

COOPERATIVE PROJECT AGREEMENT
Port San Luis Harbor Terrace

The State Coastal Conservancy (the “**CONSERVANCY**”) and the Port San Luis Harbor District (the “**DISTRICT**”) enter into this Cooperative Project Agreement (the “**AGREEMENT**”) as of _____, 2013 (the “**EFFECTIVE DATE**”) and agree as follows:

PERTINENT FACTS

- A. The CONSERVANCY is an agency of the State of California charged under Division 21 of the California Public Resources Code with providing public access and public access facilities to and along the coast of California and with restoring and developing California’s urban waterfronts into environmentally sound areas to promote tourism, public access, and private sector development. These purposes may be accomplished within urban waterfront areas and coastal areas throughout the state of California, including within the Port San Luis Harbor area (the “**HARBOR**”), located in San Luis Obispo County.
- B. The DISTRICT is a public entity harbor district created and existing under the California Harbors and Navigation Code, sections 6000, et seq., with, among other things, the purpose and authority to improve or develop the water, lands and facilities within the jurisdiction of the DISTRICT, which are within and adjacent to the HARBOR.
- C. The parties share an interest in improving the Harbor waterfront, by integrating man-made features into the natural coastal environment and encouraging the development of park and open space lands, visitor serving facilities, and lodging for all income levels that will promote tourism and public access. The parties believe that these shared interests will be best served by cooperating in carrying out the Harbor Terrace Project (the “**PROJECT**”) within the Harbor Terrace area of the DISTRICT. (The area and geographic location of the PROJECT will be referred to in this AGREEMENT as the “**PROJECT SITE**”).
- D. The PROJECT SITE includes approximately 32 acres of coastal land, owned by or under long-term lease to the DISTRICT. The PROJECT SITE is depicted on the map attached as Exhibit 1 to this Agreement and incorporated by this reference.

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- E. The parties contemplate that when fully constructed, the PROJECT will serve to provide lower-cost overnight visitor serving facilities (tent camping, tent cabins, RVs) and related accessory uses and structures for coastal access (such as parking and other visitor-serving, operational and marine use facilities and amenities), as outlined in detail in the San Luis Obispo Bay Area Plan (“SLOBAP”), a component of the San Luis Obispo County General Plan.
- F. The criteria set forth in the SLOBAP provide the PROJECT key elements and the basic framework for the PROJECT.
- G. At its December 6, 2012 regular meeting, the CONSERVANCY, through its appointed board, adopted a resolution authorizing its Executive Officer to enter into this AGREEMENT, on behalf of the CONSERVANCY, with the DISTRICT.
- H. At its _____, 20__ meeting, the Harbor Commission (the “HARBOR COMMISSION”), the governing body of the DISTRICT, adopted a resolution authorizing its _____ to enter into this AGREEMENT, on behalf of the DISTRICT, with the CONSERVANCY.
- I. In order to carry out the mutual intention and desire to carry out and complete the PROJECT, the parties agree as set forth below.

The parties agree as follows, in light of the Pertinent Facts, above:

- 1. Term of Agreement. This AGREEMENT shall commence on the EFFECTIVE DATE and terminate 30 years from the EFFECTIVE DATE, unless otherwise terminated as provided in this AGREEMENT.
- 2. Early Termination. This AGREEMENT may be terminated as expressly permitted below. In addition, the CONSERVANCY may terminate this AGREEMENT and be relieved of all of its remaining obligations, if circumstances, which are not reasonably within the control of the CONSERVANCY, such as an Executive Order restricting availability of CONSERVANCY funds, adversely affect the ability of the CONSERVANCY to carry out its obligations under this AGREEMENT. In the event of such circumstances, the CONSERVANCY will promptly notify the DISTRICT, and the parties will, in good faith, endeavor to reach an equitable resolution of the outstanding obligations of both parties under this AGREEMENT.
- 3. Overview of Rights and Obligations
 - 3.1. Under and subject to the specific terms and conditions of this Agreement, the Conservancy, through its third party contractor(s), will undertake pre-PROJECT

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development activities (“**PDA**s”), including development and preparation of a more precise conceptual plan, preparation of documentation required for the PROJECT under the California Environmental Quality Act (**CEQA**), preparation of all required documentation for securing development permits, and payment of associated filing fees.

- 3.2. Under and subject to the specific terms and conditions of this Agreement, the DISTRICT will cooperate with and assist the Conservancy in the tasks associated with the PDA’s. The DISTRICT shall also, not later than completion of the PDA’s, initiate and expeditiously move forward with and complete the development of and construction of the PROJECT (the “**DEVELOPMENT PROCESS**”), consistent with the conceptual plan, environmental documentation and approvals achieved through the PDA’s.
- 3.3. The parties anticipate that the DEVELOPMENT PROCESS for the PROJECT will involve the DISTRICT soliciting and selecting, through a request for proposal process (the “**RFP PROCESS**”), a private developer (the “**DEVELOPER**”) to undertake all pre-construction activities and to construct the PROJECT, and to enter into a long-term Development and Lease Agreement (“**LEASE**”) with the DISTRICT.
- 3.4. Whatever the development process utilized, the DISTRICT will share with the Conservancy any income derived by the DISTRICT from the PROJECT. The sharing of income derived from the PROJECT by and between the DISTRICT and the CONSERVANCY shall be referred to in this AGREEMENT as the “**REVENUE SHARING**”.

4. Conceptual Design and Plans.

- 4.1. Prior to commencement of the PDAs, The DISTRICT will provide to the CONSERVANCY, without cost, all conceptual or other designs or plans, and studies, assessments, environmental reports, and other reports in its possession previously undertaken for or related to the PROJECT or the PROJECT SITE..
- 4.2. The CONSERVANCY will be responsible for preparing the initial pre-development conceptual design and description of the PROJECT and any refinements to the design and description as the PROJECT is modified in connection with the PDAs. The CONSERVANCY will be responsible for PROJECT conceptual design and PROJECT description changes that are reasonably necessary to undertake and complete the CEQA documentation and the development permit process, and to address concerns that arise through those processes. Any subsequent or other PROJECT description or design changes are the responsibility of the DISTRICT or the DEVELOPER, if any.

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5. Land for the PROJECT SITE. The DISTRICT will provide the land for the full PROJECT SITE. Prior to the commencement of any work by the CONSERVANCY under this AGREEMENT, the DISTRICT warrants and will provide documentation to the Conservancy that:
 - 5.1. The DISTRICT holds title to or has a leasehold interest in all of the real property comprising the PROJECT SITE that will allow for the development and operation of the PROJECT as and for as long as contemplated by this AGREEMENT.
 - 5.2. There are no existing interests, encumbrances, possessory or related claims or entitlements with respect to any of the land comprising the PROJECT SITE that would adversely affect or prevent the development and operation of the PROJECT as and for as long as contemplated by this AGREEMENT, and that any possessory or other claims or entitlements by third parties, including, without limitation, any claim for relocation costs or expenses under federal, state or local law, have been appropriately and lawfully addressed, removed or relinquished.
6. Pre-Development Activities (PDAs). The CONSERVANCY will undertake and complete the PDA's under the following terms and conditions.
 - 6.1. Except as limited below in subsection _____ or by other provisions of this AGREEMENT, the CONSERVANCY will undertake, through direct contracting with consultant(s), all reasonably necessary PROJECT PDAs. PDAs encompass:
 - 6.1.1. Preparation of all CEQA documentation and completion of the CEQA process from Scoping or Notice of Preparation through the Final Environmental Impact Statement (the “EIR”) for the PROJECT, which the parties contemplate will be required for the PROJECT in light of the nature of the PROJECT, the PROJECT SITE and the environmental conditions and circumstances related to each. The parties anticipate that this aspect of the PDAs will entail: technical studies or assessments of geology, public services, aesthetic/visual effects, greenhouse gas emissions, and traffic issues; and development of PROJECT conceptual plan revisions sufficient or needed for purposes of CEQA. Additional technical studies or assessments may be required.
 - 6.1.2. Preparation of all documentation and completion of the process required for issuance of Coastal Development Permit.
 - 6.1.3. Prior to initiating any work on the PDA's the parties shall jointly prepare a work program for the PDA's, the purpose if which is to establish the nature and extent of tasks anticipated as part of the PDA process.

- 6.2. Litigation or Administration Proceedings Following Completion of PDAS.
- 6.2.1. Under this AGREEMENT, the CONSERVANCY is not obligated to participate in any litigation or administrative proceedings that arise after and is brought in connection with the issuance of any permit or in connection with the certification of the EIR or other CEQA determinations, findings or approvals.
 - 6.2.2. If the CONSERVANCY is required by law or otherwise required to participate in litigation or in other legal proceedings, the CONSERVANCY may, in its sole discretion, elect one of the following:
 - 6.2.2.1. To cover its own costs in the litigation or other proceeding, including reasonable attorneys of defense, in which case, those costs will be allocated as PDA's EXPENSE (see Section ____, below)
 - 6.2.2.2. To require DISTRICT to pay for the CONSERVANCY's costs in the litigation or other proceeding. In satisfying this obligation, the parties will agree to retain joint counsel to represent both parties, unless there is potential for or actual conflict of interest between the parties in the litigation or other proceeding.
- 6.3. Preconstruction and Remediation Activities - not PDAS. The following are the responsibility of the DISTRICT or the DEVELOPER and are not PDAs and are not the responsibility of CONSERVANCY:
- 6.3.1. All preconstruction activities, including feasibility studies, development and preparation of construction plans and specifications, and cost-estimating.
 - 6.3.2. Any additional CEQA documentation or procedures or any additional permit approvals that are required as a result of changes in the PROJECT that occur following the completion of the PDAS by the CONSERVANCY.
 - 6.3.3. Any grading, building, electrical, plumbing, mechanical encroachment or other related pre-construction permits needed for the construction of the PROJECT.
 - 6.3.4. Any activities or any permit or approval application or documentation required to address, remediate or remove any ENVIRONMENTAL POLLUTANTS (as defined in section _____, below) on the PROJECT

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SITE, as required by any regulatory agency or under any ENVIRONMENTAL LAWS (as defined in section _____, below) in order to construct and operate the PROJECT as and for as long as contemplated by this AGREEMENT.

6.4. Limitation on CONSERVANCY Obligations – Cost of PDAS. Except as specified below, the CONSERVANCY will be required under this AGREEMENT to expend up to \$400,000 (four hundred thousand dollars) for all reasonable and necessary costs incurred by the CONSERVANCY, excluding any direct costs attributable to the work of CONSERVANCY employees (salary, wages or benefits), in carrying out the PDAS. The reasonable and necessary costs, excluding employee costs, incurred by the CONSERVANCY (whether more or less than \$400,000) in carrying out the PDAS will be referred to in this AGREEMENT as the “**PDAS EXPENSE**”.

6.4.1. Prior to initiating any work on the PDAs, the CONSERVANCY may undertake a cost-estimating assessment to determine the estimated PDAS EXPENSE. If the PDAS EXPENSE is estimated to exceed \$400,000, the CONSERVANCY will notify the DISTRICT of that assessment and the CONSERVANCY or the DISTRICT may, within forty-five (45) days of service of that notice elect to terminate this AGREEMENT without any further obligation of either party under this AGREEMENT, by providing the other party with written notice of termination. If neither party elects to terminate this AGREEMENT, then the parties shall utilize the process under subsection 4.4.3, below, to determine which party will pay the amount of the PDAS EXPENSE which exceeds \$400,000 and the effect, if any, of that determination on REVENUE SHARING.

6.4.2. If at any time after the CONSERVANCY commences work under this AGREEMENT the PDAS EXPENSE exceeds or is estimated to exceed \$400,000, but is, or is estimated to be, less than or equal to \$460,000, the Executive Officer of the CONSERVANCY will, on behalf of the CONSERVANCY and to the extent that the Executive Officer may then lawfully do so, augment the CONSERVANCY’S payment for the PDAS EXPENSE by up to 15% (i.e. up to \$460,000). Any such additional augmented payment by the CONSERVANCY will trigger an adjustment to the REVENUE SHARING under section _____, below, based on the additional PDAS EXPENSE over \$400,000 actually incurred by the CONSERVANCY. If the Executive Officer does not at the time retain the delegated authority to augment the CONSERVANCY’S payment for the PDAS EXPENSE, then the CONSERVANCY will notify the DISTRICT and the parties shall thereafter follow the process described in subsection 6.4.3, immediately below.

6.4.3. If at any time after the CONSERVANCY commences work under this AGREEMENT the PDAS EXPENSE exceeds or is estimated to exceed \$460,000 (15% over \$400,000), the Conservancy shall provide written notice of that fact to the DISTRICT, along with an estimate of the dollar amount by which the total PDAS EXPENSE will exceed \$460,000, upon completion of the PDAS. The District shall respond to the notice in writing on the earlier of: 30 days after service of the notice or 2 business days following the next regularly scheduled meeting of the HARBOR COMMISSION which occurs after service of the notice. In its response, the DISTRICT shall notify the CONSERVANCY whether or not the DISTRICT elects to pay for any additional PDAS EXPENSE over \$460,000 (the “**ADDITIONAL PDAS EXPENSE**”).

6.4.3.1. If the DISTRICT elects to pay for the ADDITIONAL PDAS EXPENSE, the DISTRICT will promptly provide an advance payment to the CONSERVANCY in the amount of \$25,000 (or less if the ADDITIONAL PDAS EXPENSE is less than \$25,000). The DISTRICT will make further advance payments in increments of \$25,000 to the CONSERVANCY, up to the full amount of the ADDITIONAL PDAS EXPENSE within 10 days of service on DISTRICT by CONSERVANCY of a notice that 75% of the prior incremental advance payment has been expended by the CONSERVANCY.

6.4.3.2. If the DISTRICT does not elect to pay for the ADDITIONAL PDAS EXPENSE, the DISTRICT will promptly notify the CONSERVANCY and the CONSERVANCY may elect to: (a) authorize additional funding with an adjustment to REVENUE SHARING under section ____, below, based on the increase in the PDAS EXPENSE; **or** (b) the CONSERVANCY may elect to terminate its obligation to complete the PDAS but retain the right to REVENUE SHARING under the terms of section ____ up to the existing PDAS EXPENSE, should the PROJECT be subsequently developed, constructed and operated and the DISTRICT receive DISTRICT’S INCOME.

6.5. DISTRICT Participation in PDAS. The DISTRICT will participate as the lead agency for all aspects of the PDAs, including the process required for the PROJECT under CEQA and the process required for issuance of all regulatory permits for the PROJECT, including a Coastal Development Permit. The DISTRICT will contribute DISTRICT employee staff time as and to the extent needed to participate as a lead agency. The parties anticipate that the DISTRICT

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will undertake activities as lead agency which include, but are not limited to the following:

- 6.5.1. Assist the CONSERVANCY in the preparation and distribution of a Request(s) for Qualifications or Request(s) for Proposal seeking consultant(s) that, under contract with the CONSERVANCY, will undertake the PDAS, and participate in interviews and the selection of consultant(s).
- 6.5.2. Assist the CONSERVANCY in the review and approval of the work of CONSERVANCY-retained consultant, including work plans, budgets, deliverables, and invoices.
- 6.5.3. Undertake review of, provide input on, and approve all components of the CEQA documentation and all components of the CEQA process, as typical for a lead agency (components may include: Scoping, Notice of Preparation, Administrative EIR Drafts, Draft EIR, Comments and Response to Comments).
- 6.5.4. As needed, attend meetings and public hearings, respond to inquiries for information and cooperate and coordinate with CONSERVANCY staff and consultants.
- 6.5.5. Prepare staff reports and proposed findings and determinations under CEQA, participate as staff in preparation for and at a public hearing or hearings at which the HARBOR COMMISSION hears testimony or deliberates on the PROJECT and on the CEQA documentation and, through its HARBOR COMMISSION, deliberate and make findings and determinations on the PROJECT and on the final EIR, or other CEQA documentation, as required under CEQA.
- 6.6. Use of and Entitlement to PDAs Work Products. The party providing, creating or producing any PDAS work product, whether directly or through that party's contractor, will retain all rights to that work product, but will grant an irrevocable, fully paid license to the other party to use, reproduce, publish, display, and make derivative use of all such work, or any part of it, free of charge and in any manner for the purpose of or in connection the PROJECT; and to authorize others to do so for the same purpose.
7. DEVELOPMENT PROCESS. Upon completion of the PDAS by the CONSERVANCY, the DISTRICT will, diligently, expeditiously and in good faith, initiate and complete the DEVELOPMENT PROCESS. The DEVELOPMENT PROCESS, whatever form it may take, will serve to initiate and complete all pre-construction and construction activities and allow for the operation of the PROJECT and lead to REVENUE SHARING, as intended under this AGREEMENT.

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- 7.1. Form of the DEVELOPMENT PROCESS. The DISTRICT may utilize any appropriate DEVELOPMENT PROCESS that reasonably and, without undue delay, leads to the construction and operation of the PROJECT and to REVENUE SHARING. The DISTRICT may undertake the DEVELOPMENT PROCESS on its own, through contractors, through a competitive RFP PROCESS or through any other form of agreement, provided that the approach utilized does not adversely and materially affect the rights of the parties under this AGREEMENT, including, without limitation rights related to REVENUE SHARING, and does not substantially alter the primary purposes of parties in undertaking the PROJECT.
- 7.1.1. The parties anticipate that the DEVELOPMENT PROCESS will take the form of an RFP PROCESS for the selection of a DEVELOPER to undertake all pre-construction activities and to construct and operate the PROJECT, and to enter into a LEASE for those purposes. In that event, the RFP PROCESS, the selection of the DEVELOPER, and the LEASE will comply with the requirements detailed in sections _____, below.
- 7.1.2. If the DISTRICT utilizes a DEVELOPMENT PROCESS other than the RFP PROCESS and utilizes any third party agreement other than the LEASE to construct and operate the project, the process and agreement used shall be consistent with the general principles underlying the requirements for the RFP PROCESS, DEVELOPER selection, the LEASE, and REVENUE SHARING set forth in sections _____, below.
- 7.2. Delay of the DEVELOPMENT PROCESS. The DISTRICT may delay the DEVELOPMENT PROCESS and not commence it promptly upon completion of the PDAS by the CONSERVANCY, if the parties agree in writing that such delay would benefit the long-term success of the PROJECT, or if there is some circumstance, such as pending litigation, which the parties agree practically prevents the expeditious initiation of the DEVELOPMENT PROCESS.
- 7.3. Requirements for RFP PROCESS. If an RFP PROCESS is used the DISTRICT, it will be subject to the following:
- 7.3.1. The DISTRICT will carry out the RFP PROCESS so that it is an arms-length process.
- 7.3.2. In connection with the RFP process, the DISTRICT will:
- 7.3.2.1. Afford the CONSERVANCY the opportunity to review and comment on the draft RFP, before it is finalized and before it is disseminated to potential private developers. The DISTRICT

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will have the authority to determine the final language of the RFP, although it will consider and may utilize any suggestions made by the Conservancy, unless there is a good business reason for not doing so.

- 7.3.2.2. Disseminate the RFP in a manner that ensures that it will be provided to a broad and diverse range of well-qualified potential respondents and provide the CONSERVANCY with documentation that it has done so.
- 7.3.2.3. Provide the CONSERVANCY with copies of all responses to the RFP, including all documentation submitted (qualifications, background, experience and economic viability) and provide input.
- 7.3.2.4. Afford the Conservancy with the opportunity to participate in or attend any interview(s) of RFP respondents that may be part of the selection process.

7.4. Selection of DEVELOPER

- 7.4.1. Prior to selection of the DEVELOPER, the DISTRICT will afford the Conservancy the opportunity to provide input on which of the RFP respondent(s) that the CONSERVANCY believes to be the best qualified to construct and carry out the PROJECT. The DISTRICT will consider the CONSERVANCY's input, but shall retain the sole discretion to ultimately select the DEVELOPER.
- 7.4.2. The DISTRICT shall select as the DEVELOPER the RFP respondent that is the best-qualified by experience, skills, background and economic viability to undertake all aspects of construction of the PROJECT and to subsequently operate the PROJECT in a manner that will maximize income at the same time as ensuring consistency with the purposes of the parties in undertaking the PROJECT (see Recitals A, B and E, above).
- 7.4.3. No Conflicts of Interest. The DISTRICT will use its best efforts to ensure that the RFP PROCESS and the selection of the DEVELOPER is in compliance with all applicable legal requirements which govern conflicts of interests under federal, state or local law and which avoids any actual or potential conflict of interest.

8. Negotiation of the LEASE

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- 8.1. Upon selection of the DEVELOPER, the DISTRICT will, diligently, expeditiously and in good faith, initiate and attempt to complete the negotiation of the LEASE with the DEVELOPER.
- 8.2. The LEASE shall contain the following key provisions:
 - 8.2.1. The time frames within which the DEVELOPER will complete the preconstruction and construction phases of the PROJECT and defined penalties or incentives or disincentives related to those time frames. The DISTRICT will use its best efforts to negotiate a completion date for the construction of the PROJECT under the LEASE that is no later than 3 years following the EFFECTIVE DATE of the LEASE.
 - 8.2.2. The right of the DISTRICT to inspect the PROJECT SITE on reasonable notice and to be accompanied by representatives of the CONSERVANCY.
 - 8.2.3. A provision that obligates the DEVELOPER to continuously operate and maintain the PROJECT and its improvements throughout the LEASE term in a manner that is consistent with the purposes of the parties in undertaking the PROJECT under this AGREEMENT (see Recitals A, B and E, above).
 - 8.2.4. The percentage or share of the DEVELOPER's income from the PROJECT that the DISTRICT will receive under the LEASE, the method of calculating the income, and the payments terms.
 - 8.2.5. A provisions that requires the DEVELOPER to procure and maintain insurance against claims for injuries to persons or damage to PROJECT property that may arise from or in connection with the construction and operation of the PROJECT.
 - 8.2.6. A provision that requires the DEVELOPER to furnish a performance bond in favor of the DISTRICT covering the construction of the PROJECT in the following amounts: for faithful performance, one hundred percent of the contract value; and for labor and materials, one hundred percent of the contract value.
- 8.3. The LEASE shall be consistent with the terms of this AGREEMENT.
 - 8.3.1. The LEASE shall not include any terms, which arbitrarily and without any sound business reason, unreasonably defer or decrease DISTRICT'S INCOME, to the detriment of the CONSERVANCY'S income under REVENUE SHARING.

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- 8.3.2. The DISTRICT will afford the Conservancy the opportunity to review drafts of the LEASE for purposes of assuring its consistency with this AGREEMENT.
- 8.3.3. If the Conservancy proposes changes to the LEASE, the DISTRICT will revise the LEASE if reasonably necessary to achieve consistency with this AGREEMENT.
- 8.3.4. The DISTRICT shall provide the CONSERVANCY with advance written notice of any proposed changes to the LEASE and shall not enter into any LEASE amendment that would have material impact on the CONSERVANCY without the prior written approval of the CONSERVANCY, which shall not be unreasonably delayed or withheld.
9. Delay in PROJECT Construction Commencement or Completion. Following completion of the PDAS by the CONSERVANCY, the parties shall have the following rights and obligations:
- 9.1. DISTRICT Obligation to Extend, Renew or Re-apply for Approvals or Permits. The DISTRICT shall be responsible for seeking and obtaining an extension or renewal of, and preparing for, updating, supplementing, adding to, or reapplying for any entitlement, permit or approval, including CEQA approval, as may be needed to move forward with completion of the PROJECT.
- 9.2. REVENUE SHARING Adjustment if Delay in PROJECT Completion. If, for any reason, whether due to an Act of God, inability to initiate the DEVELOPMENT PROCESS, select a DEVELOPER or negotiate a LEASE or some other cause, the construction and operation of the PROJECT is not substantially completed and REVENUE SHARING is delayed or substantially reduced for more than 3 years following the EFFECTIVE DATE of this AGREEMENT, the CONSERVANCY will be entitled to REVENUE SHARING at the adjusted share specified in section ____, below.
- 9.3. Failure to Complete PROJECT. This subsection will apply if, for any reason, whether due to an Act of God, inability to initiate the DEVELOPMENT PROCESS, select a DEVELOPER or negotiate a LEASE or some other reason,, the DEVELOPMENT PROCESS or the construction and operation of the PROJECT is delayed for more than 10 years after the EFFECTIVE DATE.
- 9.3.1. Initiating Renegotiation. In the event of such delay, either party may elect, by written notice to the other party, to renegotiate and amend the terms of this AGREEMENT. The right to elect to renegotiate under this subsection shall not be available to a party if that party has directly and substantially caused the delay or a significant portion of it. On receipt of

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a notice to renegotiate and if the prerequisites to renegotiation are satisfied, both parties shall, in good faith and without unreasonable delay, renegotiate the terms of the AGREEMENT, consistent with the terms of this subsection 9.3.

9.3.2. Purpose of Renegotiation. The fundamental purposes of renegotiation under this subsection are:

9.3.2.1. To amend the terms of the AGREEMENT as reasonably necessary in light of the circumstances and ensure that the original intention of the parties as to the objectives of the PROJECT are achieved in any subsequent or alternative project on the PROJECT SITE, even though the nature of the Project or the manner in which it is implemented may change.

9.3.2.2. To amend the REVENUE SHARING and other related provisions of this agreement, so that REVENUE SHARING is equitably adjusted, taking into account the factors specified in this section.

9.3.3. Considerations in Renegotiation. All of the following are considerations that shall guide the parties in any renegotiation under this subsection:

9.3.3.1. Any variation in the design or plan of the alternative or subsequent project or manner in which it may be implemented will be permitted so long as it does not alter the basic objectives of the PROJECT, which are specified in paragraph E of the Pertinent Facts, above, unless those objectives cannot be achieved under existing law.

9.3.3.2. The terms negotiated shall balance the dual objectives of enabling the PROJECT objectives to be achieved, if possible, while maintaining, to the extent possible and reasonable, the original expectations of the parties as to REVENUE SHARING.

9.3.3.3. Any change in REVENUE SHARING provisions of the AGREEMENT shall take into account the following:

9.3.3.3.1. The extent to which any plans, designs, studies, assessments, documentation, analysis, or review done under the PDAS or any other aspect of the

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PDAS are utilized by the alternative or subsequent project.

- 9.3.3.3.2. The total amount of the PDAS EXPENSE incurred by the CONSERVANCY.
- 9.3.3.3.3. The extent to which the alternative or subsequent project is similar to or varies from the PROJECT.
- 9.3.3.3.4. The original expectations of the CONSERVANCY under the AGREEMENT as to return to the CONSERVANCY from REVENUE SHARING.
- 9.3.3.3.5. Regardless of the method by which the DISTRICT may receive compensation or revenue from the subsequent project, the DISTRICT shall share revenue with the CONSERVANCY within a reasonable time after the DISTRICT receives compensation or revenue from the alternative or subsequent project.

10. REVENUE SHARING

10.1. General principles. Under this AGREEMENT, the Conservancy, will receive a share of all of the DISTRICT’S gross income from the PROJECT (“**DISTRICT’S INCOME**”), whether that income is derived from a LEASE with a DEVELOPER, received directly by the DISTRICT, or received from or under any other type of agreement, or whether that income is in the form of funds received or any other form other compensation.

10.2. Commencement of REVENUE SHARING. REVENUE SHARING will commence when the PROJECT, or any portion of it, is constructed and the DISTRICT realizes, receives or has accrued a right to receive (whether that right is deferred or not) any INCOME from the PROJECT income..

10.3. CONSERVANCY’S Share of DISTRICT’S INCOME.

10.3.1. Unless adjusted under sections __, below, the DISTRICT shall pay to the CONSERVANCY the following share of the DISTRICT’S INCOME:

10.3.1.1. Upon commencement of REVENUE SHARING (see section __, above) and for the first two years of REVENUE SHARING: a minimum of \$25,000 or, if greater, 5 percent of

the DISTRICTS INCOME; This initial share (the “**INITIAL CONSERVANCY SHARE**”) shall increase in the third year of REVENUE SHARING to a minimum of \$50,000 or, if greater, 7.5% of the DISTRICT’S INCOME and shall increase again in the fourth year of revenue sharing to a minimum of \$70,000 or, if greater, 7.5% of the DISTRICT’S INCOME and this formula shall remain in effect until the CONSERVANCY has received the total cumulative amount of the PDAS EXPENSE that the CONSERVANCY has funded under this AGREEMENT.

10.3.1.2. After the CONSERVANCY has received the total cumulative amount of the PDAS EXPENSE: 1.5 % of the DISTRICTS INCOME. This share (the “**SECONDARY CONSERVANCY SHARE**”) shall remain in effect until the termination of this AGREEMENT.

10.3.2. Adjustment of CONSERVANCY’s Share.

10.3.2.1. If in any year that the INITIAL CONSERVANCY SHARE is in effect, the DISTRICT’S INCOME is less than twice the minimum dollar amount of the then-applicable formula for the INITIAL CONSERVANCY SHARE, set forth in section ____, above, the minimum dollar amount will be revised by decreasing the minimum amount by one dollar for every one dollar that the DISTRICTS INCOME is less than twice the minimum dollar amount.

10.3.2.2. If the Conservancy elects to provide funding for PDAS EXPENSES in an amount of greater than \$400,000 under sections ____, ____, or __ above, the SECONDARY CONSERVANCY SHARE will increase by 0.1% for every \$15,000 in additional Conservancy funding above \$420,000. For any amount of increase of less than \$15,000, a proportional increase in the percentage will be imposed.

10.3.2.3. If REVENUE SHARING commences under section ____, above, more than 6 years after the EFFECTIVE DATE: as of the commencement of the seventh year after the EFFECTIVE DATE the SECONDARY CONSERVANCY SHARE will increase by an additional .015% for every additional year that commencement of REVENUE SHARING is delayed as of the seventh year after the EFFECTIVE DATE. For any delay of less than a year, a proportional increase will be imposed.

10.3.3. DISTRICT Payment of CONSERVANCY SHARE. The DISTRICT shall pay to the CONSERVANCY the INITIAL CONSERVANCY SHARE or SECONDARY CONSERVANCY SHARE of the DISTRICT'S INCOME, as appropriate (the "CONSERVANCY'S PAYMENT"), and shall provide documentation as follows:

10.3.3.1. If the DISTRICT'S INCOME is derived from a LEASE or other similar third party agreement, DISTRICT shall provide the CONSERVANCY'S PAYMENT within not more than 30 days after the DISTRICT receives any periodic payment of the DISTRICT'S INCOME under the LEASE or other agreement. If the DISTRICT'S INCOME is not derived from a LEASE or other similar agreement, DISTRICT shall provide the CONSERVANCY'S PAYMENT on a calendar-year basis, with the payment to the CONSERVANCY made on or before February 1 of year following the year in which the DISTRICT has received any DISTRICT'S INCOME.

10.3.3.2. In conjunction with each installment of CONSERVANCY PAYMENT, the DISTRICT shall provide an accounting detailing the method by which the DISTRICT'S INCOME was determined and detailing the method and formula (the INITIAL CONSERVANCY'S SHARE or the SECONDARY CONSERVANCY SHARE) that was used to arrive at the CONSERVANCY'S PAYMENT. The DISTRICT shall also provide a statement of the cumulative total of every CONSERVANCY'S PAYMENT for the calendar year, and the cumulative total of all CONSERVANCY'S PAYMENT that have been made under the AGREEMENT to date.

11. DISTRICT Hold Harmless and Indemnification, Insurance; Environmental Responsibilities.

11.1. DISTRICT's Responsibility for PROJECT and PROJECT SITE.

DISTRICT acknowledges that the CONSERVANCY has no possessory rights in the PROJECT SITE, nor any responsibility or right to control or manage the PROJECT pre-construction activities, the PROJECT construction or the PROJECT operation and maintenance after completion of construction. Accordingly, DISTRICT has and shall retain all responsibilities, and shall bear all costs and liabilities of any nature or kind, related to the ownership, operation, upkeep, improvement, and maintenance of the PROJECT SITE and related to the

PROJECT pre-construction activities, the PROJECT construction and the PROJECT operation and maintenance after completion of construction.

- 11.2. DISTRICT Release, Hold Harmless and Indemnification. DISTRICT hereby releases and agrees to hold harmless, indemnify and defend the CONSERVANCY and its members, directors, officers, employees, legal representatives, agents, and contractors and the successors, and assigns of each of them (collectively "**INDEMNIFIED PARTIES**") from and against any and all liabilities (whether legal or equitable in nature), penalties, fines, costs, losses, damages, expenses, causes of action, suits, actions, claims, demands, orders, or judgments, including, without limitation, court costs and reasonable attorneys' and experts' fees, consultants fees and attorneys' fees on appeal, arising from or in any way connected with the PROJECT SITE or arising from or related to the PROJECT pre-construction activities, construction or operation and maintenance, regardless of cause, unless, , due solely to the active negligence, contractual breach or willful misconduct of the INDEMNIFIED PARTIES. At the election of and upon written notice from the CONSERVANCY, DISTRICT shall defend any such action or proceeding by counsel reasonably acceptable to CONSERVANCY and to DISTRICT's insurer..
- 11.3. Liability Insurance. Upon initiation of PROJECT pre-construction activities on the PROJECT SITE under the LEASE and throughout the term of the LEASE, DISTRICT or, in lieu of DISTRICT, DEVELOPER, shall obtain and maintain at all times comprehensive general liability insurance against claims for personal injury, death, and property damage on the PROJECT SITE.
- 11.3.1. The required insurance shall have coverages and limits of liability in amounts customary for coastal visitor-serving facilities in the area of the PROJECT SITE of a type and scale comparable to those operations on the PROJECT SITE
- 11.3.2. The insurance shall include provisions for at least thirty (30) days advance notification to the CONSERVANCY prior to termination or expiration of the insurance coverage. DISTRICT shall deliver to the CONSERVANCY certificates of such insurance coverage within ten (10) business days of the CONSERVANCY's written request therefor.
- 11.4. Environmental Responsibilities
- 11.4.1. DISTRICT Responsible for the Property. DISTRICT is solely responsible, and the CONSERVANCY has no responsibility, for the operation of the PROJECT SITE, monitoring of hazardous or other conditions on it, or the protection of the DISTRICT, the public or any third parties from risks related to conditions on the PROJECT SITE. Nothing in this AGREEMENT shall be construed as giving any right or

ability to the CONSERVANCY to exercise physical or managerial control of the day-to-day operations of the PROJECT or PROJECT SITE or of DISTRICT's activities on the PROJECT SITE. Neither the CONSERVANCY or its employees or agents shall be liable to the DISTRICT or other person or entity in connection with consents given or withheld, or in connection with any entry upon, inspection or other activity on the PROJECT SITE, pursuant to this AGREEMENT.

11.4.2. DISTRICT's Environmental Warranty and Indemnity. DISTRICT hereby promises to hold harmless, defend and indemnify the INDEMNIFIED PARTIES from and against all litigation, liabilities, penalties, fines, charges, costs, losses, damages, expenses, causes of action, claims, demands, orders, judgments, or administrative actions, including, without limitation, reasonable attorneys' and experts' fees and attorneys' fees on appeal, arising from or connected with any release or threatened release of ENVIRONMENTAL POLLUTANTS (defined below) or wastes on, at, beneath or from the PROJECT SITE, or arising from or connected with a violation of any ENVIRONMENTAL LAWS (defined below) by the DISTRICT or any other prior or other owner of the PROJECT SITE. DISTRICT's indemnification obligation shall not be affected by any approvals provided by the CONSERVANCY to the DISTRICT with respect to the PROJECT or PROJECT SITE.

11.4.3. With respect to any ENVIRONMENTAL POLLUTANTS (defined below) or wastes which as of the EFFECTIVE DATE may be on, at, beneath or from the PROJECT SITE and, at any time after the EFFECTIVE DATE of this AGREEMENT, as to any release, discharge or other incident in, on, or about the PROJECT SITE of any substance now or hereafter defined, listed, or otherwise classified pursuant to any federal, state, or local law, regulation, or requirement as hazardous, toxic, polluting, or otherwise contaminating to the air, water, or soil, or in any way harmful or threatening to human health or the environment, the DISTRICT agrees to take any steps that are required of the DISTRICT under federal, state, or local law necessary to ensure its containment and remediation, including any cleanup.

11.4.4. This AGREEMENT is not intended to create environmental liability in the CONSERVANCY. Notwithstanding any other provision herein to the contrary, the parties do not intend this AGREEMENT be construed such that it imposes on, creates in or gives the CONSERVANCY:

11.4.4.1. The obligations or liability of an "owner" or "operator" as those words are defined and used in any ENVIRONMENTAL LAWS, as defined below, including, without limitation, the Comprehensive Environmental Response, Compensation and

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Liability Act of 1980, as amended (42 USC Section 9601 *et seq.*, and hereinafter “CERCLA”), or the Carpenter Presley Tanner Hazardous Substance Account Act, California Health and Safety Code Sections 25300-25395, or any other Federal, state, or local law or regulation making an owner or operators of property responsible for remediation of contamination.

- 11.4.4.2. The obligations or liability of a person described in 42 USC Section 9607 (a)(3) or (4).
- 11.4.4.3. The obligations of a responsible person under any applicable ENVIRONMENTAL LAWS, as defined below.
- 11.4.4.4. The right to investigate and remediate any Hazardous Materials, as defined below, associated with the PROJECT SITE.
- 11.4.5. The term “ENVIRONMENTAL POLLUTANTS” includes, without limitation, (i) material that is flammable, explosive, or radioactive; (ii) any petroleum, petroleum products, fuel oil, waste oils, explosives, reactive materials, ignitable materials, corrosive materials, hazardous chemicals, hazardous wastes, hazardous substances, extremely hazardous substances, toxic substances, toxic chemicals, radioactive materials, infectious materials and any other element, compound, mixture, solution or substance which may pose a present or potential hazard to human health or the environment; and (iii) hazardous materials, hazardous wastes, hazardous or toxic substances, or related materials defined in CERCLA, the Hazardous Materials Transportation Act (49 USC Section 5101, *et seq.*), the Hazardous Waste Control Law (California Health and Safety Code Section 25100 *et seq.*), and in the regulations adopted and publications promulgated pursuant to them, or any other applicable Federal, state, or local laws, ordinances, rules, or regulations now in effect or enacted after this date.
- 11.4.6. The term “ENVIRONMENTAL LAWS” includes, without limitation, any and all Federal, state, local or municipal laws, rules, orders, regulations, statutes, ordinances, codes, guidelines, policies or requirements of any governmental authority regulating or imposing standards of liability or standards of conduct (including common law) concerning air, water, solid waste, hazardous materials, worker and community right-to-know, hazard communication, noise, radioactive material, resource protection, subdivision, inland wetlands and watercourses, health protection and similar environmental health, safety, building and land use as may now or at any time hereafter be in effect or, in general, any administrative agency statute, regulation, rule,

ordinance, order or requirement now in effect or enacted after this date relating to pollution, protection of human health, the environment, or ENVIRONMENTAL POLLUTANTS.

12. General Provisions

- 12.1. Controlling Law. The interpretation and performance of this AGREEMENT shall be governed by the laws of the State of California and applicable laws of the United States. References to specific authorities in this AGREEMENT shall be to the statute, rule, regulation, ordinance, or other legal provision that is in effect at the time this AGREEMENT becomes effective.
- 12.2. Liberal Construction. Any general rule of construction to the contrary notwithstanding, this AGREEMENT shall be liberally construed in favor of the grant to effect the purposes of this AGREEMENT. If any provision in this instrument is found to be ambiguous, an interpretation consistent with the purposes of this AGREEMENT that would render the provision valid shall be favored over any interpretation that would render it invalid.
- 12.3. Severability. If any provision of this AGREEMENT is found to be invalid, the remainder of the provisions of this AGREEMENT, or the application of such provision to persons or circumstances other than those as to which it is found to be invalid, as the case may be, shall not be affected thereby.
- 12.4. Entire Agreement. This instrument sets forth the entire agreement of the Parties with respect to the AGREEMENT and supersedes all prior discussions, negotiations, understandings, or agreements relating to the AGREEMENT, all of which are merged herein.
- 12.5. Compliance with Laws. All activities under this AGREEMENT shall be consistent with the purposes of this AGREEMENT and in accordance with applicable law. In carrying out the PROJECT under the LEASE (pre-construction, construction and operation and maintenance of the PROJECT), the DISTRICT shall ensure that the DEVELOPER complies with all federal, state and local laws, including, if applicable, laws relating to the payment of prevailing wages for public works.
- 12.6. Notice. Any notice, request, consent or approval required or permitted by this AGREEMENT shall be in writing and may be given by personal delivery or by registered or certified mail, first class postage prepaid, return receipt requested. Any such notice, request, consent or approval shall be deemed communicated upon personal delivery or, in the case of mailing, on the third business day after deposit into the mail. Notices, requests, consents or approvals given by mail shall be given as follows (provided that each Party may change its address by notice given in accordance with this section):

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To DISTRICT: Port San Luis Harbor District
Attn: Harbor Manager
P.O. Box 249
Avila Beach, CA 93424

WITH A COPY TO:

Adamski Moroski Madden
Cumberland & Green
P. O. Box 3835
San Luis Obispo, California 93403-3835

To CONSERVANCY: State Coastal Conservancy
Attn: Executive Officer
1330 Broadway, 13th Floor
Oakland, CA 94612

WITH A COPY TO:

State Coastal Conservancy
Attn: Legal Staff (JJ)
1330 Broadway, 13th Floor
Oakland, CA 94612

- 12.7. Amendment. No amendment of this Agreement will be binding unless in writing and signed by the parties.
- 12.8. Authority to Execute AGREEMENT. Each of the parties warrants and represents to the other party that the person executing this Agreement on behalf of said party is duly authorized and empowered to execute this for and on behalf of each such party
- 12.9. Counterparts. This AGREEMENT may be signed in counterparts, each of which will be considered an original and which together will constitute one and the same AGREEMENT.

STATE COASTAL CONSERVANCY

By: Sam Schuchat
Its: Executive Officer

Date

PORT SAN LUIS HARBOR DISTRICT

By: Steve McGrath
Its: Harbor Manager

Date

DRAFT