the CDC in November 2008.

The Negotiation Agreement with S.D. Malkin is set to expire October 17, 2008. To allow adequate time to resolve the final approval of the LCPA, S.D. Malkin requests that the extension be granted to January 31, 2009.

ANALYSIS

This time extension is necessary to ensure that the Local Coastal Plan Amendment is in place prior to the signing of the lease and the Disposition and Development Agreement.

FISCAL IMPACT

Does not apply.

INSURANCE REQUIREMENTS

Does not apply.

COMMISSION OR COMMITTEE REPORT

None.

CITY ATTORNEY'S ANALYSIS

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

RECOMMENDATION

Staff recommends that the Community Development Commission approve Amendment 5 to the Negotiation Agreement with S.D. Malkin Properties, Inc., for the development of the Downtown Beach Hotel, to extend the term of the agreement from October 17, 2008 to January 31, 2009 and authorize the Executive Director to execute the amendment.

PREPARED BY:

Jane McVey
Economic and Community
Development Director

SUBMITTED BY:

Peter A. Weiss
Executive Director

REVIEWED BY:

Michelle Skaggs Lawrence, Deputy City Manager

COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF OCEANSIDE

AMENDMENT NO. 5
TO
NEGOTIATION AGREEMENT
(S.D. Malkin Properties, Inc.)

This AMENDMENT NO. 5 TO NEGOTIATION AGREEMENT (S.D. Malkin Properties, Inc.) (this "Amendment No. 5") is dated as of October 15, 2008, 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, existing and acting pursuant to Health and Safety Code Sections 33000, et seq. (the "Agency"), and S.D. MALKIN PROPERTIES, INC., a Delaware corporation (the "Developer"), to amend that certain Negotiation Agreement (S.D. Malkin Properties, Inc.) by and between the Agency and the Developer, dated September 7, 2005, as amended by that certain Amendment No. 1 to Negotiation Agreement (S.D. Malkin Properties, Inc.), dated May 10, 2006, that certain Amendment No. 2 to Negotiation Agreement (S.D. Malkin Properties, Inc.), dated August 16, 2006, that certain Amendment No. 3 to Negotiation Agreement (S.D. Malkin Properties, Inc.), dated April 9, 2008, and that certain Amendment No. 4 to Negotiation Agreement (S.D. Malkin Properties, Inc.), dated July 9, 2008 (these latter five agreements are referred to, collectively, as the "Agreement"). This Amendment No. 5 is entered into by the Agency and the Developer with reference to the following recited facts:

RECITALS

A. The Agency owns that certain real property located within the City of Oceanside Downtown Redevelopment Project Area generally located between Pier View Way, Myers Street, Seagaze Drive and Pacific Street, and specifically defined in the Agreement as the "Property"; and

B. The Developer has proposed the redevelopment of the Property as a mixed-use hotel, timeshare and retail project, defined in the Agreement as the "Project"; and

C. The Agency and the Developer entered into the Agreement to establish a specific, limited period of time to negotiate regarding a future agreement between them governing the potential lease of the Property from the Agency to the Developer and the potential redevelopment of the Project on the Property by the Developer, all subject to mutually agreeable terms, conditions, covenants, restrictions and agreements to be negotiated and documented in the future; and

D. Agency staff and the Developer have determined that the size of the Project and the additional requirements of development in the coastal zone require more time than initially contemplated for Agency staff to complete the required Local Coastal Plan Amendment with California Coastal Commission staff and for Agency staff and the Developer to complete the

agreements setting forth the proposed terms for the lease of the Property and the development of the Project; and

E. Thereafter, the Community Redevelopment Law requires a joint public hearing of the City of Oceanside and the Agency prior to consideration of approval of the contemplated Disposition Agreement (Beachfront Resort) (referred to as the "DDA" in the Agreement), with two (2) weeks advance notice of the joint public hearing published in the newspaper; and

F. The Agency and the Developer desire, by this Amendment No. 5, to extend the Second Negotiation Period to provide the additional time required for completion of the required Local Coastal Plan Amendment, to complete the agreements setting forth the proposed terms for the lease of the Property and the development of the Project and to provide the legally required joint public hearing notice prior to consideration of the contemplated Disposition Agreement (Beachfront Resort) by both the City of Oceanside and the Agency.

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES SET FORTH IN THIS AMENDMENT NO. 5 AND OTHER VALUABLE CONSIDERATION, THE AGENCY AND THE DEVELOPER AGREE, AS FOLLOWS:

1. **Incorporation of Recitals.** The Recitals set forth above are true and correct and are incorporated into this Amendment No. 5 by this reference, as though fully set forth in this Amendment No. 5.

2. **Incorporation of Defined Terms.** All terms, phrases and words indicated to be defined terms by initial capitalization in this Amendment No. 5 that are not specifically defined in this Amendment No. 5 shall have the meaning ascribed to the same term, phrase or word in the Agreement.

3. **Confirmation of Agreement**. The Agreement, as amended by this Amendment No. 5, is in all respects confirmed and all of the terms, provisions and conditions of the Agreement, as amended by this Amendment No. 5, shall be and 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. 5, 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 or neither, would constitute a default by either the Agency or the Developer under the Agreement.

5. **Amendments to the Agreement.**

(a) Section 3(b) of the Agreement is amended to read, in its entirety, as follows:

> (b) If the Developer has timely submitted to the Agency all of the documents and information required to be submitted by the Developer to the Agency pursuant to Section 6(a), made all Monthly Deposits, pursuant to Section 2(b), and the Agency and the Developer have both approved and executed a MOU, in their

respective sole and absolute discretion, then, upon the mutual agreement of the Agency and the Developer, in their respective sole and absolute discretion, the Agency and the Developer may enter into a second period of negotiations, upon all of the terms and conditions of this Agreement, commencing on the date immediately following the date of expiration of the First Negotiation Period and ending at 4:00 p.m. Pacific Time on January 30, 2009 (the "Second Negotiation Period"), subject to the limitations of Sections 3(f) and 3(h). Approval of a MOU and entry into the Second Negotiation Period shall each require official action of the Agency governing body, subject to all legally required notices and other legal requirements.

(b) Section 3(f) of the Agreement is amended to read, in its entirety, as follows:

(f) The Second Negotiation Period shall expire at 4:00 p.m. on January 30, 2009.

(c) Section 3(h) of the Agreement is amended to read, in its entirety, as follows:

(h) Notwithstanding any other term, provision, condition, covenant, restriction or agreement contained in this Agreement, the aggregate time period of the combined First Negotiation Period and any Second Negotiation Period shall expire at 4:00 p.m. on January 30, 2009.

6. **Execution in Counterparts**. This Amendment No. 5 may be executed by the Parties in multiple counterpart originals, each of which shall be considered an original, but all of which together shall constitute one and the same instrument.

7. **Interpretation**. The agreements contained in this Amendment No. 5 shall not be construed in favor of or against any Party, but shall be construed as if each Party prepared this Amendment No. 5.

8. **Entire Agreement**. The Agreement, as amended by this Amendment No. 5, represents the entire understanding between the Parties as to the subject matter of the Agreement, as so amended.

9. **Governing Law**. The Agency and the Developer agree that this Amendment No. 5 shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California, without application of conflicts of laws principles.

10. **No Intended Third-Party Beneficiaries**. None of the terms or provisions of this Amendment No. 5 are intended to benefit any person or entity other than the Agency or the Developer.

SIGNATURE PAGE
TO
AMENDMENT NO. 5
TO
NEGOTIATION AGREEMENT
(S.D. Malkin Properties, Inc.)

IN WITNESS WHEREOF, the Agency and the Developer sign this Amendment No. 5, by and through the signatures of their authorized representatives, as follow:

AGENCY:

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

By:_____
Peter Weiss
Executive Director

DEVELOPER:

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

By:_____
Jeremy Cohen
Sr. Vice President

ATTEST:

By:_____
Secretary

APPROVED AS TO FORM:

By: John P Mullen
General Counsel