SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is made and entered into in San Mateo County, California, on January __________, 2016, by and between, CITIZENS FOR THE PUBLIC TRUST ("CITIZENS") and TED J. HANNIG ("HANNIG") (collectively, the "CITIZENS Parties"), on the one hand, and the CITY OF REDWOOD CITY (the "CITY"), on the other hand (all collectively, the "PARTIES").

RECITALS

WHEREAS, on November 9, 2015, the CITIZENS Parties filed a Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief against the CITY in San Mateo Superior Court, Case Number CIV 536168 as amended (the "Petition");

WHEREAS, the Petition alleges, among other things, violations of environmental law and the common law Public Trust Doctrine in connection with Docktown Marina located in Redwood City, California ("Docktown");

WHEREAS, to resolve any and all claims arising out of the Petition, the PARTIES now desire to compromise and settle their disputes as set forth herein, subject to the conditions stated herein;

WHEREAS, the CITIZENS Parties acknowledge that the CITY is a public entity and the terms of this Agreement must be formally approved at a public meeting in order to become effective and enforceable; and

THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, and in consideration of the mutual covenants contained herein, the PARTIES agree as follows:

ARTICLE I
EFFECTIVE DATE

1.1 Effective Date. The effective date of this Agreement shall be January 26, 2016, so long as the CITY formally approves this Agreement at its regular council meeting on January 25, 2016. In the event this Agreement is not approved by January 25, 2016, the CITIZENS Parties reserve their right to withdraw from its terms and terminate their offer of settlement.

ARTICLE II
DOCKTOWN FUND

2.1 Creation of Docktown Fund ("Fund"). The CITY will set aside three million dollars ($3,000,000.00) in an earmarked fund to address environmental issues, including any potential contamination, and public trust issues, such as possible relocation assistance, associated with the public trust portion of Docktown. The Fund will be administered consistent with the
objective of bringing the CITY's use of the public trust portion of Docktown into closer compliance with the California State Lands Commission's ("Commission") public trust policies regarding Docktown and the June 19, 2015 letter from the California Attorney General ("AG") attached hereto as Exhibit "1" ("AG's 6/19/15 Letter") or any subsequent superseding policies of the Commission, AG, or action by the California State Legislature ("Legislature") regarding residential use on the public trust portion of Docktown.

(a) Absent a superseding change in the Commission's policies, a superseding and duly issued opinion by the AG, and/or a superseding action by the Legislature, which allows residential use in Docktown, the City shall allocate a portion of the Fund to provide financial incentives for liveaboard residents in Docktown to relocate their houseboats elsewhere.

(b) The Fund shall exist and be subject to the terms of this Agreement until the City fully performs the terms of this Agreement, or December 31, 2020, whichever is earlier.

(c) Should the entirety of the Fund not be required for the CITY to undertake its obligations under this Agreement, the monies deposited in the Fund shall remain the property of the City and may be used thereafter for any purposes designated by the CITY free and clear of this Agreement.

(d) Should the entirety of the Fund not be sufficient for the CITY to undertake its obligations under this Agreement, it shall make other funds available to fund the obligations under this Agreement.

2.2 Payment to the CITIZENS Parties. Within ten (10) calendar days of the formal approval described in paragraph 1.1 above, the CITY shall pay one million five hundred thousand dollars ($1,500,000.00) to the CITIZENS Parties, payable to "Hannig Law Client Trust Account." The CITIZENS Parties shall provide the CITY with an executed IRS Form W9 prior to the expiration of the ten day period to facilitate tax reporting of any reportable amount. The CITY shall not be obligated to make any payment until it has received a properly completed and signed W9 as provided herein. This amount shall be considered reimbursement to the CITIZENS Parties for all of their legal fees, costs, expenses and damage claims arising from or related to the Petition and this Agreement, including any legal fees, costs, and expenses arising from the quarterly reports provided by the CITY. CITIZENS Parties and Ted Hannig expressly acknowledge and agree, that any tax consequences arising from CITY's payment of any sums hereunder shall be the full responsibility of CITIZENS Parties and Ted Hannig to investigate and address based on independent legal advice. CITIZENS Parties and Ted Hannig further agree that they will indemnify and hold CITY harmless from and against any claims, costs and expense imposed by any taxing authority against CITY for non-payment of taxes by reason of payment described in this paragraph.

2.3 No Admission of Liability. The CITY's payment is not intended, and shall not be construed, to be an acknowledgment, admission, concession, or stipulation of liability or
wrongdoing by the CITY but, rather, constitute a resolution and settlement of disputed issues without admission of any fault.

ARTICLE III
ACTIONS

3.1 Adoption of Docktown Plan ("Plan"). Absent a superseding and publicly documented change in the Commission’s policies, an opinion by the AG, and/or a superseding action by the Legislature, which allows residential use in Docktown, the CITY shall take formal action, no later than December 31, 2016, to adopt a Plan that will be in conformance with the Commission’s policies concerning residential use of the public trust portion of Docktown and consistent with the AG’s 6/9/15 Letter. By December 31, 2017, the CITY shall have undertaken its best efforts and action towards prompt implementation of the Plan.

3.2 Environmental Site Assessment. By December 31, 2016, the CITY shall complete the environmental site assessment and sampling work described in the December 22, 2015 Technical Proposal prepared by Eriker & Kalinowski, Inc. ("EKI Proposal"), attached hereto as Exhibit “2,” and prepare a report. The CITY shall submit this report to relevant federal, state, and local agencies, including, without limitation, the County of San Mateo, San Francisco Bay Regional Water Quality Control Board, and/or the Department of Toxics Substances Control. The City shall work cooperatively with these agencies regarding remedial action, if any, in connection with the report.

3.3 Pedestrian 101 Underpass Crossing. By July 1, 2016, the CITY will submit applications to build a pedestrian underpass crossing under Highway 101, leading from Docktown to downtown Redwood City, with all relevant third party agencies and promptly pursue all necessary approvals. Upon receipt of all necessary approvals from these agencies, the CITY will use its best efforts to begin construction of the pedestrian undercrossing as soon as practical, but no later than twelve (12) months after it receives all of the approvals.

ARTICLE IV
MUTUAL RELEASE AND DISMISSAL

4.1 Release of the CITY. Except for claims arising directly as a result of breach of the terms, covenants, conditions and representations of the CITY contained in this Agreement, and as a material inducement to the CITY to enter into this Agreement, the CITIZENS Parties, and each of them, do hereby irrevocably and unconditionally release, acquit and forever discharge the CITY, and each of them, and its officials, council members, members, directors, officers, agents, assigns, attorneys, insurers, representatives, and employees from any and all claims, actions, charges, complaints, causes of action, rights, demands, and damages, at law and equity, which the CITIZENS Parties have or could have, whether now or in the future known, against CITY. The CITIZENS Parties represent and warrant hereby that they have not made an assignment or any other transfer of any interest in the claims, causes of action, suits, debts,
agreements or promises described herein. Nothing in this paragraph is intended to release any right or obligation of any party arising out of this Agreement.

4.2 Release of the CITIZENS Parties. Except for claims arising directly as a result of breach of the terms, covenants, conditions and representations of the CITIZENS Parties contained in this Agreement, and as a material inducement to the CITIZENS Parties to enter into this Agreement, the CITY does hereby irrevocably and unconditionally release, acquit and forever discharge the CITIZENS Parties, and each of them, and their respective subsidiaries, affiliates, members, directors, officers, agents, assigns, attorneys, insurers, representatives, and employees from any and all claims, actions, charges, complaints, causes of action, rights, demands, and damages, at law and equity, which the CITY has or could have, whether now or in the future known, against the CITIZENS Parties. The CITY represents and warrants hereby that it has not made an assignment or any other transfer of any interest in the claims, causes of action, suits, debts, agreements or promises described herein. Nothing in this paragraph is intended to release any right or obligation of any party arising out of this Agreement.

4.3 Dismissal. By February 12, 2016, the CITIZENS Parties shall file a Stipulation for Dismissal without prejudice and request that the Court retain jurisdiction to enforce the terms of this Agreement. A copy of this Agreement shall be attached as an exhibit to the Stipulation for Dismissal. The CITIZENS Parties shall file a Stipulation requesting modification of the previously granted dismissal to reflect the Parties’ agreement that said dismissal is with prejudice no later than thirty (30) calendar days after the City fully performs the terms of this Agreement, or December 31, 2020, whichever is earlier.

ARTICLE V
MISCELLANEOUS PROVISIONS

5.1 Recitals. The aforementioned Recitals are incorporated into this Agreement as if set forth fully herein.

5.2 Quarterly Progress Reports. The CITY will email progress reports of its actions required under paragraphs 3.1, 3.2, and 3.3 to HANNIG at tih@hanniglaw.com, on a quarterly basis.

5.3 Withdrawal of Records Requests. As of the Effective Date, the CITIZENS Parties agree to withdraw and abandon all California Public Records Act requests that are pending before the CITY, and the CITY agrees to withdraw its letter dated May 22, 2015 to HANNIG.

5.4 Dispute Resolution; Appointment of Special Master. Should any dispute arise as to whether the terms and/or conditions of this Agreement have been breached, each of the PARTIES may seek a court order enforcing the terms of this Agreement or seek appointment of a Special Master.

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(a) If the Court declines to exercise jurisdiction to enforce this Agreement as requested under paragraph 4.3, the CITIZENS Parties retain the right to re-file the Petition for the sole purpose of enforcing this Agreement. The CITY agrees to waive any affirmative defenses regarding the timeliness of any such re-filed action, including, without limitation, the defense of latches, statute of limitations, or compliance with any government filing deadline or requirements.

(b) Alternatively, each of the PARTIES may seek appointment of a Special Master (1) to determine whether the CITY breached this Agreement; and (2) to the extent a breach occurred, to enforce the terms of this Agreement. The CITY may request, at its sole cost and expense, the Special Master to provide other services. If available and willing to serve, the PARTIES stipulate that P. Terry Anderlini, Esq. is mutually satisfactory as a first choice for Special Master. The initial cost of the Special Master shall be borne equally by the PARTIES.

(c) The prevailing party in any dispute filed with the Court or a Special Master shall be entitled to an award of its reasonable attorney’s fees, costs, and expenses, including the costs of any Special Master.

5.5 **Investigation.** Each of the PARTIES has made such investigation of the facts pertaining to this Agreement as it deems necessary. The PARTIES hereto understand that if any fact with respect to any matter covered by this Agreement is found hereafter to be other than, or different from, the facts now believed by the PARTIES to be true, each party hereto expressly accepts and assumes the risk of such possible difference in facts and agree that this Agreement shall become and remain effective notwithstanding such different facts.

5.6 **Release of Unknown or Unsuspected Claims.** For the purpose of implementing full and complete releases to the extent stated herein, the PARTIES hereto expressly acknowledge that the releases provided in this Agreement are intended to include in their effect, without limitation, any and all claims, complaints, charges or suits within the scope of such releases, including those claims, complaints, charges or suits which they do not know or suspect to exist in their favor at the time of execution hereof, which if known or suspected, could materially affect the PARTIES’ decision to execute this Agreement. This Agreement contemplates the extinguishment of any such claims, complaints, charges or suits within the scope of the stated releases and therefore all rights under Section 1542 of the California Civil Code are hereby expressly waived. Section 1542 of the Civil Code provides:

"A general release does not extend to claims which the creditor does not know or suspect to exist in his or her favor at the time of executing the release, which if known by him or her must have materially affected his or her settlement with the debtor."

The PARTIES each represent that it has read and understood the provisions of California Civil Code Section 1542. Further, each acknowledges that it is represented by counsel and has
been specifically advised by its counsel of the consequences of the above waiver, as well as with
respect to this Agreement generally.

5.7 **Integration Clause.** This Agreement contains the entire agreement of the
PARTIES with respect to the subject matter of this Agreement and supersedes any and all prior,
written or oral, agreements among them concerning the subject matter of this Agreement. There
are no representations, agreements, arrangements or understandings, oral or written, among the
PARTIES, relating to the subject matter of this Agreement that are not fully expressed herein.
This is a fully integrated document.

5.8 **Other and Further Documents.** The PARTIES, and each of them, shall take such
actions and shall execute, deliver and file or record any such document as may be reasonable or
necessary to effectuate the purposes and contents of this Agreement.

5.9 **Consultation With Counsel.** The PARTIES represent and warrant that they have
presented their respective counsel with this Agreement, that their respective counsel has had the
opportunity to review this Agreement and that they are executing this Agreement of their own
free will after having received advice from their respective counsel regarding the execution of
this Agreement.

5.10 **Choice of Law, Jurisdiction and Venue.** This Agreement shall be governed by
and construed in accordance with California law. Any action or proceeding arising under this
Agreement shall be brought exclusively in the San Mateo County Superior Court.

5.11 **Severability.** If any one or more of the provisions of this Agreement should be
ruled wholly or partly invalid or unenforceable by a court or other government body of
competent jurisdiction, then; (i) the validity and enforceability of all provisions of this
Agreement not ruled to be invalid or unenforceable shall be unaffected; (ii) the effect of the
ruling shall be limited to the jurisdiction of the court or other government body making the
ruling; (iii) the provision(s) held wholly or partly invalid or unenforceable shall be deemed
amended, and the court or other government body is authorized to reform the provision(s), to the
minimum extent necessary to render them valid and enforceable in conformity with the
PARTIES' intent as manifested herein; and (iv) if the ruling and/or the controlling principle of
law or equity leading to the ruling is subsequently overruled, modified, or amended by
legislature, judicial, or administrative action, then the provision(s) in question as originally set
forth in this Agreement shall be deemed valid and enforceable to the maximum extent permitted
by the new controlling principle of law or equity.

5.12 **No Waiver.** The failure of any party to insist upon compliance with any of the
provisions of this Agreement or the waiver thereof, in any instance, shall not be construed as a
general waiver or relinquishment by such party of any other provision of this Agreement.

5.13 **Amendment.** This Agreement may not be amended except by an instrument in
writing, executed by the PARTIES, and each of them.
5.14 **Agreement Obligates, Extends and Inures.** The provisions of this Agreement shall be binding upon each of the PARTIES and others to the extent stated herein. The provisions of this Agreement shall be binding upon those who may succeed to, or assume, the capacities of the PARTIES and such others subsequent to the execution and effective date of this Agreement.

5.15 **No Reliance.** Each of the PARTIES represents and warrants that, except for the representations and warranties specifically set forth in this Agreement, in executing this Agreement, it does not rely, and has not relied, on any representation or statement made by any other party to this Agreement, or any representation or statement made by any person acting or purporting to act on behalf of any other party to this Agreement.

5.16 **No Assignment.** Each of the PARTIES represents and warrants that it owns the claims released hereby; that no other person or entity has any interest in such claims; that it has not sold, assigned, conveyed or otherwise transferred any such claim, or any other claim or demand against any person released hereby; and, that it has the sole right to settle and release such claims. The undersigned represent and warrant that to the best of their information and belief, they have no knowledge of any claims held by one against the other that are not released hereby.

5.17 **No Pending Action.** The PARTIES represent and warrant that they have not filed any other claim, complaint, charge or suit against any other party or any other party’s predecessors, subsidiaries, affiliates, members, directors, officers, shareholders, trustees, partners, successors, agents, assigns, joint venturers, attorneys, insurers, representatives, employees, heirs and executors, with any federal, state or other agency, court, board, office or other forum or entity, without limitation. Except for breaches of a party’s representations, warranties or covenants under this Agreement, the PARTIES will not, at any time hereafter, file or pursue any claim, complaint, charge or suit based upon circumstances heretofore arising.

5.18 **Multiple Counterparts.** This Agreement may be executed in multiple counterparts that shall become effective to the same extent as the original only when every party has signed and delivered a signed counter-part. For purposes of the execution of this Agreement, signature pages transmitted by facsimile or electronic mail shall be given the same weight and effect as, and treated as, original signatures.

5.19 **Authority.** The undersigned natural persons executing this Agreement warrant and represent that they are duly authorized to do so and to bind the person or entity for which they sign.

5.20 **Construction.** Each party hereto has cooperated in the drafting and preparation of this Agreement. In any construction to be made of this Agreement, the same shall not be construed against any party on the ground that said party drafted this Agreement. This Agreement shall be deemed to have been executed and delivered within the State of California,
and the rights and obligations of the PARTIES hereunder shall be construed and enforced in accordance with, and governed by, the laws of the State of California, in effect as of the date hereof.

5.21   No Admission of Liability. Nothing in this Agreement shall be construed as an acknowledgment, admission, concession, or stipulation of liability or wrongdoing by either party.

5.22   No Third Party Beneficiary. The terms and provisions of this Agreement shall be binding upon and inure to the benefit of the PARTIES, and their respective successors and assigns, and is made solely and specifically for their benefit. No other person shall have any rights, interest or claims hereunder or be entitled to any benefits under or on account of this Agreement as a third-party beneficiary or otherwise.

IN WITNESS WHEREOF the PARTIES hereto have executed this Agreement on the dates written below.

READ CAREFULLY BEFORE SIGNING:

Dated: January 18, 2016

TED J. HANNIG, an individual

By:

TED J. HANNIG

Dated: January 18, 2016

CITIZENS FOR THE PUBLIC TRUST

By: 

Elmer Guerrero, President

Dated: January ___, 2016

CITY OF REDWOOD CITY

By: 

Melissa Stevenson Diaz, City Manager

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APPROVED AS TO FORM AND CONTENT:

Dated: January 18, 2016

HANNIG LAW LLP

By: [Signature]

Trevor L. Ross, Esq.
Attorneys for CITIZENS FOR THE PUBLIC
TRUST and TED J. HANNIG

Dated: January ____ , 2016

CITY OF REDWOOD CITY, CITY
ATTORNEY

By: [Signature]

Michelle Marchetta Kenyon, Acting City
Attorney

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Attorney-Client Privileged Communication

June 19, 2015

Jennifer Lucchesi  
Executive Officer  
California State Lands Commission  
100 Howe Avenue, Suite 100 South  
Sacramento, California 95825-8202

Dear Ms. Lucchesi:

This letter concerns the residential houseboat community at Redwood City's Docktown Marina. The marina is located on sovereign lands legislatively granted in trust to Redwood City in Statutes of 1945, chapter 1359, as amended. On behalf of the California State Lands Commission (Commission), you have requested this office's informal advice concerning whether the private residential use of houseboats or "liveaboards" on these sovereign tidelands is legally permissible.¹

For the reasons discussed in more detail below, our opinion is that private residential use of houseboats and liveaboards at Docktown violates both the terms of the statutes by which the Legislature granted these tidelands in trust to the City and the common law public trust doctrine. Dating back to the early 1970s, this office has consistently opined and advised the Commission, and the Commission has in turn advised legislators, other agencies (including Redwood City)

¹ A houseboat is typically a watercraft principally designed and used for residential rather than transportation purposes. (See, e.g., Wat. Code, § 13901.) A liveaboard is typically an unmodified boat used for extended periods of time for residential purposes. As a matter of convenience for the purposes of the analysis below, we refer to both types of vessels collectively as "houseboats."
and private parties, that residential houseboat use is inconsistent with the public trust doctrine.\(^2\) Our legal research has uncovered no authority in the intervening four decades that would cause us to change this opinion.


The common law public trust doctrine traditionally defined these public trust uses as water-related commerce, navigation, and fishing. (Marks v. Whitney, supra, 6 Cal.3d at p. 259; Pub. Resources Code, § 6009, subd. (a).) However, California courts have recognized that public trust uses are “sufficiently flexible to encompass changing needs.” (Marks v. Whitney; supra, 6 Cal.3d at p. 259.) As a result, courts have also recognized bathing, swimming, boating, and other recreational purposes, as well as preservation of these lands in their natural state for scenic, scientific study, open space, and habitat values, as public trust uses. (Marks v. Whitney, supra, 6 Cal.3d at p. 259; National Audubon Society v. Superior Court, supra, 33 Cal.3d at pp. 434-435.)

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\(^2\) See, for example, December 20, 1971 letter from Attorney General Evelle Younger to State Sen. Jack Schrade; January 10, 1978 letter from William Northrop, Commission Executive Officer, to State Sen. Dennis E. Carpenter; November 5, 1985 letter from Robert Hight, Commission Chief Counsel, to Robert Tufts, Chairman, San Francisco Bay Conservation and Development Commission (BCDC); November 19, 1986 letter from Claire Dedrick, Commission’s Executive Officer, to Russell Smith; February 25, and August 7, 2014 letters from Sheri Pemberton, Commission’s Chief, External Affairs, to Bill Eker, City of Redwood City. The Commission has found that small numbers of liveaboards within commercial marinas may be permissible for limited periods of time and in limited circumstances. (See, e.g., January 10, 1978, letter from William Northrop, Commission Executive Director, to State Sen. Dennis E. Carpenter, pp. 2-3.) However, the 80% of Docktown berths that houseboats currently occupy greatly exceeds any percentage the Commission has previously approved.

\(^3\) Tidelands are those lands lying between the lines of mean high tide and mean low tide. Lands seaward of the line of mean low tide are submerged lands. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 478 fn. 13.)
Administration of the public trust is a matter entrusted to the Legislature. (County of Orange v. Heim (1973) 30 Cal.App.3d 694, 707-708.) It is a question for the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be continued, modified, or extinguished. (Marks v. Whitney, supra, 6 Cal.3d at pp. 260-261.) The Legislature has delegated to the Commission exclusive jurisdiction over all state-owned ungranted tidelands and submerged lands as well as all jurisdiction remaining in the State as to tidelands and submerged lands to which grants, such as that to Redwood City, have been or will be made. (Pub. Resources Code, § 6301.)

A common thread running through these recognized public trust uses is that they benefit all people of the State. (Marks v. Whitney, supra, 6 Cal.3d at pp. 259-260; accord, Colberg, Inc. v. State ex rel. Dept. of Public Works (1967) 67 Cal.2d 408, 417.) Uses that provide only a local benefit are inconsistent with the public trust doctrine. (See Mallon v. City of Long Beach (1955) 44 Cal.2d 199, 209-211.) For example, the California Supreme Court explained in Mallon that city storm drains, a city incinerator, libraries, hospitals, and public parks were not public trust uses because they conferred a purely local, not statewide, benefit. (Ibid.)

A use that is purely local in benefit or is otherwise not a recognized public trust use may still be permissible if it is incidental to a legitimate statewide public trust use. (People v. City of Long Beach (1959) 51 Cal.2d 875, 879-880 [proposed operation of facility in harbor providing lodging and recreation for naval personnel and merchant seamen was consistent with and supported public trust use of harbor for commerce and navigation]; Haggerty v. City of Oakland (1958) 161 Cal.App.2d 407, 413-414 [proposed convention, banquet, and exposition facilities in the City’s port area held incidental to public trust use, as facilities would encourage associations and interested persons to learn about port facilities and exchange ideas about maritime commerce].)

The Legislature may grant tidelands and submerged lands in trust to local entities. Granted lands remain subject to state supervision. The state acts as both the trustor and the representative of the people as beneficiaries of the public trust for the granted lands, and the grantee acts as trustee. (Pub. Resources Code, § 6009.1, subds. (a), (b).) Grantees must manage granted lands in a manner “consistent with the terms and obligations of their grants and the public trust. . . .” (Pub. Resources Code, § 6009, subd. (d).) As a result, grantees may neither use state-granted lands for non-trust uses nor apply revenues generated by such lands for purely local, non-trust purposes. (Mallon v. City of Long Beach, supra, 44 Cal.2d at pp. 210-211; City of Long Beach v. Morse (1947) 31 Cal.2d 254, 257-258.) A legislative grant of sovereign lands to a municipality such as Redwood City, however, does not place the lands beyond the supervision of the State. The State has a duty to continue to protect the public trust on behalf of all of the people of California. (Illinois Central R.R. Co. v. Illinois (1892) 146 U.S. 387, 452-453; City of Coronado v. San Diego Unified Port Dist. (1964) 227 Cal.App.2d 455, 474.)

In this case, the Legislature in 1945 granted the sovereign lands where Docktown is located in trust to Redwood City for "the establishment, improvement and conduct of a harbor, including an airport or aviation facilities, and for the construction, maintenance and operation
thereon of wharves, docks, piers, slips, quays and other utilities, structures, facilities and appliances necessary or convenient for the promotion and accommodation of commerce and navigation by air as well as by water....” (Stats. 1945, chap. 1359, § 1(a), as amended.) This grant permits Redwood City to lease parts of these lands for up to 50 years but only “for purposes consistent with the trust upon which said lands are held by the State of California....” (Ibid.) Under the grant, these lands must “always remain available for public use for all purposes of commerce and navigation....” (Id., § 1(b).) The grant reserves “in the people of the State of California the absolute right to fish in the waters of said harbor with the right of convenient access to said waters over said lands for said purposes.” (Id., § 1(d).)

Redwood City’s charter mirrors these restrictions. The charter provides that the City’s legislatively-granted “Harbor Lands” are “required for use for purposes in connection with or for the promotion and accommodation of commerce, navigation or fishery....” and may be leased “subject to the trusts and conditions contained in the grants of such property to the City of Redwood City.” (City Charter, § 48.)

For several reasons, our opinion is that allowing private residential houseboats on these granted tidelands is inconsistent with both the public trust doctrine and the terms of this granting statute.

First, despite the public trust doctrine’s “flexibility” as recognized in Marks, our legal research has uncovered no California case holding that either residential land use generally, or residential houseboat use in particular, qualifies as a public trust use. To the contrary, while the California Supreme Court has not directly addressed the issue, several justices, in dissent, have opined that residential uses of land are not public trust uses. (City of Berkeley v. Superior Court (1980) 26 Cal.3d 515, 538 [Clark, J., dissenting; “...under the [public] trust tidelands may be filled and used for commercial and recreational purposes but not residential purposes.”]; State of California v. Superior Court (Lyon) (1981) 29 Cal.3d 210, 235 [Clark, J., concurring and dissenting; “[T]here are certain common land uses which are not included within [public] trust uses, namely, residential, agricultural, and general governmental.”])

Nor has our research uncovered out-of state case law holding otherwise. Instead, two cases from Washington held in the context of regulatory takings claims that the residential use of tidelands is inconsistent with the public trust doctrine. Esplanade Properties, LLC v. City of Seattle (9th Cir. 2002) 307 F.3d 978 held that the City’s decision denying plaintiff’s application to develop tidelands with residences effected no regulatory taking because the tidelands were subject to the public trust, which in turn precluded residential development that might interfere with their public recreational use. (Id., at p. 985-987, applying Washington law.) Orion Corp. v. State (Wash. 1987) 747 P.2d 1062 held that because the public trust doctrine precluded dredging and filling of tidelands for proposed residential development, state regulations protecting these tidelands did not interfere with a landowner’s “investment-backed expectations” for regulatory takings purposes. (Id., at pp. 1072-1073, 1086; accord, Eichenberg, Bothwell, and Vaughn, Climate Change and the Public Trust Doctrine: Using an Ancient Doctrine to Adapt to Rising Sea Levels in San Francisco Bay (2010) 3 Golden Gate U. L. Rev. 243, 259 [a property owner
“would normally not have reasonable-investment backed expectations for filling tidelands for non-trust private residential or agricultural uses under the public trust doctrine and consequently prohibiting those uses generally would not constitute a taking,” citing *Orion Corp. v. State, supra.*))

Second, as to residential houseboat use in particular, the court in *People ex rel. San Francisco Bay Conservation and Development Com. v. Smith* (1994) 26 Cal.App.4th 113, 123, interpreting whether liveaboards in the San Francisco Bay required a permit under the McAteer-Petris Act (Government Code, §§ 66600, et seq.) observed that residential liveboard boat use is not a public trust use. (See also BCDC, San Francisco Bay Plan, p. 77 ["A houseboat is neither a water-oriented use nor a use that furthers the public trust and does not serve a statewide public benefit."].) Though this case arose from the specific McAteer-Petris statutory scheme governing the San Francisco Bay and shoreline, we believe its analysis—grounded in the public trust doctrine—applies equally to the sovereign tidelands at Redwood City. We have found no California case law that reaches a contrary holding.

Third, that residential houseboat use violates the public trust doctrine logically follows from the nature of the public trust. Private occupancy of such boats for residential purposes confers a purely local benefit. It does not provide a benefit to citizens of California statewide. (See *Marks v. Whitney, Colberg, Inc. v. State ex rel. Dept. of Public Works, supra.*) At best, it facilitates the use of the granted tideland area by those few who occupy these boats. It is not a use tied to sovereign tidelands because private residences can be, and normally are, located on non-sovereign uplands. Private houseboat use is also not incidental to any public trust use. It does not further or encourage recognized public trust uses. We have found no case holding that private residential use of any sort is incidental to recognized public trust uses.⁴

If anything, the private use of houseboats in fact detracts from these legitimate public trust uses. For example, by restricting areas of the harbor to private residential use, houseboats deprive the public of access to the tidelands for recreational, navigation, and similar public trust purposes. The loss of such access is particularly pronounced here, where residential houseboats dominate Docktown Marina. As the City has recognized, private houseboats occupy 70 of the 87 boat berths at the Docktown Marina, or approximately 80% of these berths. (City Manager’s Report to Mayor and City Council, April 27, 2015.) In the analogous context of the San Francisco Bay, BCDC has recognized that houseboats contravene the public trust by competing for vessel berths that the broader public might otherwise use for trust purposes. (BCDC, San Francisco Bay Plan, p. 77.)

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⁴ This office has opined that a public agency trustee may lease a portion of filled tidelands for construction of a timeshare resort, which involves a purchaser’s right to exclusive residential occupancy of a timeshare unit for a period of time. But we reached this opinion in significant part because timeshares may enhance public access to the shoreline for public trust purposes and provide visitor-serving accommodations to the public. (79 Ops.Cal. Atty.Gen. 133, 145-146 (1996).) Private residential houseboats do neither.
Fourth, houseboats detract from other public trust uses as well. As BCDC has stated, private houseboats detract from the scenic and habitat value of surrounding waters by restricting views, blocking beneficial sunlight penetration into tideland waters, and causing detrimental sedimentation by reducing wind and wave action. (BCDC, San Francisco Bay Plan, p. 77.)

Environmental and public health effects of houseboat use also may negatively affect public trust uses. Houseboat use may result in discharge of raw sewage or used “grey water” into surrounding tideland waters, potentially endangering wildlife. (People ex rel. San Francisco Bay Conservation and Development Com., supra, 26 Cal.App.4th at p. 121 n. 5 [citing Regional Water Quality Control Board data on houseboat related pollution in Richardson Bay].) In the analogous context of the San Francisco Bay, BCDC has specifically identified substandard sewage systems in houseboat areas as a source of high coliform bacteria count in the Bay. (BCDC Final Staff Report, Water Quality Protection and Nonpoint Source Pollution Control in San Francisco Bay (October 2003) (http://www.bcdc.ca.gov/pdf/planning/reports/water_quality_nonpoint_source.pdf), p. 30.) Similarly, a San Francisco Bay Regional Water Quality Control Board study identified houseboat marinas as “consistently the most significant sources of pollution in Richardson Bay” over the 1994-2003 period. (San Francisco Regional Water Quality Control Board, Pathogens in Richardson Bay Total Maximum Daily Load (TMDL) (http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/tmdls/richardsonbaypathogens.shtml) (July 2008), p. 14.) Such environmental impacts detract from the preservation of tidelands and submerged lands for their habitat value.

For these reasons, residential houseboat use is inconsistent not just with the public trust doctrine but also with Redwood City’s granting statute. The statute makes no reference to residential use generally, or houseboat use specifically, as a permitted use of the granted lands. As discussed above, houseboat use is not “necessary or convenient for the promotion and accommodation of” trust uses authorized under this statute either. It interferes with the “right of convenient access” for fishing in nearby waters that the granting statute expressly reserves to the public. And permitting continued residential houseboat use would also violate the City’s fiduciary obligations as trustee to “administer the trust solely in the interest of the beneficiaries” (here, the people of the State) and not to use trust property “for any other purpose unconnected to the trust.” (Pub. Resources Code, § 6009.1, subds. (c)(5), (c)(7).)

We understand that proponents of residential houseboat use in Redwood City have contended that rising housing prices in the area have left houseboats as one of few affordable housing options. We also anticipate that these proponents might argue that potential flooding at Redwood City as a result of ongoing global climate change and sea level rise might eventually make houseboats necessary to replace lost upland housing. However, our opinion is that neither

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5 The San Francisco Bay Plan does explain that the BCDC could authorize limited houseboat use but only subject to strict conditions. These conditions include that the number of houseboats is limited, their use is part of a broader area plan, and their use is limited in duration. Based on the facts known to us, none of these conditions apply here.
the former argument if accurate nor the latter risk if realized makes residential houseboat use consistent with the public trust doctrine or Redwood City’s granting statute. The California Supreme Court in *Marks* specifically identified “population pressures” as one of the reasons why preservation of the public trust is critical. (*Marks v. Whitney, supra, 6 Cal.3d at p. 257.*) And *Marks* held that the public trust doctrine is “sufficiently flexible to encompass changing needs.” (*Id. at p. 259.*) More than four decades have passed since the *Marks* decision. Over that period, no California court has held that the public trust encompasses residential use of tidelands generally or residential houseboat use specifically. Redwood City may not effectively expand the public trust on its own by allowing continued houseboat use on its granted lands here.

We appreciate the opportunity to provide this opinion to you. Please let us know if you have any questions.

Sincerely,

ANDREW M. VOGEL  
Deputy Attorney General

For  
KAMALA D. HARRIS  
Attorney General

AMV:
AGREEMENT FOR PROFESSIONAL SERVICES
ERLER & KALINOWSKI, INC.

THIS AGREEMENT is made and entered into as of the 22 day of December, 2015 by and between the CITY OF REDWOOD CITY, a charter city and municipal corporation of the State of California ("City"), and Erler & Kalinowski Inc. ("Consultant").

RECITALS

A. City requires the professional services for water supply planning.

B. Consultant has the necessary experience in providing professional services and advice.

C. Selection of Consultant is expected to achieve the desired results in an expedited fashion.

D. Consultant has submitted a proposal to City and has affirmed its willingness and ability to perform such work.

NOW, THEREFORE, in consideration of these recitals and the mutual covenants contained herein, the Parties agree as follows:

1. Scope of Work. City retains Consultant to perform, and Consultant agrees to render, those services (the "Services") that are defined in attached Exhibit "A," which is incorporated herein by reference. In the event of a conflict between the provisions of Exhibit "A" and the terms of this Agreement, the terms of this Agreement shall prevail. City shall have the right to modify the scope of work to delete tasks in whole or in part.

2. Standard of Performance. While performing the Services, Consultant will exercise the reasonable professional care and skill customarily exercised by reputable members of Consultant's profession practicing in the urban Northern California Area, and will use reasonable diligence and judgment while exercising its professional skill and expertise.

3. Term. Unless earlier terminated, the term of this Agreement will commence upon the date first above written and shall expire upon completion of performance of Services hereunder by Consultant.

4. Schedule. Consultant will adhere to the schedule set forth in Exhibit "A", provided, that City in its discretion may grant reasonable extensions of time for the performance of such services occasioned by unusually lengthy governmental reviews of Consultant's work product or other unavoidable delays occasioned by circumstances; provided, further, that such unavoidable delay will not include strikes, lockouts, work
stoppages, or other labor disturbances conducted by, or on behalf of, Consultant's officers or employees.

Consultant acknowledges the importance to City of City's project schedule and agrees to use its professional efforts to meet the schedule. City understands that Consultant's performance must be governed by sound practices.

5. **Time is of the Essence.** Subject to Section 2, time is of the essence for each and every provision of this Agreement.

6. **Compensation.** City shall pay Consultant for all work and services on a time and expense reimbursement basis in accordance with the Schedule of Charges set forth in Exhibit B, attached hereto and made a part hereof by reference. A budget in the amount of thirty-seven thousand dollars ($37,000) is established on the basis of the Services in Exhibit A. This budget will not be exceeded without additional authorization by City.

   6.1 An application for payment form must be submitted to City which shall include the following: a clear, detailed invoice reflecting work being billed for, a summary sheet showing hourly rates, hours worked, percentage of work completed to date, amount/percent billed to date and current status of all tasks within a project; any/all backup documentation supporting the above items. Work schedule updates must also be included with the payment requests. Invoices will be paid to Consultant by City within thirty (30) days of invoice date.

   6.2 Consultant shall maintain adequate records and shall permit inspection and audit by City of Consultant's charges under this Contract. Consultant shall make such records available to City during normal business hours upon reasonable notice. Nothing herein shall convert such records into public records, and they will be available only to City and any specified public agencies. Such records shall be maintained by Consultant for one (1) year following completion of the work under this Contract unless a longer period of time is required by state or federal law, in which event Consultant shall retain its records for the time required by such laws.

   6.3. The payment made to Consultant pursuant to the Agreement will be the full and complete compensation to which Consultant is entitled. City will not make any federal or state tax withholdings on behalf of Consultant or its agents, employees or subcontractors. City will not be required to pay any workers' compensation insurance or unemployment contributions on behalf of Consultant or its employees or subcontractors. Consultant agrees to reimburse City within thirty (30) days for any tax, retirement contribution, social security, overtime payment, unemployment payment or workers' compensation payment which City makes on behalf of Consultant or any agent, employee, or subcontractor of Consultant for work done under this Agreement. At the City's election, City may deduct the reimbursable amount from any balance owing to Consultant.
7. **Status of Consultant.** Consultant will perform the Services as an independent contractor and not as an employee of City. The persons used by Consultant to provide services under this Agreement shall not be considered employees of City for any purposes.

8. **Subcontracting.** Consultant will not subcontract any portion of the Services without prior written approval of City Manager or his/her designee. If Consultant subcontracts any of the Services, Consultant will be fully responsible to City for the acts and omissions of Consultant’s subcontractor and of the persons either directly or indirectly employed by the subcontractor, as Consultant is for the acts and omissions of persons directly employed by Consultant. Nothing contained in this Agreement will create any contractual relationship between any subcontractor of Consultant and City. Consultant will be responsible for payment of subcontractors. Consultant will bind every subcontractor and every subcontractor of a subcontractor by the terms of this Agreement applicable to Consultant’s work unless specifically noted to the contrary in the subcontract and approved in writing by City.

9. **Other Consultants.** City reserves the right to employ other consultants in connection with the Services.

10. **Indemnification.** Consultant will indemnify and hold harmless City and its officers, agents, and employees from and against all claims, damages, losses and expenses including attorney fees (collectively “Claim”) arising out of the performance of the Services, to the extent caused in whole or in part by the willful misconduct or any negligent act or omission of the Consultant, any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, except where caused by the sole negligence or willful misconduct of City.

Consultant shall have no duty to hire counsel to defend the City, but at the time of any settlement or adjudication of a Claim the Consultant shall pay as damages to City all reasonable attorney's fees and costs incurred by City to the extent arising from the willful misconduct or negligence of the Consultant. Further, Consultant shall assume responsibility for the investigation, analysis, and defense of any and all issues alleged against City or Consultant to the extent arising out of Consultant’s scope of services, or Consultant’s actual or alleged negligence.

The Parties expressly agree that any reasonable payment, attorney's fee, cost or expense City incurs or makes to or on behalf of an injured employee under the City’s self-administered workers' compensation is included as a loss, expense or cost for the purposes of this section.

The parties expressly agree that this section shall survive the expiration or early termination of the Agreement.
11. **Insurance.** Consultant shall obtain and maintain for the duration of the Agreement and any and all amendments, insurance against claims for injuries to persons or damage to property which may arise out of or in connection with performance of the Services by Consultant or Consultant’s agents, representatives, or employees. The insurance carrier is required to maintain an A.M. Best rating of not less than "A-:VII".

11.1 **Coverages and Limits.** Consultant, at its sole expense, shall maintain the types of coverages and minimum limits indicated below, unless otherwise approved by City in writing. These minimum amounts of coverage will not constitute any limitations or cap on Consultant's indemnification obligations under this Agreement.

11.1.1 **Commercial General Liability Insurance.** Consultant shall maintain occurrence based coverage with limits not less than $1,000,000 per occurrence. If the submitted policies contain aggregate limits, such limits will apply separately to the Services, project, or location that is the subject of this Agreement or the aggregate will be twice the required per occurrence limit. The Commercial General Liability insurance policy shall be endorsed to name the City, its officers, agents, employees and volunteers as additional insureds, and to state that the insurance will be primary and not contribute with any insurance or self-insurance maintained by the City.

11.1.2 **Business Automobile Liability Insurance.** Consultant shall maintain coverage with limits not less than $1,000,000 per each accident for owned, hired and non-owned automobiles.

11.1.3 **Workers' Compensation Insurance.** Consultant shall maintain coverage as required by the California Labor Code. The Workers' Compensation policy shall contain an endorsement stating that the insurer waives any right to subrogation against the City, its officers, agents, employees and volunteers.

11.1.4 **Employer's Liability Insurance.** Consultant shall maintain coverage with limits not less than $1,000,000 per each accident for bodily injury or disease.

11.1.5 **Professional Liability Insurance.** Consultant shall maintain coverage with limits not less than $1,000,000 per occurrence/$2,000,000 aggregate. Professional Liability may be written as claims-made coverage.
11.2. **Notice of Cancellation.** This insurance will be in force during the life of the Agreement and any extensions of it and will not be canceled without Consultant providing thirty (30) days prior written notice to City sent pursuant to the Notice provisions of this Agreement.

11.3 **Providing Certificates of Insurance and Endorsements.** Prior to City's execution of this Agreement, Consultant shall provide to City certificates of insurance and above-referenced endorsements sufficient to satisfaction of City's Risk Manager. In no event shall Consultant commence any work or provide any Services under this Agreement until certificates of insurance and endorsements have been accepted by City's Risk Manager.

11.4 **Failure to Maintain Coverage.** If Consultant fails to comply with these insurance requirements, then City will have the option to declare Consultant in breach, or may purchase replacement insurance or pay the premiums that are due on existing policies in order to maintain the required coverages. Consultant is responsible for any payments made by City to obtain or maintain insurance and City may collect these payments from Consultant or deduct the amount paid from any sums due Consultant under this Agreement.

11.5 **Submission of Insurance Policies.** City reserves the right to require, at any time, complete copies of any or all required insurance policies and endorsements.

12. **Business License.** Consultant will obtain and maintain a City of Redwood City Business License for the term of the Agreement, as may be amended from time-to-time.

13. **Maintenance of Records.** Consultant will maintain complete and accurate records with respect to costs incurred under this Agreement. All records will be clearly identifiable. Consultant will allow a representative of City during normal business hours to examine, audit, and make transcripts or copies of records and any other documents created pursuant to this Agreement. Consultant will allow inspection of all work, data, documents, proceedings, and activities related to the Agreement for a period of three (3) years from the date of final payment under this Agreement.

14. **Ownership of Documents.** All final work product produced by Consultant or its agents, employees, and subcontractors pursuant to this Agreement shall, upon payment of all amounts owed under this Agreement, become the property of City. Services or work products generated electronically or in hardcopy as a result of this Agreement (collectively "Work Product") are intended for the sole use and benefit only of City and may not be relied on or used by any other party or entity without the express written consent of Consultant and subject to execution of an agreement between such third party and Consultant in form and content approved by Consultant defining the terms, provisions, and limitations of the use of Work Product. City agrees to indemnify and hold Consultant harmless from any claims, suits, damages, liabilities or costs, including attorneys’ fees and costs of defense, arising from any modification of any Work Product.
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Attorney Work Product

prepared by Consultant without the prior written consent of Consultant. In the event this Agreement is terminated, all work product produced by Consultant or its agents, employees and subcontractors pursuant to this Agreement will be delivered to City pursuant to the termination clause of this Agreement. Consultant will have the right to make one (1) copy of the work product for Consultant’s records.

15. **Copyrights.** Consultant agrees that, upon payment of all amounts owed under this Agreement, all copyrights that arise from the Services will be vested in City and Consultant relinquishes all claims to the copyrights in favor of City.

16. **Notices.** The name of the persons who are authorized to give written notices or to receive written notice on behalf of City and on behalf of Consultant under this Agreement.

<table>
<thead>
<tr>
<th>For City:</th>
<th>For Consultant:</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Redwood City</td>
<td>Vera Nelson</td>
</tr>
<tr>
<td>Attention: Public Works Director</td>
<td>Vice President</td>
</tr>
<tr>
<td>1400 Broadway Street</td>
<td>1870 Ogden Drive</td>
</tr>
<tr>
<td>Redwood City, CA 94063</td>
<td>Burlingame, CA 94010</td>
</tr>
<tr>
<td>(650) 780-7474</td>
<td>(650) 292-9100</td>
</tr>
</tbody>
</table>

Except as otherwise stated, all notices to be provided or that may be provided under this Agreement must be in writing and delivered by regular and certified mail. Each party will notify the other immediately of any changes of address that would require any notice or delivery to be directed to another address.

17. **Conflict of Interest.** City will evaluate Consultant’s duties pursuant to this Agreement to determine whether disclosure under the Political Reform Act and City's Conflict of Interest Code is required of Consultant or any of Consultant’s employees, agents, or subcontractors. Should it be determined that disclosure is required, Consultant or Consultant’s affected employees, agents, or subcontractors will complete and file with the City Clerk those schedules specified by City and contained in the Statement of Economic Interests Form 700.

Consultant, for Consultant and on behalf of Consultant’s agents, employees, subcontractors and consultants warrants that by execution of this Agreement, that they have no interest, present or contemplated, in the projects affected by this Agreement. Consultant further warrants that neither Consultant, nor Consultant’s agents, employees, subcontractors and consultants have any ancillary real property, business interests or income that will be affected by this Agreement or, alternatively, that Consultant will file with City an affidavit disclosing this interest.

18. **General Compliance with Laws.** Consultant will keep fully informed of federal, state and local laws and ordinances and regulations which in any manner affect those employed by Consultant, or in any way affect the performance of the Services by
Consultant. Consistent with the requirements of the professional standard of care, Consultant will at all times observe and comply with these laws, ordinances, and regulations and will be responsible for the compliance of Consultant's Services with all applicable laws, ordinances and regulations.

19. **Discrimination and Harassment Prohibited.** Consultant will comply with all applicable local, state and federal laws and regulations prohibiting discrimination and harassment.

20. **Termination.** In the event of the Consultant's failure to prosecute, deliver, or perform the Services, City may terminate this Agreement for nonperformance by notifying Consultant in writing pursuant to the notice provisions of this Agreement.

If City decides to abandon or postpone the work or services contemplated by this Agreement, City may terminate this Agreement upon written notice to Consultant pursuant to the notice provisions of this Agreement. Termination will be effective immediately upon notification.

Either Party upon tendering thirty (30) days written notice to the other party may terminate this Agreement.

Within 10 days of termination Consultant will assemble the work product without charge and put it in order for proper filing and closing and deliver it to City. Consultant will be paid for work performed up to the termination date; however, the total will not exceed the fee payable under this Agreement. City will make a determination of final payment based upon the value of the work product delivered to City and the percentage of the services performed.

21. **Covenants against Contingent Fees.** Consultant warrants that Consultant has not employed or retained any company or person, other than a bona fide employee working for Consultant, to solicit or secure this Agreement, and that Consultant has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage, brokerage fee, gift, or any other consideration contingent upon, or resulting from, the award or making of this Agreement. For breach or violation of this warranty, City will have the right to annul this Agreement without liability, or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover, the full amount of the fee, commission, percentage, brokerage fees, gift, or contingent fee.

22. **Claims and Lawsuits.** Consultant acknowledges that if a false claim is submitted to City by Consultant, it may be considered fraud and Consultant may be subject to criminal prosecution. Consultant acknowledges that California Government Code sections 12650 et seq., the False Claims Act applies to this Agreement and, provides for civil penalties where a person knowingly submits a false claim to a public entity. These provisions include false claims made with deliberate ignorance of the false information or in reckless disregard of the truth or falsity of information. If City seeks to
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recover penalties pursuant to the False Claims Act, it is entitled to recover its litigation costs, including attorney's fees. Consultant acknowledges that the filing of a false claim may subject Consultant to an administrative debarment proceeding as the result of which Consultant may be prevented to act as a Consultant on any public work or improvement for a period of up to five (5) years. Consultant acknowledges disbarment by another jurisdiction is grounds for City to terminate this Agreement.

23. **Jurisdiction and Venue.** Any action at law or in equity brought by either of the Parties for the purpose of enforcing a right or rights provided for by this Agreement will be tried in a court of competent jurisdiction in the County of San Mateo, State of California, and the Parties waive all provisions of law providing for a change of venue in these proceedings to any other county.

24. **Successors and Assigns.** It is mutually understood and agreed that this Agreement will be binding upon the Parties and their respective successors. Neither this Agreement nor any part of it nor any monies due or to become due under it may be assigned by Consultant without the prior consent of City, which will not be unreasonably withheld.

25. **Paragraph Headings.** Paragraph headings as used herein are for convenience only and will not be deemed to be a part of such paragraphs and will not be construed to change the meaning thereof.

26. **Entire Agreement.** This Agreement, together with any other written document referred to or contemplated by it, along with the purchase order for this Agreement and its provisions, embody the entire Agreement and understanding between the parties relating to the subject matter of it. In case of conflict, the terms of the Agreement supersede the purchase order and any other attachment or exhibit. Neither this Agreement nor any of its provisions may be amended, modified, waived or discharged except in a writing signed by both parties.

27. **Authority.** The individuals executing this Agreement and the instruments referenced in it on behalf of Consultant each represent and warrant that they have the legal power, right and actual authority to bind Consultant to the terms and conditions of this Agreement.

28. **Existing Conditions.**

28.1 **Hazardous Materials.** City shall furnish, or cause to be furnished to Consultant, all documents and information known to City that relate to the identity, location, quantity, nature, or characteristics of any asbestos, PCBs, or any other hazardous materials, substances or waste at, on, under or near the site. In addition, City will furnish or cause to be furnished such reports, data, studies, plans, specifications, documents and other information on surface or subsurface site conditions, e.g., underground tanks, pipelines and buried utilities, required by Consultant for proper performance of its Services. Consultant shall
be entitled to rely upon the adequacy and accuracy of documents and information provided by City, City’s other consultants and contractors, and other third-parties (collectively “City Information”) in performing the Services. Consultant assumes no responsibility or liability for the accuracy or completeness of City Information; however, Consultant will advise City if it becomes aware of an error or omission in the City Information. City Information will remain the property of the City; however, Consultant may keep a copy of all City Information for the completion of its records.

City acknowledges that Consultant and its subconsultants and subcontractors have played no part in the creation of any hazardous waste or materials, pollution sources, nuisance, or chemical or industrial disposal problems that may exist at or near the project site, and that Consultant has been retained for the sole purpose of assisting the City in assessing any problem which may exist and in assisting the City in formulating a remedial program, if such is within the Scope of Services that Consultant has assumed. City recognizes that while necessary for investigations, commonly used exploration methods, such as drilling borings or installation of monitoring wells, involve an inherent risk. These exploration methods may penetrate through contaminated material and serve as a connecting passageway between the contaminated material and an uncontaminated aquifer or groundwater, possibly inducing cross contamination. While back-filling with grout, or other means, according to a currently accepted practices, is intended to provide a seal against such passageway, it is recognized that such a seal may be imperfect and that there is an inherent risk in drilling borings or performing other exploration methods in a hazardous waste site. Therefore, City agrees that Consultant shall have no liability for claims of cross contamination arising out of any investigation of problems at or near the project site.

The City recognizes and agrees that Consultant has assumed responsibility only for making the investigations, reports and recommendations to the City included within the Scope of Services. The responsibility for making any disclosures or reports to any third party and for the taking of corrective, remedial, or mitigation action shall be solely that of the City.

28.2 Utilities and Subsurface Conflicts. Prior to initiation of subsurface investigations, including but not limited to boreholes, probes, trenches, or subsurface sample collection, City will provide Consultant with available information, drawings, and maps regarding potential underground utilities, other potential subsurface conflicts, and overhead conflicts in the proposed areas of investigation. If City is not the property owner, City will contact the property owner and request such information. Consultant will clear the proposed investigation locations for buried utilities by obtaining the services of a utility locating company. Consultant will make reasonable efforts to identify and to avoid damage to disclosed or visually-identified utilities that may exist within the areas of investigation. Consultant, its subconsultants and subcontractors shall
have no liability for damages to persons or property, including the cost to repair, which occur during investigative activities performed by Consultant, its subconsultants and subcontractors, and arise out of or relate to undisclosed, unknown, or inaccurately specified utilities or other structures.

29. **Disposal of Contaminated Material.** City understands and agrees that Consultant is not, and has no responsibility as, a generator, operator, treator, storor, transporter or disposer of hazardous materials or toxic substances found or identified at or near the project site, including investigation-derived waste. City shall undertake or arrange for handling, removal, treatment, storage, transportation, and disposal or reuse of such materials. Arrangements and final decisions regarding disposal and/or treatment of hazardous material shall be the sole responsibility of City. Consultant’s responsibilities shall be limited to assisting City with its appropriate arrangements, if authorized by City.

30. **Confidentiality.** When business or technical information is identified as “confidential” by City, Consultant shall hold such business or technical information as confidential. Consultant shall not disclose such confidential information without City’s consent except to the extent required for (1) performance of services under this Agreement; (2) compliance with professional standards of conduct for preservation of the public safety, health and welfare; (3) compliance with any law, court order or other governmental directive; and/or (4) protection of Consultant against claims or liabilities arising from performance of Services under this Agreement. In the event that Consultant is requested to disclose any confidential information under the above conditions, Consultant will contact City to provide an opportunity for City’s defense of any confidentiality claim at its expense, including the cost of any required Consultant services at Consultant’s then current Schedule of Charges. Consultant’s obligation hereunder shall not apply to information in the public domain, previously known by Consultant, or lawfully acquired on a non-confidential basis from others.

[Signature Page Follows]
CITY: City of Redwood City,  
1017 Middlefield Road  
Redwood City, CA 94063

By: ______________________

ATTEST: 

Silvia Vonderlinden, City Clerk

CONSULTANT: Erler & Kalinowski, Inc.  
1870 Ogden Drive  
Burlingame, CA 94010

*By: ______________________  **By: ______________________

Printed Name: Andrew Safford  
Title: Vice President

Printed Name: John T. Dewitt  
Title: Secretary

If required by City, proper notarial acknowledgment of execution by Consultant must be attached. If a Corporation, Agreement must be signed by one corporate officer from each of the following two groups.

*Group A.  **Group B.
Chairman,  Secretary,  
President, or  Assistant Secretary,  
Vice-President  CFO or Assistant Treasurer

Otherwise, the corporation must attach a resolution certified by the secretary or assistant secretary under corporate seal empowering the officer(s) signing to bind the corporation.
EXHIBIT “A”

SCOPE OF SERVICES

EXHIBIT A – SCOPE OF WORK

Environmental Consulting Services Related to Sediments in Redwood Creek Portion of Inner Harbor Project Area, Redwood City, California

Erler & Kalinowski, Inc. ("EKI") is pleased to provide the City of Redwood City ("City") this scope of work for consulting services ("Services") associated with characterization of sediment in a portion of Redwood Creek. The scope of work consists of: (1) performing an environmental site assessment ("ESA") that focuses on identifying possible sources of contaminants detected in sediment, (2) preparing for and attending a meeting with the San Francisco Bay Regional Water Quality Control Board ("Water Board") to discuss available sediment data and refine project direction, and (3) prepare a sampling plan to further characterize sediment quality sediment and assess contributions of identified potential sources of contamination.

BACKGROUND

In 2011, Pacific EcoRisk Environmental Consulting and Testing ("Pacific EcoRisk") collected sediment samples from Redwood Creek near Docktown Marina and adjoining bay and marshland.\(^1\) Laboratory testing indicated the presence of contaminants in the sediment cores including polychlorinated biphenyls ("PCBs"), organochlorine pesticides (e.g., chlordane, dieldrin, toxaphene, DDT compounds), metals, organotins, and polycyclic aromatic hydrocarbons ("PAHs"). Many contaminants, most notably PCBs and organochlorine pesticides, were detected at concentrations greater than San Francisco Bay ambient (i.e., background) values and screening levels for beneficial reuse of dredged materials. These contaminants represent chemicals of potential concern ("COPCs") and Redwood City is seeking to understand the nature and extent of these COPCs and how they may influence planned redevelopment of the area.\(^2,3\)

Redwood Creek is situated north of US Highway 101 and forms the western boundary of the approximately 100-acre Inner Harbor Specific Plan area. The Specific Plan envisions creating new residential and employment areas, including a new floating home community.\(^4\) Priorities

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\(^1\) Pacific EcoRisk. May 2011. *Data Report, Sediment Characterization Sampling and Analysis Results (SAR) for the Redwood Creek Sediments.*


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are placed on enhancing and restoring wetlands and creating new open space and boating opportunities along the water’s edge. Dredging of contaminated sediment may be needed to construct improvements described in the Specific Plan. Additional data are needed to:

- Delineate the lateral and vertical extent of contaminated sediment within the Specific Plan area.
- Characterize COPC concentrations in sediment to assess whether those concentrations pose risks to human health and/or the environment that must be mitigated.
- Assess the impacts of dredging if conducted, and
- Evaluate cost-effective means of re-using or otherwise managing dredged materials.

In addition, a complaint has been filed that alleges COPCs in sediments are due to Docktown Marina. The complaint states vessels in the marina scrape against gravel and shells in the bay mud, which causes hull paint and other contaminants to be released into the surrounding environment. Our initial review of sediment data does not suggest this activity is occurring.

Antifouling paints have been used for over 100 years to protect boats from weathering and biological and chemical degradation. Antifouling paints typically contain a biocide that kills algae and other organisms that would otherwise attach to the hull. Biocides and additives in antifouling paints have included organotins, cadmium, chromium, copper, lead, mercury, and zinc. Although these COPCs are detected in sediment at the Docktown Marina, higher concentrations of these same COPCs are found in sediment within the adjoining bay and marshland. Moreover, COPC concentrations in sediment at the Port of Redwood City are similar to those in sediment at Docktown Marina. Maritime traffic on San Francisco Bay, past and present operations at nearby industrial and commercial properties, and land use from urbanized upland areas may account for COPCs detected in sediment. Further assessment of potential impacts of Docktown Marina operations and other potential sources are part of the proposed scope of work.

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6 Complaint at 3, Citizens for the Public Trust and Ted J. Hannig v. The City of Redwood City. (San Mateo County Superior Court 2015) (CIV536168).
PROPOSED SCOPE OF WORK

Tasks 1 through 4 comprise the ESA that will be performed to identify possible sources of COPCs in Redwood Creek sediment. As such, the ESA is not intended to conform to guidelines provided by the ASTM International Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, Designation: ASTM E1527-13 (published on 1 November 2013). Task 5 entails preparing for and attending a meeting with the Water Board. Task 6 describes preparation of a sediment sampling plan.

Task 1 - Identify Properties That Have Greatest Potential to Impact Redwood Creek

EKI will retain a firm specializing in the computerized search of environmental regulatory agency electronic databases to assist in identification of businesses or industries that may have discharged or have ongoing releases of hazardous substances to Redwood Creek. The database firm will perform a search of selected federal, state, tribal, and local government databases. The database search will include properties immediately adjacent and in close proximity to the portion of Redwood Creek utilized for the Docktown Marina. EKI is not responsible for any inaccuracies, omissions, or deficiencies in the results of the database search (referred to as a “radius map report”).

We will review the radius map report to identify properties that have the greatest potential to impact Redwood Creek. Identification of such properties will be based on the type of activities currently or formerly conducted at the properties, reported nature and extent of releases, known or suspected surface water flow paths, and proximity to Redwood Creek.

EKI will obtain Sanborn fire insurance maps and historical city directories, if available, that cover development and occupancy of the Inner Harbor. The historical review will focus on years from the late 1920s to the present, which encompass the time period of production and use of the COPCs.

One property of interest is 320 Blomquist Street. Pacific EcoRisk reported chlordane concentrations of 83 to 130 micrograms per kilogram ("μg/kg") in sediment samples obtained from Redwood Creek and adjoining bay and marshland in 2011. High chlordane concentrations were detected in surficial soil samples collected near the rail spur at 320 Blomquist Street in 2012. Chlordane was measured in sample HAB-28-0.5 at 2,300 μg/kg and sample HAB-29-0.5 at 1,000 μg/kg. The property at 320 Blomquist Street is a possible source of chlordane detected in sediment within the Inner Harbor.

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Task 2 - Review Reasonable Ascertainable Governmental Case Files

EKI will submit requests to the Water Board, California Department of Toxic Substances Control ("DTSC"), and San Mateo Department of Environmental Health ("SMCDEH") to review current publicly available and reasonably ascertainable case files for properties identified by the database search to have the greatest potential to impact Redwood Creek. Files for these properties will be reviewed at agencies offices, if not available electronically.

EKI assumes that ten hours will be needed to review case files at DTSC and Water Board offices, and an additional two hours will be needed to review case files maintained by SMCDEH. Case files will be examined to determine compliance with existing orders and other identified environmental permits to the extent EKI determines such review is valuable to assessing impacts of potential sources on sediment quality in Redwood Creek. EKI also will evaluate the significance of data obtained during environmental investigative or remedial actions, if this information is available in files accessed by EKI.

Task 3 – Conduct Site Reconnaissance

One site visit will be made by EKI team members to the Inner Harbor to observe current environmental conditions. The City will make all arrangements for access onto Docktown Marina and will provide a guide knowledgeable of site activities to accompany EKI on the walk-through. EKI staff will access and observe those areas that are reasonably accessible, safe to inspect, can be observed without moving equipment, materials, or other objects or structures that may limit inspection, and are reasonably expected to have been utilized for chemical use, storage, or disposal. No environmental sampling (e.g., collection of soil or sediment) will be performed by EKI.

Task 4 – Prepare ESA Report

Following completion of Tasks 1 through 3, EKI will prepare a draft written summary of findings. Using primarily tables and figures, EKI will present findings regarding the nature and extent of COPCs in sediment within the Inner Harbor and will discuss likely sources of this contamination. The ESA report also will discuss further sediment sampling activities needed to address data gaps and identify key locations to assess potential contributors to sediment contamination in Redwood Creek and the bay.

Task 5 - Prepare for and Attend Meeting with Water Board

This task includes preparation for and attendance at a meeting with Water Board staff. EKI will assist City with formulating an agenda and presentation materials for the meeting. Depending upon the meeting date, EKI will present its ESA findings to City for possible incorporation into the meeting. We understand the purpose of the meeting is to review existing sediment data and
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discuss potential next steps with Water Board staff regarding the scope of additional investigation needed to characterize COPC impacts to sediment and possible remediation requirements.

Task 6 – Prepare Sediment Sampling Plan

Based upon information and existing data, EKI will develop a plan for further characterization of Redwood Creek sediment and assessment of the contributions of identified potential sources of contamination. As part of this task, EKI will identify appropriate sample collection depths and locations based on current and historical storm drain outfalls and properties that have been identified as potential sources. EKI also will establish sample collection depths and locations in the vicinity of Docktown Marina based upon our review of activities at and near this area.

EKI will coordinate with City to identify COPCs for which testing will be performed. For example, no testing has been conducted for asbestos containing materials ("ACM"), polychlorinated dibenzodioxins/polychlorinated dibenzofurans ("dioxins and furans"), or polybrominated diphenyl ethers ("PBDEs"). These or other contaminants may govern remediation of Redwood Creek, reuse of dredged material as part of Inner Harbor redevelopment, or acceptance of dredged material at off-site permitted waste management facilities. After deciding the scope of testing, EKI will determine appropriate analytical methods, based upon published protocols and regulatory agency guidance. EKI will retain WRA Inc. as sub consultant to provide input on biological issues to aid in development of the sampling plan, if needed.

A draft sampling plan will be provided to City for review and comment. Upon finalization, it is anticipated that the sampling plan will be provided to Water Board staff for review and comment.

PROJECT SCHEDULE

We are prepared to begin work immediately on this project upon receipt of City’s authorization to proceed. The meeting with the Water Board will be scheduled at a mutually agreed upon time. Timing of the meeting is contingent upon the objectives to be achieved. Holding the meeting after completion of the ESA allows for a more comprehensive discussion of sources that could be contributing to sediment contamination and involvement of potentially responsible parties in characterizing and remediating sediment with the Inner Harbor. Alternatively, holding the meeting in advance of the ESA allows the City to introduce Water Board staff to the project and solicit their input, which may modify how the ESA is performed.

Approximately two weeks will be required to obtain and review the radius map report, and submit written requests to appropriate regulatory agencies for access to review files. The site reconnaissance by EKI team members can occur during the third week, assuming City has arranged for site access. Agency file reviews can be conducted during the third or fourth weeks,
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assuming access to files has been granted by the regulatory agencies. It should be noted that some agencies require up to ten working days, or more, to process Freedom of Information Act ("FOIA") or Public Record Act ("PRA") requests for file reviews. These dates are subject to change due to office closures during the weeks of December 25 and January 1.

Assuming no unanticipated delays in obtaining information or access needed for Tasks 1, 2 and 3, the draft ESA report, will be submitted to City approximately six to seven weeks after receiving authorization to proceed. The final report, can be submitted to City within several days of receipt of all comments from City on the draft report. Thus, approximately seven to eight weeks will be required to complete Tasks 1 through 4. If requested access to potentially pertinent records or individuals cannot be obtained by EKI in the time allowed, such incomplete investigations will be noted in the ESA report or City may allow additional time for completion of Tasks 1 through 3. Task 6 can be completed within approximately two to three weeks of finishing Tasks 1 through 5.

PROPOSED PROJECT BUDGET

Inasmuch as the exact level of effort to complete the Services cannot be identified at this time, we propose that compensation for consulting services by EKI be on a time and expense reimbursement basis in accordance with the Agreement. On the basis of the Services described above, we propose a budget of $37,000, which will not be exceeded without additional authorization from City. A breakdown of the estimated costs by task is presented below. This budget may be allocated among tasks as appropriate to meet project needs.

<table>
<thead>
<tr>
<th>Task</th>
<th>Budget</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Identify Properties That Have Greatest Potential to Impact Redwood Creek</td>
<td>$ 8,000</td>
</tr>
<tr>
<td>2 Review Reasonable Ascertaintable Governmental Case Files</td>
<td>$ 6,000</td>
</tr>
<tr>
<td>3 Conduct Site Reconnaissance</td>
<td>$ 3,000</td>
</tr>
<tr>
<td>4 Prepare ESA Report</td>
<td>$ 5,000</td>
</tr>
<tr>
<td>5 Prepare for and Attend Meeting with Water Board</td>
<td>$ 5,000</td>
</tr>
<tr>
<td>6 Prepare Sediment Sampling Plan</td>
<td>$10,000</td>
</tr>
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</table>

**TOTAL:** $ 37,000

As the Services to be provided by EKI may evolve, EKI will inform City whenever the existing budget is anticipated to need augmentation to accomplish requested work; such additional
budgets will be established by mutually agreeable work authorizations. For example, the results of the database report, initial contacts with the regulatory agencies, or review of historical land use information may indicate that numerous and/or extensive files are available for on-site or off-site, upgradient chemical release(s), and that these items require further review to complete the ESA.
Proposal/Agreement Date: 15 December 2015

EKI Proposal # B5-103

SCHEDULE OF CHARGES FOR ERLER & KALINOWSKI, INC. 1 JANUARY 2015

Personnel Compensation

<table>
<thead>
<tr>
<th>Classification</th>
<th>Hourly Rate</th>
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<tbody>
<tr>
<td>Officer and Chief Engineer-Scientist</td>
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<tr>
<td>Principal Engineer-Scientist</td>
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<tr>
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<tr>
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<tr>
<td>CADD / GIS Operator</td>
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<tr>
<td>Administrative Assistant</td>
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</tr>
<tr>
<td>Secretary</td>
<td>75</td>
</tr>
</tbody>
</table>

Direct Expenses

Reimbursement for direct expenses, as listed below, incurred in connection with the work will be at cost plus fifteen percent (15%) for items such as:

a. Maps, photographs, reproductions, printing, equipment rental, and special supplies related to the work.

b. Consultants, soils engineers, surveyors, drillers, laboratories, and contractors.

c. Rented vehicles, local public transportation and taxis, travel and subsistence.

d. Special fees, insurance, permits, and licenses applicable to the work.

e. Outside computer processing, computation, and proprietary programs purchased for the work.

Communication charges for local and long distance telephone, facsimile transmittal, standard delivery U.S. postage, and routine in-house copying will be charged at a rate of 4% of labor charges. Large volume copying of project documents, e.g., bound reports for distribution or project-specific reference files, will be charged as a project expense as described above.

Reimbursement for company-owned automobiles, except trucks and four-wheel drive vehicles, used in connection with the work will be at the rate of sixty cents ($0.60) per mile. The rate for company-owned trucks and four-wheel drive vehicles will be seventy-five cents ($0.75) per mile. There will be an additional charge of thirty dollars ($30.00) per day for vehicles used for field work. Reimbursement for use of personal vehicles will be at the federally allowed rate plus fifteen percent (15%).

CADD Computer time will be charged at twenty dollars ($20.00) per hour. In-house material and equipment charges will be in accordance with the current rate schedule or special quotation. Excise taxes, if any, will be added as a direct expense.

Rate for professional staff for legal proceedings or as expert witnesses will be at a rate of one and one-half times the Hourly Rates specified above.

The foregoing Schedule of Charges is incorporated into the Agreement for the Services of Erler & Kalinowski, Inc. and may be updated annually.