

AN ORDINANCE 2008-08-21-0728

APPROVING THE TERMS AND CONDITIONS OF A MEMORANDUM OF UNDERSTANDING WITH HOTEL INVESTMENTS, L.P., FAULKNERUSA, L.P., AND TX RIVERWALK RESIDENCES RELATED TO THE GRAND HYATT SAN ANTONIO CONVENTION CENTER HOTEL AND THE ALTEZA CONDOMINIUMS

* * * * *

WHEREAS, the Grand Hyatt San Antonio Convention Center Hotel is a \$236M, 1,003 room headquarters hotel adjacent to the Henry B. Gonzalez Convention Center and built on City-owned property pursuant to a 75 year lease with the developer/owner Hotel Investments, Ltd. and is privately-owned hotel by Hotel Investments, Ltd. and operated by Hyatt Corporation; and

WHEREAS, Hotel Investments consists of Marathon Investments, as the General Partner, and FaulknerUSA, who is also the design/builder responsible for constructing the Hotel under a Guaranteed Maximum Price Contract whereby cost overruns are the Firm's responsibility; and

WHEREAS, Texas Riverwalk Residences is the developer/owner of the 144 condominiums built above the Grand Hyatt and consists of FaulknerUSA, as the General Partner and Marathon Investments, which project FaulknerUSA is also constructing; and

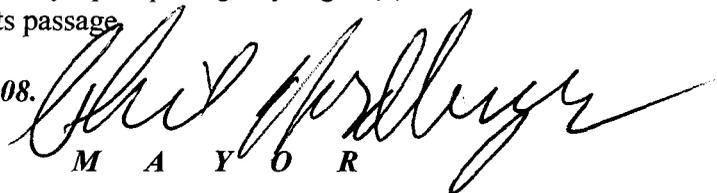
WHEREAS, the City has reached an agreement with the Hotel and Condominium Developers by which the Hotel Developer will assist in the close out of both the Hotel and the Condominiums, which City Council desires to approve: **NOW THEREFORE:**

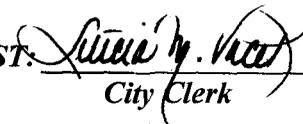
BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF SAN ANTONIO:

SECTION 1. City Council hereby approves the terms and condition of a Memorandum of Understanding with Hotel Investments, L.P., FaulknerUSA, L.P., and TX Riverwalk Residences related to the Grand Hyatt San Antonio Convention Center Hotel and the Alteza Condominiums. The City Manager or her designee is authorized to execute this Memorandum of Understanding upon the recommendation of the City Attorney.

SECTION 2. This Ordinance shall take effect immediately upon passage by eight (8) affirmative votes; otherwise it shall be effective ten (10) days after its passage.

PASSED AND APPROVED this 21st day of August, 2008.


M A Y O R

ATTEST: 
City Clerk

APPROVED AS TO FORM: 
for City Attorney

BINDING MEMORANDUM OF UNDERSTANDING

This Binding Memorandum of Understanding (this "Agreement") is dated as of August 21, 2008 (the "Execution Date"), but shall be effective for all purposes as of the 31st day of July, 2008 (the "Effective Date") and is made and entered into by and among The City of San Antonio, Texas, a municipal corporation and home-rule city of the State of Texas (the "City"), Hotel Investments, L.P., a Delaware limited partnership (the "Hotel Developer"), FaulknerUSA, L.P., a Texas limited partnership (the "Design-Builder") and TX Riverwalk Residences, L.P., a Texas limited partnership (the "Upper Unit Developer"). Capitalized terms used herein but not defined in this Agreement shall have the meaning given to such terms in the Hotel Project Agreement (as defined below). The City, the Hotel Developer, the Design Builder and the Upper Unit Developer are each referred to herein individually as a "Party" and collectively as the "Parties".

WITNESSETH:

WHEREAS, the City and the Hotel Developer are the parties to that certain Amended and Restated Hotel Project Agreement dated November 21, 2006 and effective as of June 8, 2005 (the "Hotel Project Agreement"), pursuant to which, among other things, the Hotel Developer undertook and agreed to design, develop and construct, upon lands leased by the City to the Hotel Developer pursuant to that certain Amended and Restated Ground Lease and License Agreement dated as of November 21, 2006 and effective as of June 8, 2005 (the "Ground Lease") by and between the City and Hotel Developer, a convention center hotel that is currently known as the Grand Hyatt San Antonio Convention Center Hotel (the "Hotel");

WHEREAS, the City and the Upper Unit Developer are the parties to that certain Upper Unit Project Agreement dated November 21, 2006 (the "Upper Unit Project Agreement"), pursuant to which, among other things, the Upper Unit Developer undertook and agreed to design, develop and construct residential condominium units in the air space located immediately above the Hotel;

WHEREAS, the Hotel Developer, as owner, and the Design/Builder, as design/builder, are the parties to that certain Design/Build Agreement dated as of June 8, 2005, as amended by Change Order to Design/Build Agreement dated as of November 21, 2006 by and between the Hotel Developer and the Design/Builder and to which the Upper Unit Developer is an additional obligee, and as further amended or modified by subsequent agreed-upon change orders (as so modified, the "Design/Build Agreement"), pursuant to which, among other things, the Hotel Developer retained the Design/Builder to design, construct and complete the Hotel and the Upper Unit Shell (the Upper Unit Shell and the Hotel and all common areas, being collectively referred to herein as the "Project") in accordance with, among other requirements, the applicable terms, conditions and provisions set forth in the Hotel Project Agreement;

Initials

SA PPF UMA

Agenda Item:	23 (in consent vote: 5, 9, 12, 13, 14, 15, 16, 17, 20, 21, 23, 25, 26, 27B)						
Date:	08/21/2008						
Time:	09:45:18 AM						
Vote Type:	Motion to Approve						
Description:	An Ordinance approving the terms and conditions of a Memorandum of Understanding with Hotel Investments, L.P., FaulknerUSA, L.P., and TX Riverwalk Residences related to the Grand Hyatt San Antonio Convention Center Hotel and the Alteza Condominiums. [Penny Postoak Ferguson, Assistant City Manager; Michael J. Sawaya, Director, Convention, Sports and Entertainment Facilities]						
Result:	Passed						
Voter	Group	Not Present	Yea	Nay	Abstain	Motion	Second
Phil Hardberger	Mayor		x				
Mary Alice P. Cisneros	District 1		x				
Sheila D. McNeil	District 2		x				
Jennifer V. Ramos	District 3		x				
Philip A. Cortez	District 4		x				
Lourdes Galvan	District 5		x				
Delicia Herrera	District 6		x				x
Justin Rodriguez	District 7		x				
Diane G. Cibrian	District 8		x				
Louis E. Rowe	District 9		x			x	
John G. Clamp	District 10		x				

WHEREAS, the parties hereto desire to mutually compromise and resolve certain issues (the "Issues") that have arisen concerning, relating to and/or arising out of the Substantial Completion of the Hotel, Substantial Completion of the Upper Unit Shell, Combined Project Substantial Completion, the date on which substantial completion of the Hotel was first achieved, the amount and timing of certain extension fees claimed by the City, and the completion of certain high priority items of punchlist work with respect to the Hotel Project Improvements Work and the Substantial Completion of the Upper Unit Shell;

NOW THEREFORE, in consideration of the mutual agreements, undertakings and commitments made under this Agreement and in further consideration of the sum of ten and 00/100 (\$10.00) paid by each Party to the other, the receipt and sufficiency of which being acknowledged and agreed to by each of the Parties, the Parties, intending to be immediately and legally bound, do hereby agree as follows:

1. PAYMENT OF AMOUNTS CLAIMED DUE UNDER THE HOTEL PROJECT AGREEMENT. The City and the Hotel Developer acknowledge and agree that, on July 31, 2008, the Hotel Developer made a payment to the Trustee of the aggregate sum (the "July 31 Payment") of \$1,595,297.55 (comprised of the sum of (x) \$1,160,216.40 with respect to all Project Completion Deadline Extension Periods between the dates of February 6, 2008 and July 15, 2008 and any related Extension Liquidated Damages which may have accrued during such period and (y) \$435,081.15 with respect to the Project Completion Deadline Extension Period from July 16, 2008 through and including July 31, 2008 and all Extension Liquidated Damages which may have accrued during such period, which July 31 Payment was calculated pursuant to and in accordance with that certain letter dated July 15, 2008 addressed by the City (Mr. Michael J. Sawaya) to Hotel Developer (Mr. Brian Ricklin). The City and the Hotel Developer acknowledge and agree that the remittance of the July 31 Payment was made in full payment of any and all amounts (including, without limitation, all Extension Liquidated Damages) which may have become due and payable to the Trustee and/or the City under the Hotel Project Agreement during, and/or with respect to, each Project Completion Deadline Extension Period from February 6, 2008 through and including July 31, 2008 and shall constitute full, complete and timely payment of all Extension Liquidated Damages and all other sums due or to become due to the Trustee and/or the City in connection with (x) all prior extensions of the Project Completion Deadline, (y) all Project Completion Deadline Extension Periods from February 6, 2008 through and including July 31, 2008 and (z) any delays in the achievement of Combined Project Substantial Completion under the Hotel Project Agreement through July 31, 2008. The Parties also acknowledge, confirm and agree that, upon the City's receipt of the July 31 Payment, all of the conditions precedent to the effectiveness of each prior Project Completion Deadline Extension Period shall be deemed to have been satisfied for such prior Project Completion Deadline Extension Periods with the result that the Project Completion Deadline has been effectively adjourned to July 31, 2008.

2. EXTENSION OF PROJECT COMPLETION DEADLINE; COMMENCEMENT OF OPERATING TERM; DEVELOPER REMEDIAL PLAN. The City, the Hotel Developer and the Upper Unit Developer do hereby acknowledge and agree that (i) the Project Completion Deadline under each of the Hotel Project Agreement and the Upper Unit Project Agreement is hereby duly extended to the Priority Work Completion Deadline (as defined below), (ii) the Operating Term (as such term is defined in the Ground Lease) shall be deemed to have commenced and, without limiting or otherwise affecting any rights, remedies of the City under any other provisions of the Ground Lease, that the Ground Lease has not been terminated, and is no longer subject to being terminated, pursuant to the terms of Section 3.1.1 of the Ground Lease and (iii) the execution and delivery to the City of this Agreement shall be deemed, for purposes of extending the Project Completion Deadline to the Priority Work Completion Deadline, to constitute timely delivery of the Remedial Plan required under Section 9.2.5 of the Project Agreement.
3. DATE OF SUBSTANTIAL COMPLETION OF THE HOTEL. The Parties acknowledge, confirm and agree that, for all purposes under the Hotel Project Agreement and the other Project Documents, Substantial Completion of the Hotel shall be deemed to have occurred, and all Hotel Unit Substantial Completion Requirements shall be deemed to have been satisfied, on July 31, 2008 (the "Hotel Substantial Completion Date").
4. COMBINED PROJECT SUBSTANTIAL COMPLETION; FORBEARANCE FROM COLLECTION AND POTENTIAL ELIMINATION OF EXTENSION LIQUIDATED DAMAGES.
- (a) Anything to the contrary set forth in the Hotel Project Agreement and/or the Upper Unit Project Agreement notwithstanding, the City, the Hotel Developer, the Upper Unit Developer and the Design-Builder do hereby acknowledge and agree that, if substantial completion (i.e., completion except for minor punchlist type items, as reasonably determined by the City) of all of the work described on Schedule 1 annexed hereto and made a part hereof (the "City Priority Work") occurs on or before the later of: (x) if substantially completed by Design/Builder, on or before the date (the "Design/Builder Outside Completion Date") which is the sixtieth (60th) day after the Execution Date, provided that so long as Design/Builder has been diligently and continuously prosecuting the City Priority Work during the sixty (60) days prior to the Design/Builder Outside Completion Date (it being agreed that having a reasonable number of workers on the job site actively performing the City Priority Work during normal work hours shall constitute diligent and continuous prosecution thereof) and the City Priority Work which has not yet been completed is capable of being completed within fifteen (15) calendar days of the original Design/Builder Outside Completion Date or less, as reasonably determined by the City, then, upon Design/Builder's written request delivered to the City on or before the fifth (5th) Business Day prior to the Design/Builder Outside

Completion Date, the Design/Builder Outside Completion Date shall be extended for an additional fifteen (15) days; or (y) if Design/Builder does not achieve substantial completion of the City Priority Work on or before the Design/Builder Outside Completion Date (as the same may have been extended, as provided above) and no less than five (5) Business Days prior to the Design/Builder Outside Completion Date, Hotel Developer undertakes in writing to promptly do so and thereafter achieves substantial completion of all of the City Priority Work on or before the date (the "Outside Hotel Developer Cure Date") which is the earlier of (A) the next occurring Debt Service Payment Date (i.e., January, 2009) or (B) the date which is the forty-fifth (45th) day next following the Design/Builder Outside Completion Date (as the same may have been extended), then on or before the Outside Hotel Developer Cure Date (the Design/Builder Outside Completion Date or, if applicable, the Outside Hotel Developer Cure Date, being referred to herein as the "Priority Work Completion Deadline"), then (i) Combined Projects Substantial Completion shall be deemed to have been achieved on the date on which the City Priority Work is substantially completed in accordance with the foregoing, (ii) no Extension Liquidated Damages shall be due and payable under the Hotel Project Agreement, other than the July 31 Payment, (iii) no Upper Unit Project Daily Liquidated Damages (other than those previously drawn by City under the Standby Letter of Credit previously delivered by Upper Unit Developer to the City (the "Upper Unit Letter of Credit") as and for the Delay LD Deposit under Section 6.1 of the Upper Unit Project Agreement) shall be due and payable under the Upper Unit Project Agreement and (iv) the City's Right of Reverter (as defined in the Upper Unit Project Agreement) shall be terminated and of no further force or effect. Supplementing the foregoing, Design/Builder does hereby unconditionally and irrevocably acknowledge and agree that, in the event that Design/Builder does not substantially complete the City Priority Work on or before the Design/Builder Outside Completion Date, then Hotel Developer may, but shall not be required to, deliver the undertaking/cure notice referred to in clause (y) above and may thereafter enter the Project and undertake, or cause a third party contractor to undertake, to complete the City Priority Work (with the cooperation of Design/Builder and its Affiliates, agents or employees) and shall be entitled to be reimbursed, from time to time, for the reasonable costs incurred by Hotel Developer in connection with completing the City Priority Work from the Retainage funds then being held under the Design/Build Agreement. In the event that it becomes apparent to the Hotel Developer and the City that substantial completion of the wall to the West of the Hotel and covering the Lila Cockrell Theatre, as described in Schedule 1, will not occur on or before October 10, 2008, without regard to any extension that may be permitted hereunder, the Hotel Developer shall install or cause to be installed, at its sole cost and expense, a banner in front of such wall prior to October 12, 2008. The size, shape, quality and location of such banner

shall be reasonably approved by the City, with the understanding that (A) the purpose of such banner is to cover the ongoing construction of such wall in an aesthetically pleasing manner but still allow construction of the wall to continue and (B) the timely installation of such banner, in accordance with the above provisions, shall, for all purposes under this Agreement, constitute substantial completion of the portion of the City Priority Work described in numbered paragraph "3" of Schedule 1. Notwithstanding anything stated herein, the wall is to be finally completed within the time frames established in paragraph 13, below. The City, the Hotel Developer and the Design Builder will meet immediately upon the execution of this Agreement to discuss the schedule for the construction work at the wall, including but not limited to the dates and times during which construction at the wall will not be conducted (with the parties acknowledging that the currently anticipated dates and times during which no work on the wall may be conducted are set forth on Schedule 3).

- (b) In the event that the City Priority Work is not substantially completed on or before the Priority Work Completion Deadline or in the event that Hotel Developer, Upper Unit Developer or Design Builder fail to comply, in all material respects, with any of their obligations under Section 4(c) or Section 10 of this Agreement, then the City, acting in its sole and absolute discretion, shall have the right to deliver written notice to the Hotel Developer, the Upper Unit Developer and the Design/Builder that this Agreement is terminated (the "Termination Notice"). In the event that the City delivers the Termination Notice, this Agreement will be null and void and of no force and effect in any respect, to the same extent as if this Agreement was never entered into, except that, (a) the City, acting in its sole and absolute discretion, shall have the right to make immediate written demand upon Hotel Developer for payment to the Trustee, for deposit into the Debt Service Fund, with such payment to be made on or before the thirtieth (30th) day next following Hotel Developer's receipt of such demand (but in any event at least one Business Day prior to the January Debt Service Payment Date), of an amount equal to the lesser of (x) the Extension Liquidated Damages (calculated in accordance with Section 9.2.1 of the Hotel Project Agreement) with respect to all Project Completion Deadline Extension Periods following July 31, 2008 through and including the date of the Priority Work Completion Deadline, with Hotel Developer also remaining obligated to pay any Extension Liquidated Damages which may thereafter accrue from and after the Priority Work Completion Deadline through and including the date on which Combined Project Substantial Completion is achieved or (y) an amount equal to the difference between (A) the Debt Service due and payable in January, 2009, plus the two month reserve of One Million Seven Hundred Forty Thousand Three Hundred Twenty Four and 67/100 Dollars (\$1,740,324.67), minus (B) the funds on deposit in the Debt Service Fund as of the date such payment is due, (b) the City, acting in its sole discretion, shall have the right to make immediate written demand

upon Upper Unit Developer for payment to the City, on or before the thirtieth (30th) day next following Upper Unit Developer's receipt of such demand (but in any event at least one Business Day prior to the January Debt Service Payment Date), of Upper Unit Project Daily Liquidated Damages (net of the amount of the Delay LD Deposit (i.e., \$1,035,000)) with respect to the period from and after February 6, 2008 through and including the Priority Work Completion Deadline, with Upper Unit Developer also remaining obligated to pay any Upper Unit Project Daily Liquidated Damages which may thereafter accrue from and after the Priority Work Completion Deadline through and including the date on which Combined Project Substantial Completion is achieved and (c) Hotel Developer and Upper Unit Developer shall be required to timely and fully satisfy all Upper Unit Substantial Completion Requirements in order to achieve Combined Projects Substantial Completion in accordance with the Hotel Project Agreement and the Upper Unit Project Agreement.

- (c) The Hotel Developer agrees that if the City Priority Work is substantially completed on or before the Priority Work Completion Deadline and the City confirms that Combined Project Substantial Completion has been achieved, then, notwithstanding any contrary provisions of this Agreement (including, without limitation, the provisions of Section 4(a)), if, and to the extent, there are insufficient funds in the Debt Service Fund on the next occurring Debt Service Payment Date (i.e. January, 2009), to pay the Debt Service due on such date (such deficiency being referred to herein as the "January 2009 Debt Service Deficiency"), then Hotel Developer shall, three (3) business days prior to the Debt Service Payment Date, pay to the Trustee for deposit into the Debt Service Fund an amount equal to the January 2009 Debt Service Deficiency .
- (d) Commencing with the date that is ten (10) Business Days after the Execution Date and every tenth (10th) Business Day thereafter until the City Priority Work has been substantially completed, the Design/Builder shall prepare and deliver to each of the Hotel Developer and the City a reasonably detailed progress report in which the Design/Builder shall apprise the Hotel Developer and the City as to the general status of the City Priority Work, including, without limitation, the components thereof which have been completed and the anticipated timing for the completion of the other major components thereof.

5. ACKNOWLEDGEMENT OF SPECIFIC PUNCHLIST ITEMS. The Hotel Developer, the Upper Unit Developer and the Design/Builder acknowledge receipt of that certain list of punchlist type items dated July 31, 2008 prepared by David Kubena, on behalf of the City, and delivered to the Hotel Developer and the Design/Builder, which list identifies certain punchlist type items which the City requires to be completed on an expedited basis (a copy of such letter is annexed hereto as Exhibit A, the "City Punch Request Letter"). All of the work identified in the City Punch Request Letter shall be completed by the Hotel

Developer, the Upper Unit Developer and/or the Design/Builder, at their sole cost and expense, as soon as commercially practicable and with a priority to all other work required to cause Final Completion (as defined in the Hotel Project Agreement and the Upper Unit Project Agreement, collectively), except that greater priority will be given to the City Priority Work, but in all events the matters identified on the City Punch Request Letter (x) which comprise part of the Hotel Project Improvements, shall be fully completed on or before the 180th day after the Execution Date and (y) which comprise part of the Upper Unit Project shall be fully completed on or before the 180th day after Combined Projects Substantial Completion.

6. PAYMENT OF CITY'S EXPENSES AND COSTS. The Hotel Developer and the Upper Unit Developer acknowledge and agree that the City has incurred certain expenses in connection with the subject matter of this Agreement, including, but not limited to, consultant and legal fees, and for which the City is entitled to reimbursement pursuant to the Hotel Project Agreement and/or the Upper Unit Project Agreement (the "City Reimbursable Costs"). The Hotel Developer and the Upper Unit Developer also agree to pay the Ambac consent fees of Five thousand Dollars (\$5,000) and Ambac's reasonable attorney's fees. As of the Execution Date, the aggregate amount of the City Reimbursable Costs are \$369,053.66, which costs and expenses are more specifically described on Schedule 2 annexed hereto. On or before the third (3rd) Business Day following the Execution Date, the Hotel Developer shall pay to City, or cause the Upper Unit Developer or the Design/Builder to pay to City, by wire transfer or certified/cashier's check, the full amount of the City Reimbursable Costs as identified above and on Schedule 2. Should the City not receive payment for the City Reimbursable Costs within three (3) Business Days of the Execution Date, the City shall have the right to deliver notice to the Hotel Developer, the Upper Unit Developer and the Design/Builder that it is terminating this Agreement, in which event this Agreement shall terminate and be of no force and effect to the same extent as if it was never executed.
7. COORDINATION WITH BANK MIDWEST. Upon the request of the Upper Unit Developer, the City has previously (i) informed Bank MidWest that it has reached a tentative agreement, concerning the condition of the Upper Unit Project and the remaining items required to be completed in order to achieve Combined Projects Substantial Completion and (ii) provided a letter to Bank Midwest describing the pertinent terms and conditions of this Agreement, a copy of which is annexed hereto as Exhibit B. Promptly following the execution of this Agreement, the City shall update such letter by providing to Bank MidWest a copy of Section 4(a) of this Agreement and, upon receipt of a written request therefore from Bank MidWest, a complete copy of this Agreement.
8. COOPERATION. Each of the Parties does hereby undertake and agree to, in all reasonable respects, act reasonably, promptly and in good faith with each of the

other parties in connection with such parties endeavors to fulfill its obligations and/or conditions hereunder.

9. CONFIDENTIALITY. The Parties acknowledge and understand that the City is a public entity and is subject to open records requests. In the event that the City receives any request or is required by Governmental Rule or any applicable law (whether pursuant to an open records request, oral questions, interrogatories, requests for information or documents, subpoena, civil investigation demand or similar process) to disclose any information related to the subject matter of this Agreement, the City will notify the Hotel Developer, the Upper Unit Developer and the Design/Builder promptly after receipt of such request, and shall reasonably cooperate with the Hotel Developer, the Upper Unit Developer and the Design/Builder (at no cost or expense to the City) as necessary to provide the Hotel Developer, the Upper Unit Developer and the Design/Builder with an opportunity to seek, at its own request, an appropriate protective order. Notwithstanding the foregoing or anything herein to the contrary, nothing shall prohibit the City, the Hotel Developer, the Upper Unit Developer or the Design/Builder from providing a copy of this Agreement to the Surety (as defined below), the Bond Insurer, the Trustee or Bank MidWest.
10. MUTUAL RELEASE UPON COMBINED PROJECT SUBSTANTIAL COMPLETION. Each of Design/Builder and Upper Unit Developer (on behalf of themselves and their respective Affiliates) on the one hand and the City (on behalf of itself and its Affiliates) on the other hand hereby agree that if the City Priority Work is completed on or before the Priority Work Completion Deadline and the City thereafter acknowledges that Combined Projects Substantial Completion has been achieved, then each of Design/Builder and Upper Unit Developer (and their respective Affiliates), on the one hand, and the City (and its Affiliates), on the other hand, will execute a release of claims in favor of the other such other party pursuant to which the releasing party shall irrevocably and unconditionally waive and relinquish all claims that such party may have against the other party to the extent arising out of or relating to the Project from the beginning of time through the date on which Combined Project Substantial Completion is achieved, *provided* that the City shall be entitled to retain the Delay LD Deposit it received by drawing on the Upper Unit Letter of Credit. The foregoing notwithstanding, the City will not be required to release and/or waive indemnification claims under the Hotel Project Agreement and/or the Upper Unit Project Agreement and/or other claims to the extent such claims relate to defects, whether latent or patent, in the design, construction and/or structural integrity of the Hotel Project Improvements and/or the Upper Unit Shell constructed by Design/Builder as part of the Project. Supplementing the foregoing, the release to be provided by Design/Builder shall contain a similar release in favor of Hotel Developer, provided however that such release shall be limited to a release of claims which relate to, arise out of and/or are connected to any acts or omissions of the City and/or its Affiliates which resulted in (x) any delays in achieving Combined Project Substantial Completion and/or (y) any increase(s) in the cost of achieving Final Completion.

11. CONSENT OF SURETY AND BOND INSURER. The Parties intend to secure the cooperation, and to procure the consent, of each of (i) SAFECO Insurance Company of America and American States Insurance Company (collectively, the "Surety"), in their capacity as the sureties which have provided performance and payment bonds to the Project and (ii) if required under the Hotel Project Agreement, the Bond Insurer to the execution and performance of this Agreement. Supplementing the foregoing, Design/Builder shall cause (i) the guarantors under the Design/Build Agreement and the Upper Unit Project Agreement to deliver to the other parties to this Agreement a written acknowledgement that their respective guaranties remain enforceable and in full force and effect notwithstanding the execution of this Agreement and (ii) Safeco to deliver to the other parties to this Agreement a written acknowledgement that the payment/performance bonds issued by Safeco with respect to this Project remain enforceable and in full force and effect notwithstanding the execution of this Agreement. The City's obligations under this Section 11 shall be to reasonably cooperate, at no cost or expense to the City, with the other Parties as necessary to secure the cooperation, and to procure the consent, of the Surety, the Bond Insurer, the aforesaid guarantors and Safeco to the execution and performance of this Agreement. In the event that the Parties have not procured the aforesaid consents of each of the Surety, the Bond Insurer, the aforesaid guarantors and Safeco on or before the fifteenth (15th) day after the Execution Date, then any Party may terminate this Agreement by providing a written notice of termination to the other Parties, following which this Agreement shall terminate and be of no force and effect to the same extent as if it was never executed, unless such consents are procured and delivered to the Party delivering such termination notice on or before the tenth (10th) day after delivery of such termination notice.
12. EXCUSABLE DEVELOPER DELAY. Notwithstanding anything to the contrary set forth in the Hotel Project Agreement and/or the Upper Unit Project Agreement, but only with respect to the obligation to timely achieve substantial completion of the City Priority Work, the Priority Work Completion Deadline shall be extended by the amount of any delay actually caused by or attributable to Force Majeure, provided that the Hotel Developer and/or the Upper Unit Developer, as applicable, provides the City with reasonably prompt written notice of the occurrence of such Force Majeure together with reasonable supporting documentation evidencing that the occurrence of such Force Majeure resulted in a delay to the prosecution and/or completion of the City Priority Work. For purposes of this Section 12, Force Majeure shall be limited to severe weather, war, acts of terrorism and insurrection, fire or other casualty and then only to the extent that Hotel Developer and/or Upper Unit Developer provides reasonable supporting documentation evidencing that the occurrence of such Force Majeure Event was the cause of a delay in the prosecution and/or completion of the City Priority Work. In the event that the City Priority Work is not substantially completed by the next occurring Debt Service Payment Date as a result of any such Force Majeure or other excusable cause, then the provisions of Section 4(c) of this Agreement (inasmuch as they relate to an obligation of Hotel Developer to

fund into the Debt Service Fund the January 2009 Debt Service Deficiency) shall apply.

13. **FINAL COMPLETION DATE.** The Parties do hereby acknowledge and agree that, notwithstanding anything to the contrary set forth in the Hotel Project Agreement, the Upper Unit Project Agreement or any other Project Document (as defined in the Hotel Project Agreement and the Upper Unit Project Agreement), the Hotel Developer and the Upper Unit Developer shall be required to achieve Final Completion (as defined in the Hotel Project Agreement and the Upper Unit Project Agreement, collectively) on or before (x) the 180th day following the Execution Date as to all items of work comprising the Hotel Project Improvements and (y) the 180th day after Combined Project Substantial Completion as to all items of work comprising a part of the Upper Unit Shell. Design/Builder shall be required to achieve Final Completion (as defined in the Hotel Project Agreement) within the time required under the Design/Build Agreement (as previously or hereafter modified).
14. **NO CHANGE TO AGREEMENT.** Except to the extent expressly provided herein, nothing herein is intended to modify or change the rights, obligations or terms and conditions of the Hotel Project Agreement, the Upper Unit Project Agreement, the Ground Lease or any other Project Document.
15. **GOVERNING LAW.** THIS AGREEMENT, AND THE ACTIONS OF THE PARTIES HEREUNDER SHALL IN ALL RESPECTS BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF TEXAS (EXCLUDING PRINCIPLES OF CONFLICT OF LAWS).
16. **SEVERABILITY.** If any term or provision of this Agreement shall to any extent be invalid or unenforceable in any jurisdiction, as to such jurisdiction, the remainder of this Agreement shall not be affected thereby, and each term and provision of this Agreement shall be valid and enforceable to the fullest extent permitted by any Governmental Rule and any such invalidity or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction, so long as the invalidity and/or unenforceability does not deprive any one or more of the Parties of any material component of the benefit of its bargain with respect to this Agreement. To the extent permitted by any Governmental Rule, the Parties hereby waive any provision of any Governmental Rule that renders any provision thereof prohibited or unenforceable in any respect. The foregoing notwithstanding, if any material term(s) or provision(s) of this Agreement are determined to be unenforceable as against any one or more of the Parties, then the other Parties, at their sole option, shall be entitled to terminate this Agreement, effective as of the date on which such unenforceability takes effect.
17. **HEADINGS, EXHIBITS.** The name/title of this Agreement, the table of contents, if any, and headings, if any, of the various articles, sections and other subdivisions of this Agreement are for convenience of reference only and shall

not modify, define or limit any of the terms or provisions hereof. All appendixes, schedules and exhibits attached to this Project Agreement are incorporated herein by reference in their entirety and made a part hereof for all purposes.

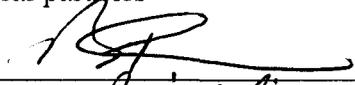
18. COUNTERPARTS; FULLY SIGNED AGREEMENT. This Agreement may be signed in one or more counterparts with each such counterpart, upon being annexed to counterparts signed by all other parties, being deemed to be a fully signed and duly executed original copy of this Agreement. The Parties agree that this Agreement shall not be effective and/or enforceable against any of the Parties unless and until all of the Parties have delivered (by messenger, mail, email or fax) to all of the other Parties (or their respective attorneys) a signed counterpart hereof.

[Signature Page Follows]

IN WITNESS WHEREOF, the City, the Design/Builder, the Hotel Developer and the Upper Unit Developer, intending to be legally bound do hereby execute and deliver, each to the other, this Agreement, as of the Execution Date but with the purpose, intent and effect of being effective for all purposes as of the Execution Date, with the understanding and acknowledgement that same shall be immediately binding upon the Parties and enforceable against them in accordance with its terms.

HOTEL INVESTMENTS, L.P.

By: Hotel Investments GP, LLC
its general partners

By: 
Name: Brian Kicklin A/P
Title:

TX RIVERWALK RESIDENCES, L.P.

By: TX Riverwalk Residences GP, LLC
its general partner

By: San Antonio Condos Development LLC
its manager

By: 
Name: MARK ARMSTRONG
Title: MANAGER

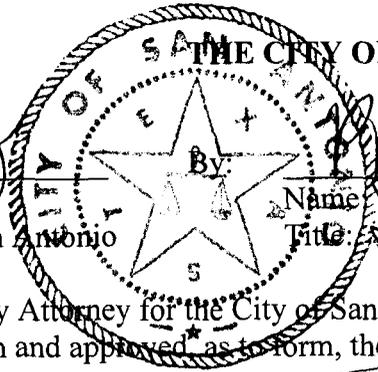
FAULKNERUSA L.P.

By: FaulknerUSA GP, Inc., its general partner

By: 
Name: MARK ARMSTRONG
Title: CEO

[Signatures Continue on Next Page]

ATTEST:



THE CITY OF SAN ANTONIO, TEXAS

By:

Leticia M. Vaca
Name:
City Clerk, City of San Antonio

[Signature]
Name: *Renny Postoak-Ferguson*
Title: *Assistant City Manager*

I, the undersigned, City Attorney for the City of San Antonio, Texas, hereby certify that I read, passed upon and approved as to form, the foregoing Binding Memorandum of Understanding.

[Signature]
By:

Michael D. Bernard
City Attorney

SCHEDULE 1

CITY PRIORITY WORK

1. FaulknerUSA will complete operational installation of the 25th floor fire sprinkler system including the flow and tamper elements of the standpipes, to the satisfaction of the City Fire Marshall.
2. FaulknerUSA will complete the substrate siding of the above the condominium main roof areas such that the yellow board siding receives its final stucco finish consistent with the similar exterior finishes throughout the project.
3. FaulknerUSA will complete installation and final finishes of the wall immediately adjacent to the Lila Cockrell theatre to the west of the hotel.
4. On floors 26 through 33, FaulknerUSA will complete corridor wall framing, frame around mechanical chases, install M.E.P and life safety stub outs and drywall one side (either the corridor side or the interior side at FaulknerUSA option) of the corridor wall framing, after inspection and approval of corridor wall framing by the City's Development Services Department to not less than the level of completion of level 26 which exists as of the date of the Agreement (only with respect to the corridor wall framing and drywall corridor installation and M.E.P. floor stub outs).

SCHEDULE 2

CITY REIMBURSABLE COSTS

1. Legal Fees/Expenses Incurred by City through August 22, 2008:	
Bracewell & Giuliani	\$75,341.53
Ford Nassen Baldwin	\$53,510.22
2. Outstanding fees owed to San Antonio Fire Dept.	\$172,051.20
3. Outstanding sum owed to Public Works	<u>\$ 68,150.71</u>
TOTAL:	\$369,053.66

Initials BR PPF MA

SCHEDULE 3

**DATES/TIMES DURING WHICH NO WORK
SHALL BE CONDUCTED ON THE WALL**

Saturday, August 23

Sunday, August 24

Monday, August 25

Tuesday, August 26

Wednesday, August 27

Thursday, August 28

Thursday, September 4

Friday, September 5

Saturday, September 6

Sunday, September 7

Monday, September 8

Tuesday, September 9

Wednesday, September 10

Thursday, September 11

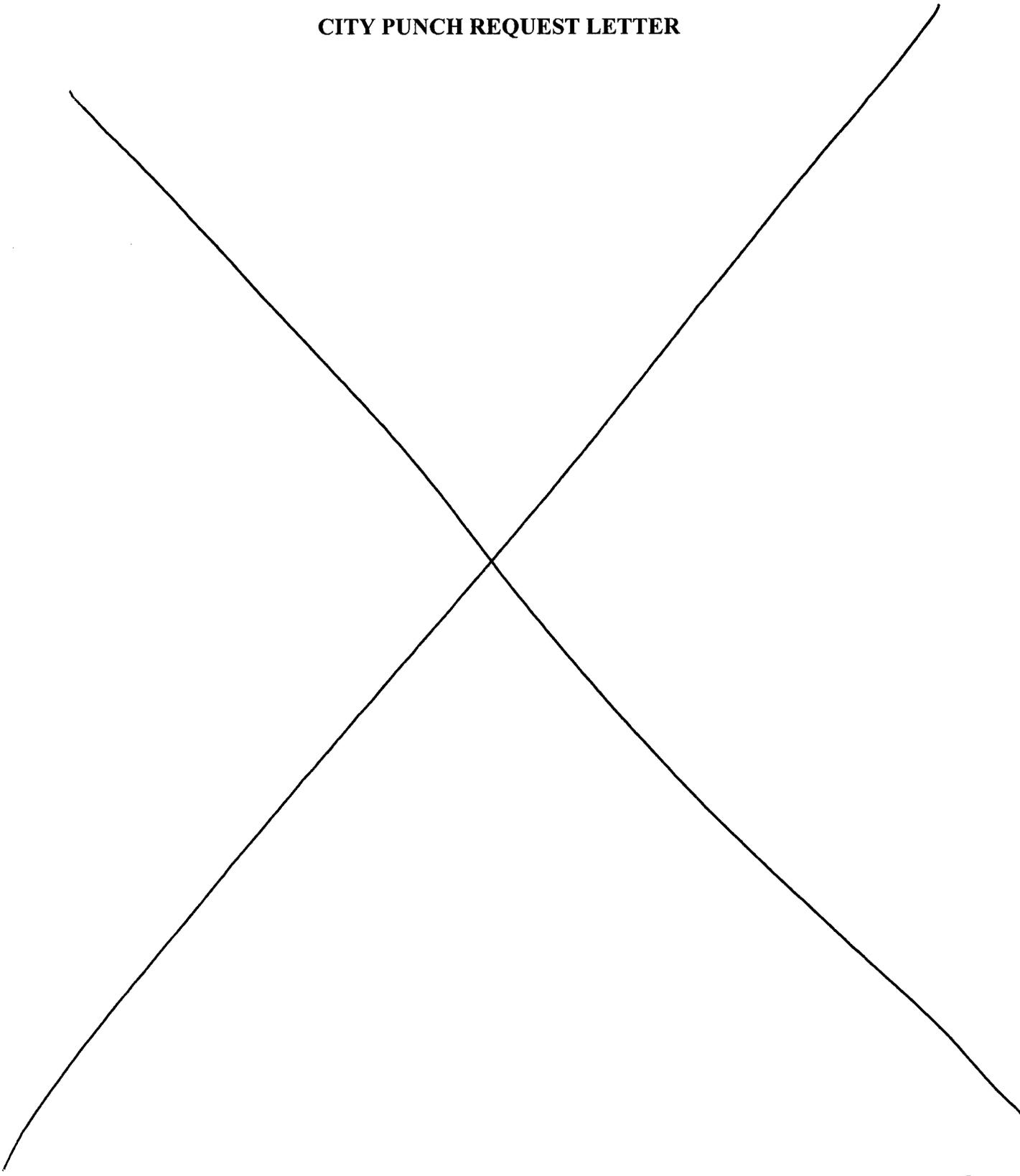
Friday, September 12

Saturday, September 13

Sunday, September 14

Monday, September 15

EXHIBIT A
CITY PUNCH REQUEST LETTER



Initials BSA PAF UMA



July 31, 2008

Fire Hydrant: The fire hydrant located on the east side of the hotel was initially located at the corner of Market Street and Bowie. This hydrant was relocated by Faulkner to accommodate the construction of the hotel. The relocation of the hydrant required by the Fire Marshall is again along Market Street. This permanent relocation shall be at the Developers sole cost and expense.

FaulknerUSA refuses to relocate the Hydrant. *ESK*

Convention Center Stairwell: This stairwell to the River Walk remains incomplete. Partial temporary handrails were installed and do not meet current City Building codes. Permanent handrails are required as is the installation of step lights. Landscape, irrigation and the installation of rock at the base of the new bridge are also incomplete.

FaulknerUSA has not given a completion date on this and is still disputing the handrails. *?*

Lila Cockrell Theater (LCT): Several copper downspouts are damaged or missing, and drains have material and debris in them. The drain grates originally located around the exterior of the Theater are being used in the alley between the buildings. These grates do not fit properly and are a trip hazard.

Down spouts are not complete *?*

The Fire line for the LCT, was removed from underground and installed temporarily above ground during the initial construction. This line is currently above ground and should be reburied.

Faulkner has agreed do these repairs (Not Complete) *?*

LCT: Handrails are missing, from the Hotels patio to the stairwell leading to the walkway on the River Walk level.

Complete

Stairs: New handrails block Stairs at the LCT loading dock area leading to the back of the Theater.

Complete

Loading dock: Numerous paint splatters.

Not Complete *?*

MA SA PAF

Loading Dock Ramp: Concrete needs to be repaired in several areas. Concrete base requires repair the supports the handrail.

Faulkner has agreed to the concrete base at the handrails, however has not committed to the concrete repairs in the loading dock ramp area.

Partial Completion ?

Convention Center VIP Lot: Numerous exterior wall damage due to construction and past repairs made to the upper areas of the wall are visible. The wall paint used to cover these repairs does not match the existing walls.

Not Complete ?

Convention Center Blue Wall: Numerous scratches and needs general cleaning.

Robert Carr is getting a bid to clean this wall and I will forward the bid to Faulkner.

Bid provided to Faulkner not Complete ?

Irrigation: The irrigation for the convention center and dome walk way was disconnected for the construction of the hotel. The grass and several trees in these areas have expired due to the lack of water.

Faulkner will repair the irrigation, however has not agreed to replace the trees and grass. ?

Not Complete

Dome Walkway: Several bollards are damaged due to construction equipment. The walkway at Bowie Street is not complete. The walkway should be returned as existing.

Faulkner has submitted no plans and no commitment has been made in this area. This requires a discussion between Mike Sawaya and Faulkner according to Ruben. Pictures have been provided to Faulkner that shows the area before the project began. \$50,000

SAWS Building: Irrigation and landscape are incomplete.

Faulkner will install sod only, no plants, shrubs, side walk repairs etc: Pictures provided to Faulkner ?

David Kubena

Senior Projects manager

Convention, Sports, and Entertainment Facilities

SA
MA
1999

EXHIBIT B
COPY OF LETTER TO BANK MIDWEST

Initials *BR* *PP*
MM



CITY OF SAN ANTONIO

OFFICE OF THE CITY ATTORNEY
P.O. BOX 839966
SAN ANTONIO, TEXAS 78283-3966
TEL: 210-207-8940
FAX: 210-207-4004

August 14, 2008

Brent A. Parsons
Vice President
Bank Midwest
1111 Main St Ste 1600
Kansas City MO 64105

Re: San Antonio Grand Hyatt Convention Center Hotel

Dear Mr. Parsons:

I am the City Attorney for the City of San Antonio. I have been asked by Hotel Investments, L.P., TX Riverwalk Residences, L.P. and FaulknerUSA, L.P. (Developer Parties) to communicate with Bank Midwest concerning negotiations between and among those parties and the City related to the Grand Hyatt San Antonio Convention Center Hotel. The City and the Developer Parties have reached a tentative agreement, subject to City Council approval, related to substantial completion of the Upper Unit Shell.

Pursuant to the agreement, the City will agree in paragraph 4(a) to waive its rights to collect additional Upper Unit Project Daily liquidated damages from FaulknerUSA provided that FaulknerUSA achieves substantial completion of the Upper Unit shell within the time frames established in the agreement. The City will also agree that, should FaulknerUSA achieve this substantial completion, the City's Right of Reverter will terminate. A copy of paragraph 4(a) of the agreement, and the agreed scope of work that Faulkner needs to achieve, is attached for your reference.

Please feel free to contact the undersigned should you have any questions or concerns. Thank you for your interest in this project.

Very truly yours,

Michael D. Bernard

MDB/lpg
cc: Brian Ricklin
Hotel Investments, L.P.

4. COMBINED PROJECT SUBSTANTIAL COMPLETION; FORBEARANCE FROM COLLECTION AND POTENTIAL ELIMINATION OF EXTENSION LIQUIDATED DAMAGES.

- (a) Anything to the contrary set forth in the Hotel Project Agreement and/or the Upper Unit Project Agreement notwithstanding, the City, the Hotel Developer, the Upper Unit Developer and the Design-Builder do hereby acknowledge and agree that, if all of the work described on Schedule 1 annexed hereto and made a part hereof (the "City Priority Work") is substantially completed, i.e. (x) completed, except for minor punchlist type items and (y) meets all other requirements of the Hotel Project Agreement or Upper Unit Project Agreement, as applicable with respect to such work, in each case as reasonably determined by the City, by either (x) Design/Builder on or before the sixtieth (60th) day after the Execution Date (the "Priority Work Completion Period") or (y) in the event Design/Builder does not achieve substantial completion of the City Priority Work as required herein within the Priority Work Completion Period and on or before the last day of the Priority Work Completion Period, Hotel Developer undertakes in writing to promptly do so and thereafter achieves Substantial Completion of the City Priority Work within thirty (30) days of its delivery of such written undertaking (such later date, the "Priority Work Completion Deadline"), then, subject to the terms and conditions of this Agreement, including, but not limited to Section 11, (i) Combined Projects Substantial Completion shall be deemed to have been achieved on the date on which such City Priority Work is substantially completed as required by the terms of this Agreement, (ii) no Extension Liquidated Damages shall be due and payable under the Hotel Project Agreement, other than the July 31 Payment, (iii) no Upper Unit Project Daily Liquidated Damages (other than those previously drawn by City under the Letter of Credit previously delivered by the Upper Unit Developer to the City as and for the Delay LD Deposit under Section 6.1 of the Upper Unit Project Agreement) shall be due and payable under the Upper Unit Project Agreement and (iv) the City's Right of Reverter (as defined in the Upper Unit Project Agreement) shall be terminated and of no further force or effect. Supplementing the foregoing, Design/Builder does hereby acknowledge and agree that, in the event that Design/Builder does not Substantially Complete the City Priority Work within the Priority Work Completion Period, then Hotel Developer may deliver the undertaking/cure notice referred to in clause (y) above and may thereafter undertake, or cause a third party contractor to undertake, to complete the City Priority Work and shall be entitled to be reimbursed, from time to time, for the costs incurred by the Hotel Developer in connection with completing the City Priority Work from the Retainage funds then being held under the Design/Build Agreement.

Handwritten initials and signature in the bottom right corner of the page.

Agreed Scope of Work

1. FaulknerUSA will complete operational installation of the 25th floor fire sprinkler system including the flow and tamper elements of the standpipes, to the satisfaction of the City Fire Marshall.
2. FaulknerUSA will complete the substrate siding of the above the condominium main roof areas such that the yellow board siding receives its final stucco finish consistent with the similar exterior finishes throughout the project.
3. FaulknerUSA will complete installation and final finishes of the wall immediately adjacent to the Lila Cockrell theatre to the west of the hotel.
4. On floors 26 through 33, FaulknerUSA will complete corridor wall framing, frame around mechanical chases, install M.E.P and life safety stub outs and drywall one side (either the corridor side or the interior side at FaulknerUSA option) of the corridor wall framing, after inspection and approval of corridor wall framing by the City's Development Services department to not less than the level of completion of level 26 which exists as of the date of the Agreement (only with respect to the corridor wall framing and drywall corridor installation and M.E.P. floor stub outs.

FaulknerUSA will complete the above referenced work within a time duration of 75 calendar days that will commence upon formal execution of the parties Agreement.

WMA PPF BR



CITY OF SAN ANTONIO
Request for Council Action

Agenda Item # 23
Council Meeting Date: 8/21/2008
RFCA Tracking No: R-3786

DEPARTMENT: Convention Sports and
Entertainment Facilities

DEPARTMENT HEAD: Michael Sawaya

COUNCIL DISTRICT(S) IMPACTED:
City Wide

SUBJECT:
The Grand Hyatt San Antonio Convention Center Hotel and the Alteza Condominiums

SUMMARY:
The agreement establishes a process for the orderly closeout of these two contiguous projects. Final steps are under way for the Hotel and Residential developers and the Design Builder to undertake minor remaining work. While not part of the development team, the City, through this Agreement, will assist the team in achieving the projects goals.

BACKGROUND INFORMATION:
The Grand Hyatt is a \$236M, 1,003 room headquarters hotel adjacent to the Henry B. Gonzalez Convention Center and built on City-owned property pursuant to a 75 year lease with the developer/owner Hotel Investments, Ltd. The Grand Hyatt is a privately-owned hotel managed by Hyatt Hotels. The City of San Antonio has provided credit support for a portion of the financing for the Hotel Project; however, debt service is anticipated to be paid by the net operating income of the hotel. Hotel Investments consists of Marathon Investments, who is the General Partner, and FaulknerUSA. FaulknerUSA is also the design/builder and is responsible for constructing the hotel under a Guaranteed Maximum Price Contract whereby cost overruns are their responsibility.

Texas Riverwalk Residences is the developer/owner of the 144 condominiums built above the hotel. Texas Riverwalk Residences consists of FaulknerUSA, who is the General Partner and Marathon Investments. Faulkner is also constructing the condominiums.

ISSUE:
The Project Agreements for the Hotel and the Condominiums required each of the Projects to be substantially completed by February 6, 2008. Although the Hotel was opened on March 22, 2008, minor work remains to be done on this as well as the Condominium Project. The City intends that the Projects be closed out by the end of this calendar year. If the Projects are not completed by this time frame the City will enforce its rights under the two Project Agreements.

ALTERNATIVES:

The City has reached an agreement with the Hotel Developer by which the Hotel Developer will assist in the close out of both the Hotel and the Condominiums. In the absence of this Agreement, the Hotel Developer would have no obligation to participate in the close out of the Condominiums. The Hotel Developer brings additional assets to this close out process.

FISCAL IMPACT:

There is no immediate fiscal impact with this action.

RECOMMENDATION:

Staff recommends approval of this agreement to close out the hotel and condominium projects.

ATTACHMENT(S):

File Description	File Name
Voting Results	
Ordinance/Supplemental Documents	200808210728.pdf

DEPARTMENT HEAD AUTHORIZATIONS:

Michael J. Sawaya Director Convention Sports and Entertainment Facilities

APPROVED FOR COUNCIL CONSIDERATION:

Penny Postoak Ferguson Assistant City Manager