

**COUNCIL ACTION
EXECUTIVE SUMMARY SHEET
CITY OF SAN DIEGO**

DATE: 09/07/2011

ORIGINATING DEPARTMENT: Real Estate Assets

SUBJECT: Authorize an Amendment to the Exclusive Negotiating Agreement (ENA) Between the City of San Diego and Brown Field International Business Park LLC, dba DPC Brown Field, which extends the initial term of the ENA, by 18 months from the existing term of two (2) years, to three (3) years and 6 months.

COUNCIL DISTRICT(S): 8

CONTACT/PHONE NUMBER: Roy Nail/619-641-3101 MS- 51A

DESCRIPTIVE SUMMARY OF ITEM:

The City Council authorized the City to enter into an Exclusive Negotiating Agreement (ENA) with Brown Field International Business Park, LLC, dba Distinctive Projects Company, Inc. Brown Field (DPC), to further negotiations regarding a proposed development at the Brown Field Airport (Document No. RR-305157, filed with the City Clerk on July 28, 2009). The ENA has an initial two (2) year term, which will terminate on October 1, 2011. The ENA also provides for an additional twelve (12) month extension which may be granted only upon a showing of good cause and upon the payment of an additional non-refundable \$50,000 to the City's Airport Enterprise Fund.

Upon commencement of the initial term of the ENA, DPC was required to, and did, pay a non-refundable sum of \$100,000 into the City's Airport Enterprise Fund to offset consulting costs and other administrative costs incurred by the City to process the proposed project. Since the ENA was authorized, it is uncontested that DPC has attempted to diligently pursue all of its requirements under the ENA. However, DPC's ability to process the project has been completely stopped and/or delayed for a period of approximately 18 months due to circumstances that have been largely beyond both DPC's and the City's control. DPC's primary impediment was the issuance of a Federal Court Injunction, commonly referred to as the "Brewster Injunction". The Brewster Injunction precluded the City from processing any applications for development of properties within the City's jurisdiction which contained vernal pools. Brown Field Airport was included within the properties subject to the Brewster Injunction. Although the Brewster Injunction has now been lifted, the Injunction affected the ability of DPC's and the City's ability to process the project's application for over a year. Additionally, DPC has since suffered delays in receiving needed traffic modeling information from the City, due to factors involving the Otay Mesa Community Plan Update. The traffic modeling information is required for DPC's Traffic Impact Analysis. City staff acknowledges that DPC was not responsible for the above-referenced delays and recommends that 18 months be added onto the initial term of the ENA in order to avoid penalizing DPC for delays, which were beyond its control and which directly affected DPC's ability to perform under the ENA. Said extension will allow DPC to continue performing under the ENA without having to seek permission to exercise the one, 12-month contingency option built into the ENA, which was intended as a protection to DPC for delays caused by normal activities associated with processing a project application.

STAFF RECOMMENDATION:

Recommend Approval and Forward to City Council for Consideration an Amendment to the Exclusive Negotiating Agreement (ENA) Between the City of San Diego and Brown Field International Business Park LLC, dba DPC Brown Field, which extends the initial term of the ENA, by 18 months from the existing term of two (2) years, to three (3) years and 6 months.

EXECUTIVE SUMMARY OF ITEM BACKGROUND:

On July 15, 2009, City staff presented a proposed ENA between the City and DPC to the Land Use and Housing Committee (LU&H) for a project proposed by DPC. DPC's proposed project was for the development of approximately 356 gross acres of vacant land at Brown Field Airport. LU&H voted unanimously to forward the proposed ENA with DPC to the full City Council. Thereafter, the City Council authorized the Mayor to enter into the ENA for the proposed development of a portion of Brown Field Airport with DPC.

The ENA has an initial two (2) year term which will terminate on October 1, 2011. The ENA also provides for one additional twelve (12) month extension, which may be granted only upon a showing of good cause and upon the payment of an additional non-refundable \$50,000 to the City's Airport Enterprise Fund.

Upon commencement of the initial term of the ENA, DPC was required to, and did, pay a consideration of \$100,000 to the Airports Enterprise Fund; which sum was to offset consulting costs and other administrative costs incurred by the City to process the proposed project.

Since entering into the ENA, the following project milestones have been achieved:

- The Federal Aviation Administration (FAA) has approved a 20-year aviation forecast, which is a requirement to allow non-aviation uses at Brown Field Airport.
- DPC has retained industry leading consultants, such as Rick Engineering and ESA (an environmental sciences and planning firm), as well as others, to process the project application.
- All technical reports have now been submitted, and DPC is in their fourth project review with Development Services.
- DPC has submitted a Section 7 Biological Assessment to the FAA in order to obtain a Biological Opinion from U.S. Fish & Wildlife concerning the mitigation of environmental issues.
- The project programmatic Draft Environmental Impact Report (EIR) is nearing completion.
- The City has retained Pacific Municipal Consultants (PMC) to investigate the feasibility of forming an Infrastructure Finance District (IFD) to finance necessary infrastructure in the Otay Mesa area. The findings of the PMC study are not finalized.

DPC has experienced project application processing delays of approximately 18 months due to circumstances beyond its control. The two major delay-causing impediments were the Brewster Injunction, which precluded DPC from processing its project's application, and delays associated with the Otay Mesa Community Plan Update. Extending the initial term of the ENA by 18 months will allow DPC to finalize the project Environmental Impact Report (EIR), Site Development Permit (SDP) and Leasehold Development Agreement (LDA). If an 18-month extension is granted, the initial term of the ENA would be extended from the present termination date of October 1, 2011 to a new termination date of April 1, 2013. And, by extending the

ENA's initial term, the one, 12-month extension built into the ENA as a paid contingency will remain. That paid contingency period is a one-time extension of 12 months, meant to be granted only upon a showing of good cause and upon a payment of \$50,000. DPC has invested 10 million dollars in the project since project inception. DPC estimates investing an additional 1 million dollars in the next 18 months in project costs.

Project Overview:

The proposed four-phase project is comprised of the construction of: aircraft hangars, office space, fixed base operations, restaurants, hotels, commercial space, industrial space, a solar farm, and an aviation museum. At build-out, the proposed project will cover an approximate 2.9 million square feet, at an estimated costs of \$699 million dollars. It is estimated that Phase One of the project will create 1,300 jobs, and will revitalize the airport and encourage further development in the Otay Mesa area.

Phasing:

Phase 1 is approximately 407,000 square feet of construction, comprised of a corporate jet Fixed Base Operator (FBO), small aircraft hangars, an helicopter FBO, a 6-8 Megawatt solar field, and a restaurant.

Phase 2 is approximately 995,000 square feet of construction, and is comprised of aircraft hangars, industrial buildings and a hotel.

Phase 3 is approximately 873,000 square feet of construction, and is comprised of aircraft hangars, commercial/industrial development, and a second hotel.

Phase 4 is approximately 710,000 square feet of construction, comprised of aircraft hangars, office space, commercial/industrial development, and a museum.

In addition to receiving approvals from the City of San Diego, the project must receive approvals from the Federal Aviation Administration (FAA). FAA approval of the non-aviation segments of the DPC development requires the submission of a 20-year Aviation Forecast, which assures adequate airport aviation capacity. The FAA has approved the 20-year Aviation Forecast. Also required is the FAA approval of an Airport Layout Plan (ALP), showing an intelligent arrangement of airport aviation and non-aviation facilities. The ALP has been submitted to the FAA, and its approval is expected by the end of 2011.

Future Project Milestones:

- November 2012 submit to City Council for approval the Environmental Impact Report (EIR), Site Development Permit (SDP) and Leasehold Development Agreement (LDA)

FISCAL CONSIDERATIONS:

The Airports Division is an enterprise fund supported by rent collected from leases and other on-airport revenue sources/activities. DPC's proposed development will increase revenue by bringing new aviation activities and revenue sources to Brown Field airport.

EQUAL OPPORTUNITY CONTRACTING INFORMATION (IF APPLICABLE):

PREVIOUS COUNCIL and/or COMMITTEE ACTION (describe any changes made to the item from what was presented at committee):

On July 15, 2009, the Land Use and Housing Committee recommended forwarding the ENA to City Council.

On July 28, 2009, the City Council approved the ENA via Resolution R-305157.

COMMUNITY PARTICIPATION AND PUBLIC OUTREACH EFFORTS:

Since May 2007, staff has attended meetings regarding the Brown Field Development project with the following groups:

Federal Aviation Administration District Office, Land Use and Housing Committee, San Diego Regional Airport Authority, San Diego Regional Chamber of Commerce Transportation Committee, San Diego Regional Chamber of Commerce Public Policy Committee, Otay Mesa Planning Group, Otay Mesa Chamber of Commerce, Airports Advisory Committee, South County Economic Development Council, and two Experimental Aircraft Association Forums.

KEY STAKEHOLDERS AND PROJECTED IMPACTS:

Stakeholders and likely groups to be impacted are airport users, existing Airport tenants, and the surrounding Otay Mesa Community. There are currently four aviation tenants at Brown Field:

Experimental Aircraft Association, Chapter 14

EAA currently leases 2.3 acres at Brown Field, adjacent to the control tower. EAA has operated as a nonprofit organization at Brown Field Airport since 1981, and is dedicated to the education of its members in the aeronautical sciences and engineering, and to the introduction and education of young people in flying and aircraft building. EAA has cooperated with the City by amending its leasehold boundaries in anticipation of the construction of a new and better entrance into the airport; which new entrance would be constructed as part of DPC's proposed project.

Brown Field Aviation Ventures/Lancair

Lancair subleases approximately 20 acres from Brown Field Aviation Ventures and operates the largest FBO at Brown Field, handling the majority of the large multi-engine and jet traffic on the Airport.

Aviation International

Aviation International leases approximately 2.5 acres in the center of the Brown Field's main ramp area. The primary services offered are hangar and aircraft tie-down rentals.

First Flight

First Flight Corporation leases and operates approximately 2.9 acres at the west end of the ramp, servicing small twin and single-engine aircraft.

COPY

EXCLUSIVE NEGOTIATION AGREEMENT

BY AND BETWEEN

THE CITY OF SAN DIEGO

AND

BROWN FIELD INTERNATIONAL BUSINESS PARK LLC,

DBA DPC BROWN FIELD

**FOR A PROPOSED DEVELOPMENT AT
BROWN FIELD AIRPORT**

DOCUMENT NO. 02-005157
FILED JUL 28 2009
OFFICE OF THE CITY CLERK
SAN DIEGO, CALIFORNIA

EXCLUSIVE NEGOTIATION AGREEMENT

FOR A PROPOSED DEVELOPMENT AT BROWN FIELD AIRPORT

This Exclusive Negotiation Agreement [ENA] for a proposed development at Brown Field Airport, is made by and between the City of San Diego [City], a municipal corporation, and Brown Field International Business Park LLC, dba DPC Brown Field [Developer], jointly referred to as the "Parties", and shall be effective the ___ day of ___, 2009 [Effective Date].

RECITALS

WHEREAS, the City owns in fee simple approximately 356 gross acres of land available for development at Brown Field Airport [Airport] that are the subject of this agreement, more particularly described in "Exhibit A" [Property], both being attached hereto and made a part hereof; and

WHEREAS, the City issued a Request for Qualifications in regard to the possible development of the Airport, to which Developer timely responded and whereby the Developer's financial, managerial, and development qualifications were validated in an open competitive Request for Qualifications process; and

WHEREAS, thereafter the Developer submitted a response to the City's Request for Proposals at Brown Field Airport [RFP], for the purposes of developing the same with aviation, commercial, and industrial facilities to be operated and/or subleased by Developer to third party users, and was ultimately selected by City under the terms of the RFP; and

WHEREAS, City staff was supported by the Land Use and Housing Committee [LU&H] to engage in exclusive negotiations with Developer, pursuant to an exclusive negotiation agreement, and subject to approval by the City Council; and

WHEREAS, prior to submitting this ENA to the City Council for its approval, the Parties have reached certain understandings respecting processes and procedures for negotiating terms which are meant to lead to the eventual submission and approval of documents required for the development of Brown Field Development Airport [the Proposed Project]; and

WHEREAS, upon completion the Proposed Project contemplated by this ENA, as more fully described in the Developers response to the RFP, is anticipated to generate significant economic impacts to the local and regional community, including up to \$20,000,000 per year in increased tax revenues, up to 3,800 new permanent jobs, and up to \$2,200,000 per year in additional revenues for the Airport Enterprise Fund.

NOW, THEREFORE, City and Developer agree that the purpose of this ENA is to provide a broad outline of the basis on which the City and Developer will work with each other during the term of this ENA, and hereby express their understanding as follows:

Section 1 Definitions

“Basic Aviation Facilities” means the development and construction of aviation-related facilities and related aeronautical improvements, consistent with City’s Request for Proposal, Exhibit “B” (General Aviation Aeronautical Activities and FBO Minimum Standards for Brown Field Municipal Airport), and Developer’s proposal as presented at LU&H.

“Conditional Airport Layout Plan” means a provisional approval of a plan by the FAA which identifies existing airport facilities, proposed land uses and proposed developments. A Conditional Airport Layout Plan is for planning purposes only. It does not commit the airport sponsor to building any depicted airport facilities.

“Core Infrastructure” means those improvements to the Property, including without limitations, grading and drainage, roadways, water/sanitary sewer, utilities, and other improvements necessary for the development of the Proposed Project.

“Development Agreement” means that contract between the City and Developer to be negotiated as a set forth in this agreement which will direct the development of the Proposed Project.

“FAA” means the Federal Aviation Administration.

“Infrastructure Financing District” means a mechanism, described in Government Code section 53398, by which public works and services needed to support new commercial and industrial development can be financed within the Border Development Zone.

“Land Use Classifications” means those development uses and users for the Proposed Project established pursuant to FAA guidelines.

“Land Use Plan” means that geographic depiction of the Proposed Project setting forth the Land Use Classifications, and other pertinent information pertaining to the Proposed Project, as attached hereto as Exhibit A.

“Museum Facility” means a proposed facility of the San Diego Air and Space Museum, and which is subject to approval by the FAA.

“Proposed Project” means the development of the Property as set forth conceptually in the Land Use Plan.

“Solar Power Facility” means the power generating facility, which will be developed by the Developer, and which is subject to approval by the FAA.

Section 2 Term

Unless terminated earlier by agreement of the Parties, as set forth elsewhere herein, the obligations and privileges contained in this ENA shall be in effect for a period of two (2) years commencing upon the Effective Date hereof, or until the effective date of an approved Development Agreement, whichever occurs first in time ("Term"). Provided, however, that the City may, good cause having been shown, extend this ENA for an additional twelve (12) months upon payment of an additional non-refundable Fifty Thousand Dollars (\$50,000) to the City's Airport Enterprise Fund. Upon the expiration or early termination of this ENA, all obligations and privileges under this ENA shall terminate.

Section 3 Exclusive Rights

City hereby agrees that so long as Developer is negotiating in good faith toward the submission of a Development Agreement (and all other associated and necessary documents) to the City Council for their approval, City shall not negotiate with any person or entity, other than Developer, regarding the Proposed Project or any development or redevelopment of the Property, for the Term of this ENA. This prohibition does not apply to the temporary use of any areas of the Property which are not under development or are currently occupied and whose temporary use by City or another would not preclude Developer from fulfilling its obligations under this ENA.

City and Developer further agree that if during the Term of this ENA it is determined that less than the entire Property would be required for the Proposed Project, the description of the Property would be so modified, and the City would be permitted to negotiate and/or discuss the development of that portion eliminated from the boundaries of the Property with potential third-party developers.

City further explicitly reserves the right to offer, negotiate, and lease other portions of the Airport which are not part of the Property.

Section 4 Consideration

In consideration of City's agreement to negotiate exclusively with Developer pursuant to Section 3 herein, Developer shall pay, within ten (10) business days after the Effective Date of this ENA, a non-refundable sum of One Hundred Thousand Dollars (\$100,000.00), to the City's Airports Enterprise Fund.

Section 5 Basic Aviation Facilities

As an essential inducement to the City to enter into this ENA, the Developer agrees that any Development Agreement submitted for approval to the City Council will provide for the development of, and strict timelines for, the construction of Basic Aviation Facilities and related Core Infrastructure as a component of the Proposed Project, and that the Basic Aviation Facilities shall be constructed in the first phase of the Proposed Project, if developed in phases.

Section 6 Environmental Review

As soon as is reasonably practicable, but no later than one hundred eighty (180) days after the Effective Date of this ENA, Developer agrees to submit to City, at Developer's sole cost and expense, a Planned Development Permit Application [Application] for the Proposed Project. The Application shall include a proposed CEQA scoping document in conformity with the then-current standardized Appendix G checklist as set forth in the CEQA guidelines. This ENA shall be subject to early termination, as provided for in Section 16, on Developer's failure to timely submit the Application.

Section 7 Initial Financing Plan

It is agreed that within ten (10) days of the execution of this ENA, Developer shall, at its sole cost and expense, submit a financing plan which will, to the reasonable satisfaction of City, evidence Developer's ability to finance all activities required during the Term of this ENA.

It is further agreed that said financing plan shall include, but not be limited to: (1) up-dated corporate financial statements of Developer and its existing members; (2) current SEC 10Q and 10K reports of any new members of the Developer if those members are public companies or proof reasonably acceptable to the City of the new members capacity to meet its financial commitments to the Developer if those members are private companies or individuals; and (3) the Developer's debt to equity ratio.

Within thirty (30) days of receipt of the materials described above, City shall notify Developer in writing concerning the acceptability of the financing plan. In the event that City rejects the financing plan, City shall provide the developer with a written explanation for the rejection. Thereafter, Developer shall have one opportunity, within thirty (30) days of receipt of the explanation for rejection, to address the reasons for rejection given by City and resubmit the financing plan for City's approval.

Section 8 Airport Water/Sewer Capacity

It is agreed that during the term of this ENA, City and Developer will use reasonable business efforts to investigate the formation of an Airport Infrastructure Financing District, from which incremental property tax revenue could be made available to Developer to finance certain Core Infrastructure necessary to support development of the Proposed Project or infrastructure elsewhere at the Airport.

Section 9 FAA - Conditional Airport Layout Plan

It is understood and agreed that FAA approval of certain elements of the Proposed Project will be required. In order to facilitate the negotiation process of the Proposed Project, City agrees to seek from the FAA a Conditional Airport Layout Plan based on the Developer's proposed Land Use Plan. In that regard, as soon as is reasonably practicable after the Effective Date of this ENA, the City's Airports Director, or his designee, and Developer shall commence consultation efforts with the FAA, with input from appropriate community planning groups, to facilitate the granting of such a conditional plan.

Section 10 FAA - Land Use Classifications

It is understood and agreed that in order for the Proposed Project to receive FAA approval, the FAA must be satisfied with the Land Use Classifications proposed for the Project. In order to facilitate the negotiation process, City and Developer agree to work together to develop land use classifications which are satisfactory to the FAA and which are in accordance with applicable state laws and other laws and/or regulations.

Section 11 Parcel Lease Rates and Charges

The determination of the parcel lease rental rates, charges and/or additional rents, will be established in accordance with the terms of an approved Development Agreement. However, subject to approval of the Development Agreement, and for preliminary guidance purposes only, it is agreed that the rate-making methodology for the determination of parcel lease rental rates, charges, and/or additional rents be based on the following proposed terms:

(i) **Aviation Parcel Leases:** For parcel leases used for direct aviation and direct aviation support purposes, base ground rent would be the fair market ground rent established by the City for aviation leases. A fair market ground rent shall be determined no more than six (6) months prior to the issuance of a Certificate of Occupancy [COO] for a parcel lease, and shall commence upon the issuance of a COO for a parcel lease. Direct Aviation users may be subject to non-discriminatory additional rents established by the City for aviation related activities at the Airport.

(ii) **Non-Aviation Parcel Leases:** For Parcel Leases used for indirect aviation purposes and non-aviation purposes, the annual base ground rent would be ten percent (10%) of the fair market value of the parcel established by the City. A fair market value shall be determined no more than six (6) months prior to the issuance of a COO for a parcel lease, and shall commence upon issuance of a COO for a parcel lease. All Non-Aviation uses would be subject to non-discriminatory additional rents established by the City for non-aviation related activities at the Airport. In addition, non-aviation retail uses would be subject to a percentage rents.

(iii) **Non-Aviation Retail Parcel Leases:** For parcel leases where all or a portion of the parcel lease premises are sites for non-aviation commercial retail uses, the base ground rent would be established as set forth in Paragraph (ii) above. In addition, non-aviation retail users would be subject to a percentage rents based on a percentage of gross revenues, to the extent that such percentage rents on a monthly basis exceed the base ground rent of the parcel lease attributable for the premises of such retail site for the month. The percentage used to calculate percentage rents would be determined in the amounts similar to percentages used for retail users at airports located in southern California.

In addition, all non-aviation commercial retail uses would be subject to non-discriminatory additional rents established by the City for non-aviation related activities at the Airport.

(iv) Non-Aviation Museum parcel lease: For a parcel lease or portion thereof used solely for a proposed Museum Facility, which use is subject to approval by the FAA, base ground rent would be One Dollar (\$1.00) per year, plus an additional annual administration fee, as determined by the then-current City fee schedule. In addition, such a Museum Facility use would be subject to non-discriminatory additional rents established by the City for non-aviation related activities at the Airport.

(v) Non-Aviation Solar Power Facility Lease: For a parcel lease or portion thereof used solely for a proposed Solar Power Facility, which use is subject to approval by the FAA, base ground rent would be established pursuant to the normal and customary fee structure for such facilities in the United States. Consideration would be given to the City for the value of the premises, but such consideration may include the benefit of the energy produced and used by the City or the Airport. A Solar Power Facility use would be subject to non-discriminatory additional rents established by the City for non-aviation related activities at the Airport.

In determining the fair market ground rent or fair market value for parcel leases, as set forth above, it is proposed that the real estate appraiser, among other factors, shall assume that the property is in an "as is" condition, and that the use on each parcel lease is the use approved in any development permits. Further, in compliance with FAA rules, it is proposed that the lease term for aviation related leases be 50 years, and that other non-aviation related leases be granted terms of 50 years with a non-assignable right of first refusal to the Developer for one subsequent term for each lease parcel. However, if the term of a parcel lease is extended prior to the expiration of the original term, or if the use changes, for that parcel lease, Developer shall not be granted a first right of refusal on that particular parcel lease. If, during the term of the lease, the parties agree to a change in use, the lease rate shall be revised to reflect the new use. For example if a non-aviation parcel is changed to an aviation parcel then the rental rate would be modified to reflect the new use. Notwithstanding anything set forth in this ENA, all lease terms, and/or methodologies for establishing lease terms, will be set forth in a proposed Development Agreement and are subject to approval by the City Council, in its sole discretion.

Section 12 Proposed Phasing Schedule

If the Proposed Project is developed in phases, it is agreed that: (1) Developer shall include in any Development Agreement the requirement that the Basic Aviation Facilities shall be completed within the first phase of the Proposed Project; (2) that any subsequent phases shall be developed in accordance with approved schedules, which will determine the requirement, if any, to construct, and the order of construction, all in accordance with applicable law.

Section 13 Regional Studies

During the term of this ENA, City agrees to use its ~~reasonable~~ business efforts to work cooperatively with the San Diego Regional Airport Authority and the San Diego Association of Governments during their Airport Land Use Compatibility Plan (“ALUCP”), Regional Aviation Strategic Plan (“RASP”), and Airport Multimodal Accessibility Plan (“AMAP”) update processes (“Regional Studies”) to provide information pertaining to the Proposed Project, with the intension to ~~ensure~~ consistency with the master plan for the community:

Section 14 Right of Entry

During the term of this ENA, the City will execute and deliver to Developer a right-of-entry permit, in form and content mutually agreeable to Develop and City, under the terms of which the City will grant to Developer and its agents, employees, a reasonable right-of-entry upon the Property to make or cause to be made such investigations, surveys and testing on the Property, as considered necessary or advisable by Developer in connection with the Proposed Project.

Section 15 Termination of ENA by Developer

Developer shall have the right at any time during the term of this ENA, exercisable at its option by giving written notice thereof to the City, to terminate this ENA if the Proposed Project proves to be impractical, uneconomical or otherwise unfeasible as determined by Developer in its sole discretion. If Developer exercises it option to terminate as set forth in this section, Developer (i) shall not be entitled to any compensation or other payment whatsoever by the City on account of such termination, and (ii) shall offer to the City, at a reasonable cost to be determined by the Developer in Developer’s sole discretion, copies of and rights to all plans, specifications, permits and studies prepared for or germane to the Proposed Project and the Property or any part thereof.

Section 16 Termination of ENA by City

City expressly reserves the right and option to terminate this ENA upon written notice to Developer if: (i) the Developer fails to commission, at Developer’s expense, environmental review as set forth in Section 6 herein; or (ii) the City does not approve the Developer’s Financing Plan as set forth in Section 7 herein; or (iii) the Developer fails to fully observe and perform all of the terms, covenants, and conditions set forth in this ENA.

Upon termination of this ENA as set forth in this Section, this ENA shall: (i) become null and void; (ii) Developer shall have no rights to develop the Property or any part thereof; and (iii) Developer shall have no rights or interest whatsoever in or to the Property. In addition, Developer: (i) shall not be entitled to any compensation or other payment whatsoever by the City on account of such termination or for any improvements constructed by Developer on the Property (if any); and (ii) shall offer to the City, at a reasonable cost to be determined by the Developer in Developer’s sole discretion, copies of and rights to all plans, specifications, permits and studies prepared for or germane to the Proposed Project and the Property or any part thereof.

Section 17 Construction and Amendment

This ENA constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any and all prior oral or written agreements, understandings, representations, and warranties between the Parties with respect to the subject matter hereof. This ENA has been negotiated by Developer and City with and upon the advice of their respective counsel, all of whom have participated in the drafting hereof. Consequently, the usual rule of construction shall not be applicable, which provides that the document is to be interpreted against the interests of the party who has primarily drafted the language in an agreement. No amendment or modification of the ENA or any attachment hereto shall be effective unless incorporated in a written instrument executed by the City and Developer.

Section 18 Assignment

Developer shall not sell, assign, convey or transferred in any manner, to any other person or entity, any right hereunder granted to Developer. Any such sale, assignment, conveyance or transfer would be in breach of this provision and would be null and void.

Section 19 Governing Law

This ENA and the Parties' respective rights and obligations hereunder shall be governed and construed in accordance with the laws of the State of California without regard to conflicts of law, principles thereof, or of any other jurisdiction. If any term or provision of this ENA is held by a court or other competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this ENA shall remain in full force and effect and shall in no way be affected, impaired or invalidated. Any of the terms or conditions of this ENA may be waived at any time and from time to time in writing by mutual consent of the Parties, without affecting any other terms or conditions herein.

Section 20 Counterparts

This ENA may be executed in two or more counterparts, each of which will be deemed to be an original copy of this ENA and all of which, when taken together, will be deemed to constitute one and the same agreement. Scanned and facsimile copies shall be deemed originals in all respects.

Section 21 Notices

All notices required or permitted under this MOU shall be given (i) by hand, recognized overnight courier, or by the United States Postal Service to the Parties as the addresses set forth below, effective upon receipt or refusal of delivery, or (ii) by facsimile (fax) transmission to the Parties at their fax numbers set forth below effective upon electronic confirmation of transmission by sender. The Parties may change the entity to receive notice or the address of that entity upon thirty (30) days' written notice to the other Party.

Address for Developer:

Brown Field International Business Park LLC
% Foley & Lardner LLP
402 West Broadway, Suite 2100
San Diego, California 92101
Attention: S. Wayne Rosenbaum, Esq.
Tel: (619) 685-6413
Fax: (619) 234-3510

Address for the City:

The City of San Diego Airports Director
3750 John J. Montgomery Drive
San Diego, California 92123
Tel: (858) 573-1441
Fax: (858) 279-0536

Section 22 Relationship of the Parties

Notwithstanding anything to the contrary contained herein, the relationship of City and Developer shall be solely that of property owner and prospective developer/tenant, respectively, and nothing contained herein shall be deemed to create a partnership or joint venture between them.

Further, Developer specifically acknowledges that City shall not be responsible or held liable for any costs incurred by the Developer in relation to this ENA, regardless of the type or amount of cost(s) incurred.

Section 23 City Council Approval Required

Notwithstanding anything which may seem to the contrary, it is understood and agreed that any proposed Development Agreement, parcel lease, or other binding agreement(s) contemplated in this ENA, must be reviewed, considered, and approved at a hearing before the City Council of the City of San Diego. Further, that this ENA does not convey to Developer any property rights in the Property, nor any right to develop and/or lease the Property. While the City Airports Director and/or staff may recommend approval of documents contemplated in this ENA, the City Council shall have the sole discretion to approve or disapprove any such documents.

IN WITNESS WHEREOF, City and Developer have executed this ENA as of the date first set forth above.

THE CITY OF SAN DIEGO,
a municipal corporation

By: Hildred Pepper
Name: Hildred Pepper
Title: Director

BROWN FIELD INTERNATIONAL BUSINESS PARK LLC,
a Delaware limited liability company, dba DPC Brown
Field

By: [Signature]
Name: Richard Lee Sax
Title: President

Approved as to form and legality

this 27th day of August, 2009.

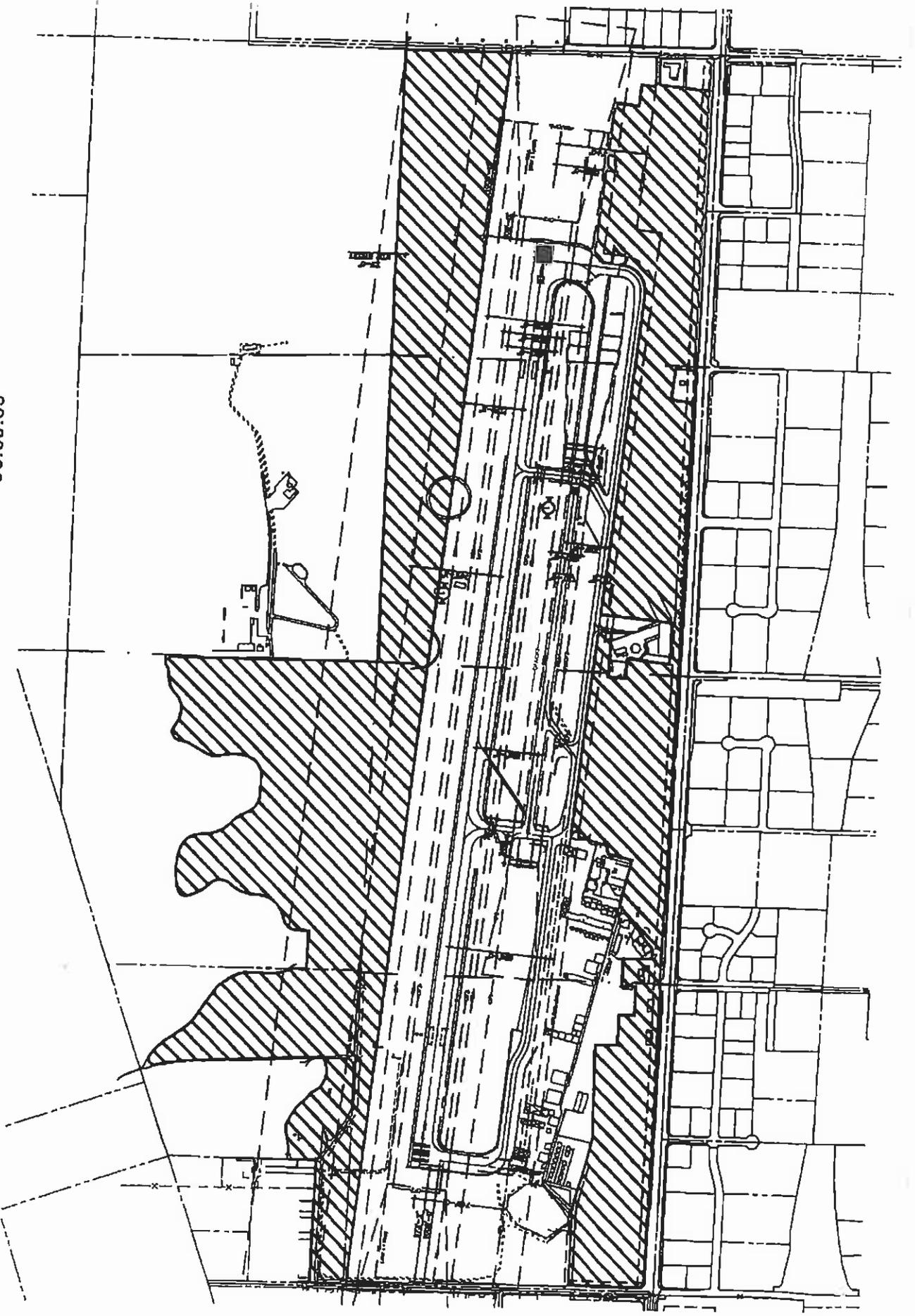
JAN I. GOLDSMITH, City Attorney

By: [Signature]
Debra J. Bevier
Deputy City Attorney

RECEIVED
09 AUG 27 PM 4:57
SAN DIEGO, CALIF.

R-005157

Exhibit A
Brown Field International Business Park
06.09.09



RESOLUTION NUMBER R- 305157

DATE OF FINAL PASSAGE JUL 31 2009

A RESOLUTION OF THE CITY OF SAN DIEGO
AUTHORIZING THE MAYOR OR HIS DESIGNEE TO ENTER
INTO AN EXCLUSIVE NEGOTIATION AGREEMENT WITH
BROWN FIELD INTERNATIONAL BUSINESS PARK LLC,
dba DPC BROWN FIELD, FOR A PROPOSED
DEVELOPMENT AT BROWN FIELD AIRPORT; AND TO
AUTHORIZE THE ACCEPTANCE AND EXPENDITURE OF
NON-REFUNDABLE SUMS FROM DPC BROWN FIELD
WHICH WILL BE USED TO PAY FOR EXPENSES
INCURRED BY THE CITY OF SAN DIEGO DURING THE
TERM OF THE EXCLUSIVE NEGOTIATIONS AGREEMENT.

WHEREAS, in December 2006, the City of San Diego's [City]Airports Division issued a Request for Qualifications [RFQ] soliciting qualifications to develop and operate a Fixed Base Operator or other aviation-related business at Brown Field Airport; and

WHEREAS, of the five respondents to the RFQ, two were selected to move forward to the next phase of responding to a Request for Proposals [RFP]; and

WHEREAS, an 11-member selection committee evaluated the two RFP responses and recommended that City enter into exclusive negotiations with Distinctive Projects Company, Inc. [Brown Field International Business Park, LLC, dba DPC Brown Field, hereafter referred to as "DPC Brown Field"]; and

WHEREAS, DPC Brown Field and City staff have arrived at terms, as set forth in the proposed Exclusive Negotiation Agreement [ENA], which will be used to guide DPC Brown Field during its further negotiations with City regarding the proposed development project at Brown Field; and

WHEREAS, in order to offset City staff costs, consultant costs and other administrative costs incurred by City in negotiating, preparing and processing the proposed development project at Brown Field; and pursuant to the terms of the proposed ENA, DPC Brown Field agrees to deposit a non-refundable sum of \$100,000 (an additional \$50,000 is required, and provided for within the ENA for any extension of the ENA), into the Airport Enterprise Fund, Fund No. 41100; and

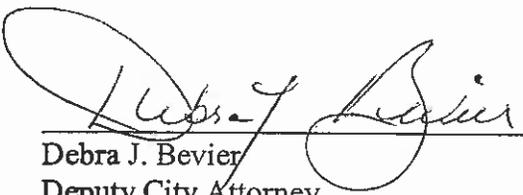
WHEREAS, on July 15, 2009, the Land Use & Housing Committee [LU&H] recommended forwarding the proposed ENA to the City Council; NOW, THEREFORE,

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

1. That the Mayor, or his designee, is authorized to execute and take all actions necessary to administer the Exclusive Negotiation Agreement with Brown Field International Business Park, LLC, dba DPC Brown Field, which concerns a proposed development project at Brown Field Airport, under the terms and conditions set forth in the Exclusive Negotiation Agreement, on file in the Office of the City Clerk as Document No. R-005157.
2. That the Mayor, or his designee, is authorized to accept from DPC Brown Field the sum of \$100,000 (an additional \$50,000 is required, and provided for within the ENA for any extension of the ENA), and deposit said sum(s) into the Airport Enterprise Fund, Fund No. 41100, to be used to offset City staff costs, consultant costs and other administrative costs incurred by City in negotiating, preparing and processing the proposed development project for Brown Field.
3. That the Comptroller is authorized to appropriate and expend \$100,000 (and any further deposit(s) contemplated in the ENA), to offset City staff costs, consultant costs and other administrative costs incurred by City in negotiating, preparing and processing the proposed

development project for Brown Field, from the Airport Enterprise Fund, Fund No. 41100,
contingent on the funds being received from DPC Brown Field.

APPROVED: JAN I. GOLDSMITH, City Attorney

By 
Debra J. Bevier
Deputy City Attorney

DJB:mm
07/08/09
Or.Dept:READ
R-2010-42
MMS#9845

I hereby certify that the foregoing Resolution was passed by the Council of the City of San
Diego, at this meeting of JUL 28 2009.

ELIZABETH S. MALAND
City Clerk

By 
Deputy City Clerk

Approved: 7-31-09
(date)


JERRY SANDERS, Mayor

Vetoed: _____
(date)

JERRY SANDERS, Mayor

