

**FILE NUMBER: 2024-328**

**DATE:** Tuesday, August 13, 2024

**SUBJECT: Amended and Restated Exclusive Negotiating Agreement with 1HWY1, LLC**

**DESCRIPTION: Resolution Authorizing Amended and Restated Exclusive Negotiating Agreement Between the San Diego Unified Port District and 1HWY1, LLC**

**EXECUTIVE SUMMARY:**

On February 22, 2016, staff issued Request for Proposals 16-04ME (“**RFP**”) for the redevelopment of 70 acres of land and water situated between downtown San Diego and the Bay in the District’s Central Embarcadero area (“**Redevelopment Site**”) (see Attachment A – Location Map). 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, San Diego Bay to the south and west, and includes Embarcadero Marina Park North, Ruocco Park and Tuna Harbor.

Following an extensive solicitation and due diligence process, the Board of Port Commissioners (“**Board**”), at the November 8, 2016 Board meeting, selected Gafcon, Inc. (on behalf of a to be formed entity that is now 1HWY1, LLC) as the successful proposer. Thereafter on October 2, 2017, the District and 1HWY1, LLC (as successor-in-interest to Protea Waterfront Development, LLC<sup>1</sup>, a former Gafcon, Inc. affiliate) (“**1HWY1**”) entered into an Exclusive Negotiating Agreement, which was later amended by Amendment No. 1 to the ENA (as amended, the “**Original ENA**”)<sup>2</sup>. The Original ENA obligates the parties to negotiate, in good faith, the terms of a binding agreement for 1HWY1’s proposed project (“**Proposed Development**”), subject to completing requisite environmental review and obtaining all necessary approvals, including from the Board, in the Board’s sole and absolute discretion.

The Original ENA’s term is currently scheduled to expire on October 1, 2024; provided the District may extend the Original ENA through October 1, 2025 for a to-be determined fee. However, now that the Proposed Development is undergoing environmental review, 1HWY1 has requested to enter into an Amended and Restated Exclusive Negotiating Agreement (“**A&R ENA**”) with a term expiring on October 1, 2027 to reduce uncertainty for investors given the significant capital requirements associated with advancing the Environmental Impact Report (“**EIR**”) and other components of the Proposed Development.

---

<sup>1</sup> Protea Waterfront Development, LLC is 1HWY1’s managing member with the power to direct major as well as day to day decisions.

<sup>2</sup> Exclusive Negotiating Agreement dated October 2, 2017 and recorded in the Office of the District Clerk as Document No. 67343 as amended by Amendment No. 1 dated January 5, 2021 and recorded in the Office of the District Clerk as Document No. 72137.

Staff and 1HWY1 have negotiated a proposed A&R ENA in the form attached to this agenda as Attachment B with the following key provisions:

- (i) a no cost term extension through October 1, 2027 in order to provide for continued negotiations through the anticipated entitlement phase and subject to either party's right to terminate for feasibility concerns;
- (ii) revised 1HWY1 submittal requirements to a request-based format based on District needs in order to reduce the administrative burden associated with a pre-established list of required submittals;
- (iii) updated termination mechanics while retaining all current District discretion set forth in the Original ENA to terminate the proposed A&R ENA for feasibility concerns or in the event of default;
- (iv) to facilitate capital investment, preapproves certain 1HWY1 ownership transfers so long as Protea Waterfront Development, LLC remains 1HWY1's managing member with the power to direct major as well as day to day decisions;
- (v) broad discretion afforded to District and 1HWY1 whether to ultimately enter into any binding agreement for the Proposed Development;
- (vi) aids in the implementation of the District's Seaport Village leasing strategy by only requiring notice of new occupancy agreements with a term extending beyond October 1, 2029; and
- (vii) otherwise generally tracks the Original ENA.

The proposed A&R ENA will allow 1HWY1 and the District to continue working to advance the Proposed Development, support 1HWY1's efforts to secure additional capital required during the entitlement phase, revise submittal requirements for streamlined tracking and administration, and provide various legal benefits to the District. In light of the foregoing, staff recommends that the Board adopt a resolution authorizing the proposed A&R ENA.

**RECOMMENDATION:**

Adopt a resolution authorizing an Amended and Restated Exclusive Negotiating Agreement between the San Diego Unified Port District and 1HWY1, LLC.

**FISCAL IMPACT:**

Board authorization to enter into the proposed A&R ENA will not have a direct fiscal impact to the District. 1HWY1 is responsible for all of its own costs and fees associated with the Proposed Development as well as third-party costs associated with processing the EIR, including costs for environmental consultants HDR, Inc. and California Coastal Works LLC to provide project management services to the District.

Costs to be incurred by the District for other third-party consultants to support District efforts in connection with the Proposed Development will be pursuant to on-call agreements previously approved in accordance with BPC Policy No. 110 and with amounts included in Board approved budgets.

**COMPASS STRATEGIC GOALS:**

This agenda item supports the following Strategic Goals:

- 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; and
- A financially sustainable Port that drives job creation and regional economic vitality.

## **DISCUSSION:**

### *Background*

The District and 1HWY1 are currently parties to the Original ENA to negotiate, in good faith and subject to all requisite reviews and approvals, a binding agreement for the redevelopment of the approximately 70 acres of land and water area composing the Redevelopment Site. Since the ENA's execution on October 1, 2017, 1HWY1 has been refining the Proposed Development via undertaking feasibility studies, iterations to project descriptions, pro-formas, phasing plans, and financing strategies, and at various times with District staff, updating the Board, and the public, on the current Proposed Development's project description and receiving Board and stakeholder feedback on the same.

In light of the progress made since the Original ENA's execution, on November 8, 2022, the Board adopted Resolution No. 2022-134 authorizing staff to commence environmental review for the Proposed Development. The District, 1HWY1, and HDR, Inc. ("**HDR**") thereafter entered into an agreement for environmental consulting services to be paid for solely by 1HWY1, including preparation of an EIR. 1HWY1 has submitted extensive designs, plans, and other detailed information necessary for the environmental analyses required for the EIR and other District evaluation of the Proposed Development. The District issued a Notice of Preparation of a Draft EIR on September 14, 2023 ("**NOP**"), notifying the public and responsible and interested agencies that the District is conducting an environmental assessment and preparing an EIR for the Proposed Development. The Draft EIR for the Proposed Development is expected to be completed by 3<sup>rd</sup> Quarter of 2025.

### *District Efforts*

Since the RFP was issued in 2016, the District has allocated significant resources to advance the redevelopment of the Redevelopment Site. This includes staff and attorney time across multiple District departments, the Office of the General Counsel, as well as District paid third party consultants. Staff from Real Estate, Development Services, Planning, and the Office of the General Counsel have regularly met and corresponded with the 1HWY1 team since the Original ENA's execution to discuss the Proposed Development, navigate the entitlement phase, and work towards a transaction framework that could be presented to the Board for consideration, which meetings have taken place on a weekly basis for over two years. District staff from Real Estate and Planning, attorneys from the Office of the General Counsel, and, as necessary, staff from other

District departments, also meet internally every week to discuss the District's next steps with respect to the Proposed Development.

The District has expended approximately \$320,000 on third party consultants to date to support efforts related to the Proposed Development. In addition, the District has utilized creative deal structures to attract and maintain tenants at Seaport Village while limiting the amount of lease term in order to preserve flexibility for potential future redevelopment.

#### *Amended and Restated ENA*

Given the scale and complexity of the Proposed Development, the expected timeframe to complete a Draft EIR and work through other entitlements, 1HWY1's significant past and future expenses associated with the entitlement and design phase, the required investor capital to advance entitlements and design, the need for additional time to further negotiate a proposed business deal for Board consideration, and 1HWY1's request for an extension of the Original ENA's term, 1HWY1 and the District negotiated the terms of the proposed A&R ENA. As compared with the Original ENA, a summary of the updates contained the proposed A&R ENA is below.

- Term: no cost term extension to October 1, 2027.
- Submittals: District may request, in its reasonable discretion, broad Proposed Development related submittals on an as-needed basis, for purposes including, but not limited to, feasibility analysis, all proposed financing mechanisms, environmental review, entitlements, construction and phasing plans, transportation and circulation designs, benefits to California residents, District's financial interests, and/or provisions to be included in any binding agreement for Board consideration.
- Termination: either party can terminate in the event of an uncured default or if a party determines, in its sole and absolute discretion, that the Proposed Development is not feasible, with any District decision to terminate requiring Board approval in open session.
- Ownership Transfers: to facilitate capital investment, and so long as Protea Waterfront Development, LLC remains 1HWY1's managing member with power to direct major as well as day to day decisions, preapproves ownership transfers among 1HWY1's existing members or admission of new minority members into 1HWY1 so long as any new members are reputable and meet other specified criteria.
- District Legal Protections: affords the District and the Board sole and absolute discretion to ultimately approve of any environmental impact report and any proposed binding documents as well as broad indemnity and waiver protections in connection with District decisions.
- District Notifications: as staff continues to execute a leasing strategy to secure new lease agreements with both existing and prospective Seaport Village tenants over the next five years, District is only required to provide notice to 1HWY1 of any occupancy agreements entered into within the Redevelopment Site with a term extending beyond October 1, 2029, and to which 1HWY1 may object, with the District being obligated to reasonably consider any objection before moving

forward with the agreement. 1HWY1 would not have notice or objection rights for occupancy agreements with expiration dates prior to October 1, 2029.

The proposed A&R ENA is beneficial to the District by materially reducing administrative burden, signaling support for Seaport Village lease renewals, providing District with legal protections, and maintaining broad District and Board discretion on whether or not to move forward with the Proposed Development. It also provides an improved framework for the District and 1HWY1 to share information, work through entitlements, and negotiate, in good faith, a proposed binding agreement for Board consideration. Lastly, by extending the negotiating timeframe, the proposed A&R ENA supports 1HWY1's efforts to raise the significant investor capital necessary to continue moving the Proposed Development through the entitlement and environmental review phase. For these reasons, staff recommends the Board authorize the Amended and Restated Exclusive Negotiating Agreement in substantial form as that attached to this agenda sheet as Attachment B.

### **General Counsel's Comments:**

The Office of the General Counsel has reviewed this agenda sheet and the attachments as presented to it and approves the same as to form and legality.

### **Environmental Review:**

The proposed Board action, including without limitation a resolution authorizing an amended and restated exclusive negotiating agreement between the District and 1HWY1 for the Proposed Development, does not constitute a project under the definition set forth in California Environmental Quality Act ("**CEQA**") Guidelines Sections 15352 and 15378 because no direct or indirect changes to the physical environment would occur. CEQA requires that the District adequately assess the environmental impacts of projects and reasonably foreseeable activities that may result from projects prior to the approval of the same. Any project developed as a result of the proposed Board action that requires the District or the Board's discretionary approval resulting in a physical change to the environment will be analyzed in accordance with CEQA prior to such approval. As discussed above, the District has commenced the CEQA review process for the Proposed Development, including public circulation of the NOP and preparation of a Draft EIR. CEQA review may result in the District, in its sole and absolute discretion, requiring implementation of mitigation measures, adopting an alternative, including without limitation, a "no project alternative" or adopting a Statement of Overriding Consideration, if required. The proposed Board action in no way limits the exercise of this discretion. Additionally, Section 10 of the proposed A&R ENA, among other items, acknowledges that an approval or adoption of the Proposed Development has not occurred and reserves the Board's sole and absolute discretion to (i) prepare, adopt, or disapprove the CEQA analysis for the Proposed Development and any and all discretionary actions for the Proposed Development; (ii) adopt, condition or disapprove any and all projects on the Redevelopment Site; (iii) adopt any and all feasible mitigation measures; and (iv) modify the Proposed Development, adopt a CEQA alternative to the same, including the "no project" alternative and adopt or refuse to adopt a Statement of Overriding

Considerations, if applicable. Therefore, no CEQA review is required for this proposed Board action.

The proposed Board action complies with Sections 21 and 35 of the Port Act, which allow the Board to pass resolutions and to do all acts necessary and convenient for the exercise of its powers. 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.

The proposed Board action does not allow for development, as defined in Section 30106 of the California 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 Coastal Development Permit or exclusion is not required. However, development within the District requires processing under the District's CDP Regulations. Future development, as defined in Section 30106 of the Coastal Act, will remain subject to its own independent review pursuant to the District's certified CDP Regulations, PMP, and Chapters 3 and 8 of the Coastal Act. The exercise of the District's discretion under the District's CDP Regulations is in no way limited by the proposed Board action.

**Diversity, Equity, and Inclusion Program:**

This agenda sheet has no direct DEI impact on District workforce or contract reporting at this time.

**PREPARED BY:**

James Hammel  
Department Manager, Real Estate

Alexa Paulus  
Department Manager, Real Estate

Attachment(s):

Attachment A: Location Map

Attachment B: Amended and Restated Exclusive Negotiating Agreement