

Council/Agency Meeting Held: _____	City Clerk's Signature
Deferred/Continued to: _____	
<input type="checkbox"/> Approved <input type="checkbox"/> Conditionally Approved <input type="checkbox"/> Denied	
Council Meeting Date:                      12/15/08	Department ID Number:    AD 08-19

**CITY OF HUNTINGTON BEACH  
REQUEST FOR CITY COUNCIL/REDEVELOPMENT AGENCY ACTION**

**SUBMITTED TO:** Honorable Mayor/Agency Chairman and City Council/Agency Members

**SUBMITTED BY:** Fred A. Wilson, City Administrator/Executive Director

**PREPARED BY:** Paul Emery, Deputy City Administrator

**SUBJECT:** Approve the Implementation Agreement and Escrow Agreement between the City of Huntington Beach, the Redevelopment Agency and Makallon Atlanta Huntington Beach, LLC to implement the provisions of the Owner Participation Agreement that govern the design, development and construction of the Senior Center.

**Statement of Issue, Funding Source, Recommended Action, Alternative Action(s), Analysis, Environmental Status, Attachment(s)**

**Statement of Issue:** The City of Huntington Beach, the Redevelopment Agency and Makallon Atlanta Huntington Beach, LLC entered into an Owner Participation Agreement (OPA) for the Pacific City Project in 2006. It is now necessary to approve an implementation agreement and escrow agreement for the Senior Center component of the OPA.

**Funding Source:** The development, design and construction of the Senior Center is being funded by the Park In-Lieu Fee assessed against the residential portion of the Pacific City Project as calculated pursuant to Zoning and Subdivision Ordinance Section 254.08.

**Recommended Action: Motion to:** Approve and authorize the Mayor/Chairman and City Clerk/Agency Secretary execute the Implementation Agreement and Escrow Agreement between the City of Huntington Beach, the Redevelopment Agency and Makallon Atlanta Huntington Beach, LLC.

**Alternative Action(s):** Do not approve the Agreements and direct staff accordingly.

**Analysis:** On October 16, 2006 the City of Huntington Beach, Redevelopment Agency and Makallon Atlanta Huntington Beach LLC entered into an Owner Participation Agreement (OPA) that included the provisions for the construction of a Senior Center. It has become necessary to implement the provisions of the OPA that govern the design, development and construction for the Senior Center. The implementation agreement identifies the schedules of performance, project budget submissions and escrow deposit obligations. The Escrow Agreement defines the escrow fund and the disbursement and release of funds.

# REQUEST FOR CITY COUNCIL ACTION

CITY COUNCIL MEETING DATE:

December 15, 2008

DEPARTMENT ID NUMBER:

AD 08-19

The Implementation Agreement identifies four schedules – schematic design, street and utility design, building design, and construction. Based on the proposed schedules and the opportunity for extension, the outside date for construction completion of the Senior Center is April 2011. There are a number of additional terms in the agreement including status and reporting requirements and remedies for delays.

The Escrow Agreement is to be established within 5 days of execution and is funded by a deposit of \$2,000,000 by Makallon Atlanta Huntington Beach, LLC. These funds will be utilized throughout the design schedules identified above. Upon commencement of construction the escrow account will be increased to \$3,000,000 and drawn down for construction expenses.

Each of these agreements set forth the implementation of the design and construction of the Senior Center in furtherance of the Owner Participation Agreement.

**Strategic Plan Goal:** (C-2) Provide quality public services with the highest professional standards to meet community expectations and needs, assuring that the city is sufficiently staffed and equipped overall.

**Environmental Status:** Not Applicable

**Attachment(s):**

City Clerk's Page Number	No.	Description
3	1.	Implementation Agreement between the City of Huntington Beach, the Redevelopment Agency and Makallon Atlanta Huntington Beach, LLC.
25	2.	Escrow Agreement between the City of Huntington Beach, the Redevelopment Agency and Makallon Atlanta Huntington Beach, LLC.

# **ATTACHMENT #1**

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IMPLEMENTATION AGREEMENT

THIS IMPLEMENTATION AGREEMENT (this "Agreement") is entered into as of \_\_\_\_\_, 2008, by and among the REDEVELOPMENT AGENCY OF THE CITY OF HUNTINGTON BEACH, a public body, corporate and politic ("Agency"), the CITY OF HUNTINGTON BEACH, a charter city ("City"), and MAKALLON ATLANTA HUNTINGTON BEACH, LLC, a Delaware limited liability company ("Participant").

RECITALS

A. The parties to this Agreement are parties to that certain Owner Participation Agreement ("OPA") for the Pacific City Project, executed and delivered pursuant to Agency Resolution No. 364 and City Resolution 2006-67 approved and adopted at the October 16, 2006 City Council meeting, as supplemented by letter dated February 1, 2008.

B. This Agreement is intended to implement the provisions of the OPA that govern the design, development and construction of the Senior Center.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Definitions; Acknowledgments. Capitalized terms used in this Agreement without definition have the respective meanings assigned to such terms in the OPA or in the Conditions of Approval therein referenced. The parties hereby acknowledge that (i) Final Tract Map No. 16338 was recorded in the Recorder's Office of the County of Orange on August 30, 2007, (ii) the "Effective Date" of the OPA is August 30, 2007 and (iii) Environmental Impact Report No. 07-002, and related Conditional Use Permit No. 07-39 and Findings and Conditions of Approval, for the Senior Center were approved and adopted at the February 4, 2008 City Council meeting.

2. Schedules of Performance. In furtherance of Section 607.a of the OPA, the Participant hereby proffers, and the City and the Agency hereby approve, the four (4) separate performance schedules attached to and made a part of this Agreement as Schedule 1 [Schematic Design Approval], Schedule 2 [Street and Utility Design], Schedule 3 [Building Design] and Schedule 4 [Construction] (individually, a "Schedule" and collectively, whether all or less than all, the "Schedules"). The Schedules in material part provide as follows:

Schedule 1 is a schedule to process and obtain schematic building design approval of the Senior Center by applicable City authorities ("Schematic Approval"); the effective date of Schematic Approval constitutes the "commencement date" for Schedule 2 [Street and Utility Design] and Schedule 3 [Building Design];

Schedule 2 [Street and Utility Design] is a time-line for the design, permitting and utility contracting (as applicable), for public streets and wet and dry utilities, including

the submission, processing and issuance of a rough grading plan and permit; the effective date of Schematic Approval constitutes the "commencement date" for the Schedule;

Schedule 3 [Building Design] is a time-line for the design of the Senior Center building, including the submission, processing and issuance of building permits; the effective date of Schematic Approval constitutes the "commencement date" for the Schedule and the Schedule runs concurrently with Schedule 2; and

Schedule 4 [Construction] is a time-line for contract bidding and construction of the Senior Center; the effective date of issuance of the last of all requisite building permits, approvals and utility agreements for the Senior Center and attendant public streets and utilities by all applicable governmental, public and quasi-public authorities under Schedules 2 and 3 constitutes the "commencement date" for the Schedule.

3. Schedule Extensions. At the election and in the sole discretion of Participant from time to time, Schedule 1 permissively may be extended for a maximum period of sixty (60) days in the aggregate, Schedule 2 permissively may be extended for a maximum period through to the first anniversary of the effective date of Schematic Approval (with such 1-year anniversary date inclusive of the Schedule 2 time-line), Schedule 3 permissively may be extended for a maximum period through to the first anniversary of the effective date of Schematic Approval (with such 1-year anniversary date inclusive of the Schedule 3 time-line), and Schedule 4 permissively may be extended for a maximum period of one hundred eighty (180) days in the aggregate. In addition, each Schedule shall be extended:

(a) For each day of any prevention, delay or stoppage proximately resulting from the occurrence of a Force Majeure event (as the term "Force Majeure" is defined under the OPA); and/or

(b) For each day of prevention, delay or stoppage proximately resulting from (i) any delay by any governmental, public or quasi-public authority in any processing and/or approval of any good faith submission in excess of the time period(s) provided therefor in the applicable Schedule(s) and/or (ii) any request or requirement by any governmental, public or quasi-public authority in addition to the Conditions of Approval and Mitigation Measures in effect as of the date hereof with respect to the Senior Center ("City Delay"); and/or

(c) For each day of continuance of any unrelated third party legal or equitable suit or action respecting or involving the Senior Center (in any instance, "Litigation").

The City, by and through the City Administrator, and the Participant, by and through its designated representative from time to time, shall meet and confer biannually and execute and initial effective as of each 6-month anniversary of this Agreement a memorandum of the status of performance under the then applicable Schedule(s) specifying any extension(s) to such Schedule(s) desired by the Participant and/or arising under the preceding provisions of this Section 3. For purposes hereof, the first 6-month anniversary of this Agreement shall be deemed

to be April 30, 2009 and each 6-month subsequent anniversary shall be each succeeding October 31 and April 30 until substantial completion of the Senior Center (as defined in Section 5 hereof). Effective as of each such 6-month anniversary, the Participant also shall deliver to the City a statement of the aggregate of funds expended to date and costs and expenses incurred to date in furtherance of the design, development, installation and/or construction of the Senior Center, including the Management Fee to the extent of such funds and expenses (as of any specified date, the "Participant Interim Costs").

4. Senior Center Completion. The Participant hereby agrees to use good faith efforts in order to complete the design, development and construction of the Senior Center in accordance with the Schedules (as the same may be extended pursuant to Section 3 hereof or with the prior written consent of the City in its sole discretion) and further agrees to give to the City monthly status reports during the pendency of Schedule 1, quarterly status reports during the pendency of Schedule 2 and Schedule 3, and monthly status reports during the pendency of Schedule 4. By execution of this Agreement, the Agency and the City acknowledge that this Agreement is in furtherance of Section 607.a of the OPA, hereby accept the performance obligations reflected in the Schedules (as the same may be extended pursuant to Section 3 hereof or with the prior written consent of the City in its sole discretion) and further agree this Agreement and the time lines and time periods hereby created, proffered and accepted supersede any contrary provision, express or implied, of the OPA.

(a) Subject to paragraph (b) below, if the scope of performance provided for in any Schedule(s) shall not be completed within the time period(s) provided for in such Schedule(s) (as such Schedule(s) may be extended as provided for in Section 3 hereof or with the prior written consent of the City in its sole discretion), then Participant shall be relieved of its obligation to design, develop and construct the Senior Center as set forth in the OPA and this Agreement and the Participant shall instead pay the entire Park In-Lieu Fee to the City, due and payable in immediately available funds no later than sixty (60) days from approval of the Certified Cost Statement, subject, however, to a credit against the Park In-Lieu Fee to the extent of the then aggregate of Participant Interim Costs, as the same shall be substantiated in the Certified Cost Statement (such Park In-Lieu Fee, less such credit at any time, being the "Park In-Lieu Fee Balance"). If the Participant is obligated under this paragraph (a) to pay the Park In-Lieu Fee Balance, then:

(A) If the Participant disputes its obligation under this paragraph (a) to pay the Park In-Lieu Fee Balance, then, the Participant nevertheless shall deliver the Park In-Lieu Fee Balance to its duly appointed legal counsel or title company, and the same shall be held, in escrow, pending resolution of such dispute either (1) by final unappealable order issued in legal or equitable proceedings, or mediation or arbitration, or (2) by mutual agreement of the parties and joint written instructions given to the escrow agent. If such dispute is resolved by adversarial action (whether judicial proceedings, or mediation or arbitration), the prevailing party shall be entitled to an award of its reasonable legal costs and expenses and the cost of such proceedings from the others (with the City and the Participant being treated hereunder as the primary parties entitled to or obligated for the payment of such award, as the case may be). All funds at any time and from time to time

held in escrow in accordance with this paragraph (A) shall be invested with such financial institution and with such investments as from time to time in writing are approved by the Participant and all such funds shall bear interest for the benefit and in the name of the Participant. The parties shall indemnify and agree to hold harmless and defend the escrow agent hereunder in the good faith performance of its duties, (ii) release the escrow agent from and against any liability to the parties except for fraud, gross negligence or willful misconduct, (iii) authorize the escrow agent to rely upon any signature, notice, demand, waiver, consent or other instrument in good faith believed by it to be genuine, and, (iv) in the event of a dispute between or among the parties respecting the proper disposition of escrowed funds hereunder, authorize the escrow agent to pay the same into the registry of any court having jurisdiction over the Participant and the City.

(B) The amount of the Park In-Lieu Fee Balance shall be subject to adjustment to the extent of the Index Adjustment for the period from August 31, 2009 to the date of payment, which period shall be shortened in time for the aggregate number of days (if any) of prevention, delay and/or stoppage proximately resulting from any Force Majeure, City Delay or Litigation under Sections 3(a), 3(b) and/or 3(c) but shall not be shortened for the period, if any, that the Park In-Lieu Fee Balance is held in escrow in accordance with paragraph (A) above. For purposes of the foregoing, "Index Adjustment" means the arithmetic average of the percentage changes for the applicable time in the McGraw Park Engineering News (i) 20-City Materials Cost Index arithmetic average for cement and lumber (excluding structural steel) and (ii) 20-City Building Cost Index for Skilled Labor (excluding Building Cost and Wage\$/hr).

(b) If (i) a Force Majeure event or Litigation shall occur, and (ii) such occurrence reasonably prohibits the right of the City or the Participant to construct the Senior Center (a "Restraining Event"), and (iii) such Restraining Event continues in effect for ten (10) months or more (but in no event beyond December 31, 2009), then at any time after the expiration of such 10-month period (or December 31, 2009, as the case may be), the City shall have the right upon thirty (30) days prior written notice given to the Participant to instruct the Participant to cease all work in furtherance of the Senior Center and instead to pay the Park In-Lieu Fee Balance, in which event the Participant shall be relieved of its obligation to design, develop and construct the Senior Center as set forth in the OPA and this Agreement and the Participant shall instead pay the Park In-Lieu Fee Balance, due and payable ratably over the 516 approved residential condominium units of the Project and at the time of issuance of building permits for such units, but in no event later than February 1, 2015. In addition and not in limitation of the foregoing provisions of this Section 4(b):

(A) If under this Section 4(b) a Restraining Event shall occur and the Participant shall be relieved of its obligation to design, develop and construct the Senior Center and instead pay the Park In-Lieu Fee Balance and if less than the 516 approved residential condominium units for the Project in fact are constructed, then the deficiency in the payment of Park-In-Lieu Fee Balance resulting as a consequence of the shortfall in the number of condominium units to be so constructed shall be paid (to the extent then known) at the time of issuance of the first building permit for the final building phase of

the Project and any further deficiency shall be paid with the issuance of the final building permit in such final building phase.

(B) If under this Section 4(b) a Restraining Event shall occur and the Participant shall be relieved of its obligation to design, develop and construct the Senior Center and instead pay the Park In-Lieu Fee Balance, then the amount of Park In-Lieu Fee Balance for each condominium unit shall be subject to Index Adjustment for the period from February 1, 2011 to the date of payment for such condominium unit.

(C) Upon the occurrence of a Restraining Event, the City shall have the right upon thirty (30) days prior written notice given to the Participant to instruct the Participant to stay all work in furtherance of the Senior Center pending the outcome of such Restraining Event and the determination by the City of its right under the preceding provisions of this Section 4(b). Any such instruction by the City to stay work shall constitute a continuance of the Force Majeure event or Litigation giving rise to such Restraining Event and a continued extension of the affected Schedule(s).

(D) For purposes of this paragraph 4(b), a "Restraining Event" shall be deemed to have occurred upon the issuance in that certain pending litigation (the "Parks Litigation") captioned *PARKS LEGAL DEFENSE FUND, a California non-profit organization, et al., v. THE CITY OF HUNTINGTON BEACH et al.*, as filed in the Superior Court of the State of California for the County of Orange, Case No. 00051261, of an order (1) restraining the construction of the Senior Center, (2) requiring with respect to the Senior Center the conduct of a new Environmental Impact Report under the California Environmental Quality Act, or (3) requiring approval of the Senior Center by a new Measure C vote under Section 612 of the City Charter.

(E) If under this Section 4(b) a Restraining Event shall occur but the City does not exercise its right to stay work under paragraph (C) above and either (1) the Restraining Event does not continue in effect for ten (10) months or more (or beyond December 31, 2009), or (2) the Restraining Event continues in effect for ten (10) months or more (or beyond December 31, 2009) but the City does not exercise its right to relieve the Participant of its obligation to design, develop and construct the Senior Center and instead pay the Park In-Lieu Fee Balance as herein provided for, then and in any such event the Participant shall be obligated to continue performance in accordance with the Schedules (as the same may be extended pursuant to Section 3 hereof) to the extent such performance in the good faith judgment of Participant and its professional advisors proximately is not prevented, delayed or stopped by such Restraining Event. By way of example, if the Participant is obligated to continue performance as aforesaid and if as part of the Parks Litigation construction of the Senior Center shall be the subject of a restraining order, then the Participant nevertheless shall continue performance under Schedule 2 [Street and Utility Design] and Schedule 3 [Building Design] to the extent the same is not thereby so prevented, delayed or stopped.

(c) If the Participant completes the design, development and construction of the Senior Center in accordance with the Schedules (as the same may be extended pursuant to Section 3 hereof), then, subject to the remainder of this paragraph (c), the amount of the Park In-Lieu Fee Balance existing as of August 31, 2009 shall be subject to Index Adjustment for the period (but only for the period) from August 31, 2009 through to the date of substantial completion of the Senior Center. For purposes of this Agreement, the Senior Center shall be deemed "substantially complete" and the "date of substantial completion" shall be deemed to have occurred when substantial completion occurs under the terms of the general construction contract or is certified by the project architect, provided, however, that, for purposes of calculating the Index Adjustment under this Section 4(c) and liquidated damages under Section 4(d) hereof, the date of substantial completion (or the date of certification thereof, as the case may be) shall be reduced in time for the aggregate number of days (if any) of prevention, delay and/or stoppage proximately resulting from any Force Majeure, City Delay or Litigation.

(d) In addition and not in lieu of the preceding provisions of this Section 4, if the Participant completes the design, development and construction of the Senior Center and if the date of substantial completion occurs after April 22, 2011, then, the Participant shall pay to the City liquidated damages for the period from April 22, 2011 to and including such date of substantial completion (the "Liquidated Damages Period"), with such Liquidated Damages Period reduced in time for the aggregate number of days (if any) of prevention, delay and/or stoppage proximately resulting from any Force Majeure, City Delay or Litigation, and with such liquidated damages calculated at the rate of \$2,500 per day for each business day of the Liquidated Damages Period and due and payable within thirty (30) days of the expiration of the Liquidated Damages Period. For purposes of this Section 4(d), a "business day" shall mean any day other than a Saturday or Sunday or day on which national banks doing business in the State of California are closed for business.

(e) If at any time the Participant is obligated to pay the Park In-Lieu Fee or any Park In-Lieu Fee Balance hereunder or under the OPA and such obligation is a deferred obligation, then the Participant nevertheless shall have the right to prepay the same in whole or in part at any time or from time to time, without penalty.

5. Project Budget Submissions. Consistent with the Schedules adopted hereunder, the proforma proposed Project Budget provided for in the first sentence of Section 305.6.b shall be submitted to the City within sixty (60) days of the effective date of Schematic Approval and the Project Budget shall be submitted within the later of ninety (90) days from final plan approval of the Senior Center and sixty (60) days from award of bids under Schedule 4.

6. Deposit Obligations. Attached to this Agreement as an Exhibit is a copy of an Escrow Agreement (the "Escrow Agreement") dated of even date herewith, made by and among the Participant, the City and Fidelity National Title Insurance Company, as escrow agent (the "Escrow Agent"), and simultaneously herewith executed and delivered by the parties thereto. In furtherance of the provisions of this Agreement, within five (5) days from and after the date this Agreement shall have been executed and delivered by the parties hereto, the Participant shall deliver to the Escrow Agent the sum of \$2,000,000 to be held, invested, disbursed and/or

released in accordance with the terms and provisions of the Escrow Agreement. The Participant hereby agrees to deliver the following additional funds to the Escrow Agent at the following times, in each instance to be held under and in accordance with the terms and provisions of the Escrow Agreement:

(a) Within ten (10) business days from and after the delivery of the proforma Project Budget to the City pursuant to Section 305.6.b (as amended by Section 5 of this Agreement, above), the difference (if any) between the aggregate of the proforma Project Budget line item allocations for all work to be performed under Schedules 1, 2 and 3 [respectively, Schematic Approval, Street and Utility Design and Building Design], and the arithmetic total of (i) then aggregate Participant Interim Costs and (ii) the \$2,000,000 delivered to the Escrow Agent as hereinabove provided for (such initial \$2,000,000, together with any such additional amount, the "Design Escrow");

(b) The sum of \$3,000,000 (the "Construction Escrow") within ten (10) business days from and after notice of commencement of performance under the general construction contract for the Senior Center building improvements shall have been given by the Participant; and

(c) The difference between the sum of \$3,000,000 (or, if less, the unpaid balance under the general construction contract for the Senior Center building improvements, including retainage) and the then balance of the Construction Escrow, within ten (10) business days from and after the date the balance of the Construction Escrow falls below \$300,000.

The parties acknowledge that, as more fully provided for in the Escrow Agreement, the Design Escrow and the Construction Escrow each may and shall be drawn by the Participant to pay for costs incurred in furtherance of the design, development and construction of the Senior Center pursuant to the scope of work reflected under the applicable Schedules, proforma Project Budget, Project Budget, and the OPA and this Agreement (as the same from time to time may be modified, amended and/or supplemented).

7. Bonds. This Implementation Agreement and the Escrow Agreement are in lieu of the performance bond obligation of the Participant as set forth in Section 614.1 of the OPA with respect to the Senior Center, and such bonding obligation hereby is deleted. The labor and materials bond obligation of the Participant as set forth in Section 614.2 of the OPA with respect to the Senior Center shall be included in the construction contract as subcontractor requirements based upon then existing market conditions and bonding availability.

8. Authority. Each individual executing this Agreement on behalf of a party hereto represents that he or she has full authority to do so and to bind such party to perform pursuant to the terms and conditions of this Agreement.

9. Ratification; Inconsistence. The parties ratify and affirm the OPA as hereby supplemented. In the event of any inconsistency between the terms of the OPA and this Implementation Agreement, the terms of this Implementation Agreement shall control.

10. Effective Date. This Agreement shall not be effective unless and until this Agreement has been executed by the Agency and the City and the Participant.

REDEVELOPMENT AGENCY OF  
THE CITY OF HUNTINGTON BEACH

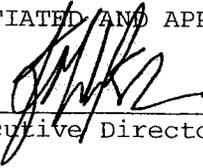
Date: \_\_\_\_\_

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

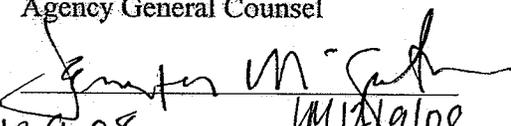
ATTEST:

INITIATED AND APPROVED:

\_\_\_\_\_  
Agency Secretary

  
\_\_\_\_\_  
Executive Director

REVIEWED AND  
APPROVED AS TO FORM:  
Agency General Counsel

  
12-9-08 MIA 12/9/08

THE CITY OF HUNTINGTON BEACH

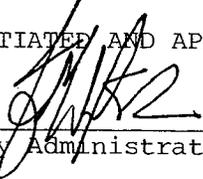
Date: \_\_\_\_\_

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

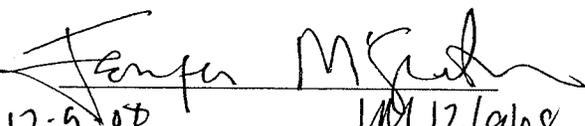
ATTEST:

INITIATED AND APPROVED:

\_\_\_\_\_  
City Clerk

  
\_\_\_\_\_  
City Administrator

REVIEWED AND  
APPROVED AS TO FORM:  
City Attorney

  
12-9-08 MIA 12/9/08



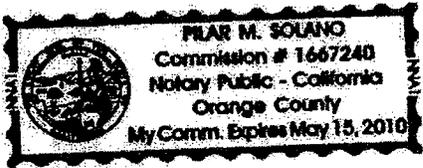
**CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT**

State of California

County of Orange

On December 08, 2008 before me, Pilar Solano Notary Public  
Date Here Insert Name and Title of the Officer

personally appeared Paul Makarechian  
Name(s) of Signer(s)



who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.  
Signature [Handwritten Signature]  
Signature of Notary Public

Place Notary Seal Above

**OPTIONAL**

*Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.*

**Description of Attached Document**

Title or Type of Document: \_\_\_\_\_

Document Date: \_\_\_\_\_ Number of Pages: \_\_\_\_\_

Signer(s) Other Than Named Above: \_\_\_\_\_

**Capacity(ies) Claimed by Signer(s)**

Signer's Name: \_\_\_\_\_

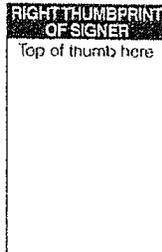
- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

Signer's Name: \_\_\_\_\_

- Individual
- Corporate Officer — Title(s): \_\_\_\_\_
- Partner —  Limited  General
- Attorney in Fact
- Trustee
- Guardian or Conservator
- Other: \_\_\_\_\_



Signer Is Representing: \_\_\_\_\_

Schedule 1 - Schematic Design Approval  
Schedule 2 - Street and Utility Design  
Schedule 3 - Building Design  
Schedule 4 - Constuction

# **EXHIBIT A**

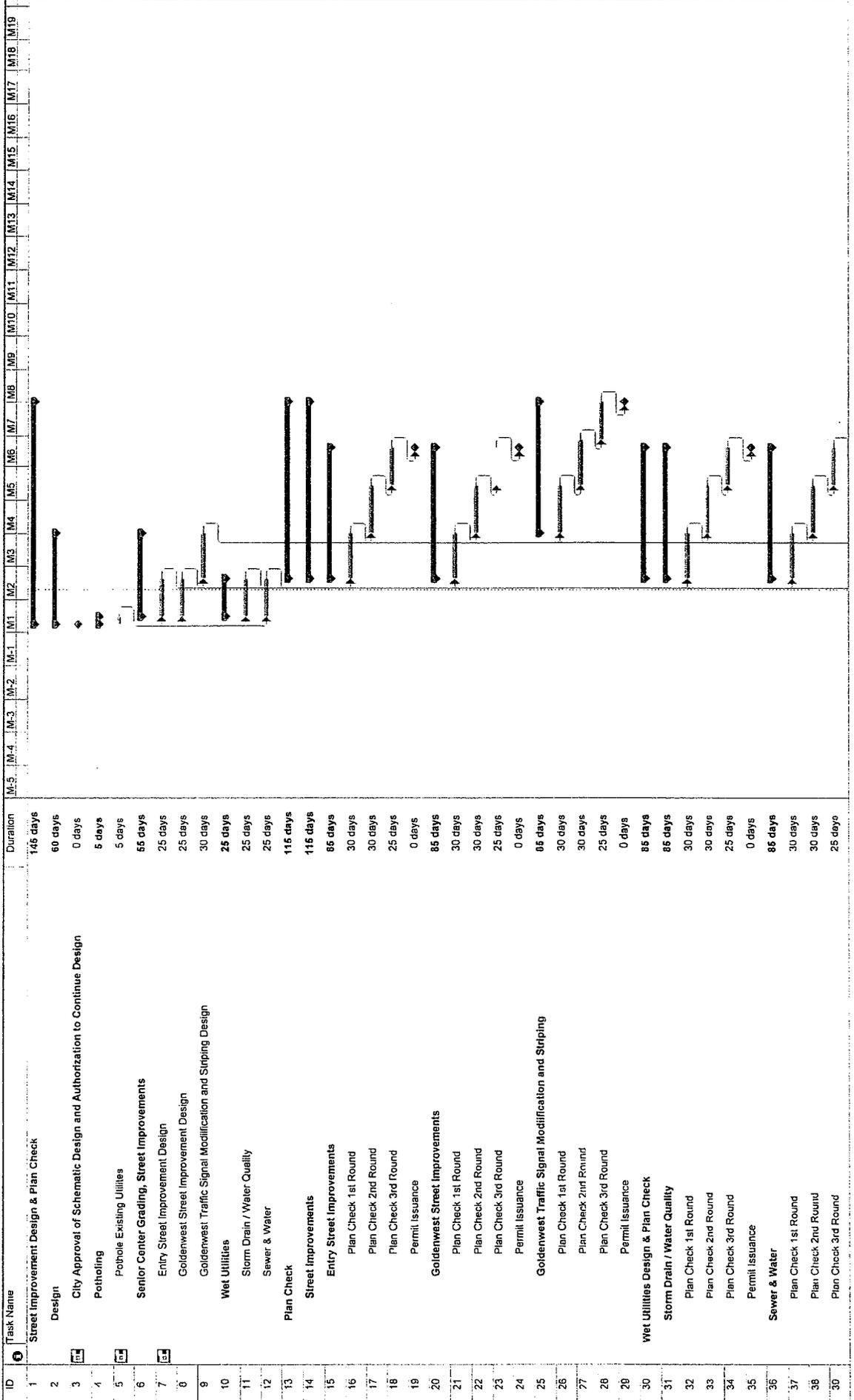
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Senior Center  
Schedule 2

[Street and Utility Design]



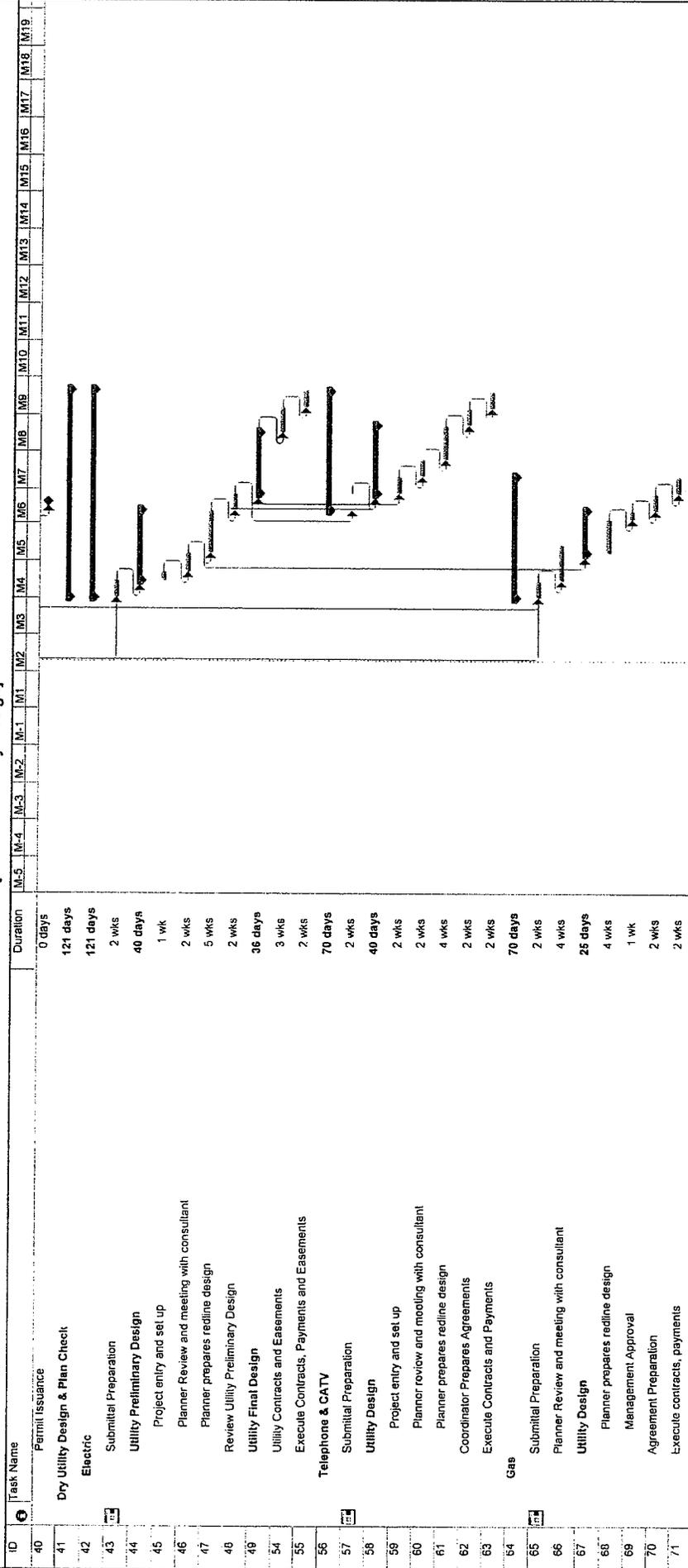
ID	Task Name	Duration	M-5	M-4	M-3	M-2	M-1	M1	M2	M3	M4	M5	M6	M7	M8	M9	M10	M11	M12	M13	M14	M15	M16	M17	M18	M19
1	Street Improvement Design & Plan Check	145 days																								
2	Design	60 days																								
3	City Approval of Schematic Design and Authorization to Continue Design	0 days																								
4	Potholing	5 days																								
5	Pothole Existing Utilities	5 days																								
6	Senior Center Grading, Street Improvements	55 days																								
7	Entry Street Improvement Design	25 days																								
8	Goldenwest Street Improvement Design	25 days																								
9	Goldenwest Traffic Signal Modification and Striping Design	30 days																								
10	Wet Utilities	25 days																								
11	Storm Drain / Water Quality	25 days																								
12	Sewer & Water	25 days																								
13	Plan Check	115 days																								
14	Street Improvements	115 days																								
15	Entry Street Improvements	85 days																								
16	Plan Check 1st Round	30 days																								
17	Plan Check 2nd Round	30 days																								
18	Plan Check 3rd Round	25 days																								
19	Permit Issuance	0 days																								
20	Goldenwest Street Improvements	85 days																								
21	Plan Check 1st Round	30 days																								
22	Plan Check 2nd Round	30 days																								
23	Plan Check 3rd Round	25 days																								
24	Permit Issuance	0 days																								
25	Goldenwest Traffic Signal Modification and Striping	85 days																								
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30	Wet Utilities Design & Plan Check	85 days																								
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34	Plan Check 3rd Round	25 days																								
35	Permit Issuance	0 days																								
36	Sewer & Water	85 days																								
37	Plan Check 1st Round	30 days																								
38	Plan Check 2nd Round	30 days																								
39	Plan Check 3rd Round	30 days																								
40	Plan Check 3rd Round	25 days																								

Project: Huntington Beach S  
Date: 10/10/08

September 5, 2008

Schedule is based on working days (M - F)  
Rough grading plan/permit is in process  
Start of Street Improvement and Utility Design coincides with City approval of Schematic Design

Senior Center  
Schedule 2  
[Street and Utility Design]



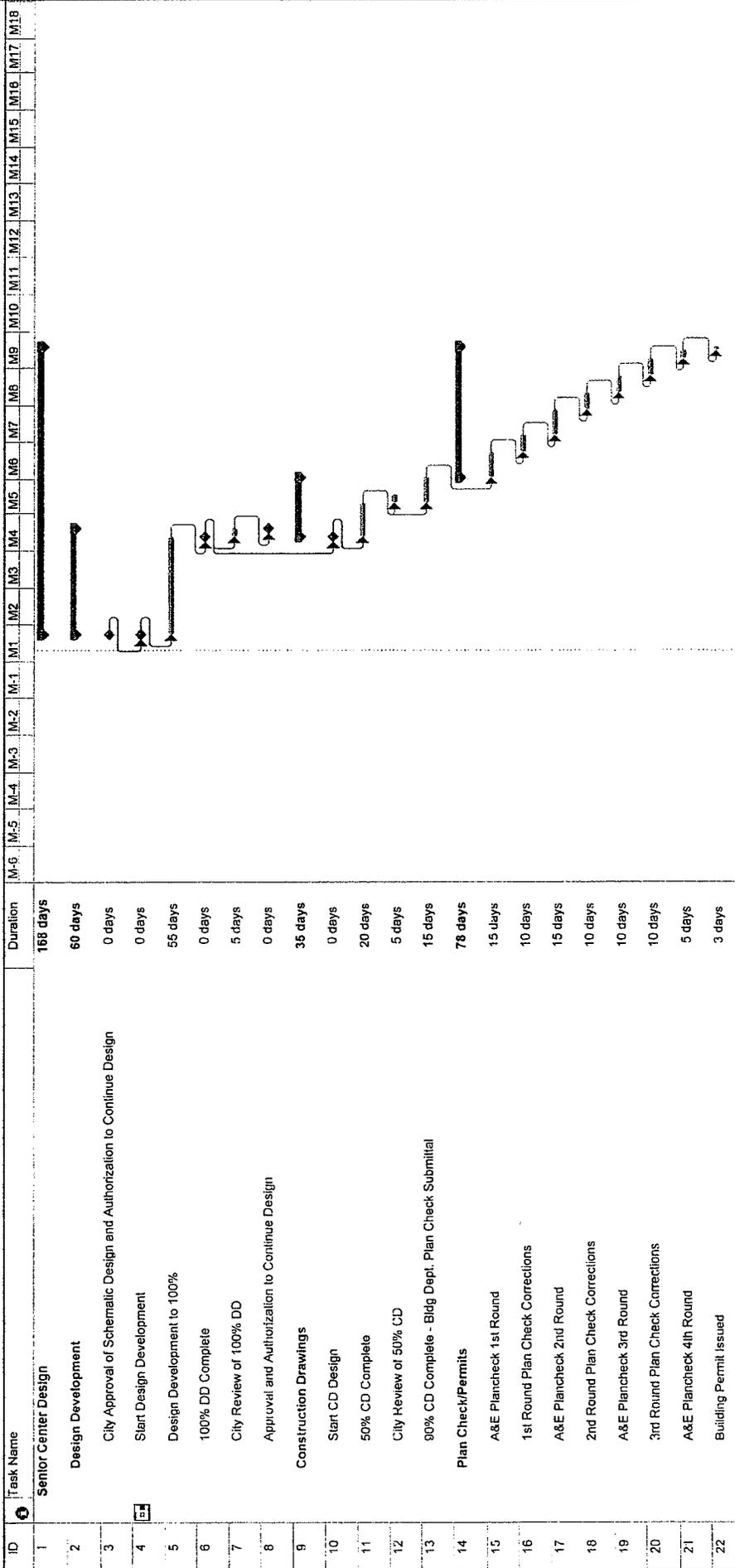
ID	Task Name	Duration	M-5	M-4	M-3	M-2	M-1	M1	M2	M3	M4	M5	M6	M7	M8	M9	M10	M11	M12	M13	M14	M15	M16	M17	M18	M19
40	Permit Issuance	0 days																								
41	Dry Utility Design & Plan Check	121 days																								
42	Electric	121 days																								
43	Submittal Preparation	2 wks																								
44	Utility Preliminary Design	40 days																								
45	Project entry and set up	1 wk																								
46	Planner Review and meeting with consultant	2 wks																								
47	Planner prepares redline design	5 wks																								
48	Review Utility Preliminary Design	2 wks																								
49	Utility Final Design	36 days																								
54	Utility Contracts and Easements	3 wks																								
55	Execute Contracts, Payments and Easements	2 wks																								
56	Telephone & CATV	70 days																								
57	Submittal Preparation	2 wks																								
58	Utility Design	40 days																								
59	Project entry and set up	2 wks																								
60	Planner review and meeting with consultant	2 wks																								
61	Planner prepares redline design	4 wks																								
62	Coordinator Prepares Agreements	2 wks																								
63	Execute Contracts and Payments	2 wks																								
64	Gas	70 days																								
65	Submittal Preparation	2 wks																								
66	Planner Review and meeting with consultant	4 wks																								
67	Utility Design	25 days																								
68	Planner prepares redline design	4 wks																								
69	Management Approval	1 wk																								
70	Agreement Preparation	2 wks																								
71	Execute contracts, payments	2 wks																								

Project: Huntington Beach S  
Date: 10/10/08

September 5, 2008

Schedule is based on working days (M - F)  
Rough grading permit is in process  
Start of Street Improvement and Utility Design coincides with City approval of Schematic Design

Senior Center  
Schedule 3  
[Building Design]



Task	Summary Progress	Task Progress	Task	Baseline Milestone
Senior Center Design	Summary	Task Progress	Task Split	Milestone
Design Development	Project Summary	Baseline	Task Progress	Summary
City Approval of Schematic Design and Authorization to Continue Design	Critical Split	Baseline Milestone	Baseline	Summary
Start Design Development	Critical Progress	Milestone	Baseline Split	
Design Development to 100%				
100% DD Complete				
City Review of 100% DD				
Approval and Authorization to Continue Design				
Construction Drawings				
Start CD Design				
50% CD Complete				
City Review of 50% CD				
90% CD Complete - Bldg Dept. Plan Check Submittal				
Plan Check/Permits				
A&E Plancheck 1st Round				
1st Round Plan Check Corrections				
A&E Plancheck 2nd Round				
2nd Round Plan Check Corrections				
A&E Plancheck 3rd Round				
3rd Round Plan Check Corrections				
A&E Plancheck 4th Round				
Building Permit issued				

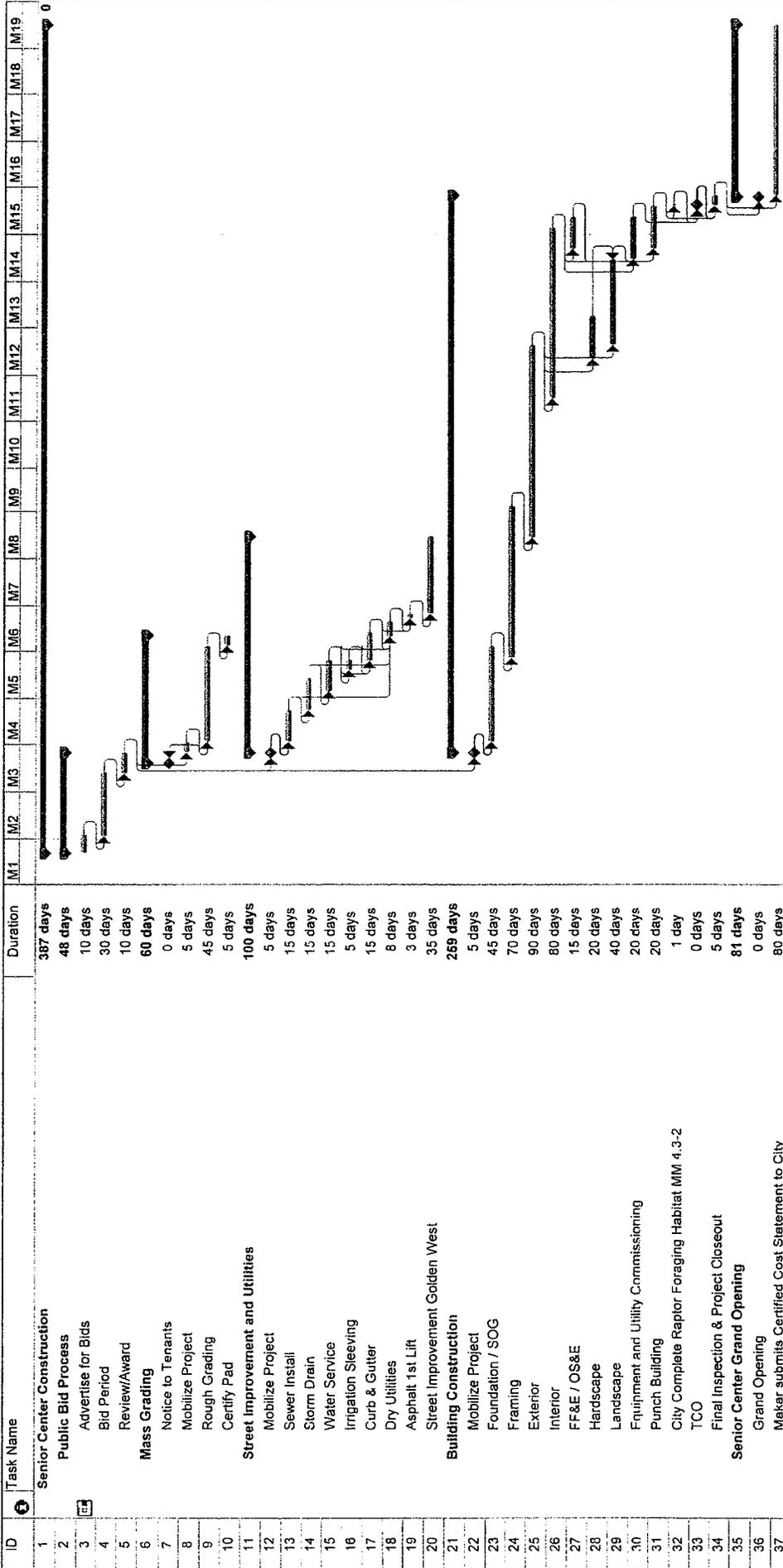
Project: Huntington Beach S  
Date: 10/10/08

September 5, 2008

Schedule is based on working days (M - F)  
Building Design coincides with City approval of Schematic Design

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Senior Center  
Schedule 4  
[Construction]



Task	Summary Progress	Task Progress	Task	Baseline Milestone
Senior Center Construction	Summary	Task Progress	Split	Milestone
Public Bid Process	Project Summary	Baseline	Task Progress	Summary Progress
Mass Grading	Critical Split	Baseline Split	Baseline	Summary
Street Improvement and Utilities	Critical Progress	Baseline Milestone	Baseline Split	
Building Construction		Milestone		
Senior Center Grand Opening				

Project: Huntington Beach S  
Date: 10/10/08  
September 5, 2008  
This Schedule commences with the completed performance under Schedule 2 and Schedule 3  
Schedule is based on working days (M - F)

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# **ATTACHMENT #2**

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## ESCROW AGREEMENT

THIS ESCROW AGREEMENT (this "Escrow Agreement") is made as of \_\_\_\_\_, 200\_\_ by and among MAKALLON ATLANTA HUNTINGTON BEACH, LLC, a Delaware limited liability company (the "Participant"), and the CITY OF HUNTINGTON BEACH, a charter city (the "City"), and is accepted by FIDELITY NATIONAL TITLE INSURANCE COMPANY, as escrow agent hereunder (the "Escrow Agent").

### RECITALS:

A. The parties to this Escrow Agreement *inter alia* are parties to that certain Owner Participation Agreement ("OPA") for the Pacific City Project that was executed and delivered pursuant to Agency Resolution No. 364 and City Resolution 2006-67 approved and adopted at the October 16, 2006 City Council meeting, as supplemented by letter dated February 1, 2008, and further supplemented by that certain Implementation Agreement of even date herewith implementing the provisions of the OPA governing the design, development and construction of the Senior Center (the "Implementation Agreement").

B. In accordance with Section 6 of the Implementation Agreement, within five (5) days from and after the date hereof, the Participant shall deliver to the Escrow Agent the sum of TWO MILLION DOLLARS (\$2,000,000), to be held, invested, disbursed and released in accordance with the terms and provisions of this Escrow Agreement.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which hereby are acknowledged, Participant and the City agree as follows:

1. Definitions. Capitalized terms used in this Escrow Agreement without definition have the respective meanings assigned to such terms in the OPA and the Implementation Agreement (as applicable).

2. The Escrow Fund. Simultaneously herewith, the Participant is delivering to the Escrow Agent, and by its execution hereof the Escrow Agent hereby accepts, good funds in the amount of TWO MILLION DOLLARS (\$2,000,000) and represents an initial design escrow fund hereunder. The Participant agrees to deliver, and the Escrow Agent agrees to accept, the following additional funds at the following times:

(a) Within ten (10) business days from and after the delivery of the proforma Project Budget pursuant to Section 305.6.b of the OPA (as amended by Section 5 of the Implementation Agreement), a one-time addition to the foregoing \$2,000,000 design escrow fund equal to the difference (if any) between the aggregate of the proforma Project Budget allocation for the work to be performed under Schedules 1, 2 and 3 [respectively, Schematic Approval, Street and Utility Design and Building Design], and the arithmetic total of (i) then aggregate Participant Interim Costs and (ii) the \$2,000,000 initial design escrow fund

delivered to the Escrow Agent as hereinabove recited (such initial \$2,000,000 initial design escrow fund and any such addition, collectively, the "Design Escrow");

(b) The sum of \$3,000,000 as a construction escrow fund, within ten (10) business days from and after the date notice of commencement of performance under the general construction contract for the Senior Center building improvements shall have been given to the general contractor by the Participant; and

(c) As additions to the foregoing \$3,000,000 construction escrow fund, on a continuing basis, the difference between the sum of \$3,000,000 (or, if less, the then unpaid balance under the general construction contract for the Senior Center building improvements, including retainage) and the then balance of such construction escrow fund, within ten (10) business days from and after the date the balance of the Construction Escrow (as herein defined) at any time falls below \$300,000 (such initial \$3,000,000 construction escrow fund and any and all such additions, collectively, the "Construction Escrow").

The Design Escrow and Construction Escrow as existing from time to time (in either instance or collectively, the "Escrow Fund") shall be held, invested, disbursed and released by the Escrow Agent under and in accordance with the terms and provisions of this Escrow Agreement, and shall be deposited by the Escrow Agent in a federally insured financial institution doing business in the State of California, in an insured money market or other interest bearing account or investment, as from time to time in writing may be available by and shall be approved or directed by the Participant. No interest earned on the Escrow Fund shall be deemed a part of the Escrow Fund and shall belong to Participant, and shall be disbursed to the Participant as from time to time requested (but no more frequently than on a calendar quarter basis) and in any event upon termination of this Escrow Agreement.

### 3. Disbursements and Release of Escrow Fund.

(a) Subject to the terms and conditions of this Agreement, upon the written request of the Participant (a "Disbursement Request") and the satisfaction by the Participant of the requirements of this Section 3, the Escrow Agent shall release portions of the Escrow Fund to the Participant or any third party professional, consultant or contractor designated by the Participant for the payment of costs incurred in furtherance of the design, development and construction of the Senior Center pursuant to the scope of work reflected under the applicable Schedules, proforma Project Budget, Project Budget, and the OPA and this Agreement (as the same from time to time may be modified, amended and/or supplemented). The Design Escrow shall be released only for the scope of work to be performed under Schedules 1, 2 and/or 3 [respectively, Schematic Approval, Street and Utility Design and Building Design], and the Construction Escrow shall be released only for the scope of work to be performed under Schedule 4 [Construction], except, that, as provided for under Section 3(e) hereof, any balance of the Design Escrow remaining after completion of the scope of work to be performed under Schedules 1, 2 and 3 [respectively, Schematic Approval, Street and Utility Design and Building Design] at the election and the written

direction of the Participant may be added to and thereupon shall be and become a part of the Construction Escrow hereunder.

(b) Each Disbursement Request shall include: (i) a description of the scope of work for which such Disbursement Request is made and for which payment is sought, (ii) invoices in support of such Disbursement Request and, for Disbursement Requests of the Construction Escrow, written certification from the general contractor or project architect that the invoiced work is in place and was constructed in substantial compliance with approved plans and specifications, and (iii) a written certification of the Participant that (y) such Disbursement Request is in compliance with line item allocations set forth in the proforma Project Budget or Project Budget from time to time (as the case may be), (z) all costs described in such Disbursement Request have been incurred in furtherance of the design, development and/or construction of the Senior Center as reflected under the applicable Schedules and the OPA and Implementation Agreement (as the same from time to time may be modified, amended and/or supplemented).

(c) If pursuant to any professional, consulting, or development or construction contract, the payee thereunder is entitled to periodic payments or a deposit payment is required prior to the delivery of goods or completion of services, then a Disbursement Request rightfully may be made in accordance with the terms of such contract and, if applicable, prior to the commencement of work under such contract. Except as otherwise provided in the preceding sentence, a Disbursement Request shall be made only after completion of that portion of the work for which payment is sought.

(d) The Participant shall provide to the City a copy of each Disbursement Request and supporting documentation delivered to the Escrow Agent concurrently with its delivery to Escrow Agent. With respect to any Disbursement Request received by Escrow Agent, funds shall be disbursed from the Escrow Fund, by federal wire transfer or good check, no more frequently than once each month, within no more than twenty (20) days following receipt by Escrow Agent of a completed Disbursement Request. For purposes of facilitating the performance of the Escrow Agent hereunder, as part of the submission of a Disbursement Request and supporting documentation to the Escrow Agent, the Participant shall certify to the Escrow Agent its compliance with the requirements of this Section 3 in all material respects and the Escrow Agent shall have the right to rely upon such certification for the purpose of making disbursements of the Escrow Fund hereunder.

(e) Upon completion of the scope of work to be performed under Schedules 1, 2 and 3 [respectively, Schematic Approval, Street and Utility Design and Building Design], any balance of the Design Escrow then remaining shall be released to the Participant, provided, that, at the election and in the discretion of the Participant, upon written direction given to the Escrow Agent, such balance instead shall be added to and thereupon shall be and become a part of the Construction Escrow hereunder. Promptly after the Participant shall give written certification to the Escrow Agent that the Senior Center has been substantially completed (as defined in Section 4(c) of the Implementation Agreement), all funds remaining in the Escrow Fund that are not to be disbursed pursuant to any pending Disbursement Request shall be immediately released by the Escrow Agent to the Participant. A copy of such certification of substantial completion shall be delivered to the

City. Notwithstanding any provision of this Agreement, the OPA or the Implementation Agreement express or implied to the contrary, in no event shall the City have the right or authority to prohibit or delay any disbursement of any portion of the Escrow Fund hereunder pursuant to any Disbursement Request or otherwise pursuant to the terms hereof, and any notice or instruction given by the City to the Escrow Agent contrary to the foregoing restriction shall be void, provided, however, that, the foregoing restriction shall not estop or otherwise limit right of the City to make or initiate any independent claim, demand or action against the Participant based upon an alleged wrongful Disbursement Request or release of any portion of the Escrow Fund.

(f) If the Participant is relieved or excused under the terms of the OPA and/or the Implementation Agreement from the obligation to design, develop and/or construct the Senior Center and instead becomes obligated to pay the Park In-Lieu Fee or Park In-Lieu Fee Balance, then all funds remaining in the Escrow Fund that are not to be disbursed pursuant to any pending Disbursement Request immediately shall be released to the Participant. If under Section 4(b)(C) of the Implementation Agreement, the City shall stay work in furtherance of the Senior Center pending the outcome of a Restraining Event, then, during the tenure of such stay, the Participant shall have no obligation to fund (and the City shall have no right to require the funding of) any additional amounts into the Escrow Fund hereunder for any reason.

(g) For purposes of clarity, the parties acknowledge that no Disbursement Request and no release of any portion of the Escrow Fund shall be deemed to amend or modify, or supersede, the provisions of the OPA controlling the determination of "Senior Center Costs" thereunder.

5. Escrow Agent.

(a) The reasonable fees and expenses of the Escrow Agent hereunder shall be paid for, in full, by the Participant and shall not constitute a Senior Center Cost under the OPA.

(b) The City and Participant hereby (i) agree to indemnify, hold harmless and defend the Escrow Agent, as escrow agent hereunder, in the good faith performance of its duties hereunder as such escrow agent, and release the Escrow Agent from and against any liability to the City or Participant hereunder except for fraud, gross negligence or willful misconduct, (ii) authorize the Escrow Agent to rely upon any signature, certification, notice, demand, waiver, consent or other instrument reasonably believed by the Escrow Agent to be genuine, and, (iii) in the event of a dispute between the City and Participant respecting the proper disposition of the Escrow Fund, authorize the Escrow Agent to pay the Escrow Fund into the registry of any court asserting jurisdiction over this Escrow Agreement, whereupon the Escrow Agent thereupon shall be fully released and discharged from all obligations to perform any and all duties or obligations under this letter respecting such funds.

(c) Without limiting the right of the Escrow Agent under clause (iii) of the preceding paragraph 5(b), the Escrow Agent shall have the right to resign its position as Escrow Agent hereunder upon thirty (30) days prior notice of resignation given to the Participant and the City, whereupon the Participant shall have the right to replace such Escrow Agent upon prior written notice given to the City. The Participant shall have the right to remove and replace the

Escrow Agent upon thirty (30) days prior notice of removal and appointment of a successor Escrow Agent to serve hereunder. Any successor Escrow Agent hereunder may be (and only may be) a attorney in good standing licensed to practice law in and a resident of the State of California or a national title insurance company or agency doing business in the State of California and, as a requirement of appointment, shall execute an escrow agreement in all material respects the substance of this Escrow Agreement, with any proposed substantive amendment or modification to this Escrow Agreement subject to the prior consent of the Participant and the City, each in the exercise of their respective discretion.

6. Miscellaneous.

(a) This Escrow Agreement shall be governed by the laws of the State of California, without regard to conflicts of laws principles.

(b) Time is of the essence of this Escrow Agreement.

(c) No provision of this Escrow Agreement may be waived except by instrument signed by the party against whom enforcement is sought. This Escrow Agreement may not be amended except by written instrument executed by the City, the Participant and the Escrow Agent.

(d) This Escrow Agreement shall terminate as of the date of payment and release of the entire Escrow Fund.

(e) This Escrow Agreement may be executed simultaneously in one or more counterparts, each of which shall be deemed to be an original, and all of which together shall constitute one and the same instrument.

(f) All notices and other communications required or permitted to be given under this Escrow Agreement shall be in writing and shall be sent by either recognized overnight courier or personal delivery or electronic mail (and, in such instance, with a copy of such electronic mail notice simultaneously given by either recognized overnight courier or personal delivery), in all cases addressed to the parties as and at the addresses set forth below, with copies to the other parties there noted, or at such other address, and to the attention of such person, of which Participant, the City or the Escrow Agent shall have given notice as therein provided.

If to Participant:

c/o Makar Properties, LLC  
4100 Macarthur Boulevard  
Suite 200  
Newport, CA 92660  
Attention: Executive Vice President for Development  
Telephone: 949/255-1100  
e-mail: [michaelg@makarproperties.com](mailto:michaelg@makarproperties.com)

With a copy to:  
Wendy L. Fields, Esquire  
Katten Muchin Rosenman LLP  
2900 K Street, N.W.  
Washington, DC 20007  
Telephone: 202/625-3800  
email: [wendy.fields@kattenlaw.com](mailto:wendy.fields@kattenlaw.com)

If to the City:

If to the Escrow Agent:

Fidelity National Title Insurance Company  
4041 MacArthur Boulevard, Suite 490  
Newport Beach, CA 92660  
Attention: Valerie Vona,  
Senior Commercial Escrow Officer  
Telephone: 949/477-3646  
e-mail: [VDVona@fnf.com](mailto:VDVona@fnf.com)

Notices shall be deemed given on the date delivered or attempted in good faith to be delivered to the primary addressee during normal working hours on business days.

SIGNATURES BEGIN ON FOLLOWING PAGE

IN WITNESS WHEREOF, the undersigned have executed this Escrow Agreement as of the date first set forth above.

THE CITY OF HUNTINGTON BEACH

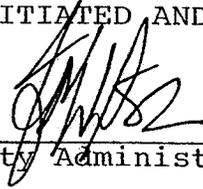
Date: \_\_\_\_\_

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

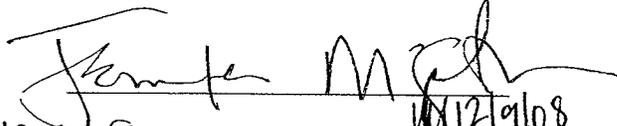
ATTEST:

\_\_\_\_\_  
City Clerk

INITIATED AND APPROVED:

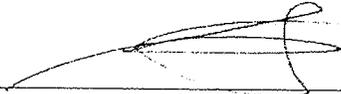
  
\_\_\_\_\_  
City Administrator

REVIEWED AND  
APPROVED AS TO FORM:  
City Attorney

  
12-9-08 12/9/08

MAKALLON ATLANTA HUNTINGTON BEACH, LLC,  
a Delaware limited liability company, its Member

By: Makar Properties, LLC,  
a Delaware limited liability company,  
its Authorized Member

By:   
\_\_\_\_\_  
Paul Makarechian  
Chief Executive Officer

By execution below, FIDELITY NATIONAL TITLE INSURANCE COMPANY hereby agrees to act as Escrow Agent hereunder in accordance with the terms hereof and hereby acknowledge receipt of certified true copies of the OPA and Implementation Agreement from the Participant and the City.

FIDELITY NATIONAL TITLE INSURANCE COMPANY

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

Date: \_\_\_\_\_, 2008

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