

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**PLANNING COMMISSION RESOLUTION NO. 6090**

A RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF CARLSBAD, CALIFORNIA, RECOMMENDING APPROVAL OF A DEVELOPMENT AGREEMENT BETWEEN THE CITY OF CARLSBAD AND POSEIDON RESOURCES (CHANNELSIDE) LLC TO PROVIDE FOR THE CONSTRUCTION OF THE CARLSBAD SEAWATER DESALINATION PLANT.

CASE NAME:       PRECISE DEVELOPMENT PLAN AND DESALINATION PLANT  
CASE NO.:         DA 05-01

---

WHEREAS, Poseidon Resources (Channelside) LLC, "Developer," and the City of Carlsbad ("City") have proposed a Development Agreement for the Carlsbad Seawater Desalination Plant, appurtenant facilities, and related project approvals ("Project") as more completely described in Covenant 1 of the proposed Development Agreement; and

WHEREAS, the property leased by the Developer for the Carlsbad Seawater Desalination Plant that is generally the subject of the Development Agreement is described as:

**That portion of Lot "H" of Rancho Agua Hedionda in the City of Carlsbad, County of San Diego, State of California, according to Partition Map thereof No. 823, filed in the Office of the County Recorder of San Diego County, November 16, 1896, as described in Certificate of Compliance recorded October 30, 2001, as Document No. 2001-0789068, Parcel 4, more particularly described as follows:**

**Commencing at the most southerly corner of said Parcel 4, also being a point on the westerly line of the 100.00-foot-wide right-of-way on the Atchison Topeka and Santa Fe Railroad, also being the most southeasterly corner of Parcel 4 as shown on Record of Survey No. 17350; thence along said westerly line, north 22°30'13" west, 1763.84 feet; thence leaving said westerly line, at right angles, south 67°29'47" west, 54.68 feet to the point of beginning; thence south 67°22'25" west, 427.00 feet; thence north 22°37'35" west, 320.00 feet; thence north 67°22'25" east, 427.00 feet; thence south 22°37'35" east, 320.00 feet to the point of beginning**

("the Property"); and

1                   WHEREAS, the Carlsbad Seawater Desalination Plant and some appurtenant  
2 facilities are proposed at the Encina Power Station; other appurtenant facilities, including water  
3 conveyance pipelines and a pump station, are proposed offsite of the Encina Power Station and  
4 in the cities of Carlsbad, Oceanside, and Vista; and

5                   WHEREAS, said Development Agreement is referenced in Exhibit "X," dated  
6 May 3, 2006, attached hereto and on file in the Planning Department **PRECISE**  
7 **DEVELOPMENT PLAN AND DESALINATION PLANT – DA 05-01** as provided by  
8 Government Code 65864 et seq., Chapter 21.70 of the Carlsbad Municipal Code, and City  
9 Council Policy 54; and

10                   WHEREAS, the Planning Commission did on the 3rd day of May, 2006, hold a  
11 duly noticed public hearing as prescribed by law to consider said request; and

12                   WHEREAS, at said public hearing, upon hearing and considering all testimony  
13 and arguments, if any, of all persons desiring to be heard, said Commission considered all factors  
14 relating to the Development Agreement.

15                   NOW, THEREFORE, BE IT HEREBY RESOLVED by the Planning  
16 Commission of the City of Carlsbad as follows:

- 17
- 18
- 19                   A) That the foregoing recitations are true and correct.
- 20                   B) That based on the evidence presented at the public hearing, the Commission  
21 **RECOMMENDS APPROVAL** of **PRECISE DEVELOPMENT PLAN AND**  
22 **DESALINATION PLANT – DA 05-01**, based on the following findings and  
subject to the following conditions:

23 **Findings:**

- 24                   1. Approval of the Development Agreement complies with all the provisions of state law  
25 (Government Code Section 65864 et seq.) which enables the City to enter into such  
agreements including the following:
- 26                   a) The Development Agreement specifies the duration of the agreement, the  
27 permitted uses of the property, the density or intensity of use, the maximum

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes as **the Agreement incorporates the Precise Development Plan and Desalination Plant project (as described in Precise Development Plan PDP 00-02 and Environmental Impact Report EIR 03-05) and other project approvals.**

- b) The Development Agreement includes conditions, terms, restrictions, and requirement for subsequent discretionary actions; however, the conditions, terms, restrictions, and requirements do not prevent development of the land for the uses and to the density or intensity of development set forth in the Development Agreement, and are consistent with the **development standards, design guidelines, and other provisions of the Precise Development Plan and Desalination Plant project** and existing rules, regulations, and policies.
- c) Unless otherwise provided by the Development Agreement, rules, regulations, and official policies governing permitted uses of the land, governing density and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to the Development Agreement shall be those rules, regulations, and official policies in force at the time of execution of the agreement.
- d) The Development Agreement does not prevent the City, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth in the Agreement, and which do not materially, adversely affect the timing or phasing of construction of development as further set forth in the Development Agreement, nor does the Development Agreement prevent the City from denying or conditionally approving any subsequent development project application on the basis of noncompliance with existing rules, regulations, and policies.
- e) The Development Agreement includes terms and conditions **to ensure funding for public facilities in the South Carlsbad Coastal Redevelopment Area.**
- f) The applicant for the Development Agreement has a legal or equitable interest in the real property which is the subject of this Development Agreement.
- g) The Development Agreement requires an annual review at which time the applicant shall be required to demonstrate good faith compliance with the terms of the Development Agreement. If, as a result of such annual review, the City finds and determines, on the basis of substantial evidence, that the applicant has not complied in good faith with terms or conditions of the Development Agreement, the City may terminate or modify the Development Agreement.
- h) The Development Agreement is consistent with the City's Local Coastal Program in that **the Project is consistent with, and includes elements specifically intended to advance the goals of the State of California related to, the protection, maintenance and where feasible enhancement and restoration of**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**the overall quality of the coastal zone environment and to maximize public access and recreational opportunities along the coast, and includes public dedication of several acres of ocean and lagoon front property.**

2. Approval of the Development Agreement complies with Chapter 21.70 of the Carlsbad Municipal Code. All noticing, review, and other procedural requirements have been accomplished in compliance with the Chapter. The findings required by the Chapter have been met as follows:

a) The Development Agreement is consistent with the objectives, policies, general land uses, programs, and provisions specified in the General Plan, and any applicable specific plan, in that **the Development Agreement implements and legally references the other Project approvals being considered. It does not permit anything that is inconsistent or does not conform to these other approvals. It does not change or modify the zoning, General Plan designations, the Specific Plan regulations or the Precise Development Plan being considered under the other Project actions. It will not become effective unless the other Project approvals are given. Therefore, it is consistent with the General Plan, the zoning, the applicable Specific Plan and the Precise Development Plan for the Property. Additionally, the Project will achieve the South Carlsbad Coastal Redevelopment Plan goals to enhance commercial and recreational functions and increase parking and open space amenities in the Project area and is consistent with the Plan's permitted uses. It further is in conformity with public convenience, general welfare, and good land use practices and will not be detrimental to the health, safety, and welfare of the community.**

b) The Development Agreement is compatible with the uses authorized in and the regulations prescribed for the land use district in which the real property is located and all other provisions of Title 21 of the Carlsbad Municipal Code, in that **the Development Agreement is consistent with the uses in and the regulations prescribed for the Public Utilities (P-U) Zone in which the real property is located and the provisions of Title 21 of the Carlsbad Municipal Code. The Development Agreement implements and incorporates by reference the other project actions and approvals, including the Precise Development Plan, the approval of which is a requirement of Title 21 for development in the P-U Zone. These other actions establish the permitted uses of the property, the density and intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. Further, as required by Chapter 21.70 of the Carlsbad Municipal Code, the Administrative Services Director (Finance Director), the City Attorney, and the Planning Director have reviewed the Development Agreement and find that it does conform to all of the applicable state laws, City ordinances, and City policies.**

c) The Development Agreement is in conformity with public convenience, general welfare, and good land use practices, in that **it will result in a use that has been planned in a comprehensive manner, which provides benefits to the**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

community in terms of water reliability and quality, recreation and coastal access, and economics, and has been reviewed in terms of protecting the general welfare of the community.

- d) The Development Agreement will not be detrimental to health, safety, and general welfare, in that **it incorporates other project approvals, which have been analyzed and found not to have a negative effect on the general public health, safety, and welfare. Furthermore, the Development Agreement does not prevent the City from imposing emergency measures related to the health, safety, and welfare of the community, nor does the agreement limit the authority of other agencies. Finally, the Development Agreement requires the Developer to operate and maintain the project in accordance with all applicable state and federal environmental laws, notwithstanding any exemption the Developer may otherwise have under international trade rules.**
  
- e) The Development Agreement will not adversely affect the orderly development of property or the preservation of property values in that **the Project has been comprehensively planned and conditioned in accordance with all City and other agency requirements, including the California Environmental Quality Act; and the majority of the project, with the exception of the desalination plant building, appurtenant facilities at Encina Power Station, and a small pump station, are pipelines that will be placed underground in existing or future roads.**
  
- f) The Development Agreement is consistent with the provisions of Government Code Sections 65864.5 - 65869.5, in that **compliance with the Government Code provisions is demonstrated in Finding No. 1 of this resolution.**
  
- g) The Development Agreement ensures provision of public facilities in a manner consistent with the General Plan, in that **since it incorporates the other project actions and approvals, the Development Agreement identifies the public facilities, improvements, and infrastructure needed to allow the project to be built and contains provisions requiring compliance with the Growth Management Plan.**
  
- h) The approval of the Development Agreement will result in the provision of economic, environmental, recreational, cultural, or social benefits to the City which would not be attainable without its approval **in that benefits are detailed in Finding No. 3 of this resolution. The Development Agreement provides more certainty that the project will be built, thus increasing the likelihood of resulting benefits.**

3. The Development Agreement has been drafted, processed, negotiated, and reviewed in terms of compliance with City Council Policy No. 56. Approval of the Development Agreement conforms to the Council determinations identified in the Policy for approving an agreement as follows:

1 a) The proposed development is in the interests of the city in that it will provide  
2 substantial economic, public recreation, and water reliability benefits to the  
3 City. Roughly 80% (about \$2 million) of the tax revenue from the Project  
4 will go to the Carlsbad Housing and Redevelopment Commission to be used  
5 to fund projects within the South Carlsbad Coastal Redevelopment Area  
6 including road improvements, water distribution facilities, sewer facilities,  
7 and support of affordable housing programs. Further, if the Desalination  
8 Plant facilities are relocated to property not covered by the Development  
9 Agreement, the Developer is required by the Agreement to pay liquidated  
10 damages to the City of \$15 million, which will be reduced by a specified  
11 amount for each year the Developer pays the property taxes or mitigation  
12 fees specified in the Agreement. The City's right to receive an economic  
13 benefit from the Project is protected even in the event of the purchase (either  
14 through voluntary sale or condemnation) by a governmental body. The  
15 payment of liquidated damages and protected right to receive an economic  
16 benefit would not be achievable without a development agreement.

17  
18 The Project also provides a local source of potable water to supplement  
19 imported water supplies available to the City of Carlsbad and the San Diego  
20 region, improve water reliability and enhance water quality. In so doing, the  
21 Project also complements local and regional water conservation, and water  
22 recycling programs. In addition, Project construction and operation will  
23 benefit the economy through creation of jobs and increased spending.  
24 Furthermore, the Project increases opportunities for public access to the  
25 coastal area through public enhancements and dedications of coastal  
26 property.

27 b) The proposed development is a well-planned, comprehensive development,  
28 involving more than one building, more than one phase of development, or some  
other condition that the City Council considers justification for entering into a  
Development Agreement in that the Project consists of a multi-year, multi-  
phased development with specialized components to be constructed in several  
locations and in different jurisdictions. The Project features a complex  
network of product water pipelines both on-site at the Encina Power Station  
and off-site in the communities of Carlsbad, Vista, and Oceanside, that are  
comprehensively planned to deliver water to existing distribution facilities,  
and minimize impacts to sensitive habitats and resources and other utilities  
and infrastructure. The Project will require a substantial expenditure by the  
Developer of time and predevelopment costs and risk before approval of  
building and other permits. This justifies and is a reasonable and  
appropriate request for entering into a Development Agreement. A degree of  
certainty is needed so the Project can proceed forward in construction and  
operation.

c) The proposed development will require a substantial expenditure by the applicant  
of time, predevelopment costs, and "holding" costs prior to the approval of  
permits and other land use entitlements in that the Developer will realize  
significant expense, risk, and time to design the Project and obtain all

1                   **necessary permits from local, state, and federal agencies to construct a**  
2                   **project that desalinates seawater into potable water, discharges brine into**  
3                   **the ocean, and requires construction of a complex and lengthy network of**  
4                   **pipelines and infrastructure to deliver the desalinated water into existing**  
5                   **public water systems.**

6                   d) The proposed development will require a substantial expenditure by the applicant  
7                   to design and construct public infrastructure facilities that will benefit the  
8                   community in that **the Developer will realize significant expense, risk, and**  
9                   **time to design the Project, obtain all necessary permits from local, state, and**  
10                  **federal agencies, and acquire necessary rights of way to construct a complex**  
11                  **and lengthy network of pipelines and infrastructure to deliver the**  
12                  **desalinated water into existing public water systems. Through the Water**  
13                  **Purchase Agreement, the City may elect to own these pipelines and other**  
14                  **appurtenant facilities.**

15                  e) The proposed Development Agreement is consistent with the requirements of this  
16                  Policy in that **the City Attorney has determined that the proposed**  
17                  **Development Agreement legally conforms to all of the applicable state laws,**  
18                  **City ordinances, and City policies.**

19                  f) The proposed Development Agreement includes legally binding commitments by  
20                  the applicant to provide substantial public benefits over and above those which  
21                  the applicant would otherwise be obligated to provide as a condition of project  
22                  approval in the absence of a development agreement in that **many of the terms**  
23                  **and conditions of the proposed Development Agreement are intended to**  
24                  **preserve for the benefit of the City, Carlsbad Municipal Water District, and**  
25                  **Carlsbad Housing and Redevelopment Commission the property tax**  
26                  **revenues that will be paid by the Project. If a successor of Poseidon does not**  
27                  **have an agreement with the City regarding payment of a mitigation fee or**  
28                  **such successor fails to pay property taxes, the Development Agreement**  
                    **establishes a mitigation fee that will be paid by Poseidon, or its successors in**  
                    **interest. This mitigation fee is sufficient to fund all, or a significant portion,**  
                    **of the most beneficial Redevelopment Plan projects to be undertaken. The**  
                    **mitigation fee and property tax revenue have been secured for the City,**  
                    **Carlsbad Municipal Water District, and Carlsbad Housing and**  
                    **Redevelopment Commission through the proposed Development Agreement,**  
                    **the Water Purchase Agreement between the District and Poseidon**  
                    **(September 2004), and the Agreement Memorializing Certain**  
                    **Understandings and Establishing a Framework for Cooperation between the**  
                    **City, Carlsbad Municipal Water District, Carlsbad Housing and**  
                    **Redevelopment Commission, and San Diego County Water Authority (April**  
                    **2005). Therefore, the proposed Development Agreement includes legally**  
                    **binding commitments by Poseidon to provide substantial public benefits over**  
                    **and above those which Poseidon otherwise would be obligated to provide as a**  
                    **condition of approval in the absence of the Development Agreement.**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

g) It is unlikely that the proposed development, including the public benefits to be derived therefrom, would occur when and as provided in the proposed Development Agreement in the absence of the vesting assurances incorporated in the proposed Development Agreement **because the Development Agreement provides more certainty that the Project will be built and justifiably allows the applicant to proceed with the Project in accordance with existing policies, rules and regulations, and Project conditions.**

- 4. **The Development Agreement removes uncertainty in the approval of the Project which can result in a waste of resources, escalate the cost of development, and discourage significant investment in the community and in a commitment to comprehensive planning.**
- 5. **The Development Agreement provides assurances to the Developer that upon approval of the Project, the Developer may proceed with the Project in accordance with existing policies, rules and regulations, and subject to conditions of approval. This will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.**

**NOTICE**

Please take **NOTICE** that approval of your project includes the “imposition” of fees, dedications, reservations, or other exactions hereafter collectively referred to for convenience as “fees/exactions.”

You have 90 days from date of final approval to protest imposition of these fees/exactions. If you protest them, you must follow the protest procedure set forth in Government Code Section 66020(a), and file the protest and any other required information with the City Manager for processing in accordance with Carlsbad Municipal Code Section 3.32.030. Failure to timely follow that procedure will bar any subsequent legal action to attack, review, set aside, void, or annul their imposition.

You are hereby **FURTHER NOTIFIED** that your right to protest the specified fees/exactions **DOES NOT APPLY** to water and sewer connection fees and capacity charges, nor planning, zoning, grading or other similar application processing or service fees in connection with this project; **NOR DOES IT APPLY** to any fees/exactions of which you have previously been given a **NOTICE** similar to this, or as to which the statute of limitations has previously otherwise expired.

...  
...  
...  
...  
...



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PASSED, APPROVED AND ADOPTED at a regular meeting of the Planning Commission of the City of Carlsbad held on the 3rd day of May 2006, by the following vote, to wit:

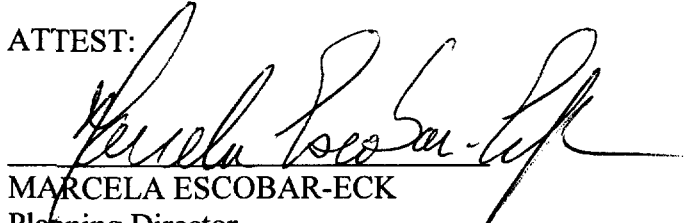
AYES: Chairperson Montgomery, Commissioners Baker, Cardosa, Heineman, Segall, and Whitton

NOES:

ABSENT:

ABSTAIN: Commissioner Dominguez

  
MARTELL B. MONTGOMERY, Chairperson  
CARLSBAD PLANNING COMMISSION

ATTEST:  
  
MARCELA ESCOBAR-ECK  
Planning Director



1 incorporated by reference ("Development Agreement") is approved. The Mayor is authorized to  
2 execute said agreement on behalf of the City.

3 SECTION II: That the findings of the Planning Commission in Planning  
4 Commission Resolution No. 6090 also shall also constitute the findings of the City Council.

5 Section III: Upon the occurrence of the Effective Date (as defined in the  
6 Development Agreement), the City Clerk is authorized and directed to record the Development  
7 Agreement in the Office of the San Diego County Recorder pursuant to Section 21.70.030 of the  
8 Carlsbad Municipal Code.

9 EFFECTIVE DATE: This ordinance shall be effective thirty (30) days after  
10 its adoption, and the City Clerk shall certify to the adoption of this ordinance and cause it to be  
11 published at least once in a publication of general circulation in the City of Carlsbad within  
12 fifteen (15) days after its adoption. Notwithstanding the preceding, this ordinance shall not  
13 become effective unless and until the Development Agreement is approved by the California  
14 Coastal Commission.  
15

16  
17 INTRODUCED AND FIRST READ at the regular meeting of the Carlsbad City  
18 Council on the \_\_\_\_\_ day of \_\_\_\_\_ 2006, and thereafter.

19 ////

20 ////

21 ////

22 ////

23 ////

24 ////

25 ////

26 ////

27 ////

28 ////

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PASSED, APPROVED AND ADOPTED at a regular meeting of the City Council  
of the City of Carlsbad, California, on the \_\_\_\_\_ day of \_\_\_\_\_, by the following vote, to  
wit:

AYES:

NOES:

ABSENT:

ABSTAIN:

APPROVED AS TO FORM AND LEGALITY

\_\_\_\_\_  
RONALD R. BALL, City Attorney

\_\_\_\_\_  
CLAUDE A. LEWIS, Mayor

ATTEST:

\_\_\_\_\_  
LORRAINE M. WOOD, City Clerk

(SEAL)

Recorded at request of: )  
)  
Clerk, City Council )  
City of Carlsbad )  
)  
When recorded return to: )  
)  
CITY OF CARLSBAD )  
1200 Carlsbad Village Drive )  
Carlsbad, CA 92008 )  
Attn: City Attorney )

---

(Space above for Recorder's Use Only)

This document is exempt from the payment of  
a recording fee pursuant to Government Code  
Section 6103.

**DEVELOPMENT AGREEMENT**

A DEVELOPMENT AGREEMENT BETWEEN

CITY OF CARLSBAD

and

POSEIDON RESOURCES (CHANNELSIDE) LLC

**TABLE OF CONTENTS**

1	DEFINITIONS AND EXHIBITS.....	2
	1.1 Definitions.....	2
2	GENERAL PROVISIONS.....	6
	2.1 Binding Effect of Agreement.....	6
	2.2 Legal Interest in Property.....	6
	2.3 Term.....	6
	2.4 Sale, Transfer or Assignment.....	6
	2.5 Amendment or Cancellation of Agreement.....	9
	2.6 Termination.....	9
	2.7 Liability.....	10
	2.8 Compliance With Environmental Law.....	10
3	DEVELOPMENT OF THE PROJECT.....	10
	3.1 Permitted Uses.....	10
	3.2 Vested Rights.....	10
	3.3 Effect of Agreement on Land Use Regulations.....	11
	3.4 Timing of Development.....	11
	3.5 Changes and Amendments.....	11
	3.6 Reservations of Authority.....	12
	3.7 Public Works.....	13
	3.8 Provision of Real Property Interests by the City.....	13
	3.9 Regulation by Other Public Agencies.....	14
	3.10 Tentative Tract Map Extension.....	14
	3.11 Poseidon Obligation to Obtain and Maintain Insurance.....	14
4	PUBLIC BENEFITS.....	14
	4.1 Intent.....	14
	4.2 Mitigation Measures and Fees.....	14
	4.3 Dedications.....	15
5	FINANCING OF APPURTENANT FACILITIES; OTHER PUBLIC FINANCING; USE OF PUBLIC RIGHTS OF WAY.....	16
	5.1 Appurtenant Facilities.....	16
	5.2 Other Public Financing.....	16
	5.3 Use of Public Rights of Way.....	16
6	ANNUAL REVIEW.....	16
	6.1 Periodic Review.....	16
	6.2 Opportunity to be Heard.....	17
	6.3 Information to be Provided Poseidon.....	17
7	INCORPORATION AND ANNEXATION.....	17
	7.1 Intent.....	17
	7.2 Incorporation.....	17
	7.3 Annexation.....	17
8	DEFAULT AND REMEDIES.....	17
	8.1 Remedies in General.....	17

	8.2 Termination by City.....	18
	8.3 Liquidated Damages for Poseidon's Failure to Amend This Agreement Upon Relocation of Plant Facilities .....	18
	8.4 Specific Performance.....	19
	8.5 Release and Reservation .....	19
	8.6 Termination Agreement for Default of Poseidon.....	19
	8.7 Termination of Agreement for Default of the City.....	20
	8.8 Rights, Remedies for Negligence, Willful Misconduct.....	20
9	THIRD PARTY LITIGATION; INDEMNIFICATION.....	20
	9.1 General Plan Litigation .....	20
	9.2 Third Party Litigation Concerning Agreement.....	20
	9.3 Breaches of Agreement; Property Damage, Bodily Injury or Death.....	21
	9.4 Indemnification Procedure .....	21
	9.5 Survival.....	21
10	MORTGAGEE PROTECTION.....	22
11	MISCELLANEOUS PROVISIONS.....	22
	11.1 Recordation of Agreement.....	22
	11.2 Further Actions .....	22
	11.3 Amendment .....	22
	11.4 Entire Agreement.....	23
	11.5 Notices.....	23
	11.6 Controlling Law.....	23
	11.7 Headings .....	23
	11.8 Cumulative Rights; Waiver .....	23
	11.9 Liberal Construction.....	24
	11.10 Severability .....	24
	11.11 Good Faith and Fair Dealing.....	24
	11.12 No Third Party Beneficiaries .....	24
	11.13 Execution in Counterparts. ....	24
	11.14 Time of the Essence .....	24
	11.15 Number, Gender .....	25
	11.16 Relationship.....	25
	11.17 Joint and Several Obligations .....	25
	11.18 Force Majeure .....	25
	11.19 Mutual Covenants.....	25
	11.20 Successors in Interest .....	25
	11.21 Jurisdiction and Venue .....	25
	11.22 Project as a Private Undertaking .....	26
	11.23 Eminent Domain .....	26
	11.24 Agent for Service of Process .....	26
	11.25 Authority to Execute.....	26
	11.26 Commission Approval Required .....	26
	11.27 Approval Procedure .....	26

## DEVELOPMENT AGREEMENT

This Agreement, entered into as of the Effective Date, by and between the City and Poseidon, is made with respect to the following facts:

### RECITALS

WHEREAS, the City is authorized to enter into binding development agreements with persons having legal or equitable interests in real property for the development of such property, pursuant to Section 65864, et seq. of the Code; and,

WHEREAS, pursuant to Section 65865 of the Code, the City has adopted Chapter 21.70 of the Carlsbad Municipal Code, establishing rules and regulations for consideration of development agreements; and,

WHEREAS, Poseidon and the City have agreed to enter into a development agreement and proceedings have been taken in accordance with Chapter 21.70 and otherwise in accordance with the rules and regulations of the City; and,

WHEREAS, by electing to enter into this Agreement, the City shall bind future City Councils of the City by the obligations specified herein and limit the future exercise of certain governmental and proprietary powers of the City; and,

WHEREAS, the terms and conditions of this Agreement have undergone extensive review by the City and the City Council of the City and have been found to be fair, just and reasonable; and,

WHEREAS, the best interests of the citizens of the City and the public health, safety and welfare will be served by entering into this Agreement; and,

WHEREAS, the Project (as hereinafter defined) is consistent with, and includes elements specifically intended to advance the goals of the State of California related to, the protection, maintenance and where feasible enhancement and restoration of the overall quality of the coastal zone environment and to maximize public access and recreational opportunities along the coast, and includes public dedication of several acres of ocean and lagoon front property that has been agreed to by Poseidon as described in Exhibit 5 of the Precise Development Plan (PDP 00-02); and,

WHEREAS, all of the procedures of CEQA have been met with respect to the Project and this Agreement; and,

WHEREAS, by Council Resolution No. \_\_\_\_\_, the City Council, after making appropriate findings, certified the Environmental Impact Report for the Project, dated \_\_\_\_\_, 2006, under the provisions of CEQA; and,

WHEREAS, this Agreement and the Project are consistent with the City's General Plan and the Precise Development Plan applicable to the Property; and,

WHEREAS, all actions taken and approvals given by the City have been duly



taken or approved in accordance with Chapter 21.70 and with all applicable legal requirements for notice, public hearings, findings, votes, and other procedural matters; and,

WHEREAS, pursuant to the Approval Ordinance, the City Council approved this Agreement; and,

WHEREAS, development of the Project in accordance with this Agreement will provide substantial benefits to the City and will further important policies and goals of the City; and,

WHEREAS, this Agreement will eliminate uncertainty in planning and provide for the orderly development of the Project, ensure progressive installation of necessary improvements, provide for public services appropriate to the development of the Project, and generally serve the purposes for which development agreements under Sections 65864, et seq. of the Code and Chapter 21.70 are intended; and,

WHEREAS, Poseidon has incurred and will in the future incur substantial costs in the development of the Project in accordance with this Agreement in order to assure vesting of legal rights to develop the Project in accordance with this Agreement.

NOW, THEREFORE, in consideration of the above recitals and of the mutual covenants hereinafter contained and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

## **COVENANTS**

### **1 DEFINITIONS AND EXHIBITS.**

1.1 Definitions. When used in this Agreement, the following terms shall have the meaning set forth below:

1.1.1 "Agreement" means this Development Agreement.

1.1.2 "Agreement Date" means the date this Agreement is fully executed by the parties.

1.1.3 "Approval Ordinance" means the City Ordinance No. \_\_\_\_\_, which became effective on \_\_\_\_\_, 2006, approving this Agreement.

1.1.4 "Appurtenant Facilities" means transmission assets, whether or not located at the Power Plant, consisting of appurtenant and ancillary facilities, including without limitation (a) pipelines, pump stations and other facilities within the City that are necessary or convenient for the use, conveyance, storage, and distribution of desalinated seawater, and (b) such incidental appurtenant and ancillary facilities as are located in the Cities of Oceanside or Vista, California.

1.1.5 "Cabrillo" means Cabrillo Power I, LLC, a Delaware limited liability company, its successors and assigns, and the successors in interest to all or any part of Cabrillo's interest in the Property.

1.1.6 "CEQA" means the California Environmental Quality Act, California Public Resources Code Sections 21000 et seq.

1.1.7 "City" means the City of Carlsbad, California, a municipal corporation and a general law city formed under the laws of the State of California.

1.1.8 "City Council" means the duly elected members of the City Council of the City, as those members may from time to time be elected.

1.1.9 "Code" means the California Government Code.

1.1.10 "Commission" means the California Coastal Commission.

1.1.11 "Default" means (a) with respect to either party, any failure to perform any material duty or obligation under this Agreement, (b) with respect to Poseidon, any Event of Default with respect to Poseidon under the Water Purchase Agreement, and with respect to the City, any Event of Default with respect to the District under the Water Purchase Agreement.

1.1.12 "Development" means the improvement of the portion of the Property subject to the Leasehold for the purposes of completing the structures, improvements and facilities comprising the Plant Facilities, including, but not limited to: grading; the construction of infrastructure and public facilities, whether located within or outside the portion of the Property subject to the Leasehold that are related to the Plant Facilities; the construction of buildings and structures; and the installation of landscaping. "Development" does not include the maintenance, repair, reconstruction or redevelopment of any building, structure, improvement or facility after the construction and completion thereof.

1.1.13 "Development Approvals" means all permits and other entitlements for use, subject to approval or issuance by the City, the RDA or the Commission, as applicable, in connection with: (i) Development of the portion of the Property subject to the Leasehold and (ii) the Appurtenant Facilities, including, but not limited to:

- (a) Project EIR
- (b) Precise Development Plan (PDP 00-02) and any amendments thereto;
- (c) Coastal Development Permit;
- (d) Redevelopment Permit;
- (e) Improvement Plans;
- (f) Grading permit(s);
- (g) Habitat Management Plan Permit;
- (h) Encroachment Permit(s);
- (i) Easements and Rights of Way Permits;
- (j) Haul Route Permit;

- (k) This Agreement; and
- (l) Special Use Permit.

1.1.14 "Development Plan" means the Existing Development Approvals and the Existing Land Use Regulations applicable to Development of the Project on the portion of the Property subject to the Leasehold.

1.1.15 "District" means the Carlsbad Municipal Water District, a municipal water district.

1.1.16 "Effective Date" means the last to occur of the following: (i) the date the Approval Ordinance becomes effective, (ii) the date that the Agreement is fully executed by the parties, (iii) the date the Commission approves this Agreement, or (iv) the date Cabrillo has provided the consent attached hereto as Exhibit "A".

1.1.17 "Existing Development Approvals" means all Development Approvals approved or issued prior to the Agreement Date. Existing Development Approvals include the approvals incorporated herein as Exhibit "D" and all other approvals which are a matter of public record on the Agreement Date.

1.1.18 "Existing Land Use Regulations" means all Land Use Regulations in effect on the Agreement Date. Existing Land Use Regulations include the Land Use Regulations incorporated herein as Exhibit "E" and all other Land Use Regulations which are a matter of public record on the Agreement Date. Existing Land Use Regulations do not include Police Power Regulations.

1.1.19 "Land Use Regulations" means all ordinances, resolutions, codes, rules, regulations and official policies of the City, other than the Police Power Regulations, governing the development and use of land, including without limitation the permitted use of land, the density or intensity of use, subdivision requirements, the maximum height and size of proposed buildings, the provisions for reservation or dedication of land for public purposes, and the design, improvement and construction standards and specifications applicable to the development of the Property.

1.1.20 "Lease" means that certain Ground Lease and Easement Agreement, dated July 11, 2003, and entered into by and between Poseidon and Cabrillo.

1.1.21 "Leasehold" means Poseidon's interest in a portion of the Property under the terms and conditions of the Lease.

1.1.22 "MGD" means million gallons per day.

1.1.23 "Mortgagee" means a mortgagee of a mortgage, a beneficiary under a deed of trust or any other security-device lender, and their successors and assigns.

1.1.24 "Plant Facilities" means production assets consisting of a reverse-osmosis seawater desalination plant.

1.1.25 "Police Power Regulations" means any City ordinance, resolution, code, rule, regulation or official policy, governing: (a) public health, safety, morals and welfare, in general, and the control and abatement of nuisances, in particular; (b) the

granting of right of way permits and the conveyance of rights and interests which provide for the use of or the entry upon public property (excluding any Development Approvals or any rights of way necessary to implement the Project as specified in the Development Approvals) or (c) the exercise of the power of eminent domain.

1.1.26 "Poseidon" means Poseidon Resources (Channelside) LLC, a Delaware limited liability company, its successors and assigns, and the successors in interest to all or any part of Poseidon's interest in the Project.

1.1.27 "Power Plant" means the Encina Power Station owned and operated by Cabrillo.

1.1.28 "Product Water" means desalinated seawater produced from the Project.

1.1.29 "Project" means, generally, the Development of the portion of the Property subject to the Leasehold contemplated by the Development Plan as such Development Plan may be further defined, enhanced or modified pursuant to the provisions of this Agreement, and specifically, the development of an integrated reverse-osmosis desalination plant comprising: (1) the Plant Facilities; and (2) the Appurtenant Facilities; provided, however that if the District elects to own or have a joint powers authority own facilities pursuant to Section 9.2 of the Water Purchase Agreement, such facilities shall be excluded from the definition of Project hereunder. The Project is expected to have the capacity to produce and convey approximately 25 MGD to 55 MGD of Product Water, but the scope of the Project, including without limitation the location of the Appurtenant Facilities, may be further defined, enhanced or modified pursuant to the provisions of the Development Approvals.

1.1.30 "Property" means the real property described on Exhibit "B" and depicted on Exhibit "C" to this Agreement.

1.1.31 "RDA" means the Carlsbad Housing and Redevelopment Commission.

1.1.32 "Reservations of Authority" means the rights and authority excepted from the assurances and rights provided to Poseidon under this Agreement and reserved to the City under Sections 3.6 through 3.6.4 of this Agreement.

1.1.33 "Subsequent Development Approvals" means all Development Approvals required subsequent to the Agreement Date in connection with development of the Project.

1.1.34 "Subsequent Development Exaction" means any requirement of the City in connection with or pursuant to any Subsequent Land Use Regulation or Subsequent Development Approvals for the dedication of land, the construction of improvements or public facilities, or the payment of fees in order to lessen, offset, mitigate or compensate for the impacts of development on the environment or other public interests.

1.1.35 "Subsequent Land Use Regulations" means any Land Use Regulations adopted and effective after the Agreement Date.

1.1.36 "Water Purchase Agreement" means that certain Water Purchase Agreement, dated as of September 28, 2004, and entered into by and between

Poseidon and the District, as the same shall be amended from time to time.

1.2 Exhibits. The following documents are attached to, and by this reference made a part of, this Agreement:

- Exhibit "A" -- Form of Cabrillo Consent.
- Exhibit "B" -- Legal Description of the Property.
- Exhibit "C" -- Map depicting Property and its location.
- Exhibit "D" -- Existing Development Approvals.
- Exhibit "E" -- Existing Land Use Regulations.

## **2 GENERAL PROVISIONS.**

2.1 Binding Effect of Agreement. This Agreement runs with, and is binding upon, the Leasehold, the Project and the Property. Development of the Project is authorized by the Development Approvals and, except as otherwise provided for herein, shall be carried out only in accordance with the terms of the Development Approvals. Notwithstanding anything in this Agreement to the contrary, this Agreement shall only apply to the Development of the Project on the Property subject to the Leasehold, and shall not apply to any other development of the Property.

2.2 Legal Interest in Property. Poseidon represents and covenants that Cabrillo is the owner of the fee simple title to the Property, and that, as of the Agreement Date, Poseidon has a legal interest in the Property pursuant to the Lease.

2.3 Term. The term of this Agreement shall commence on the Effective Date and shall continue for a period of forty (40) years thereafter, unless the Agreement is terminated or the term is modified or extended pursuant to the provisions of this Agreement.

### **2.4 Sale, Transfer or Assignment.**

2.4.1 Right to Assign. Poseidon shall have the right to sell, transfer or assign this Agreement, in whole or in part, if and only if it meets the conditions set forth in clauses (a) and (b) below:

(a) Either:

(i) The sale, transfer or assignment is made in connection with a sale, transfer or assignment, voluntarily or involuntarily, by operation of law or otherwise, of all or a part of the Project and the prior written consent of the City is obtained; or

(ii) The sale, transfer or assignment is made in connection with a sale, transfer or assignment, voluntarily or involuntarily, by operation of law or otherwise, of all or a part of Poseidon's interest in the Leasehold and the Property and the prior written consent of the City is obtained;

or

(iii) The sale, transfer or assignment is made in connection with a permitted assignment of the Water Purchase Agreement; and

(b) The proposed assignee has provided the City Manager with an executed agreement, in a form reasonably acceptable to the City, providing therein that such purchaser, transferee or assignee expressly and unconditionally assumes all the duties and obligations of Poseidon under this Agreement, including but not limited to the financial obligations of Poseidon set forth herein.

(c) Any sale, transfer or assignment not made compliance with the foregoing conditions shall constitute a default by Poseidon under this Agreement. Notwithstanding the failure of any purchaser, transferee or assignee to execute the agreement required by Paragraph (b), above, of this Subsection 2.4.1, and regardless of whether such purchaser, transferee or assignee has succeeded to Poseidon's interest in the Project, the Property or the Leasehold voluntarily or involuntarily, by operation of law or otherwise, the burdens of this Agreement shall be binding upon such purchaser, transferee or assignee, but the benefits of this Agreement shall not inure to such purchaser, transferee or assignee until and unless such agreement is executed.

**2.4.2 Condemnation.** In reliance upon the terms, covenants and conditions set forth in this Agreement, the City and (or) the RDA have (has) incurred and/or will incur costs and expenses, including but not limited to costs and expenses to finance or refinance the construction and installation of public improvements of benefit to the Project, a portion of are expected to be reimbursed to the City as mitigation fees pursuant to Section 4 of this Agreement. The parties intend that the right to this mitigation fee and the recordation of this Agreement reflecting the mitigation fee obligation, which runs with the Property and the Project under this Agreement, constitute a compensable interest in the Property held by the City and/or the RDA (the "City/RDA Property Interest"). If at any time during the term of this Agreement: (i) all or any portion of Poseidon's interest in the Project or its interest in the Lease or the real property underlying the Project (the "Poseidon Property Interest") is taken under the power of eminent domain, or if there is a voluntary conveyance in lieu of or under the threat of eminent domain, (ii) Poseidon is no longer obligated to pay the mitigation fee pursuant to Section 4 of this Agreement and (iii) the acquiring party does not agree to pay such mitigation fee, the provisions of this Section 2.4.2 shall apply.

(a) If a court or jury renders a total, undivided award of compensation in a condemnation action without apportioning the award between the Poseidon Property Interest and the City/RDA Property Interest, then the parties agree (absent an agreement upon how the undivided sum should be shared), to request the court to conduct a second phase of the trial to apportion the award between the City and/or the RDA, on the one hand, and Poseidon, on the other hand, in accordance with their respective property interests. In such a second phase, the City and/or RDA shall present evidence of the value of its interest as described in subsection (c) below, and Poseidon shall present evidence of the value of its interest according to the method of valuation which it believes is most appropriate under the circumstances and timing of the condemnation. If the amount of the undivided award is insufficient to compensate the City and/or the RDA, on the one hand, and Poseidon, on the other hand, based on each party's method of valuation, then it is the parties'

intent that the court shall equitably apportion the undivided award (without any preference or priority being applied to the interest of either the City and/or the RDA, on the one hand, or Poseidon, on the other hand).

(b) If there is a voluntary conveyance by Poseidon of the Poseidon Property Interest or any part thereof to a public or quasi-public agency or entity (the "Condemning Agency") in lieu of or under threat by the Condemning Agency to take the Poseidon Property Interest, or any portion thereof, by eminent domain proceedings, Poseidon shall include in the voluntary sales price the present value (calculated as of the date of the voluntary conveyance using as a discount rate the Standard & Poor's (S&P) Composite Yield Table, prepared by the Bond Market Association, showing the yield composites of AA-rated municipal bonds with 20-year maturities (the "S&P Composite Bond Yield Index") for the month immediately preceding the month in which the voluntary conveyance occurs) of the estimated property taxes that the City, the District or the RDA would receive from the construction, operation and ownership of the Project on the Property, from the date of the voluntary conveyance to the end of the term of this Agreement, and within thirty (30) days of receipt of the voluntary sales proceeds or the first installment thereof if there is an installment sale, shall pay to the City and/or the RDA such present value (or in the case of an installment sale a portion thereof based on the relative amount of such present value and the aggregate voluntary sales price).

(c) If at any time during the term of this Agreement there is a taking of an interest in the Project under the power of eminent domain, as more particularly set forth in and subject to Section 2.4.2 (a) above, then, as between the City and/or the RDA, on the one hand, and Poseidon, on the other hand, the parties agree that the value of the City/RDA Property Interest shall be calculated as follows:

the value shall be equal to the unamortized value of the total cost and expenses incurred by the City and/or the RDA pursuant to this Agreement, determined by calculating the present value (calculated as of the date of the taking using as a discount rate the S&P Composite Bond Yield Index for the month immediately preceding the month in which the taking occurs) of the estimated property taxes that the City, the District or the RDA would receive from the construction, operation and ownership of the Project on the Property, from the date of the taking to the end of the term of this Agreement.

(d) Within ten (10) days after receipt thereof, each party shall give the other party copies of any notice received with respect to a proposed or pending taking under power of eminent domain of any portion of the Project or the real property underlying the Project. Poseidon shall give the City and RDA written notice at least ten (10) days prior to entering into an agreement voluntarily conveying all or any portion of the Poseidon Property Interest in lieu of or under the threat of eminent domain.

(e) This Section 2.4.2 shall not apply to any Condemning Agency that has an agreement with the City and/or the RDA with respect to the

payment of a mitigation fee (including that certain Agreement Memorializing Certain Understandings and Establishing a Framework for Cooperation, dated as of April 28, 2005, by and between the San Diego County Water Authority, the City, the District and the RDA).

(f) If (i) at any time during the term of this Agreement there is a taking of an interest in the Project under the power of eminent domain (or by a voluntary conveyance in lieu thereof), as more particularly set forth in Section 2.4.2 (a) or (b) above, (ii) the Condemning Agency does not have an agreement with the City and/or the RDA with respect to the payment of a mitigation fee, (iii) the Condemning Agency nonetheless pays some or all of the mitigation fee required by Section 4 of this Agreement, (iv) the City or the RDA has received payment for the City/RDA Property Interest pursuant to Section 2.4.2 (a) or (b) above and (v) in the case of an award being apportioned pursuant to Section 2.4.2(a) above Poseidon receives less than its proposed value of its interest, then the City shall pay Poseidon (or shall cause the RDA to pay to Poseidon) such installments of the mitigation fee received from the Condemning Agency, within thirty (30) days of the date the City and/or RDA receives such payments, until such time as Poseidon has received an amount equal to the amount paid to the City and/or RDA pursuant to Section 2.4.2 (a) or (b) above set forth.

**2.4.3 Subsequent Assignment.** Any subsequent sale, transfer or assignment of this Agreement after an initial sale, transfer or assignment of this Agreement shall be made only in accordance with and subject to the terms and conditions of this Section.

**2.5 Amendment or Cancellation of Agreement.** This Agreement may be amended or cancelled in whole or in part only by written consent of all parties in the manner provided for in Code Section 65868. This provision shall not limit any remedy of the City or Poseidon as provided by this Agreement.

**2.6 Termination.** The parties acknowledge and agree that, except for Section 2.7 hereof, this Agreement is intended to run with the Leasehold and the Project and to be binding on successors and assigns of the parties hereto. Accordingly, even if Poseidon is no longer the lessee under the Lease or the owner of the Project, this Agreement shall not be deemed terminated, but shall continue in full force and effect unless any of the following events occurs:

- 2.3;
- (a) Expiration of the term of this Agreement stated in Section 2.3;
  - (b) Entry of a final non-appealable judgment setting aside, voiding or annulling the adoption of the Approval Ordinance;
  - (c) The adoption of a referendum measure repealing the Approval Ordinance; or
  - (d) The Project does not commence operation within ten (10) years after the Agreement Date.

Termination of this Agreement shall not constitute termination of any other land use entitlements approved for the Project or the portion of the Property subject to the Leasehold. Upon the termination of this Agreement, no party shall have



any further right or obligation hereunder except with respect to any obligation to have been performed prior to such termination or with respect to any default in the performance of the provisions of this Agreement which has occurred prior to such termination or with respect to any obligations which are specifically set forth as surviving the termination of this Agreement.

2.7 Liability. The parties acknowledge and agree that Poseidon Resources (Channelside) LLC shall have no further liability under this Agreement in the event of:

- (i) A sale, transfer or assignment of this Agreement pursuant to Section 2.4.1;
- (ii) Acquisition of Poseidon's interest in the Project as described in Section 2.4.2; or
- (iii) Poseidon otherwise ceases the Development of the Project.

The release of liability in this Section 2.7 shall apply to Poseidon Resources (Channelside) LLC only, and not to any successor in interest, by operation of law or otherwise, to Poseidon Resources (Channelside) LLC.

2.8 Compliance With Environmental Law. Poseidon shall operate and maintain the Project in accordance with all applicable state and federal environmental laws, notwithstanding any exemption that Poseidon may otherwise have under international trade rules.

### **3 DEVELOPMENT OF THE PROJECT.**

3.1 Permitted Uses. The Project shall be used and developed only for the purposes more particularly set forth in the Development Plan and for such other uses that may be mutually agreed upon by the parties hereto in accordance with Subsequent Development Approvals and the applicable provisions of the Code relating to the amendment of development agreements. In particular, the permitted uses of the portion of the Property subject to the Leasehold, the density and intensity of use, the maximum height and size of proposed buildings, the production capacity of the Plant Facilities, and provisions for reservation and dedication of land for public purposes shall be those set forth in the Development Plan.

3.2 Vested Rights. Unless amended or terminated in the manner specified in this Agreement (and subject to the provisions of this Agreement), or unless Poseidon otherwise agrees, Poseidon shall have the rights and benefits afforded by this Agreement and this Agreement shall be enforceable by Poseidon and the City notwithstanding the occurrence of any of the following after the Agreement Date: (a) any growth control measure or any development moratorium, or (b) any change in the applicable general or specific plans, zoning, subdivision or building regulations adopted by the City which alter or amend the Development Approvals, or (c) the adoption of any new or amended ordinance, resolution, rule, regulation, requirement or official policy, other than any of the Police Power Regulations, that is inconsistent with, or more burdensome on Poseidon than, the Development Approvals so as to prevent or materially adversely affect development, financing, construction or operation in accordance with the Development Approvals. Unless Poseidon otherwise consents in

writing, this Section shall be construed to prohibit the City from applying to the Project any development moratorium that is adopted specifically to prohibit the construction of the Project, or as an interim measure pending contemplated General Plan, specific plan or zoning changes, or as a general growth control management measure without other bona fide reasons relating to unforeseeable emergency situations (as described in Section 3.2.1, below). The Project shall remain subject to all Subsequent Development Approvals required to complete the Project as contemplated by the Development Plan.

**3.2.1 Exceptions to Vested Rights.** Notwithstanding any provision to the contrary contained herein, and without limiting the generality of Section 3.6, the City expressly reserves the right to apply to the Project: (a) Reservations of Authority made under Section 3.6; (b) any of the Police Power Regulations; or (c) any development moratorium, limitation on the delivery of City-provided utility services, or other generally applicable emergency rule, regulation, law or ordinance (collectively an "Emergency Measure") which meets all of the following criteria: (i) such Emergency Measure is based on genuine health, safety and general welfare concerns (other than general growth management issues); (ii) such Emergency Measure arises out of an emergency situation, as declared by the President of the United States or the Governor of California, or as declared by the Mayor or City Council of the City of Carlsbad; and (iii) such Emergency Measure is based upon its terms or its effect as applied, does not apply exclusively or primarily to the Project.

**3.3 Effect of Agreement on Land Use Regulations.** Except as otherwise provided under the terms of this Agreement, including without limitation Section 3.2.1 above, the rules, regulations and official policies governing permitted uses of the portion of the Property subject to the Leasehold, the density and intensity of use of the portion of the Property subject to the Leasehold, the maximum height and size of proposed buildings, and the design, improvement and construction standards and specifications applicable to development of the Project shall be the Existing Land Use Regulations. In connection with any Subsequent Development Approval, the City shall exercise its discretion in accordance with the Development Plan, and as provided by this Agreement including without limitation Section 3.2.1 hereof. The City shall accept for processing, review and action all applications for Subsequent Development Approvals, and such applications shall be processed in the normal manner for processing such matters.

**3.4 Timing of Development.** The parties acknowledge that Poseidon cannot at this time predict when or the rate at which the Project will be developed. Such decisions depend upon numerous factors which are not within the control of Poseidon, such as approvals from other government agencies, availability of subsidies from Metropolitan Water District of Southern California or others, obtaining water supply contracts with purchasers of Product Water equal to output of the Project, interest rates, construction completion and other similar factors. Since the California Supreme Court held in Pardee Construction Co. v. City of Camarillo (1984) 37 Cal.3d 465, that the failure of the parties therein to provide for the timing of development resulted in a later adopted initiative restricting the timing of development to prevail over such parties' agreement, it is the parties' intent to cure that deficiency by acknowledging and providing that Poseidon shall have the right to develop the Project in such order and at such rate and at such times as are more particularly described in the Water Purchase Agreement, subject only to any additional or different timing requirements set forth in the Development Plan.

**3.5 Changes and Amendments.** The parties acknowledge that refinement and further development of the Project will require Subsequent Development Approvals and may demonstrate that changes are appropriate and mutually desirable in the Existing

Development Approvals. If Poseidon finds that a change in the Existing Development Approvals is necessary or appropriate, Poseidon shall apply for Subsequent Development Approvals to effectuate such change and the City shall process and act on such application in accordance with the Existing Land Use Regulations, except as otherwise provided by this Agreement, including the Reservations of Authority. If approved, any such change in the Existing Development Approvals shall be incorporated herein as an addendum to Exhibit "D," and may be further changed from time to time as provided in this Section. Unless otherwise required by law, as determined in the City's reasonable discretion, a change to the Existing Development Approvals shall not require an amendment to this Agreement, provided such change does not:

- (a) Alter the permitted uses of the Property as a whole; or,
- (b) Increase the density or intensity of use of the Project as a whole; or,
- (c) Increase the maximum height and size of permitted buildings; or,
- (d) Increase the production capacity of the Plant Facilities; or
- (e) Delete a requirement for the reservation or dedication of land for public purposes within the Property as a whole; or,
- (f) Constitute a project requiring a subsequent or supplemental environmental impact report pursuant to Section 21166 of the Public Resources Code.

### 3.6 Reservations of Authority.

3.6.1 Limitations, Reservations and Exceptions. Notwithstanding any other provision of this Agreement, the City shall have the following Reservations of Authority with respect to application of Subsequent Land Use Regulations to the Development of the Project.

- (a) Processing fees and charges of every kind and nature imposed by the City to cover the estimated and/or actual costs to the City of processing applications for Development Approvals or for monitoring compliance with any Development Approvals granted or issued.
- (b) Procedural regulations relating to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure.
- (c) Regulations governing construction standards and specifications including, without limitation, the City's Building Code, Plumbing Code, Mechanical Code, Electrical Code, Fire Code and Grading Code.
- (d) Regulations imposing Subsequent Development Exactions; provided, however, that no such Subsequent Development Exaction shall be applicable to development of the Project unless such Subsequent Development Exaction is applied uniformly to development, either throughout the City or within the South Carlsbad

Redevelopment Area. No such Subsequent Development Exaction shall apply if its application to the Project would have a material adverse effect on the development of the Project for the uses and to the density or intensity of development set forth in the Development Plan.

(e) Regulations which may be in conflict with the Development Plan but which are reasonably necessary to protect the public health, safety, morals and welfare. To the extent possible, any such regulations shall be applied and construed so as to provide Poseidon with the rights and assurances provided under this Agreement.

(f) Regulations which are not in conflict with the Development Plan; provided that such regulations do not have a material adverse effect on the development of the Project. Any regulation, whether adopted by initiative or otherwise, limiting the rate or timing of development of the Project shall be deemed to conflict with the Development Plan and shall therefore not be applicable to the development of the Project.

(g) Regulations which are in conflict with the Development Plan, provided Poseidon has given written consent to the application of such regulations to development of the Project.

3.6.2 Subsequent Development Approvals. This Agreement shall not prevent the City, in acting on Subsequent Development Approvals, from applying Subsequent Land Use Regulations which do not conflict with the Development Plan (provided that such regulations do not have a material adverse effect on the development of the Project).

3.6.3 Modification or Suspension by State or Federal Law. If State or Federal laws or regulations, whether existing on or enacted after the Agreement Date, prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of this Agreement shall be modified or suspended as may be necessary to comply with such State or Federal laws or regulations, provided, however, that this Agreement shall remain in full force and effect to the extent it is not inconsistent with such laws or regulations and to the extent such laws or regulations do not render such remaining provisions impractical to enforce.

3.6.4 Intent. The parties acknowledge and agree that the City is restricted in its authority to limit its police power by contract and that the foregoing limitations, reservations and exceptions are intended to reserve to the City all of its police power which cannot be so limited, including without limitation the Police Power Regulations. This Agreement shall be construed, contrary to its stated terms if necessary, to reserve to the City all such power and authority which cannot be restricted by contract.

3.7 Public Works. If Poseidon is required by this Agreement to construct any public works facilities which will be dedicated to the City or any other public agency upon completion, and if required by applicable laws to do so, Poseidon shall perform such work in the same manner and subject to the same requirements as would be applicable to the City or such other public agency should it have undertaken such construction.

3.8 Provision of Real Property Interests by the City. In any instance where Poseidon is required to construct any public improvement on land not owned by Poseidon, Poseidon shall at its sole cost and expense provide or cause to be provided,

the real property interests necessary for the construction of such public improvements. If Poseidon is unable, and upon a showing that it has exhausted all legal remedies available to it, including without limitation the rights under Sections 1001 and 1002 of the California Civil Code, to acquire the real property interests necessary for the construction of such public improvements, and if so requested by Poseidon and upon Poseidon's provision of adequate security for costs the City may reasonably incur, then: (a) the City may negotiate the purchase of the necessary real property interests to allow Poseidon to construct the public improvements as required by this Agreement; and (b) if necessary, in accordance with the procedures established by law, the matter may be brought before the City Council to, in its discretion, make the findings necessary to use its power of eminent domain to acquire such required real property interests. Poseidon shall pay all costs associated with such acquisition or condemnation proceedings. This Section 3.8 is not intended by the parties to impose upon: (x) the City a duty to acquire any land or otherwise exercise any power of eminent domain; or (y) upon Poseidon an enforceable duty to acquire land or construct any public improvements on land not owned by Poseidon, except to the extent that Poseidon elects to proceed with the Development of the Project, and then only in accordance with valid conditions imposed by the City upon the Development of the Project under applicable legal authority.

**3.9 Regulation by Other Public Agencies.** The parties acknowledge that other public agencies not within the control of the City possess authority to regulate aspects of the development of the Project separately from or jointly with the City, and this Agreement does not limit the authority of such other public agencies. If any revisions or corrections of the Development Plan approved by the City shall be required by any government official, agency, department or bureau having jurisdiction over the development of the Project (except the City), Poseidon and the City shall cooperate in reasonable efforts in complying with such requirements, to obtain waiver of such requirements or to develop a mutually acceptable alternative.

**3.10 Tentative Tract Map Extension.** Notwithstanding the provisions of Section 66452.6 of the Code, no tentative subdivision map or tentative parcel map, heretofore or hereafter approved in connection with development of the Project, shall be granted an extension of time except in accordance with the Existing Land Use Regulations.

**3.11 Poseidon Obligation to Obtain and Maintain Insurance.** Before commencing any improvement or construction work pursuant to any City-approved permit on the Project, Poseidon shall obtain and maintain the insurance as required under Section 12 of the Water Purchase Agreement.

## **4 PUBLIC BENEFITS.**

**4.1 Intent.** The parties acknowledge and agree that this Agreement and the development of the Project will result in substantial benefits for Poseidon, and the City.

### **4.2 Mitigation Measures and Fees.**

**4.2.1 Payment; Waiver; No Contest.** Poseidon and its successors in interest shall pay a mitigation fee to the City equal to the property taxes that the City, the District or the RDA would receive from the construction, ownership, use and occupancy of the Project on the portion of the Property subject to the Leasehold; provided, however, that this shall not apply to any successor which has an agreement with the City with respect to the payment of a mitigation fee (including that certain Agreement Memorializing Certain Understandings and Establishing a Framework for Cooperation, dated as of April 28, 2005, by and between the San Diego County Water

Authority, the City, the District and the RDA). Notwithstanding the foregoing, such mitigation fee shall be waived so long as Poseidon or its successors in interest shall pay and continue to pay, as and when due, property taxes due under state law for the construction, ownership, use and occupancy of the portion of the Property subject to the Leasehold, and shall not claim a partial or full exemption from payment for such tax. Neither Poseidon nor any of its successors in interest shall contest the payment of (a) any property taxes validly imposed under applicable law or (b) the mitigation fee above described; provided however that this shall not prevent Poseidon or its successors from contesting that such taxes were not correctly calculated.

**4.2.2 No Discriminatory Fees.** The City agrees that for the term of this Agreement, so long as the City, the District or the RDA is paid property taxes from the construction, ownership, use and occupancy of the Project on the portion of the Property subject to the Leasehold, or the mitigation fee described in Section 4.2.1, the City agrees that it will not levy, set or impose any taxes, fees, rates or charges in a discriminatory manner against Poseidon. For example and not by way of limitation, so long as the City, the District or the RDA is paid property taxes from the construction, ownership, use and occupancy of the Project on the portion of the Property subject to the Leasehold, or the mitigation fee described in Section 4.2.1, the City will not attempt to collect from Poseidon a franchise fee, tax, or other monetary charge levied only on businesses which produce or sell water. Further, if such discriminatory fee, tax or charge is adopted by the City, Poseidon and its successors shall be exempt therefrom.

**4.2.3 Continuation of Fees.** Should all or any portion of the Property become part of a city or another county, the fees payable pursuant to Section 4.2 shall remain and still be payable to the City.

**4.2.4 Security.** The performance of the terms and conditions of Sections 4.2.1 and 8.3 shall, upon the closing of the construction financing (the "Financing"), for the Project, be secured by a deed of trust and a security agreement encumbering the Project. Each of such deed of trust and security agreement shall be in a form reasonably acceptable to both parties. The City's rights under each of the deed of trust and the security agreement shall be subordinated to the prior payment in full of the lenders providing the Financing pursuant to an agreement with the City acceptable to such lenders.

**4.2.5 Preliminary Security.** The performance of the terms and conditions of Section 4.2.1 shall be secured by a deed of trust encumbering the Project. The deed of trust shall be: (i) in a form reasonably acceptable to the parties, (ii) be recorded within ninety (90) days after the parties agree upon the form thereof and (iii) released upon the earlier of (x) a termination of this Agreement pursuant to Section 2.6 or (y) a recordation of this Agreement pursuant to Section 11.27(d).

**4.2.6 Accounting Requirements.** With respect to any fee the City receives or costs the City recovers pursuant to this Agreement, in general, or this Section 4, in particular, the City shall comply with the requirements of Section 21.70.025 of the Carlsbad Municipal Code and Section 66006 et seq. of the Code.

**4.3 Dedications.** Poseidon acknowledges that one of the Development Approvals other than this Agreement shall require Cabrillo, at the commencement of construction, to dedicate real property as described in Exhibit 5 of the Precise Development Plan (PDP 00-02).

## **5 FINANCING OF APPURTENANT FACILITIES; OTHER PUBLIC FINANCING; USE OF PUBLIC RIGHTS OF WAY.**

5.1 Appurtenant Facilities. The City will use commercially reasonable efforts to cooperate with Poseidon in obtaining subsidies, grants or external funding, including without limitation funds available under Proposition 50, to pay for the construction of Appurtenant Facilities required as part of the Development Plan. The City also agrees that, to the extent any such subsidies, grants or external funding is available to finance such Appurtenant Facilities, the City may join with Poseidon in applying therefor. Notwithstanding the foregoing, the parties acknowledge and agree that nothing contained in this Agreement shall be construed as requiring the City or the City Council of the City to join with Poseidon to apply for such subsidies, grants or external funding.

5.2 Other Public Financing. The City shall have no obligation to use public financing of any kind, including, without limitation, a community facilities district, an assessment district or other land-secured financing, for financing the construction, maintenance or operation of public infrastructure or other improvements, including without limitation roads or pipelines.

5.3 Use of Public Rights of Way. The City shall provide without charge, and shall cause any governmental agency under its control to provide without charge, Poseidon access to any public rights of way required for the construction or installation of the Appurtenant Facilities to deliver Product Water to the District from the Project. The City's obligations under this Section 5.3 shall apply only to public rights of way already in existence or planned as of the Effective Date as described in Exhibit 3.5 of the final Project EIR and shall not apply to any rights of way on, in, under, about or in any way relating to that certain real property commonly known as the Carlsbad Municipal Golf Course, located in the area bounded by Faraday Avenue and Cannon Road on the North, Palomar Airport on the East, Palomar Airport Road on the South, and Hidden Valley Road on the West. Nothing set forth in this Section 5.3 shall require the City to provide without charge, or to cause any governmental agency under its control to provide without charge, access to any required public rights of way for the Appurtenant Facilities to deliver Product Water from the Project to any purchaser of Product Water other than the District. Further, nothing set forth in this Section 5.3 shall permit Poseidon access to public rights of way without first obtaining all necessary permits for work and otherwise in accordance with the Development Plan.

## **6 ANNUAL REVIEW.**

6.1 Periodic Review. The City's Planning Director shall review the extent of good faith substantial compliance by Poseidon with the terms of this Agreement annually, on or before each anniversary of the Effective Date. Subject to the notice and cure procedure set forth in Section 8.6, such a periodic review may result in termination of this Agreement, provided a Default has been established under the terms of this Agreement. Pursuant to Government Code Section 65865.1, as amended, Poseidon shall have the duty to demonstrate its good faith compliance with the terms of this Agreement at such review. The parties recognize that this Agreement and the documents incorporated herein could be deemed to contain many requirements and that evidence of each and every requirement would be a wasteful exercise of the parties' resources. Accordingly, Poseidon shall be deemed to have satisfied its duty of demonstration if it presents substantial evidence to the City of its good faith and substantial compliance with the provisions of this Agreement, including any information concerning the numbers, types, densities, heights and sizes of structures completed and of any reservations and dedications to the City. Any party may address any

requirement of this Agreement during the review. However, ten (10) days' written notice of any requirement to be addressed shall be made by the requesting party. If at the time of review an issue not previously identified in writing is required to be addressed, the review at the request of either party shall be continued to afford sufficient time for analysis and preparation. Poseidon shall pay the City's reasonable costs incurred in conducting annual review in accordance with this Agreement.

6.2 Opportunity to be Heard. Upon written request to the City by Poseidon, Poseidon shall be permitted an opportunity to be heard orally and/or in writing at a noticed public hearing regarding its performance under this Agreement. Poseidon shall be heard before the City Council at any required public hearing concerning a review of action on the Agreement.

6.3 Information to be Provided Poseidon. The City shall deposit in the mail to Poseidon a copy of staff reports and related exhibits concerning contract performance a minimum of ten (10) calendar days prior to any such review or action upon this Agreement by the City Council.

## **7 INCORPORATION AND ANNEXATION.**

7.1 Intent. If all or any portion of the Property subject to the Leasehold is annexed to or otherwise becomes a part of another city or another county, the parties intend that this Agreement shall survive and be binding upon such other jurisdiction.

7.2 Incorporation. If at any time during the term of this Agreement, another city is incorporated comprising all or any portion of the Property subject to the Leasehold, the validity and effect of this Agreement shall be governed by Section 65865.3 of the Code.

7.3 Annexation. Poseidon and the City shall oppose, in accordance with the procedures provided by law, the annexation to any other city of all or any portion of the Property subject to the Leasehold unless both Poseidon and the City give written consent to such annexation.

## **8 DEFAULT AND REMEDIES.**

8.1 Remedies in General. The parties would not have entered into this Agreement without the limits on damages set forth herein. Accordingly, the parties agree that each of the parties hereto may pursue any remedy at law or equity available for breach of any provision of this Agreement, subject to the following:

(a) The City and all persons acting on behalf of the City shall not be liable in damages to Poseidon, or to any successor in interest, or to any other person. Poseidon covenants not to sue for monetary damages or claim any monetary damages:

(i) for any breach of this Agreement or for any cause of action which arises out of this Agreement; or

(ii) for taking, impairment or restriction of any property right or interest as the result of or arising under or pursuant to this Agreement, but excluding claims based upon applicable obligations of the City acting in its governmental capacity and not as a party to this Agreement, and reserving the reserved rights and remedies described in Sections 8.5 and 8.8; or



(iii) arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement.

(b) Poseidon shall not be liable in monetary damages to City, or to any person acting on behalf of City, and City covenants not to sue for damages or claim any monetary damages:

(i) for failure to construct and operate the Project or any breach of this Agreement or for any cause of action which arises out of this Agreement; or

(ii) arising out of or connected with any dispute, controversy or issue regarding the application or interpretation or effect of the provisions of this Agreement;

(iii) provided, however, that City reserves the right to sue for any sums, including without limitation any sums due pursuant to Section 4 of this Agreement, that are specifically required to be paid by Poseidon or its successors pursuant to this Agreement, and provided further, however, the City also reserves the rights and remedies described in Section 8.8:

Nothing in this Section 8.1 shall be construed to limit or otherwise effect the remedies available to Poseidon and the District under the Water Purchase Agreement.

**8.2 Termination by City.** The City may terminate this Agreement upon a termination of the Water Purchase Agreement by the District pursuant to Section 2.3.4 thereof.

**8.3 Liquidated Damages for Poseidon's Failure to Amend This Agreement Upon Relocation of Plant Facilities.** Provided the Desalination Project has commenced Commercial Operation (as that term is defined in the Water Purchase Agreement), if all of or a material portion of the Plant Facilities are relocated to real property that is not encumbered by this Agreement, then Poseidon agrees to amend this Agreement in all respects necessary to provide for this Agreement to encumber the real property to which the Plant Facilities are so relocated. If Poseidon fails to do so and fails to pay the mitigation fees payable pursuant to Section 4.2.1 of this Agreement, Poseidon shall be in Default of this Agreement, and shall pay liquidated damages to the City in the initial amount of Fifteen Million Dollars (\$15,000,000.00), to compensate the City for a portion of the mitigation fees that would be payable pursuant to Section 4 of this Agreement. Such amount of liquidated damages shall be reduced by One Million Dollars (\$1,000,000) for each year that Poseidon pays the property taxes or mitigation fee pursuant to Section 4.2.1 of this Agreement. By signing or initialing in the space provided below, Poseidon and the City acknowledge and agree that it would be impractical and extremely difficult for the City to estimate its costs and losses as the result of the failure to pay such mitigation fees, and that under the circumstances as they exist as of the date of execution of this Agreement, the sum of the liquidated damages set forth above is a reasonable estimate of costs that the City would incur in the event of such failure.

\_\_\_\_\_  
Initials of Authorized  
Signatory on Poseidon's  
Behalf

\_\_\_\_\_  
Initials of Authorized  
Signatory on City's  
Behalf

**8.4 Specific Performance.** The parties acknowledge that, except as provided in Sections 8.1(b)(iii) above and 8.8 below, money damages and remedies at law generally are inadequate and that specific performance and other non-monetary relief are the exclusive remedies for the enforcement of this Agreement and should be available to all parties for the following reasons:

(i) Money damages are unavailable against City, or against Poseidon except as provided herein;

(ii) Due to the size, nature and scope of the Project, it will not be practical or possible to restore the portion of the Property subject to the Leasehold to its preexisting condition once implementation of this Agreement has begun. After such implementation Poseidon may be foreclosed from other choices it may have had to utilize the portion of the Property subject to the Leasehold and provide for other benefits. Poseidon has invested significant time and resources and performed extensive planning and processing of the Project in agreeing to the terms of this Agreement, and will be investing even more significant time and resources in implementing the Project in reliance upon these terms, and it will not be possible to determine the sum of money that would adequately compensate Poseidon for such efforts. By the same token, City will have invested substantial time and resources and will have permitted irremediable changes to the land and increased demands on the surrounding infrastructure and will have committed, and will continue to commit, to development in reliance upon the terms of this Agreement, and it would not be possible to determine a sum of money which would adequately compensate City for such undertakings. For this reason, the parties hereto agree that, except as otherwise provided in this Agreement, if any party fails to carry out its obligations under this Agreement, an injured party shall be entitled to non-damages remedies, including the remedy of specific performance of this Agreement.

**8.5 Release and Reservation.** Except for non-damage remedies, including the remedy of specific performance and judicial review as provided for in Section 8.4, Poseidon, for itself, its successors and assignees, hereby releases the City, its officers, agents and employees from any and all claims, demands, actions, or suits of any kind or nature arising out of any liability, known or unknown, present or future, including, but not limited to, any claim or liability, based or asserted, pursuant to Article I, Section 19 of the California Constitution, the Fifth Amendment of the United States Constitution, or any other law or ordinance which seeks to impose any other liability or damage, whatsoever, upon the City because it entered into this Agreement or because of the terms of this Agreement; provided, however, that Poseidon reserves all of its otherwise applicable rights and remedies in the event of an actual condemnation, inverse condemnation or inappropriate taking, restriction or regulation by the City, which are rights and remedies Poseidon otherwise has as a property owner.

**8.6 Termination Agreement for Default of Poseidon.** The City may terminate this Agreement for any Default by Poseidon; provided, however, the City may terminate this Agreement pursuant to this Section only after providing written notice to Poseidon

of Default setting forth the nature of the Default and the actions, if any, required by Poseidon to cure such Default and, where the Default can be cured, Poseidon has failed to take such actions and cure such Default within sixty (60) days after Poseidon's receipt of such notice or, in the event that such Default cannot be cured within such sixty (60) day period but can be cured within a longer time, Poseidon has failed to commence the actions necessary to cure such Default within such sixty (60) day period and to diligently proceed to complete such actions and cure such Default.

8.7 Termination of Agreement for Default of the City. Poseidon may terminate this Agreement for any Default by the City only after providing written notice to the City of Default setting forth the nature of the Default and the actions, if any, required by the City to cure such Default and, where the Default can be cured, the City has failed to take such actions and cure such Default within sixty (60) days after the City's receipt of such notice or, in the event that such Default cannot be cured within such sixty (60) day period but can be cured within a longer time, the City has failed to commence the actions necessary to cure such Default within such sixty (60) day period and to diligently proceed to complete such actions and cure such Default.

8.8 Rights, Remedies for Negligence, Willful Misconduct. Nothing in this Agreement shall be deemed to waive or limit any rights and remedies that the parties otherwise would have against the other in the absence of this Agreement with respect to injury caused by the negligence or willful misconduct of a party.

## **9 THIRD PARTY LITIGATION; INDEMNIFICATION.**

9.1 General Plan Litigation. The City has determined that this Agreement is consistent with its General Plan and the Precise Development Plan, and that the General Plan and the Precise Development Plan meet all requirements of law. Poseidon has reviewed the General Plan and the Precise Development Plan and concurs with the City's determination. The parties acknowledge that:

(a) In the future there may be litigation challenging the legality, validity and adequacy of certain provisions of the General Plan or Precise Development Plan or other, similar challenges; and,

(b) If successful, such challenges could delay or prevent the performance of this Agreement and the development of the Project.

The City shall have no liability in damages under this Agreement for any failure of the City to perform under this Agreement or the inability of Poseidon to develop the Project as contemplated by the Development Plan of this Agreement as the result of a judicial determination that on the Agreement Date, or at any time thereafter, the General Plan or the Precise Development Plan, or portions thereof, are invalid or inadequate or not in compliance with law.

9.2 Third Party Litigation Concerning Agreement. In the event of any legal action instituted by a third party (not a party to this Agreement) or any governmental entity or official (other than the City or an official of the City), challenging the validity of any provision of this Agreement or the other Development Approvals or any City action relating thereto, the parties hereby agree to cooperate in defending said action; provided, however Poseidon shall indemnify and hold harmless City from all litigation expenses, including reasonable attorneys' fees and costs, arising out of any legal action instituted by such third party (not a party to this Agreement), or other governmental

entity or official (other than City or an official of the City) challenging the validity of any provision of this Agreement, or the other Development Approvals or any City action relating thereto. City shall promptly notify Poseidon of any such action and City shall cooperate in the defense thereof.

**9.3 Breaches of Agreement; Property Damage, Bodily Injury or Death.** In addition to the provisions of Section 9.2 above, Poseidon shall save, indemnify, hold harmless and defend, at its expense, including attorneys' fees, the City, its officers, agents, employees and independent contractors (the "City Indemnitees") from and against any and all loss, costs, fees, expenses or liability whatsoever, arising out of or based upon any breach or alleged breach of this Agreement by Poseidon. Poseidon shall not, however, be required to indemnify the City Indemnitees with respect to any loss, costs, fees, expenses or liability arising through the gross negligence or willful misconduct of the City.

**9.4 Indemnification Procedure.** In any situation in which Poseidon is required to indemnify the City pursuant to this Agreement, as a condition thereto the City shall give Poseidon reasonably prompt notice of any matter for which indemnification is sought hereunder. The City shall cooperate in the defense of such claim (and pending assumption of defense, the City, in its good faith judgment, may take such steps to defend itself against such claim as it deems appropriate to protect its interests). Poseidon shall pay the City's reasonable out-of-pocket expenses incurred in connection with such cooperation and such steps taken to defend itself pending Poseidon's assumption of defense. Poseidon shall keep the City reasonably informed as to the status of the defense of such claim. After notice from Poseidon to the City of the assumption, and the defense of a claim, Poseidon shall not be liable to the City for any legal or other expenses subsequently incurred by the City in connection with the defense thereof other than those expenses referred to above. Poseidon, at its own expense and through counsel chosen by it (which counsel shall be reasonably acceptable to the City), shall defend any such claim; provided, however, that if, in the City's reasonable judgment at any time, either a conflict of interest arises between Poseidon and the City or if there are defenses which are different from or in addition to those available to Poseidon and/or the City and the representation of both parties by the same counsel would be inappropriate, then in each such case the City shall have the right to employ a separate law firm in each applicable jurisdiction (if necessary) ("Separate Counsel"), to represent the City in any action or group of related actions (which firm or firms shall be reasonably acceptable to Poseidon), and in that event: (a) the reasonable fees and expenses of such Separate Counsel shall be paid by Poseidon (it being understood, however, that Poseidon shall not be liable for the expenses of more than one Separate Counsel with respect to any claim (even if against multiple indemnified Parties)); and (b) Poseidon shall have the right to conduct its own defense in respect of such claim. If Poseidon does not defend against a claim, the City may defend, compromise and settle such claim and shall be entitled to indemnification hereunder (to the extent permitted by this Agreement). Notwithstanding the foregoing, Poseidon shall not, without the City's prior written consent (which shall not be unreasonably withheld, conditioned or delayed), settle or compromise any claim or consent to the entry of any judgment unless: (x) there is no finding or admission of any violation of law or any violation of the rights of any person and no effect on any other claims that may be made against the City; and (y) the sole relief provided is monetary damages that are paid in full by Poseidon.

**9.5 Survival.** The provisions of this Sections 9.1 through 9.4, inclusive, shall survive the termination of this Agreement.

## **10 MORTGAGEE PROTECTION.**

The parties hereto agree that this Agreement shall not prevent or limit Poseidon, in any manner, at Poseidon's sole discretion, from encumbering the Project or any portion thereof or any improvement thereon by any mortgage, deed of trust or other security device securing financing with respect to the Project. The City acknowledges that the lenders providing such financing may require certain Agreement interpretations and modifications and agrees upon request, from time to time, to meet with Poseidon and representatives of such lenders to negotiate in good faith any such request for interpretation or modification. The City will not unreasonably withhold its consent to any such requested interpretation or modification provided such interpretation or modification is consistent with the intent and purposes of this Agreement. Any Mortgagee of the Project shall be entitled to the following rights and privileges:

(a) Neither entering into this Agreement nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any mortgage on the Project made in good faith and for value, unless otherwise required by law.

(b) Any Mortgagee of any mortgage or deed of trust encumbering the Project, or any part thereof, which has submitted a request in writing to the City in the manner specified herein for giving notices, shall be entitled to receive written notification from the City of any Default by Poseidon in the performance of Poseidon's obligations under this Agreement concurrently with the receipt of any such notice by Poseidon.

(c) The Mortgagee shall have the right, but not the obligation, to cure a Default during the remaining cure period allowed Poseidon under this Agreement.

(d) Subject to compliance with the provisions of Section 2.4.1(b) of this Agreement, any Mortgagee who comes into possession of the Project, or any part thereof, pursuant to foreclosure of the mortgage or deed of trust, or deed in lieu of such foreclosure, shall take the Project, or part thereof, subject to the terms of this Agreement.

## **11 MISCELLANEOUS PROVISIONS.**

11.1 Recordation of Agreement. As more particularly set forth below in Section 11.27, this Agreement and any amendment or cancellation thereof shall be recorded against the real property included in the Specific Plan Amendment area by the Clerk of the City Council filing a copy of this Agreement or any such amendment with the San Diego County Recorder within the period required by Section 65868.5 of the Code.

11.2 Further Actions. Each of the parties shall cooperate with and provide reasonable assistance to the other to the extent contemplated hereunder in the performance of all obligations under this Agreement and the satisfaction of the conditions of this Agreement. At any time and from time to time after the date hereof, each Party agrees to take such actions and to execute and deliver such documents as each other Party may reasonably request to effectuate the purposes of this Agreement.

11.3 Amendment. Except as otherwise provided in this Agreement, neither this

Agreement nor any provision hereof may be waived, modified, amended, discharged, or terminated except by an instrument in writing signed by the party against which the enforcement of such waiver, modification, amendment, discharge or termination is sought, and then only to the extent set forth in such writing.

11.4 Entire Agreement. This Agreement and the Water Purchase Agreement constitute the entire understanding among the parties with respect to the matters set forth herein, and supersede all prior or contemporaneous understandings or agreements among the parties with respect to the subject matter hereof, whether oral or written.

11.5 Notices. As used in this Agreement, "notice" includes, but is not limited to, the communication of notice, request, demand, approval, statement, report, acceptance, consent, waiver, appointment or other communication required or permitted hereunder. Any notice, approval, consent, waiver or other communication required or permitted to be given or to be served upon any party in connection with this Agreement shall be in writing. Such notice shall be personally served, sent by facsimile, sent prepaid by registered or certified mail with return receipt requested, or sent by reputable overnight delivery service, such as Federal Express, and shall be deemed given: (a) if personally served, when delivered to the party to whom such notice is addressed; (b) if given by facsimile, when sent, provided that the confirmation sheet from the sending fax machine confirms that the total number of pages were successfully transmitted; (c) if given by prepaid or certified mail with return receipt requested, on the date of execution of the return receipt; or (d) if sent by reputable overnight delivery service, such as Federal Express, when received. Such notices shall be addressed to the party to whom such notice is to be given at the address below specified. Either party may, by notice given at any time and sent in accordance with this Section, require subsequent notices to be given to another person or entity, whether a party or an officer or representative of a party, or to a different address, or both. Notices given before actual receipt of notice of change shall not be invalidated by the change.

If to CITY, to:

City of Carlsbad  
1200 Carlsbad Village Drive  
Carlsbad, CA 92008  
Attn: City Manager  
Fax No. (760) 729-9461

If to Poseidon, to:

Poseidon Resources (Channelside) LLC  
501 West Broadway, Suite 840  
San Diego, CA. 92101  
Attn: President  
Fax No. (619) 595-7892

11.6 Controlling Law. This Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of California, without giving effect to any choice-of-law or conflicts-of-laws rule or principle that would result in the application of any other laws.

11.7 Headings. Headings, titles and captions are for convenience only and shall not constitute a portion of this Agreement or be used for the interpretation thereof.

11.8 Cumulative Rights; Waiver. The rights created under this Agreement, or

by law or equity, shall be cumulative and may be exercised at any time and from time to time. No failure by any party to exercise, and no delay or omission by any party in exercising any rights, shall be construed or deemed to be a waiver thereof, nor shall any single or partial exercise by any party preclude any other or future exercise thereof or the exercise of any other right. Any waiver of any provision or of any breach of any provision of this Agreement must be in writing, and any waiver by any party of any breach of any provision of this Agreement shall not operate as or be construed to be a waiver of any other breach of that provision or of any breach of any other provision of this Agreement. The failure of any party to insist upon strict adherence to any term of this Agreement on one or more occasions shall not be considered or construed or deemed a waiver of any provision or any breach of any provision of this Agreement or deprive that party of the right thereafter to insist upon strict adherence to that term or provision or any other term or provision of this Agreement.

**11.9 Liberal Construction.** This Agreement constitutes a fully-negotiated agreement among commercially sophisticated parties, each assisted by legal counsel, and the terms of this Agreement shall not be construed or interpreted for or against any party hereto because that party or its legal representative drafted or prepared such provision.

**11.10 Severability.** If any provision of this Agreement shall be ruled invalid, illegal or unenforceable, then the parties shall: (a) promptly negotiate a substitute for such provision which shall, to the greatest extent legally permissible, therein effect the intent of the parties in such invalid, illegal or unenforceable provision; and (b) negotiate such changes in, substitutions for or additions to the remaining provisions of this Agreement as may be necessary in addition to and in conjunction with clause (a) above to give effect to the intent of the parties without the invalid, illegal or unenforceable provision. To the extent that the parties are able to negotiate such changes, substitutions or additions as set forth in the preceding sentence, and the intent of the parties with respect to the essential terms of the Agreement may be carried out without the invalid, illegal or unenforceable provision, then the balance of this Agreement shall not be affected, and this Agreement shall be construed and enforced as if such invalid, illegal or unenforceable provision did not exist.

**11.11 Good Faith and Fair Dealing.** The parties hereto acknowledge and agree that the performances required by the provisions of this Agreement shall be undertaken in good faith, and with all parties dealing fairly with one another.

**11.12 No Third Party Beneficiaries.** Except as provided in this Section 11.12, this Agreement does not create, and shall not be construed to create, any rights enforceable by any person, partnership, corporation, joint venture, limited liability company or other form of organization or association of any kind that is not a party to this Agreement. Notwithstanding the foregoing, the RDA and the District are intended beneficiaries of this Agreement, with the right to enforce this Agreement in accordance with its terms.

**11.13 Execution in Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon, provided such signature page is attached to any other counterpart identical thereto except for having an additional signature page executed by the other party.

**11.14 Time of the Essence.** Time is of the essence of each and every provision

of this Agreement. Unless business days are expressly provided for, all references to "days" herein shall refer to consecutive calendar days. If any date or time period provided for in this Agreement is or ends on a Saturday, Sunday or federal, state or legal holiday, then such date shall automatically be extended to the next day which is not a Saturday, Sunday or federal, state or legal holiday.

11.15 Number, Gender. Where a word or phrase is defined in this Agreement, its other grammatical forms have a corresponding meaning. As used herein, and as the circumstances require, the plural term shall include the singular, the singular shall include the plural, the neuter term shall include the masculine and feminine genders, the masculine term shall include the neuter and the feminine genders, and the feminine term shall include the neuter and the masculine genders.

11.16 Relationship. Nothing in this Agreement shall be deemed to constitute either party a partner, agent or legal representative of the other party, neither party is acting as the agent of the other in any respect hereunder, each party is an independent contracting entity with respect to the terms, covenants and conditions contained in this Agreement, and no partnership, joint venture or other association of any kind is formed by this Agreement. No liability or benefits, such as workers' compensation, pension rights or liabilities, other provisions or liabilities arising out of or related to a contract for hire or employer/employee relationship, shall arise or accrue to any party's agent or employee as a result of this Agreement or its performance.

11.17 Joint and Several Obligations. If at any time during the term of this Agreement the Project is owned, in whole or in part, by more than one owner, all obligations of such owners under this Agreement shall be joint and several, and the Default of any such owner shall be the Default of all such owners.

11.18 Force Majeure. Neither party shall be deemed to be in Default where failure or delay in performance of any of its obligations under this Agreement is caused an event of Force Majeure. "Force Majeure" as used herein shall have the meaning more particularly set forth in Section 17 of the Water Purchase Agreement.

11.19 Mutual Covenants. The covenants contained herein are mutual covenants and also constitute conditions to the concurrent or subsequent performance by the party benefited thereby of the covenants to be performed hereunder by such benefited party.

11.20 Successors in Interest. The burdens of this Agreement shall be binding upon all successors in interest to the parties to this Agreement. Subject to Section 2.4 of this Agreement, the benefits of this Agreement shall inure to the successors in interest to the parties to this Agreement. Subject to the receipt of any consent of Cabrillo required under the Lease, all provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the Leasehold. Subject to the receipt of any consent of Cabrillo required under the Lease, each covenant to do or refrain from doing some act hereunder with regard to development of the Project and the Leasehold : (a) is for the benefit of and is a burden upon every portion of the Project and the Property subject to the Leasehold; (b) runs with the Project and the portion of the Property subject to the Leasehold and each portion thereof; and, (c) is binding upon each party and each successor in interest during ownership of the Project or the Leasehold or any portion thereof.

11.21 Jurisdiction and Venue. Any action at law or in equity arising under this Agreement or brought by a party hereto for the purpose of enforcing, construing or determining the validity of any provision of this Agreement shall be filed and tried in the



Superior Court of the County of San Diego, State of California, and the parties hereto waive all provisions of law providing for the filing, removal or change of venue to any other court.

11.22 Project as a Private Undertaking. The parties specifically understand and agree that the development of the Project is a private development. The only relationship between the City and Poseidon is that of a government entity regulating the development of a private Project and the lessee, grantee and developer of such Project.

11.23 Eminent Domain. No provision of this Agreement shall be construed to limit, restrict or require the exercise by the City of its power of eminent domain.

11.24 Agent for Service of Process. Poseidon shall designate and maintain Corporation Service Company (or a similar national company) as its agent for the purpose of service of process in any court action arising out of or based upon this Agreement, and the delivery to such agent of a copy of any process in any such action shall constitute valid service upon Poseidon. If for any reason service of such process upon such agent is not feasible, then in such event Poseidon may be personally served with such process out of this County and such service shall constitute valid service upon Poseidon.

11.25 Authority to Execute. Each party warrants and represents that this Agreement has been duly authorized by such party. Each party shall deliver to the other party copies of such resolutions, certificates or written assurances evidencing authorization to execute, deliver and perform this Agreement.

11.26 Commission Approval Required. This Agreement shall not become effective unless and until it is approved by the Commission, as required by Code Section 65869.

11.27 Approval Procedure. The following procedure shall govern approval of this Agreement:

(a) Prior to City Council consideration of this Agreement, Poseidon shall execute this Agreement; provided, however, that Poseidon shall have the right prior to the Agreement Date of this Agreement to withdraw its execution based upon the terms and conditions contained in the Development Approvals, in which case this Agreement shall be of no force or effect.

(b) City Council shall undertake all necessary proceedings to consider this Agreement. Approval by the City shall be by adoption of the Approval Ordinance.

(c) Following adoption of the Approval Ordinance, the Mayor shall execute this Agreement on behalf of the City, and take such steps as may be required to obtain Commission approval as described above in Section 11.26.

(d) This Agreement shall be effective on the Effective Date. As provided in Code Section 65868.5, the City shall cause a copy of this Agreement to be recorded against the real property included in the Specific Plan Amendment area by the Clerk of the City Council filing a copy of this Agreement with the San Diego County Recorder within ten (10) days following the Effective Date. Poseidon shall pay any recording costs.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the day and year below set forth.

Dated: \_\_\_\_\_, 2006

"CITY"

CITY OF CARLSBAD

By: \_\_\_\_\_

Name:

Title:

ATTEST:

By: \_\_\_\_\_

City Clerk  
(SEAL)

Dated: \_\_\_\_\_, 2006

"POSEIDON"

Poseidon (Channelside) LLC, a  
Delaware limited liability company

By: \_\_\_\_\_

Name:

Title:

STATE OF CALIFORNIA }

} ss

COUNTY OF SAN DIEGO }

On \_\_\_\_\_, before me,

\_\_\_\_\_, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

\_\_\_\_\_  
Signature

STATE OF CALIFORNIA }

} ss

COUNTY OF SAN DIEGO }

On \_\_\_\_\_, before me,

\_\_\_\_\_, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

\_\_\_\_\_  
Signature

**Exhibit "A"**  
**CONSENT OF PROPERTY OWNER**

Cabrillo Power I, LLC, a Delaware limited liability company ("Cabrillo"), is the owner of the Property that is the subject of the Precise Development Plan No. \_\_\_\_\_ (Planning Application No. \_\_\_\_\_). Poseidon Resources (Channelside) LLC, a Delaware limited liability company ("Poseidon"), currently is the lessee of the Property under the terms and conditions of that certain Ground Lease and Easement Agreement, dated July 11, 2003, by and between Cabrillo and Poseidon. Cabrillo hereby consents to the entering into of that certain Development Agreement between the City of Carlsbad and Poseidon, to which this Consent is attached and which affects the Property.

Dated: "Cabrillo"

CABRILLO POWER I, LLC, a Delaware limited liability company

By: \_\_\_\_\_  
Name:  
Title:

STATE OF CALIFORNIA    }  
  } ss  
COUNTY OF SAN DIEGO   }

On \_\_\_\_\_, before me, \_\_\_\_\_, personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

Witness my hand and official seal.

\_\_\_\_\_  
Signature

**EXHIBIT "B"**

**(Legal Description of the Property)**

**EXHIBIT "C"**

**(Map of the Property)**

## **EXHIBIT "D"**

### **(Existing Development Approvals)**

- (a) Final EIR 03-05; Findings of Fact; Statement of Overriding Considerations; and Mitigation Monitoring and Reporting Program
- (b) Precise Development Plan (PDP 00-02);
- (c) Specific Plan 144(H)
- (d) Coastal Development Permit CDP 04-41;
- (e) South Carlsbad Coastal Redevelopment Permit RP 05-12;
- (f) Habitat Management Plan Permit HMPP 05-08;
- (g) This Agreement DA 05-01; and
- (h) Special Use Permit SUP 05-04.

The development approvals listed above include the approved maps and all conditions of approval.

COPIES OF THE EXISTING DEVELOPMENT APPROVALS LISTED ABOVE ARE ON FILE IN THE CITY OF CARLSBAD CITY CLERK'S OFFICE AND THE CITY OF CARLSBAD PLANNING DEPARTMENT AND ARE INCORPORATED HEREIN BY REFERENCE.

**EXHIBIT "E"**

**(Existing Land Use Regulations)**

1. City of Carlsbad General Plan as amended through Resolution No. 8307.
2. City of Carlsbad Precise Development Plan 00-02 as amended through Ordinance No. \_\_\_\_\_.
3. South Carlsbad Coastal Redevelopment Plan.
4. Specific Plan 144(H), as amended through City of Carlsbad Ordinance No. \_\_\_\_\_.

COPIES OF THE EXISTING LAND USE REGULATIONS LISTED ABOVE ARE ON FILE IN THE CITY OF CARLSBAD CITY CLERK'S OFFICE AND THE CITY OF CARLSBAD PLANNING DEPARTMENT AND ARE INCORPORATED HEREIN BY REFERENCE.