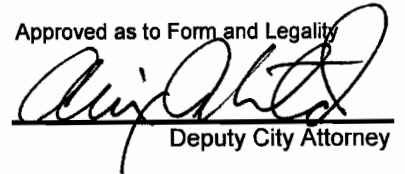


FILED
OFFICE OF THE CITY CLERK
OAKLAND

2012 MAY 31 PM 4:38

Approved as to Form and Legality


Deputy City Attorney

OAKLAND CITY COUNCIL

RESOLUTION No. 83932 C.M.S.

RESOLUTION AUTHORIZING THE CITY ADMINISTRATOR TO NEGOTIATE AND EXECUTE AN AMENDED AND RESTATED COST SHARING AGREEMENT BETWEEN THE REDEVELOPMENT AGENCY OF THE CITY OF OAKLAND (AGENCY) AND THE PORT OF OAKLAND PERTAINING TO INFRASTRUCTURE IMPROVEMENTS AT THE FORMER OAKLAND ARMY BASE, TO REFLECT THE TRANSFER OF THE PROPERTY FROM THE AGENCY TO THE CITY OF OAKLAND, TO ACKNOWLEDGE AN AMENDMENT TO THE TRADE CORRIDOR IMPROVEMENT FUNDS (TCIF) BASELINE AGREEMENT, TO ESTABLISH RESPECTIVE ROLES AND RESPONSIBILITIES BETWEEN THE PORT AND CITY AS TO GRANT FUNDING; TO IDENTIFY THE FUNDING SOURCES TO MATCH THE TCIF GRANT; AND TO COMMIT AN ADDITIONAL \$22.5 MILLION IN CITY FUNDS TO MATCH THE TCIF GRANT, IN A FORM AND CONTENT SUBSTANTIALLY IN CONFORMANCE WITH THE ATTACHED AGREEMENT, WITHOUT RETURNING TO THE CITY COUNCIL

WHEREAS, the City of Oakland (City) and the Port of Oakland (Port) own respective parcels of the former Oakland Army Base; and

WHEREAS, the real property at the former Oakland Army Base, have transferred from the Redevelopment Agency of the City of Oakland (Agency) to the City as of January 31, 2012; and

WHEREAS, the City previously prepared and certified/adopted the 2002 Oakland Army Base ("OARB") Redevelopment Plan Environmental Impact Report, which was a "project level" EIR pursuant to California Environmental Quality Act ("CEQA") Guidelines section 15180(b); the 2006 OARB Auto Mall Supplemental EIR and 2007 Addendum; and the 2009 Addendum for the Central Gateway Aggregate Recycling and Fill Project; while the Port prepared and adopted the Port's 2006 Maritime Street Addendum (collectively called "Previous CEQA Documents"); and

WHEREAS, the Oakland Army Base Reuse Plan and 2002 Environmental Impact Report document the need to install all new public utilities and streets to serve new development of the former Oakland Army Base; and

WHEREAS, the cost for new rail and street systems, utilities, streets, open space, and safe public access is estimated at \$500 million; and

WHEREAS, the Port is in discussions with the California Transportation Commission (CTC) for an allocation of more than \$242 million in Trade Corridor Improvement Funds (TCIF) to be used for the construction of infrastructure improvements within the East and Central Areas of the former Oakland Army Base; and

WHEREAS, the Port, the California Department of Transportation (Caltrans), and CTC entered into the TCIF Baseline Agreement as of December 10, 2009; and

WHEREAS, on or about July 27, 2011, the Port of Oakland, the Redevelopment Agency of the City of Oakland, and the City of Oakland entered into a Cost Sharing Agreement for the Oakland Army Base (CSA) to support each agency's economic development goals for their respective portions of the former Oakland Army Base; and

WHEREAS, the CSA provided for the terms under which the City and/or the Redevelopment Agency would contribute toward the matching funds required for the Port of Oakland's TCIF grant; and

WHEREAS, the parties to the TCIF Baseline Agreement intend to amend that agreement to add the City as a grant recipient, to expand the scope and areas where the TCIF funds can be extended, to establish a new performance schedule, and to identify the funding sources to match the TCIF funds, and the City Council authorized such amendment at its meeting of May 15, 2012; and

WHEREAS, the parties to the CSA wish to amend and restate the CSA to reflect the changes to the TCIF Baseline Agreement, to commit an additional \$22.5 million in City funds to match the TCIF grant, and to establish the respective roles and responsibilities between the Port and City, in a form and content substantially in conformance with the agreement attached hereto as **Exhibit A**; and

WHEREAS, the City has identified that the \$22.5 million in funding will come from a combination of \$18 million in scheduled land sales and \$4.5 million in Fund Balances from OBRA Leasing and Utility Fund (5671) and Oakland Army Base Reuse Authority Fund (5670); and

WHEREAS, the parties to the CSA wish to amend and restate the CSA to acknowledge that the Agency's interests in the former Oakland Army Base have transferred to the City; now, therefore be it

RESOLVED: That the City Administrator is hereby authorized to negotiate and execute an Amended and Restated Cost Sharing Agreement with the Port of Oakland for the development of infrastructure and other improvements on the former Oakland Army Base that

will: (1) acknowledge that the Oakland Redevelopment Agency's interests in the former Oakland Army Base have transferred to the City; (2) commit an additional Twenty-Two Million Five Hundred Thousand dollars (\$22,500,000) of City funds to match the Trade Corridor Improvement Fund (TCIF) grant made by the California Transportation Commission; and (3) establish the respective roles and responsibilities between the Port and the City, in a form and content substantially in conformance with the agreement attached hereto as **Exhibit A**, without returning to the City Council; and be it

FURTHER RESOLVED: That the City Administrator is authorized to appropriate and allocate \$22.5 million in funding from a combination of scheduled land sales and Fund Balances from OBRA Leasing and Utility Fund (5671) and Oakland Army Base Reuse Authority Fund (5670) to the Joint Infrastructure Development Fund (5672) into Projects to be established for specific obligations, such as the design and construction of Burma Road, the development of infrastructure and public improvements on the former Oakland Army Base, and other projects as needed for the planning, design, and construction of the City's Army Base property; and be it

FURTHER RESOLVED: That the City is authorized by way of the Amended and Restated Cost Sharing Agreement and the amended TCIF Baseline Agreement to accept up to \$176.3 million in Trade Corridor Improvement Funds over the course of the agreements for the construction of infrastructure and other site preparation projects within all areas of the City's Army Base property; and be it

FURTHER RESOLVED: That City Council authorizes City staff to amend without returning to City Council the terms of the Cost Sharing Agreement as required by CTC, if the amendments will preserve TCIF funding for the construction of infrastructure and other site preparations within the City's Army Base property; and be it

FURTHER RESOLVED: That, the City Council, based upon its own independent review, consideration, and exercise of its independent judgment, hereby finds and determines, on the basis of substantial evidence in the entire record before the City, that none of the circumstances necessitating preparation of additional CEQA are present. Thus, prior to approving the 2012 OARB Project and the Amended and Restated Cost Sharing Agreement, the City can rely on the Previous CEQA Documents and the 2012 OARB Initial Study/Addendum; and be it

FURTHER RESOLVED: That, specifically, the City Council affirms and adopts as its own findings and determinations the June 12, 2012, City Council Agenda Report, including without limitation the discussion, findings, conclusions, specified conditions of approval (including the Standard Conditions of Approval/Mitigation Monitoring and Reporting Program ("SCA/MMRP")), and the CEQA findings contained in **Attachment C**, each of which is hereby separately and independently adopted by this Council in full, as if fully set forth herein; and be it

FURTHER RESOLVED: The City Council finds and determines that this action complies with CEQA and the Environmental Review Officer is directed to cause to be filed a Notice of Determination with the appropriate agencies; and be it

FURTHER RESOLVED: The record before this Council relating to this action, includes without limitation those items listed in *Attachment C*, as if fully set forth herein, which are available at the locations listed said Exhibit.

FURTHER RESOLVED: That the City Administrator and his or her designee is authorized to take whatever action is necessary with respect to negotiating and executing the amendment contemplated herein in support of the development of public improvements on the former Oakland Army Base consistent with this Resolution and its basic purposes.

IN SESSION, OAKLAND, CALIFORNIA, JUN 19 2012, 2012

PASSED BY THE FOLLOWING VOTE:

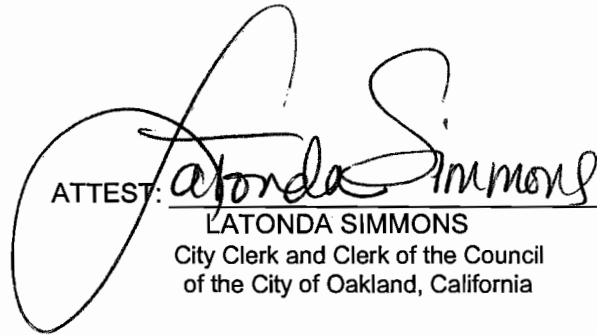
AYES - ~~BRUNNER~~, BRUNNER, DE LA FUENTE, KAPLAN, KERNIGHAN, NADEL, QUAN, SCHAAF, AND PRESIDENT REID - 7

NOES - 0

ABSENT - 0

ABSTENTION - Brooks - 1

ATTEST:



LATONDA SIMMONS
City Clerk and Clerk of the Council
of the City of Oakland, California

DATE OF ATTESTATION: _____

EXHIBIT A

Proposed Amended and Restated Cost Sharing Agreement

AMENDED AND RESTATED
COST SHARING AGREEMENT
(FORMER OAKLAND ARMY BASE)

THIS AMENDED AND RESTATED COST SHARING AGREEMENT (“Restated Agreement”) dated for reference purposes only as of June __, 2012, is between the CITY OF OAKLAND, a municipal corporation, acting by and through its City Council (hereafter referred to herein as the “City”), and the CITY OF OAKLAND, a municipal corporation, acting by and through its Board of Port Commissioners (hereafter referred to herein as the “Port”) (together, the “Parties” and each individually, a “Party”). The City and the Port hereby agree as follows:

1.0 Background Facts. The City and the Port are entering into this Restated Agreement based upon the facts set forth in this Section 1.0.

1.01 The City, the Redevelopment Agency of the City of Oakland, a community redevelopment agency organized and existing pursuant to the Community Redevelopment Law of the State of California (hereafter referred to herein as the “Agency”), and the Port are parties to that certain Cost Sharing Agreement dated June 11, 2011 (the “Initial Agreement”). All recitals stated in the Initial Agreement are hereby incorporated herein by reference.

1.02 The purposes of the Initial Agreement were to: (i) set forth terms and conditions by which the Agency would expend up to \$32,000,000 towards environmental remediation, planning and design of the improvements contemplated by the TCIF Projects, and other development activities to be agreed upon in writing between the Agency and the Port; (ii) set forth the terms and conditions under which the Port will, subject to CTC’s prior approval pursuant to the TCIF program, provide the City and the Agency with the right to use TCIF funds for the redevelopment of certain portions of the OAB owned by the Agency; and (iii) place conditions upon how such TCIF funds will be used and managed.

1.03 Pursuant to a Grant Deed recorded in the official records of the Alameda County Recorder’s Office on January 31, 2012 as Document Number 2012030757, the Agency transferred the Army Base property (excluding Parcel E, as described in that certain Patent from the State of California, acting by and through the State Lands Commission to the Redevelopment Agency of the City of Oakland dated _____, 2006 and recorded in the official records of the Alameda County Recorder’s Office on _____, 2006 as Document Number _____ and hereafter referred to as “Parcel E”) to the City. Concurrently with such transfer, the Agency assigned its rights and obligations under the Initial Agreement with respect to the property so transferred to the City.

1.04 The Oakland City Council adopted Resolution No. 83679 CMS on January 10, 2012, electing to become the successor agency to the Agency pursuant to California Health & Safety Code Sections 34171(j) and 34173 upon the Agency’s dissolution. In executing and performing under this Restated Agreement, the City is acting in its own capacity and as the successor agency to the Agency.

1.05 On or about February 1, 2012, the Agency dissolved pursuant to Assembly Bill 1X26 passed by the California legislature in 2011. Pursuant to Assembly Bill 1X26, Parcel E and the Agency’s rights and obligations under the Initial Agreement with respect to Parcel E were transferred to the City as the successor agency to the Agency.

1.06 To preserve TCIF funds, the City and the Port have agreed to submit proposed modifications to the TCIF Projects that (i) would eliminate 7th Street from TCIF funding, (ii) expand the OHIT Project to include both the City Lands and portions of the Port Lands, and (iii) consolidate all TCIF funding for both OHIT and 7th Street into the OHIT Project.

1.07 The consolidated OHIT Project is more particularly described in Section 5.02(a) below and is sometimes referred to herein as the “**Revised OHIT Project.**”

2.0 Purpose of Restated Agreement: The purpose of this Restated Agreement is to set forth the terms and conditions by which (i) the Parties will seek the reallocation of TCIF funds to use the entire \$242 million TCIF funds granted to the Port for the development of the Revised OHIT Project, (ii) the Parties will obtain the matching funds required by the TCIF program for the Revised OHIT Project; (iii) the TCIF funds and the Port, City and third party matching funds will be used to support certain elements of the redevelopment of both the City Lands and a portion of the Port Lands, and (iv) contingent upon the reallocation of the TCIF Funds and such funds being available for the development of the Revised OHIT Project, the Parties reaffirm the City’s and the Port’s support of each other in pursuing other sources of funding for the Port’s intermodal rail yard and the 7th Street improvements. Unless otherwise defined herein, all capitalized terms used in this Restated Agreement shall have the meaning given in Exhibit F, attached hereto and made a part hereof.

3.0 CEQA/NEPA Review of the OAB Project.

3.01 Lead Agency. The Port and the City have agreed that the City will be the lead agency under CEQA, and the Port will be a responsible agency under CEQA for the redevelopment of Port Lands. The Project Description (the “**Project Description**”) as stated in the proposed 2012 Oakland Army Base Project Initial Study/Addendum to the 2002 EIR (the “**Addendum**”) has been agreed to by the Parties as the intended development of the City Lands and the Port Lands in accordance with the terms and conditions of this Restated Agreement. The Addendum, including the Project Description, is the basis on which the City Council for the City acting as the lead agency under CEQA and the Board of Port Commissioners (the “**Board**”) for the Port acting as a responsible agency under CEQA have made or will make certain findings and determinations as to CEQA compliance. Such Project Description incorporates each of the Development Elements described in Section 5.02a below. The Parties further agree that, unless otherwise agreed by the Parties, the Port shall be the lead agency under the National Environmental Protection Act (“**NEPA**”) for any other work on Port Lands, including, without limitation, the Port Rail Terminal (as defined herein), and the City shall be the lead agency under NEPA for any work requiring NEPA compliance on City Lands.

3.02 In furtherance of the purpose of this Restated Agreement, the City and the Port hereby acknowledge and agree that:

- a. Most of the activities covered under this Restated Agreement have already been evaluated by the 2002 EIR (e.g., hazardous materials remediation);
- b. Certain activities under this Restated Agreement are statutorily exempt from environmental review under CEQA, such as planning and feasibility studies, including detailed design and engineering efforts pursuant to Section 15262 of the CEQA Guidelines;
- c. The funding mechanisms contemplated under this Restated Agreement are not subject to environmental review pursuant to Section 15378(b)(4) of the CEQA Guidelines; and

- d. Because this Restated Agreement only sets forth the terms and conditions for the City's funding of certain design work associated with the TCIF Projects, it can be seen with certainty that there is no possibility that the Restated Agreement may have a significant effect on the environment and is therefore exempt under Section 15061(b)(3) of the CEQA Guidelines.

3.03 The City and the Port further acknowledge and agree that this Restated Agreement does not constitute an approval of the Revised OHIT Project by either the City or the Port, and the subsequent approval of any specific projects by either the City Council or the Port Board are subject to CEQA, where applicable. If the Revised OHIT Project requires any additional environmental analysis pursuant to CEQA, then after completion of any such additional environmental analyses, those portions of the Revised OHIT Project which are to be developed on City Lands shall return to the City Council and those portions of the Revised OHIT Project which are to be developed on Port Lands shall return to the Port Board for their respective consideration for adoption and approval. Except as otherwise stated in this Restated Agreement, the City and the Port each reserves all of their respective rights and duties under CEQA with respect to the redevelopment of the OAB, including without limitation, the authority to do any and all of the following:

- a. Prepare an environmental study evaluating the impacts of the proposed project, feasible alternatives to the Revised OHIT Project, and feasible mitigation measures;
- b. Adopt any feasible alternatives and/or feasible mitigation measures to lessen any significant environmental impacts resulting from the proposed Revised OHIT Project;
- c. Determine that any significant environmental impacts of the proposed Revised OHIT Project that cannot be mitigated are acceptable due to project benefits overriding any significant unavoidable impacts; and/or
- d. Decide to modify or deny its approval of the proposed Revised OHIT Project, and not to proceed with the Revised OHIT Project, due to the results/findings of the CEQA process.

4.0 Master Infrastructure Development Planning: The City and the Port agree that the *Oakland Army Base Master Plan Design Set* dated April 2, 2012 prepared by Architectural Dimensions Master Design Team represents the master infrastructure development plan for the OAB (the "**Master Plan**") that the Parties have agreed upon in concept subject to comments previously provided by the Port being adequately addressed. Once such Port comments have been satisfactorily addressed, as determined by the Port, the Master Plan will serve as the basis for detailed design and construction activities needed to build out each of the Development Elements (defined below) for the Revised OHIT Project. The Master Plan consists of the following elements: (i) a conceptual design of the necessary infrastructure up to rough grading; (ii) a circulation and street use traffic plan, including the 7th Street Project; (iii) a conceptual rail terminal plan; (iv) a site utility relocation, vacation, and construction plan; (v) preliminary cost estimates for design and construction; (vi) a geotechnical analysis and soil stabilization plan; (vii) value engineering recommendations; and (viii) a green and sustainable development plan. If any subsequently agreed upon changes to the Master Plan result in corresponding changes to the project documents or information (e.g., baseline budgets, TCIF funds, matching funds, plans, etc.) the parties shall cooperate to make applicable changes.

5.0 Proposed Amendments to TCIF Baseline Agreements.

5.01 Port Proposal for Amendment to OHIT Baseline Agreement: The Port has applied to CTC for permission to amend the Port's Baseline Agreements to (i) remove the 7th Street Project

from TCIF funding, (ii) add the \$110 million in TCIF funds from the 7th Street Project to OHIT, (iii) revise the OHIT project description to specifically include improvements to Burma Road, a new bulk terminal at Berth 7, a new recycling center at the North Gateway site and other trade and logistics improvements on the City's side of the OAB, and (iv) add the City as a co-signatory to the amended OHIT Baseline Agreement. The estimated total TCIF funding for the revised OHIT project will be \$242.1 million, and the proposed amendment to the OHIT Baseline Agreement will reflect that the City and the Port will provide TCIF matching funds by a combination of public and private investments as shown in Table 1 below, for a total project cost of approximately \$484.2 million.

5.02 Proposed Amendment to OHIT Project Scope: The OHIT Baseline Agreement Amendment request will include:

- a. A revised TCIF project description for the proposed amendment to the OHIT Baseline Agreement and the Revised OHIT Project that includes the following development elements (which is further described in the site layout plan detailed project description attached hereto as Exhibit A):
 - i. New Maritime Street improvements, Burma Road relocation and extension, Wake Avenue realignment and a “backbone” utility infrastructure to serve both the Port Lands and the City Lands (the “**Backbone Infrastructure**”);
 - ii. Environmental remediation on the Port Lands and the City Lands necessary to complete the RAP and, in conjunction with the other work, the RMP (respectively, the “**Port Environmental Work**” and the “**City Environmental Work**”);
 - iii. Demolition/de-construction, earthwork, and other site preparation on the Port Lands and the City Lands as necessary to construct the other development elements described in this Section 5.02a (“**Site Prep Work**”);
 - iv. A new rail yard (as further defined in Exhibit F) located on the eastern portion of the Port Lands including any utility relocation or protection required to vacate that portion of 14th Street within the Port Lands (“**Port Rail Terminal**”);
 - v. Trade and logistics facilities located on the City Lands, including rail spurs (the “**City Trade & Logistics Facilities**”);
 - vi. West Gateway Break Bulk Terminal and rail spur located on the City Lands (the “**Oakland Bulk and Oversized Terminal**”); and
 - vii. Recycling facilities located on the City Lands (the “**Recycling Facilities**”).

Each of the development elements set forth in this Section 5.02a.i through 5.02a.viii above together with the 7th Street Project (as defined in the Initial Agreement) are collectively referred to herein as the “**Development Elements**” and individually as a “**Development Element.**” However, if the Baseline Agreement Amendment is approved, the Parties hereby acknowledge and agree that the 7th Street Project shall not be a Development Element that will be funded by TCIF funds.

- b. The Project Delivery Schedule for City Lead Improvements (defined below) is attached hereto as Exhibit B and Project Delivery Schedule for the Port Rail Terminal is attached hereto as Exhibit C.

5.03 Financial Plan: The proposed amendment to the OHIT Baseline Agreement will include the following proposed sources and uses set forth in Table 1 below, showing each source of funds needed to develop the Revised OHIT Project and satisfy the TCIF matching funds. The numbers represent millions of dollars, e.g., “10” means “\$10 million.”

Table 1*

Development Elements	Total Cost	Port	City	City Private Match	TCIF
Remediation	11.4	5.7	5.7	-	-
Port Rail Terminal	79.6	10	5.8	-	65.8
Site Prep on City Lands/Backbone Infrastructure	247.2	-	45.0	25.9	176.30
Recycling Facilities	46.6	-	-	46.6	-
City Logistics & Oakland Bulk and Oversized Terminal	99.4	-	-	99.4	-
TOTAL	484.2	15.7	54.5	171.9	242.1

* Sources shown in top horizontal row to the right of “Total Cost,” and Uses are shown in the column under Development Elements.

5.04 Amendment to OHIT Baseline Agreement: The Parties acknowledge and agree that on or about March 30, 2012, the Port submitted to the Executive Director of the CTC a proposed amendment to the OHIT Baseline Agreement as set forth and described in Section 5.01 above of this Restated Agreement. The parties further agree to use good faith and commercially reasonable efforts to encourage the CTC to approve the proposed amendment to the OHIT Baseline Agreement substantially as proposed by the Port on March 30, 2012.

- a. If the CTC approves the proposed amendment to the OHIT Baseline Agreement substantially as proposed, the City and the Port agree that the TCIF funds shall be allocated and used for each Development Element in accordance with the uses of TCIF funds shown on Table 1 above. If the OHIT Baseline Agreement is amended as stated herein, the City and the Port each agree to (i) strictly comply with any and all rules and regulations of the CTC and/or CalTrans in connection with the use, expenditure, or accounting of TCIF funds in the design, development, or delivery of the City Lands (including, without limitation, the streets and roadways adjacent to the City Lands) and the Port Lands, as the case may be, and (ii) subject to the TCIF funds actually being available, to use and develop the City Lands and the Port Lands in substantial conformance with the Master Plan (as defined in Section 4.0 of this Restated Agreement) and only for purposes that are consistent with and in furtherance of the amended OHIT Baseline Agreement and the Proposition 1B Goods Movement Program, as the same may be modified or amended from time to time.
- b. If the CTC declines to approve an amendment to the OHIT Baseline Agreement substantially as proposed by the Port on March 30, 2012 (including, without limitation, with respect to the cash flow model proposed therein), the Parties shall meet and confer until December 1, 2012, to attempt to respond to or resolve the issues that are the basis for CTC’s refusal to approve the proposed amendment or determine a replacement source of funding for the TCIF grant funds. If the parties are unable to agree upon a course of action as a result

of the meet and confer or if the CTC initially approves the proposed amendment and subsequently refuses to fund the TCIF grant under the amended OHIT Baseline Agreement, either Party shall have the right to terminate this Restated Agreement by giving written notice to the other at least 30 days prior to the intended date of termination. If this Restated Agreement is terminated pursuant to this Section 5.04b, the parties' rights under Section 1,2, 3, 4, 12, 13, 15, 16, 17 and 18 shall survive and the parties rights and obligations under Sections 5, 6, 7, 8, 9, 10, 11, and 14 shall terminate.

6.0 Design and Construction of the Development Elements.

6.01 Lead Entity for Development and Delivery of Development Elements: Subject to the *force majeure* provisions set forth in Section 16.0 below and the self-help rights set forth in Section 6.06 below, the Port shall be responsible for the design and construction of the Port Rail Terminal, Port Environmental Work and related Site Prep Work on the Port Lands (the "**Port Lead Improvements**") and, subject to the availability of the 2012 ACTC Funds, the Port shall be responsible for the design and construction of the 7th Street Project. Subject to *force majeure* and the self-help rights set forth in Section 6.06 below, the City shall be responsible for the design and construction of the Backbone Infrastructure, City Environmental Work, City Trade & Logistics Facilities, Oakland Bulk and Oversized Terminal, Recycling Facilities and related Site Prep Work (collectively, the "**City Lead Improvements**") each pursuant to the delivery schedule set forth in Exhibit C.

6.02 Delivery Schedules; Milestone Dates: The delivery schedules set forth in Exhibits C and D (each, a "**Delivery Schedule**") include identified milestones for certain contracting, design and construction activities that are necessary to be met to meet the deadlines set forth in the proposed Baseline Agreement Amendment (each, a "**Milestone Date**").

6.03 Budget for Development Elements: The City and the Port hereby agree that the baseline budget for each Development Element is as shown in the "Total Cost" column of Table 1. Such baseline budget includes an agreed-upon percentage of total contract costs allocated for contingency approvals. The Party that takes the lead in the development and delivery of each such Development Element shall be solely responsible (as between the City and the Port) for any construction costs that exceed such baseline budget. Notwithstanding the foregoing to the contrary, unless otherwise agreed to in writing between the Parties, each Party shall be responsible for costs associated with maintaining temporary utilities to their own property. If any Party completes the development of any Development Element for less than the amount agreed upon as the baseline budget for that Development Element, then the Party who achieved such cost savings may apply such cost savings to other Development Elements in the following priority: (a) Development Elements on such Party's portion of the OAB and (b) Development Elements on the other Party's portion of the OAB.

6.04 Design/Build Methodology; Contracting; Insurance.

- a. In order to meet the TCIF schedule and to be consistent with its RFQ, RFP, ENA, and LDDA negotiations, it is the intent that the City will work with the City's developer of the City Lands on the construction of the City Lead Improvements using the proposed design/build process. In order to meet the TCIF schedule, the Port will implement its own design/build process for the construction of the Port Lead Improvements.

b. Each lead Party shall apply their own procurement rules, policies and “community benefits” to the Development Elements that they are charged with delivering under this Restated Agreement, regardless of where the improvements are located. The non-lead Party may require reports regarding contracting that are reasonably required to satisfy such Parties’ TCIF reporting requirements. Notwithstanding the foregoing to the contrary, the parties agree that the City Trade & Logistics Facilities, Oakland Bulk and Oversized Terminal, and Recycling Facilities are private improvements and subject to the agreement between the City and the applicable private party, certain of the City’s procurement rules, policies and community benefits may not apply.

c. The Parties shall reasonably cooperate and agree upon insurance requirements related to the development of any Common Development Element, particularly as it relates to the release or presence of any hazardous materials.

6.05 Detailed Designs: The City and the Port shall each prepare or cause the preparation of detailed designs for each Development Element in a manner that is substantially consistent with such Development Element in the Master Plan.

a. Assignment of Existing Work Product; Release. The City hereby assigns to the Port the work product solely related to the design of the Port Lead Improvements and the 7th Street Project set forth in Exhibit D-1, attached hereto. The City hereby assigns to the Port the work product set forth in Exhibit D-2, which relates to both the City Lands and the Port Lands, but only as such work product is related to the development of the Port Lands and of dedicated City Streets on both City Lands and Port Lands. The City expressly retains ownership of such work product as it relates exclusively to the development of the City Lands. The work product assigned to the Port pursuant to this Section is referred to herein as the “**Work Product**”. The Port hereby accepts the assignment of such work product, to the extent the Port incorporates such work product into its construction drawings (defined below). Except as otherwise agreed in this Restated Agreement, the Port on behalf of its managers, employees, officers, directors, representatives, agents, successors and assigns (the “**Port Parties**”) hereby release the City, the California Capital Group, CCIG Oakland Global, LLC and all City design consultants and each of their partners, members, managers, employees, officers, directors, representatives, agents, servants, attorneys, affiliates, parent companies, subsidiaries, successors and assigns, and all persons, firms, corporations and organizations acting on their behalf (the “**Released Parties**”) from any and all claims that the Port Parties may now have or hereafter acquire against the Released Parties for any costs, losses, liability, damages, expenses, demands, actions or causes of action (collectively, “**Claims**”) arising from or related to the Work Product, except to the extent any Claims arise out of the gross negligence or willful misconduct of any of the Released Parties.

b. This release shall not include Claims arising from or related to the following Work Product, to the extent the same (i) was prepared by, contracted for or commissioned by the City, the California Capital Group, CCIG Global, LLC or any of City designers, architects, or professional engineers and (ii) actually relied upon by the Port and its design professionals: geotechnical reports and investigations; environmental studies, reports or

b. Each lead Party shall apply their own procurement rules, policies and “community benefits” to the Development Elements that they are charged with delivering under this Restated Agreement, regardless of where the improvements are located. The non-lead Party may require reports regarding contracting that are reasonably required to satisfy such Parties’ TCIF reporting requirements. Notwithstanding the foregoing to the contrary, the parties agree that the City Trade & Logistics Facilities, Oakland Bulk and Oversized Terminal, and Recycling Facilities are private improvements and subject to the agreement between the City and the applicable private party, certain of the City’s procurement rules, policies and community benefits may not apply.

c. The Parties shall reasonably cooperate and agree upon insurance requirements related to the development of any Common Development Element, particularly as it relates to the release or presence of any hazardous materials.

6.05 Detailed Designs: The City and the Port shall each prepare or cause the preparation of detailed designs for each Development Element in a manner that is substantially consistent with such Development Element in the Master Plan.

a. **Assignment of Existing Work Product; Release.** The City hereby assigns to the Port the work product solely related to the design of the Port Lead Improvements and the 7th Street Project set forth in Exhibit D-1, attached hereto. The City hereby assigns to the Port the work product set forth in Exhibit D-2, which relates to both the City Lands and the Port Lands, but only as such work product is related to the development of the Port Lands and of dedicated City Streets on both City Lands and Port Lands. The City expressly retains ownership of such work product as it relates exclusively to the development of the City Lands. The work product assigned to the Port pursuant to this Section is referred to herein as the “**Work Product**”. The Port hereby accepts the assignment of such work product, to the extent the Port incorporates such work product into its construction drawings (defined below). Except as otherwise agreed in this Restated Agreement, the Port on behalf of its managers, employees, officers, directors, representatives, agents, successors and assigns (the “**Port Parties**”) hereby release the City, the California Capital Group, CCIG Oakland Global, LLC and all City design consultants and each of their partners, members, managers, employees, officers, directors, representatives, agents, servants, attorneys, affiliates, parent companies, subsidiaries, successors and assigns, and all persons, firms, corporations and organizations acting on their behalf (the “**Released Parties**”) from any and all claims that the Port Parties may now have or hereafter acquire against the Released Parties for any costs, losses, liability, damages, expenses, demands, actions or causes of action (collectively, “**Claims**”) arising from or related to the Work Product, except to the extent any Claims arise out of the gross negligence or willful misconduct of any of the Released Parties.

b. This release shall not include Claims arising from or related to the following Work Product, to the extent the same (i) was prepared by, contracted for or commissioned by the City, the California Capital Group, CCIG Global, LLC or any of City designers, architects, or professional engineers and (ii) actually relied upon by the Port and its design professionals: geotechnical reports and investigations; environmental studies, reports or

investigations; topographical and survey reports, studies and investigations; and utility markings, surveys, reports or studies.

- c. Except as otherwise provided in this Restated Agreement, this release includes both known and unknown Claims and the Port, on behalf of the Port parties hereby waives the provision of California Civil Code Section 1542, which provides as follows:

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

- d. **Rail Permitting Assistance.** The Port agrees, that in the interest of continuity and relations with the railroads that the Port will use commercially reasonable and good faith efforts to retain, for some advisory capacity, HDR Engineering, the City’s rail design consultant.

- e. **Design Coordination/Process.** In connection with the detailed design development of the Backbone Infrastructure, Port Rail Terminal, the 7th Street Project (only if 2012 ACTC Funds are available) and related Site Prep Work (each, a “**Common Development Element**”), the City and the Port agree to abide by the design approval process set forth in Exhibit E, attached hereto. No phase of any Common Development Element shall be commenced unless and until each Party has approved in writing (or been deemed to have been approved pursuant to Exhibit E) the final construction drawings for such Common Development Element.

6.06 Right to Self-Help Related to Delivery of Development Elements: If a Party identified as the responsible Party for the design and construction of a particular Development Element (the “**Lead Party**”) fails to meet any one of the Milestone Dates set forth in the applicable schedule attached hereto as Exhibit B and D, the other Party (the “**Substitute Party**”) shall have the right, but not the obligation, to avail itself of the rights set forth in this Section 6.06.

- a. **Conditions Precedent to Notice and Right to Cure for Self-Help.** The Substitute Party may not either (1) provide notice to the Lead Party as set forth below or (2) avail itself of the self-help rights set forth in this Section 6.06 until the Substitute Party confirms in writing to the Lead Party’s satisfaction that all of the following conditions for each Development Element that the Substitute Party seeks to assume (“**Assumed Development Element**”) have been satisfied:

- 1) The Substitute Party is not in default or breach of this Restated Agreement;
- 2) The Substitute Party has met all scheduled Milestone Dates for each of its Development Elements;
- 3) If applicable to the subject Milestone Date, TCIF funding has been obligated for the Assumed Development Element.

Further, the Substitute Party may not either (1) provide notice to the Lead Party as set forth below or (2) avail itself of the self-help rights set forth in this Section 6.06 if the Lead Party is prevented from achieving the Milestone Date because of a

Force Majeure Event unless the Substitute Party is able to prove that it would not similarly be prevented from achieving the Milestone Date by such *Force Majeure* Event or other, concurrent *Force Majeure* Event.

If the Substitute Party elects to exercise its self-help rights pursuant to conditions described in this Section 6.06(a)(3), the Substitute Party shall be bound to meet all subsequent Milestone Dates for the Assumed Development Element as the Lead Party would have been had no *Force Majeure* notice been issued. Furthermore, if after exercising such self-help right, the Substitute Party fails to meet any Milestone Date for such Assumed Development Element, the Lead Party shall have the right (but not the obligation) to immediately re-take primary development responsibility for such Assumed Development Element by giving ten (10) days written notice to the Substitute Party. In such event, the Substitute Party shall take steps to assign contracts and documents back to the Lead Party in a similar manner as described in Section 6.06(c) below.

The Substitute Party shall have no right to and shall not, directly or indirectly, create or permit to be created or to remain and shall promptly discharge or remove any Encumbrance upon any interest in the underlying land to any Assumed Development Element (including, without limitation, the Port's fee or other interests in the Port Area) and, in the event of the registration, filing or attaching of any such Encumbrance after assuming such Assumed Development Element, the Substitute Party shall, at its sole cost and expense, immediately cause the same to be discharged. NOTICE IS HEREBY GIVEN THAT NEITHER THE CITY NOR THE PORT (AS THE CASE MAY BE) SHALL BE LIABLE FOR ANY LABOR, SERVICES OR MATERIALS FURNISHED OR TO BE FURNISHED TO THE SUBSTITUTE PARTY OR TO ANYONE HOLDING OR OCCUPYING ANY CITY LANDS OR PORT LANDS (AS THE CASE MAY BE) THROUGH OR UNDER THE SUBSTITUTE PARTY, AND THAT NO MECHANICS' OR OTHER LIENS FOR ANY SUCH LABOR, SERVICES OR MATERIALS SHALL ATTACH TO OR AFFECT THE INTEREST OF THE CITY OR THE PORT IN AND TO THE CITY LANDS OR THE PORT LANDS (AS THE CASE MAY BE). TO THE EXTENT REQUIRED BY LAW, THE CITY MAY AT ANY TIME POST ANY NOTICES ON ANY CITY LANDS AND THE PORT MAY AT ANY TIME POST ANY NOTICES ON PORT LANDS UPON WHICH ANY ASSUMED DEVELOPMENT ELEMENTS ARE CONSTRUCTED REGARDING SUCH NON-LIABILITY OF THE CITY OR THE PORT.

The Port's fee interest in Port Lands and the Tidelands Trust shall not be subordinated under any circumstance whatsoever to any Encumbrance.

b. Notice and Right to Cure; Assumption of Responsibility. If a Substitute Party believes that the Lead Party has failed to meet a Milestone Date, the Substitute Party shall provide the Lead Party with written notice specifically stating the alleged default (the "**Default Notice**"). The Default Notice shall be transmitted via electronic mail and certified mail return receipt to all of the persons listed in Section 18.01 (Notices) of this Restated Agreement. Such Default Notice shall be transmitted (if at all) no later than ten (10) calendar days after the earlier of (i) the Lead Party's issuance of a notice of the occurrence of a *Force Majeure* Event pursuant to Section 16.01(a) below, or (ii) the

scheduled Milestone date as shown in Exhibit B or Exhibit C, as applicable. The Lead Party shall have forty five (45) days after receipt of the Default Notice to cure the default. If the Lead Party fails to timely cure the default within the forty five (45) calendar day period after the Default Notice is received, and such failure is not caused by a *Force Majeure* Event, the Substitute Party shall have the right, but not the obligation, to assume responsibility for the completion of the design and construction of the Assumed Development Elements as set forth in this Section 6.06 by delivering written notice to the Lead Party (the “**Assumption Notice**”) no later than ten (10) calendar days after the expiration of such 45 day cure period. The Assumption Notice shall include the plan (including, without limitation, a financing plan) and procedure whereby the Substitute Party intends to complete the design and construction of the applicable Assumed Development Element. The *Force Majeure* provisions of this Section 6.06b shall not apply if the Substitute Party is able to prove that the Substitute Party (and not any assignee thereof) would not similarly be prevented from achieving the Milestone Date by such *Force Majeure* Event or other, concurrent *Force Majeure* Event.

c. Assignment. In the event a Lead Party timely receives an Assumption Notice in accordance with the provisions of this Section 6.06, the Lead Party shall (a) assign and deliver all applicable design documents, construction contracts, and construction materials related to the applicable Development Element to the Substitute Party and (b) pay to the Substitute Party any remaining matching funds to be expended by the Lead Party for the applicable Development Element (as set forth in Table 1 above), each within five (5) business days after receipt of the Assumption Notice.

d. Indemnity, Insurance and Warranties. The Substitute Party shall cause the Lead Party to be added (i) as an indemnitee in any indemnity provision included in all contracts directly associated with the applicable Development Element, (ii) where applicable, as an additional insured with respect to applicable commercial general liability policies, and (iii) as a beneficiary of all contractual warranties directly associated with the applicable Development Element.

The City shall be entitled to assign its rights under this Section 6.06 to the master developer of the City Lands upon written notice to the Port. However, the City hereby acknowledges and agrees that no assignment of its rights under this Section 6.06 shall relieve the City of any of its obligations under this Restated Agreement (including, without limitation, the provisions of this Section 6.06), and the City shall continue to be liable as a principal under this Restated Agreement for the acts or omissions of its assignee to the same extent as though no assignment had been made.

e. Completion of Assumed Development Element. Upon the completion of any Assumed Development Element, the Substitute Party shall immediately deliver and release to the Lead Party all rights, title, and interest that the Substitute Party may claim or have acquired to any and all of the improvements constructed or completed by the Substitute Party as part of the Assumed Development Element, together with any and all as-built construction drawings, free and clear of any and all claims, liens, and Encumbrances. The foregoing notwithstanding, the Substitute Party shall be entitled to retain a copy of all such as-built construction drawings.

6.07 Right of Way, Permit and Construction Coordination.

a. Right of Way and Permits. Subject to the following, each Party shall be responsible for obtaining the right of way and permits necessary to deliver the improvements for which they are responsible for delivering.

(i) To the extent that the construction of Backbone Infrastructure requires rights of way or easements (construction, utility and access) over a portion of a Parties' property, the owner of such property shall provide the same upon written request and without requiring consideration therefor. Notwithstanding the foregoing, the Parties shall develop standard indemnity and insurance provisions which will apply to each request for construction easements, and the Parties may impose reasonable conditions on the uses of such rights of way or easements. To the extent the construction of other Development Elements require rights of way or easements over a portion of a Party's property, the owner of such property shall consider and meet and confer with the Party who needs such right of way or easement to negotiate in good faith the terms and conditions for such right of way or easement.

(ii) To the extent feasible, the Parties shall coordinate and cooperate in the other Parties' efforts to obtain the required permits.

b. Coordination of Other Activities. The parties shall negotiate in good faith regarding procedures to deal with traffic control, temporary utilities and the maintenance of utility access for the Port, temporary parking, construction storage and temporary tenant relocation.

7.0 Funding for TCIF Projects: If the Port succeeds in amending the Baseline Agreements as described above, the City and the Port agree to allocate and use the funds shown in the source columns of Table 1 for the Development Elements shown in Table 1.

7.01 City Contribution: The City agrees to expend or cause the expenditure of City funds set forth in Table 1 above and use commercially reasonable efforts to cause the expenditure of the City Private Match funds set forth in Table 1 above, each as matching funds for the OHIT Project in a manner generally consistent with the applicable OHIT Project Programming Request (attached to the proposed amendment to the OHIT Baseline Agreement) and the applicable Project Delivery Schedule (see Exhibit B or Exhibit C, attached).

7.02 Port Contribution: The Port agrees to expend or cause the expenditure of the Port funds set forth in Table 1 above as matching funds for the OHIT Project in a manner generally consistent with the applicable OHIT Project Programming Request and the applicable Project Delivery Schedule.

7.03 Pursuit of Federal, State and Other Funds.

a. In General: If needed, the City and the Port agree to cooperate in good faith with one another and with the developers of the City Lands and the Port Lands, in applying for and pursuing federal, state, and other sources of public and private funds to develop additional transportation infrastructure improvements on the City Lands and the Port Lands. Such cooperation shall not require either the City or the Port to make any additional expenditure

of funds or resources without the prior written approval of City Council or the Port Board, as the case may be.

b. Alameda County Transportation Commission (“ACTC”) Funds: The Port will seek ACTC funding of approximately \$271 million (“ACTC Funds”) for the development of the 7th Street Project and other development activities on the Port’s side of OAB, and, contingent upon the Port succeeding in amending the Baseline Agreements as described above and the TCIF funds actually being available to fund the OHIT Project, the City shall use good faith and reasonable efforts to support the Port’s efforts to obtain such ACTC Funds. If the ACTC Funds are issued in phases and ACTC determines that the Port is not ready/eligible for a particular phase, the City may, at its sole cost, apply for and receive funds from such phase for the OHIT Project (or other City projects).

c. Federal Funding Segregated. The Port will identify and segregate any federal funds it receives for its portion of the OAB for construction of specified Development Elements. The Parties agree that no federal dollars will be transmitted to the City for the development of its portion of the OAB.

8.0 Management of Funds.

8.01 Generally Accepted Accounting Principles: All accounting and financial terms used herein, unless specifically provided to the contrary, shall be interpreted and applied in accordance with generally accepted accounting principles in the United States of America, consistently applied.

8.02 City and Port Accounting Responsibilities: The City and the Port shall each prepare and keep at their respective offices in the City of Oakland, complete and accurate books, records and accounts relating to all remediation, design, development (including, without limitation, predevelopment), contracting, and construction of any improvements (including, without limitation, site preparation work) in connection with those Development Elements for which each entity is responsible for developing as set forth in Section 6.01 herein. Such books and records shall be maintained in a true and accurate manner, in a form and manner in compliance with the requirements of the OHIT Baseline Agreement and in accordance with generally accepted accounting principles and generally accepted auditing standards. Such records may be in the form of electronic media compatible with, or convertible to, a format compatible with computers utilized by each Party at their respective offices, or a computer run hard copy. Each Party shall retain such books and records for a period of no less than five (5) years following the completion for each Development Element for which such Party is responsible as evidenced by a certificate of completion issued by the Port’s Director of Engineering for the Port Lead Improvements or by the City’s Director of Engineering for the City Lead Improvements; provided, however, that if prior to the expiration of such five (5)-year period, any audit, review or investigation is commenced by the other Party, the CTC, or CalTrans, or any claim is made or litigation is commenced relating to this Restated Agreement, or the OHIT Project, such books and records shall continue to be maintained by the responsible Party, and the other Party shall continue to have the right to inspect such books and records in the manner stated in this Restated Agreement, until the audit, claim or litigation is final. Notwithstanding any other provision in this Restated Agreement, failure of either Party to maintain records as required herein shall constitute a breach of this Restated Agreement.

8.03 Allocation of Liability Under the Amended Baseline Agreement. The Parties acknowledge that as between the CTC and Caltrans as one contracting party under the Amended Baseline Agreement and the City and the Port as another contracting party under the Amended Baseline Agreement, the City and Port are jointly and severally liable to the CTC and Caltrans for performance under the Baseline Agreement. However, if the acts or omissions of either Party causes a breach or default under the Baseline Agreement (including, without limitation, a failure to provide or cause the provision of adequate TCIF matching funds in accordance with this Restated Agreement), such Party shall indemnify, defend, and hold the other harmless for any claims, damages, costs, expenses and other liabilities, including, without limitation, any TCIF repayment or reimbursement obligations and reasonable attorney's fees and court costs, arising out of either Party's default or breach of the Amended Baseline Agreement

9.0 Disbursement of TCIF Funds.

9.01 Allocation of TCIF Funds: As shown in Table 1 above, the City and the Port have agreed that \$65.8 million of TCIF Funds shall be allocated to the development of the Port Rail Terminal (a Port Lead Improvement) and \$176.3 million of TCIF Funds shall be allocated to the development of City Site Prep and Backbone Infrastructure (each, a City Lead Improvement).

9.02 Cash Flow & Match Analysis: If deemed necessary by both Parties, after the amendment to the OHIT Baseline Agreement has been approved by the CTC and CalTrans and the amended OHIT Baseline Agreement has been signed and delivered amongst the CTC, the Port, and the City but at least 90 days prior to the commencement of construction on any improvements contemplated by the TCIF Projects as they may be amended by the amended Baseline Agreements, the City and the Port will jointly select an independent economic consultant approved in writing by each of the City Administrator and the Port Executive Director. The independent economic consultant shall prepare and update cash flow and TCIF matching fund contribution requirement models to ensure that (i) there are sufficient matching funds on record in accordance with the TCIF rules and regulations to access the TCIF funds when needed to pay for construction costs, and (ii) there are sufficient cash reserves to support construction costs as required under, and in accordance with, the requirements of the Baseline Agreements (as the same may be amended from time to time), the provisions of this Restated Agreement, and for work to be agreed upon in the future between the City and the Port. As a condition precedent to the retention of the independent economic consultant, the following conditions must be satisfied:

- a. The City and the Port must agree in writing on the selection and the process for selecting the independent economic consultant;
- b. The general parameters and elements of the cash flow and TCIF matching fund contribution model must be established and agreed upon between the City and the Port; and
- c. All required TCIF matching funds must be evidenced by (i) legally binding agreements between the entity that is funding the TCIF matching funds and the Port or the City, and (ii) written approval or acknowledgment from the CTC or CalTrans that all such TCIF matching funds for one or both of the TCIF Projects have been satisfied.

9.03 TCIF Cost Reimbursements: The Port shall be responsible for submitting for TCIF cost reimbursements on the Port Rail Terminal, and the City shall be responsible for submitting for TCIF cost reimbursements on the Site Prep Work on City Lands and the Backbone Infrastructure.

Each Party who submits for TCIF cost reimbursement shall be responsible for providing such backup information and materials and performing any other follow up actions as may be required by the CTC and/or Caltrans or may otherwise be necessary to obtain such TCIF cost reimbursement. Each Party shall provide the other with copies of its reimbursement requests to CTC for tracking purposes. The City shall be solely responsible (as between the City and the Port) for accounting for and compliance with all TCIF requirements for the City Lead Improvements. The Port shall be solely responsible (as between the City and the Port) for accounting for and compliance with all TCIF requirements for the Port Rail Terminal.

9.04 Use of Third Party Entities: The City and the Port acknowledge and agree that the development of the Revised OHIT Project will require consultation and/or agreements with other third party entities in the design, development, and operation of the Revised OHIT Project in accordance with this Restated Agreement. If any such consultation or agreements with third party entities requires the expenditure of any funds by one Party to be reimbursed by the other Party, then the City and the Port agree that neither shall incur such expense without having first obtained the prior written approval of such expense from the other Party.

9.05 Allocation Accounting: Once every three (3) months from the effective date of this Restated Agreement, the City and the Port shall reconcile their respective funds and expenditures to ensure that each Party's contribution towards the Revised OHIT Project are in accordance with the terms and conditions of this Restated Agreement.

10. Port Rail Terminal Operator: The Port and City each hereby acknowledge (a) the importance of an identified rail operator's input during the design process for the Port Rail Terminal and (b) that the operator's input is required in order to allow the parties to negotiate and agree upon the Rail Access Agreement. Accordingly, the Port intends to solicit a rail operator who will provide railroad switching services for Port and City rail customers. As of May 2012, the Port anticipates entering into contract with the rail operator by December 28, 2012, subject to change based on the pace and progress of the design and construction. The Port will offer the Port's current and anticipated future rail customers, as well as the Port's rail operator (after the Port enters into a contract with such rail operator), an opportunity to review and comment on the various stages of design, as will the rail operator, following its selection by the Port.

11.0 Port Commitment to Permit City Access to Rail Terminal: In recognition of the City's needs for rail access to the Port Rail Terminal, the Port and City will negotiate in good faith an agreement for the Port Rail Terminal to serve the City's rail needs within the following parameters: (i) the Port shall use commercially reasonable efforts to select the operator of the Port Rail Terminal no later than a date to be agreed upon between the City and the Port; (ii) upon completion of the Port Rail Terminal, the Port shall require its operator of the Port Rail Terminal to provide rail services to the City's rail needs for a period of 20 years as follows: (a) priority rail service to City's rail needs for up to 50% of the train capacity at the Support Yard (the 8 approximately 4,000 foot tracks) portion of the Port Rail Terminal, provided that if the City's rail activity is not utilizing 50% of the train capacity at the Support Yard portion of the Port Rail Terminal, the Port shall have the right to use such train capacity for Port rail needs, and (b) priority rail service to Port's rail activity for up to 50% of the train capacity at the Support Yard portion of the Port Rail Terminal, provided that if the Port's rail activity is not utilizing 50% of the train capacity at the Support Yard portion of the Port Rail Terminal, the City shall have the right to use such train capacity for City rail activity; and (c) the new Knight Rail Yard (manifest train tracks) shall be operated on a first-come/first-served basis; (iii) the City and its tenants shall be required to pay the standard operator charges and Port rail tariffs as such charges and tariffs may be adjusted from time to time by the Port Board

(which charges shall be transparent, market rate (consistent with other West coast rail facilities) and non-discriminatory (as between City/Port tenants/customers); and (iv) should the demand for rail service from both the City's and the Port's rail needs reach or exceed 80% of the rail terminal's total capacity to serve all the interested customers for a continuous period of 12 consecutive months within 10 years after the completion of the Port Rail Terminal, the Port and the City shall negotiate in good faith for the expansion of the Port Rail Terminal. Additionally, upon the expiration of the term of the City's priority use, the City shall have non-exclusive, non-priority access to the Support Yard upon market rate terms.

If the Port operator is unable to deliver the rail services as provided in the preceding paragraph, the City shall have the right to provide such services for its own uses of the Port Rail Terminal using its own operator. In such an event, the City and the Port shall negotiate in good faith the terms and conditions for the City's operator to enter and use the Port Rail Terminal at market rates. Additionally, the Parties agree that the Port will not prohibit Oakland Global Rail Enterprise from responding to the Port's operator RFP.

12.0 Maintenance of Public Utilities and Infrastructure: In developing the Backbone Infrastructure, the City shall use commercially reasonable efforts to avoid disruptions of utility services to the Port Lands without the Port's prior written permission. Such efforts shall include, but not be limited to, (a) installing the new utilities before decommissioning the existing utilities, (b) scheduling work with its contractors to avoid disruptions and downtime, (c) using commercially reasonable efforts to minimize the number of hours of disruptions or interrupted service, and (d) providing the Port with at least seven (7) business days written notice of planned interruptions of service when it is infeasible to maintain constant service. The City shall be responsible for obtaining all necessary approvals from any third parties who will be the owner and/or user of any utility or other infrastructure improvement developed as part of the Backbone Infrastructure prior to commencement of construction of such Backbone Infrastructure. If a particular utility or other infrastructure improvement developed as part of the Backbone Infrastructure is to be owned or maintained by either the Port or a third party, the City (as the lead entity for the development of the Backbone Infrastructure) shall give written notice ("Completion Notice") to the Port or such third party when, in the written opinion of the City's Director of Public Works, such utility or other infrastructure improvement is Substantially Complete subject to a list of punchlist items prepared by the City attached to or incorporated into such Completion Notice, and the City shall schedule a joint inspection of such utility or other infrastructure improvement with the Port or such third party within ten (10) business days after the Port or such third party receives such Completion Notice. For purposes of this Restated Agreement, "Substantially Complete" or "Substantial Completion" shall mean the reasonable written determination by the City's Director of Public Works that the utility or other infrastructure improvement which is the subject of the Completion Notice has been completed substantially in accordance with the final design and specific plans approved in accordance with this Restated Agreement, and are ready and available for use by the Port or such third party for the purposes for which they are intended. Following such joint inspection, the City shall add to the list of punchlist items any additional items discovered by either Party during the joint inspection. As to those utilities or infrastructure improvements that will be owned or used by the Port, if the City and the Port disagree whether such utility or infrastructure improvement is Substantially Complete, the Parties shall resolve such disagreement pursuant to the procedures set forth in Section 17.0 below. As to those utilities or infrastructure improvements that will be owned or used by a third party, the City shall be responsible for causing such party to accept the improvement for permanent maintenance. As to those utilities or infrastructure improvements that will be owned or used by the Port, upon agreement between the Parties that Substantial Completion has been achieved for such utility or infrastructure improvement, the Port shall accept such utility or other infrastructure improvement and shall maintain such utility and other infrastructure improvements in the same manner and standard as similar such utility and other infrastructure improvements are maintained throughout the City of Oakland. No Common Development

Element developed as part of the Backbone Infrastructure shall be deemed completed unless and until all parties who will be responsible for the permanent maintenance of such improvement has accepted such responsibility. As to those utilities or infrastructure improvements that will be owned or used as City public utilities or public infrastructure, the City shall accept such utility or other infrastructure improvement and shall maintain such utility and other infrastructure improvements in the same manner and standard as similar such utility and other infrastructure improvements are maintained throughout the City of Oakland. If the responsible Party fails to perform the required maintenance in accordance with the foregoing standard, the other Party may perform such maintenance pursuant to the self-help provisions of Section 6.06 above. The Parties hereby acknowledge that the City and Port have entered into previous payment agreements whereby the Port reimburses the City for the maintenance of certain public streets and utilities within the Port Area. If such a payment agreement already exists or is agreed upon in the future between the City and the Port for any Backbone Infrastructure within the Port Area, the provisions of this Section 12.0 shall not apply.

13.0 Proposed Land Exchange: The City has proposed an exchange of property rights (fee, easements, and leases) involving the properties listed on Exhibit G. Each Party will each use good faith efforts to negotiate a separate agreement to effectuate such an exchange.

14.0 Accommodation of Temporary Relocation of Trucking Facility: The City may need to temporarily relocate the 15-acre truck parking facility on its property during construction of its development on the OAB, in order to ensure the timely use of private matching funds. The Port will use good faith efforts to facilitate this temporary relocation on its own undeveloped property, if possible.

15.0 Deconstruction of Warehouses; Shared Costs and Responsibilities.

15.01 Elements of Deconstruction and Demolition: The City and the Port will share the costs of any deconstruction of the buildings on the OAB that cross property lines between the City Lands and the Port Lands (“**Shared Buildings**”), which costs may include the salvaging as whole timber posts, beams, trusses and siding of the Shared Buildings and other actions required as part of Mitigation Measure 4.6-9 of the Oakland Army Base Mitigation Monitoring and Reporting Program (MMRP) (including employing members of the local job-training bridge programs) (“**Deconstruction**”) as provided herein. The Parties will also share the costs of the concurrent demolition of the remaining portions of the Shared Buildings, which demolition shall include the taking down of those portions of the Shared Buildings that are not deconstructed, clearing and hauling away of the materials and debris for proper disposal and documentation (“**Demolition**”). Neither Deconstruction nor Demolition will include any environmental remediation of property, for which the Parties’ responsibilities and allocation of costs are set forth in the ARMOA, or the removal of the slabs, footings or flooring of the shared building, underground remediation, dewatering for construction purposes or the removal or treatment of hazardous materials (the “**Excluded Items**”). The costs of both the Deconstruction and Demolition of any or all of the Shared Buildings are referred to herein as the “**Shared Costs.**”

15.02 Shared Costs: Shared Costs will include (a) the reasonable out-of-pocket transaction costs incurred by any Party for the study, design, implementation of the Deconstruction and Demolition (excluding in the case of each Party (i) its own costs and expenses for staff and internal overhead and (ii) both in-house and outside legal counsel), (b) survey, environmental, insurance and consulting costs associated with the design, implementation or carrying out of the Deconstruction and Demolition, (c) costs of Deconstruction and Demolition, including any payments to third-party contractors or local job-training bridge program for the performance of the Deconstruction and Demolition.

15.03 Percentage Shares: For each Shared Building, each Party shall pay a percentage share of any Shared Costs in proportion to the percentage of the square footage of each of the Shared Buildings on each respective Party’s property. For the purposes of this Restated Agreement, the Parties agree that the square footage and percentage share of the Shared Costs for each Shared Building are as follows, unless these percentages change as a result of the Proposed Land Exchange listed in Section 13.0:

<u>Building #</u>	<u>Total Square Footage</u>	<u>Square Footage on Port Property</u>	<u>Port Percentage of Shared Costs</u>	<u>Square Footage on City Property</u>	<u>City Percentage of Shared Costs</u>
804	237,983	210,194	88.32	27,789	11.68
805	239,170	181,273	75.79	57,897	24.21
806	237,760	185,614	78.07	52,146	21.93
807	237,752	114,285	48.11	123,287	51.89
808	238,518	69,398	29.10	169,120	70.90
Total	1,191,003	760,764	63.88	430,239	36.12

15.04 Initiation and Implementation of Deconstruction and Demolition: Either the Port or the City may initiate the implementation of the Deconstruction and Demolition of any of the Shared Buildings (the “**Initiating Party**”) by first submitting an implementation plan for agreement by the other Party in writing relating to the Shared Building or Shared Buildings on which the Initiating Party intends to initiate the Deconstruction and Demolition. The implementation plan shall include, but not be limited to:

- a. a scope of work, including any pre-demolition hazardous material survey (the costs of such survey shall be part of the Shared Costs);
- b. submittals from and regarding any third-party consultant or contractor (including description of any bidding procedure or requirements);
- c. estimated budget based on the scope of work identified in the Implementation Agreement for the Deconstruction and Demolition of the particular Shared Building or Shared Buildings;
- d. estimated time for completion (including any phasing of the Deconstruction and Demolition) based on the scope of work identified in the Implementation Agreement for the Deconstruction and Demolition of the particular Shared Building or Shared Buildings;
- e. insurance and indemnity provisions;
- f. construction mitigation and environmental compliance; and
- g. any other information deemed relevant by agreement between the Parties.

15.05 Hiring of Third-Party Contractors: Prior to the contracting or hiring of any third-party consultant or contractor by any Party for the purpose of the Deconstruction or Demolition, each Party will review and accept the scope and budget for any such third-party contract, provided however, each Party shall complete its review of the scope and budget within thirty (30) days from the date that the Initiating Party delivers to the other Party in writing the scope and budget for review (which scope and budget may be submitted as part of the implementation plan), and no Party may unreasonably withhold its acceptance of the scope and budget. If no objection is raised during the thirty (30) day review period, the scope and budget shall be deemed accepted by the Parties and the Initiating Party may proceed with the hiring of the third party consultant or contractor. If any Party finds the scope and budget unacceptable, the objecting Party shall specify its objection within the thirty (30) day

review period and the Parties shall negotiate a resolution to the objection, provided however, that the objecting party shall alone bear any costs incurred as a result of the objection being raised (including, but not limited to, costs of engineering, survey or attorney services or costs due to delay of Deconstruction or Demolition).

15.06 Reimbursement of Deconstruction and Demolition Costs: The Initiating Party may initially pay the cost of any Deconstruction and Demolition it initiated and implemented pursuant to any implementation plan. The Initiating Party shall invoice the other Party for reimbursement of the other Party's percentage share of the Shared Costs, but in any event, no later than forty-five (45) days after the payment of such Shared Costs by the Initiating Party or forty-five (45) days after the Completion of the Deconstruction and Demolition, whichever is later. The other Party shall reimburse the Initiating Party for its share of the Shared Cost within forty-five (45) days from the date of the invoice from the Initiating Party.

15.07 Partial Deconstruction/Demolition: If one Party desires to proceed with the Deconstruction/Demolition of the portion of a Shared Building on its property prior to the other Party, the initiating Party shall provide the other Party with at least 180 days' prior written notice of such intent. Upon request of the other Party, the Parties shall meet and confer for a period of 60 days on methods to minimize the impact on the Party that desires to retain its portion of the Shared Building; however, upon the expiration of the 180 day notice period, the Initiating Party shall be entitled to proceed with the Deconstruction/Demolition of its portion of the Shared Building to the property line. In such an event, the Party desiring to preserve its portion of the Shared Building shall be required to take such steps, at its sole cost, to preserve its portion of the Shared Building. Consistent with the terms of the ARMOA, neither Party shall take any steps to delay or obstruct the other Party's development plans.

16.0 Force Majeure.

16.01 Force Majeure Events: In the event that either Party's responsibility under this Restated Agreement to develop and deliver any Development Element is affected by a *Force Majeure* Event, the provisions of this Section 16 shall apply.

(a) **Notice of the Occurrence of a Force Majeure Event.** The Party that is affected by a *Force Majeure* Event shall give notice as soon as practicable and in no event later than ten (10) calendar days following the date on which it first became aware of such *Force Majeure* Event to the other Party (provided that in the case of the same *Force Majeure* Event being a continuing cause of delay, only one notice shall be necessary), which notice shall include (i) a statement of which *Force Majeure* Event the claim is based upon, (ii) details of the circumstances from which the delay arises and (iii) an estimate of the delay in the performance of obligations under this Restated Agreement attributable to such *Force Majeure* Event and information in support thereof, if known at that time. The Party receiving such notice shall, after receipt thereof, be entitled by notice to require the Party claiming a *Force Majeure* Event to provide such further supporting information or details as the Party receiving such notice may reasonably consider necessary.

(b) **Notice of the Cessation of a Force Majeure Event.** The Party claiming a *Force Majeure* Event shall notify the other Party as soon as practicable and in no event later than ten (10) calendar days following the date on which it first became aware that a *Force Majeure* Event has ceased.

(c) **Consequences of a Force Majeure Event.** Subject to the Party claiming a *Force Majeure* Event giving the notice required in Section 16.01(a), a *Force Majeure* Event shall excuse such Party from whatever obligation or covenant such Party, using all commercially reasonable efforts, is not actually capable of performing or observing or causing to be performed or observed as a direct result of the *Force Majeure* Event being claimed for the *Force Majeure* Delay Period applicable to such *Force Majeure* Event. Notwithstanding the occurrence of a *Force Majeure* Event, (i) this Section 16.01(c) shall not excuse the Party claiming a *Force Majeure* Event from the performance and observance under this Restated Agreement of any obligations and covenants that such Party, using all commercially reasonable efforts, is actually capable of performing or observing, or causing to be performed during the applicable *Force Majeure* Delay Period, and (ii) during such applicable *Force Majeure* Delay Period, each Party shall use its commercially reasonable efforts to minimize the effect and duration of the *Force Majeure* Event. Nothing herein shall permit or excuse noncompliance with a change to applicable Laws.

16.02 Parties Rights: If a *Force Majeure* Event occurs that has the effect of rendering the Party claiming such *Force Majeure* Event in accordance with Section 16.01 not actually capable, despite using all commercially reasonable efforts, of performing, observing, or causing to be performed or observed, (i) the development and delivery of any Development Element, (ii) the maintenance of any roadway or other infrastructure that either Party is required to perform under this Restated Agreement as a direct result of such *Force Majeure* Event, (iii) in the case of the Port, the completion of the Port Rail Terminal by June 30, 2015, or (iv) in the case of the City, the completion of the Maritime Street Common Development Element of the Backbone Infrastructure by October, 2015, and of the Burma Road Common Development Element of the Backbone Infrastructure by September 16, 2018, then the Party claiming such *Force Majeure* Event shall have the right to extend the due date for the performance of such obligation for an amount of time equal to the *Force Majeure* Delay Period.

17.0 Dispute Resolution.

17.01 Scope: Any dispute arising out of, relating to or in connection with any material provision of this Restated Agreement, including any question as to whether such dispute is subject to the dispute resolution procedures set forth below, which the Parties have been unable to resolve by the informal dispute resolution procedures described in Section 17.02 below, may be submitted to non-binding mediation under the mediation procedures described in Section 17.03 below.

17.02 Informal Dispute Resolution Procedures: The Parties agree that, at all times, they will attempt in good faith to resolve all disputes that may arise under this Restated Agreement. The Parties further agree that, upon receipt of written notice of a dispute from a Party, the Parties will refer the dispute to the Designated Person of each Party. The Designated Persons shall negotiate in good faith to resolve the dispute, conferring as often as they deem reasonably necessary, and shall gather and in good faith furnish to each other the information pertinent to the dispute. Statements made by Representatives of the Parties during the dispute resolution mechanisms set forth in this Section 17.02 and documents specifically created for such dispute resolution mechanisms shall be considered part of settlement negotiations and shall not be admissible in evidence by any proceeding without the mutual consent of the Parties.

17.03 Mediation: Mediation of a dispute under this Restated Agreement may not be commenced until the earlier of: (a) such time as both of the Designated Persons, after following the procedures set forth in Section 17.02, conclude in good faith that amicable resolution through continued negotiation of the matter does not appear likely; or (b) fifteen (15) calendar days after the date of the notice referring the dispute to the Designated Persons, pursuant to Section 17.02. If, after such time period, the dispute remains unresolved, either Party may seek to resolve the dispute through non-binding mediation administered by the Judicial Arbitration Mediation Services (“JAMS”), or such other association as may be agreed to by the Parties. The Parties will cooperate with each other in selecting the arbitrator from the panel of neutral arbitrators knowledgeable in infrastructure development from JAMS, and in scheduling the time and place of the mediation. Unless otherwise agreed to by the Parties, such selection and scheduling shall be completed within forty-five (45) calendar days after the date of the notice referring the dispute to the Designated Persons. Unless otherwise agreed to by the Parties, the mediation shall not be scheduled for a date that is greater than 120 calendar days from the date of the notice referring the dispute to the Designated Persons. The Parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs (other than each Party’s individual attorneys’ fees and costs related to the Party’s participation in the mediation, which fees and costs shall be borne by such Party). Statements made by Representatives of the Parties during the mediation procedures set forth in this Section 17.03 and documents specifically created for such mediation procedures shall be considered part of settlement negotiations and shall not be admissible in evidence by any proceeding without the mutual consent of the Parties.

17.04 Provisional Remedies. Notwithstanding anything to the contrary in this Section 17.0, no Party shall be precluded from initiating a proceeding in a court of competent jurisdiction for the purpose of obtaining any emergency or provisional remedy to protect its rights that may be necessary and that is not otherwise available under this Restated Agreement.

18.0 Miscellaneous.

18.01 Notices: Any notice or other communication required to be given under or pursuant to this Restated Agreement shall be in writing and may be served by actual delivery in person or by registered mail, postage prepaid or by facsimile transmission, to the representative of the Party to whom such notice is to be given at the following locations respectively:

If to the Port:

Director of Maritime
Port of Oakland
530 Water Street, 6th Floor
Oakland, CA 94607
Facsimile: (510) 835-1641

With a copy to:

Deputy Port Attorney – Maritime
Port of Oakland
530 Water Street, 4th Floor
Oakland, CA 94607

Facsimile: (510) 444-2093

If to the City:

Assistant City Administrator for Community and
Economic Development
City of Oakland
250 Frank H. Ogawa Plaza, 2d Floor
Oakland, CA 94612
Telephone: 510-238-2229
Facsimile; 510-238-2226

With a copy to:

Office of the City Attorney
One Frank H. Ogawa Plaza, Sixth Floor
Oakland, CA 94612
Attention: Dianne Millner, Esq., Deputy City Attorney
Telephone: 510-238-3601
Facsimile: 510-238-6515

or at such other location as either Party shall advise by notice from time-to-time.

All notices provided for herein may be faxed (with machine verification of receipt), sent by Federal Express or other overnight courier service, personally delivered or mailed registered or certified mail, return receipt requested. If a notice is sent by fax, it shall be deemed given when transmission is complete if (i) a confirmation of successful transmission is contemporaneously printed by the transmitting fax machine, and (ii) a copy of the notice is sent to the recipient by overnight courier for delivery on the Business Day next following the date of fax transmission. If a notice is personally delivered, sent by overnight courier service or sent by registered or certified mail, it shall be deemed given upon receipt or refusal of delivery.

18.02 Indemnification.

a. City: The City shall indemnify, protect, defend and hold harmless the Port, including, but not limited to, all of the members of the Board of Port Commissioners, its departments and other subdivisions, including, without limitation, all of the officers, employees, agents, contractors, and representatives of the Port, and their respective heirs, legal representatives, successors, and assigns, and each of them (collectively, the “**Port Indemnified Parties**”) from and against any and all claims, demands, losses, liabilities, damages (including foreseeable and unforeseeable consequential damages), liens, obligations, interest, injuries, penalties, fines, lawsuits, and other proceedings, judgments, awards, costs, and expenses (including, without limitation, reasonable attorneys’ fees and costs and consultants’ fees and costs) of whatever kind or nature, known or unknown, contingent or otherwise (collectively, “**Losses**”) to the extent arising out of the City’s performance of its rights and obligations under this Restated Agreement, except to the extent of Losses resulting from the gross negligence or willful misconduct of any of the Port Indemnified Parties.

b. Port: The Port shall indemnify, protect, defend and hold harmless the City, including, but not limited to, all of the members of the its governing body, its departments and other subdivisions, including, without limitation, all of the officers, employees, agents, contractors, and representatives of the City, and its heirs, legal representatives, successors, and assigns, and each of them (the “**City Indemnified Parties**”) from and against any and all Losses to the extent arising out of the Port’s performance of its rights and obligations under this Restated Agreement, except to the extent of Losses resulting from the gross negligence or willful misconduct of any of the City Indemnified Parties.

18.03 No Modifications to ARMOA: Nothing in this Restated Agreement shall be construed to amend or modify the terms and conditions of the ARMOA, including without limitation, any funds to be deposited into the JERF. If there are any inconsistencies between the terms and conditions of the ARMOA and the terms and conditions of this Restated Agreement, the terms and conditions of this Restated Agreement shall control.

18.04 No Modifications to Baseline Agreements: Nothing in this Restated Agreement shall be construed to amend or modify the terms and conditions of the Baseline Agreements. Unless and until the OHIT Baseline Agreement is duly amended to (i) expressly recognize the City’s financial contribution toward the TCIF matching funds and (ii) more clearly identify the scope of improvements to be developed on the City Lands - as evidenced by one or more written amendments to the Baseline Agreements approved by the CTC and the Port Board and signed by the authorized representatives of the CTC, CalTrans, and the Port - the City shall have no right to any TCIF funds and any expenditure by the City of funds set forth in Section 7.01 of this Restated Agreement is solely at the City’s risk.

18.05 Headings: All headings and captions appearing in this Restated Agreement have been inserted for convenience and reference only and in no way define, limit or enlarge the scope or meaning of this Restated Agreement or any provision thereof.

18.06 No Presumption Against Drafter. This Restated Agreement has been negotiated at arm’s length and between Parties sophisticated and knowledgeable in the matters dealt with herein. In addition, each Party has been represented by experienced and knowledgeable legal counsel. Accordingly, this Restated Agreement shall be interpreted to achieve the intents and purposes of the Parties, without any presumption against the Party responsible for drafting any part of this Agreement (including, but not limited to California Civil Code Section 1654).

18.07 Entire Agreement: This Restated Agreement is in furtherance of and in addition to the ARMOA and is the entire agreement among the Parties hereto with respect to the subject matter hereof and supersedes all prior agreements (including the ARMOA to the extent there are any conflicts or inconsistencies between the ARMOA and this Restated Agreement) and understandings, whether oral or written, between the Parties with respect to the matters contained in this Restated Agreement.

18.08 No Representations: The making, execution and delivery of this Restated Agreement by the Parties have not been induced by any representations, statements, warranties or agreements other than those expressly set forth herein.

18.09 Successors and Assigns: This Restated Agreement shall be binding upon and inure to the benefit of each of the Parties and to their respective transferees, successors, and assigns.

18.10 No Third Party Beneficiaries: The Parties agree that it is their specific intent that no broker or any other person shall be a party to, or a third party beneficiary of, this Restated Agreement; and further that the consent of a broker or other third party shall not be necessary to any agreement, amendment, or document with respect to the transactions contemplated by this Restated Agreement.

18.11 No Waiver: No waiver hereunder by any Party of any breach hereunder shall be deemed a waiver of any other or subsequent breach.

18.12 Expenses: Except as expressly provided herein, each Party shall pay its own expenses incurred in connection with this Restated Agreement and the transactions contemplated hereby.

18.13 Counterparts: This Restated Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which when taken together shall constitute one and the same instrument. The signature page of any counterpart may be detached therefrom without impairing the legal effect of the signature(s) thereon provided such signature page is attached to any other counterpart identical thereto except having additional signature pages executed by other Parties to this Restated Agreement attached thereto.

18.14 Time of Essence: Time is of the essence in the performance of and the compliance with each of the provisions and conditions of this Agreement. All times provided in this Restated Agreement for the performance of any act shall be strictly construed.

18.15 Severability: Should any provision in this Restated Agreement be illegal or not enforceable, it shall be considered separate and severable from this Restated Agreement and the remaining provisions shall remain in force and be binding upon the Parties as though the said provision had never been included.

18.16 Non-Waiver of Rights: No condoning, excusing or overlooking by the City or the Port of any default, breach or non-observance at any time by the Port or the City shall operate as a waiver of the City's or the Port's rights under this Restated Agreement concerning any continuing or subsequent default, breach or non-observance, or so as to defeat or affect the rights of the City or the Port concerning any such continuing or subsequent default or breach.

18.17 Amendments: This Restated Agreement constitutes the entire agreement between the Parties hereto and supersedes all previous negotiations, representations and documents in relation hereto made by any Party to this Restated Agreement, and may be amended only by an agreement in writing signed by the Parties.

18.18 Further Acts: Each of the Parties hereto shall perform such further acts and execute such further agreements as may be required from time-to-time to give proper effect to the intent of this Restated Agreement.

<p>CITY OF OAKLAND, a municipal corporation acting by and through its City Council, on its own behalf and as successor agency to the Redevelopment Agency of the City of Oakland</p> <p>By: _____ Deanna J. Santana City Administrator</p> <p>Dated:</p> <p>Resolution No. _____ C.M.S.</p> <p>Approved as to form and legality:</p> <p>Barbara Parker, City Attorney</p> <p>By: _____ Deputy City Attorney</p> <p>Dated:</p>	<p>CITY OF OAKLAND, a municipal corporation acting by and through its Board of Port Commissioners</p> <p>By: _____ Omar Benjamin Executive Director</p> <p>Dated:</p> <p>Resolution No. _____</p> <p>Approved as to form and legality:</p> <p>Michele Heffes, Port Attorney (Acting)</p> <p>By: _____ Port Attorney</p> <p>Dated:</p>
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Exhibit A

Project Description

Exhibit B

City Project Delivery Schedule for Each City Lead Improvement

- | | |
|---|--------------------|
| 1. Complete Design Build Bridging Documents: | September 28, 2012 |
| 2. Execute Design Build Contract: | November 30, 2012 |
| 3. Issuance of Notice to Proceed for Backbone Infrastructure: | May 31, 2013 |
| 4. Substantial Completion of Construction: | April 15, 2018 |

Exhibit C

Port Project Delivery Schedule

Port Rail Terminal Milestone Dates, Pursuant to Section 6.02

1. Issuance of Request for Proposals for design build contractor for the Port Rail Terminal by ***December 31, 2012***;
2. Execution of a Design Build Contract by the Port for the Port Rail Terminal by ***June 30, 2013***.
3. Issuance of Notice to Proceed for Demolition/Deconstruction or Site Prep Work for Port Rail Terminal by ***December 30, 2013***.
4. Substantial Completion of the Port Rail Terminal by ***June 30, 2015***.

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Exhibit D-1

**City-Port Infrastructure Work Product Related to the Design of the Port Lead Improvements and
the 7th Street Project**

Exhibit D-2

City-Port Infrastructure Work Product Related to Both the City Lands and the Port Lands

(But only as such work product is related to the development of the Port Lands and of dedicated City Streets on both City Lands and Port Lands).

Exhibit E

OAB Design Approval Process

For Common Development Elements

1.00 Approval and Comment — General. The City and the Port shall each submit to the other for review in accordance with this Submittal Review Process Common Development Elements of the Revised OHIT Project described in Section 6.04(e) of this Restated Agreement.

2.00 Approval Required. The City shall submit to the Port for the Port's approval those Common Development Elements that are City Lead Improvements, and the Port shall submit to the City for the City's approval those Common Development Elements that are Port Lead Improvements.

2.01 The City or the Port (as the case may be) shall submit for the other Approval (defined below) the draft plans and specifications ("**Contract Data**") for the applicable Common Development Element at the following stages:

Design Build Bridging Documents: 90% and subsequent material modifications; and

Construction Drawings: 50%, 90%, and subsequent material modifications.

The Parties further agree to submit to the other signature set Construction Drawings for Comment only.

3.00 Approving Party Comment. A Lead Party shall consider any comments received from the Approving Party in good faith, but (subject to the Approval rights set forth herein) retains sole discretion on whether to take any action or make any changes in response to the comments.

4.00 Approval. When either Party is entitled to "**Approve**" any item (each an "**Approving Party**") from the other Party, the Approving Party shall give its approval ("**Approval**") unless doing so is reasonably likely to (a) (i) materially adversely impact the Approving Party's operations, (ii) adversely impact the Approving Party's costs (unless the other Party agrees in writing to pay such costs), or (iii) adversely impact the Approving Party's safety, security or compliance with Laws. When Approving Party is entitled to "**Comment**" on any item from the other Party, the other Party shall consider any comments received from the Approving Party in good faith, but retains sole discretion on whether to take any action or make any changes in response to the comments.

4.01 The Parties acknowledge and agree that, except as otherwise expressly provided in this Restated Agreement, neither Party's comment on or Approval of any item, nor any other review, inspection, observation or review of any item by such Approving Party, shall be construed to be for the purpose of determining the accuracy or completeness of schedules, plans, specifications, documents or any other item. In connection therewith, the Parties agree that, except as otherwise expressly provided in this Restated Agreement, the Approving Party shall not be liable for errors, inconsistencies or omissions in any item received from the other Party. Neither any Approval or Comment by the Approving Party, nor any other review, inspection, observation or review by the Approving Party, is intended to alter the responsibilities of the other Party, its Design-Build Contractor, its O&M Contractor and any others with respect to any item submitted to the Approving Party for Approval or Comment.

5.00 Submittal Review Process. Unless otherwise provided in this Restated Agreement, whenever one Party submits Contract Data or other items for review pursuant to this Restated Agreement, the process described in this Section 5.00 (“**Submittal Review Process**”) shall apply:

5.01 The City or the Port, as the case may be, shall deliver with the Contract Data to the Approving Party a written request (the “**Review Request Notice**”) specifying in reasonable detail (a) the item or items for which Approval or Comment, as the case may be, are sought, (b) whether in the submitting Party’s view the Approving Party is entitled to Comment or Approve the item or items, and (c) if not in digital form, five (5) copies of the material subject to Approval or Comment. If the Approving Party reasonably and in good faith believes a Review Request Notice is incomplete or inadequate so that the Approving Party cannot properly review the Review Request Notice as required by the Submittal Review Process, the Approving Party shall notify the other Party as promptly as reasonably possible of the deficiency and reasons therefore (but in no event later than the applicable Review Response period in Section 5.02 below), in which case the submitting Party shall correct the deficiency and resubmit, and the Approving Party will respond as required by Section 5.02.

5.02 Unless a longer period is specifically noted in the Review Request Notice, the Approving Party shall have ten (10) Business Days after receipt of the Review Request Notice (the “**Review Response Period**”) to deliver a written response to the other Party (except that the Review Response Period shall automatically be twenty (20) Business Days if the submittal is a submitting Party’s Proposed Change or any change to a Final Design). If the Approving Party is entitled to Approve (in accordance with Section 4.00 above or otherwise), the written response (the “**Review Response**”) shall either (a) indicate Approval, or (b) indicate “no Approval” and reason(s) therefore. In case of “no Approval,” the Approving Party will use reasonable efforts to include detailed commentary and/or markup sufficient to describe any deficiencies in the submittal, and will also use reasonable efforts to identify terms which would be acceptable to the Approving Party to allow the requested work to continue. If the Approving Party is entitled to Comment only (and not Approve), the Review Response shall either indicate “no Comment” or “Comment,” in which latter case the Approving Party will use reasonable efforts to include detailed commentary and/or markup sufficient to describe the Approving Party’s concerns.

5.03 Should the Approving Party require additional time beyond the Review Response Period, the Approving Party shall request a time extension (“**Extension**”) of not more than five (5) Business Days in writing in accordance with this Section 5.00 prior to the expiration of the Review Response Period, which if submitted by that time shall be automatically granted. The parties agree that they have (or plan to) retain consultants for the specific purpose of assisting the Party’s Approval and Comment rights under this Restated Agreement in a timely manner.

5.04 Upon receipt of the Review Response, the submitting Party shall have ten (10) Business Days to provide a written response to the Approving Party, detailing the proposed disposition of the Review Response.

5.05 If the submitting Party agrees to do so, the submitting Party will incorporate the Review Response into the Common Development Element designs. If the submitting Party objects to the commentary and/or markup, the Parties shall then have five (5) Business Days to make such arrangements or take such steps as they shall mutually agree to satisfy the objection(s).

5.06 If after the end of this five (5) Business Day period the Parties, after using good faith efforts, are unable to resolve such objections, either Party may seek non-binding mediation pursuant to the procedures set forth in Section 17.0 of the Restated Agreement.

Exhibit F

Definitions

“**2002 EIR**” shall have the meaning set forth in the second Recital of the Initial Agreement.

“**2012 ACTC Funds**” shall mean up to \$271 million in funds that the Port will apply to the Alameda County Transportation Commission for if a sales tax measure for infrastructure improvements in Alameda County is passed by the voters of Alameda County in November, 2012.

“**7th Street Baseline Agreement**” shall have the meaning set forth in the ninth Recital of the Initial Agreement.

“**7th Street Project**” shall have the meaning set forth in the seventh Recital of the Initial Agreement.

“**ACTC Funds**” shall have the meaning set forth in Section 7.03b of this Restated Agreement.

“**Addendum**” shall have the meaning set forth in Section 3.01 of this Restated Agreement.

“**Agency**” shall have the meaning set forth in the preamble of the Initial Agreement.

“**Agency Board**” shall mean the governing body of the Agency as determined in accordance with the California Community Redevelopment Law (Health and Safety Code Sections 33000, et seq.

“**Agency/City Indemnified Parties**” shall have the meaning set forth in Section 6.02b of the Initial Agreement.

“**Agency Lands**” shall have the meaning set forth in the fourth Recital of the Initial Agreement.

“**Agreement**” shall have the meaning set forth in the preamble of this Cost Sharing and Lead Agency Designation Agreement.

“**Approval**” shall have the meaning set forth in Section 4.00 of Exhibit E to this Restated Agreement.

“**Approving Party**” shall have the meaning given in Section 4.00 of Exhibit E to this Restated Agreement.

“**ARMOA**” shall have the meaning set forth in Section 2.01a of the Initial Agreement.

“**Assumed Development Element**” shall have the meaning given in Section 6.06a of this Restated Agreement.

“**Assumption Notice**” shall have the meaning set forth in Section 6.06a of this Restated Agreement.

“Backbone Infrastructure” shall mean the new Maritime Street, Burma Road, Wake Avenue (realignment) and a “backbone” utility corridor and other utility infrastructure to serve both the Port Lands and the City Lands.

“Baseline Agreement” or **“Baseline Agreements”** shall have the meaning set forth in the ninth Recital of the Initial Agreement.

“Caltrans” shall have the meaning set forth in the eighth Recital of the Initial Agreement.

“CEQA” shall have the meaning set forth in the second Recital of the Initial Agreement.

“City” shall have the meaning set forth in the preamble of the Initial Agreement.

“City Lands” shall mean the Agency Lands.

“City Charter” shall mean the Charter of the City of Oakland originally adopted by the people of the City of Oakland on November 5, 1968, as amended from time-to-time.

“City Indemnified Parties” shall have the meaning set forth in Section 18.02b of this Restated Agreement.

“City Environmental Work” shall mean the environmental remediation on the City Lands necessary to complete the RAP and, in conjunction with the other work, the RMP.

“City Lead Improvements” shall mean the Backbone Infrastructure, City Environmental Work, City Trade & Logistics Facilities, Berth 7 Terminal, Recycling Facilities and related Site Prep Work for each such Development Element.

“City Trade and Logistics Facilities” shall mean the trade and logistics facilities located on the City Lands.

“Claims” shall have the meaning set forth in Section 6.04a of this Restated Agreement.

“Common Development Elements” or **“Common Development Element”** shall mean the Backbone Infrastructure, Port Rail Terminal, and related Site Prep Work for each such Development Element.

“Contract Data” shall mean the items to be submitted by one Party to the other Party pursuant to Section 6.05c and Exhibit E of this Restated Agreement.

“CTC” shall have the meaning set forth in the seventh Recital of the Initial Agreement.

“Default Notice” shall have the meaning given in Section 6.06a of this Restated Agreement.

“Delivery Schedule” shall have the meaning given in Section 6.02 of this Restated Agreement.

“Demolition” shall have the meaning given in Section 15.01 of this Restated Agreement.

“Designated Person” means the representative of each Party who is designated as such for the purposes of Section 17.

“Development Element” or “Development Elements” shall mean the development elements set forth in Section 5.02a.i through 5.02a.vii of this Restated Agreement together with the 7th Street Project (as defined in the Initial Agreement).

“Encumbrance” shall mean any mortgage, deed of trust, claim, levy, lien, judgment, execution, pledge, charge, security interest, restriction, covenant, condition, reservation, rights of way, liens, encumbrances, certificate of pending litigation, judgment or certificate of any court, and other matters of any nature whatsoever, whether arising by operation of Law or otherwise created, affecting the lands upon which any Assumed Development Element is developed.

“Excluded Items” shall have the meaning set forth in Section 15.01 of this Restated Agreement.

“Extension” shall have the meaning given in Section 5.03 of Exhibit E to this Restated Agreement.

“Force Majeure Delay Period” means that period during which a Party claiming a *Force Majeure* Event in accordance with the notice provisions of Section 16.01(a) is not actually capable, despite using all commercially reasonable efforts, of performing or observing or causing to be performed or observed one or more of its obligations or covenants under this Restated Agreement as a direct result of the *Force Majeure* Event being claimed by such Party.

“Force Majeure Event” means any event beyond the reasonable control of the City or the Port, as the case may be, that delays or interrupts the performance of the obligations or covenants of the City or the Port, respectively, hereunder, including, without limitation, the availability of TCIF funds for reimbursement of construction costs associated with each Development Element in accordance with the Amended Baseline Agreement, the filing of a lawsuit challenging the City’s or the Port’s CEQA determinations for the Revised OHIT Project, any delays caused by any Party submitting a written notice of dispute pursuant to Section 17.02 of this Restated Agreement regarding any Approval required under Exhibit E (OAB Design Approval Process for Common Development Elements) to this Restated Agreement, any delays not caused by the Party claiming a *Force Majeure* in the issuance of any governmental permits required to develop any Development Element, an intervening act of God or public enemy, war, act of terror, invasion, armed conflict, act of foreign enemy, blockade, revolution, sabotage, civil commotions, interference by civil or military authorities, earthquake, riot or other public disorder, epidemic, quarantine restriction, strike, labor protest, stop-work order or injunction issued by a Governmental Authority (other than the Port) of competent jurisdiction, governmental embargo, restrictions, priorities or allocations of any kind and all kinds, nuclear or other explosion, radioactive or chemical contamination or ionizing radiation, fire, tornado, hurricane or other natural disaster; but only if such event is not the result of (i) the negligence or misconduct of the City or the Port, as the case may be, or their respective Representatives, or (ii) any act or omission by the City or the Port, as the case may be, or their respective Representatives in breach of the provisions of this Restated Agreement.

“Governmental Authority” shall mean any court, federal, State or local government, department, commission, board, bureau, agency or other regulatory, administrative, governmental or quasi-governmental authority, including the City and the Port, of the United States of America, including any successor agency.

“Initial Agreement” shall mean the Cost Sharing Agreement dated for reference purposes only as of June 11, 2011 by and amongst the Agency, the City, and the Port.

“**Initiating Party**” shall have the meaning given in Section 15.04 of this Restated Agreement.

“**JERF**” shall have the meaning set forth in Section 2.01a of the Initial Agreement.

“**JIDF**” shall have the meaning set forth in Section 2.01b of the Initial Agreement.

“**Law**” shall mean any resolution, order, writ, injunction, decree, judgment, law, ordinance, decision, opinion, ruling, policy, program, permit, statute, code, rule or regulation of, or conditions applicable to the lands on which any Development Element is constructed or under any permit, license, concession, authorization or other approval by, or other directives issued by, any Governmental Authority, including any adopted, promulgated or enacted subsequent to the date of this Restated Agreement, as the same may be modified, amended, or reissued, and including, but not limited to, the Charter of the City of Oakland (including, without limitation, Section 728 entitled “Living Wages and Labor Standards at Port-Assisted Businesses” and laws which seek to reduce the risk from, and to mitigate the results of, an act that threatens the safety and security of personnel, the Port’s facilities, private property and the public, such as the Federal Maritime Transportation Security Act of 2002), the Port’s Tariff, any project labor agreements that the Port is a party to, land use restrictions or limitations relating to human or public health, the Environment, water, sanitation, safety, security, welfare, the filling of or discharges to the air or water or navigation and use of the Port Area.

“**Lead Party**” shall have the meaning given in Section 6.06 of this Restated Agreement.

“**Losses**” shall have the meaning set forth in Section 11.02a of this Restated Agreement.

“**Master Plan**” shall mean the master infrastructure development plan for the OAB as provided in the *Oakland Army Base Master Plan Design Set* dated April 2, 2012 prepared by Architectural Dimensions Master Design Team that is subject to comments previously provided by the Port being adequately addressed.

“**Milestone Date**” shall have the meaning given in Section 6.02 of this Restated Agreement.

“**MMRP**” shall have the meaning given in Section 15.01 of this Restated Agreement.

“**NEPA**” shall mean the National Environmental Protection Act.

“**OAB**” shall have the meaning set forth in the second Recital of the Initial Agreement.

“**OAB Project Area**” shall have the meaning set forth in the first Recital of the Initial Agreement.

“**Oakland Bulk and Oversized Terminal**” shall mean the West Gateway Break Bulk Terminal and rail spur located on the City Lands.

“**OHIT**” shall have the meaning set forth in the seventh Recital of the Initial Agreement.

“**OHIT Baseline Agreement**” shall have the meaning set forth in the eighth Recital of the Initial Agreement.

“OHIT Project” shall mean the revised Project Description for the OHIT Baseline Agreement set forth in Section 2.02a of this Restated Agreement, including, without limitation, each of the Development Elements therein. The OHIT Project does not include the 7th Street Project Development Element.

“Party” shall mean the City or the Port.

“Plan Dispute Notice” shall have the meaning set forth in Section 5.03d of the Initial Agreement.

“Port” shall have the meaning set forth in the preamble of the Initial Agreement.

“Port Area” shall have the meaning set forth in the third Recital of the Initial Agreement.

“Port Board” shall mean the Board of Port Commissioners as duly appointed pursuant to Section 702 of the City Charter.

“Port Environmental Work” shall mean the environmental remediation on the Port Lands necessary to complete the RAP and, in conjunction with the other work, the RMP

“Port Indemnified Parties” shall have the meaning set forth in Section 11.02a of this Restated Agreement.

“Port Lands” shall have the meaning set forth in the fifth Recital of the Initial Agreement.

“Port Lead Improvements” shall mean the Port Rail Terminal, Port Environmental Work and related Site Prep Work on the Port Lands.

“Port Parties” shall have the meaning given in Section 6.04a of this Restated Agreement.

“Port Rail Terminal” shall mean the new rail yard located on approximately 35 acres on the eastern portion of the Port Lands including any utility relocation or protection required to vacate that portion of 14th Street within the Port Lands. The Port Rail Terminal will include: (i) approximately 33,000 feet of unit train support tracks for the storage of up to 3,700 foot long unit trains; (ii) approximately 16,000 feet of manifest tracks for the storage of rail cars; and (iii) miscellaneous rail yard infrastructure such as an administration building, gatehouse, air compressors, fencing, switches, and signaling.

“Project” shall have the meaning set forth in the sixth Recital of the Initial Agreement.

“Project Description” shall mean the 2012 Oakland Army Base Project Description as stated in the Addendum and as set forth in Section 3.01 of this Restated Agreement.

“Public Improvements” shall mean all improvements to either the City Lands or the Port Lands paid for by public funds, including without limitation, any City funds, Port funds, TCIF funds, other state funds, or federal funds and without regard to whether such funds are grants or loans. As currently contemplated by the City and the Port, Public Improvements includes all rail improvements, all street and utility improvements, and all site preparation work (both on public roadways and adjacent lands) including without limitation, the capping and/or removal of old existing utilities, any environmental remediation and/or compliance work, any soil surcharging, any grading and paving, and any other work needed to prepare the land for construction.

“RAP/RMP” means the Final Remediation Action Plan dated September 27, 2002, amended on July 29, 2004 to include the Subaru Lot and on December 4, 2006 to include the East Maritime Army Reserve Property, to address Hazardous Materials at the EDC Property (as defined in the ARMOA) together with the Final Risk Management Plan, attached as Appendix E to the Final Remediation Action Plan, setting forth the procedures for addressing Environmental Conditions at the EDC Property as they are identified.

“Recycling Facilities” shall mean the recycling facilities located on the City Lands.

“Redevelopment MOU” shall have the meaning set forth in the third Recital of the Initial Agreement.

“Redevelopment Plan” shall have the meaning set forth in the first Recital of the Initial Agreement.

“Released Parties” shall have the meaning given in Section 6.04a of this Restated Agreement.

“Representative” means, with respect to any Party, any director, officer, employee, official, lender (or any agent or trustee acting on its behalf), partner, developer, member, owner, agent, lawyer, accountant, auditor, professional advisor, consultant, engineer, contractor, sub-lessees, customers, or other person for whom such Party is at law responsible or other representative of such Party and any professional advisor, consultant or engineer designated by such Party as its “Representative.”

“Responsible Agency” shall have the meaning set forth in Section 1.03b of the Initial Agreement.

“Restated Agreement” shall mean this Amended and Restated Cost Sharing Agreement

“Review Request Notice” shall have the meaning given in Section 5.01 of Exhibit E to this Restated Agreement.

“Review Response Period” shall have the meaning given in Section 5.02 of Exhibit E to this Restated Agreement.

“Review Response” shall have the meaning given in Section 5.02 of Exhibit E to this Restated Agreement.

“Revised OHIT Project” shall have the meaning given in Section 1.07 of this Restated Agreement, all as further depicted in Drawing X-127 attached to Exhibit A of this Restated Agreement.

“Shared Buildings” shall have the meaning given in Section 15.01 of this Restated Agreement.

“Shared Costs” shall have the meaning given in Section 15.01 of this Restated Agreement.

“Site Prep Work” shall mean all demolition/de-construction, earthwork, and other site preparation on the Port Lands and the City Lands as necessary to construct the Development Elements.

“Submittal Review Process” shall have the meaning given in Section 5.00 of Exhibit E to this Restated Agreement.

“Substantial Completion” or **“Substantially Complete”** shall have the meaning given in Section 12.0 of this Restated Agreement.

“Substitute Party” shall have the meaning given in Section 6.06 of this Restated Agreement.

“TCIF” shall have the meaning set forth in the seventh Recital of the Initial Agreement.

“TCIF Projects” shall have the meaning set forth in the seventh Recital of the Initial Agreement.

“TEU” or **“TEUs”** shall have the meaning set forth in the second Recital of the Initial Agreement.

“Tidelands Trust” shall mean the State of California’s public trust for commerce, navigation and fisheries, and particularly the Act of the Legislature of the State of California, entitled “An Act Granting Certain Tidelands and Submerged Lands of the State of California to the City and Regulating the Management, Use and Control Thereof,” approved May 1, 1911 (Statutes 1911, Chapter 657), as amended.

“Work Product” shall have the meaning given in Section 6.05a of this Restated Agreement.