

Attachment C to Agenda File No. 2018-0158

CONTRIBUTION AGREEMENT FOR NORTH EMBARCADERO VISIONARY PLAN PUBLIC IMPROVEMENTS

THIS CONTRIBUTION AGREEMENT FOR NORTH EMBARCADERO VISIONARY PLAN PUBLIC IMPROVEMENTS (“Agreement”) is dated as of _____, 2018 for reference purposes only and is entered into between THE CITY OF SAN DIEGO, a municipal corporation (“City”) and the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation (“Port”) (collectively, the “Parties” and individually, a “Party”), to contribute funds to the Port.

RECITALS

- A. The Port is a public corporation created by the Legislature in 1962 pursuant to Harbors and Navigation Code Appendix 1 (“Port Act”).
- B. The Port holds certain property located in the City of San Diego in trust for the State of California, including that approximately 69,278 square feet of land area located south of the southernmost edge of the prolongation of “C” Street, on the north side of Broadway between North Harbor Drive and Pacific Highway in the City of San Diego, California (“Property”) commonly known as Lane Field South and more particularly described in that certain lease dated May 4, 2016 between the Port and LFS Development, LLC, a Delaware limited liability company (“Tenant”) (District Clerk No. 64976) (the “Lease”).
- C. On April 9, 2007, the City, the City of San Diego Redevelopment Agency (“Redevelopment Agency”), acting through Centre City Development Corporation (“CCDC”), and the Port created and established the North Embarcadero Alliance Joint Powers Authority (the “JPA”) through the execution of a Joint Exercise of Powers Agreement (the “Authority Agreement”) to implement the North Embarcadero Visionary Plan (the “NEVP”) and to exercise the powers described in the Authority Agreement.
- D. On January 8, 2008, the Port approved a Coastal Development Permit (“CDP”) (No. 2008-01) for a development that included a setback park/plaza along West Broadway which was an integral component of implementing NEVP as originally designed in a document known as the NEVP Schematic Design Documents – 100% Corrections dated June 1, 2005 and approved by the Board of Port Commissioners (“Board”) of the Port on October 11, 2005.
- E. As set forth in the Lane Field Public Access Program, as revised August 20, 2008, the Lane Field project is a fundamental part of the NEVP, integrating the public realm improvements along Broadway, Harbor Drive and Pacific Highway and extending C Street west of Pacific Highway to Harbor Drive.
- F. After hearing the appeal of the Port-issued CDP, on January 8, 2009 the California Coastal Commission (“CCC”) authorized issuance of a CDP for the development of Lane

Field North and Lane Field South that included the creation of a public pedestrian landscaped park/plaza along the Broadway Street frontage in front of retail stores and restaurants as well as public terraces at the fifth floor (“CCC CDP”).

- G. On April 13, 2011, the NEVP Phase 1 CDP was issued to the Port authorizing the development, among other projects, of improvements along West Broadway Street from North Harbor Drive east to the railroad tracks located between Pacific Highway and Kettner, including landscaping and lighting.
- H. On May 4, 2016, the Port and Tenant entered into a sixty-six year Lease for the Property.
- I. Section 5.1 of the Lease requires Tenant to construct an approximately 0.41 acre, 55 foot setback park from West Broadway at Tenant’s expense that shall be owned and maintained by the Port (“Broadway Setback Park”).
- J. Section 5.1(a) of the Lease also gives Tenant the right to develop underground structured parking beneath the Broadway Setback Park to the extent required, if necessary, to accommodate all project parking requirements plus the 271 public parking spaces required by the CCC CDP (“271 Parking Spaces”).
- K. Tenant has the right to occupy and use the Broadway Setback Park consistent with the Port’s permitting policies for public parks.
- L. The Broadway Setback Park and 271 Parking Spaces are collectively referred to herein, as the “South Public Improvements”.
- M. On February 22, 2017, Tenant paid the City development impact fees (“DIF”) in the amount of \$2,181,407.74 as required by the San Diego Municipal Code for Lane Field South (“DIF Amount”).
- N. Contribution from the City’s Downtown Development Impact Fee Fund for the Broadway Setback Park is provided in the 2015 Downtown Public Facilities Financing Plan (“PFFP”) under Project P-13 “Downtown Park Acquisition and Development”, which authorizes funding for acquisition, design and construction of up to 5.7 acres of public open space and park facilities to include “mini-parks, pocket parks and plazas.”
- O. Contribution from the City’s Downtown Development Impact Fee Fund for the 271 Parking Spaces is provided in the PFFP under Project T-7 “Below-Grade Parking Structures”. Part of the parking structure is located under the Broadway Setback Park. Pursuant to Section 2 of the Lease, and consistent with the CCC CDP, 271 spaces must be available to the general public.

- P. The City is contributing DIF to the Port because the amount paid in DIF is fixed and is duplicative of impacts mitigated by the construction of the South Public Improvements. NEVP contemplated cost sharing and contribution of public improvements.
- Q. The Port and the Tenant are concurrently entering into a Reimbursement Agreement for North Embarcadero Visionary Plan Public Improvements of even date herewith (“Reimbursement Agreement”) pursuant to which the Port shall reimburse the DIF Amount, received from the City, to the Tenant in an amount not to exceed \$2,181,407.74.
- R. Section 26(a) of the Lease required Tenant and its contractors, subcontractors, agents, or affiliates to pay prevailing wages to all persons and entities subject to California’s prevailing wage laws who provide any labor, services, equipment or materials in connection with any construction or work of improvement on the Property or areas occupied by Tenant.
- S. Tenant has represented to the Port and the City that it paid prevailing wages and entered into a Memorandum of Understanding with UNITE HERE Local 30 for labor representation and a Skilled Workforce Supply and Training Agreement or “PLA”.
- T. Tenant has represented to the Port that any portion of the DIF Amount that the Port delivers to Tenant shall be used by the Tenant for improvements to or improvements that directly benefit the Property.
- U. The Parties herein now desire to define the terms and conditions under which the City shall contribute the DIF Amount to the Port for the South Public Improvements.

NOW, THEREFORE, in consideration of the mutual promises set forth herein, and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Port and City agree as follows:

- 1. The Recitals are hereby incorporated by reference.
- 2. Upon completion of the South Public Improvements, Tenant shall notify Port and Port shall conduct an inspection within ten (10) days of Port’s receipt of Tenant’s notice to confirm that the South Public Improvements are complete in accordance with the Port’s approvals (“Site Inspection”). If the Port determines during the Site Inspection that the South Public Improvements are complete, the Port shall deliver a letter to the Tenant within seven (7) days of the Site Inspection confirming that the South Public Improvements are complete in accordance with the Port’s approvals (“Confirmation Letter”).
- 3. Port shall deliver to the City the Confirmation Letter and a request for payment of the DIF Amount paid by Tenant to the City in the amount of \$2,181,407.74 no later than two

(2) days after the Port's delivery of the Confirmation Letter to the Tenant. The \$2,181,407.74 represents the City's maximum total contribution for the South Public Improvements.

4. City shall deposit with Port, within sixty (60) days of receipt of the Port's request set forth in Section 3, \$2,181,407.74, which equals the total DIF Amount paid by Tenant and available for contribution to the Port for the South Public Improvements. City's total obligation for the DIF Amount contribution shall not exceed the amount of \$2,181,407.74.
5. The designated contact person on the City's behalf for any issues related to this Agreement shall be Megan Sheffield, Planning Department (619) 533-3672, 1010 Second Avenue, Suite 600, San Diego, California 92101. The designated contact person on Port's behalf for any issues related to this Agreement shall be Tony Gordon, Director, Real Estate, 3165 Pacific Highway, San Diego, CA 92101, (619) 686-6287, 3165 Pacific Highway, San Diego, CA 92101. Either Party may change its designated contact person under this Agreement by delivering written notice to the other Party via certified United States Mail (return receipt requested), which will be effective three days after deposit in the United States Mail.
6. The effectiveness of this Agreement is subject to the approval of the Board, which may be withheld, conditioned or denied in the Board's sole and absolute discretion. This Agreement and any City obligations under this Agreement are subject to the approval by the Council of the City of San Diego ("City Council").
7. No alteration or variation of the terms of this Agreement shall be valid unless made in writing and signed by the Parties hereto and no oral understanding or agreement not incorporated herein shall be binding on any of the Parties hereto.
8. This Agreement shall be interpreted in accordance with the laws of the State of California. If any action is brought to interpret or enforce any term of this Agreement, the action shall be brought in a state or federal court situated in the County of San Diego, State of California.
9. All terms, conditions, and provisions hereof shall inure to and shall bind each of the Parties hereto, and each of their respective heirs, executors, administrators, successors, and assigns.
10. For purposes of this Agreement, the relationship of the Parties is that of independent entities and not as agents of each other or as joint ventures or partners. The Parties shall maintain sole and exclusive control over their personnel, agents, consultants, and operations. For so long as the South Public Improvements exist, nothing herein shall prohibit the general public from using the South Public Improvements in accordance with any applicable federal, state, and local laws, rules, policies and regulations, including without limitation those

of the Port, and subject to any rights of the Tenant and any permittee of the South Public Improvements.

11. This Agreement is not intended to create duties or obligations to, or rights in, third parties to this Agreement or affect the legal liability of the Parties to this Agreement to third parties. Nothing in this Agreement, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Agreement on any persons or entities other than Port and City and their respective permitted successors and assigns, nor is anything in this Agreement intended to relieve or discharge the obligation or liability of any third parties to any Party to this Agreement, nor shall any provisions give any third parties any right of subrogation or action over or against any Party to this Agreement.
12. By entering into this Agreement, the Port and City acknowledge and agree that this Agreement is limited to the South Public Improvements and the City's contribution of \$2,181,407.74 to the Port.
13. The waiver or failure to enforce any provision of this Agreement by a Party will not operate as a waiver of such Party's right to enforce future defaults or breaches of any such provision or any other provision of this Agreement.
14. This Agreement shall expire upon the earlier of: (a) Port's receipt of the deposit of \$2,181,407.74 in one or more installments from the City for the DIF Amount paid by Tenant; or (b) five (5) years from the Effective Date, unless terminated earlier pursuant to the terms of this Agreement. Upon expiration of the Agreement, neither Party shall have any further rights, remedies or obligations to the other Party under this Agreement and the Parties shall each be relieved and discharged from all further responsibility or liability under this Agreement.
15. The Parties sole remedy under this Agreement for any breach of this Agreement by the other Party shall be to terminate this Agreement without damages of any kind.
16. This Agreement constitutes the entire understanding and agreement of the Parties, integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the Parties or their predecessors in interest with respect to all or any part of the subject matter hereof.
17. This Agreement may be executed in any number of identical counterparts, each of which shall be deemed to be an original, and all of which together shall be deemed to be one and the same instrument when each party has signed one such counterpart.

18. The Parties acknowledge that this Agreement has been agreed to by both the Parties, that both Port and City have consulted with attorneys with respect to the terms of this Agreement and that no presumption shall be created against the drafting party. Any deletion of language from this Agreement prior to its execution by Port and City shall not be construed to raise any presumption, canon of construction or implication, including, without limitation, any implication that the Parties intended thereby to state the converse of the deleted language. Unless otherwise specified in this Agreement, any approval or consent to be given by Port may be given or withheld in Port's sole discretion.
19. This Agreement will be effective upon the approval of this Agreement by both the Board and the City Council and execution by both the Port and the City ("Effective Date").

IN WITNESS WHEREOF, this Agreement is signed and entered into by City and Port effective as of the Effective Date.

PORT:

APPROVED AS TO FORM AND
LEGALITY:

GENERAL COUNSEL

By: _____
Assistant/Deputy

SAN DIEGO UNIFIED PORT DISTRICT,
a public corporation

By: _____

Name: _____

Its: _____

CITY:

THE CITY OF SAN DIEGO,
a municipal corporation

By: _____

Name: _____

Its: _____

APPROVED AS TO FORM:

MARA W. ELLIOTT, City Attorney

By: _____

Katherine A. Malcolm
Deputy City Attorney