



Legislation Text

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DATE: June 12, 2018

SUBJECT:

CITY OF SAN DIEGO, FIFTH AVENUE LANDING, AND SAN DIEGO UNIFIED PORT DISTRICT - PROPERTY LOCATED AT FIFTH AVENUE LANDING AND MARINA PARK WAY, SAN DIEGO, CALIFORNIA:

RESOLUTION APPROVING, SUBJECT TO APPROVAL OF THE CITY OF SAN DIEGO, A PURCHASE AND SALE AGREEMENT (PSA) BY AND AMONG THE CITY OF SAN DIEGO (CITY), FIFTH AVENUE LANDING (FAL) AND THE SAN DIEGO UNIFIED PORT DISTRICT (DISTRICT) FOR: (1) THE DISTRICT TO PURCHASE FROM FAL ITS INTEREST IN THE PROPERTY LOCATED AT FIFTH AVENUE LANDING AND MARINA PARK WAY (SITE) FOR UP TO \$33.2 MILLION, SUBJECT TO TITLE CONDITIONS AND RECEIPT OF THE CITY'S PAYMENTS TO THE DISTRICT; THE CITY TO PURCHASE FROM THE DISTRICT LEASEHOLD INTEREST AND AN OPTION IN THE SITE FOR \$28.2 MILLION IN ANTICIPATION OF THE SAN DIEGO CONVENTION CENTER PHASE III EXPANSION SUBJECT TO THE PASSAGE OF THE "FOR A BETTER SAN DIEGO" CITIZEN'S BALLOT MEASURE, (COLLECTIVELY, ALTERNATIVE A CLOSING), OR (2) IF THE ALTERNATIVE A CLOSING DOES NOT OCCUR, FOR THE DISTRICT TO ENTER INTO LEASE AMENDMENTS AND AGREEMENTS WITH FAL, SUBJECT TO CERTAIN TITLE CONDITIONS (COLLECTIVELY, ALTERNATIVE B CLOSING), AS FOLLOWS:

A. IF THE ALTERNATIVE A CLOSING OCCURS THE FOLLOWING SHALL BE DEEMED APPROVED:

- 1. ORDINANCE GRANTING TO THE CITY AMENDMENT NO. 2 TO AMENDED, RESTATED AND COMBINED LEASE OF PROPERTY LOCATED AT FIFTH AVENUE LANDING AND MARINA PARK WAY, SAN DIEGO, CALIFORNIA TO ASSIGN THE LEASEHOLD INTEREST TO THE CITY, AMEND THE LEASED PREMISES AND EXTEND THE TERM OF THE LEASE;**
- 2. ORDINANCE GRANTING TO FAL AMENDMENT NO. 1 TO LEASE OF PROPERTY LOCATED AT FIFTH AVENUE LANDING AND MARINA PARK WAY, SAN DIEGO, CALIFORNIA TO RELOCATE THE PREMISES, REINSTATE SHADING CREDITS AND GRANT AN OPTION FOR EXPANDED FERRY SERVICE SUBJECT TO A RESERVATION OF DISCRETION;**
- 3. RESOLUTION APPROVING AND AUTHORIZING (A) THE ASSIGNMENT AND ASSUMPTION OF THE AMENDED, RESTATED AND COMBINED (ARC) LEASE BY AND BETWEEN FAL AND DISTRICT (B) THE CONSENT TO A QUITCLAIM DEED FROM FAL TO THE DISTRICT FOR THE MARINA LANDSIDE AREA; AND (C) UPON DISTRICT ASSUMPTION OF THE ARC LEASE, RELEASE OF GUARANTORS EXCLUDING INDEMNITY AND HOLD HARMLESS OBLIGATIONS**

B. IF THE ALTERNATIVE B CLOSING OCCURS THE FOLLOWING SHALL BE DEEMED APPROVED:

- 1. ORDINANCE GRANTING TO FAL AMENDMENT NO. 2 TO AMENDED, RESTATED AND COMBINED LEASE FOR PROPERTY LOCATED AT FIFTH AVENUE LANDING AND MARINA PARK WAY, SAN DIEGO, CALIFORNIA TO INCLUDE A PROCESS FOR NEGOTIATION OF FUTURE LEASES SUBJECT TO A RESERVATION OF DISCRETION AND EXTEND THE TERM BY THREE (3) YEARS; AND**
- 2. ORDINANCE GRANTING TO FAL AMENDMENT NO. 1 TO LEASE OF PROPERTY LOCATED AT FIFTH AVENUE LANDING AND MARINA PARK WAY, SAN DIEGO, CALIFORNIA TO REINSTATE SHADING CREDITS**

C. RESOLUTION APPROVING AND AUTHORIZING DISTRICT OPTION AND CITY OPTION AND AUTHORIZING MEMORANDUM OF DISTRICT OPTION AND MEMORANDUM OF CITY OPTION

D. RESOLUTION APPROVING AND AUTHORIZING A NEW INDEMNITY AGREEMENT BY AND BETWEEN THE DISTRICT, THE CITY AND FAL FOR THE BENEFIT OF THE DISTRICT AND THE CITY

E. ORDINANCE AMENDING THE FISCAL YEAR 2018 BUDGET BY ADDING \$5 MILLION TO THE NON-PERSONNEL APPROPRIATION FROM PREVIOUS YEARS' CUMULATIVE UNRESTRICTED RESOURCES

EXECUTIVE SUMMARY:

The San Diego Convention Center (Convention Center) is located on San Diego Unified Port District (District) tidelands and was built and paid for by the District in 1989 and later expanded in 2001 by the District and the City of San Diego (City). The Convention Center is recognized as one of the top convention centers in the country and is host to major conventions, trade shows, meetings and special events including one of San Diego's largest conventions, San Diego Comic-Con International. Since its opening in 1989, the Convention Center has contributed approximately \$26.4 billion to the regional economy making it one of San Diego's most important economic engines. As a result of its success, the Convention Center has reached a maximum occupancy, and there is lack of available space to bring additional convention business to San Diego.

Over the past decade, the City, the District and the San Diego Convention Center Corporation (SDCCC) have engaged in extensive planning, design, and financing efforts to complete another expansion to the Convention Center, the Phase III Expansion, which would satisfy a significant demand for additional convention center space and provide numerous public benefits, including millions of dollars economic and fiscal benefits, permanent and temporary jobs and increased public access to the waterfront.

In 1984, the District entered into a 40-year lease with Fifth Avenue Landing, LLC (FAL) for the site on which the City proposes to construct the Phase III Expansion. In 2010, the leasehold held by FAL was split into two separate leaseholds and the District entered into two leases - a lease with SDCCC for the Phase III Expansion site (ARC Lease, as amended) and a lease with FAL for the continued operation of a marina on certain water parcels and water transportation center on a landside parcel,

known as the “Marina Landside Area” (Marina Lease) on the adjacent premises. The ARC Lease also granted the SDCCC an option to lease for a 66-year lease for the purpose of construction and operation of the Phase III Expansion upon satisfaction of certain conditions precedent (Expansion Option). Pursuant to the terms of the ARC Lease, SDCCC’s leasehold interest was subsequently assigned to and assumed by FAL. An area site plan and site plan depicting the area of the proposed Phase II Expansion have been included as Attachment A.

The ARC Lease also provides that upon the assumption of the ARC Lease by FAL and once hotel market performance achieved a certain threshold, FAL must submit a proposed minimum 400-room hotel project to the District for its consideration. On January 11, 2016, FAL submitted a project proposal consisting primarily of a hotel, a lower cost overnight accommodation and a marina expansion (FAL Project), which the District has been processing diligently and in good faith. Recently, FAL requested that the District enter into negotiations to facilitate a transaction that would give the City control of the ARC Lease premises, which makes up the majority of the Phase III Expansion site (Expansion) Site, in anticipation of a citizens’ initiative titled “For a Better San Diego” (Initiative and when put on the ballot in November 2018, Ballot Measure). The Initiative is being launched by a coalition of business and labor organizations for a proposed special tax measure to increase the City’s transient occupancy tax and dedicate the resulting increased tax revenues for specified public benefits, including financing construction of an expansion of the Convention Center and modernization of the facility.

The result of the three-party negotiations is the proposed Purchase and Sale Agreement (PSA) that is before the Board of Port of Commissioners (Board) for its consideration. If authorized by the Board and City), the District, City and FAL would enter into the PSA. The PSA has been structured to allow for two alternative closings - Alternative A Closing and Alternative B Closing. The PSA and aerial site plans showing the existing and potential future premise conditions under each alternative closing have been included as Attachments B and C, respectively.

Alternative A Closing is conditioned on passage of the Ballot Measure and involves the District as party to two real estate transactions; one with the City and the other with FAL. Under Alternative A Closing the following transactions would occur:

- The District through four option payments (District Option Payments) will purchase from FAL its interest in the ARC Lease and Marina Landside Area for \$30 million and reimburse FAL up to \$3.2 million that it has expended related to the FAL Project;
- Depending on certain conditions, within approximately 60 to 80 days of the Board’s approval, District pays FAL its first initial non-refundable option payment of \$5 million non- (Released Initial Option Payment) towards the purchase price, which shall be secured through a promissory note from the City to the District. The remaining District Option Payments are not due until after the November 2018 election.
- City through three option payments (City Option Payments) will purchase from the District the ARC Lease, Expansion Option, a leasehold interest in the Marina Landside Area and extended term for up to \$28.2 million. Other than the Released Initial Option Payment, the District’s payments to FAL are conditioned on the City making the City Option Payments to the District.

- If the Alternative A Closing does not occur, FAL would retain any payments received and the District would proceed with the Alternative B Closing which primarily includes prompt consideration of the FAL Project by the Board, an ARC Lease term extension to make up for lost time and reinstatement of some shading credits.

A set of supporting transactions conditioned upon either the occurrence of the Alternative A Closing or Alternative B Closing would be required. A summary of each of these transactions has been provided below.

RECOMMENDATION:

Staff recommends the Board approve and authorize the Executive Director or her representative to enter into the PSA and approve each of the supporting Alternative A Closing agreements and documents, expressly conditioned on the occurrence of the Alternative A Closing and the supporting Alternative B Closing agreements and documents, expressly conditioned on the occurrence of the Alternative B Closing, as well as the proposed Indemnity Agreement, memoranda of options and authorize the attachment of the pro forma policies administratively. Staff further recommends the Board amend the Fiscal Year 2019 budget to transfer \$5 million to the non-personnel expenditure from the cumulative unrestricted reserves, which will be used for the Released Initial Option Payment.

FISCAL IMPACT:

The fiscal impact to the District from this action will be \$5 million if the Alternative A Closing occurs. If the Alternative B Closing occurs, the \$5 million would be reimbursed by the City. With approval of the recommended budget amendment, funds will be available in the Fiscal Year 2018 non-personnel appropriation. Funds for the recommended budget amendment are available from previous years' cumulative unrestricted resources.

COMPASS STRATEGIC GOALS:

This agenda item supports the following Strategic Goals(s).

- A Port that the public understands and trusts.
- A vibrant waterfront destination where residents and visitors converge.
- A Port with a comprehensive vision for Port land and water uses integrated to regional plans.
- A financially sustainable Port that drives job creation and economic vitality.

DISCUSSION:

Background

The Convention Center is located on District tidelands and was built and paid for by the District in 1989 and later expanded in 2001 by the District and the City. The City and SDCCC is currently responsible for managing, operating, maintain and promoting the Convention Center in accordance with the 1998 Management Agreement¹, as amended between the City and the District.

The Convention Center is recognized as one of the top convention centers in the country and is host to major conventions, trade shows, meetings and special events including one of San Diego's largest

conventions, San Diego Comic-Con International. Since its opening in 1989, the Convention Center has contributed approximately \$26.4 billion to the regional economy making it one of San Diego's most important economic engines.² In 2017 alone, the Convention Center generated a total of \$1.14 billion in regional impact as a result of attendance and direct spending.³

As a result of its success, the Convention Center has reached a maximum occupancy, and there is lack of available space to bring additional convention business to San Diego. Many revenue-generating conventions are booked in other cities, and San Diego loses significant economic benefit causing the City to lose its competitive edge in the visitor-serving market and the District to potentially lose revenues from hotel nights.

Phase III Expansion Project

Over the past decade, the City, the District and SDCCC have engaged in extensive planning, design, and financing efforts to complete a Phase III Expansion. These efforts included the creation of the Mayor's Citizen Task Force Committee. In 2009, the committee released the first feasibility study for a Phase III Expansion. As envisioned and approved in the Port Master Plan, the Phase III Expansion would add approximately 400,000 square feet of contiguous exhibit, ballroom, and meeting space to the existing Convention Center facility. This would satisfy a significant demand for additional convention center space. The Phase III Expansion would also provide numerous public benefit features, including a sustainably designed five-acre rooftop public park with views of the City and bay and increased public access to the waterfront. Attachment D also includes further discussion of the public benefits of the Phase III Expansion.

The Phase III Expansion site is located on District Tidelands bayward of Convention Way and Marina Park Way (Expansion Site) as shown generally in Attachment A. The Expansion Site is partially located on property leased by FAL since July 1, 1984. In 2010, the District and FAL split FAL's original leasehold into two separate premises and leaseholds through two agreements:

- 1) An ARC Lease between the SDCCC, as lessee and District, as lessor for 193,232 square feet of land allowing parking and special events with an Expansion Option for the Phase III Expansion built into Paragraph 49 of the ARC Lease, and
- 2) A Marina Lease for 25,643 square feet of land (Marina Landside Area) and 155,428 square feet of water area for the continued operation of a marina and water transportation center (WTC) on the adjacent premises between FAL, as lessee and District, as lessor.⁴

As a separate, but related transaction, SDCCC and FAL entered into a purchase and sale agreement where SDCCC agreed to pay FAL \$13.5 million to permanently acquire the ARC Lease and the interest therein. SDCCC issued FAL a promissory note secured by a Deed of Trust that encumbered the ARC Lease.

Previous Phase III Expansion Project Approvals

At its September 19, 2012 Board meeting, the District took various actions towards moving the Phase III Expansion forward, including:

- 1) Entering into a Support Agreement with the City to memorialize the District's \$60 million financial commitment towards the Phase III Expansion paid over 20 years starting at the opening of the expansion,
- 2) Granting Amendment No. 1 to the ARC Lease, which allowed the transfer and assignment of the Expansion Option to the City and memorialized agreements between the SDCCC and the City and
- 3) Certifying the Final Environmental Impact Report (EIR) for the San Diego Convention Center Phase III Expansion and Expansion Hotel Project and Port Master Plan Amendment (SCH #2010121004, UPD-83356-EIR-855)⁵, adopted Findings of Fact, a Statement of Overriding Considerations and a Mitigation Monitoring Reporting Program, and approved the associated San Diego Port Master Plan Amendment #6-PSD-MAJ-45-13 (PMPA).⁶

On October 11, 2013, the California Coastal Commission (CCC) unanimously certified the PMPA, with hundreds of people attending the CCC hearing in support of the Phase III Expansion. On March 4, 2014, District approved an Addendum to the FEIR⁷ and adopted the CCC's certification of the PMPA and on May 28, 2015, the CCC accepted District's March 4, 2014 action. Among other things, the Final EIR and Addendum analyzed the construction and operation of the Phase III Expansion, a 500-room hotel tower located adjacent to the Hilton Bayfront, road realignments and relocation of the WTC to an approximate 35,000 square foot parcel on the ARC Lease premises (commonly referred to as the Flag Lot). The location of the Flag Lot is depicted in Attachment C.

In August, 2014 a financing mechanism to fund the Phase III Expansion was overturned by the California Court of Appeal⁸ and due to budget constraints, SDCCC could not pay the remaining amount under the promissory note. Consequently, in June 2015, pursuant to the terms of the ARC Lease, SDCCC assigned its rights in the ARC Lease to FAL through an assignment in-lieu of foreclosure.

The FAL Project and Three-Party Negotiations

Once the ARC Lease was assigned to FAL and pursuant to the requirements of Paragraph 50 of the ARC Lease, FAL submitted a proposal for the development of an 830-850 room hotel project to the District. While not required by the ARC Lease, FAL also proposed a lower cost hotel and a marina expansion, as part of its project (collectively with the proposed 830-850 room hotel, FAL Project).

The District was diligently processing the FAL Project, including, but, not limited to public circulation of a Draft EIR (SCH#2016081053), when FAL requested that the District enter into negotiations to facilitate a deal that would give the City control of the Expansion Site in anticipation of a citizens' initiative titled the "For a Better San Diego" (Initiative and when put on the ballot in November 2018, Ballot Measure). The Initiative is being launched by a coalition of business and labor organizations and is for a proposed special tax measure to increase the City's transient occupancy tax and dedicate the resulting increased tax revenues for specified public benefits, including financing construction the Phase III Expansion and modernization of the facility.

The result of the three-party negotiations is the proposed PSA (Attachment B) that is before the Board for its consideration. The PSA and related transactions are discussed in detail below.

PSA and Related Transactions

If authorized by the Board, the District, City and FAL would enter into the PSA, which has been structured to allow for two alternative closings - Alternative A Closing and Alternative B Closing - dependent on the occurrence of certain conditions as described below. The Board's approval of the PSA is specifically conditioned on the City's approval of the same PSA.

Alternative A Closing and Related Transactions

The Alternative A Closing includes two transactions as summarized and described below.

District-FAL Transaction

In the first transaction, the District through option payments will purchase from FAL its interest in the ARC Lease and Marina Landside Area for \$30 million and reimburse FAL up to \$3.2 million for costs expended related to the FAL Project, as verified through a process specified in the PSA (FAL Cost Reimbursement). The up to \$33.2 million purchase price is supported for the public purpose as described in Attachment D.

Additionally, under the FAL-District transaction, within approximately 60 to 80 days of the Board's approval and on the condition that all documents have been delivered by each party into escrow, the District would pay FAL \$5 million in a Released Initial Option Payment secured by a promissory note issued by the City to the District (Promissory Note). As consideration for the transaction, including without limitation its structure, and to compensate FAL for either giving up the FAL Project or putting it on hold, FAL will retain the Released Initial Option Payment even if the Alternative A Closing does not occur. As specified in the PSA, the Support Agreement is no longer valid and in-lieu of the District's support payments specified in the Support Agreement, the PSA provides that the Released Initial Option Payment plus three (3) percent annual interest is a District contribution towards the Phase III Expansion, if the Alternative A Closing and the Phase III Expansion occurs. In accordance with the Promissory Note and PSA, the City will deposit the \$5 million plus interest due under the Promissory Note in a separate escrow account. If the Alternative A Closing does not occur, the \$5 million plus interest will be released to the District from escrow.

As shown in Table-1 below, the remaining up to \$28.2 million purchase price is divided into three option payments from the District to FAL, due after and conditioned on the passage of the Ballot Measure.

TABLE 1 - DISTRICT OPTION PAYMENTS

Date Deposited into Escrow	Amount
Two Business Days After the City Option Payment	\$9.5 million
Two Business Days After the City Option Payment	\$9.5 million
Two Business Days After the City Option Payment	Up to \$9.5 million*

*Subject to verification of the FAL Cost Reimbursement.

District-City Transaction

In the second transaction, the City will purchase through option payments from the District the ARC Lease and Expansion Option, both with extended terms (see Amendment No. 2 of Expansion ARC Lease, below for more information) for up to \$28.2 million. As shown in the Table-2 below, the \$28.2 million purchase price is divided into three option payments from the City to the District due after and conditioned on the passage of the Ballot Measure. The City plans on making the City Option Payments through the TOT generated by the Ballot Measure. It is important to note that payment of each of the District Option Payments is expressly conditioned on the City making its corresponding City Option Payment to the District first.

TABLE 2 - CITY OPTION PAYMENTS

Date Deposited into Escrow	Amount
On or before April 1, 2019	\$9.5 million
On or before July 1, 2019	\$9.5 million
On or before October 1, 2019	Up to \$9.5 million*

*Subject to verification of the FAL Cost Reimbursement.

Supporting Alternative A Closing Transactions

There are several transactions related to the Alternative A Closing, each of which is described below and shown in Table A of the PSA. All of the Alternative A Closing supporting transactions are specifically conditioned on the occurrence of the Alternative A Closing.

Assignment and Assumption of ARC Lease (FAL and District) and Quitclaim Deed (FAL to District)

Through the Assignment and Assumption, FAL would assign its leasehold interest in the ARC Lease to the District and the District would assume and consent to the assignment. The Assignment and Assumption expressly states that FAL's indemnity and hold harmless obligations to the District will survive the assignment and assumption consistent with the terms of the ARC Lease. The

Assignment and Assumption is attached as Exhibit D-1 of the PSA. Additionally, a Reaffirmation of Guaranty and Consent by the Guarantors, attached as Exhibit D-2 of the PSA, is proposed for the Assignment and Assumption, so that the Guaranty, by Raymond Carpenter, Arthur Engel, David Engel and Herbert Engel (collectively, Guarantors) will apply to the surviving FAL indemnity and hold harmless obligations to the District. FAL will also quitclaim its interest in the Marina Landside Area to the District through a Quitclaim Deed, attached as Exhibit D-3 of the PSA, and the District needs consent to the quitclaim.

ARC Lease Expansion Assignment and Lease Amendment

Once the District assumes the ARC Lease interest, it will assign the ARC Lease to the City and amend it through Amendment No. 2 to the ARC Lease (as amended by Amendment No. 1 and No. 2, ARC Expansion Lease). The amendment will facilitate the Phase III Expansion and accelerates certain transactions that were already contemplated by the ARC Lease, including incorporating the Marina Landside Area into the premises and removing the Flag Lot from the premises. The Flag Lot is the site for FAL's relocated WTC (see Amendment No. 1 to the Marina Lease (Alternative A), below). The assignment and ARC Lease Expansion Amendment is Exhibit L of the PSA. The following is a summary of the main terms of Amendment No. 2 to the ARC Lease:

- The premises will be amended to add the Marina Landside Area, which is part of the Expansion Site, and remove the Flag Lot.
- The term of the ARC Expansion Lease will be coterminous with an existing management agreement for SDCCC between the City and District. Accordingly, the term would be extended from June 30, 2024 to approximately May 1, 2042.
- The term of the Expansion Option, in Paragraph 49 of the ARC Expansion Lease, would be extended from June 30, 2024 to December 31, 2028 when the Ballot Measure requires the City to issue bonds for the Phase III Expansion.
- If the City fails to exercise the Expansion Option by December 31, 2028, Paragraph 50 has been amended to provide a process for the City to propose a redevelopment of the Expansion Site, subject to the District's reservation of discretion.
- The City will deposit with the District one-year of minimum annual rent as a security deposit.
- The rent structure remains the same except for abatement of rent while FAL occupies the premises through a Tidelands Use and Occupancy Permit (see below) and the rent funding sources. Additionally, the allowable uses and conditions to exercise the Expansion Option remain the same and are not altered by the Amendment No. 2 to the ARC Lease.

Memoranda of the ARC Expansion Lease (Exhibit Q of the PSA) to give notice on title is also proposed.

Amendment No. 1 to Marina Lease (Alternative A)

As stated above, the parties envisioned and analyzed in the Final EIR and Addendum the relocation of the WTC to the Flag Lot. Amendment No. 1 to the Marina Lease (Alternative A), attached as Exhibit M-1 of the PSA, accomplishes this and removes the Marina Landside Area from the lease

premises, as well as includes additional terms. The following is a summary of the main terms of Amendment No. 1 to the Marina Lease (Alternative A):

- The premises will be amended to remove the Marina Landside Area and add approximately 25,643 square feet of the Flag Lot (the same size of the Marina Landside Area in the current Marina Lease) for the relocated WTC.
- The allowable uses for the portion of Flag Lot incorporated into the Marina Lease will be amended to allow for the relocated WTC as analyzed in the Final EIR and Addendum.
- An option to lease for the remaining 9,467 square feet of the Flag Lot and approximately 23,153 square feet of water area will be added, subject to certain conditions, including without limitation, expansion of ferry service to the Chula Vista Bayfront and East Harbor Island, environmental review under the California Environmental Quality Act (CEQA) review and the District's reservation of discretion.
- The amendment will recognize the District's ability to potentially redevelop the Flag Lot with WTC for FAL in the future, but does not propose any particular redevelopment project or approve any redevelopment.
- Reinstatement of up to 39,000 square feet of shading credits will occur subject to certain conditions. Previously FAL held approximately 70,000 shading credits that were transferred back to the District.
- The amendment states that FAL's indemnity and hold harmless obligations to the District for the Marina Landside Area will survive.
- The allowable use for the water parcels and rent structure for operations of the water transportation center remain the same and are not altered by Amendment No. 1 to the Marina Lease (Alternative A).

A Memorandum of Amendment No. 1 to Marina Lease (Alternative A) (Exhibit R of the PSA) to give notice on title is also proposed. Furthermore, the Guarantors executed a Guaranty for FAL's performance under the Marina Lease. Consequently, a Reaffirmation of Guaranty and Consent by the Guarantors is proposed for the Amendment No. 1 to Marina Lease (see Exhibit M-2 of the PSA).

Tidelands Use and Occupancy Permit (TUOP)

A TUOP will be granted to FAL by the District to allow for its continued occupancy of the ARC Expansion Lease premises and Marina Landside Area until the time the City starts construction of the SDCC Phase III Expansion. The allowable uses will continue and not be altered. FAL will pay the District minimum annual rent of \$382,079 per year under the TUOP plus an additional \$58,466 for use of a portion of the Flag Lot during the term of the TUOP. A license agreement, attached to the TUOP, will allow the City to perform due diligence for the construction of the Phase III Expansion. District consent to the license agreement is required. The proposed TUOP is attachment P of the PSA.

Release of Guarantors

The Guarantors guaranteed FAL's performance under the ARC Lease through a Guaranty. Because

the ARC Lease will be assigned by FAL and assumed by the District (and then assigned to the City), a Release of Guarantors is required. The Release of Guarantors, Exhibit U of the PSA, is subject to the survival of the Guaranty for FAL's remaining indemnity and hold harmless obligations to the District under the ARC Lease and as discussed in the Assignment and Assumption section, above.

Alternative B Closing and Related Transactions

If the Alternative A Closing fails to occur and the PSA is not terminated for the reasons as specified therein, the Alternative B Closing will occur. The Alternative B Closing is primarily a transaction between FAL and the District. In summary, under the Alternative B Closing, FAL will (1) not sell its interest in the ARC Lease and Marina Landside Area, (2) keep the Initial Released Option Payment (subject to the Promissory Note), and (3) retain any District Option Payments paid to FAL, if any. Additionally, subject to its reservation of discretion, the Board will expeditiously consider the Final EIR for FAL Project and the FAL Project after all legal notices are issued and if it certifies the Final EIR and approves the FAL Project, the District will expedite the entitlement process for the FAL Project.

Supporting Alternative B Closing Transactions

There are several transactions related to the Alternative B Closing, each of which are described below and are shown in Table B of the PSA. All of the Alternative B Closing supporting transactions are specifically conditioned on the occurrence of the Alternative B Closing.

Amendment No. 2 to ARC Lease - Amended FAL ARC Lease

Subject to the reservation of discretion specified in the ARC Lease, the District will agree to start negotiating the leases required for the FAL Project. However, Paragraph 50 of the ARC Lease provides for a specific process and timeline for those negotiations. Consequently, Paragraph 50 will be amended to remove these timelines from the ARC Lease. Additionally, the District and FAL will enter into the District's normal negotiation process regarding price and terms. Accordingly, Exhibit H of the ARC Lease, which sets forth a term sheet for FAL's proposed hotel will be inapplicable. Finally, the District will extend the term of the ARC Lease by three (3) years to, among other things, make up for the time lost during the negotiations and the time necessary to see if the Ballot Measure is successful. No changes to the allowable uses or rent are proposed as part of the Amendment No. 2 to the ARC Lease. The proposed Amendment No. 2 to the ARC Lease (Amended FAL ARC Lease) is Exhibit O-1 of the PSA. Memorandum of the Amended FAL ARC Lease (Exhibit S of the PSA) is also proposed and will be recorded to provide notice on title. Moreover, the Guarantors guaranteed FAL's performance under the ARC Lease and accordingly, a Reaffirmation of Guaranty and Consent by the Guarantors is proposed, as Exhibit O-2 of the PSA.

Amendment No. 1 to Marina Lease (Alternative B)

The Marina Lease will be amended to reinstate up to 39,000 square feet of shading credits will occur. Previously FAL held approximately 70,000 shading credits that were transferred back to the District. The proposed Amendment No. 1 to the Marina Lease (Alternative B) is Exhibit N-1 of the PSA. A Memorandum of Amendment No. 1 to Marina Lease (Alternative B) (Exhibit T of the PSA) is proposed and will be recorded to provide notice on title. Additionally, a Reaffirmation of Guaranty and Consent by the Guarantors is proposed, as Exhibit N-2 of the PSA, as the Guarantors guaranteed FAL's performance under the Marina Lease.

Other Proposed Agreements and Documents

Regardless which closing occurs, FAL has agreed to indemnify and hold the District and City harmless for third-party claims that may result from the approval of the PSA and supporting agreements and transactions. The Indemnity Agreement is Exhibit K-1 of the PSA. The Indemnity Agreement has been guaranteed by the Guarantors through a Guaranty (Exhibit K-2 of the PSA). Additionally, option and title policies will be issued to the District and City. Memoranda of these Option Policies will be recorded as part of this process (see Exhibits F-1 and F-2 of the PSA). The PSA provides that the pro forma policies for the options (Exhibits G-1 and G-2 of the PSA) and the final pro forma policies (Exhibits H-1 and H-2 of the PSA) may be administratively attached to the PSA.

Public Purpose and Benefits

The District and the City's participation in and implementation of the transactions described above, and ultimately the completion of the Phase III Expansion, will achieve numerous public purposes and benefits. A summary of these public benefits has been included as Attachment D.

CONCLUSION:

If the Board approves the PSA and authorizes the Executive Director to enter into the PSA and deliver it to escrow, staff is recommending that the Board approve the supporting Alternative A Closing agreements and documents, expressly conditioned on the occurrence of the Alternative A Closing and the supporting Alternative B Closing agreements and documents, expressly conditioned on the occurrence of the Alternative B Closing, as well as the proposed Indemnity Agreement, memoranda of options and authorize the attachment of the pro forma policies administratively. Additionally, Staff is recommending the Board amend the Fiscal Year 2019 budget to transfer \$5 million to the non-personnel expenditure from the cumulative unrestricted reserves, which will be used for the Released Initial Option Payment. Upon such approvals, the District will follow the steps provided in the PSA.

General Counsel's Comments:

The General Counsel's Office has reviewed the agenda sheet, and attachments, as presented to it and approves it as to form and legality.

Environmental Review:

The proposed actions were previously analyzed in the Final Environmental Impact Report that was certified by the Board on September 12, 2012 (SCH #2010121004, UPD-83356-EIR-855; District Document No. 59378, filed on September 28, 2012), were considered in the adopted Findings of Fact and a Statement of Overriding Considerations and a Mitigation Monitoring Reporting Program adopted by the Board on September 12, 2012, as well as Addendum to Final Environmental Impact Report (District Document No. 61745, filed on April 25, 2014) adopted by the Board on March 4, 2014. The Final Environmental Impact Report and Addendum are herein collectively referred to as "FEIR". The Existing ARC Lease, as amended by Amendment No. 1, includes provisions that would give the City control of the Marina Landside Area where the WTC currently is located and identifies the Flag Lot as the relocated WTC site. The FEIR analyzed, among other

features, the construction and operation of the SDCC Phase III Expansion on the site and relocation of the WTC to the Flag Lot. The proposed actions do not propose any change the SDCC Phase III Expansion or the relocated WTC. Rather, the proposed actions include agreements by and among the City, FAL and the District that give (1) the City the rights to a portion of the ARC Lease premises in anticipation of the Ballot Measure and construction of the SDCC Phase III Expansion and (2) FAL a lease for the Flag Lot for its relocated WTC. Until construction of the SDCC Phase III Expansion occurs, the existing baseline uses will continue under the deal.

The proposed actions are not a separate “project” for CEQA purposes but simply an additional governmental approval required to implement a previously approved project. (CEQA Guidelines § 15378(c); *Van de Kamps Coalition v. Board of Trustees of Los Angeles Comm. College Dist.* (2012) 206 Cal.App.4th 1036.) Accordingly, the District has determined that actions are merely a step in furtherance of the original project for which environmental review was performed, and no further environmental review is required.

Additionally, pursuant to CEQA Guidelines Sections 15162 and 15163, and based on the review of the entire record, including without limitation, the FEIR, the District finds and recommends that the proposed approvals do not require further environmental review as: 1) no substantial changes are proposed to the project and no substantial changes have occurred that require major revisions to the FEIR due to the involvement of new significant environmental effects or an increase in severity of previously identified significant effects; and 2) no new information of substantial importance has come to light that (a) shows the project will have one or more significant effects not discussed in the FEIR, (b) identifies significant impacts would not be more severe than those analyzed in the FEIR, (c) shows that mitigation measures or alternatives are now feasible that were identified as infeasible and those mitigation measures or alternatives would reduce significant impacts, and (d) requires changes to mitigation measures or alternatives. Because none of these factors have been triggered, the District has the discretion to require no further analysis or environmental documentation (CEQA Guidelines §15162(b)). Pursuant to CEQA Guidelines §15162(b), the District finds and recommends that the proposed actions are within the scope of the FEIR and no further analysis or environmental documentation is necessary.

While certain options to lease are included in some of the agreements, these options and the potential underlying leases are strictly and expressly conditioned on obtaining discretionary entitlements from the District and the District’s reserves of discretion to approve or disapprove all discretionary actions and entitlements, including the projects themselves. Such reservation of discretion applies to all contemplated legislative and quasi-judicial actions including, without limitation, CEQA compliance, approval of the entitlements and other approvals, code enforcement and the making of findings and determinations required by law. Further, the District, in its sole and absolute discretion, may or may not certify or approve the environmental review required to exercise the options and underlying projects, and may or may not approve any aspect of the same. The District and the CCC, in their sole and absolute discretion, may elect not to approve, adopt or certify a PMPA, if required, based on the CEQA environmental review or other discretionary factors. The District’s decision whether or not to certify or approve any CEQA environmental review and entitlements might be based upon District’s adoption of certain additional conditions, mitigation measures or alternatives, including the alternative of not going forward with the underlying project, and a statement of overriding considerations, if applicable. Moreover, FAL and the City accept the risk that the District or the CCC may not approve, adopt or certify the CEQA environmental review and entitlements. Based on the totality of the circumstances and the entire record, the inclusion of

these options does not commit the District to a definite course of action prior to CEQA review being conducted. Therefore, no further CEQA review is required.

In addition, the proposed Board action complies with Section 87 of the Port Act, which allows for the construction, reconstruction, repair, maintenance, and operation of public buildings public assembly and meeting places, convention centers, parks, playgrounds, bathhouses and bathing facilities, recreation and fishing piers, public recreation facilities, including, but not limited to, public golf courses, and for all works, buildings, facilities, utilities, structures, and appliances incidental, necessary, or convenient for the promotion and accommodation of any of those uses. The Port Act was enacted by the California Legislature and is consistent with the Public Trust Doctrine. Consequently, the proposed Board action is consistent with the Public Trust Doctrine.

Finally, proposed actions do not allow for “development,” as defined in Section 30106 of the Coastal Act, or “new development,” pursuant to Section 1.a. of the District’s Coastal Development Permit (CDP) Regulations because it will not result in, without limitation, a physical change, change in use or increase the intensity of uses. Therefore, issuance of a CDP or exclusion is not required. However, the District’s projects require processing under the District’s CDP Regulations. Prior to development of the SDCC Phase III Expansion and the relocation of the WTC, the Board will consider approval of CDPs under District’s CDP Regulations. The proposed approvals in no way limit the exercise of the District’s discretion under the District’s CDP Regulations.

Equal Opportunity Program:

Not Applicable

PREPARED BY:

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Attachment(s):

Attachment A: Area Site Plan and Phase III Expansion Site

Attachment B: Purchase and Sale Agreement

Attachment C: Existing and Potential Future Premise Site Plans

Attachment D: Public Purposes and Benefits

1. 1998 Management Agreement dated February 26, 2003 on file in the Office of the District Clerk bearing Document No. 37944.
2. <https://visitsandiego.com/about/regional-impact>
3. <https://visitsandiego.com/about/regional-impact>
4. (1) Amended, Restated and Combined Lease to San Diego Convention Center Corporation, dated April 6, 2010, on file in the Office of the District Clerk bearing Document No. 56486 and (2) San Diego Unified Port District Lease to Fifth Avenue Landing, LLC, dated May 7, 2010 on file in the Office of the District Clerk bearing Document No. 56494.
5. Final Environmental Impact Report (EIR) for the San Diego Convention Center Phase III Expansion and Expansion Hotel Project and Port Master Plan Amendment (SCH #2010121004, UPD-83356-EIR-855) on file in the Office of the District Clerk bearing Document No. 59378. Copies are available at the District Clerk’s Office at 3165 Pacific Highway, San Diego, CA 92101.
6. Port Master Plan Amendment #6-PSD-MAJ-45-13 filed December 2, 2013 on file in the Office of the District Clerk bearing

Document No. 61001.

7. Addendum to Final Environmental Impact Report (EIR) for the San Diego Convention Center Phase III Expansion and Expansion Hotel Project and Port Master Plan Amendment (SCH #2010121004, UPD-83356-EIR-855) on file in the Office of the District Clerk bearing Document No. 61745. Copies are available at the District Clerk's Office at 3165 Pacific Highway, San Diego, CA 92101. Both the Final EIR and Addendum were made available to the Board concurrent with publication of this agenda sheet.
8. *City of San Diego v. Shapiro*, 228 Cal.App.4th 756 (2014).