Memorandum

To: CHAIR AND COMMISSIONERS

CTC Meeting: May 21-22, 2003

Reference No.: 2.4c.(1)
Action Item

From: ROBERT L. GARCIA
Chief Financial Officer

Prepared by: Brice Paris
Division Chief
Division of Right of Way

Ref: AIRSPACE LEASE DIRECT NEGOTIATION

RECOMMENDATION:

The Department of Transportation recommends that the California Transportation Commission (Commission) authorize execution of a Lease Amendment between the State of California, Department of Transportation (Department) and the Lessee, GREGG SEAMAN.

The subject parcel is a 2.01 acre irregular quadrangle at the north-half of I-8 and west of I-805. Specifically, this parcel is located on the south side of Camino Del Rio North, directly underneath the I-805 freeway and connector ramps. The elevated ramps are approximately 50 feet above ground level in this area. They mark the east and west boundaries of the airspace parcel bound on the north by Camino Del Rio North, from which there is full at-grade access, on the south by I-8. The subject parcel is improved as a parking lot for an adjacent office building owned by Gregg Seaman, who acquired the building and an assignment of the existing airspace lease in August 2000.

The Department entered into a directly negotiated 55-year lease commencing February 1, 1982 and expiring on January 31, 2037 with Mission Valley/805, a California Limited Partnership. The use for the leased parcel was, and continues to be, as a parking lot in conjunction with an office building on the Lessee's adjacent fee-owned land.

Gregg Seaman, our current lessee, contacted the Department prior to purchasing the adjacent office building and the assignment of lease to inquire about receiving an extension of the lease term. In further discussions with Mr. Seaman, after he had completed the purchase and assignment of lease, he requested that we also consider modifying the rent escalation provisions to a more typical CPI clause from the existing provisions which consider occupancy levels and gross receipts (see Exhibit A) in addition to the lease extension which he needs to obtain optimal (re)financing.

The requested amended terms are:

Lease Term: 60 years – terminating January 31, 2063 (versus 2037)

Escalation Provision: CPI annually with a 3 percent floor and 5 percent ceiling (versus provisions in Exhibit A)

It is in the State's best interest to amend the lease as the use of this parcel in conjunction with the adjacent office building is the highest and best use and provides the greatest return to the State. The existing rent of $17,198 per month is at current fair market value as determined by a recent staff appraisal. The existing lease's settlement amendment specifies Reevaluations, every five years that will ensure that the rental rate is always close to market rent. The existing annual escalation provisions are unusual for our leases and extremely cumbersome to implement for both parties and should be audited on a regular basis. A more typical CPI-based escalation clause would simplify matters, and the Department's lack of audit support is yet another reason to support the modification.

The Commission's Airspace Advisory Committee at their April 10, 2003 meeting reviewed this Lease Amendment and recommends approval of the proposed terms and conditions.

Enclosures

4.2 Annual Adjustment of Rent

4.2.1 Definitions. As used herein with initial capital letters, the following terms shall have the following meanings:

(a) "Adjustment Date": February 1, 1993, and February 1 of each year thereafter except years in which a reevaluation under Paragraph 4.3 actually occurs.

(b) "Accounting Year": The twelve-month period beginning on February 1 of a calendar year and ending on January 31 of the immediately following calendar year. References to the "Prior Accounting Year" are to the Accounting Year just completed as of each Adjustment Date, and references to the "Second Prior Accounting Year" are to the Accounting Year immediately preceding such Prior Accounting Year. (For example, as of 2/1/93 the "Prior Accounting Year" will be the Accounting Year 2/1/92 - 1/31/93, and the "Second Prior Accounting Year" will be the Accounting Year 2/1/91 - 1/31/92.)

(c) "Average Occupancy": The average annual square feet under lease in the Building for a specified Accounting Year, which figure is derived by summing the net rentable square footage of the Building which is, on the first day of each month during that Accounting Year, the subject of a lease by a subtenant under which actual occupancy has commenced, and dividing said sum by 12.

(d) "Gross Receipts": The total amount of rents (excluding reimbursements for expenses, taxes or tenant improvements) actually received by Tenant from all subtenants of the Leased Premises and from all subtenants of the Adjacent Premises during a specified Accounting Year, excluding any rents prepaid by any subtenant or tenant for a period beyond such Accounting Year and any rents paid in the form of an advance deposit, and subject to Paragraph 4.2.4 below. Prepaid rents actually received by Tenant during any Accounting Year will be included in Gross Receipts for the Accounting Year(s) for which such rents are paid.

4.2.2 Annual Adjustments.

(a) On each Adjustment Date, the monthly rent payable to Landlord under the Lease shall be adjusted in accordance with the following formula:

R = A x B/C, where:

R = Adjusted monthly rent

A = Monthly rent in effect immediately prior to the Adjustment Date

B = $\dfrac{\text{Gross Receipts for Prior Accounting Year}}{\text{Average Occupancy for Prior Accounting Year}}$

C = $\dfrac{\text{Gross Receipts for Second Prior Accounting Year}}{\text{Average Occupancy for Second Prior Accounting Year}}$

provided, however, that if the application of such formula would result in a reduction in the rent payable, then the rent shall remain unchanged.

(b) The monthly rent as so adjusted shall become effective as of the Adjustment Date, and shall remain in effect until readjusted on the next Adjustment Date or as provided in Paragraph 4.3. Any additional rent for which Tenant becomes obligated as a result of such adjustment shall be due and payable by Tenant within thirty (30) days after Tenant's receipt of billing therefor by Landlord.

4.2.3 Reporting.

(a) Within forty-five (45) days following the close of each Accounting Year, Tenant shall deliver to Landlord a correct statement in writing itemizing the Gross Receipts and specifying the Average Occupancy (and the occupancy figures used to compute the Average Occupancy) during such Accounting Year. Such statements shall be certified as accurate and signed by Tenant or its responsible agent under penalty of perjury and shall be in the form prescribed by Landlord. Based upon this statement, Landlord shall compute the adjusted rent as provided in this Paragraph 4.2.

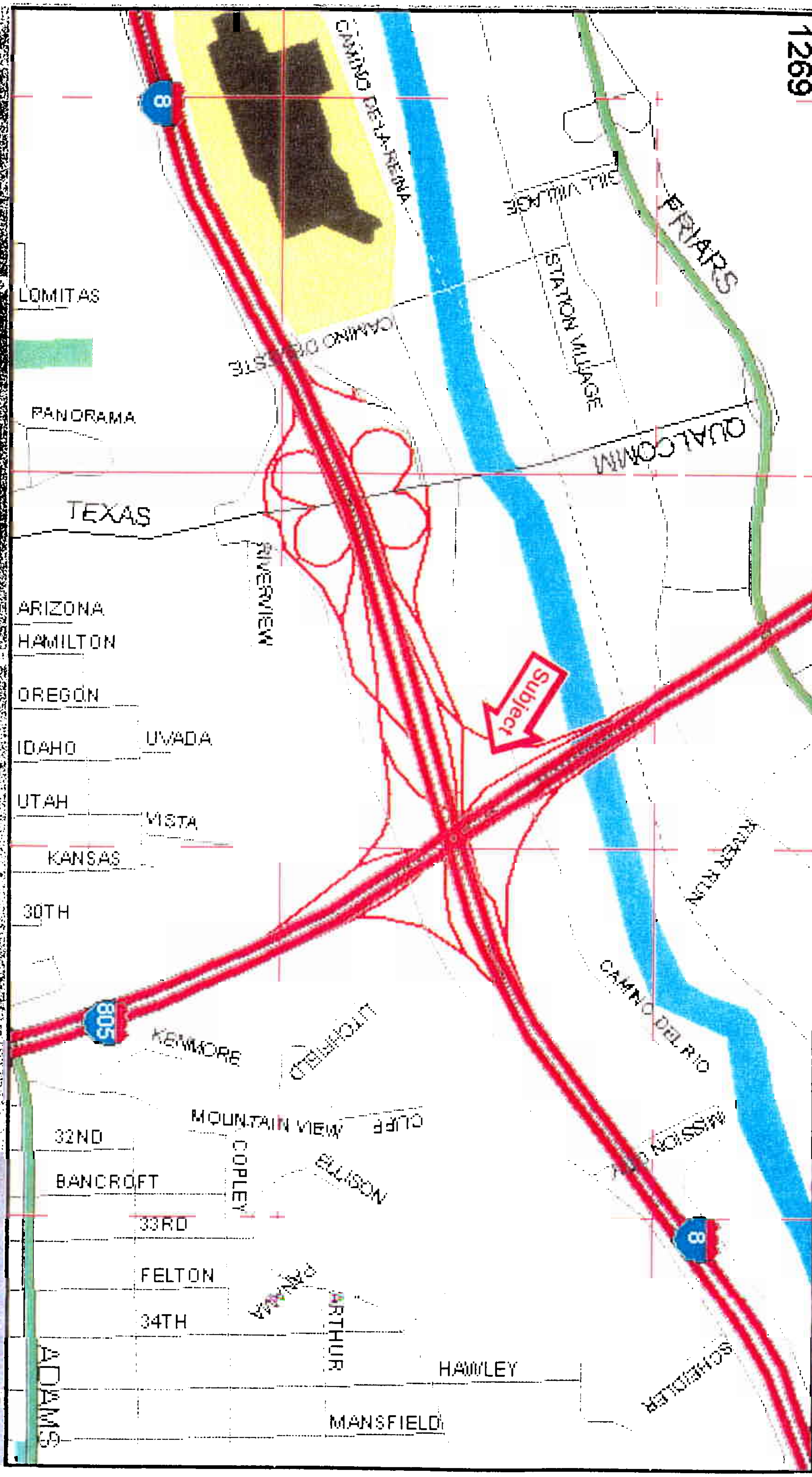
(b) Within ninety (90) days after the end of each Accounting Year, Tenant shall at its own expense submit to landlord a statement prepared, audited or reviewed by a Certified Public Accountant, reflecting the Gross Receipts for such Accounting Year. The Certified Public Accountant must attest that the statement submitted is an accurate representation of Tenant's records as reported to the United States of America for income tax purposes.

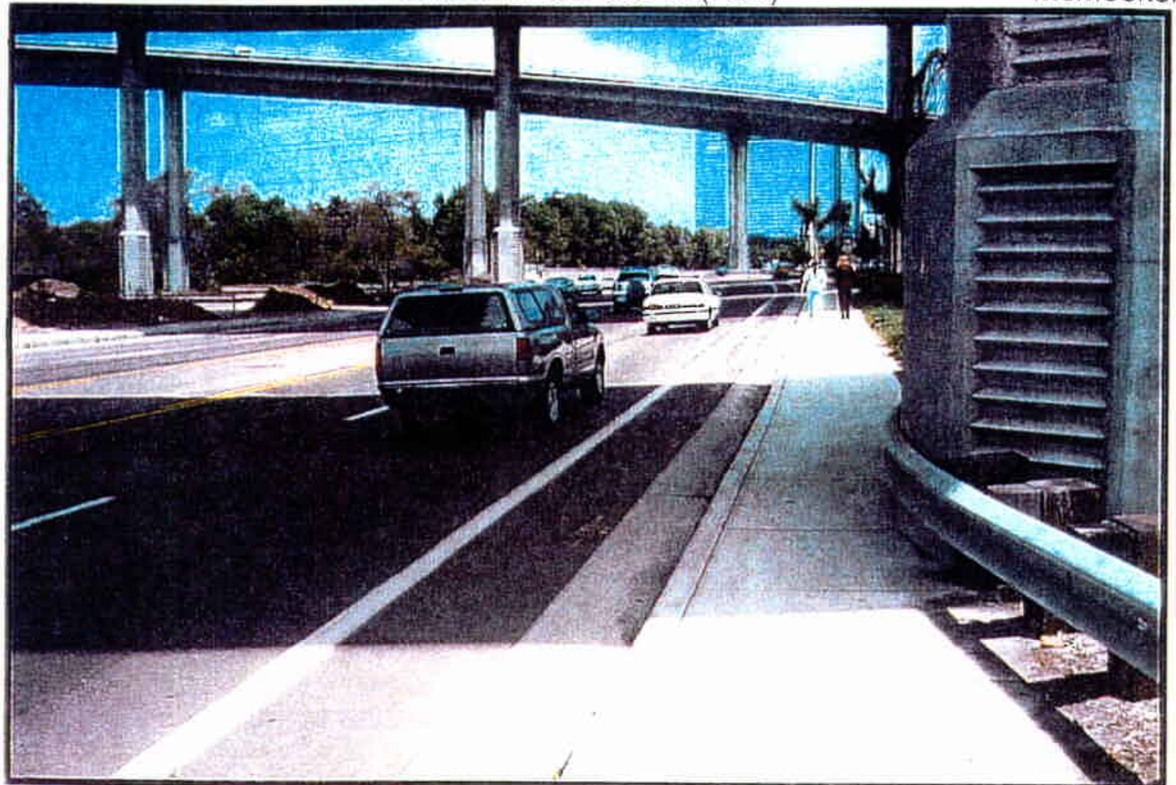
(c) All Tenant's books of account and records and supporting source documents related to the Lease or to business operation conducted within or from the Leased Premises and the Adjacent Premises shall be kept in accordance with standard accounting procedures and made available at one location within the limits of the County of San Diego. Landlord shall, through its duly authorized agents or representatives, have the right to examine and audit said books of account and records and supporting source doc[illegible]ts at any and all reasonable times for the purpose of det[illegible]n-ing the accuracy thereof. The full cost of said audit[illegible] determined by Landlord, shall be borne by Tenant if ei[illegible] or both of the following conditions exist, but otherwi[illegible] shall be borne by Landlord:

(1) The audit reveals an underpayment [illegible] more than five (5) percent between the rent due as repo[illegible]ed and paid by Tenant in accordance with this Lease and the rent due as determined by said audit; or

(2) Tenant has failed to maintain true and complete books, records, accounts and supporting source documents in accordance with this Paragraph 4.2.3(c). The adequacy of records shall be determined at the sole reasonable discretion of Landlord's auditor.

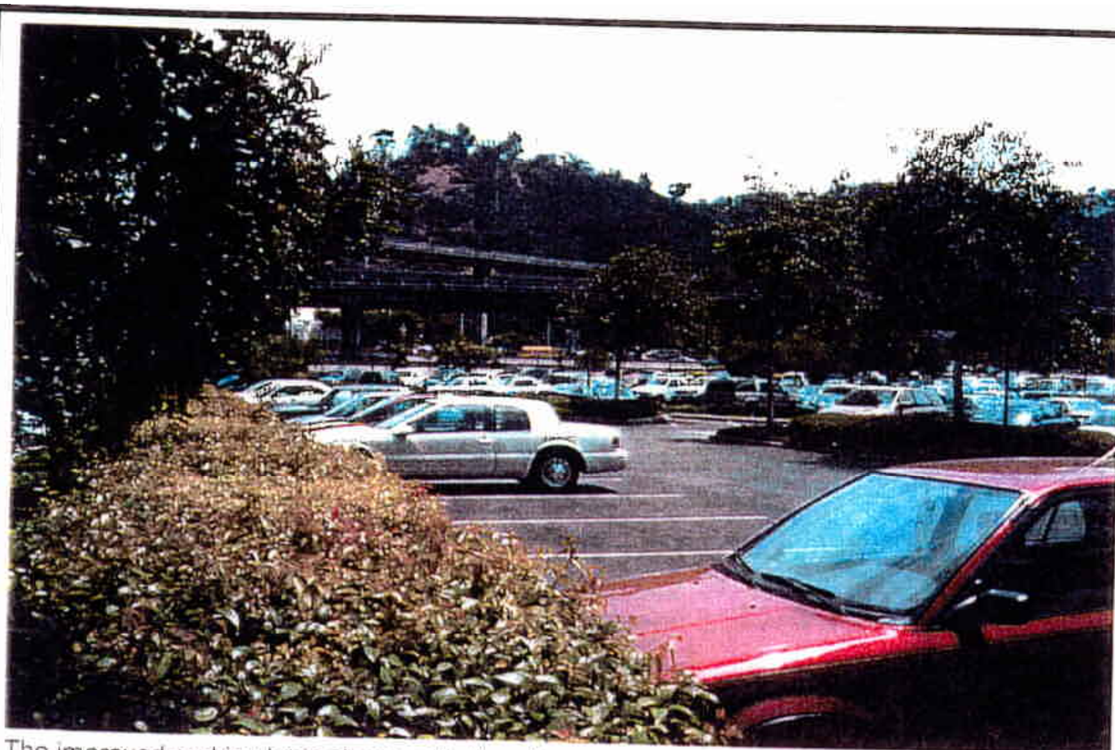
4.2.4 Adjustment to Gross **Receipts**. If Tenant enters into a lease to a subtenant which is not a bona fide, arm's length lease, and which provides for rent for the leased space which is, in the aggregate for the term of such lease, more than 25% below the fair market rent for such lease (determined based upon the rental market existing at the time that the lease was entered into, and taking into account the appropriateness in such market of "free" rent, discounted rent or other rent incentives and landlord concessions), then Gross Receipts for each Accounting Year during the term of such lease shall be increased by an amount equal to the difference between the rent payable by such subtenant during such Accounting Year and the rent which would have been payable by such subtenant during such Accounting Year if the lease had been on fair market rent terms (determined based upon the rental market existing at the time that the lease was entered into, and taking into account the appropriateness in such market of "free" rent, discounted rent or other rent incentives and landlord concessions). If Landlord believes that an adjustment to Gross Receipts is appropriate under this Paragraph 4.2.4, it shall so advise Tenant in writing, specifying the requested adjustment to Gross Receipts. Tenant shall respond thereto in writing within thirty (30) days. If Landlord and Tenant are unable to agree on an adjustment within thirty (30) days after Tenant's response, the amount of such adjustment, if any, shall be determined consistent with this Paragraph by the use of appraisers under the same procedure as set forth in Paragraph 4.3.2. The intent of this Paragraph 4.2.4 is to allow Tenant the flexibility to provide reasonable discounts and incentives to its subtenants without causing unfair manipulation of rents which may have the effect of limiting normal ground rent increases to which Landlord would otherwise be entitled.


1269
CAMINO DE LA REINA
FRIARS
STATION VILLAGE
QUALCOMM
LOMITAS
PANORAMA
TEXAS
RIVERVIEW
ARIZONA
HAMILTON
OREGON
UVADA
IDAHO
UTAH
VISTA
KANSAS
30TH
Subject
RIVER RUN
CAMINO DEL RIO
8
805
KENMORE
LITCHFIELD
MOUNTAIN VIEW
CLIFF
32ND
BANCROFT
COPLEY
ELLISON
MISSION
33RD
FELTON
34TH
ARTHUR
HAWLEY
MANSFIELD
ADAMS



This is a photo looking east on Camino Del Rio North at the subject parcel. The volume of traffic has significantly increase over the years with building development.

This picture was taken at the same place looking west at the subject parcel.



The improved parking lot is shown with the off ramp structures in the rear of the picture.

Access to Dave & Busters is seen here.

This is the transitional ramp from southbound I-805 to westbound I-8.

This is the KV line over the lot.

Photo shows the proximity of the entrance to the airspace.