

(8)

San Diego Unified Port District

Document No. **68259**Filed **APR 05 2018**

Office of the District Clerk

**BINDING LETTER OF INTENT
BY AND BETWEEN SAN DIEGO UNIFIED PORT DISTRICT
AND THE SAN DIEGO SYMPHONY ORCHESTRA ASSOCIATION**

This Binding Letter of Intent ("LOI") dated April 2nd, 2018 is entered into by and between The San Diego Symphony Orchestra Association, a California nonprofit public benefit corporation ("Symphony") and the San Diego Unified Port District, a public corporation ("District"). The Symphony and District may be individually referred to herein as, a "Party", and collectively as, the "Parties".

RECITALS

WHEREAS, every year since 2004, the Symphony has entered into a Tideland Use and Occupancy Permit ("TUOP") with the District to hold a summer concert series, now known as "Bayside Summer Nights," at Embarcadero Marina Park South located at 200 Marina Park Way in San Diego, California ("EMPS");

WHEREAS, in January 2016, following a request by the Symphony, the Board of Port Commissioners ("Board") directed staff to further study and commence negotiations with the Symphony for a permanent venue at EMPS;

WHEREAS, the Symphony submitted a proposal to develop a 10,000 seat permanent venue, along with public improvements, within EMPS, commonly referred to as the Bayside Performance Park Enhancement Project ("Project");

WHEREAS, the District has determined that for the Project or another permanent venue to be developed in EMPS, certification of an Environmental Impact Report ("EIR") and approval of a Mitigation Monitoring Reporting Program, Findings of Fact and a Statement of Overriding Considerations, if applicable, in accordance with the California Environmental Quality Act ("CEQA") are required and approval of a Port Master Plan Amendment ("PMPA"), Coastal Development Permit ("CDP") and other approvals by the District are also required;

WHEREAS, a map showing the Symphony Project area is attached hereto as Exhibit A;

WHEREAS, the District, as lead agency under CEQA, has prepared an EIR analyzing the Project, which identified alternatives that included an alternative location, reduced venue sizes of 6,000 and 8,000 seats, and reduced event programming ("Alternatives");

WHEREAS, the Alternatives were determined to be financially infeasible by an analysis conducted by an independent consultant and verified by District staff, and proposed CEQA findings to this effect were presented to the Board with the Final EIR;

WHEREAS, the EIR and PMPA will be considered by the Board on January 9, 2018;

ORIGINAL

WHEREAS, the effectiveness of this LOI shall be contingent upon the Board certifying the EIR and approving the PMPA;

WHEREAS, the District anticipates that the Project will generate substantial benefits to the local and regional communities and people of California in the form of increased lease revenues, permanent and temporary jobs, and by providing significant public amenities to EMPS, increased recreational, cultural and entertainment opportunities and environmental enhancements; and

WHEREAS, this LOI sets forth some of the essential terms upon which the District and Symphony may enter into a ground lease related to the use, occupancy, development, maintenance and operation of the Project and sets forth the mechanism upon which the remaining terms are to be negotiated by the Parties.

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 Parties agree as follows:

1. Parties: The Parties to the LOI shall be the District and the Symphony.
2. Term: The term of the LOI shall commence on the last date when all Parties have executed this LOI which shall not be earlier than the date that the Board certifies the EIR and approves the PMPA ("LOI Commencement Date") and terminate on the date the Board considers the California Coastal Commission's certification of the PMPA pursuant to 14 California Code of Regulations Section 13632(e), but in no event later than one (1) year from the LOI Commencement Date.
3. Purpose: The purpose of this LOI is to negotiate the remaining terms of a ground lease between the Parties with respect to the use, occupancy, development, maintenance and operation of the Project ("Ground Lease").
4. Negotiated Terms: The Parties agree that the following essential terms have been negotiated by the Parties and shall be incorporated into the Ground Lease, if a Ground Lease is brought before the Board for consideration as a result of this LOI, together with any remaining terms to be negotiated by the Parties during the term of this LOI:

| Category | Essential Terms |
|-------------------|--|
| Premises | 3.68 acres of the 10.8 acre Embarcadero Marina Park South located at 200 Marina Park Way in San Diego, California |
| Ground Lease Term | 15 years with three 10 year options and one 5 year option for a total of 50 years. Such Options are held by the Symphony. Only 15,090 square feet (0.35 acres) of the acreage being subject to exclusive use by the Symphony for the performance stage, back-of-house facilities, box office, and food pavilions |

| | |
|---|---|
| | and the remaining 3.33 acres being subject to non-exclusive use and publically accessible throughout each lease year except when there is an admission-based or rental event (would be capped at 15% of each lease year).* |
| Improvements | Permanent venue with a maximum seating capacity of 10,000 seats and maximum programming of 55 full-day or 110-half day events (15% of the year).* Improvements to include public improvements, including without limitation, improvements to the waterfront promenade. Symphony shall pay at its sole cost and expense for the design, development, and construction of the improvements in an amount of at least \$45 million. Symphony reserves the right to request a contribution from the District should the costs exceed \$45 million; provided, however, any such contribution shall be granted or denied by the Board in its sole and absolute discretion. Symphony shall pay at its sole cost and expense for the maintenance and operation of the improvements subject to negotiation of specific terms. All improvements to comply with all federal, state, and local laws, rules, and regulations, including without limitation, any policies of the District. The District to approve all plans and specifications prior to construction. Improvements to provide for year-round cultural uses and park-activating uses that are ancillary to the public uses.* |
| Audit on Improvements | First 10 year option extension subject to condition and maintenance audit. Additional condition and maintenance audits to occur every 5 years thereafter and any required work under the audit (s) must be completed by the Symphony to the satisfaction of the District prior to exercising a subsequent option. Symphony to pay for all audits and required work at its sole cost and expense. The establishment of a maintenance fund may be required, |
| Construction Period | Up to 2 years. |
| Percentage Rent for Gross Ticket Sales (based upon prior year Gross Ticket Sales in the indicated amounts) | <p>During Construction Period: \$0</p> <p>\$0 to \$18MM: 1.00%</p> <p>\$18MM to \$30MM: 2.50%</p> <p>>\$30MM to \$40MM: 5.00%</p> <p>>\$40MM to \$50MM: 7.00%</p> <p>>\$50MM +: 8.00%</p> <p>Percentage rental rates will be adjusted annually based on gross ticket sales for the prior year; provided, however, once gross ticket sales reach \$30MM and the percentage rent is adjusted to 5.00%, through the remaining term and option</p> |

| | |
|--|--|
| | periods the percentage rent shall not be less than 5.00%, even if gross ticket sales are less than \$30MM in any given year. |
| Percentage Rent for Gross Food & Beverage Sales | 5.00% |
| Percentage Rent for Gross Merchandise Sales | 5.00% |
| Parking and Parking Rent | <p>Symphony shall have exclusive use of 56 parking spaces in EMPS during rehearsals, concerts and events.*</p> <p>\$20.00 per parking space per day for all parking spaces reserved for rehearsals, concerts and events, with market adjustments annually; and</p> <p>15.00% of the net income from the sale of parking services or the rental of parking spaces after third party costs</p> |
| Minimum Annual Rent (MAR) | 75% of the average of the last 5 accounting years based on use through prior Tideland Use and Occupancy Permits. |
| Title to Improvements at Expiration/Early Termination | District to receive title. |

* These terms may change subject to California Coastal Act approvals.

5. **Binding:** The Parties agree that this LOI is a binding agreement between the Parties that require that the Parties (i) incorporate the negotiated terms set forth in Section 4 in the Ground Lease, if a Ground Lease is presented to the Board for consideration as a result of this LOI; and (ii) use commercially reasonable efforts to negotiate the remaining terms of the Ground Lease during the term of this LOI. Moreover, except with regard to the Cost Recovery User Fees described in Section 12, each Party agrees that, to the extent it expends funds or devotes resources to discussions relative to the feasibility of implementing the Project or this LOI, it shall do so at its sole cost and expense, without expectation of reimbursement, upon its own initiative and not in reliance on this LOI or any representations of the other Parties.
6. **Assumption of Risk:** The District and the Symphony each assume the risk that, notwithstanding this LOI and good faith negotiations, the District and the Symphony may not enter into a Ground Lease due to their failure to agree upon the remaining terms of the Ground Lease or any CEQA analysis required in connection with the foregoing and the Project. Accordingly, except as specifically set forth in this LOI, neither Party will have any liability to the other in the event that the Parties are unable to agree upon the remaining terms of the Ground Lease or to enter into the Ground Lease. Each Party hereby expressly waives, releases and relinquishes the right to any and all damages and/or monetary relief (whether based in contract or in tort), including, without limitation, any right to claim direct, compensatory, reliance, special, indirect or consequential damages

with respect to or arising out of this LOI and any other claims it may otherwise have at law or equity. In the event of a default by either Party under this LOI, the sole remedy of the non-defaulting party shall be to terminate this LOI by delivering notice to the defaulting party of termination; provided, however, the non-defaulting party must first deliver notice of default to the defaulting party and provide the defaulting party with at least ten (10) days to cure the default before delivering its notice of termination. The notice addresses shall be the same as those set forth in that certain Tideland Use and Occupancy Permit between the Symphony and the District filed with the Office of the District Clerk on June 1, 2017 as Document No. 66726 and all notices shall be sent by certified U.S. Mail (return receipt requested) and shall be deemed delivered three days after deposit in the U.S. Mail. Except with regard to the Cost Recovery User Fees described in Section 12, after termination of this LOI, neither party under this LOI shall have any further rights, remedies or obligations to the other Party under this LOI and the Parties shall each be relieved and discharged from all further responsibility or liability under this LOI.

7. Discretionary Actions: The Parties understand, acknowledge and agree that, notwithstanding the terms and conditions of this LOI, certain actions to implement the Project may require the exercise of discretion by the District (collectively, "Discretionary Actions"), which may require other actions under the law and shall require other approvals, permits and entitlements and compliance with other laws (including, without limitation, the Constitution of the State of California, California Harbors and Navigation Code, Appendix I, Section 1 et seq. ("Port Act"), the California Coastal Act, respectively, and other laws), in addition to further review under CEQA for changes to the Project. Upon approval of this LOI, the District will have taken certain Discretionary Actions, including those necessary under CEQA to date and the approval of the PMPA for submission to the California Coastal Commission; provided, however, this LOI does not commit the District to a definite course of action or in any way diminish the District's exercise of its discretion for any Discretionary Action, including, but not limited to, approval or commencement of a lease, permits, including those required under the California Coastal Act or other agreement with the Symphony for the development or operation by the District or Symphony on EMPS. Rather, this LOI sets forth the Parties' intent to further evaluate the Project; provided, however, if the District approves a lease for the Project, the terms specified in Section 4 of this LOI shall be included. Notwithstanding the foregoing, nothing in this LOI will be construed as circumscribing or limiting the District's exercise of discretion with respect to all or any future Discretionary Actions in connection with the Project or the LOI, including without limitation, to subsequent CEQA review, approval of the Project, land use entitlements, the exercise of eminent domain, the implementation of code enforcement, entry into any leases or other agreements, and the making of findings and determinations. Any and all Discretionary Actions may be exercised in the sole and absolute discretion of the Board and District. The Parties assume the risk that a Discretionary Action may not be taken or approved. The Parties do not represent by the LOI or otherwise their legal capacity for undertakings

contemplated herein, such matters to be the subject of future actions and agreements, including certain Discretionary Actions.

8. Representation of Symphony: Symphony warrants and represents to the District that it has the legal authority, capacity and direction to enter into this LOI and that all necessary resolutions or other actions have been taken so as to enter into this LOI.
9. District's Right to Use Property. The Symphony acknowledges that until such time as a Ground Lease is executed by the Parties, the District shall have the right, in its sole and absolute discretion and without consent of the Symphony, (a) to use, operate, manage or lease all or any portion of the EMPS, (b) to construct or to permit construction of infrastructure on EMPS, (c) to demolish, or to permit demolition, of any improvements on EMPS, (d) to construct, or to permit construction on EMPS, (e) to convey portions of EMPS and/or grant easements in EMPS to the City of San Diego or to any public or quasi-public entity or to any utility as necessary or desirable for the development of EMPS, (f) to issue temporary licenses or other grant of access rights to EMPS to the City of San Diego and/or to any other third party, as necessary or desirable for the development of utilities and infrastructure on, above or under EMPS, and none of the foregoing actions set forth in (a)-(f) shall be deemed a breach by the District of this LOI.
10. Entire Agreement. 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.
11. Governing Law. This LOI and all of the rights and obligations of the Parties hereto and all of the terms and conditions hereof shall be construed, interpreted and applied in accordance with and governed by and enforced under the laws of the State of California.
12. Cost Recovery User Fees. Notwithstanding anything in this LOI to the contrary, the Symphony shall pay the District all fees associated with the negotiation of the Ground Lease pursuant to Board Policy No. 106 for Cost Recovery User Fees. This Section 12 shall survive the expiration or earlier termination of this LOI.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK.]

IN WITNESS WHEREOF, the Parties hereto have executed this Binding Letter of Intent as of the day and the year set forth below.

APPROVED AS TO FORM AND
LEGALITY:

SAN DIEGO UNIFIED PORT DISTRICT,
a public corporation


GENERAL COUNSEL

By: 
Assistant/Deputy

By: 
Tony Gordon
Director, Real Estate

Dated: 4/2/2018

**THE SAN DIEGO SYMPHONY
ORCHESTRA ASSOCIATION,**
a California nonprofit public benefit
corporation

By: 
Martha Gilmer
Chief Executive Officer

*EXCERPT PROVIDED (7 of 555 PAGES);
SEE CLERK DOCUMENT NO. 68259 FOR COMPLETE DOCUMENT