



DATE: April 9, 2008

TO: Chairman and Members, Community Development Commission

FROM: Economic and Community Development Department

SUBJECT: **AMENDMENT 3 TO THE NEGOTIATION AGREEMENT BETWEEN S.D. MALKIN PROPERTIES, INC., AND THE COMMUNITY DEVELOPMENT COMMISSION TO EXTEND THE SECOND NEGOTIATION PERIOD TO JULY 11, 2008**

SYNOPSIS

Staff recommends that the Community Development Commission (CDC) approve Amendment 3 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 April 9, 2008, to July 11, 2008, 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. On December 12, 2007, 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, was heard by the California Coastal Commission. At that time there were a number of Suggested Modifications, a protracted discussion, and some procedural confusion. While the City believes the Commission understood and appreciated the City's position, the Coastal staff Revised Findings do not reflect the City's understanding of the vote, particularly with regard to the \$30,000 per door fee on demolishing and rebuilding motels and hotels that are not considered low cost by the Coastal Commission.

To that end, the City has sent a letter and substitute language to the Coastal Commission for their hearing on April 10, 2008. Based on the outcome of that meeting, it will be necessary to return to the CDC to adopt the Revised Findings, and then return to the Coastal Commission with a resubmittal of the Local Coastal Plan Amendment (LCPA).

The Negotiation Agreement with S.D. Malkin is set to expire April 9, 2008. To allow adequate time to resolve the final approval of the LCPA and conclude discussions

regarding a Disposition and Development Agreement, S.D. Malkin requests and staff is recommending that the Negotiation Agreement be extended to July 11, 2008.

ANALYSIS

This time extension is necessary to ensure that the entitlements previously approved would be upheld by the California Coastal Commission.

FISCAL IMPACT

Does not apply.

INSURANCE REQUIREMENTS

Does not apply.

COMMISSION OR COMMITTEE REPORT

None.

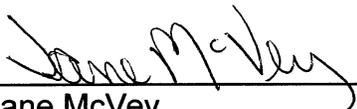
CITY ATTORNEY'S ANALYSIS

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

RECOMMENDATION

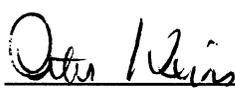
Staff recommends that the Community Development Commission (CDC) approve Amendment 3 to the Negotiation Agreement with S.D. Malkin Properties, Inc., for the development of the Downtown Beach Hotel, to extend the term of the agreement from April 9, 2008, to July 11, 2008, and authorize the Executive Director to execute the amendment.

PREPARED BY:



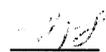
Jane McVey
Economic and Community
Development Director

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. 3
TO
NEGOTIATION AGREEMENT
(S.D. Malkin Properties, Inc.)**

This AMENDMENT NO. 3 TO NEGOTIATION AGREEMENT (S.D. Malkin Properties, Inc.) (this "Amendment No. 3") is dated as of [TO BE DETERMINED], 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, and that certain Amendment No. 2 to Negotiation Agreement (S.D. Malkin Properties, Inc.), dated August 16, 2006 (these latter three agreements are referred to, collectively, as the "Agreement"). This Amendment No. 3 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. The Agency Executive Director and the Developer previously exercised their discretion to agree to two (2) allowed extensions of the Second Negotiation Period; and

E. 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 development of the Project; and

F. The Agency and the Developer desire, by this Amendment No. 3, to extend the Second Negotiation Period to provide such additional time.

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES SET FORTH IN THIS AMENDMENT NO. 3 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. 3 by this reference, as though fully set forth in this Amendment No. 3.

2. **Incorporation of Defined Terms.** All terms, phrases and words indicated to be defined terms by initial capitalization in this Amendment No. 3 that are not specifically defined in this Amendment No. 3 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. 3, is in all respects confirmed and all of the terms, provisions and conditions of the Agreement, as amended by this Amendment No. 3, 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. 3, 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 July 11, 2008 (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 July 11, 2008.

(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 July 11, 2008.

(d) Section 10 of the Agreement is deleted in its entirety.

6. **Execution in Counterparts.** This Amendment No. 3 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. 3 shall not be construed in favor of or against any Party, but shall be construed as if each Party prepared this Amendment No. 3.

8. **Entire Agreement.** The Agreement, as amended by this Amendment No. 3, 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. 3 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. 3 are intended to benefit any person or entity other than the Agency or the Developer.

[Signatures on following page]

**SIGNATURE PAGE
TO
AMENDMENT NO. 3
TO
NEGOTIATION AGREEMENT
(S.D. Malkin Properties, Inc.)**

IN WITNESS WHEREOF, the Agency and the Developer sign this Amendment No. 3, 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: _____
General Counsel