

ORIGINAL

AMENDED AND RESTATED AGREEMENT

THIS AMENDED AND RESTATED AGREEMENT ("**Agreement**") is entered into this 4th day of April, 2017, (the "**Effective Date**") by and between the CITY OF ALAMEDA, a municipal corporation, (the "**City**"), and the ALAMEDA WEST LAGOON HOME OWNERS' ASSOCIATION, (the "**Association**"), and replaces in its entirety the original agreement entered into the 25th day of November 1964 (the "**Original Agreement**"); and the amendments dated 7 February 1968 and 4 September 1996.

RECITALS:

A. On November 25, 1964, the Original Agreement was entered into by and between City and the Association to set forth the rights and responsibilities of each party in connection with the proper maintenance of the South Shore Lagoon System (the "**Lagoons**") and all the machinery and equipment necessary for the operation of said Lagoon (the "**Machinery and Equipment**") for storm drainage and private recreational and aesthetical purposes. The Lagoons are shown in Exhibit "A" attached hereto. The Machinery and Equipment shall include but not be limited to the following: 24" pipe outboard of Shore Line Drive, Supply pump and motor, pump structure, 21" supply line, Weir gates (Willow Street), Weir structure (Willow Street), Grand Street Bridge, all 5' diameter culvert pipes, outfall Weir gates, outfall Weir structure, 10'x6' R. C. Box Culvert, outfall channel and such other machinery and equipment that may be installed in the future for the maintenance of the Lagoons. The Lagoons and the Machinery and Equipment are collectively referred to as the "**Lagoon System**".

B. On February 7, 1968, the Agreement was modified to amend paragraph 7(c) of the Original Agreement to allow funds for the replacement reserve to be placed in state or federal chartered commercial bank, as well as or instead of, a savings and loan association.

C. On September 4, 1996 the Agreement was modified to replace paragraph 5 of the Original Agreement in its entirety with a new paragraph 5; to delete paragraph 6 of the Original Agreement in its entirety; and to replace paragraph 7 of the Original Agreement in its entirety with new paragraphs 7(a) and 7(b).

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D. WHEREAS, the parties have performed under the Original Agreement, as amended from time to time, for over 50 years to their mutual satisfaction and wish to continue their arrangement; and

E. WHEREAS, the City is a municipal corporation duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of the City; and

F. WHEREAS, the Association has title to the Lagoons and all the Machinery and Equipment necessary for the operation of the Lagoon System, subject to the easements herein referred to; and

G. WHEREAS, the parties hereto desire to continue the equitable division of the costs of maintaining the Lagoon System, in good condition for storm drainage and private recreational and aesthetical purposes (the "**Maintenance Costs**"); and

H. WHEREAS, it is expressly understood that the City has plans to continue to perform the functions of sewage overflow abatement, dredging, testing and monitoring of the Lagoon System, maintaining and regulating the Lagoon System, and pay its share of the Maintenance Costs pursuant to the terms of this Agreement; and

I. WHEREAS, it is expressly understood that the Association has plans to continue to pay, or reimburse the City, promptly when due, its share of the Maintenance Costs pursuant to the terms of this Agreement.

J. City and the Association now desire to replace the Original Agreement and all amendments with this Amended and Restated Agreement and to clarify certain terms and conditions as set forth herein. Now, therefore it is mutually agreed between the parties hereto, as follows:

1. **Term of the Agreement and Renewals:** This Agreement shall run from the Effective Date until 31 December 2026, at which time it shall automatically renew for additional ten (10) year terms until the parties mutually agree to amend or terminate this Agreement. Upon termination of this Agreement, each party shall pay to the other party that share of Maintenance Services Costs specified in this Agreement that has been

incurred or owed but unpaid prior to the effective date of the expiration or early termination. This obligation expressly survives the expiration or early termination of this Agreement. The current term of this Agreement, including any automatic renewals, shall be referred to as the "Term".

2. **Maintenance Services and Access:**

(a) In collaboration with the Association, the City shall perform all work, labor, repairs, replacement, maintenance and engineering services that are necessary to keep said Lagoon System in good condition and working order for purposes of storm drainage, private recreation and aesthetics, except for work, labor, repairs, replacements maintenance or engineering services that the Association may perform with the prior written consent of the City Manager or his/her designee. If the Association undertakes (with the City's consent) any maintenance work which was the responsibility of the City under this Agreement, then the Association is entitled to an offset (or reimbursement) from the City for its share of that cost pursuant to Section 5 Division of Maintenance Costs.

(b) During the term of this Agreement, the Association hereby grants to the City and its employees, contractors and agents, free access, including access by motorized craft, to the Lagoons and the Lagoon System on a twenty-four (24) hours a day, seven (7) days a week basis and without the need for prior notice solely for the purpose of performing work, labor, repairs, replacement, maintenance and engineering services that are necessary to keep said Lagoon System in good condition and working order for purposes of storm drainage, private recreation and aesthetics.

(c) During the term of this Agreement, the City hereby grants to the Association and its employees, contractors and agents, free access to the 24" pipe outboard of Shore Line Drive, Supply pump and motor, pump structure, 21" supply line, Weir gates (Willow Street), Weir structure (Willow Street), on a twenty-four (24) hours a day, seven (7) days a week basis and without the need for prior notice solely for the purpose of performing work, labor, repairs, replacement, maintenance and engineering services that are necessary to keep said Lagoon System in good condition and working order for purposes of storm drainage, private recreation and aesthetics.

3. **Grant of Easement.** The Association hereby grants to the City perpetual non-exclusive easements over all of the Lagoons and use of the Machinery and Equipment for the purpose of allowing the City to enter upon and maintain the Lagoon System, in good condition for storm drainage and private recreational and aesthetical purposes.

4. **Third Party Contract Review.** Each party shall submit to the other party copies of all proposed contracts with vendors and/or any other third parties where the submitting party intends that the reviewing party will be either: (a) obligated to remit funds under the terms of this Agreement; and/or (b) contributing funds under Section 5 (Division of Maintenance Costs, below) for services provided by that vendor/third party. The reviewing party shall have fourteen (14) days to review and provide comments to the submitting party.

5. **Division of Maintenance Costs:** The parties hereto agree that the costs for maintaining the Lagoon System ("**Maintenance Costs**") in good condition for purposes of sewage overflow abatement, dredging, water circulation, water quality control, landscaping, testing and monitoring of the Lagoon System, storm drainage and private recreational and aesthetical purposes and other similar costs shall be divided between the parties hereto as follows:

(a) All costs relating to the maintenance, inspection, cleaning, upgrade (including new installation), repair and replacement of the items listed below shall be paid solely by the Association:

1. 24" pipe from the Bay inlet grate to the supply pump
2. Supply pump and motor
3. Pump structure
4. 21" Supply line from the supply pump to the Lagoon
5. Weir gates (Willow Street)
6. Weir structure (Willow Street)

(b) All costs relating to the maintenance, inspection, cleaning, upgrade (including new installation), repair and replacement of the items listed below shall be paid solely by the City:

1. Grand Street Bridge
2. All 5' diameter culvert pipes
3. Outfall Weir gates
4. Outfall Weir structure
5. 10'x6' R. C. Box Culvert
6. Outfall channel
7. Public seawalls and fences at the end of the streets and along the right-of-way's listed in Exhibit "B" List of Certain Public Structures.
8. Public storm drain pipes which outfall into the Lagoon System
9. All costs incurred for cleaning, testing, monitoring and chemical control due to sewage spills and/or releases from City sanitary sewer mains.

(c) All costs relating to the maintenance, upgrade (including new installation), repair and replacement of the items listed below shall be paid one half (1/2) by the City and one half (1/2) by the Association:

1. Energy for pumping;
2. Labor and materials for routine and emergency cleaning of lagoon waters, testing, monitoring and chemical control that are not required as a result of sewage spills and/or releases; (See Section 5(b)(9), above.) and
3. All costs incurred for the maintenance of the Lagoon System that do not relate specifically to items listed in Subsections 5(a) through 5(c), above, and/or 5(d) and 5(e), below.

(d) All costs related to dredging of the Lagoon System shall be paid seventy percent (70%) by the City and thirty percent (30%) by the Association.

(e) All costs incurred to assess funds from Association members shall be paid 100% by the Association.

6. **Payment of Association's Share of Maintenance Services Costs:**

(a) The City shall estimate the Association's share of all Maintenance Services Costs, in advance on a fiscal year basis (July 1st – June 30th) and shall inform the association in writing of the Association's share of said estimated costs. Said advance

estimated costs shall be delivered to the Association in writing on or before August 30th of each and every year.

(b) The Association shall then estimate the additional reasonable annual operating and reserve funds needed and shall then determine a pro-rata assessment of said total costs on each of its members. The Association shall then prepare a statement of such pro-rata assessment and mail one copy to each member of the Association pursuant to the requirements of the Davis-Stirling Act and the Association's governing documents.

(c) The City shall bill the Association quarterly on a pro-rata basis for all costs incurred incident to the lagoon system during the previous quarter. Maintenance Services Costs shall include the Association's share, if any, of contracts with third party providers of services or supplies. Said bill will be due and payable when received and the Association will be considered to be in default if it remains unpaid ninety (90) days after issuance. In the event of delinquency, the City may institute legal proceedings.

(d) The failure by City to pursue the foregoing remedies shall not operate as a waiver or otherwise excuse the Association from such default. The obligation to pay expressly survives the term of this Agreement.

7. **Reserves:** The Association and the City agree that fifty thousand (\$50,000) is a reasonable amount to be established as a reserve for the operation and maintenance of the lagoon system. Said funds shall be deposited by the Association in a Certificate of Deposit in both the City's and the Association's name and shall be established so that either party, within 72 hours prior written notification to the other party, may withdraw the principal funds to meet the obligations for maintaining and operating the lagoon system. Interest on this account shall accrue to the Association, which may withdraw such interest at their discretion.

8. **Insurance:** On or before the Effective Date, the Association shall furnish the City with certificates showing the type, amount, class of operations covered, effective dates and dates of expiration of insurance coverage in compliance with subsections 8(a) - (d) below. Such certificates shall also contain substantially the following statement: "Should any of the above insurance covered by this certificate be canceled or coverage reduced

before the expiration date thereof, the insurer affording coverage shall provide ten (10) days' advance written notice to the City of Alameda by certified mail, "Attention: Risk Manager." It is agreed that the Association shall maintain in force at all times during the Term of this Agreement all appropriate coverage of insurance required by this Agreement with an insurance company licensed to do insurance business in the State of California.

(a) Coverage: The Association shall maintain the following insurance coverage:

1. Workers' Compensation:

Statutory coverage as required by the State of California.

2. Public Liability:

Public Liability coverage in the following minimum limits:

Bodily Injury:	\$1,000,000 each occurrence
	\$2,000,000 aggregate - all other
Property Damage:	\$1,000,000 each occurrence
	\$2,000,000 aggregate

If submitted, combined single limit policy with aggregate limits in the amounts of \$2,000,000 will be considered equivalent to the required minimum limits shown above.

(b) Subrogation Waiver: The Association agrees that in the event of loss due to any of the perils for which it has agreed to provide liability insurance, the Association shall look solely to its insurance for recovery. The Association hereby grants to the City, on behalf of any insurer providing liability insurance to either the Association or the City with respect to the services of the Association herein, a waiver of any right to subrogation which any such insurer of the Association may acquire against the City by virtue of the payment of any loss under such insurance.

(c) Failure to Secure Insurance: If the Association at any time during the Term should fail to secure or maintain the foregoing insurance, the City shall be permitted (but not obligated) to obtain such insurance in the Association's name or as an agent of the Association and shall be compensated by the Association for the costs of the insurance

premiums plus interest at the maximum rate permitted by law and computed from the date written notice is received that the premiums have not been paid.

(d) Additional Insureds: The City, its City Council, boards, commissions, officials, employees, and volunteers shall be named as an additional insured under all insurance coverages, except workers' compensation insurance. The naming of an additional insured shall not affect any recovery to which such additional insured would be entitled under the insurance policy if not named as such additional insured. An additional insured named herein shall not be held liable for any premium, deductible portion of any loss, or expense of any nature on the insurance policy or any extension thereof. Any other insurance held by an additional insured shall not be required to contribute anything toward any loss or expense covered by any insurance policy required by this Agreement. Endorsements naming the City, its City Council, boards, commissions, officials, employees, and volunteers as additional insured shall be submitted with the insurance certificates.

(e) Sufficiency of Insurance: The insurance limits required by City are not represented as being sufficient to protect the Association. The Association is advised to consult the Association's insurance broker to determine adequate coverage for the Association.

9. Hold Harmless: As long as the Association has maintained the insurance specified in Section 8, above, the Association's obligation to indemnify, defend, and hold harmless as specified in this Section 9 is limited to the amount of funding that is available under that insurance coverage available for payment of the indemnification, defense and hold harmless of the City Indemnitees. The Association shall indemnify, defend, and hold harmless the City, its City Council, boards, commissions, officials, employees, and volunteers ("**City Indemnitees**") from and against any and all loss, damages, liability, claims, suits, costs and expenses whatsoever, including reasonable attorneys' fees ("**Claims**"), arising from or in any manner connected to the Association's negligent act or omission regarding performance of services or work conducted or performed pursuant to this Agreement. If Claims are filed against City Indemnitees which allege negligence on behalf of the Association, the Association shall have no right of reimbursement against

City Indemnites for the costs of defense even if negligence is not found on the part of the Association. However, the Association shall not be obligated to defend, indemnify and/or hold harmless City Indemnites from Claims arising from the sole negligence, willful misconduct of City Indemnites; the Association is also not obligated to indemnify and/or hold harmless City Indemnites for damages in excess of the funding afforded by available insurance coverage under the insurance specified in Section 8, above. This hold harmless obligation expressly survives the expiration or early termination of this Agreement.

10. **Time is of the Essence:** The Association and City agree that time is of the essence regarding the performance of this Agreement.

11. **Independent Parties:** The Association and the City each hereby declare that it is engaged as an independent entity and each agrees to perform their respective work, if any, as an independent contractor and not as an agent of the other. The manner and means of conducting the work are under the control of each party, except to the extent they are limited by statute, rule or regulation and the express terms of this Agreement. No civil service status or other right of employment will be acquired by virtue of the Association's services. None of the benefits provided by the City to its employees, including but not limited to unemployment insurance, workers' compensation plans, vacation and sick leave are available from the City to the Association, its employees or agents.

12. **Non-Discrimination:** Consistent with City's policy that harassment and discrimination are unacceptable employer/employee conduct, the Association agrees that harassment or discrimination directed toward a job applicant, a City employee, or a citizen by the Association or the Association's employee on the basis of race, religious creed, color, national origin, ancestry, handicap, disability, marital status, pregnancy, sex, age, or sexual orientation will not be tolerated. The Association agrees that any and all violations of this provision shall constitute a material breach of this Agreement.

13. **Permits and Licenses:** The Association shall obtain and maintain (or cause its contractors, consultant and vendors, if any, who perform work to obtain and maintain) during the term of this Agreement, all appropriate permits, certificates and licenses,

including a City Business License that may be required in connection with the performance of services hereunder. Costs of permits and licenses shall be included as part of the costs of maintenance, upgrade (including new installation), repair and/or replacement and shall be allocated between the City and the Association in compliance with Section 5, above.

14. **Records:**

(a) The Association and the City shall each maintain complete and accurate records with respect to sales, costs, expenses, receipts and other such information that relate to the performance of services under this Agreement. The Association and the City shall each maintain adequate records of services provided in sufficient detail to permit an evaluation of the services. All such records shall be maintained in accordance with generally accepted accounting principles and shall be clearly identified and readily accessible. The Association and the City shall each provide to the other free access to such books and records to the representatives of the auditing party or its designees at all proper times, and gives the auditing party the right to examine and audit same, and to make transcripts therefrom as necessary, and to allow inspection of all work, data, documents, proceedings and activities related to this Agreement. Such records, together with supporting documents, shall be sent by the maintaining party to the requesting party within sixty (60) days of the maintaining party's receipt of the other party's request for records.

(b) If supplemental examination or audit of the records is necessary due to concerns raised by a preliminary examination or audit of records, and a supplemental examination or audit of the records discloses a failure to adhere to appropriate internal financial controls, or other breach of contract or failure to act in good faith, then the breaching party shall reimburse the auditing party for all reasonable costs and expenses associated with the supplemental examination or audit.

15. **Notice:** All notices, demands, requests or approvals to be given under this Agreement shall be given in writing and conclusively shall be deemed served when delivered personally or when sent by facsimile and/or other electronic means (or on the

second business day after the deposit thereof in the United States Mail, postage prepaid, registered or certified, addressed) as hereinafter provided.

All notices, demands, requests, or approvals from the Association to City shall be addressed to City at:

City of Alameda
Public Works Department
950 West Mall Square, Room 110
Alameda, CA 94501
Attn: Public Works Director
Email address: pw@alamedaca.gov
Ph: (510) 747-7930 / Fax: (510) 769-6030

All notices, demands, requests, or approvals from City to the Association shall be addressed to the Association at:

Alameda West Lagoon Home Owners' Association
c/o Walsh Property Management
P.O. Box 2657
Castro Valley, CA 94546-0657
Attn: Board President
Email address: ewalsh@walshpm.com
Ph: (510) 888-8973 / Fax: (510) 886-5223

Any change of contact information provided by either party to the other party will go into effect fifteen (15) days after receipt of that written notice of change in contact information.

16. **Assignment by the Association:** The Association shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of the City. Any attempt to do so without said consent shall be null and void, and any assignee, sub-lessee, hypothecate or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. However, claims for money owed by the City to the Association under this Agreement may be assigned by the Association to a bank, trust company or other financial institution without prior written consent. Written notice of such assignment shall be promptly furnished to City by the Association.

17. **Assignment by the City:** City shall not assign, sublease, hypothecate, or transfer this Agreement, or any interest therein, directly or indirectly, by operation of law or otherwise, without prior written consent of the Association. Any attempt to do so without said consent shall be null and void, and any assignee, sub-lessee, hypothecate or transferee shall acquire no right or interest by reason of such attempted assignment, hypothecation or transfer. However, claims for money owed by the Association to the City under this Agreement may be assigned by the City to a bank, trust company or other financial institution without prior written consent. Written notice of such assignment shall be promptly furnished to the Association by the City.

18. **Compliance:** The Association shall comply with all applicable laws, state and federal and all ordinances, rules and regulations enacted or issued by City.


19. **Conflict of Law:** This Agreement shall be interpreted under, and enforced by the laws of the State of California excepting any choice of law rules which may direct the application of laws of another jurisdiction. The Agreement and obligations of the parties are subject to all valid laws, orders, rules, and regulations of the authorities having jurisdiction over this Agreement (or the successors of those authorities). Any suits brought pursuant to this Agreement shall be filed with the courts of the County of Alameda, State of California.

20. **Recitals, Wineseth Section and Exhibits:** The Recitals and exhibits contain material terms and are expressly incorporated into this Agreement.


21. **Captions:** The captions in this Agreement are for convenience only, are not a part of the Agreement and in no way affect, limit or amplify the terms or provisions of this Agreement.

22. **Integrated Contract:** This Agreement represents the full and complete understanding of every kind or nature whatsoever between the parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions hereof. Any modification of this Agreement will be effective only by written execution signed by the City and the Association. IN WITNESS WHEREOF, the parties have caused the Agreement to be executed on the day and year first above written.

ALAMEDA WEST LAGOON
HOME OWNERS' ASSOCIATION
A California Corporation


Name: Joan M. Uhler
Title: Treasurer
Date: 3-3-17

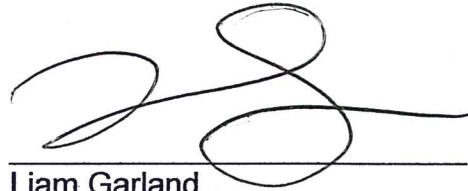
ALAMEDA WEST LAGOON
HOME OWNERS' ASSOCIATION
A California Corporation


Name: Karen L. Boutlier
Title: Secretary
Date: 3-3-2017

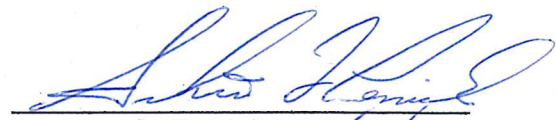
CITY OF ALAMEDA
A Municipal Corporation


Jill Keimach
City Manager
Date: 4/14/17

RECOMMENDED FOR APPROVAL


Liam Garland
Acting Public Works Director
Date: 3/16/17

APPROVED AS TO FORM:
City Attorney


Andrico Q. Penick 3/16/17
Assistant City Attorney



1/5/2016

City of Alameda Web Map

Scale: 1 inch = 330 feet
122° 15' 10.000" 37° 47' 13.100" 5446 132 03



The City of Alameda does not
guarantee the information contained
in this map to be an accurate
representation of actual existing
conditions.

EXHIBIT "B"

List of Certain Public Structures

Seawalls, fences and shore protection in public ROW are the maintenance responsibility of the City of Alameda and include:

- Structures found within the public ROW or within the lagoon parcels, but between the extensions of the ROW lines, at the end of these streets:
 - Bay Street
 - Cedar Street
 - Chestnut Street
 - Lafayette Street
 - St. Charles Street
 - Union Street
 - Walnut Street
- Structures found within the public ROW or within the lagoon parcel, when the public ROW directly adjoins the lagoon:
 - Broadway
 - Court Street
 - Grand Street
 - La Jolla Drive
 - Otis Drive
 - Powell Street (including the end of Laurel Street)
 - Waterton Street
 - Willow Street

Seawalls, fences and shore protection in private parcels, or in lagoon parcels directly adjacent to private parcels, are the maintenance responsibility of the adjacent upland private parcel owner.

The following seawalls, fences and shore protection beyond the ends of public ROWs have unclear ownership and maintenance responsibility. They will need a title search, easement and/or change of ownership, before they can be maintained:

- Caroline Street
- Hawthorne Street
- Ninth Street
- Paru Street
- Sherman Street
- Versailles Ave
- Weber Street

