ITEM NO. 16

STAFF REPORT

CITY OF OCEANSIDE

DATE: May 10, 2006

TO: Chairman and Members, Community Development Commission

FROM: Economic Development and Redevelopment Department

SUBJECT: **AMENDMENT 1 TO THE NEGOTIATION AGREEMENT WITH S.D. MALKIN PROPERTIES, INC., REGARDING THE DOWNTOWN BEACH HOTEL**

SYNOPSIS

Staff recommends that the Community Development Commission (CDC) approve Amendment 1 to the Negotiating Agreement with S.D. Malkin Properties, Inc., for the development of a memorandum of understanding (MOU) regarding the Downtown Beach Hotel, extending the term of the agreement 90 days from May 20, 2006, to August 18, 2006, and authorize the City Manager to execute the amendment.

BACKGROUND

On September 7, 2005, the CDC entered into a negotiation agreement with S.D. Malkin Properties, Inc., for a resort hotel on property owned by the CDC, bounded by Pacific Street on the west, Seagaze Drive on the south, Meyers Street on the east, and Pier View Way on the north. The Negotiation Agreement outlined a process and time line to complete two main goals: negotiate an MOU setting forth the main deal points of the proposed project; and the process to begin and complete the environmental impact report and ultimate development entitlements.

One of the initial steps was for the developer to submit the preferred alternative for the proposed site plan. The most important element to be determined at that juncture was the location or disposition of the Graves/Top Gun House.

The next step was for the developer to submit financial proformas for the project based upon the preferred alternative. This included the developer submitting the proposed site plan to two separate construction firms, as well as an independent construction consultant. Those firms each compiled independent construction cost estimates, which the developer provided to the CDC's consultants, as well as having the cost estimates reconciled. The developer then prepared new proformas.

In the time period since the original construction cost estimates were prepared, a number of changes have taken place. The estimates prepared in December 2004 were

based on a concept, not on detailed information. The project has changed and now is proposed to consist of 289 hotel rooms, a 47-room boutique hotel, and a 48-unit fractional time share. The gross area of the building has increased by 11 percent.

The proposed project is complex due to a number of regulatory requirements. For example, there are three main buildings requiring thirteen elevators. The 500-seat ballroom plus dance floor has a significant parking requirement. The desire for a building with a lot of articulation in the design also increases the cost of the project. The most significant impact has been that construction costs have increased approximately 37 percent, on a per-square-foot basis.

To deal with rising construction costs and to provide an adequate return, the developer has revised the building program to create more revenue-producing rooms, without sacrificing quality. This new building program must now be illustrated in a new project financial proforma. Following receipt of a new project proforma, staff intends to work with the developer regarding an investment package tailored to accomplish the project. Staff estimates that ninety additional days are needed.

ANALYSIS

The Downtown Beach Hotel project is a highly complex one and subject to the requirements of the 9 Block Master Plan component of the Local Coastal Plan. This plan sets forth a minimum number of 240 hotel rooms, 18,000 square feet of visitor-serving commercial, public open space and other components.

The entitlement, development, and construction of this scale of hotel is a complex and time-consuming process. The large increase in construction costs is beyond either the CDC's or the developer's control, and must be dealt with. An additional time period is needed to work on possible solutions to this cost increase.

FISCAL ANALYSIS

Does not apply.

CITY ATTORNEY'S ANALYSIS

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

COMMITTEE/COMMISSION REPORT

The Redevelopment Advisory Committee will have heard this issue at the meeting of May 8, 2006.

RECOMMENDATION

Staff recommends that the Community Development Commission (CDC) approve Amendment 1 to the Negotiating Agreement with S.D. Malkin Properties, Inc., for the development of a memorandum of understanding (MOU) regarding the Downtown Beach Hotel, extending the term of the agreement 90 days, from May 20, 2006, to August 18, 2006, and authorize the City Manager to execute the amendment.

PREPARED BY:

Jane McVey
Economic Development &
Redevelopment Director

SUBMITTED BY:

Steven R. Jepsen
City Manager

REVIEWED BY:

Michelle Skaggs Lawrence, Assistant to the City Manager
Mike Blessing, Deputy City Manager

Attachments:

Exhibit A: September 7, 2005, Negotiation Agreement
Exhibit B: Amendment No. 1 to Negotiation Agreement

COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF OCEANSIDE

AMENDMENT NO. 1
TO
NEGOTIATION AGREEMENT
(S.D. Malkin Properties, Inc.)

This AMENDMENT NO. 1 TO NEGOTIATION AGREEMENT (S.D. Malkin Properties, Inc.) (this "Amendment No. 1") is dated as of May 10, 2006, 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.) between the Agency and the Developer, dated September 7, 2005 (the "Agreement"). This Amendment No. 1 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 intent of both the Agency and the Developer in entering into the "First Negotiation Period" (defined in Section 3(a)) of the Agreement) was to establish a specific, limited period of time for (1) their negotiation of a Memorandum of Understanding ("MOU") regarding basic business terms for a future DDA, which terms are not to be binding on either Party, unless and until both Parties approve and execute a complete DDA in the future, and (2) certain submittals by the Developer to further define the Project;

E. The Agency Executive Director and the Developer mutually agreed to extend the First Negotiation Period for thirty (30) days, pursuant to Section 3(e) of the Agreement;

F. Due to the scale of the Project, various constraints of the Property and significant increases in construction costs, the Agency and the Developer desire to amend the Agreement to extend the duration of the First Negotiation Period for an additional ninety (90) days, with one (1) possible thirty (30) day extension, to provide more time to negotiate a MOU;

NOW, THEREFORE, IN CONSIDERATION OF THE PROMISES SET FORTH IN THIS AMENDMENT NO. 1 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. 1 by this reference, as though fully set forth in this Amendment No. 1.

2. **Incorporation of Defined Terms.** All terms, phrases and words indicated to be defined terms by initial capitalization in this Amendment No. 1 that are not specifically defined in this Amendment No. 1 shall have the meaning ascribed to the same term, phrase or word in the Agreement.

3. **Effective Date.** This Amendment No. 1 shall be effective as of April 20, 2006, without regard to the date that it is approved or executed by the Agency or the Developer.

4. **Confirmation of Agreement.** The Agreement, as amended by this Amendment No. 1, is in all respects confirmed and all of the terms, provisions and conditions of the Agreement, as amended by this Amendment No. 1, shall be and remain in full force and effect.

5. **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 or the Developer under the Agreement.

6. **Amendments of Section 3 of the Agreement.** Section 3 of the Agreement is amended to read, in its entirety, as follows:

> (a) The rights and duties of the Agency and the Developer established by this Agreement shall commence on the first date on which all of the following have occurred (the "Effective Date"): (1) execution of this Agreement by the authorized representative(s) of the Developer and delivery of such executed Agreement to the Agency, (2) payment of the Initial Deposit to the Agency by the Developer, in accordance with Section 2(a) and (3) approval of this Agreement by the Agency governing body and execution of this Agreement by the authorized representative(s) of the Agency and delivery of such executed Agreement to the Developer. The Agency shall deliver a fully executed counterpart original of this Agreement to the Developer, within ten (10) calendar days following the Agency governing body's approval of this Agreement, if approved, and the execution of this Agreement by the authorized representative(s) of the Agency. This Agreement shall continue in effect for the period of the three hundred thirty (330) consecutive calendar days immediately following the Effective Date (the "First

Negotiation Period"), except as otherwise expressly provided in Section 10, but subject to the limitations of Sections 3(e) and 3(h).

(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, for an additional four hundred fifty (450) consecutive calendar days commencing on the date immediately following the date of expiration of the First Negotiation Period (the "Second Negotiation Period"), except as otherwise expressly provided in Section 10, but 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.

(c) If Agency staff gives written notice to the Developer that Agency staff will present a MOU to the Agency governing body for consideration, the Developer shall have until the earlier of: (i) seven (7) calendar days following such notice or (ii) the day preceding the date of the meeting at which the Agency will consider the MOU, to have such MOU executed by the authorized representative(s) of the Developer and delivered to the Agency for consideration. If the Developer submits such an executed MOU to the Agency, then the Agency shall have until the end of the First Negotiation Period to consider such MOU, and deliver notice of the Agency's approval or disapproval of such MOU to the Developer. Additionally, the Agency shall have until the end of the First Negotiation Period to determine whether or not the Agency desires to proceed to the Second Negotiation Period and deliver written notice of such determination to the Developer. The Agency's delivery of notice of disapproval of a MOU, election not to proceed to the Second Negotiation Period or the Agency's failure to deliver any such notice before the end of the First Negotiation Period will constitute the Agency's disapproval of any MOU and determination not to proceed to the Second Negotiation Period and this Agreement shall automatically terminate pursuant to Section 3(g).

(d) Any decision of the Agency governing body to proceed to the Second Negotiation Period shall not constitute approval of a MOU or any term, provision, covenant, condition, restriction or other portion of a DDA with the Developer. Additionally, any approval of a MOU by the Agency governing body shall not constitute the Agency governing body's election to proceed to the Second Negotiation Period.

(e) The First Negotiation Period may be extended upon the mutual written agreement of the Agency's Executive Director or his or her designee and the

Developer for up to an additional consecutive thirty (30) calendar days. If the First Negotiation Period is extended pursuant to this Section 3(e), the Executive Director or his or her designee may also modify the deadlines for any remaining actions to be taken by either the Agency or the Developer, within such extended First Negotiation Period. Notwithstanding the immediately preceding sentence, Section 10 or any other part of this Agreement, in no event (including any Unavoidable Delay(s)), shall the First Negotiation Period exceed three hundred ninety (390) consecutive calendar days.

(f) The Second Negotiation Period may be extended upon the mutual written agreement of the Agency's Executive Director or his or her designee and the Developer for up to an additional consecutive sixty (60) calendar days. If the Second Negotiation Period is extended pursuant to this Section 3(f), the Executive Director or his or her designee may also modify the deadlines for any remaining actions to be taken by either the Agency or the Developer, within such extended Second Negotiation Period. Notwithstanding the immediately preceding sentence, Section 10 or any other part of this Agreement, in no event (including any Unavoidable Delay(s)), shall the Second Negotiation Period exceed five hundred forty (540) consecutive calendar days.

(g) This Agreement shall automatically expire and be of no further force or effect at the end of the First Negotiation Period, unless, prior to that time, the Agency and the Developer each approve and execute a separate MOU and each agree to enter into the Second Negotiation Period, pursuant to the provisions of Section 3(b).

(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 not exceed nine hundred thirty (930) consecutive calendar days.

(i) If the Second Negotiation Period is entered into, this Agreement shall automatically expire and be of no further force or effect at the end of the Second Negotiation Period or sooner, pursuant to the provisions of Section 3(j).

(j) Notwithstanding any other term, condition, covenant, restriction or agreement contained in this Agreement, this Agreement shall automatically expire and be of no further force or effect, if both the Agency and the Developer approve and execute a separate DDA acceptable to both the Agency and the Developer, in their respective sole and absolute discretion, in which case this Agreement will terminate on the effective date of such DDA.

7. **Renewal of Section 3(e) Authority**. Notwithstanding the previous extension of the First Negotiation Period referenced in Recital E, the authority to extend the First Negotiation Period pursuant to Section 3(e) of the Agreement is renewed by this Amendment No. 1.

8. **Execution in Counterparts**. This Amendment No. 1 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.

9. **Interpretation**. The agreements contained in this Amendment No. 1 shall not be construed in favor of or against any Party, but shall be construed as if each Party prepared this Amendment No. 1.

10. **Entire Agreement**. The Agreement, as amended by this Amendment No. 1, represents the entire understanding between the Parties as to the subject matter of the Agreement, as so amended.

11. **Governing Law**. The Agency and the Developer agree that this Amendment No. 1 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.

12. **No Intended Third-Party Beneficiaries**. None of the terms or provisions of this Amendment No. 1 are intended to benefit any person or entity other than the Agency or the Developer.

[Signatures on following page]

SIGNATURE PAGE
TO
AMENDMENT NO. 1
TO
NEGOTIATION AGREEMENT
(S.D. Malkin Properties, Inc.)

IN WITNESS WHEREOF, the Agency and the Developer execute this Amendment No. 1, 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:_____
Jim Wood
Chairperson

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

COMMUNITY DEVELOPMENT COMMISSION OF THE CITY OF OCEANSIDE

NEGOTIATION AGREEMENT

(S. D. MALKIN PROPERTIES, INC.)

THIS NEGOTIATION AGREEMENT, is dated as of September 7, 2005 (this "Agreement") 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 the California Community Redevelopment Law (Health and Safety Code Sections 33000, *et seq.*) (the "Agency"), and S. D. MALKIN PROPERTIES, INC., a Delaware corporation (the "Developer"), to provide a specified period of time to attempt to negotiate a DDA (as defined in Recital E, below). The Agency and the Developer are sometimes referred to in this Agreement individually, as a "Party" and, collectively, as the "Parties." This Agreement is entered into by the Parties with reference to the following recited facts (each, a "Recital"):

RECITALS

A. The City of Oceanside, California (the "City"), adopted the Redevelopment Plan for the Downtown Redevelopment Project (the "Redevelopment Plan") covering a certain geographic area within the City (the "Project Area"); and

B. The Agency has adopted an implementation plan for the Redevelopment Plan, pursuant to Health & Safety Code Section 33490 or 33352 (the "Implementation Plan"); and

C. The Agency owns that certain real property located within the Project Area generally located between Pier View Way, Myers Street, Seagaze Drive and Pacific Street and more specifically described in the legal description attached to this Agreement as Exhibit "A" (the "Property"); and

D. The Developer has proposed the redevelopment of the Property as a mixed-use hotel, timeshare and retail project, as generally depicted in the conceptual site plan and elevations attached to this Agreement as Exhibit "B" (the "Project"); and

E. The intent of both the Agency and the Developer in entering into this Agreement is 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 (this future agreement is referred to in this Agreement as a "DDA"); and

F. The intent of both the Agency and the Developer in entering into the "First Negotiation Period" (defined in Section 3(a)) under this Agreement is to establish a specific, limited period of time for (1) their negotiation of a Memorandum of Understanding ("MOU") regarding basic business terms for a future DDA, which terms shall not be binding on either Party, unless and until both Parties approve and execute a complete DDA in the future, and (2) certain submittals by the Developer to further define the Project;

NOW, THEREFORE, IN VIEW OF THE GOALS AND OBJECTIVES OF THE AGENCY RELATING TO THE IMPLEMENTATION OF THE REDEVELOPMENT PLAN AND THE PROMISES OF THE AGENCY AND THE DEVELOPER SET FORTH IN THIS AGREEMENT, THE AGENCY AND THE DEVELOPER AGREE, AS FOLLOWS:

1. **Incorporation of Recitals.** The Recitals of fact set forth above are true and correct and are incorporated into this Agreement, in their entirety, by this reference.

2. **Deposits.**

(a) Concurrent with the Developer's execution of this Agreement, the Developer shall pay to the Agency a deposit in the amount of Twenty-Five Thousand Dollars ($25,000) in immediately available funds (the "Initial Deposit") to ensure that the Developer will proceed diligently and in good faith to fulfill its obligations under this Agreement during the First Negotiation Period, as part of the consideration for the Agency's agreement not to negotiate with other persons during the First Negotiation Period, and to defray certain costs of the Agency in pursuing the contemplated negotiations with the Developer during the First Negotiation Period, pursuant to this Agreement. The Initial Deposit shall be fully earned by the Agency, when made, and shall be non-refundable to the Developer.

(b) Commencing with the first calendar month following the calendar month in which the Effective Date occurs, on the seventh (7^{th}) day of each calendar month during the First Negotiation Period, the Developer shall pay to the Agency a monthly deposit in the amount of Five Thousand Dollars ($5,000) in immediately available funds (each, a "Monthly Deposit"). The purposes of each Monthly Deposit are the same as the purposes of the Initial Deposit. Each Monthly Deposit shall be fully earned by the Agency, when made, and shall be non-refundable to the Developer.

(c) If the Agency and the Developer enter into the Second Negotiation Period, pursuant to Section 3(b), then the Developer shall deposit an additional One Hundred Thousand Dollars ($100,000) in immediately available funds with the Agency on the first day of the Second Negotiation Period (the "Second Deposit"). The Second Deposit is intended to ensure that the Developer will proceed diligently and in good faith to fulfill its obligations under this Agreement during the Second Negotiation Period, as part of the consideration for the Agency's agreement not to negotiate with other persons during the Second Negotiation Period, and to defray certain costs of the Agency in pursuing the contemplated negotiations with the Developer during the Second Negotiation Period, pursuant to this Agreement. The Second Deposit shall be fully earned by the Agency, when made, and shall be non-refundable to the Developer.

(d) Upon each extension of the Second Negotiation Period occurring pursuant to the provisions of Section 3(f), if any, the Developer shall deposit an additional Fifteen Thousand Dollars ($15,000) in immediately available funds with the Agency on the first day of any extension of the Second Negotiation Period occurring pursuant to the provisions of Section 3(f) (each, an "Extension Deposit"). Each Extension Deposit is intended to ensure that the Developer will proceed diligently and in good faith to fulfill its obligations under this Agreement during any extension of the Second Negotiation Period, as part of the consideration for the Agency's agreement not to negotiate with other persons during any such extension of the Second

Negotiation Period, and to defray certain costs of the Agency in pursuing the contemplated negotiations with the Developer during any such extension of the Second Negotiation Period, pursuant to this Agreement. Each Extension Deposit shall be fully earned by the Agency, when made, and shall be non-refundable to the Developer.

3. **Term of Agreement.**

(a) The rights and duties of the Agency and the Developer established by this Agreement shall commence on the first date on which all of the following have occurred (the "Effective Date"): (1) execution of this Agreement by the authorized representative(s) of the Developer and delivery of such executed Agreement to the Agency, (2) payment of the Initial Deposit to the Agency by the Developer, in accordance with Section 2(a) and (3) approval of this Agreement by the Agency governing body and execution of this Agreement by the authorized representative(s) of the Agency and delivery of such executed Agreement to the Developer. The Agency shall deliver a fully executed counterpart original of this Agreement to the Developer, within ten (10) calendar days following the Agency governing body's approval of this Agreement, if approved, and the execution of this Agreement by the authorized representative(s) of the Agency. This Agreement shall continue in effect for the period of the two hundred ten (210) consecutive calendar days immediately following the Effective Date (the "First Negotiation Period"), except as otherwise expressly provided in Section 10, but subject to the limitations of Sections 3(e) and 3(h).

(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, for an additional four hundred fifty (450) consecutive calendar days commencing on the date immediately following the date of expiration of the First Negotiation Period (the "Second Negotiation Period"), except as otherwise expressly provided in Section 10, but 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.

(c) Not later than the one hundred eightieth (180^{th}) day following the Effective Date, Agency staff shall give written notice to the Developer of whether or not Agency staff believes that a MOU has been negotiated with the Developer that Agency staff will submit to the Agency governing body for consideration. If Agency staff gives written notice to the Developer that Agency staff will present a MOU to the Agency governing body for consideration, the Developer shall have ten (10) calendar days to have such MOU executed by the authorized representative(s) of the Developer and delivered to the Agency for consideration. If the Developer submits such an executed MOU to the Agency, then the Agency shall have until the end of the First Negotiation Period to consider such MOU, and deliver notice of the Agency's approval or disapproval of such MOU to the Developer. Additionally, the Agency shall have until the end of the First Negotiation Period to determine whether or not the Agency

desires to proceed to the Second Negotiation Period and deliver written notice of such determination to the Developer. The Agency's delivery of notice of disapproval of a MOU, election not to proceed to the Second Negotiation Period or the Agency's failure to deliver any such notice before the end of the First Negotiation Period will constitute the Agency's disapproval of any MOU and determination not to proceed to the Second Negotiation Period and this Agreement shall automatically terminate pursuant to Section 3(g).

(d) Any decision of the Agency governing body to proceed to the Second Negotiation Period shall not constitute approval of a MOU or any term, provision, covenant, condition, restriction or other portion of a DDA with the Developer. Additionally, any approval of a MOU by the Agency governing body shall not constitute the Agency governing body's election to proceed to the Second Negotiation Period.

(e) The First Negotiation Period may be extended upon the mutual written agreement of the Agency's Executive Director and the Developer for one (1) additional consecutive thirty (30) calendar day period. Notwithstanding the immediately preceding sentence, Section 10 or any other part of this Agreement, in no event (including any Unavoidable Delay(s)), shall the First Negotiation Period exceed two hundred seventy (270) consecutive calendar days.

(f) The Second Negotiation Period may be extended upon the mutual written agreement of the Agency's Executive Director and the Developer for two (2) additional consecutive thirty (30) calendar day periods. Notwithstanding the immediately preceding sentence, Section 10 or any other part of this Agreement, in no event (including any Unavoidable Delay(s)), shall the Second Negotiation Period exceed five hundred forty (540) consecutive calendar days.

(g) This Agreement shall automatically expire and be of no further force or effect at the end of the First Negotiation Period, unless, prior to that time, the Agency and the Developer each approve and execute a separate MOU and each agree to enter into the Second Negotiation Period, pursuant to the provisions of Section 3(b).

(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 not exceed eight hundred ten (810) consecutive calendar days.

(i) If the Second Negotiation Period is entered into, this Agreement shall automatically expire and be of no further force or effect at the end of the Second Negotiation Period or sooner, pursuant to the provisions of Section 3(j).

(j) Notwithstanding any other term, condition, covenant, restriction or agreement contained in this Agreement, this Agreement shall automatically expire and be of no further force or effect, if both the Agency and the Developer approve and execute a separate DDA acceptable to both the Agency and the Developer, in their respective sole and absolute discretion, in which case this Agreement will terminate on the effective date of such DDA.

4. **Negotiation of MOU and DDA.** During the First Negotiation Period, the Agency and the Developer shall negotiate diligently and in good faith to prepare a MOU between them and to commence negotiation of a DDA. During the Second Negotiation Period, if entered into, the Agency and the Developer shall negotiate diligently and in good faith to prepare a DDA between them. The Agency and the Developer shall generally cooperate with each other and supply such documents and information as may be reasonably requested by the other to facilitate the conduct of the negotiations. Both the Agency and the Developer shall exercise reasonable efforts to complete discussions relating to the terms and conditions of a MOU and/or a DDA, as applicable, and such other matters, as may be mutually acceptable to both the Agency and the Developer, in their respective sole discretion. The exact terms and conditions of a MOU or a DDA, if any, shall be determined during the course of these negotiations. Nothing in this Agreement shall be interpreted or construed to be a representation or agreement by either the Agency or the Developer that a mutually acceptable MOU or DDA will be produced from negotiations under this Agreement. Nothing in this Agreement shall impose any obligation on either Party to agree to a definitive MOU or DDA in the future. Nothing in this Agreement shall be interpreted or construed to be a guaranty, warranty or representation that any proposed MOU or DDA that may be negotiated by Agency staff and the Developer will be approved by the Agency governing body. The Developer acknowledges and agrees that the Agency's consideration of any MOU or DDA is subject to the sole and absolute discretion of the Agency governing body and all legally required public hearings, public meetings, notices, factual findings and other determinations required by law. Any MOU produced from negotiations under this Agreement shall contain substantially the provisions set forth in Exhibit "C" attached to this Agreement.

5. **Restrictions Against Change in Ownership, Management and Control of Developer and Assignment of Agreement.**

(a) The qualifications and identity of the Developer and its principals are of particular concern to the Agency. It is because of these qualifications and identity that the Agency has entered into this Agreement with the Developer. During the First Negotiation Period and, if entered into, the Second Negotiation Period, no voluntary or involuntary successor-in-interest of the Developer shall acquire any rights or powers under this Agreement, except as provided in Section 5(c).

(b) The Developer shall promptly notify the Agency in writing of any and all changes whatsoever in the identity of the business entities or individuals either comprising or in Control (as defined in Section 5(d)) of the Developer, as well as any and all changes in the interest or the degree of Control of the Developer by any such person, of which information the Developer or any of its shareholders, partners, members, directors, managers or officers are notified or may otherwise have knowledge or information. Upon the occurrence of any significant or material change, whether voluntary or involuntary, in ownership, management or Control of the Developer (other than such changes occasioned by the death or incapacity of any individual) that has not been approved by the Agency, prior to the time of such change, the Agency may terminate this Agreement, without liability to the Developer or any other person, by sending written notice of termination to the Developer, referencing this Section 5(b).

(c) The Developer may assign its rights under this Agreement to an Affiliate (as defined in Section 5(d)), on the condition that such Affiliate expressly assumes all of the obligations of the Developer under this Agreement in a writing reasonably satisfactory to the Agency, and further provided that S. D. Malkin Properties, Inc., a Delaware corporation, shall, at all times, Control any such Affiliate and be responsible and obligated directly to the Agency for performance of the Developer's obligations under this Agreement.

(d) For the purposes of this Agreement, the term "Affiliate" means any person, directly or indirectly, controlling or controlled by or under common control with the Developer, whether by direct or indirect ownership of equity interests, by contract, or otherwise. for the purposes of this agreement, "Control" means possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether by ownership of Equity Interests, by contract, or otherwise.

6. **Developer Submittals.**

(a) During the First Negotiation Period, the Developer shall proceed diligently and in good faith to do all of the following:

(i) Within thirty (30) days following the Effective Date, submit to Agency staff for comment, the Developer's preferred Project alternative, along with other Project development alternatives; and

(ii) Within thirty (30) days following the Developer's receipt of any comments of Agency staff to the submittal(s) to be made pursuant to Section 6(a)(i), submit to Agency staff for comment, a "Concept Plan" for the Project that contains, at a minimum, all of the following: (1) a site plan, (2) elevation renderings showing all four (4) sides of the proposed Project, (3) approximate square footage of each proposed land use, (4) the anticipated total number of proposed hotel rooms, and (5) the anticipated total number of proposed timeshare units; and

(iii) Within thirty (30) days following the Developer's receipt of any comments of Agency staff to the submittal(s) to be made pursuant to Section 6(a)(ii), submit to Agency staff for comment, a proposed time schedule, cost estimates and financial pro-forma for development and operation of the Project, as described in the Concept Plan, a proposed financing plan identifying potential financing sources for the private and public improvements proposed for the Project, by phase, if appropriate, benchmark criteria with respect to the classes of tenants, tenant mix and lease rates for leased retail and restaurant spaces, a ground lease proposal and cost estimates and financial pro-formas for the Project development alternatives submitted pursuant to Section 6(a)(i); and

(b) If the Agency and the Developer enter into the Second Negotiation Period, then during the Second Negotiation Period, the Developer shall proceed diligently and in good faith to do all of the following:

(i) Within thirty (30) calendar days following the commencement of the Second Negotiation Period, submit to the City Planning Department, a complete Development application, a complete Tentative Parcel Map or Subdivision Map application (as

appropriate), a complete Conditional Use Permit application, a complete Historic Use Permit application, a complete Coastal Permit application, and technical reports and studies (not including an Environmental Impact Report) necessary for preparation of an Environmental Impact Report ("EIR") for the proposed Project, pursuant to the California Environmental Quality Act, Public Resources Code Sections 21000, *et seq.* ("CEQA"). Whether or not any required application or other required information is "complete" or "final" shall be determined by City and Agency staff; and

(ii) Within ninety (90) days following issuance of the Notice of Preparation pursuant to Section 9, submit a screen-check draft EIR for the Project to Agency staff for review and comment; and

(iii) Within sixty (60) days following receipt of Agency staff comments to the draft screen-check EIR submitted pursuant to Section 6(b)(ii), submit a second screen-check draft EIR for the Project to Agency staff for review and comment; and

(iv) Within sixty (60) days following receipt of Agency staff comments to the draft screen-check EIR submitted pursuant to Section 6(b)(iii), submit a draft EIR for the Project to Agency staff for circulation for public review and comment under CEQA; and

(v) Within sixty (60) days following the close of the public comment/review period applicable to the draft EIR, submit a final EIR for the Project to Agency staff, including proposed responses to any comments and a proposed Mitigation Monitoring and Reporting Program relative to potential certification of the final EIR; and

(c) Additionally, the Developer shall submit to Agency staff for comment, within one hundred twenty (120) days following commencement of the Second Negotiation Period, a refined list of proposed classes of retail tenants for the Project.

7. **Developer Obligations to Review Draft Agreements and Attend Meetings.**

(a) During the First Negotiation Period, the Developer shall also diligently review and comment on drafts of a proposed MOU prepared by the Agency's legal counsel and, if the terms and conditions of such a MOU are agreed upon between Agency staff and the Developer, submit the MOU fully executed by the authorized representative(s) of the Developer to the Agency Executive Director for submission to the Agency governing body for review and approval or disapproval. Any future MOU shall consist of terms and conditions acceptable to both the Developer and the Agency, in the sole and absolute discretion of each of them, and shall be subject to no conditions or contingencies on the part of the Developer, except final approval of any such MOU by the governing body of Agency.

(b) During the First Negotiation Period and, if entered into, the Second Negotiation Period, the Developer shall also diligently review and comment on drafts of a DDA prepared by the Agency's legal counsel and, if the terms and conditions of such a DDA are agreed upon between Agency staff and the Developer, submit the DDA fully executed by the authorized representative(s) of the Developer to the Agency Executive Director for submission to the Agency governing body for review and approval or disapproval. Any future DDA shall

consist of terms and conditions acceptable to both the Developer and the Agency governing body, in their respective sole and absolute discretion.

(c) During the First Negotiation Period and, if entered into, the Second Negotiation Period, the Developer shall also keep Agency staff advised on the progress of the Developer in performing its obligations under this Agreement, on a regular basis or as requested by Agency staff, including, without limitation, having one or more of the Developer's employees or consultants who are knowledgeable regarding this Agreement, the design and planning of the Project and the progress of negotiation of a MOU and a DDA, such that such person(s) can meaningfully respond to Agency and/or Agency staff questions regarding the progress of the design and planning of the Project or the negotiation of a MOU and a DDA, attend both: (1) monthly meetings with Agency staff, as reasonably scheduled by Agency staff at, approximately, thirty (30) day intervals during the First Negotiation Period and, if entered into, the Second Negotiation Period (each, a "Monthly Meeting"), and (2) meetings of the Agency governing body, when reasonably requested to do so by Agency staff.

8. **Agency Staff Comment Regarding Developer Submittals**. Agency staff shall endeavor to provide any comments that Agency staff may then have regarding the submittals of the Developer described in Sections 6(a), 6(b) and 6(c), within thirty (30) days following receipt of each such submittal. Any failure of Agency staff to provide any such comments within thirty (30) days following receipt of a submittal from the Developer shall not constitute either (i) a default or breach of this Agreement by the Agency or (ii) "bad faith" on the part of the Agency. Nothing in this Agreement, nor any comments provided by Agency staff, nor any failure of Agency staff to provide comments to any submittal under or pursuant to this Agreement shall: (1) modify or replace any land use entitlement process of either the City or the Agency applicable to the Project, (2) limit the police power land use jurisdiction of either the City or the Agency relative to the Project, (3) constitute an approval of all or any portion of the Project by the City or the Agency pursuant to the police power land use jurisdiction of either the City or the Agency or (4) constitute any approval of all or any portion of a future MOU or DDA with the Developer by the City or the Agency. The Developer shall give notice of any assertion by the Developer of delay by Agency staff in responding to any submittals of the Developer at the first succeeding Monthly Meeting following the occurrence of such asserted delay and the Developer and Agency staff shall meet and confer regarding resolving such asserted delay.

9. **Agency Issuance of Notice of Preparation of EIR**. No later than fifteen (15) days following Agency staff's determination that the applications and other submittals of the Developer described in Section 6(b)(i) are complete, Agency staff shall issue a Notice of Preparation under CEQA regarding preparation of the EIR.

10. **Unavoidable Delay**. The time period for performance of any action to be taken by either the Agency or the Developer pursuant to this Agreement shall be extended by the number of days by which an Unavoidable Delay(s) actually delays such performance, subject to the limitations set forth in this Section 10 and Sections 3(e), 3(f) and 3(h). For the purposes of this Agreement "Unavoidable Delay" means delay in either Party performing any obligation under this Agreement, except payment of money, arising from or on account of any cause whatsoever beyond the Party's control, despite such Party's diligent efforts, including industry-wide strikes, labor troubles or other union activities (but only to the extent such actions affect

similar persons at that time and do not result from an act or omission of the Party), casualty, third-party legal actions related to the Agency's approval of this Agreement or the pursuit of the activities contemplated by this Agreement, war, acts of terrorism or riots. Unavoidable Delay shall not include delay caused by a Party's financial condition, illiquidity, or insolvency. Any Party claiming Unavoidable Delay shall notify the other Party: (a) within ten (10) days after such Party knows of any such Unavoidable Delay; and (b) within five (5) days after such Unavoidable Delay ceases to exist. To be effective, any notice of an Unavoidable Delay must describe the Unavoidable Delay in reasonable detail. The Party seeking to be excused shall exercise its best efforts to cure the condition causing the Unavoidable Delay, within a reasonable time. Each Party expressly agrees that adverse changes in economic conditions, of either Party specifically or the economy generally, or changes in market conditions or demand shall not operate to excuse or delay the performance of each and every of each Party's obligations and covenants arising under this Agreement. Both Parties expressly assume the risk of such adverse economic or market changes, whether or not foreseeable as of the execution of this Agreement.

11. **Developer to Pay All Costs and Expenses.** All fees or expenses of engineers, architects, financial consultants, legal, planning or other consultants or contractors, retained by the Developer for any study, analysis, evaluation, report, schedule, estimate, environmental review, planning and/or design activities, drawings, specifications or other activity or matter relating to the Property or the Project or negotiation of a MOU or a DDA that may be undertaken by the Developer during either or both the First Negotiation Period and/or any Second Negotiation Period, pursuant to or in reliance upon this Agreement or in the Developer's discretion, regarding any matter relating to a MOU, a DDA, the Property or the Project, shall be the sole responsibility of and undertaken at the sole cost and expense of the Developer and no such activity or matter shall be deemed to be undertaken for the benefit of, at the expense of or in reliance upon the Agency. The Developer shall also pay all fees, charges and costs, make all deposits and provide all bonds or other security associated with the submission to and processing by the City and/or the Agency of any and all applications and other documents and information to be submitted to the City and/or the Agency by the Developer pursuant to this Agreement or otherwise associated with the Project. The Agency shall not be obligated to pay or reimburse any expenses, fees, charges or costs incurred by the Developer in pursuit of any study, analysis, evaluation, report, schedule, estimate, environmental review, planning and/or design activities, drawings, specifications or other activity or matter relating to the Property or the Project or negotiation of a MOU or a DDA that may be undertaken by the Developer during either or both the First Negotiation Period and/or any Second Negotiation Period, whether or not this Agreement is, eventually, terminated or extended or a MOU or a DDA is entered into between the Agency and the Developer, in the future.

12. **Agency Not To Negotiate With Others.**

(a) During the First Negotiation Period and, if entered into, the Second Negotiation Period, the Agency and Agency staff shall not negotiate with any other person regarding the lease or redevelopment of the Property, except owners of or business tenants occupying property within the Project Area, as provided for in the Redevelopment Plan. The term "negotiate," as used in this Agreement, means and refers to engaging in any discussions with a person other than the Developer, regardless of how initiated, with respect to that person's redevelopment of the Property to the total or partial exclusion of the Developer from

redeveloping the Property, without the Developer's written consent, subject to the provisions of Section 12(b) and further provided that the Agency may receive and retain unsolicited offers regarding redevelopment of the Property, but shall not negotiate with the proponent of any such offer during the First Negotiation Period or, if entered into, the Second Negotiation Period; provided, however, that the Agency may discuss the fact that the Agency is a party to this Agreement.

(b) Implementation of the Redevelopment Plan shall be and remain in the sole and exclusive purview and discretion of the Agency. Nothing in this Agreement shall limit, prevent, restrict or inhibit the Agency from providing any information in its possession or control that would customarily be furnished to persons requesting information from the Agency concerning the Agency's activities, goals, matters of a similar nature relating to implementation of the Redevelopment Plan or as required by law to be disclosed, upon request or otherwise.

13. **Acknowledgments and Reservations.**

(a) The Agency and the Developer agree that, if this Agreement expires or is terminated for any reason, or a future MOU or DDA is not approved and executed by both the Agency and the Developer, for any reason, neither the Agency nor the Developer shall be under any obligation, nor have any liability to each other or any other person regarding the lease or other disposition of the Property or the redevelopment of the Project or the Property.

(b) The Developer acknowledges and agrees that no provision of this Agreement or a future MOU shall be deemed to be an offer by the Agency, nor an acceptance by the Agency of any offer or proposal from the Developer for the Agency to convey any estate or interest in the Property to the Developer or for the Agency to provide any financial or other assistance to the Developer for redevelopment of the Project or the Property.

(c) The Developer acknowledges and agrees that the Developer has not acquired, nor will acquire, by virtue of the terms of this Agreement or a future MOU, any legal or equitable interest in real or personal property from the Agency.

(d) Certain development standards and design controls for the Project may be established between the Developer and the Agency, but it is understood and agreed between the Agency and the Developer that the Project and the redevelopment of the Property must conform to all Agency, City, Coastal Commission and other applicable governmental development, land use and architectural regulations and standards. Drawings, plans and specifications for the Project shall be subject to the approval of the Agency and the City, through the standard development application process for redevelopment projects within the Project Area. Nothing in this Agreement or a future MOU shall be considered approval of any plans or specifications for the Project or of the Project itself by either the Agency or the City.

(e) The Agency reserves the right to reasonably obtain further information, data and commitments to ascertain the ability and capacity of the Developer to lease, develop and operate the Property and/or the Project. The Developer acknowledges that it may be requested to make certain financial disclosures to the Agency, its staff, legal counsel or other consultants, as part of the financial due diligence investigations of the Agency relating to the

potential lease of the Property and redevelopment of the Project on the Property by the Developer and that any such disclosures may become public records. The Agency shall maintain the confidentiality of financial information of the Developer to the extent allowed by law, as determined by the City Attorney for the City of Oceanside, California.

(f) The Agency shall not be deemed to be a Party to any agreement for the acquisition of, lease of or disposition of real or personal property, the provision of financial assistance to the Developer or development of the Project on the Property or elsewhere, until the terms and conditions of a complete future DDA are considered and approved by both the City Council and the Agency governing body, in their respective sole and absolute discretion, following the conclusion of one or more duly noticed public hearings, as required by law. The Developer expressly acknowledges and agrees that the Agency will not be bound by any statement, promise or representation made by Agency staff or representatives during the course of negotiations of a future MOU or a future DDA and that the Agency shall only be legally bound upon the approval of a complete DDA by both the City Council and the Agency governing body, in their respective sole and absolute discretion, following one or more duly noticed public hearings, as required by law.

14. **Nondiscrimination.** The Developer shall not discriminate against nor segregate any person, or group of persons on account of race, color, creed, religion, sex, marital status, handicap, national origin or ancestry in undertaking its obligations under this Agreement.

15. **LIMITATION ON REMEDIES AND DAMAGES.**

(a) **IN THE EVENT OF A MATERIAL BREACH OF THIS AGREEMENT BY THE AGENCY, THE DEVELOPER SHALL BE LIMITED TO RECOVERING AMOUNTS ACTUALLY PAID BY THE DEVELOPER AS DEPOSITS PURSUANT TO SECTION 2 AND AMOUNTS ACTUALLY PAID BY THE DEVELOPER, FROM APRIL 20, 2005, UNTIL THE DATE OF THE BREACH, TO THIRD-PERSONS DIRECTLY RELATED TO PERFORMANCE OF THE DEVELOPER'S SUBMITTAL OBLIGATIONS UNDER SECTION 6 OF THIS AGREEMENT OR TO ITS ATTORNEYS FOR SERVICES DIRECTLY RELATED TO NEGOTIATION OR DOCUMENTATION OF THIS AGREEMENT OR A FUTURE MOU OR DDA, EXCLUSIVE OF AMOUNTS PAID DIRECTLY OR INDIRECTLY TO EMPLOYEES, MEMBERS, SHAREHOLDERS, PARTNERS, AFFILIATES OR EMPLOYEES OR AGENTS OF ANY OF THEM.**

(b) **NOTWITHSTANDING SECTION 15(a), IN THE EVENT OF ANY BREACH OF THIS AGREEMENT BY THE AGENCY DURING THE FIRST NEGOTIATION PERIOD, THE DEVELOPER MAY ALSO RECOVER AMOUNTS PAID BY THE DEVELOPER TO MR. JEREMY Z. COHEN IN REASONABLE RELIANCE ON THIS AGREEMENT FOR SERVICES DIRECTLY RELATED TO PERFORMANCE OF THE DEVELOPER'S SUBMITTAL OBLIGATIONS UNDER SECTION 6 OF THIS AGREEMENT OR DIRECTLY RELATED TO NEGOTIATION OR DOCUMENTATION OF A FUTURE MOU OR DDA, IN AN AGGREGATE AMOUNT NOT EXCEED FIFTY THOUSAND DOLLARS ($50,000). NOTWITHSTANDING SECTION 15(a), IN THE EVENT OF ANY BREACH OF THIS**

AGREEMENT BY THE AGENCY DURING THE SECOND NEGOTIATION PERIOD, THE DEVELOPER MAY ALSO RECOVER AMOUNTS PAID BY THE DEVELOPER TO MR. JEREMY Z. COHEN IN REASONABLE RELIANCE ON THIS AGREEMENT FOR SERVICES DIRECTLY RELATED TO PERFORMANCE OF THE DEVELOPER'S SUBMITTAL OBLIGATIONS UNDER SECTION 6 OF THIS AGREEMENT OR DIRECTLY RELATED TO NEGOTIATION OR DOCUMENTATION OF A FUTURE MOU OR DDA, IN AN AGGREGATE AMOUNT NOT EXCEED TWO HUNDRED FIFTY THOUSAND DOLLARS ($250,000). (INCLUSIVE OF AND NOT IN ADDITION TO THE DOLLAR AMOUNT SPECIFIED IN THE IMMEDIATELY PRECEDING SENTENCE).

(c) **THE AGENCY AND THE DEVELOPER EACH ACKNOWLEDGE AND AGREE THAT THE AGENCY WOULD NOT HAVE ENTERED INTO THIS AGREEMENT, IF IT WERE TO BE LIABLE TO THE DEVELOPER FOR ANY MONETARY DAMAGES, MONETARY RECOVERY OR ANY REMEDY IN THE EVENT OF A BREACH OF THIS AGREEMENT BY THE AGENCY, OTHER THAN TERMINATION OF THIS AGREEMENT AND PAYMENT OF THE AMOUNTS SPECIFIED IN SECTION 15(a) AND SECTION 15(b). ACCORDINGLY, THE AGENCY AND THE DEVELOPER AGREE THAT THE DEVELOPER'S SOLE AND EXCLUSIVE RIGHT AND REMEDY UPON THE BREACH OF THIS AGREEMENT BY THE AGENCY IS TO TERMINATE THIS AGREEMENT AND RECEIVE THE DEVELOPER'S RELIANCE DAMAGES, AS PROVIDED AND LIMITED IN SECTIONS 15(a) AND 15(b). THE DEVELOPER WAIVES ANY RIGHT TO PURSUE ANY REMEDY OTHER THAN TERMINATION OF THIS AGREEMENT AND TO RECOVER ANY AMOUNTS, OTHER THAN THOSE AMOUNTS SPECIFIED IN SECTION 15(a) AND SECTION 15(b), FROM THE AGENCY DUE TO ANY BREACH OF THIS AGREEMENT BY THE AGENCY.**

(d) **THE DEVELOPER ACKNOWLEDGES THAT IT IS AWARE OF THE MEANING AND LEGAL EFFECT OF CALIFORNIA CIVIL CODE SECTION 1542, WHICH PROVIDES:**

> **A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM WOULD HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR.**

(e) **CALIFORNIA CIVIL CODE SECTION 1542 NOTWITHSTANDING, IT IS THE INTENTION OF THE DEVELOPER TO BE BOUND BY THE LIMITATION ON DAMAGES, RECOVERY AND REMEDIES SET FORTH IN THIS SECTION 15, AND THE DEVELOPER HEREBY RELEASES ANY AND ALL CLAIMS AGAINST THE AGENCY FOR MONETARY DAMAGES, MONETARY RECOVERY OR OTHER LEGAL OR EQUITABLE RELIEF RELATED TO ANY BREACH OF THIS AGREEMENT, EXCEPT AS SPECIFICALLY PROVIDED IN THIS SECTION 15, WHETHER OR NOT ANY SUCH RELEASED CLAIMS WERE KNOWN**

OR UNKNOWN TO THE DEVELOPER AS OF THE EFFECTIVE DATE OF THIS AGREEMENT. THE DEVELOPER SPECIFICALLY WAIVES THE BENEFITS OF CALIFORNIA CIVIL CODE SECTION 1542 AND ALL OTHER STATUTES AND JUDICIAL DECISIONS (WHETHER STATE OR FEDERAL) OF SIMILAR EFFECT WITH REGARD TO THE LIMITATIONS ON DAMAGES AND REMEDIES AND WAIVERS OF ANY SUCH DAMAGES AND REMEDIES CONTAINED IN THIS SECTION 15.

Initials of Authorized Representative of Agency

Initials of Authorized Representative of Developer

16. **Default.**

(a) Failure or delay by either Party to perform any material term or provision of this Agreement shall constitute a default under this Agreement. If the Party who is claimed to be in default by the other Party cures, corrects or remedies the alleged default within fifteen (15) calendar days after receipt of written notice specifying such default, such Party shall not be in default under this Agreement. The notice and cure period provided in the immediately preceding sentence shall not, under any circumstances, extend either the First Negotiation Period or, if entered into, the Second Negotiation Period. If there are less than fifteen (15) days remaining in the First Negotiation Period or, if entered into, the Second Negotiation Period, the cure period allowed pursuant to this Section 16(a) shall be automatically reduced to the number of days remaining in the First Negotiation Period or, if entered into, the Second Negotiation Period.

(b) The Party claiming that a default has occurred shall give written notice of default to the Party claimed to be in default, specifying the alleged default. Delay in giving such notice shall not constitute a waiver of any default nor shall it change the time of default. However, the injured Party shall have no right to exercise any remedy for a default under this Agreement, without first delivering written notice of the default.

(c) Any failure or delay by a Party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any rights or remedies associated with a default.

(d) If a default of either Party remains uncured for more than fifteen (15) calendar days following receipt of written notice of such default, a "breach" of this Agreement by the defaulting Party shall be deemed to have occurred. In the event of a breach of this Agreement, the sole and exclusive remedy of the Party who is not in default shall be to terminate this Agreement by serving written notice of termination on the Party in breach and, in the case of a breach by the Agency, the Developer shall also be entitled to receive the amounts specified in Section 15(a) and Section 15(b).

17. **Compliance with Law.** The Developer acknowledges that any future DDA, if approved by the governing body of the Agency, will require the Developer (among other things) to carry out the development of the Project in conformity with all applicable laws, including all

applicable building, planning and zoning laws, environmental laws, safety laws and federal and state labor and wage laws.

18. **Notice.** All notices required under this Agreement shall be presented in person, by nationally recognized overnight delivery service or by facsimile and confirmed by first class certified or registered United States Mail, with return receipt requested, to the address and/or fax number for the Party set forth in this Section 18. Notice shall be deemed confirmed by United States Mail effective the third (3rd) business day after deposit with the United States Postal Service. Notice by personal service or nationally recognized overnight delivery service shall be effective upon delivery. Either Party may change its address for receipt of notices by notifying the other Party in writing. Delivery of notices to courtesy copy recipients shall not be required for valid notice to a Party.

TO DEVELOPER:	S. D. Malkin Properties, Inc. 835 5th Avenue Suite 401 San Diego, California 92101 Attn: Jeremy Cohen Fax: (619) 239-2444
COURTESY COPY TO:	Brian Seltzer, Esq. Seltzer Caplan McMahon Vitek 2100 Symphony Towers 750 B Street San Diego, CA 92101 Fax: (619) 702-6808
TO AGENCY:	Community Development Commission of the City of Oceanside 300 North Coast Highway Oceanside, California 92054 Attn: Executive Director Fax: (760) 435-3353

19. **Warranty Against Payment of Consideration for Agreement.** The Developer warrants that it has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement. Third parties, for the purposes of this Section 19, shall not include persons to whom fees are paid for professional services, if rendered by attorneys, financial consultants, accountants, engineers, architects and other consultants, when such fees are considered necessary by the Developer.

20. **Acceptance of Agreement by Developer.** The Developer shall acknowledge its acceptance of this Agreement by delivering to the Agency three (3) original counterpart executed copies of this Agreement signed by the authorized representative(s) of the Developer.

21. **Counterpart Originals.** This Agreement may be executed by the Agency and the Developer in multiple counterpart originals, all of which together shall constitute a single agreement.

22. **No Third-Party Beneficiaries.** Nothing in this Agreement is intended to benefit any person or entity other than the Agency or the Developer.

23. **Governing Law.** The Agency and the Developer acknowledge and agree that this Agreement was negotiated, entered into and is to be fully performed in the City of Oceanside, California. The Agency and the Developer agree that this Agreement shall be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of California, without application of such laws' conflicts of laws principles.

24. **Waivers.** No waiver of any breach of any term or condition contained in this Agreement shall be deemed a waiver of any preceding or succeeding breach of such term or condition, or of any other term or condition contained in this Agreement. No extension of the time for performance of any obligation or act, no waiver of any term or condition of this Agreement, nor any modification of this Agreement shall be enforceable against the Agency or the Developer, unless made in writing and executed by both the Agency and the Developer.

25. **Construction.** Headings at the beginning of each section and sub-section of this Agreement are solely for the convenience of reference of the Agency and the Developer and are not a part of this Agreement. Whenever required by the context of this Agreement, the singular shall include the plural and the masculine shall include the feminine and vice versa. This Agreement shall not be construed as if it had been prepared by one or the other of the Agency or the Developer, but rather as if both the Agency and the Developer prepared this Agreement. Unless otherwise indicated, all references to sections are to this Agreement. All exhibits referred to in this Agreement are attached to this Agreement and incorporated into this Agreement by this reference. If the date on which the Agency or the Developer is required to take any action pursuant to the terms of this Agreement is not a business day of the Agency, the action shall be taken on the next succeeding business day of the Agency.

[Signatures on following page]

IN WITNESS WHEREOF, the Agency and the Developer have executed this Negotiation Agreement on the dates indicated next to each of the signatures of their authorized representatives, as appear below.

DEVELOPER:

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

Dated: 9/26/05

By: _____
Name: VICE-PRESIDENT
Its: Jeremy Cohen

Dated: _____

By: _____
Name: _____
Its: _____

AGENCY:

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

Dated: Sept. 20, 2005

By: _____
Jim Wood
Chairperson

ATTEST:

By: _____
Secretary

APPROVED AS TO FORM:

By: _____
General Counsel

EXHIBIT "A"
TO
NEGOTIATION AGREEMENT

Legal Description of Property

Lots 1 through 12, inclusive, in Block, 16 of Oceanside, in the City of Oceanside, County of San Diego, State of California, according to Map thereof No. 344, filed in the Office of the County Recorder of San Diego County, July 1, 1885.

APN: 147-261-01 through 12

Together with, Lots 1 through 12, inclusive, in Block, 17 of Oceanside, in the City of Oceanside, County of San Diego, State of California, according to Map thereof No. 344, filed in the Office of the County Recorder of San Diego County, July 1, 1885.

APN: 147-076-01 through 3 and 147-076-10 through 12

EXHIBIT "B"
TO
NEGOTIATION AGREEMENT

Project Description

[To Be Attached Behind This Page]

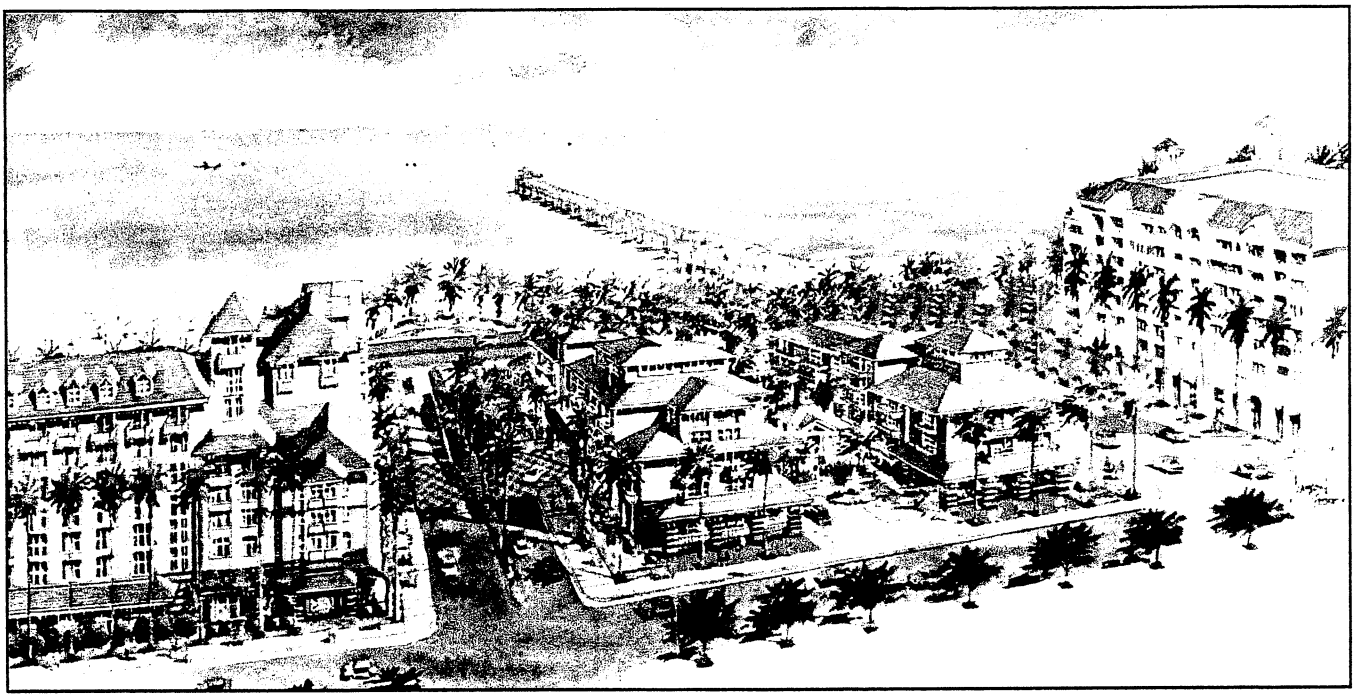
EXHIBIT B

Project Description

OCEANSIDE BEACH HOTEL

CONCEPT SUMMARY

S.D. MALKIN



NUMBER OF ROOMS	302
NUMBER OF TIMESHARES	72
MEETING & BANQUET SPACE	25,960 SQ. FT.
BANQUET SPACE	9,500 SQ. FT.
HOTEL FLAG	WESTIN
AVERAGE DAILY ROOM RATE (ADR)	$224

EXHIBIT "C"
TO
NEGOTIATION AGREEMENT

MOU Provisions

[Attached Behind This Page]

MOU PROVISIONS

Any terms, conditions, covenants, restrictions or agreements set forth in this MOU for potential inclusion in a definitive DDA are not intended to constitute a binding agreement, but rather to serve as the basis for negotiating and drafting a definitive DDA between the Parties potentially containing the terms stated in this MOU, as well as other terms and conditions to be determined. Neither Party will rely on any terms, conditions, covenants, restrictions or agreements set forth in this MOU for potential inclusion in a definitive DDA as binding on the other; any such reliance would be imprudent and unreasonable. Neither Party will be bound by any such provisions, unless and until a definitive DDA has been approved, executed and delivered by both Parties, in their respective sole and absolute discretion.

It is understood and agreed that this MOU does not contain all of the essential terms that the Parties expect or intend will be part of a DDA. Further negotiations between the Parties are contemplated before a binding DDA will be prepared. Further efforts by either Party to perform due diligence, arrange or obtain financing, or carry out other acts in contemplation of the possible lease or development of the Property or the Project may not be deemed evidence of intent by either Party to be bound by any terms, conditions, covenants, restrictions or agreements set forth in this MOU for potential inclusion in a definitive DDA.

The performance by either Party, before execution of a definitive DDA, of any of the obligations that may be included in a DDA between the Parties when negotiations are completed, will not be considered evidence of intent by either Party to be bound by any terms, conditions, covenants, restrictions or agreements set forth in this MOU for potential inclusion in a definitive DDA.

No binding DDA will be entered into unless and until each Party has reviewed, approved (in its sole discretion), and executed a definitive written DDA. Neither Party has any obligation to conclude any business arrangement described in this MOU. Nothing contained in this MOU shall impose any obligation on either Party to agree to a definitive DDA in the future, regardless of whether or not any provisions set forth in this MOU are included as part of such a future agreement. Each Party acknowledges that it will not take action or refrain from taking action in reliance on this MOU and that any such reliance will be at its own risk.

The Parties enter into this MOU acknowledging and intending that a complete and definitive DDA may not be entered into between them and may not become binding on either Party prior to the Agency's certification of an EIR for the Project, if at all.

WRITTEN CONSENT OF THE BOARD OF DIRECTORS

OF

S. D. MALKIN PROPERTIES, INC.,
A DELAWARE CORPORATION

The undersigned, Scott D. Malkin, as the sole member of the Board of Directors of S.D. MALKIN PROPERTIES, INC., a Delaware corporation (the "Corporation"), by consent in writing of its sole director pursuant to Section 141(f) of the General Corporation Law of the State of Delaware, and in lieu of convening the Annual Meeting of the Board of Directors of the Corporation, hereby adopts, confirms and ratifies by his approval and execution of this Written Consent, the following actions taken or to be taken by the Corporation:

WHEREAS, the undersigned believes it to be in the best interests of the Corporation for the Corporation to enter into that certain Negotiation Agreement ("Negotiation Agreement"), with the Community Development Commission of the City of Oceanside relating to the proposed redevelopment of certain real property in Oceanside, California as a mixed-use hotel, time share and retail project;

NOW THEREFORE, that Jeremy Cohen, as Vice President of the Corporation, acting alone, is hereby authorized to execute the Negotiation Agreement, on behalf of the Corporation, and to take such further actions, as are necessary or desirable to effectuate the intent of the above resolutions and all such prior acts and actions on the part of Jeremy Cohen and the Corporation being hereby ratified.

This Written Consent may be sent via facsimile and such facsimile shall be considered an original, executed copy of this Written Consent.

The undersigned, constituting the sole member of the Board of Directors of S.D. Malkin Properties, Inc., hereby consents to and approves the foregoing actions and resolutions as of August 31, 2005.

Scott D. Malkin, Sole Director