

RESOLUTION NUMBER R-_____

DATE OF FINAL PASSAGE _____

A RESOLUTION OF THE COUNCIL OF THE CITY OF SAN DIEGO APPROVING TRANSACTION DOCUMENTS AMONG THE CITY OF SAN DIEGO, THE SAN DIEGO UNIFIED PORT DISTRICT, AND FIFTH AVENUE LANDING, LLC (FAL), FOR THE CITY'S ACQUISITION OF A LONG-TERM LEASEHOLD INTEREST IN TIDELANDS PROPERTY NEEDED FOR THE SAN DIEGO CONVENTION CENTER PHASE III EXPANSION AND THE SETTLEMENT OF PENDING LITIGATION AND ANY RELATED CLAIMS BETWEEN THE CITY AND FAL, AND APPROVING CERTAIN RELATED ACTIONS.

WHEREAS, the City of San Diego (City) is responsible for managing, operating, maintaining, and promoting the San Diego Convention Center (Convention Center) in accordance with the 1998 Management Agreement, as amended (Management Agreement), between the City and the San Diego Unified Port District (District); and

WHEREAS, the City and the District have engaged in extensive efforts over the past decade to implement the Phase III expansion of the Convention Center (Expansion), which would (a) add approximately 400,000 square feet of rentable exhibit, ballroom, and meeting space to the existing Convention Center facility (the total current space is approximately 816,091 square feet), (b) increase the competitiveness of the Convention Center in the visitor-serving market by allowing the Convention Center to attract, retain, and accommodate large conventions, and (c) result in a positive fiscal impact to the San Diego region by creating new temporary and permanent jobs, generating substantial direct spending at local businesses, and substantially increasing the City's tax revenues; and

WHEREAS, the District's Board of Port Commissioners (District Board) and the California Coastal Commission have approved an amendment to the District's Port Master Plan authorizing the City's construction and operation of the Expansion; and

WHEREAS, Fifth Avenue Landing, LLC, a California limited liability company (FAL), is the leasehold owner, and the District is the fee title owner, of certain tidelands on which the City desires to construct and operate the Expansion; and

WHEREAS, under the Amended, Restated and Combined Lease dated April 6, 2010, as further amended (ARC Lease), FAL leases from the District approximately 193,232 square feet of tidelands located bayward of Convention Way and Marina Park Way (Existing ARC Lease Premises); and

WHEREAS, under the Lease dated May 7, 2010 (Marina Lease), FAL leases from the District certain tidelands and water areas located adjacent to the Existing ARC Lease Premises, which include approximately 25,643 square feet of tidelands (Marina Landside Area) and approximately 155,428 square feet of water area, all of which FAL uses for commercial marina operations; and

WHEREAS, since January 2016, in accordance with the ARC Lease, FAL has been processing an application with the District to develop a market-rate hotel, a low-cost visitor-serving hotel (i.e., a hostel), and an expansion of the existing marina operations on the Existing ARC Lease Premises and on and beyond the Marina Lease premises (FAL Project); and

WHEREAS, in October 2017, FAL filed a lawsuit against the City and San Diego Convention Corporation, Inc. (SDCCC), in San Diego Superior Court Case No. 37-2017-00037528-CU-BC-CTL (FAL Lawsuit), alleging that FAL incurred monetary damages in a to-

be-determined amount as a result of alleged efforts by the City and SDCCC to interfere with the proposed FAL Project; and

WHEREAS, the City, the District, and FAL (collectively, Parties) have engaged in confidential mediation discussions under the direction of Judge Leo S. Papas (Ret.) in an effort to resolve the FAL Lawsuit and related matters; and

WHEREAS, during the mediation discussions, the Parties negotiated a proposed Purchase and Sale Agreement and Escrow Instructions (Purchase Agreement), together with various related transaction documents (collectively, Transaction Documents), which are included as Attachment 5 to the Staff Report dated June 6, 2018, accompanying this Resolution (Staff Report); and

WHEREAS, the Purchase Agreement contemplates a virtually simultaneous closing of two related real property transactions (collectively, Alternative A Transactions), in which (a) FAL will assign or quitclaim to the District leasehold interests now controlled by FAL with respect to the Existing ARC Lease Premises and the Marina Landside Area in exchange for the District's payment to FAL of a purchase price not to exceed \$33.2 million, and (b) the District will grant to the City a long-term leasehold interest in tidelands of approximately 183,767 square feet (New ARC Lease Premises), comprised of the Marina Landside Area and the majority of the Existing ARC Lease Premises (excluding a land area known as the Flag Lot, consisting of approximately 35,000 square feet), in exchange for the City's payment to the District of a purchase price not to exceed \$33.2 million; and

WHEREAS, if the Alternative A Transactions are completed, the City will own a leasehold interest through May 1, 2042, in the New ARC Lease Premises, by virtue of an

amendment to the ARC Lease (Exhibit L to the Purchase Agreement) that substitutes the City in place of FAL as the lessee (ARC Lease Expansion Amendment); and

WHEREAS, if the City meets additional conditions after the Alternative A Transactions are completed (such as obtaining the coastal development permit for the Expansion and providing evidence of a financing plan for the Expansion), the ARC Lease, as amended by the ARC Lease Expansion Amendment (collectively, Amended ARC Lease), will allow the City to exercise an option through December 31, 2028, to enter into a Management Agreement amendment with the District on specified terms; and

WHEREAS, the Amended ARC Lease provides that, if the City and the District enter into the anticipated Management Agreement amendment, the City will acquire a new 66-year leasehold interest in both the New ARC Lease Premises and an additional District-owned land area adjacent to the Hilton Bayfront Hotel currently used as a landscaped park, and the resulting total leasehold interest acquired by the City will consist of 262,639 square feet of land area (Expansion Premises); and

WHEREAS, the City will need to acquire a long-term leasehold interest in the entirety of the Expansion Premises to construct and operate the Expansion; and

WHEREAS, to allow time to complete the Alternative A Transactions, FAL agrees in the Transaction Documents to forgo the District's consideration of discretionary land use entitlements for the FAL Project; and

WHEREAS, although the Transaction Documents will provide the City with an opportunity to pursue the Expansion, a financing plan for the Expansion must be in place before the City is able to begin construction of the Expansion; and

WHEREAS, a petition to place the “For a Better San Diego” citizens’ initiative (Initiative) on the November 2018 ballot is circulating for signature, and the Initiative seeks to increase the City’s transient occupancy tax (TOT) by varying percentages of 1.25, 2.25, or 3.25 percent, depending on the geographical location of each affected lodging establishment within the City, to provide financing for the Expansion and other specified public benefits; and

WHEREAS, if the Initiative petition receives sufficient valid signatures, it is anticipated that local voters will decide whether to approve the ballot measure resulting from the Initiative (Ballot Measure) in the November 2018 citywide election; and

WHEREAS, if the Ballot Measure is approved, it is anticipated that the City will begin collecting the new TOT revenue in early 2019; and

WHEREAS, if approved, the Ballot Measure will require 59 percent of the new TOT revenue to be dedicated to specified Convention Center expenditures, including costs of land acquisition, financing, permitting, design, development, and construction of the Expansion; and

WHEREAS, the Purchase Agreement requires the Parties to complete the initial steps of approving the condition of title to the affected property interests, completing any due diligence regarding the physical condition of those property interests, and delivering signed closing documents into escrow within 60 days after the Purchase Agreement becomes effective; and

WHEREAS, after the Parties have completed those initial steps, (a) the District will make a non-refundable down-payment to FAL in the amount of \$5 million, and (b) the City Promissory Note (Exhibit E to the Purchase Agreement) signed by the City in the District’s favor and the Settlement Agreement and Mutual Release (Exhibit C to the Purchase Agreement) signed by the City and FAL (Settlement Agreement) will become effective; and

WHEREAS, if the voters approve the Ballot Measure in the November 2018 election and other closing conditions are met, the District will be able to acquire the Existing ARC Lease Premises and the Marina Landside Area from FAL, and the City will be able to acquire the New ARC Lease Premises from the District, if the District makes three installment payments to FAL, and if the City makes three installment payments to the District, of \$9.4 million each in April, July, and October of 2019 (provided that the third installment payment will be reduced below \$9.4 million to the extent that FAL's actual, verifiable costs incurred with respect to the FAL Project and the Purchase Agreement since May 7, 2015, are less than \$3.2 million); and

WHEREAS, under the City Promissory Note, the City will owe \$5 million, plus interest accruing at three percent per year, to the District; and

WHEREAS, to secure the City's payment of principal and accrued interest on the City Promissory Note if the Ballot Measure is unsuccessful, the City will deposit \$5.3 million into a sub-escrow account for the Alternative A Transactions (Note Escrow Account) within 60 days after the Purchase Agreement becomes effective; and

WHEREAS, if and when the Alternative A Transactions occur, the Note Escrow Account funds of \$5.3 million will be returned to the City, but the City will remain obligated under the City Promissory Note, unless a certificate of occupancy is issued for the Expansion by December 31, 2028; and

WHEREAS, if a certificate of occupancy for the Expansion is not timely issued, the City will owe the principal and accrued interest on the City Promissory Note to the District by December 31, 2029; and

WHEREAS, if a certificate of occupancy for the Expansion is timely issued, the District will forgive the entire balance of the City Promissory Note and will treat the debt forgiveness as a portion of its financial contribution toward the Expansion; and

WHEREAS, the Settlement Agreement will completely resolve the FAL Lawsuit and include a mutual release of all past and present claims between FAL, on the one hand, and the City and SDCCC, on the other hand; and

WHEREAS, the Settlement Agreement states that, if the Alternative A Transactions occur, (a) the City will pay FAL's actual, reasonable costs to relocate its existing marina operations to the Flag Lot consistent with Exhibit E to the Amended ARC Lease (Marina Relocation Costs), and (b) to the extent necessary to offset impacts of the City's construction of the Expansion on FAL's operation of the marina during the Marina Lease term, the City will pay FAL's rent to the District under the Marina Lease for a period of up to two years, capped at \$244,920 (Marina Disruption Costs); and

WHEREAS, the Settlement Agreement further states that, if the Alternative A Transactions occur, the City will not oppose FAL's efforts to obtain discretionary approvals for a proposed hotel or other development project on the Flag Lot, so long as such development project does not unreasonably impair the construction or operation of the Expansion; and

WHEREAS, the Purchase Agreement and the Settlement Agreement require that, while the Alternative A Transactions are pending and after they occur, FAL will (a) dissolve its political action committee organized to oppose implementation of the Expansion, (b) not contribute any funding, or directly expend any funds, to oppose implementation of the Expansion, and (c) support the City's efforts to implement the Expansion at no cost to FAL; and

WHEREAS, the Purchase Agreement provides that, if the Alternative A Transactions are cancelled and certain other conditions are met, the District and FAL (and not the City) will complete the “Alternative B” transaction, which calls for the District Board to promptly consider discretionary approvals for the FAL Project; and

WHEREAS, the Settlement Agreement states that, if the Alternative A Transactions are cancelled due to any cause other than FAL’s default, FAL’s inability to deliver “clean” title to the relevant property interests, or FAL’s inability to confirm that FAL’s individual guarantors have not incurred a material adverse change in their financial condition, the City will neither oppose FAL’s effort to obtain discretionary approvals for the FAL Project nor pursue the Expansion on the Existing ARC Lease Premises through the end of 2026 (provided that the City may defend against pending litigation and, in 2025 or beyond, may take steps to secure financing and obtain a coastal development permit for the Expansion); and

WHEREAS, the City negotiated the Transaction Documents with a full awareness that the Initiative petition may not receive sufficient valid signatures to qualify for the November 2018 ballot and that, even if the Initiative petition so qualifies, the Ballot Measure may not receive sufficient affirmative votes for passage in the November 2018 citywide election; and

WHEREAS, nothing in this Resolution or the Transaction Documents is intended to constitute an official City position for or against the Initiative petition or the Ballot Measure; and

WHEREAS, if the Ballot Measure is approved, the Council will be asked on a future date or dates to appropriate special funds of the City (Special Funds) to pay the three option installment payments to the District and any other financial obligations of the City under the Transaction Documents, including, but not limited to: (a) the posting of a security deposit, anticipated to equal \$418,989, for the benefit of the District, as the landlord under the Amended

ARC Lease; (b) the payment of annual rent to the District under the Amended ARC Lease, anticipated to be at least \$418,989 per year (although the City's rental obligation will be triggered only when the City takes possession of the New ARC Lease Premises, which will not occur until the City begins construction of the Expansion); and (c) the payment of the Marina Relocation Costs and the Marina Disruption Costs to FAL under the Settlement Agreement; and

WHEREAS, the Special Funds are anticipated to consist of the new TOT revenues resulting from voter approval of the Ballot Measure, if voter approval occurs; and

WHEREAS, in this Resolution, the Council will make certain findings of public purpose with respect to: (a) the City's participation in, and implementation of, the Transaction Documents and the City's eventual completion of the Expansion; and (b) the City's initial investment of \$5 million, plus any accrued interest, under the City Promissory Note; and

WHEREAS, various information, explanations, and documents in support of the Council's findings of public purpose are contained in Attachments 2, 3, and 4 to the Staff Report (collectively, Supporting Information), and all of the Supporting Information is fully incorporated into this Resolution by this reference; and

WHEREAS, the City will not owe any brokerage fee or commission to any person or entity if the Alternative A Transactions occur; and

WHEREAS, the District Board is expected to consider approval of the Transaction Documents and related actions substantially concurrent with the Council's consideration of this Resolution, and the District's signing of the Transaction Documents will be contingent upon the District Board's approval; NOW, THEREFORE,

BE IT RESOLVED, by the Council of the City of San Diego, as follows:

1. The Council approves the Transaction Documents, which include the Purchase Agreement and various attachments and exhibits to the Purchase Agreement, including, but not limited to, the Settlement Agreement, the City Promissory Note, and the ARC Lease Expansion Amendment. A copy of the Purchase Agreement, when signed by the Parties, shall be placed on file in the Office of the City Clerk as Document No. RR-_____.

2. The Mayor, or designee, is authorized and directed to sign the Transaction Documents, to administer the City's obligations, responsibilities, and duties to be performed under the Transaction Documents, and to sign all documents and take all actions necessary and appropriate to carry out and implement the intent of the Transaction Documents.

3. Based on the information contained in this Resolution and the Supporting Information, the Council finds that the City's participation in, and implementation of, the Transaction Documents and the City's eventual completion of the Expansion will achieve demonstrated public purposes and benefits and will serve the best interests of the City.

4. Based on the information contained in this Resolution and the Supporting Information, the Council finds that the City's initial investment of \$5 million, plus any accrued interest, under the City Promissory Note in favor of the District will achieve demonstrated public purposes and benefits and will serve the best interests of the City.

5. The City's Chief Financial Officer is authorized to appropriate and expend an amount not to exceed \$5,400,000 from City Fund No. 720045 (Public Liability Fund) for the following potential City costs described in the Purchase Agreement: (a) up to \$5,300,000 in costs related to the City's payment to the District of the principal amount of, and any accrued interest on, the City Promissory Note through the First Maturity Date, as defined in the City Promissory

Note (no later than December 31, 2019), which funds will be deposited into the Note Escrow Account as required by the Purchase Agreement; and (b) up to \$100,000 in costs related to the City's payment of any incidental expenses and due diligence expenses, including, but not limited to, any title, survey, and escrow expenses, associated with the City's implementation of the Transaction Documents.

6. The City's Chief Financial Officer is authorized to accept, and deposit into the City's Public Liability Fund, any future return to the City of all or any portion of the Note Escrow Account funds, if a return of such funds occurs in accordance with the provisions of the Purchase Agreement and the City Promissory Note.

7. Through and including December 31, 2019, the Council will not de-appropriate, or re-appropriate for a different purpose, any of the \$5,400,000 in funds appropriated for the Alternative A Transactions under Paragraph 5 of this Resolution unless and until such funds become unnecessary to fulfill the City's obligations under the Transaction Documents.

8. By adopting this Resolution, the Council is not taking any position for or against either the Initiative petition or the Ballot Measure.

APPROVED: MARA W. ELLIOTT, City Attorney

By _____
Kevin Reisch
Senior Chief Deputy City Attorney

KJR:nja
06/06/18
Or. Dept: Mayor
Doc. No. 1766013
Comp. R-2018-612

I hereby certify that the foregoing Resolution was passed by the Council of the City of San Diego, at this meeting of _____.

ELIZABETH S. MALAND
City Clerk

By _____
Deputy City Clerk

Approved: _____
(date)

KEVIN L. FAULCONER, Mayor

Vetoed: _____
(date)

KEVIN L. FAULCONER, Mayor