

DRAFT

RESOLUTION 20xx-xxx

**RESOLUTION AUTHORIZING AGREEMENT FOR
AMENDMENT OF EXCLUSIVE NEGOTIATING
AGREEMENT AMENDMENT NO. 1 BETWEEN THE
SAN DIEGO UNIFIED PORT DISTRICT AND
1HWY1, LLC FOR THE PROPOSED
REDEVELOPMENT OF 70-ACRES OF LAND AND
WATER IN THE CENTRAL EMBARCADERO**

WHEREAS, the San Diego Unified Port District (District) is a public corporation created by the legislature in 1962 pursuant to Harbors and Navigation Code Appendix 1 (Port Act); and

WHEREAS, on February 22, 2016, staff issued a Request for Proposals 16-04ME (RFP) for the redevelopment of 70 acres of land and water situated between downtown and the Bay in the District's Central Embarcadero area (Redevelopment Site); and

WHEREAS, the Redevelopment Site is bordered by the USS Midway Museum and Harbor Drive to the north, Manchester Grand Hyatt and Kettner Boulevard to the east, and San Diego Bay to the south and west; and

WHEREAS, the Redevelopment Site also includes Embarcadero Marina Park North, Ruocco Park and Tuna Harbor; and

WHEREAS, following an extensive solicitation and due diligence process at the November 8, 2016 meeting, the Board of Port Commissioners (BPC) selected 1HWY1, LLC (1HWY1) as the successful proposer; and

WHEREAS, on October 2, 2017, the District entered into an Exclusive Negotiating Agreement (ENA) with 1HWY1; and

WHEREAS, the ENA between the District and 1HWY1 commenced on October 2, 2017 and was originally set to expire on October 1, 2019; and

WHEREAS, the ENA allows staff to administratively extend the negotiating period for the ENA or submittal deadlines by ninety (90) day increments for a total negotiating period not to exceed five years (i.e., October 1, 2022); and

WHEREAS, due to its complexity and size, the proposed Seaport San Diego Project (Seaport San Diego) has evolved since the parties entered into the ENA and timelines have shifted accordingly; and

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WHEREAS, as permitted under the ENA, the District has administratively granted various extensions to 1HWY1 over the last three years including extensions of the submittal deadlines for the project description and proforma (October 1, 2018 to July 29, 2019 (cumulatively)) and the negotiating period (from October 2, 2019 to September 28, 2020 (cumulatively)); and

WHEREAS, on September 14, 2020, an additional 180-day extension was granted which extended the ENA's negotiating period to March 27, 2021; and

WHEREAS, the Seaport Project contains various programmatic components that require further evaluation to determine consistency with the Public Trust Doctrine (Trust Doctrine); and

WHEREAS, determining whether the Seaport Project is consistent with the Trust Doctrine is an important milestone that must be satisfied before the project moves into the environmental review phase; and

WHEREAS, to advance this process, on August 21, 2020, District staff submitted 1HWY1's project description and accompanying materials to the California State Lands Commission (SLC) staff to begin the process of a Preliminary Trust Doctrine Consistency Review of the Seaport Project; and

WHEREAS, in September 2020, 1HWY1 requested that the District consider an amendment to the ENA that would allow additional time to work through the Trust Doctrine consistency process, the entitlement phase and financial feasibility; and

WHEREAS, the proposed amendment to the ENA (Amendment No. 1) includes modifications to the following terms:

- Term – Extends to October 1, 2024 with possible additional one year administrative extension by Executive Director, in his or her sole and absolute discretion, and reserves right to charge 1HWY1 a non-refundable extension fee for additional year;
- Termination – Either party can terminate if the Seaport Project is “not feasible” or there is an uncured default by the non-terminating party and includes a list of potential factors which may be considered by a terminating party, in their sole and absolute discretion, when interpreting if the proposed development is “not feasible”, such as non-compliance with the Trust Doctrine, the California Coastal Act, or other laws; financial subsidy from the District; minimum rent threshold; or an uncured default;
- Submittals – By December 31, 2021, 1HWY1 must submit certain items, including a development phasing plan and updates to project

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description, pro forma, organizational chart, financial strategy and market demand studies, to further refine the proposed development prior to conducting California Environmental Quality Act (CEQA) review and to advance the parties' negotiations of the economic terms for the definitive agreement; also, introduces the negotiation of a non-binding term sheet;

- Transferable Products – Clarifies that design type documents (i.e., drawings and specifications) will remain the property of 1HWY1, but the District would not be prohibited from disclosing and providing copies of the documents to a third party that are the property of 1HWY1 if the District determines, in its sole and absolute discretion, that such disclosure and/or production is required under the California Public Records Act and other laws; District still receives studies, reports, and other similar types of due diligence materials;
- Indemnity – 1HWY1 shall indemnify, defend, and hold harmless the District for third-party claims arising out of 1HWY1's performance, the ENA, amendments to the ENA, permits or approvals, extensions of the submittal deadlines or negotiating period, or alleged non-compliance with CEQA or the National Environmental Policy Act for the ENA, amendments to the ENA, the proposed development, property, or related actions; 1HWY1 pays costs and expenses incurred by the District in such defense;
- Release of Claims - 1HWY1 releases District from any claims arising out of the ENA, including unknown claims, and 1HWY1 also reaffirms all the releases and waivers of 1HWY1, as the "Developer" under the ENA;
- Other – Clarifying changes made to incorporate new section references, clarify definition of attorneys' fees, clarify CEQA process while fully reserving the Board's discretion to approve or disapprove the Seaport Project, its entitlements and/or condition the same, and conform the ENA as needed; and

WHEREAS, staff recommends the Board approve Amendment No. 1 because Amendment No. 1 will continue to advance the Seaport Project, support 1HWY1's efforts to secure additional capital for the entitlement phase and provide the District with the ability to collect a non-refundable extension fee if the additional 1 year administrative extension is requested and receive additional protections via the new indemnity and release provisions; and

WHEREAS, the requested BPC action does not constitute a "project" or an "approval" of a "project" under the definitions set forth in CEQA Guidelines Sections 15352 and 15378, nor does it allow for "development" or "new

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development” pursuant to the California Coastal Act and the District’s Coastal Development Permit Regulations.

NOW, THEREFORE, BE IT RESOLVED by the Board of Port Commissioners (BPC) of the San Diego Unified Port District (District), as follows:

That the Executive Director, or his or her designated representative, is hereby authorized and directed on behalf of the San Diego Unified Port District to enter into the Agreement for Amendment of Exclusive Negotiating Agreement Amendment No. 1 between the District and 1HWY1, LLC for the proposed redevelopment of 70-acres of land and water in the Central Embarcadero.

APPROVED AS TO FORM AND LEGALITY:
GENERAL COUNSEL

By: Assistant/Deputy

PASSED AND ADOPTED by the Board of Port Commissioners of the San Diego Unified Port District, this 28th day of December, 2020, by the following vote: