

**AGREEMENT FOR AMENDMENT OF EXCLUSIVE NEGOTIATING AGREEMENT  
AMENDMENT NO. 1**

THIS AGREEMENT FOR AMENDMENT OF EXCLUSIVE NEGOTIATING AGREEMENT AMENDMENT NO. 1 ("**AMENDMENT NO. 1**") is made and entered into this \_\_\_\_ day of \_\_\_\_\_, 2020, by and between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter called "District," and 1HWY1, LLC, a Delaware limited liability company, hereinafter called "1HWY1" or "Developer," WITNESSETH:

WHEREAS, District and 1HWY1 entered into that certain Exclusive Negotiating Agreement dated as of October 2, 2017 ("**ENA**") related to certain property located in the City of San Diego, California as more particularly described therein, which ENA is on file in the Office of the Clerk of District bearing Document No. 67343; and

WHEREAS, Section 2(b) of the ENA grants the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, the right to extend the Negotiating Period (as such term is defined in the ENA) in writing by 90-day increments for a total Negotiating Period not to exceed 5 years; and

WHEREAS, on September 24, 2018, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the deadline to submit the Project Description (as defined in the ENA) and Project Pro Forma (as defined in the ENA) to December 31, 2018; and

WHEREAS, on December 7, 2018, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the deadline to submit the Project Description and Project Pro Forma to March 31, 2019; and

WHEREAS, on March 26, 2019, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the deadline to submit the Project Description and Project Pro Forma to June 29, 2019; and

WHEREAS, on September 19, 2019, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to December 31, 2019; and

WHEREAS, on December 18, 2019, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to March 30, 2020; and

WHEREAS, on March 27, 2020, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to September 26, 2020; and

WHEREAS, on September 14, 2020, in response to a request from 1HWY1, the District sent a letter to 1HWY1 extending the Negotiating Period to March 27, 2021; and

WHEREAS, District and 1HWY1 would now like to further extend the Negotiating Period to allow for continued due diligence and refinements to the Proposed Development, modify the termination provision under the ENA, and describe the additional submittals needed from

1HWY1 before the Proposed Development can be presented to the Board of Port Commissioners for approval to commence environmental review under CEQA; and

WHEREAS, 1HWY1 submitted a Project Description and Project Proforma to the District on June 29, 2019, which Project Description was supplemented on August 2, 2019; and

WHEREAS, on August 21, 2020, the District submitted the Project Description to the State Lands Commission and requested a preliminary Public Trust Doctrine consistency review of the Proposed Development; and

WHEREAS, the District and 1HWY1 are now mutually desirous of amending said ENA.

NOW THEREFORE, for valuable consideration, the receipt and sufficiency of which is hereby acknowledged, said ENA is hereby amended in the following respects only and no others, and except as expressly amended, all terms, covenants and conditions of said ENA shall remain in full force and effect:

- A. Said ENA is hereby amended by deleting Section 2(a) in its entirety and replacing it with the following Section 2(a):

“a. **Period of Negotiations.** The negotiating period shall commence on October 2, 2017 (“Effective Date”) and shall end on October 1, 2024 (“Negotiating Period”).”

- B. Said ENA is hereby amended by deleting Section 2(b) in its entirety and replacing it with the following Section 2(b):

“b. **Extensions.** Notwithstanding the foregoing, upon the written request of the Developer or at the election of the Executive Director of the District, the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, may extend, without the approval of the Board, the deadlines for the delivery of the submittals described in Section 6 and Section 6.1 in writing by up to 180 day increments at a time provided that the Negotiating Period does not extend beyond October 1, 2024 (“Original Expiration Date”). In addition, upon written request of the Developer, the Executive Director of the District or his/her designee, in his/her sole and absolute discretion, may extend the Negotiating Period by up to an additional year not to exceed October 1, 2025 without the approval of the Board; provided, however, the Executive Director of the District, on behalf of him/her and his/her designees, reserves the right, and Developer acknowledges and agrees that the Executive Director of the District and his/her designees have the right, to require the Developer to pay the District a non-refundable extension fee as a condition precedent to each time the Executive Director of the District or his/her designee grants an extension of the Negotiating Period to Developer between the Original Expiration Date and October 1, 2025, that if exercised by the Executive Director of the District or his/her designee, shall be based on the fee adopted by the District through administrative policy, Board Policy, or ordinance for the extension of the term of an agreement, and if such adopted fee does not exist, in such amount as shall be negotiated by the Parties at the time the request for extension is made to the Executive Director of the District or his/her designee. In no event shall the Developer deliver to the District written notice of its request for an extension later than the

applicable expiration of the applicable and then existing Negotiating Period or submittal deadline under Section 6 or Section 6.1. If the District grants an extension of the Negotiating Period and/or the submittal deadline(s), the Negotiating Period and/or the submittal deadline(s), as applicable, but subject to the District's receipt of an extension fee (if applicable), shall be automatically extended to include such extensions granted by the Executive Director of the District and/or his/her designee upon the delivery of notice to the Developer and without further amendment to this Agreement. The District undertakes no commitment or obligation to the Developer to grant any extensions and shall incur no liability to the Developer resulting from the election to extend or not extend the Negotiating Period or submittal deadlines nor its election to extend or not extend the Negotiating Period or submittal deadlines for period(s) less than 180 days at a time."

- C. Said ENA is hereby amended by deleting Section 3 in its entirety and replacing it with the following Section 3:

"3. **RIGHTS TO TERMINATE.** In addition to each Party's right to terminate this Agreement in accordance with Section 13 for an Uncured Default, the District and the Developer shall each have the separate and independent right to terminate this Agreement if at any time the terminating Party determines in its sole and absolute discretion that the Proposed Development is not feasible. For purposes of this Section 3, the phrase "not feasible" may be interpreted by the terminating Party, in its sole and absolute discretion, to mean one or more of the following potential factors, among others: (i) the Proposed Development does not comply with the Public Trust Doctrine, the Coastal Act, or any other federal, state, or local law, policy, ordinance, regulation, or requirement, including without limitation those of the District; (ii) the Proposed Development cannot be financed without a financial subsidy from the District; (iii) the minimum rent proposed by Developer is less than \$22.5M in Year 8 of stabilization for the Proposed Development; (iv) the Developer is unable to secure financing sufficient to complete construction of the Proposed Development; (v) adverse changes to the financial capacity of Developer; (vi) an Uncured Default by the non-terminating Party, or (vii) any other reason the result of which is that the Party will be adversely affected economically. If a Party makes a determination that the Proposed Development is not feasible and desires to terminate the Agreement, the terminating Party shall provide written notice to the non-terminating Party of such determination; provided, that, if the terminating Party is terminating under Section 13 for an Uncured Default or because the Proposed Development is "not feasible" under (vi) above, the terminating Party need only follow the procedures set forth in Section 13 to terminate the Agreement without consultation from the Board required herein or the meet and confer process set forth in the last two sentences of this Section 3. Except as provided in the foregoing sentence, the District shall consult with the Board prior to delivering a notice of such determination to Developer. Within forty-five (45) days after delivery of such notice by either Party, the Parties shall meet to discuss the termination, but without commitment to withhold, waive or reverse its termination request. On the date of the meeting, or within five (5) business days following the meeting, the terminating Party shall confirm in writing to the other Party whether it still desires to terminate the Agreement and if the terminating Party elects to terminate the Agreement, the Negotiating Period and this Agreement shall automatically terminate on the date of the meeting (if notice is delivered on such date) or on the date of delivery of written notice of such election to the non-terminating

Party after the meeting and, except as set forth in Section 11(e), neither Party shall have any further rights, remedies or obligations to the other Party under the Agreement and the Parties shall each be relieved and discharged from all further responsibility or liability under this Agreement.”

D. Said ENA is hereby amended by adding Section 6.1 as follows:

**“6.1 POST-DELIVERY OF PROJECT DESCRIPTION SUBMITTALS.** Submittal by Developer of the deliverables listed in this Section 6.1 is necessary to further refine the Proposed Development prior to conducting CEQA review and to advance the Parties’ negotiations of the economic terms for the Definitive Agreement. Accordingly, Developer shall deliver to the District the following submittals specified in Sections 6.1(a), 6.1(b), 6.1(c), 6.1(d), 6.1(e) and 6.1(f) below no later than December 31, 2021. The District reserves the right to request periodic updates to the materials submitted by Developer under Sections 6.1(a)-(f) below due to changes in the Proposed Development during the Negotiating Period. In addition to the information requested in 6.1(a)-(f) below, Developer acknowledges and agrees that the District reserves the right at any time to reasonably request from the Developer additional information related to the Proposed Development. Developer shall from time to time submit updates or supplements to any materials previously submitted to the District in response to questions or comments from the District and may from time to time submit general updates on matters related to the Property or the Proposed Development. In the event that Developer is required to make changes to the Proposed Development in order to prevent the Proposed Development from being not feasible (as defined in Section 3), the Developer shall submit written documentation advising the District of any changes to the Proposed Development, including but not limited to, changes to Programmatic Components to clearly identify and reflect changes to the scope, scale or location of the Proposed Development for the District’s consideration and approval. The Developer acknowledges and agrees that the District’s consideration of any proposed changes to the Proposed Development shall not limit, modify, or amend the Executive Director’s, or his or her designee’s, right to terminate this Agreement under Section 3. The Executive Director of the District, or his or her designee, shall have the authority to determine in his or her sole and absolute discretion whether any of the submittals delivered by Developer under Section 6 and Section 6.1 satisfactorily meet the requirements specified in Section 6 and Section 6.1, as applicable, and shall have the authority to waive, modify, or substitute any of the requirements under Section 6 and Section 6.1, without amendment to this Agreement or the consent or approval of the Board. Notwithstanding the foregoing, the Executive Director may elect, in his or her sole and absolute discretion, to consult with the Board prior to determining whether any deliverables under Section 6 and Section 6.1 satisfactorily meet the requirements of Section 6 and Section 6.1, as applicable, or waiving, modifying, or substituting any of the requirements under Section 6 and Section 6.1. Once all of the deliverables set forth in Section 6 and Section 6.1 have been submitted and the District, in its sole and absolute discretion, has deemed the submittals to satisfactorily meet the requirements specified in Section 6 and Section 6.1, the Parties will commence negotiations of a non-binding term sheet; provided that the Executive Director of the District, or his or her designee, may in his or her discretion elect to commence negotiation of such non-binding term sheet at an earlier date. Once negotiated, the non-binding term sheet may

be the basis for the economic terms of any Definitive Agreement entered into by the Parties pursuant to this Agreement.

- a. Project Description for CEQA.** A project description shall be a concise written description of the Proposed Development with sufficient detail to understand the Proposed Development and related Programmatic Components in order and to start the environmental review in accordance with CEQA. At a minimum, the initial submission by the Developer shall include the following:

A project description shall include detailed narratives and exhibits for each of the Programmatic Components proposed to be developed on the Property, as applicable:

- Total site area including land and water;
- Building dimensions, including square footages, heights, and number of floors;
- Land and water areas devoted to specific uses;
- Number of hotel rooms (overall and by each hotel);
- Building materials to be used and type of construction;
- Vehicle site access and internal circulation;
- Parking details, including number of proposed parking spaces for each use and locations;
- Number and size of boat slips and moorings, if applicable;
- Public docks;
- Removal of any in-water components and structures;
- Square footage of overwater coverage ("shading") and occupied water column or pilings' footprints ("fill" as defined by the Coastal Act);
- Massing diagrams from public viewing areas;
- Comparison diagrams of the proposed development profile against existing development, including existing and proposed grades;
- View corridors from North Harbor Drive, Pacific Highway, Kettner Boulevard, and waterfront promenades and parks;
- Location, size and characteristics of each public open space and park (categorized by on-grade and above-grade);
- Summary of signage (private signage and public wayfinding);
- Summary of lighting planned for each Programmatic Component;
- Public access and activation description that demonstrates how the development will provide, manage, and report on access and activation to the general public throughout the site (including water and land uses), including areas and/or amenities offered to the general public free-of-charge, at low-cost, and at market-rate;
- Description and location of any other public amenities; and any proposed land and water infrastructure improvements; and
- Proposed relocation of utility improvements and facilities (on and off-site) including electric power, natural gas, water, wastewater, stormwater, solid waste, telecommunications, and renewable energy.

At a minimum, a project description shall include the following construction information, as applicable:

- Land and water construction information, including without limitation the length and phasing of demolition and construction;
- Construction methods and equipment to be used;
- Anticipated import and export of dirt and proposed disposal site(s);
- Anticipated temporary stockpiling (anticipated duration, location and height);
- Haul routes; and
- Description and location(s) of any impacted public access areas including parks, promenades, and parking.

At a minimum, a project description shall include sufficient information related to:

- Sea-level rise based on the best available science;
- Geologic safety;
- An obstruction evaluation (determination of no hazard to air navigation) provided by the federal aviation administration (FAA) for construction cranes and permanent structures (see FAA 7460 guide);
- Site drainage including on and off-site; and
- Estimates on the anticipated amounts used/generated at full-build out: electricity, natural gas, water, wastewater, and solid waste.

A project description shall include a listing of all proposed uses on the site and a consistency statement that all proposed uses and improvements are in compliance with the Public Trust Doctrine and the Coastal Act.

- A project description shall be accompanied by conceptual drawings for the overall Proposed Development and shall also be accompanied by conceptual drawings for each Programmatic Component.

Conceptual drawings and information shall be in sufficient detail to clearly illustrate the Proposed Development and, at a minimum, shall include the following:

- Site and Floor Plans: Site plans shall illustrate a comprehensive overview with sufficient detail to understand the scope of the entire Proposed Development on land and in water, and shall at a minimum clearly identify locations and size of building footprints for each Programmatic Component, areas proposed for public space, and parking area layouts with estimated parking space counts and vehicular and pedestrian access. The site plan shall clearly distinguish area allocations among proposed uses, including commercial uses, Public Trust Doctrine compliant uses, and water side uses (recreational vs commercial fishing uses), in addition to service delivery, parking, circulation, view corridors, boat slips, public docks, stormwater outfalls, public areas, and public infrastructure. Site plan and floor plans for each Programmatic Component, as applicable, that includes typical floor plans, subterranean levels, and roof plans. Detailed floor plans are not required; however, general outlines and perimeter information to collaborate illustrated elevations must be provided (locations of windows, doors, shear walls, etc.). Additional plans shall

be included showing conceptual construction phasing, staging, laydown, and haul routes for the course of anticipated development; description and location(s) of any impacted public access areas including parks, promenades, and parking; and alternate temporary public access to be provided during construction.

- Elevations: Initial colored architectural exterior elevations that provide a comprehensive view of the entire Proposed Development and illustrate proposed building massing, height, materials and colors, primary exterior lighting, roof-mounted mechanical and telecommunication equipment, and related architectural elements. Elevations must match rendering on perspective drawings. Elevations for each building face and enlarged elevations for all building frontages shall be included. All elevations should identify base datum used in height measurements.
- Context and Perspective Drawings: A series of colored renderings and/or drawings approximately thirty inches (30") by forty-two inches (42") that sufficiently provide a representative illustration of the Proposed Development, clearly showing massing and the relationship of the Proposed Development in context to its surrounding environment with the adjacent building masses roughed in. Additional comparisons of the Proposed Development profile against existing development shall be included. Context elements do not need to be photo realistic but must accurately convey the bulk, scale, and character of the surrounding area with an emphasis on perspectives from key public viewing locations. The Developer shall include nighttime renderings for the overall Proposed Development.
- Digital Format: All conceptual drawings described in this Section 6.1 shall also be submitted in high resolution digital format(s) in addition to or as an alternative to the format(s) described above.
- General Requirements: All conceptual drawings, including site and floor plans, elevations, and sections must be legible, drawn to scale, and be fully labeled and dimensioned and shall include the date of plan preparation. Plans should typically orient north up, one plan, elevation or perspective per sheet (other than those floor plans noted as "typical").

During the CEQA process the following items, at a minimum, will be required to conduct the environmental analysis and data, if any, and shall be provided by the Developer within thirty (30) days of request by the District:

- Public access and activation plan/program that demonstrates how the development will provide, manage, and report on access and activation to the general public throughout the site (including water and land uses), including areas and/or amenities offered to the general public free-of-charge, at low-cost, and at market-rate;
- Proposed stormwater best management practices (BMPs);
- Shoring information (temporary and permanent);
- Estimated number and location of construction-related parking spaces;
- Estimated number of daily vehicle (e.g., workers, site supervisors, etc.) and truck (e.g., construction equipment, deliveries, etc.) trips anticipated to occur at the height

of construction (Note: one vehicle arriving and departing the site is considered two trips);

- Alternate temporary public access to be provided during construction;
- Estimated amount of construction-related debris including percent to be recycled and anticipated disposal site(s);
- Construction laydown area and locations;
- An eelgrass survey, including amounts and locations;
- A Public Access and Activation Plan that demonstrates, conceptually, how the Proposed Development will provide, manage, and report on public access and activation (including plazas, promenades, and other areas) available to the general public throughout the site. The plan shall describe areas and/or visitor-serving amenities offered to the general public free-of-charge, at low-cost, and at market-rate, including physical improvements, services, and event programming. The plan shall also include key locations for public wayfinding signage; descriptions and locations for multi-modal access to the site including but not limited to parking, transit, vehicle drop-off, bicycle, pedestrian, and shuttle service.
- Conceptual Transportation Demand Management Plan (TDM) that considers existing off-site conditions that affect travel demand including street and freeway access, transit services, bicycle and pedestrian facilities; TDM program strategies for the Proposed Development such as accessibility, curbside management, bicycle and pedestrian connections, bicycle parking, electric vehicle parking and charging, parking policies, commute trip reduction, transit incentives, transit system improvements, on-site TDM coordinator, etc.
- Parking analysis shall provide a sufficient determination of parking requirements based on Proposed Development uses, transit services, and public amenities.
- Site plan and floor plans for each Programmatic Component, as applicable, that includes all levels (do not duplicate identical floor plans), subterranean levels, and roof plans; and
- Proposed colors and materials for structures.

Additional information and data may be requested by the District, in the District's sole and absolute discretion, which shall be provided by Developer, to enable the District to conduct CEQA review, including compliance with the Public Trust Doctrine and the Coastal Act. Developer shall use reasonable diligence to provide the requested additional information within thirty (30) days of obtaining the request.

- b. Updated Pro Forma.** Concurrently with the submittal of a project description described in Section 6.1(a), Developer shall submit an updated and complete cost estimate and pro forma financial analysis consistent with the requirements outlined in Section 6(d)(i)-(xviii), but based on the project description submitted under Section 6.1(a) ("Updated Pro Forma").
- c. Development Phasing Plan.** Concurrently with the submittal of a project description described in Section 6.1(a), Developer shall submit a detailed development phasing plan for the Proposed Development, that includes without



limitation, an outline of when each Programmatic Component and infrastructure of the Proposed Development will be constructed.

- d. **Final Market Demand and Feasibility Study.** Concurrently with the submittal of the Updated Pro Forma, Developer shall submit an updated Market Demand and Feasibility Study consistent with the requirements outlined in Sections 6(a)(i) and 6(a)(ii) that demonstrates support for the Proposed Development and validates the demand, revenue, expense, and development cost assumptions in the Updated Pro Forma.
  - e. **Financing Strategy.** Concurrently with the submittal of the Updated Pro Forma, Developer shall submit an outline of its financing strategy which shall include an analysis of its anticipated debt and equity requirements, a proposed financing structure and/or segmentation of future financing offerings (i.e., if financing is to be broken down by each Programmatic Component or blocks of a project description), a proposed leasing structure for each of the Programmatic Components detailing any proposed tenants or subtenants, and a list of milestones and corresponding dates that Developer will be tracking in order to effectively attract and secure financing partners and finance the Proposed Development (collectively, the "Updated Financing Plan"). Developer shall also include letters of interest from potential financing partners that Developer is considering as well as a detailed description of the proposed financing structure and funding responsibilities that will satisfy Developer's funding amounts necessary through the Negotiating Period.
  - f. **Organization Chart.** Concurrently with the submittal of the Updated Pro Forma, Developer shall submit a current organization chart for Developer and explain any proposed changes during the Negotiating Period."
- E. Said ENA is hereby amended by deleting Section 7(b) in its entirety and replacing it with the following Section 7(b):

**"b. Transferable Products.** "Transferrable Projects" shall mean all drafts and final versions of any reports, studies, and surveys, or any other due diligence materials related to the Property (including any structures currently located thereon), generated by, or caused to be generated by, Developer and/or obtained by Developer from third parties, that pertain to the physical condition of the Property, such as soil reports, geotechnical reports, engineering reports, environmental or hazardous materials reports or studies, title reports and land surveys. Developer shall use commercially reasonable efforts to cause all contracts with its consultants and contractors for preparation of Transferable Products to require that such Transferable Products be prepared for the benefit of Developer and the District, and be transferable to and by the District in whole, and shall impose no restriction, cost or fee on the District, or the person or entity to which the District transfers the Transferrable Products, with respect to the transfer of such Transferable Products to or by the District or the use thereof by the District or any person or entity to which the District transfers the Transferrable Products. Upon termination of this Agreement with or without execution of a Definitive Agreement by the District and Developer, Developer shall be deemed to have transferred its interest in the Transferable Products to the District without representation or warranty except as

to the delivery of the most current complete form of the Transferable Products generated by Developer or caused to be generated by Developer, whereupon the Transferable Products shall become the property of the District and shall be delivered to the District immediately if not delivered in whole previously and the District shall have the right, in its sole discretion, to use grant, license, or otherwise dispose of such Transferable Products to any person or entity for future development of the Property or any other purpose at no cost or expense to the District; provided, however, that Developer shall have no liability whatsoever to the District or any transferee of title to the Transferable Products regarding the accuracy or breadth of any information contained in the Transferable Products or the use of the Transferable Products (except as it relates to the transferability of the Transferable Products by the Developer or third party and the delivery of the Transferable Products to the District in whole). As between Developer and the District, all Products other than the Transferable Products (the "Other Products") shall be and remain the sole property of Developer and will not be deemed to have been transferred to the District upon any termination of this Agreement; provided, that, nothing herein shall prohibit or limit the District's ability to disclose and provide copies of any of the Other Products to a third party as the District determines such disclosure and/or production is required in its sole and absolute discretion pursuant to the California Public Records Act or any other requirement under federal, state, or local laws, regulations, ordinances, requirements, or policies, including those of the District. This Section 7 shall survive the expiration or earlier termination of this Agreement."

- F. Said ENA is hereby amended by deleting Section 11(e) in its entirety and replacing it with the following Section 11(e):

"e. **Termination and Survival Provisions.** Notwithstanding any other provision of this Agreement, this Agreement and its terms are binding on the Parties until this Agreement terminates and, further, the provisions of Section 7 (Developer's Findings, Studies and Reports), Section 9 (Costs and Expenses) (as it relates to the obligation of Developer to pay specified fees and costs incurred by the District), Section 13 (Remedies for Breach of Agreement), Section 14 (CEQA, Entitlements and Reservation of Discretion), Section 15 (Attorneys' Fees), Section 30 (No Broker), Section 31 (No Agreements with Third Parties), and Section 33 (OFAC Compliance) shall survive the termination of this Agreement and the Parties shall each remain liable with respect to each of such surviving provisions, as set forth in this subsection 11(e) for all obligations, fees, costs and expenses thereunder incurred during or as a result of matters arising during the Negotiating Period.

This Section 11 shall survive the expiration or earlier termination of this Agreement."

- G. Said ENA is hereby amended by deleting Section 12 in its entirety and replacing it with the following Section 12:

"12. **DEFAULT.** Failure by either Party (a) to negotiate in good faith, (b) to negotiate exclusively, as provided in Section 2(c), or (c) perform any other of its obligations as provided in this Agreement, including without limitation, the delivery of the

submittals set forth in Section 6 and Section 6.1, shall constitute an event of default under this Agreement. The non-defaulting Party shall give written notice of a default to the defaulting Party, specifying the nature of the default and the action required to cure the default. If the default remains uncured for twenty (20) days after the date of such notice it shall be deemed an "Uncured Default", and the nondefaulting Party may terminate this Agreement as set forth in Section 13(a) of this Agreement."

H. Said ENA is hereby amended by adding the following as Section 13(d):

"d. **Indemnity.** Without limitation of the Developer's other obligations under this Agreement, the Developer agrees, at its sole cost and expense, to indemnify, defend and hold harmless the District and its officers, directors, commissioners, employees, partners, affiliates, agents, contractors, successors and assigns (collectively with the District, the "District Parties") from any claims, demands, actions, causes of action, suits (collectively, "Claims") and any costs, damages (of all kinds including punitive damage, diminution in value and loss of use), liabilities, expenses (including reasonable attorneys', consultants' and experts' fees), losses, fines, penalties and court costs related to the subject matter of such costs (collectively, the "Related Costs") and amounts paid in settlement of any claims or actions related to the subject matter of the Related Costs (as determined by the District), initiated, commenced, or filed by third parties arising out of:

- (a) the performance by Developer of its obligations under the Agreement;
- (b) any actions taken by the Developer or its officers, directors, employees, partners, affiliates, agents, contractors, successors and assigns (collectively, the "Developer Affiliates") in connection with this Agreement;
- (c) the consideration or approval of the Agreement and any amendments to this Agreement;
- (d) the consideration or approval of permits or approvals sought by or granted to the Developer or Developer Affiliates related to the Property or Proposed Development during the Negotiation Period, including, but not limited to, approvals or permits for any due diligence activities (collectively, "Related Approvals");
- (e) the granting or failure to grant any amendments to the Agreement, Discretionary Actions or Related Approvals;
- (f) the granting or failure to grant any extensions of the Negotiating Period or submittal deadlines under Section 6 and Section 6.1; and
- (g) alleged non-compliance with CEQA or the National Environmental Policy Act for the Agreement, any amendments to the Agreement, the Proposed Development, Property, Related Approvals or Discretionary Actions.

The District shall select its own counsel, in its sole and absolute discretion, that is independent and separate to any counsel selected by Developer to represent Developer, to conduct the defense of the District Parties from any Claims and the costs and expenses incurred by the District in such defense (including, without limitation, reasonable attorneys' fees and costs) shall be covered by the indemnification, hold harmless and defense obligations of Developer under this Section 13(d) and be subject to immediate payment once incurred. The District's participation in its defense of the District Parties from any Claims shall not relieve the Developer of any of its obligations under this Section 13. The terms of this Section 13 shall survive the expiration or earlier termination of this Agreement. The foregoing indemnity obligations of the

Developer are in addition to, and not in limitation of, any other indemnity obligations of Developer contained in this Agreement or otherwise.”

- I. Said ENA is hereby amended by deleting Section 14 in its entirety and replacing it with the following Section 14:

**“14. CEQA, ENTITLEMENTS AND RESERVATION DISCRETION.** This Section 14 shall apply notwithstanding any other provision of this Agreement; provided, that, if either Party terminates this Agreement pursuant to Section 3 or Section 13, Section 11(e) shall control as to the Parties remaining obligations under this Agreement. The Parties agree and acknowledge that compliance with CEQA is a legal precondition to the District’s or Board’s commitment or approval of any discretionary District action for a project that may result in a direct or indirect physical change to the environment, including, without limitation the Definitive Agreement, a Port Master Plan Amendment (“PMPA”), and a Coastal Development Permit (“CDP”) for the Proposed Development (“Discretionary Actions”). No Discretionary Action shall be approved or deemed to be approved by the District or the Board, until after the CEQA analysis for the same is completed and the Proposed Development is considered and approved by the District or Board in accordance with the requirements of CEQA. The Parties acknowledge and agree that the District is in the process of updating the Port Master Plan (“Port Master Plan Update”) and that a project Description for the Proposed Development, including land and water uses, is not sufficiently defined to include the Proposed Development in the Port Master Plan Update, and any Discretionary Actions for the Proposed Development shall be subject to the Port Master Plan then in existence and controlling as of the time the Discretionary Action is considered by the Board. The Parties also acknowledge and agree to the following terms and conditions:

- a. Preparation of a PMPA, CDP and CEQA analysis by a Consultant (defined below). If deemed necessary by the District, in its sole and absolute discretion, a PMPA and CDP under the Coastal Act for the Proposed Development may be required. CEQA analysis shall also be required. The District, in its sole and absolute discretion, may have the CEQA analysis, PMPA or CDP prepared by one or more private firms (collectively, "Consultant") under a three-party agreement executed by the District, Developer and the Consultant. If the District decides that such a three-party agreement is required, Developer shall enter into said agreement. The Parties intend that the three-party agreement include, at a minimum, the following provisions:
  - i. District shall control and direct the Consultant without any influence from Developer; and
  - ii. Developer agrees to pay on the terms provided in the three party agreement for all of the Consultant cost, including, without limitation, the Consultant fees for preparing the CEQA analysis, PMPA, or a CDP and obtaining California Coastal Commission (“Coastal”) approval of said entitlements, and any other required entitlements; and

iii. Developer will directly pay such costs as they are incurred within 30 days after Developer receives written request for payment from either the District or the Consultant. Developer shall fully and timely cooperate with the District and, if applicable, the Consultant, in furnishing information required for the District's consideration of its approval of the CEQA analysis, PMPA or CDP and the District's efforts to obtain approvals from Coastal. Said cooperation shall include, without limitation, submitting necessary and useful information at the request of the District or the Consultant and attending and presenting at community workshops or other public forums where issues relating to the CEQA analysis, PMPA, CDP or other entitlements are discussed. Developer shall have the right to review all costs including third party studies and documents and protest any unreasonable fees. Notwithstanding the above, if this Agreement is terminated, Developer shall have no liability to pay any future costs or expenses incurred pursuant to this Section 14(a) after the date of termination of the Agreement but shall pay all costs and expenses up to the date of termination. Prior to incurring any fees, the District shall provide Developer with an estimate of the fees.

b. Review and Approval of the CEQA Analysis, PMPA, CDP and Proposed Development. The Parties agree and acknowledge that an approval of a project under CEQA Guideline Sections 15352 and 15378 has not occurred by the District's approval of this Agreement. The CEQA analysis, Discretionary Actions and Proposed Development may be reviewed and considered by the Board, in its sole and absolute discretion, and the Parties acknowledge and agree that this Agreement is not and does not guarantee approval of the CEQA analysis, required findings, including without limitation a Statement of Overriding Considerations, a Mitigation Monitoring Reporting Program ("MMRP") or any permits, entitlements (including, without limitation, the Discretionary Actions), improvements or other projects (collectively, "Required Approvals") for the Proposed Development or the Proposed Development itself as contemplated by this Agreement or otherwise. The Parties further agree and acknowledge that the Board and District retain sole and absolute discretion to, among other things:

- i. prepare, adopt, or disapprove an exemption, a Mitigated Negative Declaration ("MND") or an Environmental Impact Report ("EIR"), pursuant to CEQA for the Proposed Development, Discretionary Actions and other required permits and entitlements required to carry out the Proposed Development or any other project proposed by Developer on the Property;
- ii. adopt, condition or disapprove any and all projects including, without limitation, any and all of the Required Approvals or the Proposed Development;

- iii. adopt any and all feasible mitigation measures to lessen potentially significant environmental impacts from any project, including the Proposed Development; and
- iv. modify any project, including the Proposed Development, adopt any alternatives to the same, including the "no project" alternative, and adopt or refuse to adopt a Statement of Overriding Consideration, if applicable, in connection with the CEQA process.

Developer acknowledges that this Agreement shall not be construed as a direct or indirect commitment by the Board, the District or any other entity to take or to not take any action, whether under CEQA, the Coastal Act or otherwise, in connection with the Required Approvals or the Proposed Development or any other projects related to matters set forth in this Agreement or otherwise. Additionally, the Parties acknowledge and agree that the Discretionary Actions and other permits, entitlements or project approvals shall not be presented to the District or Board for approval unless and until all environmental review under CEQA has been completed and certified. Developer shall have no claim, cause of action, or right to compensation or reimbursement from District if the Proposed Development or Required Approvals are not adopted for any reason or an alternative, including the no project alternative is adopted, or if adopted, the item is subject to the performance of certain additional conditions or mitigation measures.

Developer fully assumes all the risk that the District, the Board or Coastal will not approve or adopt any or all of the Required Approvals or will impose conditions and mitigation measures to the Required Approvals or select an alternative, including the no project alternative. This Section 14 shall survive the expiration or earlier termination of this Agreement."

- J. Said ENA is hereby amended by deleting Section 15 in its entirety and replacing it with the following Section 15:

**"ATTORNEYS' FEES.** In the event of any dispute between the Parties hereto involving the covenants or conditions contained in this Agreement or arising out of the subject matter of this Agreement, the prevailing Party shall be entitled to have and recover from the losing party reasonable attorneys' fees and costs of suit, including, without limitation, any and all costs incurred in enforcing, perfecting and executing such judgment."

- K. 1HWY1 hereby reaffirms all of the releases and waivers of 1HWY1, as the "Developer" (defined in the ENA), under or pursuant to the ENA, releases the District from any claims arising out of the ENA, waives the application and benefits of California Civil Code §1542, and verifies that it has read and understands the following provision of California Civil Code § 1542:

"A general release does not extend to claims that the creditor or releasing party does not know or suspect to exist in his or her favor at the time of executing the release and that, if known by him or her, would have materially affected his or her settlement with the debtor or released party."

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- L. Capitalized terms not defined herein shall have the meaning ascribed thereto in the ENA.
- M. The Parties acknowledge that this Amendment No. 1 has been agreed to by both of the Parties, that both the District and 1HWY1 have consulted with attorneys with respect to the terms of this Amendment No. 1 and that no presumption shall be created against the drafting party. Any deletion of language from this Amendment No. 1 prior to its execution by the District and 1HWY1 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.
- N. Developer acknowledges and agrees that the concurrence of the Executive Director or his or her designee with the terms and provisions of this Amendment No. 1 shall not be construed or interpreted as the District approving or accepting such terms and shall not be relied on by Developer.
- O. This Amendment No. 1 may be executed in any number of counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same agreement.
- P. Each signatory and party to this Amendment No. 1 warrants and represents to the other party that it has the legal authority, capacity and direction from its principal(s) to enter into this Amendment No. 1 and that all resolutions, ordinances or other actions have been taken so as to enter into this Amendment No. 1.
- Q. Time is of the essence with respect to all the express conditions contained herein.
- R. This Amendment No.1 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.
- S. The waiver or failure to enforce any provision of this Amendment No. 1 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 Amendment No. 1.
- T. If any portion of this Amendment No. 1 is declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, that portion will be deemed severed from this Amendment No. 1 and the remaining parts of this Amendment No. 1 will remain in full force as fully as though the invalid, illegal, or unenforceable portion had never been part hereof.
- U. Nothing in this Amendment No. 1, whether expressed or implied, is intended to confer any rights or remedies under or by reason of this Amendment No. 1 on any persons other than Developer and the District and their respective permitted successors and assigns, nor is anything in this Amendment No. 1 intended to relieve or discharge the obligation or liability of any third persons to any Party hereto, nor shall any provisions

give any third persons any right of subrogation or action over or against any Party hereto.

- V. Except as modified by this Amendment No. 1, the ENA is hereby ratified and confirmed.

**(Remainder of Page Intentionally Left Blank.)**



**IN WITNESS WHEREOF**, the parties hereto have executed this Amendment No. 1 as of the day and the year first above written.

APPROVED AS TO FORM AND LEGALITY:  
GENERAL COUNSEL

By: Elizabeth Alonso  
Assistant/Deputy

**SAN DIEGO UNIFIED PORT DISTRICT**,  
a public corporation

By: \_\_\_\_\_  
Tony Gordon  
Director, Real Estate

**1HWY1, LLC**,  
a Delaware limited liability company

By: Yehudi Gaffen  
Signature  
Yehudi Gaffen

PRINT NAME: \_\_\_\_\_

CEO  
PRINT TITLE: \_\_\_\_\_