

ORDINANCE NO. 3359 C.S.

**ORDINANCE IMPLEMENTING FIRST AMENDMENT TO TIDELANDS LEASE TO THE
CANNERY ROW COMPANY - AMENDMENT TO EXTEND LENGTH OF LEASE, REVISE
AND UPDATE CERTAIN TERMS TO FACILITATE NEW HOTEL PROJECT ON ADJACENT
LAND AT 750 CANNERY ROW**

SECTION 1: Section 1, Term., of the Tidelands Lease is hereby amended by deleting same and inserting the following in its place:

(a) This lease shall be for a sixty-six year (66) year initial term commencing on the date of recordation of a Memorandum of the Tidelands Lease and ending sixty-six (66) years from that date. If the City decides to lease the property after the expiration or termination of this lease it shall first offer to the Lessee, or any other person to whom this lease has been transferred or assigned under the terms herein, the right to lease the property on the same terms and conditions that it is then willing to lease to others. The City shall give Lessee at least ninety (90) days written notice to exercise this right of first refusal. If Lessee shall fail to exercise this right of first refusal, the City shall then be free to lease the property to others on terms no more favorable than those offered to Lessee; *provided, however*, in no event shall the City lease the property to others on terms more favorable to others than those offered to Lessee, and the City shall be required to resubmit to Lessee pursuant to this right of first refusal any contemplated lease on terms more favorable to others than those offered to Lessee.

(b) Lessee shall have one option to extend this lease on all the terms and conditions herein contained for an additional thirty-three (33) year term (the "Option Term"), commencing on the first day after the initial term and ending thirty-three (33) years later, subject to the following two conditions: (i) Rent for the Option Term shall be established in accordance with Section 6 of this lease, and (ii) the City Council shall adopt a Resolution approving its entry into the Option Term at such Rent. Lessee may exercise this option, subject to the aforesaid conditions, by delivery of a written notice of exercise of option (the "Option Notice") to the City not more than thirty-three (33) years prior to the end of the initial term and not less than three (3) years prior to the end of the initial term.

SECTION 2: Section 2, Use., of the Tidelands Lease is hereby amended by deleting the first sentence and inserting the following in its place:

The property may be used for a hotel project consisting of approximately 208 guest rooms, an approximately 95 seat restaurant, approximately 10,200 square feet of meeting space, approximately 18,500 square feet of retail space, and a parking structure and uses ancillary thereto or for such other uses as the City may approve from time to time.

SECTION 3: Section 5, Rent., of the Tidelands Lease is hereby amended as follows:

Section 5(1) of the Tidelands Lease is hereby amended by deleting same and inserting the following in its place:

Fixed rent at the rate of Eleven Thousand Seven Hundred Fifty Dollars (\$11,750.00) per calendar quarter, partial quarters being pro rated, commencing on January 1 following the fifth

(5th) full calendar year of hotel operations (the "Rent Commencement Date"), provided that on each January 1 thereafter during the Term, the fixed rent shall be adjusted annually, by the same percentage change in the Consumer Price Index –Urban Wage Earners and Clerical Workers (San Francisco-Oakland-San Jose)(1982-84=100), or if such index is discontinued, a comparable successor index, over the prior calendar year; or

Section 5(2) is hereby amended so that (i) the word "rates" in the tenth line is amended to read "rents", (ii) reference to "Article 6" is amended to read "Article 6.6.", and (iii) in this Section 5(2), and all other references in the Tidelands Lease, the phrase "the Ground Lease" shall refer to the Hotel Ground Lease by and between Lessee and Pacific Hotel Management, L.L.C., a California limited liability company and/or its affiliates, all controlled by the family that owns Pacific ("Developer"), and not to the lease to Pacific Equity Development dated July 27, 1983.

The second full paragraph of Section 5(2) of the Tidelands Lease is hereby amended by deleting same and inserting the following in its place:

Fixed rent shall be paid quarterly, in advance, beginning on the Rent Commencement Date and continuing throughout the Term.

The third full paragraph of Section 5(2) of the Tidelands Lease is hereby amended by deleting the first sentence and inserting the following in its place:

Percentage rent shall be paid quarterly, in arrears, beginning on the 45th day of the first calendar quarter following the Rent Commencement Date and continuing throughout the Term.

SECTION 4: Section 6, Rent Revision, of the Tidelands Lease is hereby amended by deleting same and inserting the following in its place:

The rent set forth in this lease is in accordance with Section 6.4, Charter of the City of Monterey. If Lessee shall give the Option Notice, City and Lessee will each fully comply with the procedures established in this Section 6. City shall deliver written notice to Lessee and any sublessee of the Tidelands Parcel within three months of receipt of the Option Notice stating the proposed rental for the Option Term. The City, Lessee and any sublessee shall negotiate in good faith and use their best efforts to agree upon the rental payable for the Option Term. If the City, Lessee and any sublessee are not able to agree on same within six (6) months of receipt of the Option Notice, Lessee shall continue to pay the rental payable hereunder and the matter shall be determined by arbitration within the County of Monterey, State of California, in accordance with the California Code of Civil Procedure, including, but not limited to, Section 1283.05, and the procedures described in this Section 6. Each of the City, on the one hand, and the Lessee and the sublessee, on the other hand, shall select an arbitrator, who shall be a licensed appraiser having at least ten years experience in the valuation of leasing of tidelands parcels. The two arbitrators shall attempt to agree on the rent for the Option Term based on the rents then being charged by the City for other tidelands parcels. If the two arbitrators are unable to agree on the rent for the Option Term, they shall together appoint a third arbitrator, who shall be a licensed appraiser having at least ten years experience in the valuation of leasing of tideland parcels. The rent for the Option Term shall be the amount agreed by any two of the three arbitrators. Each of the City, on the one hand, and the Lessee and the sublessee, on the other hand, shall pay the costs and fees of its arbitrator and attorneys and one-half of the costs and fees of the third arbitrator, if one is necessary, and expenses of

arbitration.

Subject to the conditions set forth in Section 1(b) (ii) herein, the rent for the Option Term determined by arbitration as set forth in this Section 6 shall be final, binding and conclusive on the parties, and judgment may be rendered thereon upon application of any party to the Superior Court of the State of California, in and for the County of Monterey ("Monterey Superior Court").

If the two arbitrators are unable to agree on the rent for the Option Term and are unable to select a third arbitrator, then either party may apply to the presiding judge of the Monterey Superior Court to appoint the third arbitrator. If, after appointment of the third arbitrator, no two arbitrators are able to agree on the rent for the Option Term, then the matter shall be tried in the Monterey Superior Court WITHOUT A JURY and the prevailing party, as determined by the Monterey Superior Court, shall be entitled to its reasonable costs and fees, including attorney's fees and arbitrator's fees. The testimony and data of the arbitrators may be admitted as expert testimony in any such action.

The date the rent is finally determined by arbitration, or if need be, trial, and if need be, appeal, is referred to herein as the "Rent Revision Date," but the effective date of such rent shall be the first day of the Option Term.

Waiver of trial by jury. Each party expressly agrees that any suit, trial or action for the purpose of establishing the rent for the Option Term shall be had without a jury, and each party waives to the fullest extent the right to trial by jury for such purpose.

SECTION 5: Section 7, Assignment-Sublease:, of the Tidelands Lease is hereby amended as follows:

The first full paragraph of Section 7 of the Tidelands Lease is hereby amended by inserting the following at the end of said paragraph:

Notwithstanding the foregoing, upon prior written notice to the City, Lessee may assign this lease or sublease the Tidelands Parcel to the Developer and to Developer's successors and assigns, and Lessee, Developer and/or Developer's successors and assigns may assign their interest in this lease or in any sublease of the Tidelands Parcel to any lender holding a security interest in the hotel improvements.

The second full paragraph of Section 7 of the Tidelands Lease is hereby amended by deleting the first and second sentences and inserting the following in their place:

The City further recognizes that this lease, the Tidelands Sublease and the hotel improvements to be constructed will be encumbered from time to time with a mortgage, deed of trust, assignment of rents, UCC filings and other similar or related security interests and that the holder of same will require the right to succeed to the rights granted by this lease and/or the Tidelands Sublease without the consent or further action of the City. Accordingly, the City hereby agrees to amend this lease or to execute such other documents as may be required to reasonably recognize the rights of a lender to succeed automatically to this lease and/or the Tidelands Sublease, with no additional consideration, in the event of a default hereunder.

SECTION 6: Section 8, Estoppel Certificate;, and all of the Tidelands Lease are hereby amended so that all references to "Pacific Equity Development" shall refer to the Developer and *not* to Pacific Equity Development.

SECTION 7: Section 14, Notices;, of the Tidelands Lease is hereby amended as follows: The second sentence of Section 14 of the Tidelands Lease is hereby amended by inserting the following at the end of same:

and addressed to the attention of Lessee, with a copy addressed to the attention of the Developer or any sublessee then in possession, as the case may be.

SECTION 8: Section 18, Termination by City;, of the Tidelands Lease is hereby deleted in its entirety and replaced with the words "Intentionally Deleted"

SECTION 9: Section 20, Disposition of Improvements on Termination of Lease;, of the Tidelands lease is hereby deleted in its entirety and replaced with the following:

Upon termination of this lease for any reason, Lessee shall quitclaim to City Lessee's right, title and interest to the improvements in good condition excepting reasonable wear and tear, including reasonable access thereto.

SECTION 10: Section 22, Cross-Defaults;, of the Tidelands Lease is hereby deleted in its entirety and replaced with the words "Intentionally Deleted."

SECTION 11: A new Section 23 Miscellaneous: of the Tidelands Lease is hereby inserted to read as follows:

The Recitals set forth above are incorporated by this reference into this lease. The headings of Sections are for convenience only and shall not be used to determine the meaning or interpretation of the contents of the Sections. The laws of the State of California govern the interpretation and enforcement hereof, and the conduct of the parties under this lease. If any part, option, term, portion, or provision of this lease is determined to be illegal, or in conflict with any law, or otherwise rendered unenforceable or ineffectual, the remaining parts, options, terms, portions or provisions are severable and not affected thereby; without limiting the generality of the foregoing, if the option to extend this lease subject to conditions is determined to be illegal, or in conflict with any law, or otherwise rendered unenforceable or ineffectual, the initial term of the lease shall not be affected or diminished in any way, this lease shall remain in full force and effect for such initial term, and the option to extend shall be reduced to such maximum period as is legal, or not in conflict with any law, and shall be otherwise fully enforceable and effectual. The language in all parts of this lease must be construed as a whole according to its fair meaning, and not strictly for or against any party. All parties have equally participated in the preparation of this lease. The word "assign" includes the word "transfer." The plural includes the singular, and the singular the plural. One gender includes all genders. This lease, together with any exhibits and schedules hereto, constitutes the entire lease between the parties relating to the subject matter of this lease and supersedes any and all prior negotiations, correspondence, leases, resolutions, ordinances and understandings with respect to the subject matter of this lease. This lease may be altered, amended or revoked only by an instrument in writing signed by the parties. No representations whatsoever have been made relating to the subject matter of this lease except as are expressly stated in writing in this lease. The Mayor of the City is properly authorized and directed to execute this lease. The City shall

record in the official records of Monterey County, California, a Memorandum of the Tidelands Lease as herein amended. The failure to record such a Memorandum shall in no way affect the validity or enforceability of the lease.

SECTION 12: Future amendments to the aforesaid Tidelands Lease shall be implemented by passage of a Resolution of the City Council of the City of Monterey.

SECTION 13: Staff is hereby authorized and directed to prepare the necessary amendment / transaction documents in their proper legal form and consistent with City policy on lease administration and risk management.

SECTION 14: The Mayor is hereby authorized and directed to execute all documents necessary to carry out the provisions of this ordinance.

SECTION 15: All ordinances and parts of ordinances in conflict herewith are repealed.


SECTION 16: This ordinance shall be in full force and effect 30 days after its final passage and adoption.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF MONTEREY this 20th day of September 2005, by the following vote:

AYES: 5 COUNCILMEMBERS: DELLA SALA, DOWNEY, HAFERMAN,
ROBERSON, ALBERT

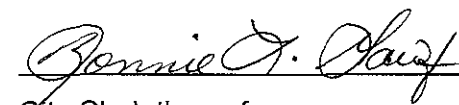
NOES: 0 COUNCILMEMBERS:
ABSENT: 0 COUNCILMEMBERS:

APPROVED:



Mayor of said City

ATTEST:



City Clerk thereof

STATE OF CALIFORNIA)
COUNTY OF MONTEREY)
CITY OF MONTEREY)

PUBLICATION DATE: September 11, 2005


I, Bonnie L. Gawf, CITY CLERK OF THE CITY OF MONTEREY, AND EX-OFFICIO CLERK OF THE COUNCIL THEREOF, HEREBY CERTIFY THAT THE FOREGOING ORDINANCE WAS DULY PASSED TO PRINT IN THE OFFICIAL NEWSPAPER OF SAID CITY BY THE COUNCIL THEREOF ON THE 6th day of September 2005, BY THE FOLLOWING VOTE:

AYES: 5 COUNCILMEMBERS: ALBERT, DELLA SALA, DOWNEY, HAFERMAN, ROBERSON

NOES: 0 COUNCILMEMBERS: NONE

ABSENT: 0 COUNCILMEMBERS: NONE

DATED: September 7, 2005


CITY CLERK OF SAID CITY