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San Diego Unified Port District  
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**DONATION AGREEMENT  
FOR THE DEVELOPMENT OF  
RUOCO PARK  
BETWEEN  
SAN DIEGO UNIFIED PORT DISTRICT  
AND  
THE SAN DIEGO FOUNDATION**

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**DONATION AGREEMENT  
FOR THE DEVELOPMENT OF  
RUOCCO PARK**

This Donation Agreement for the Development of Ruocco Park (this "Agreement"), made NOV 10, 2008, is by and between The San Diego Foundation, a California nonprofit corporation ("Foundation"), and the San Diego Unified Port District, a public corporation ("District").

**RECITALS**

- A. On February 7, 2006, the District amended its Port Master Plan with the Old Police Headquarters & Park Project Port Master Plan Amendment (the "2006 PMPA"). The 2006 PMPA contemplates the future demolition of the Harbor Seafood Mart building, located in the Tuna Harbor planning subarea of the Centre City Embarcadero, and the construction of a new public park on the waterfront consisting of approximately 3.3 acres on the north end of the site (the "Park"). The 2006 PMPA was certified by the California Coastal Commission on August 10, 2006.
- B. The District desires to commence the design and construction of the public park described in the 2006 PMPA as soon as reasonably practicable.
- C. The Foundation has expressed its desire to donate the total of The Lloyd and Ilse Ruocco Fund "B", which, as of the date hereof, is estimated to be Three Million Five Hundred Thousand Dollars (\$3,500,000), (the "Ruocco Fund"), and as further defined in section 1.6, to enhance the design, construction and maintenance of the public park to be constructed by the District. The Foundation is charged with the responsibility of using the funds for the purpose of establishing an urban park that is an example of outstanding urban design.
- D. The District and the Foundation desire to work together to develop the improvement plans for the park, each of them enjoying the right to review and approve the design of the Park. The major elements of the Park will include landscape and aesthetic improvements such as a water feature, lawns, benches, enhanced paving, varieties of plant materials and outdoor sculpture. Both parties agree that the Park would be a valuable aesthetic improvement of the District's Tidelands, would be consistent with the tidelands trusts upon which such lands are administered by the District and the State of California, and would provide significant long-term benefits to the community at large.

In consideration of the recitals and the mutual obligations of the parties as herein expressed, District and Foundation agree as follows:

1. **DEFINITIONS:** The following definitions apply unless they are inconsistent with the context of this Agreement:
  - 1.1. **"Board"** means the San Diego Unified Port District's Board of Port Commissioners.
  - 1.2. **"Park Use Guidelines"** are defined in Exhibit C.
  - 1.3. **"Special Event Policy"** means the San Diego Unified Port District's Board of Port Commissioner Policy No. 452.
  - 1.4. **"Basic Park"** means a park consisting of grass, plants and trees, sprinkler system, plain concrete walkways, standard benches and standard lighting fixtures. A Basic Park does not include restrooms, water features or playground equipment.
  - 1.5. **"Park Enhancements"** means any and all improvements to the Park that are over and above the improvements associated with a Basic Park, including all public artwork submitted at any time during the Term of the Agreement by the Foundation that is installed or constructed on the Park.
  - 1.6. **"Ruocco Fund"** means the total of The Lloyd and Ilse Ruocco Fund "B", which, as of the date hereof, is estimated to be Three Million Five Hundred Thousand Dollars (\$3,500,000), including all earnings and net of administrative and charitable fees, to be donated towards the design and construction of the Park Enhancements and used to maintain, repair and replace the Park Enhancements.
  - 1.7. **"Retained Funds"** means the undisbursed portion of the Ruocco Fund not used towards the design and construction of the Park Enhancements to be placed in a fund established with the Foundation, where the Retained Funds and net earnings, less administrative and charitable fees, on the Retained Funds over the Term of this Agreement are paid by the Foundation towards the maintenance, repair and replacement of the Park Enhancements. The distribution of the Retained Funds will be used for the maintenance, repair and replacement of the Park Enhancements based on an annual maintenance budget for the duration of the term of this Agreement after the initial design of the Park and the construction of Park Enhancements.
  - 1.8. **"Site Preparation Work"** is defined in Exhibit D.
  - 1.9. **"Park Improvements"** means any and all improvements to the Site, including, but not limited to, the Site Preparation Work, the construction

of the Basic Park, Park Enhancements and any public artwork installed on the Site for the Term of this Agreement.

- 1.10. **"Park Improvement Plans"** means the plans prepared by the Consultant for the Park Improvements, including, but not limited to, the conceptual development plans, preliminary development plans and working drawings.
  - 1.11. **"Park Construction Work"** means any and all improvements made to the Site after completion of the Site Preparation Work to complete the Park in accordance with the Park Improvement Plans.
  - 1.12. **"Consultant"** refers to architect Dennis Otsuji of ONA Associates, Inc., located at 966 Business Park Ave., Suite 103, San Diego, CA, 92131, or any other design and/or development professional(s) designated by the Foundation to design the Park.
  - 1.13. **"District Representative"** means the individual appointed by the District for the purposes of administering the Park design process and handling project management responsibilities for the design and construction of Ruocco Park.
  - 1.14. **"Foundation Representative"** means the individual appointed by the Foundation for the purposes of representing the Foundation in the Park design process.
  - 1.15. **"Conceptual Development Plans"** means the conceptual plans prepared by the Consultant and further defined in section 8.1 of this Agreement.
  - 1.16. **"Preliminary Development Plans"** means the preliminary plans prepared by the Consultant, including, but not limited to, schematic design, and further defined in section 8.2 of this Agreement.
  - 1.17. **"Working Drawings"** are defined in section 8.3 of this Agreement.
  - 1.18. **"Relocation Site"** means the relocated or replacement park comparable in size and location to the Park and further defined in section 16 of this Agreement.
2. **SITE:** The Park will be that certain real property located within the District's Planning District 3, Centre City Embarcadero, between the waterfront and Pacific Highway and along the southern edge of Harbor Drive, as depicted on the attached Exhibit A and as legally described on the attached Exhibit B, which is incorporated herein by this reference (the "Site").

3. **TERM:** The term ("Term") of this Agreement is sixty-six (66) years, unless sooner terminated as herein provided, commencing from the date this Agreement is fully executed.
4. **PARK NAME:** The Park will be named "Ruocco Park" for the Term of this Agreement and the name of the Park will appear on the Site on a "Monument Sign" conforming to the approved Construction Bid Documents. The Monument Sign shall be consistent with Board of Port Commissioner Policy 610, "Monuments, Memorials and Plaques."
5. **PARK USE:** The Site will be used exclusively as public park during the Term, subject to (i) the Park Use Guidelines in the attached Exhibit C; (ii) the District's property use program as outlined in the Board of Port Commissioner Policy No. 452, "Permit Fees for the Use of the District Public Parks for Special Events" as applied to all Tidelands parks (Special Event Policy); and (iii) Section 8.02 of the San Diego Unified Port District Code titled "Park Areas Regulated", as either or all are amended from time to time. In the event of any inconsistency between the Park Use Guidelines and the Special Event Policy, the terms of the Park Use Guidelines shall control.
6. **GRANT FUNDS:** Subject to the terms and conditions set forth herein, the Foundation agrees to donate to the District the Ruocco Fund, which is currently estimated to be Three Million Five Hundred Thousand Dollars (\$3,500,000), towards the design and construction of Park Enhancements and the maintenance, repair and replacement of the Park Enhancements. As of the date hereof, it is estimated that approximately Two Million Five Hundred Thousand Dollars (\$2,500,000) of the Foundation's donation will be used for the initial design and construction of the Park Enhancements and approximately One Million Dollars (\$1,000,000) of the Foundation's donation will be placed in the Retained Funds and disbursed in annual installments by the Foundation for the maintenance, repair and replacement of the Park Enhancements for the duration of the Term of this Agreement. The Foundation and the District shall use their best efforts to ensure that the amount of funds expended from the Ruocco Fund towards the design and construction of the Park Enhancements shall be such that the remaining balance of the Retained Funds can adequately maintain the Park Enhancements for the duration of the Term of this Agreement, as described in section 8.1. In the event that the total amount expended for the initial design and construction of the Park Enhancements is less than Two Million Five Hundred Thousand Dollars (\$2,500,000), the excess of the funds shall be applied to the maintenance, repair and replacement of the Park Enhancements. Any additional funds that accrue in the Ruocco Fund will be applied to the maintenance, repair and replacement of the Park Enhancements.

- 6.1. Timing and Disbursement of Initial Park Development Funds: The amount and timing of the disbursement of the funds by the Foundation shall proceed as follows: (i) One Hundred Twenty-Five Thousand Dollars (\$125,000) shall be delivered to the District upon execution of the District's contract with the Consultant; (ii) Two Hundred Fifty Thousand Dollars (\$250,000) upon the award of the general contract for construction of the Park based upon the Construction Bid Documents; (iii) Five Hundred Thousand Dollars (\$500,000) upon the commencement of the Park Construction Work; (iv) Forty percent (40%) of the remaining balance of the Park Enhancement design and construction budget as agreed to by The Foundation and the District upon the receipt by the Foundation of written notice from the Consultant that the Park Construction Work has reached the midpoint in construction; and (v) The balance of the Park Enhancement design and construction budget as agreed to by the Foundation and the District upon receipt by the Foundation of written notice from the Consultant that all Park Construction Work is completed and the Park is opened to the public. Notwithstanding the foregoing, the Foundation may modify the amount and timing of the disbursements of such funds with the approval of the District.
- 6.2. Disbursement of Maintenance Funds: After completion of the Park Construction Work and the Park is opened for public use, the Foundation is required to make annual grants from the Retained Funds for the Term of this Agreement, or until the Retained Funds have been entirely depleted, whichever occurs first, to the District for the maintenance, repair and replacement of the Park Enhancements. Reimbursable costs will include, but not be limited to, compensation to be paid to District employees for the maintenance, repair and replacement of the Park Enhancements, plus the District's related overhead charges, cleaning and maintenance supplies, special maintenance equipment for the Park Enhancements and contracted-for repairs and maintenance services. During the design process, but no later than the commencement of the Site Preparation Work, the District and Foundation, in consultation with the Consultant, will agree on the allocation of maintenance requirements and an annual maintenance budget for the Park with the intent that, for the Term of this Agreement, the Foundation be responsible for the costs to maintain, repair and replace the Park Enhancements and the District be responsible for the costs to maintain and repair a Basic Park. Prior to the beginning of the District's fiscal year, the District will submit to Foundation an annual maintenance budget for review and concurrence. Within ninety (90) days from the end of the District's fiscal year, the Foundation is required to make annual grants from the Retained Funds for the maintenance, repair and replacement of the Park Enhancements in accordance with the annual maintenance budget.

6.3. Public Art: The Park shall incorporate a public art plan in its design submittals and provide public artwork(s) equal to one (1%) percent of the Park's total proposed development budget. The Foundation shall submit to the District proposals for public art to be constructed or installed on the Site before completion of the Park Construction Work, which will be reviewed by the District's Public Art Committee, whose recommendation will be submitted to the Board for approval consistent with BPC Policy No. 609 titled "Port Public Art Program," as amended from time-to-time. Upon Board approval, proposed artwork shall be included in the construction documents for Park Improvements. Construction of the initial public art will not be submitted for bid, unless necessary pursuant to the laws of the State of California regarding Public Works projects, but the District will enter into a direct contract with the artist and the form of the agreement shall be subject to the prior reasonable approval of the District and the Foundation. After completion of Park Construction Work and the initial public art has been approved by the Board and installed on the Site, all subsequent public art proposals submitted by the Foundation, or by any other means, are subject to BPC Policy No. 609 and the Foundation for review and consistency to maintain the purpose of the Ruocco Fund and the donor's intent.

7. **PARK DESIGN CONSULTANT**: The District shall retain Consultant to prepare the design of the Park, including, but not limited to, the Site Preparation Work and Park Improvement Plans, for the Park Improvements subject to the District's standard public works contracting policies, procedures and contracts. District shall be solely responsible for administering the contract with the Consultant. If District is unable to reach contractual agreement with Consultant, District will so notify the Foundation and Foundation will, designate in writing within thirty (30) days of receipt of such notice a new proposed Consultant. If the District is unable to reach agreement with the new Consultant proposed by the Foundation, within ninety (90) days after the District's receipt of the name of the proposed Consultant, then the Foundation may terminate this agreement.

7.1. Designation of Representatives: The District and the Foundation will respectively appoint one individual as their representatives for purposes of administering the Park design process as described in section 8 below. The District Representative and the Foundation Representative shall be selected concurrently with the approval of the Consultant. Unless replaced upon written notice, the Executive Director of the District or his/her designee and the Foundation's Representative shall have full authority and responsibility to act on behalf of the District and the Foundation, respectively, with regard to planning, design and budgeting decisions, but shall have no right to modify this Agreement or waive any material right of his or her principal under this Agreement. The

Foundation, at its election, shall have the right to consult advisers with regard to the plans, specifications and cost estimates prepared by the Consultant and the District's comments thereto. The Foundation's advisers may attend design and budget meetings with the District to discuss plans and cost estimates.

- 7.2. Foundation and District Review of Development Plans: Foundation and District agree to collaborate and cooperate with each other on the Park design. The major design elements of the Park shall include landscape and aesthetic improvement enhancements such as, but not limited to, a water feature, enhanced benches, enriched paving, varieties of plant and lawn materials, specimen trees, outdoor sculpture(s) and/or other artworks. The final design of the Park is subject to the South Embarcadero Phase I Urban Design and Signage Guidelines and BPC Policy No. 454 titled "Tidelands Forestry Management Policy." Foundation and District each have the right to propose design modifications to the Park Improvement Plans to keep design and development costs within budget, or to improve the design of the Park Improvements. Foundation agrees to either timely approve in writing the Park Improvement Plans, or provide in writing to District the modifications that must be made to obtain Foundation's approval of the Park Improvement Plans. Foundation's written response to District shall be within twenty (20) calendar days following receipt of a copy of the Conceptual Development Plans, within twenty (20) calendar days following receipt of a copy of the Preliminary Development Plans, and within twenty (20) calendar days following receipt of a copy of the Working Drawings, which plans and drawings are described in section 8 below. If the District does not agree with the modifications requested by Foundation, District and Foundation will meet to discuss and agree upon the proposed modification(s) of the Park Improvement Plans. If resolution is not obtained within thirty (30) calendar days following the date the District notifies Foundation that it does not agree with one or more of the modifications requested by Foundation, then the parties shall attempt to resolve the dispute(s) informally as set forth in section 27.

8. **PARK IMPROVEMENT PLANS:** Foundation and District agree: (i) that Consultant shall prepare the Park Improvement Plans; (ii) that title to the Park Improvement Plans shall vest in the District, and (iii) that District shall be solely responsible for administering the Consultant's contract.

- 8.1. Conceptual Development Plans: Consultant shall be directed by District to first prepare Conceptual Development Plans consisting of renderings and drawings definitively showing a scaled site layout of the Park, preliminary landscape and hardscape materials, preliminary sign concept

(including the Ruocco Park Monument Sign), preliminary public art concept, the location of the preliminary public art concept, water feature, benches, and other features necessary for Foundation and District to understand precisely the proposed construction of the Park. Consultant also shall be required to identify the design and improvement Park Enhancement features included in the Conceptual Development Plans and provide an estimate of the approximate costs for all the Park Improvements, plus a separate estimate of the approximate costs for the design and improvement Park Enhancement features desired by Foundation. The Foundation and the District shall use their best efforts to ensure that the amount of funds expended from the Ruocco Fund towards the initial design and construction of the Park Enhancements shall be such that the remaining balance of the Retained Funds to be used for maintenance of the Park Enhancements can adequately maintain the Park Enhancements for the duration of the Term of this Agreement. The Board must approve the Conceptual Development Plans and, when appropriate, District will notify Consultant in writing that the Conceptual Development Plans have either been unconditionally approved by both Foundation and District or that they have been approved by Foundation and District subject to certain modifications to the plans being made.

- 8.2. Preliminary Development Plans: Following written notification to Consultant that the Conceptual Development Plans have been approved by Foundation and District (which approval may be subject to Foundation and/or District-required modifications being made to the Conceptual Development Plans), Consultant shall be directed by District to prepare Preliminary Development Plans consisting of a detailed dimensional site plan drawn to scale showing all Park Improvements planned to be constructed on the Site. This plan shall include the location of all existing and proposed easements and how they will be accommodated, locations of all existing and proposed utilities, site drainage and stormwater plans, site grading plan, grade elevations of all structures, proposed site work, and site horizontal (coordinate) and vertical control drawings with a benchmark reference. The Preliminary Development Plans shall also include preliminary precise horticulture palette; preliminary hardscape plans with proposed materials identified; a sign program (including the Ruocco Park Monument Sign) indicating sign type, location, area, letter styles and heights, colors and materials to be used; preliminary artwork location plans for such items as sculptures, art objects, mosaics, fountains, etc.; complete outline specifications to cover all phases of the work; and a detailed preliminary cost estimate of all Park Improvements, with indirect costs separately identified, plus a separate cost estimate for the design and improvement Park Enhancement features desired by Foundation. Consultant shall also be directed by District to prepare an assessment of the life cycle and costs

to maintain, repair and replace the major design elements of the Park. When appropriate, District will notify Consultant in writing that the Preliminary Development Plans have either been unconditionally approved by both Foundation and District or that they have been approved by Foundation and District subject to certain modifications to the plans being made.

- 8.3. Working Drawings: Following written notification to Consultant that the Preliminary Development Plans have been approved by Foundation and District (which approval may be subject to Foundation and/or District-required modifications being made to the Preliminary Development Plans), Consultant shall be directed by District to prepare Working Drawings consisting of complete architectural, civil, structural, mechanical, electrical, plumbing, utility layout, landscaping, irrigation, stormwater, signs (including the Ruocco Park Monument Sign), and public artwork plans (including artwork locations); site horizontal (coordinate) drawings and vertical control plans included in the civil drawings; complete specifications, materials and color list, and engineering calculations for all Park Improvements, construction contract form, construction schedule; and a detail final construction cost estimate of all Park Improvements with indirect costs separately identified, plus a separate cost estimate for the design and improvement Park Enhancement features desired by Foundation. The Working Drawings shall be prepared as one project in the form approved by the Foundation and the District. When appropriate, District will notify Consultant in writing that the Working Drawings have either been unconditionally approved by both Foundation and District or that they have been approved by Foundation and District subject to certain modifications to the plans being made.
- 8.4. Construction Budget and District Costs: Within sixty (60) calendar days following approval by Foundation and District of Conceptual Development Plans and construction cost estimates prepared by Consultant, the District will prepare a total budget for design and construction of the Park Improvements in accordance with the Conceptual Development Plans. Foundation and District will determine the portion of the budget that will be for the development of the Basic Park to be funded by the District and the portion of the budget that will be for Park Enhancements to be funded by the Ruocco Fund. It is understood that the District's total budget for design, construction, and administration shall not exceed Two Million, Five Hundred Fifty Thousand Dollars (\$2,550,000.00) for the Basic Park, including applicable District employee compensation and related overhead charges, unless the Board, in its sole and absolute discretion, authorizes the expenditure of additional District funds.

9. **PIERWALK PROPERTY:** The District is currently negotiating the redevelopment of the Pierwalk Property. The District understands and agrees that, to fulfill the Foundation's mandate to design a Park that is an example of outstanding urban design, the District will keep the Foundation and the Consultant informed regarding the progress of the design of the Pierwalk Property and give the Foundation and the Consultant the opportunity to offer feedback.
10. **SITE PREPARATION WORK:** The District shall be responsible, at its sole cost and expense, for causing termination of all existing tenancies on the Site and for completing the Site Preparation Work in accordance with Exhibit D hereto. In the event of any conflict between the body of this Agreement and Exhibit D, Exhibit D shall control. The Site Preparation Work shall also be constructed in accordance with the design and plans and specifications to be prepared by the Consultant. The Site Preparation Work shall be of a construction type, quality of materials, and workmanship similar to first class projects on the District's Tidelands. If the California Coastal Commission requires its approval to any demolition permit issued by the District in connection with the Site Preparation Work, the District agrees to diligently pursue the certification of the California Coastal Commission. The District shall pay for all costs incurred in completing the Site Preparation Work without exception.
11. **CONSTRUCTION PHASE:**
- 11.1. **Construction Timeframes:** The District shall have commenced the Site Preparation Work within twenty-four (24) months of the execution of this Agreement and shall diligently work towards the completion of the Site Preparation Work and the Park Construction Work. The District has the right to extend the timeframe for the commencement of the Site Preparation Work one time for a period of twelve (12) months by giving Foundation written notice prior to the expiration of the above twenty-four (24) month period. If, after the above-mentioned timeframe and extension have been exhausted, the Site Preparation Work has not commenced, the Foundation may terminate this Agreement upon written notice to District. Within thirty (30) days after the District's receipt of the Foundation's notice of termination, the District will refund to the Foundation any funds that have been donated pursuant to this Agreement.
- 11.2. **Construction Bid Documents:** Following written approval of the Working Drawings by both Foundation and District and Consultant's incorporation into the Working Drawings of Foundation and/or District-required modifications, District shall prepare the Construction Bid Documents. The Construction Bid Documents shall conform to the California Public Works Contract Code requirements for bidding public works projects. The advertising and issuance of the Construction Bid Documents shall be

pursuant to BPC Policy No. 110 titled "Procedures for the Administration of Contracts and the Purchasing of Supplies, Materials, and Equipment," as amended from time-time. The Construction Bid Documents will not be advertised and issued until authorized by the Board. To the extent practical, construction of the Park Enhancements shall be defined separately in the Construction Bid Documents and shall be bid as separate items; however, Foundation and District agree that it may not be practical to have some Park Enhancements separately bid (e.g. upgrades of basic features). Within fifteen (15) working days following receipt of a copy of the Construction Bid Documents, Foundation agrees to either approve them in writing or provide in writing to District the modifications that need to be made to obtain Foundation's approval. If the District does not agree with the modifications requested by Foundation, Foundation and District will meet to discuss and agree upon the *proposed modification(s) of the Construction Bid Documents*. If resolution is not obtained within fifteen (15) working days of the date the District notifies Foundation that it does not agree with the modifications requested by Foundation, the District and the Foundation shall attempt to resolve the dispute(s) informally as set forth in section 27.

- 11.3. District Is Construction Manager: The administration of all construction, including inspection of the work, supervision, and determination of final acceptance, shall be the sole responsibility of the District. The Foundation shall designate a field representative to attend regular meetings with the construction contractor or project manager and approve any change orders.
- 11.4. Award of Construction Contract: Following (i) Foundation approving the Construction Bid Documents, and (ii) authorization from the Board, the District will advertise for competitive bids for the construction of the Park Improvements. When the bids have been received, District will award a contract to the lowest responsive responsible bidder. District will provide Foundation with a summary of the successful bidders' qualifications and their bids, including their separate/additive bids for the Park Enhancements for which separate/additive bids were requested. Foundation shall also have the right to review the entire construction bid submittals in the District's offices during the District's regular business hours. Within fifteen (15) working days of receipt of said bid summary, Consultant shall notify District in writing (i) which additive bid items for the Park Enhancements are acceptable to Foundation and (ii) of Consultant's good-faith estimates of the Park Enhancement design cost, the Park Enhancement construction cost, and the maintenance fund amount that should be used for the Foundation's grants to District pursuant to section 6 above. If District does not agree to one or more of

the Consultant's good-faith estimates, District shall so notify Foundation and Foundation and District shall meet and confer, within fifteen (15) working days following Foundation's receipt of the District's notice, for the purpose of reaching agreement on the amounts to be used for the Foundation's grants to District pursuant to section 6 above. In the event Foundation and District cannot reach agreement on said amounts, Foundation will be requested in writing to accept the District's amounts. If the District's amounts are not accepted by Foundation within fifteen (15) working days of receiving the District's request, District and Foundation shall, first attempt to resolve the dispute(s) informally as set forth in section 27 or accept the grant amounts proposed by Foundation. Following resolution of the Foundation's grant amounts pursuant to section 6 of this Agreement, the Board will be requested to award the construction contract.

- 11.5. Administration of Construction Contract and Change Orders: The District shall, at its sole cost and expense, administer the construction contract with the selected contractor to ensure that the Park Improvements are constructed in substantial compliance with the approved Working Drawings. The parties agree that if a change order to the construction contract is being considered that will result in a cost increase or a cost reduction that is less than Five Thousand Dollars (\$5,000.00), with an aggregate limit up to One Hundred Thousand Dollars (\$100,000), and the change order is in regards to a Park Enhancement, District, in its sole and absolute discretion, may approve or not approve such change order. In the event a change order is being considered that will result in a cost increase or cost reduction that is Five Thousand Dollars (\$5,000.00) or more, and the change order is in regards to a Park Enhancement, the Foundation and the District shall promptly meet and confer to determine if the change order should be issued. In the event of a dispute between the parties regarding a change order, the parties agree to meet and confer in good faith for the purpose of resolving the dispute. In the event Foundation and District cannot reach agreement on the change order within fifteen (15) working days of the first meeting, the District and the Foundation shall attempt to resolve the dispute(s) informally as set forth in section 27 unless such procedure will delay construction of the Park, in which case the District, in its sole and absolute discretion, may issue or deny the change order. When a change order results in an increase in the construction cost of the Park Enhancements, the Foundation shall pay one hundred percent (100%) of the increase in cost. When a change order results in a decrease in the construction cost of the Park Enhancements, Foundation shall be credited with one hundred percent (100%) of the reduction in cost. With the exception of change orders in the amount of Five Thousand Dollars (\$5,000.00) or more, the administration of all construction, including inspection of the work,

supervision, and determination of completion and final acceptance of the Park Improvements, shall be the sole responsibility of the District.

- 11.6. Ownership of Construction Documents: Title to all plans, specifications and other construction documents shall be vested in the District.
- 11.7. Approvals: District agrees to use reasonable efforts to obtain any permits and approvals required of any other authority as soon as reasonably practicable. All such approvals and permits shall be procured at the sole cost and expense of District.
12. **OWNERSHIP OF PARK IMPROVEMENTS**: All improvements to the Site, whether made from the District's funds or the Foundation's funds, will be the property of the District.
13. **DEDICATION CEREMONY**: Upon completion of the Park Construction Work, District representatives will schedule and organize a public dedication ceremony to announce the opening and name of the Park. District will coordinate such public announcement and ceremony with the Foundation and will provide Foundation with at least sixty (60) days prior written notice of the ceremony and public announcement. District will obtain the Foundation's prior approval of all promotional publicity and media/news releases regarding the ceremony. The District will be responsible for making all necessary and appropriate arrangements for promotional publicity and media/news releases regarding the ceremony.
14. **MAINTENANCE, REPAIR AND REPLACEMENT OF PARK IMPROVEMENTS**: Once the Park Construction Work has been completed, the Park will be officially opened for public use. The District will be solely responsible to manage and control the maintenance of the Park. The District will maintain the Park in a clean and functionally operative manner (which shall not be less than the District's highest then-existing standard for landscape maintenance), consistent with the Working Drawings and construction change orders. Such maintenance will include, but is not limited to, routine work such as planting, fertilizing, mowing, trimming, pruning, cleaning, sweeping, pest control, tree and shrub replacement, trash removal, sign maintenance, waterscape maintenance and other Park Improvement maintenance. If at any time during the Term of this Agreement, the Foundation determines that the District is not complying with the routine maintenance standards of this section 14 the Foundation will notify the District in writing. Upon receipt of such notice from the Foundation, the District will use commercially-reasonable efforts to remedy the alleged maintenance deficiency within thirty (30) calendar days. In the event of a dispute between the parties as to the proper maintenance of the Park, the parties agree to meet and confer in good faith for the purpose of resolving the dispute. In the event Foundation and District cannot reach agreement on the

proper maintenance of the Park within thirty (30) calendar days of the first meeting, the District and the Foundation shall attempt to resolve the dispute(s) informally as set forth in section 27.

15. **UTILITIES:** The District shall provide, and be responsible for the payment of, all water, gas, electricity and other utilities necessary for the operation of the Park consistent with the terms and conditions of this Agreement. The District shall make application for, arrange for, pay for (directly to such utility) and be solely responsible for all charges for utility services for the Park, including any connection charges or development fees relating to the development or use of utilities at the Park.
  
16. **PARK RELOCATION:** Should it be necessary to relocate or replace the Park during the Term, the District will relocate the Park with a comparable site in size and downtown location oriented to the waterfront and retain "Ruocco Park" as the Park name. The Relocation Site shall be subject to the written approval of the Foundation, which approval or disapproval shall be made within thirty (30) days after the District's written request. If the Relocation Site is approved by the Foundation, then the Relocation Site shall be developed consistent with the terms and conditions of this Agreement; provided (i) the District shall have the sole obligation to pay the cost of the initial design and construction of the Park on the Relocation Site in an amount not less than the amount previously expended by the Foundation and the District for the costs associated with the construction of a Basic Park and Park Enhancements, (ii) the District and the Foundation shall agree upon the plans and specifications for the design of the Park on the Relocation Site, and (iii) the Foundation's grants for maintenance shall only continue for the remaining number of years in the original Term. If the Foundation does not approve of the Relocation Site, future grants payable by the Foundation hereunder may be discontinued (including, without limitation, grants for park design, construction and maintenance) upon the delivery of such notice to District. Within thirty (30) days after the District's receipt of the Foundation's notice of disapproval, the District will refund to the Foundation any monies that have been donated hereunder to the park for the costs associated with the construction of Park Enhancements.
  
17. **APPROVALS AND NON-LIABILITY:** Any approval or consent given by the Foundation under the terms of this Agreement may be subject to such reasonable conditions as the Foundation deems appropriate (including, without limitation, dates by which the construction of improvements approved by Foundation must be commenced (if no such date is otherwise specified in this Agreement) and dates on which approvals or consents will expire). The Foundation shall not be liable in damages or otherwise to anyone submitting documents (including, without limitation, plans or specifications or cost estimates) to it for approval, or to any other person, by reason of mistake in judgment, negligence or nonfeasance, or for any other reason, arising out of or

in connection with the approval or disapproval or failure to approve or disapprove any such documents. Without limitation, the Foundation and the Foundation advisers shall not be liable for (a) any defect in, the inadequate design of, the lack of quality of, the inadequacy or unsuitability of materials used in, or the noncompliance with laws of any improvement constructed pursuant to such document, (b) documents which are inadequate or inaccurate or (c) documents which do not comply with the law. Any review of documents by the Foundation is solely for the benefit of the Foundation and shall not be relied upon by the District or any other person.

**18. HAZARDOUS MATERIALS:**

18.1 Definitions: "Hazardous Materials" means (a) any "hazardous substance" as defined in § 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended from time to time [42 U.S.C. §§ 9601 *et seq.*]; (b) petroleum and petroleum products (including, without limitation, crude oil, natural gas, natural gas liquids, liquefied natural gas and synthetic gas); (c) polychlorinated biphenyls (PCBs); (d) asbestos; (e) urea formaldehyde; (f) radon gas; and (g) any additional substances, materials or waste which are classified or considered to be hazardous or toxic under federal, state or local law or regulation.

18.2 Indemnification: District shall indemnify, defend (with counsel selected by District and reasonably acceptable to the Foundation) and hold harmless the Foundation or the Foundation Representative, the Foundation advisers, along with the Foundation's officers, directors, employees and agents (collectively, the "Foundation Parties") from any and all claims, losses or damage incurred by the Foundation or the Foundation Parties resulting directly or indirectly from the presence or release of Hazardous Materials on or under the Site. District shall be responsible at its sole cost for remediation or cleaning up any Hazardous Materials located on or under any portion of the Site to the extent (i) required by any governmental authority with jurisdiction over the Site or (ii) which interferes with the use of the Site as a public park.

19. **PARK OPERATIONS INDEMNITY:** District shall indemnify, defend and hold harmless the Foundation and the Foundation Parties from and against any and all claims, demands, liabilities, actions, damages, costs and expenses, including, without limitation, reasonable attorney's fees, arising out of any negligent act or omission of the District or its employees, agents, contractors or consultants for any personal injury or property damage that occurs on or about the Site. The District's obligations under this section shall survive the termination of this Agreement. ✓

20. **NOTICES AND COMMUNICATION:** Any notice, communications, reports, applications, requests or other information made or given under this Agreement must be in writing and delivered to the person shown at the respective address listed below. All written notices required by this Agreement will be deemed delivered: (i) personally, if served upon the person stated below, or (ii) by certified letter or overnight courier addressed to the address stated below. Delivery will be considered completed: when delivered, if made personally; forty-eight (48) hours after deposit in the U.S. Mail, if by certified letter; or on the specified day of delivery, if made by private courier. All such notices should be sent as follows:

If to District, to:

Executive Director  
San Diego Unified Port District  
3165 Pacific Highway, San Diego, California 92101  
or P.O. Box 120488, San Diego, California 92112-0488  
telephone: (619) 686-6414  
fax: (619) 686-6374

With a copy to:

Port Attorney  
San Diego Unified Port District  
3165 Pacific Highway, San Diego, California 92101  
or P.O. Box 120488, San Diego, California 92112-0488  
telephone: (619) 686-6219  
fax: (619) 686-6444

If to Foundation, to:

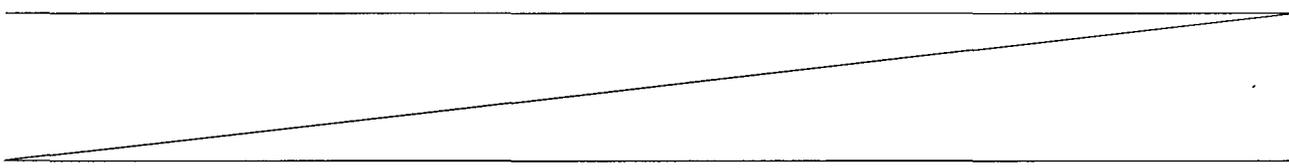
Ms. Deborah Hoffman  
The San Diego Foundation  
2508 Historic Decatur Road, Suite 200  
San Diego, CA 92106  
telephone: (619) 235-2300  
fax: (619) 235-1710

21. **THIRD PARTY BENEFICIARY:** This Agreement is made and entered into for the benefit of the District and Foundation only, and is not intended for the benefit of any other entity, party or person, and no other entity, party or person shall be or become a beneficiary to this Agreement or otherwise enjoy or acquire any rights under this Agreement.

22. **WAIVER**: Any waiver by either party of any breach by the other party of any one or more of the terms, covenants or conditions of this Agreement shall not be, nor shall such be construed to be, a waiver of any subsequent or other breach of the same or any other term, covenant or condition of this Agreement. Any failure on the part of either party to require or exact full and complete compliance by the other party with any of the terms, covenants or conditions of this Agreement, shall not be, nor shall such be construed to be, in any manner, a change in the terms of this Agreement or prevent the parties from enforcing the full provisions hereof.
23. **SUCCESSORS AND ASSIGNEES**: This Agreement may not be assigned and the beneficial rights hereunder may not be transferred in whole or in part by either party.
24. **INTERPRETATION**: Capitalized terms shall have such meaning as expressly stated herein, if there should be an irreconcilable conflict between this Agreement and any other writing or understanding, the expressly stated definitions of this Agreement shall supersede. The neuter gender includes the feminine and masculine, the masculine includes the feminine and neuter, and the feminine includes the masculine and neuter, and each includes corporations, partnerships, or other legal entities when the context so requires. The singular number includes the plural whenever the context so requires.
25. **INTEGRATION, MODIFICATIONS, AMENDMENT AND RELIANCE**: It is expressly understood and agreed that this Agreement constitutes the final and entire agreement between Foundation and District and supersedes all prior negotiations, written or oral. In no event will Foundation or the District be entitled to receive any consideration, benefits, reimbursements or ancillary services other than as expressly provided in this Agreement, as such may be properly modified or amended. No modification or amendment of this Agreement will be valid or binding unless duly authorized, reduced to writing and signed by both parties.
26. **CONSTRUCTION OF AGREEMENT**: Both District and Foundation have had the opportunity to consult legal counsel. Accordingly, it is expressly agreed that the provisions of this Agreement were freely negotiated and their meaning shall not be construed against one party as the drafter thereof.
27. **DISPUTE RESOLUTION**: All disputes or disagreements between or among parties arising out of or relating to the terms, conditions, interpretation, performance, default or any other aspect of this Agreement, such parties shall first attempt to resolve the dispute informally. In the event that the dispute is not resolved informally, prior to and as a precondition to the initiation of any legal action or proceeding, the parties shall refer the dispute to mediation before a retired State or Federal judge mutually selected by the parties. The dispute

shall be mediated through informal, nonbinding joint conferences or separate caucuses with an impartial third party mediator who will seek to guide the parties to a consensual resolution of the dispute. The mediation proceeding shall be conducted within thirty (30) days (or any mutually agreed longer period) after referral, and shall continue until any party involved concluded, in good faith, that there is no reasonable possibility of resolving the dispute without resort to a legal action or proceeding. All costs of the mediation shall be shared equally by the parties involved. Each party shall bear its own attorneys' fees and other costs incurred in connection with the mediation. In the event the parties are unable to resolve the dispute through mediation, in addition to any other right or remedies, any party may institute a legal action.

- 28. **ATTORNEY FEES:** If either party shall commence an action, whether litigation or arbitration, against the other party for breach of this Agreement or damages arising out of this Agreement, the party adjudged by a court of competent jurisdiction to be the prevailing party, shall be entitled to recover all reasonable costs of suit, including but not limited to: costs and attorney's fees (including actual costs and hourly wage expenses incurred for either party's in-house legal staff) incurred by or imposed upon the prevailing party in connection with such action.
  
- 29. **APPLICABLE LAW:** This Agreement and any Exhibits and Amendments hereto, will be construed and enforced in accordance with the laws of the State of California.
  
- 30. **RIGHTS OF THE U.S. GOVERNMENT:** This Agreement will be subordinate to the provisions and requirements of any existing or future obligations of the District under the San Diego Unified Port District Act and in or to the State of California or the United States of America, with respect to the use of District property.
  
- 31. **REQUISITE AUTHORITY:** Each of the entities, parties or persons executing this Agreement represents and warrants that it/he/she/they has or have the requisite authority to enter into this Agreement and so bind and obligate the party for whom it/he/she/they acts hereunder, and will produce, upon request by the other party, written evidence of such facts.



- 32. **SIGNATURES REQUIRED:** This Agreement will not be complete nor effective until duly approved by the District's Board of Port Commissioners and signed by the Executive Director on behalf of the District.

Now, therefore, in consideration of all the conditions and agreements between the parties hereto, the District and Foundation hereby enter into this Agreement. SAN DIEGO UNIFIED PORT DISTRICT, a public corporation (the "District"):

Port Attorney

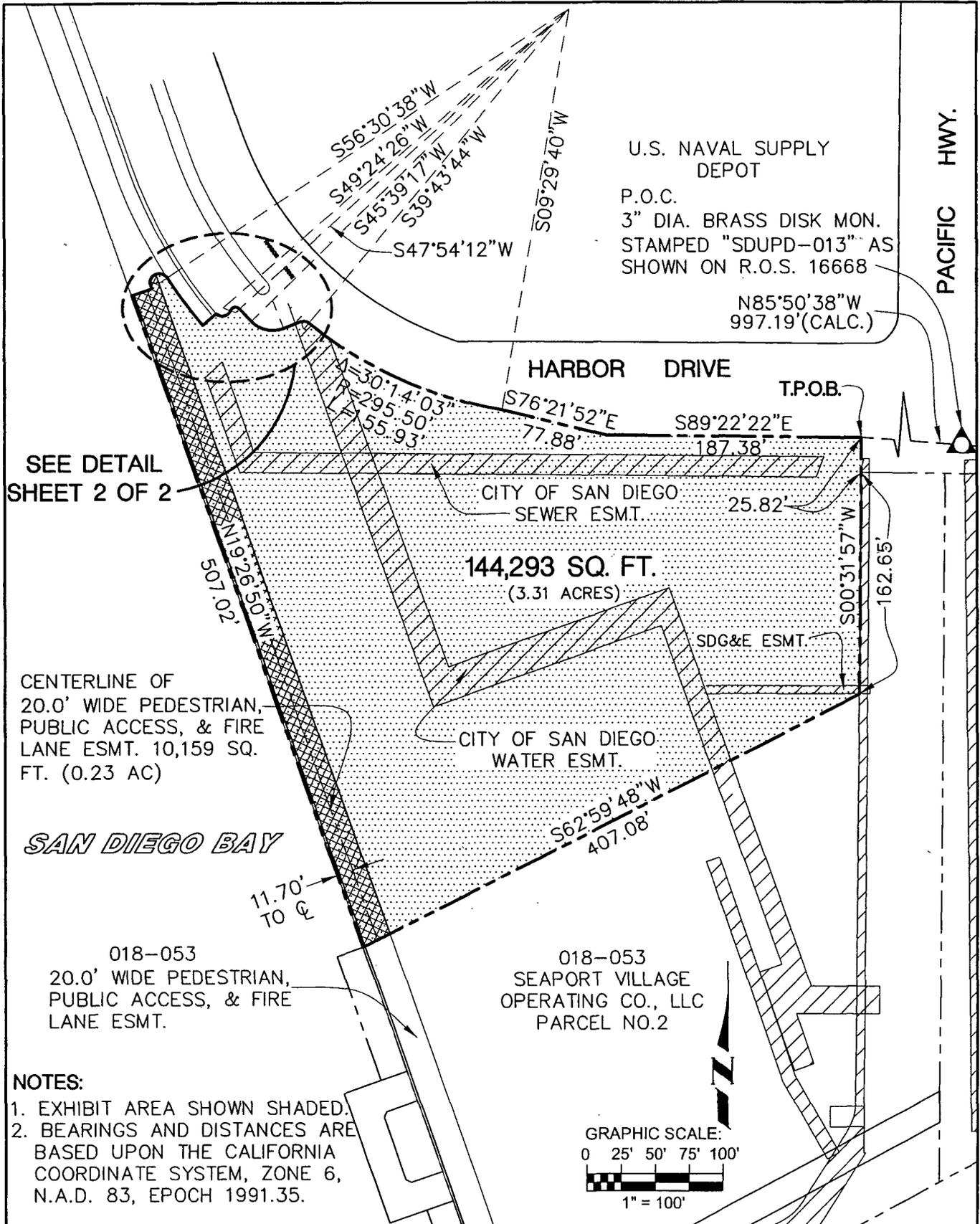
SAN DIEGO UNIFIED PORT DISTRICT

By:   
 DEPUTY PORT ATTORNEY

By: DIRK MADHIAN BR.  
 Name: Bruce B. Hollingsworth  
 Title: Executive Director

THE SAN DIEGO FOUNDATION, a  
 California nonprofit corporation

By:   
 Name: BOB KELLY  
 Title: POB/CEO



**NOTES:**

1. EXHIBIT AREA SHOWN SHADED.
2. BEARINGS AND DISTANCES ARE BASED UPON THE CALIFORNIA COORDINATE SYSTEM, ZONE 6, N.A.D. 83, EPOCH 1991.35.

DRAWN ASNOR SANTONIL  
 CHECKED \_\_\_\_\_  
 REVIEWED T. MANSWALL  
 APPROVED  
*Charles J. Stephens*  
 LAND SURVEYOR, SDUPD.

**SAN DIEGO UNIFIED PORT DISTRICT**

WITHIN CORPORATE LIMITS OF SAN DIEGO  
 THE SAN DIEGO FOUNDATION  
 AGREEMENT

DATE SEPT. 23, 2008  
 SCALE 1"=100'  
 REF. FIELD SURVEY

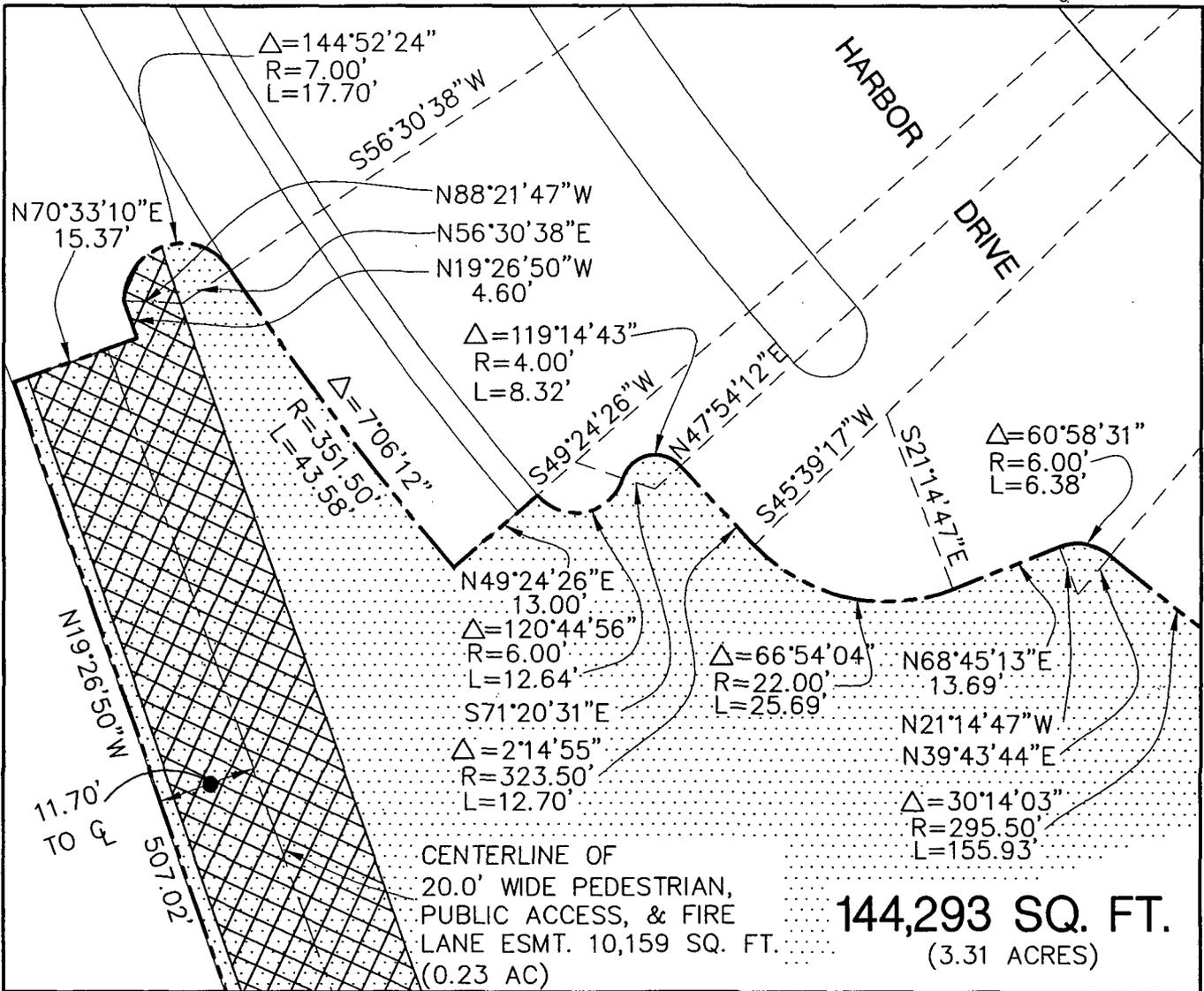
DRAWING NO.  
 SHEET 1 OF 2  
010 102

**EXHIBIT "A"**

**54151**

DEVSERV\REMI\E18\018-102

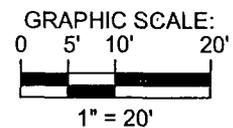
22



**DETAIL**  
SCALE: 1"=20'

**NOTES:**

- EXHIBIT AREA SHOWN SHADED.
- BEARINGS AND DISTANCES ARE BASED UPON THE CALIFORNIA COORDINATE SYSTEM, ZONE 6, N.A.D. 83, EPOCH 1991.35.



DRAWN ASNOR SANTONIL  
 CHECKED \_\_\_\_\_  
 REVIEWED T. MARSHALL  
 APPROVED \_\_\_\_\_  
 LAND SURVEYOR, SDJLPD.

**SAN DIEGO UNIFIED PORT DISTRICT**

WITHIN CORPORATE LIMITS OF SAN DIEGO  
 THE SAN DIEGO FOUNDATION  
 AGREEMENT

DATE SEPT. 23, 2008  
 SCALE 1"=20'  
 REF. FIELD SURVEY

DRAWING NO.  
 SHEET 2 OF 2  
018-102

**54151**

DEVSERV\REM\E18\018-102

**Legal Description for  
THE SAN DIEGO FOUNDATION AGREEMENT  
Parcel / Drawing No 018-102  
Within Corporate Limits of San Diego**

All that certain portion of land conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California pursuant to Chapter 67, Statutes of 1962, First Extraordinary Session, as amended, and delineated on that certain Miscellaneous Map No. 564, filed in the Office of the San Diego County Recorder on May 28, 1976, File No. 76-164686, in the City of San Diego, County of San Diego, State of California, and more particularly described as follows:

Commencing at a 3" diameter brass disk monument marked "SDUPD – 013" as shown on Record Of Survey Map No. 16668, filed in the Office of the San Diego County Recorder on July 25, 2000; thence along a tie line North 85°50'38" West a distance of 997.19 feet (calculated) to the TRUE POINT OF BEGINNING; thence South 00°31'57" West a distance of 25.82 feet to a point on the boundary line of an area now leased to the Seaport Village Operating Co., LLC; thence along said Seaport Village Operating Co., LLC boundary line South 00°31'57" West a distance of 162.65 feet; thence South 62°59'48" West a distance of 407.08 feet; thence leaving said boundary line of the Seaport Village Operating Co., LLC leasehold North 19°26'50" West a distance of 507.02 feet; thence North 70°33'10" East a distance of 15.37 feet; thence North 19°26'50" West a distance of 4.60 feet to the beginning of a non-tangent 7.00 foot radius curve, concave southeasterly, a radial to said points bears North 88°21'47" West from the center of said curve; thence northeasterly along the arc of said curve through a central angle of 144°52'24" an arc distance of 17.70 feet to a point which bears North 56°30'38" East from the center of said curve, said point also being the beginning of a 351.50 foot radius reverse curve, concave northeasterly, a radial to said point bears South 56°30'38" West; thence southeasterly along the arc of said curve through a central angle of 7°06'12" an arc distance of 43.58 feet to a point which bears South 49°24'26" West from the center of said curve; thence North 49°24'26" East a distance of 13.00 feet to the beginning of a non-tangent 6.00 foot radius curve, concave northerly, a radial to said points bears South 49°24'26" West; thence southeasterly along the arc of said curve through a central angle of 120°44'56" an arc distance of 12.64 feet to the beginning of a 4.00 foot radius reverse curve, concave southerly, a radial to said point bears North 71°20'31" West; thence easterly along the arc of said curve through a central angle of 119°14'43" an arc distance of 8.32 feet to the beginning of a 323.50 foot radius reverse curve, concave northeasterly, a radial to said point bears South 47°54'12" West; thence southeasterly along the arc of said curve through a central angle of 2°14'55" an arc distance of 12.70 feet to the beginning of a 22.00 foot radius

Sheet 1 of 2

**EXHIBIT "B"**

**54151**

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compound curve, concave northerly, a radial to said point bears South 45°39'17" West; thence southeasterly along the arc of said curve through a central angle of 66°54'04" an arc distance of 25.69 feet; thence North 68°45'13" East a distance of 13.69 feet to the beginning of a 6.00 foot radius curve, concave southerly; thence easterly along the arc of said curve through a central angle of 60°58'31", an arc distance of 6.38 feet to the beginning of a 295.50 foot radius reverse curve, concave northeasterly, a radial to said point bears South 39°43'44" West; thence southeasterly along the arc of said curve through a central angle of 30°14'03", an arc distance of 155.93 feet to a non-tangent point which bears South 09°29'40" West from the center of said curve; thence South 76°21'52" East a distance of 77.88; thence South 89°22'22" East a distance of 187.38 to the TRUE POINT OF BEGINNING, containing 144,293 square feet or 3.31 acres of tidelands area.

ALSO: Reserving therefrom a 20.0 foot wide easement for pedestrian, public access and fire lane purposes, the centerline of said easement being located parallel to and 11.70 feet easterly of the most westerly line of the above described property containing a total of 10,159 square feet or 0.23 acre of tidelands area.

The above described tidelands area is delineated on the San Diego Unified Port District Drawing No. 018-102, dated September 23, 2008 and made a part of this agreement.

All bearings and distances in the above legal description are grid, and based upon the California Coordinate System, Zone 6, N.A.D. 83, Epoch 1991.35.

*Charles J. Sefkow* 9-23-08  
Charles J. Sefkow Date  
L.S. 7876 Expires 31 Dec. 2008  
Land Surveyor  
San Diego Unified Port District



Exhibit "C"  
Park Use Guidelines

1. **Public Access.** Ruocco Park (the "Park") is for the use and enjoyment of the public. Public access to a portion of the Park shall be maintained at all times.
2. **Private Events.** "Private Events" are events held at the Park in which a portion of the Park is used exclusively by a licensee, after proper application to the District in accordance with Board of Port Commissioner Policy No. 452. There shall be no more than two hundred and fifty (250) people in attendance at any Private Event, unless otherwise agreed upon by authorized representatives of the Foundation and the District. During Private Events, there shall be public access to areas of the Park that are not designated as Private Event areas. There shall be no more than two (2) Private Events whose attendance exceeds seventy-five (75) people each calendar month. Each Private Event shall have a duration of no more than seventy-two (72) hours. The only Private Events permitted at the Park shall be weddings, birthday parties, family gatherings, and other events as agreed upon by authorized representatives of the Foundation and the District.
3. **Public Events.** "Public Events" are those events that are open to the public. Permissible Public Events include art shows, musical performances, public announcements, and other events as agreed upon by authorized representatives of the Foundation and the District. There shall be no more than two (2) Public Events each calendar month and each Public Event shall have a duration of no more than seventy-two (72) hours. The Foundation and the District shall develop a list of art shows and demonstrations at the Park each calendar year. In addition, the District may host each calendar year at the Park musical performances by students from local schools, universities and colleges. The commercial fishing business located on the Pierwalk Property may also perform public education or demonstrations on subjects relating to the fishing industry near the waterfront area, provided such demonstrations take place no more than once per month.
4. **Special Events.** "Special Events" are events held at the Park that are sponsored by the District to accommodate large-scale regional events providing an economic or social benefit to San Diego County. Permissible Special Events may include, but are not limited to, political conventions, national sporting events taking place in San Diego County, maritime festivals, air shows, etc. There shall be no more than six (6) Special Events in any calendar year and each Special Event shall be subject to Board of Port Commissioners Policy No. 452.
5. **Blackout Clause.** Park events, designated as all the above-referenced events, that are scheduled for weekend use shall only be allowed to take place for a

maximum of three (3) consecutive weekends. If Park events take place three (3) consecutive weekends, no events will be allowed on the fourth weekend in succession.

6. **Park Use Guidelines.** The Foundation and the District agree that this Exhibit "C", Park Use Guidelines, may be updated from time to time by mutual agreement of both parties with the approval of the Executive Director of the District and the Authorized Representative of the Foundation.

Exhibit "D"  
Site Preparation Work

- A. **Site Preparation Work.** All rough and final site grading, leveling, filling, drainage improvements, compaction of fill, excavation and removal of dirt necessary for the construction of the Park, and related improvements to be located on the Site and/or to provide proper drainage for the Site. All such grading work required or referenced herein shall have been compacted to within ninety percent (90%) and graded to within one-tenth (1/10th) of a foot of the finished pad grade as specified in the Construction Bid Documents and otherwise completed in accordance with the soils investigation report recommendation of the District's soils or geotechnical engineer, and certified as such by said soils or geotechnical engineer and the District's civil engineer, and as specified below. In addition, all trees, shrubbery, buildings, structures, debris, storage material and other things located within the Site shall be removed.
- B. **Utility Work.** All operational utilities necessary for the operation of the Park (sanitary sewer, water, telephone, storm drainage, gas and electric) (the "**Operational Utilities**") shall be installed underground. All such Operational Utilities shall be stubbed and available for use (the exact location of which shall be coordinated with the Consultant), all in accordance with the utility plan or specifications attached or referenced below. As provided in this Exhibit D, District shall pay any so called "hook up", "tap-in", connection charges or other development fees related to the utilities serving the Site.
- C. **Remediation.** During the Site Preparation Work, and as otherwise provided in the Agreement, the District shall be responsible at its sole cost for remediation or cleaning up of any Hazardous Material on or under any portion of the Site to the extent (i) required by law, or (ii) such Hazardous Materials may interfere with the use of the Site as a public park.