

**RECORDING REQUESTED BY AND
WHEN RECORDED MAIL TO:**

City of Alameda
City Attorney's Office
2263 Santa Clara Avenue, #280
Alameda, CA 94501-4456
Attn: Andrico Penick

MEMORANDUM OF UNDERSTANDING
FOR TRANSFER OF THE
OAKLAND INNER HARBOR TIDAL CANAL

THIS MEMORANDUM OF UNDERSTANDING (this "Agreement" or this "MOU") is made and entered into as of October ____, 2016, by and between **the City of Alameda**, a charter city and municipal corporation (the "City"), and **the U.S. Army Corps of Engineers**, (a federal agency acting under the U.S. Department of the Army) (the "Corps") (each a "Party" and collectively the "Parties") and reflects the intent of the Parties with respect to the transfer of the Alameda side of the Oakland Inner Harbor Tidal Canal (as defined below) from the Corps to the City.

RECITALS

A. On October 20, 1884, the Superior Court of Alameda granted to the Corps, by Judicial Decree No. 3590, ownership of a strip of land connecting the cities of Alameda and Oakland for purposes of dredging and excavating a tidal canal out of uplands, which property became known as the Oakland Inner Harbor Tidal Canal and is more specifically described in the map attached as "Attachment A" to this MOU (the "Tidal Canal"). Between approximately 1884-1905, the Corps excavated, dredged, and created the Tidal Canal, which is a waterway approximately 1.8 miles long and 400 feet wide and connects the Oakland Estuary with the San Leandro Bay. The Corps has retained fee title ownership of the Tidal Canal since its creation.

B. The Corps desires to remise, release, and forever quitclaim unto the City, its successors and assigns, all rights, title, and interest of the Corps in and to that certain 42 acres of land, more or less, containing 94 parcels, situated, lying and being in the County of Alameda, State of California. The approximately 42-acre, 94-parcel property herein conveyed is identified as Parcels 2 and 4 through 96, particularly depicted by the subdivision maps attached as Exhibit A, which map has been duly recorded on the ____ day of _____, 2016 in the official records of the Alameda County Records Office and made a part hereof (the transferred parcels are referred to individually each as a "Parcel" and collectively referred to as the "Property").

C. The Corps desires does hereby reserve and retain all right, title and interest in Parcels 3 and 97 through 99 and the Unsurveyed Remainder Area 1 within the Oakland Inner Harbor Tidal Canal, which contains the Oakland side of the canal ("Unsurveyed Remainder Area 1"), property adjacent to the federally-owned Navy Operational Support Center (Parcel 3), and bridge footings for the High Street Bridge (Parcel 97), the Miller-Sweeney Bridge and the Fruitvale Rail Bridge (Parcel 98) and the Park Street Bridge (Parcel 99) as particularly depicted on the subdivision map attached as Exhibit B. (These five (5) parcels are collectively referred to as the "Excluded Property").

D. The southern edge of the Property now includes uplands and bulkheads that have been utilized to varying degrees by adjacent private property owners.

E. During its ownership, the Corps has issued various approvals and authorizations to adjacent property owners to use portions of the Property through real estate licenses, leases and regulatory permits.

F. In 1990, the U.S. Congress authorized the Corps to transfer the Tidal Canal at no cost to the cities of Alameda and Oakland through the Water Resources Development Act (“WRDA”) of 1990, as amended by WRDA 1996, 2007, and 2014. The Corps has been negotiating with the cities of Alameda and Oakland since 1990 to transfer the Tidal Canal out of federal ownership.

G. Starting in 2000, the Corps instituted a moratorium on issuing regulatory permits or real estate licenses for any repairs, upgrades, improvements or new construction, with the exception of emergency repairs, within the Tidal Canal (the “Permitting Moratorium”). The Permitting Moratorium has prevented repairs and improvements to existing structures and docks along the waterfront that did not fit within the emergency repair exception, which has affected adjacent property owners and the City’s code enforcement program.

H. To lift the Permitting Moratorium and to remove the existing cloud on title along the Tidal Canal, the City has agreed to accept ownership of the Property from the Corps subject to certain conditions and, with the intent of transferring portions of the Property immediately to certain adjacent property owners at fair market value for each subdivided parcel, whichever is higher.

I. The Corps desires to transfer the Property to the City, and has agreed to take all reasonable steps necessary to effectuate the transfer, including filing a tentative map application under the Subdivision Map Act (CA Gov. Code §§66410-66413.5) to divide the Alameda side of the Tidal Canal into approximately 99 individual parcels prior to transfer to facilitate the immediate subsequent transfer of portions of the Property to the certain property owners. The filing of the tentative subdivision map application does not implicitly nor explicitly waive sovereign immunity, and is at no cost to the Corps.

J. On September 20, 2016 the City Council of Alameda (the “City Council”) approved a tentative map to divide the Property into approximately 99 individual parcels subject to certain conditions and authorized the City Manager to enter into this MOU (“City’s Initial Approval”). On October 4, 2016, the City Council authorized the, City Manager to (i) accept the Property subject to certain conditions, and (ii) enter into the subsequent and immediate transfer of portions of the Property to subsequent purchasers. On _____, 2016, the City Council approved a Final Map to divide the Property into approximately 99 individual parcels (the “Final Map”).

K. On _____, 2016, the Corps completed the Environmental Assessment/Finding of No Significant Impact to cover the federal transfer of the Tidal Canal in compliance with the National Environmental Policy Act (42 U.S.C § 4321).

L. On _____, 2016, the Corps completed a Finding of Suitability of Transfer (the “FOST”), which provides documentation that the Tidal Canal is environmentally suitable for transfer by deed.

M. To address any potential liability related to environmental contamination, dredging, and operation and maintenance within the Tidal Canal and to establish the conditions precedent to the City’s acceptance of the Property, the Corps and the City desire to enter into this MOU to outline clearly the

intent and responsibilities of the Parties related to the Tidal Canal and to have this MOU recorded with the deed for the Property.

A G R E E M E N T

Based on the mutual covenants and agreements described herein, the City and the Corps hereby agree as follows:

1. **Grant of Property; Acceptance of Property.**

(a) As soon as possible after the City's Initial Approval, and no later than fourteen (14) days after the City provides the Corps with a copy of the Final Map, the Corps shall provide the City with a duly executed and acknowledged quitclaim deed conveying the subdivided Property to the City in the form of "Attachment C" (the "Quitclaim Deed").

(b) The City shall accept fee title to the Property provided that all of the Conditions Precedent (defined below in Section 4) have been met and escrow is closed (the "Closing Date").

2. **Effective Date.** As used herein, the term "Effective Date" shall mean the date on which each Party has received from the other Party a counterpart signature page to this Agreement.

3. **Termination.** This Agreement may be terminated prior to close of escrow: (i) by the City for the Corps' failure to fulfill a Conditions Precedent; (ii) by the Corps for the City's failure to fulfill a Conditions Precedent; (iii) by the mutual consent of the Parties; or (iv) by the City pursuant to Section 4(d).

(a) Written notice of termination must be delivered to the other Party in accordance with Section 9(h) and is effective upon receipt. Upon termination, neither Party shall have any legal obligation to the other with respect to the proposed transaction. However, each side shall be entitled to their original executed documents in the possession of the other Party or in escrow and each Party shall take all reasonable actions necessary and convenient to rescind, terminate or otherwise render ineffective the terms of this MOU. This obligation shall survive the termination of the MOU.

4. **Conditions Precedent to Transfer.** The obligation of the City to accept transfer of the Property is expressly conditioned upon the satisfaction, prior to said transfer, of each of the conditions precedent set forth in this Section 4 (each a "Condition Precedent" and, collectively, the "Conditions Precedent"), any of which Conditions Precedent may be waived by the City through its City Manager in his/her sole discretion. If any of the Conditions Precedent are not met within the specified timeframes below, the City Manager, in his/her sole and absolute discretion may elect one or more of the following remedies ("City Remedies"): (i) terminate this MOU and refuse to accept the Property; (ii) extend any applicable deadlines in order to afford the Corps more time to comply with such Conditions Precedent and proceed with the transfer; or (iii) partially or fully waive the fulfillment of the Condition Precedent and proceed with the transfer. If this Agreement is terminated, the City shall be under no legal obligation to accept the transfer of the Property.

(a) **Delivery of All Documents.** Each of documents listed below, which the Parties agree are necessary to effect the transfer of the Property and closing of the transfer transaction (collectively, the "Closing Documents"), shall be provided by the Corps no later than thirty (30) days after the City's Initial Approval; provided that the Quitclaim Deed shall be provided by the Corps to the City no later than fourteen (14) days after the City provides the Corps with a copy of the Final Map:

- (i) A fully executed FOST, including all related documents;
- (ii) Two fully executed original versions of this MOU ("Fully Executed MOU");
- (iii) The Quitclaim Deed;
- (iv) A copy of the Moratorium Removal Notice (defined below) establishing that the Permitting Moratorium has been lifted as described below in Section 4(b);
- (v) Copies of any lease termination letters to adjacent property owners or assigned leases, as applicable, as may be requested by the City pursuant to Section 4(e) hereof; and
- (vi) Any other documents deemed necessary by the City, the Corps or the Escrow Agent (defined below in Section 8(b)) to complete the transaction.

(b) Removal of Permitting Moratorium. No later than thirty (30) days after the City's Initial Approval, the Corps shall submit to the City a notice addressed to all property owners adjacent to the Property that the Permitting Moratorium will be removed from all portions of the Property on the Closing Date (the "Moratorium Removal Notice").

(c) Free and Clear Title. If the survey of the Property completed by the City contains any exceptions to title which are not acceptable to the City in the City Manager's sole and absolute discretion, then the City Manager shall notify the Corps of any and all objections to same in writing to the Corps no later than three (3) business days after the Effective Date. Any such objection by the City Manager shall be deemed to be a title defect ("Title Defect"). Such notice is referred to herein as the "Notice of Title Defect." The Corps shall take all reasonable efforts to cure the Title Defects identified by the City Manager as soon as possible but no later than thirty (30) days from the City's Initial Approval. If the Corps does not timely cure all Title Defects, the City through its City Manager may elect one or more of the City Remedies.

(d) Subsequent Purchaser Participation. The City shall take all reasonable actions to enter into with each owner adjacent to the Property or such other interested purchaser, as applicable, (each a "Subsequent Purchaser") any purchase and sale agreements, other agreements, instruments and other documents that may be required by applicable law (collectively, "Subsequent Transfer Documents") to transfer 86 parcels of the 94 parcels on the Property (each parcel transfer, a "Subsequent Transfer"). In the event that there is not a Subsequent Purchaser committed to enter into a Subsequent Transfer for each of the 86 parcels within sixty (60) days of the City's Initial Approval (the "Subsequent Transfer Commitment Date"), as determined by the City Manager in his/her sole discretion, the City shall be entitled (but not obligated) to terminate this Agreement and decline to accept transfer of the Property. If the Agreement is terminated, the Parties shall follow the termination process in Section 3(a).

(e) Assign or Release Existing Leases With Property Owners. As directed by the City Manager in his/her sole discretion, the Corps shall, within thirty (30) days of the City's Initial Approval, either terminate, assign to the City, or retain in place as an approved title exception, any current leases, licenses, easements or other outgrants applicable to the Property between the Corps, on the one hand, and any tenant, licensee or easement holder on the other hand (collectively, the "Existing Leases"). In the case of termination or assignment of an Existing Lease, the Corps shall submit to the City written evidence of such termination or assignment, reasonably satisfactory to the City Manager. The City shall review and deposit into escrow.

(f) Truth of Representations and Warranties. Each of the representations and warranties set forth in Sections 5, 6 and 7 hereof shall be true and correct as of the Effective Date until the Closing Date (the “Closing Period”).

5. Corps’ Representations and Warranties. To induce the City to enter into this Agreement and to accept the Property pursuant to the terms hereof, the Corps represents and warrants for the benefit of the City, both as of the Effective Date and at all times during the Closing Period as follows:

(a) Authority. The Corps is duly authorized to enter into this Agreement and has all necessary lawful authority, and has taken all necessary actions, to: (i) execute this Agreement, (ii) incur the obligations of the Corps specified herein, and (iii) transfer the Property to the City on the Closing Date in accordance with the terms hereof.

(b) Authority to Assign or Terminate Existing Leases. The Corps has all necessary regulatory and legal authority to either terminate or assign to the City the Existing Leases as directed by the City pursuant to Section 4(e) of this Agreement.

(c) CERCLA Section 120(h). The Corps represents and warrants that all remedial action necessary to protect human health and the environment with respect to any hazardous substance identified pursuant to Section 120(h)(3) of the Comprehensive Environmental Response, Cleanup and Liability Act of 1980 (“CERCLA”) remaining on the property will have been taken before the date of the Quitclaim Deed.

6. Corps’ Covenants. To induce the City to enter into this Agreement and to accept the Property pursuant to the terms hereof, the Corps hereby covenants as follows:

(a) Use of All Reasonable Efforts to Complete Transfer. The Corps shall use reasonable efforts and allocate necessary staffing resources to:

(i) ensure the delivery of the Closing Documents within the Closing Period, which efforts shall include, but are not limited to, contacting Corps staff and their respective supervisors in the San Francisco Corps District, the Sacramento Corps District or the Corps Headquarters in Washington D.C., as necessary and applicable, to finalize the Closing Documents; and

(ii) prioritize the process of transferring the Property in accordance with the terms hereof over other projects of the Corps to the greatest extent possible during the Closing Period.

(b) Dredging and Operations and Maintenance Obligations. The Corps shall retain any and all dredging and operation and maintenance obligations required by federal law to maintain navigation within the Tidal Canal and within the Property. Such dredging and operation and maintenance obligations of the Corps shall remain in effect until such time as Congress passes legislation relieving the Corps of its obligation to maintain navigation within waters of the United States.

(c) Indemnification and Defense Related to Environmental Liability. The Corps has completed Environmental Baseline Reports which confirm that soil at multiple locations along the commercial/industrial shoreline within the Property are contaminated with petroleum and heavy metals in excess of regulatory benchmarks for industrial land use. (*Environmental Baseline Survey Report, August 2016.*) (“Existing Environmental Contamination”). The Corps acknowledges that as the sole historical owner of the Property after 1884, the Existing Environmental Contamination must have been discharged during the Corps’ or predecessor’s ownership of the Property.

(i) CERCLA Section 120(h). The Corps shall complete such additional remedial action as may be found to be necessary after the Closing Date, to the extent authorized by Section 120(h)(3) of CERCLA (“CERCLA Remedial Actions”). This covenant will not apply to any remedial action required directly as a result of any act of the City or any adjacent developer after the Closing Date that causes a new release of hazardous substances on the Property.

(ii) Indemnity. The Corps agrees to indemnify, reimburse and hold harmless the City for any claims brought against the City as the owner of the Property related to remedial actions found to be necessary after the Closing Date to the extent authorized by Section 120(h)(3) of CERCLA and the Federal Tort Claims Act (the “FTCA”), 28, U.S.C. § 1346, and the Anti-Deficiency Act, (the “ADA”), 31 U.S.C. § 1301 et. seq. This indemnity will not apply to any remedial action required as a direct result of any act of the City or any adjacent developer after the Closing Date that causes a new release of hazardous substances on the Property.

(iii) Waiver of Environmental Liability. To the fullest extent permitted by applicable law, e.g., CERCLA, FTCA, and the ADA, and except as otherwise expressly set forth in this Agreement, the Corps does hereby waive and release the City, its City Council, its boards, its commissions, its officials, and its employees, agents (including any outside legal counsel retained by the City in connection with this Agreement and the transfer of the Property), any of the City’s successors and assigns (each an “Indemnitee” and collectively the “Indemnitees”) from any present or future claims and liabilities of any nature arising from or relating to the presence or alleged presence of hazardous substances in, on, at, from, under or about the Property, including, without limitation, any claims under or on account of any environmental law, regardless of whether such hazardous substances are located in, on, at, from, under or about the Property or any adjacent property prior to or after the Closing Date. In addition, to the fullest extent permitted by CERCLA, FTCA, and the ADA, the Corps does hereby covenant and agree to defend, indemnify, and hold harmless each Indemnitee from and against any claims, demands, penalties, fines, liabilities, settlements, damages, costs or expenses, known or unknown, existing in future, to the extent relating to any hazardous substances that were placed, located or released on the Property before the Closing Date and, with respect to any such releases, that existed on the Property prior to the Closing Date, including any action or proceeding brought or threatened or ordered by governmental authorities.

(d) Waiver and Release. To the fullest extent permitted by applicable law, e.g., CERCLA and FTCA, and the ADA, the Corps does hereby waive and release the Indemnitees from any future claims related to legal descriptions of the Property, property boundary disputes, encroachments existing prior to the Closing Date or the ongoing Dredging and Operations and Maintenance Obligations of the Corps.

7. City’s Representations and Warranties.

(a) Authority. The City hereby represents and warrants that it is duly authorized to enter into this Agreement and that it has all necessary lawful authority, and has taken all necessary actions, to execute this Agreement and to accept transfer of the Property.

(b) Use of All Reasonable Efforts to Complete Transfer. The City shall use reasonable efforts and allocate necessary staffing resources to facilitate the transfer of the Property within the Closing Period, which efforts shall include but are not limited to: (i) coordinating with and distributing draft purchase and sale agreements to all Subsequent Purchasers in advance of the City Approval to expedite and confirm that all such Subsequent Purchasers have committed to enter into a Subsequent Transfer by the Subsequent Transfer Commitment Date; (ii) reviewing all applicable environmental reports in a timely manner to avoid delays; and (iii) prioritizing this transfer process over other projects of the City to the greatest extent possible during the Closing Period.

8. **Closing Process; Escrow.**

(a) **Closing Process Prior to Escrow.** The Parties agree to observe the process outlined below in order to complete the transfer of the Property (the "Closing Process").

(i) No later than five (5) days after the Corps receives the City-Executed MOU, the Corps will execute and send back to the City for review and delivery into escrow three original Fully Executed MOUs. All other Closing Documents from the Corps will be provided to the City as soon as they become available during the Closing Period but no later than thirty (30) days after the City's Initial Approval; provided that the Quitclaim Deed shall be provided by the Corps to the City no later than fourteen (14) days after the City provides the Corps with a copy of the Final Map.

(ii) The City will review the Closing Documents and notify the Corps within five (5) business days of receiving any Closing Documents of any deficiencies in such Closing Documents (a "Closing Document Deficiency"). In the event of a Closing Document Deficiency, the City Manager, in his/her sole discretion may elect to use one or more City Remedies.

(b) **Escrow.** The Parties agree that an escrow (the "Escrow") shall be established to facilitate the Property transfer and the Subsequent Transfers. The City shall take all actions necessary to establish the Escrow with Chicago Title Company, 675 N. First Street, Suite 300, San Jose, CA 95112 (the "Escrow Agent"). The Parties agree to enter into any mutually agreeable escrow agreements and other related documents (collectively, the "Escrow Documents") as may be reasonably requested or required by the Escrow Agent to establish the Escrow and give effect to the terms of this MOU.

(c) **City Deposits Into Escrow.** Once the City has determined that the Closing Documents and Escrow Documents (if any) are complete and that no uncured Closing Document Deficiencies exist, the City shall submit the Closing Documents and written escrow instructions (the "Escrow Instructions") to the Escrow Agent instructing the Escrow Agent to close the Escrow in accordance with the terms of this Agreement and such Escrow Instructions.

(d) **Close of Escrow.** When the contingencies specified in Section 4 hereof have been satisfied or waived by the City and the Escrow Agent has received all necessary Closing Documents, Escrow Documents, and Escrow Instructions, the Escrow Agent shall close the Escrow in accordance with the Escrow Instructions. The Parties shall cooperate with each other and the Escrow Agent to prepare and execute such further documents (including further escrow instructions) as may be reasonably necessary to close the Escrow.

9. **Miscellaneous.**

(a) **Integrated Agreement.** This Agreement supersedes any prior agreements of the Parties with respect to the subject matter hereof, whether written or oral.

(b) **Effective Date.** This Agreement will become effective on the Effective Date.

(c) **Mutually Drafted Agreement.** Each of the Parties has been fully and competently represented by counsel of its own choosing in the negotiation and drafting of this Agreement. Accordingly, the Parties agree that any rule of construction of contracts resolving any ambiguities against the drafting party shall be inapplicable to this Agreement. Further, each of the Parties acknowledges that it has read this entire document, including the attached exhibits, and fully understands its terms and effect.

(d) Further Assurances. The Parties shall execute, acknowledge, and deliver such additional documents or instruments as may be necessary to carry out the intent of this Agreement, including, but now limited to, those expressly referred to in this Agreement.

(e) Entire Agreement; Amendment. This Agreement contains the entire agreement between the Parties with regard to the matters set forth. This Agreement may be amended or modified only by a written agreement executed by each of the Parties.

(f) Attachments. Attachments A, B, and C of this Agreement are each incorporated herein by this reference.

(g) No Third-Party Rights. This Agreement is not intended to, and shall not create, any rights in favor of any persons or entities other than the Parties, and no such third-party beneficiaries are intended.

(h) Notice. Any notice required or permitted to be given pursuant to this Agreement shall be in writing and shall be deemed to be given when served personally, or on the third business day after mailing if mailed by United States mail, postage prepaid, addressed to the applicable Party as set forth below:

If to the City:

City of Alameda
Alameda City Hall
2263 Santa Clara Ave., Rm 320
Alameda, CA 94501
Tel: (510) 747-4700
Attn: City Manager

With a copy to:

City of Alameda
Alameda City Hall
2263 Santa Clara Ave., Rm 280
Alameda, CA 94501
Tel: (510) 747-4750
Attn: City Attorney

If to the Corps:

US Army Corps of Engineers
1455 Market Street
San Francisco, CA 94103
Tel: (415) 503-6760
Attn: District Counsel

(i) Execution in Counterparts. The Parties may execute this Agreement in counterparts, each one of which will be an original or the equivalent thereof, and all such counterparts taken together shall constitute but one and the same agreement.

(j) Construction. The language in all parts of this Agreement shall in all cases be construed simply according to its fair meaning and not strictly for or against any of the parties hereto. Section headings of this Agreement are solely for convenience of reference and shall not govern the interpretation of any of the provisions of this Agreement. References to "sections" are the Sections of this Agreement, unless otherwise specifically provided.

(Remainder of page intentionally left blank; signature page follows)

In WITNESS WHEREOF, the Parties have signed this Memorandum of Understanding on the dates indicated below.

CITY OF ALAMEDA

U.S. ARMY CORPS OF ENGINEERS

By: _____
Jill Keimach,
City Manager

By: _____
LTC John C. Morrow
Commander and District Engineer

Date: _____

Date: _____

Attest:

**THIS AGREEMENT SHALL NOT BE
VALID OR EFFECTIVE FOR ANY
PURPOSE UNLESS AND UNTIL IT IS
SIGNED BY THE CORPS ATTORNEY**

By: _____
Lara Weisiger, City Clerk

Approved as to form and legality this
_____ day of _____, 2016

Approved as to Form:

By: _____
Andrico Q. Penick
Assistant City Attorney

By: _____
Merry Goodenough
District Counsel

Authorized by City Council Ordinance No. _____

ATTACHMENT A
Tidal Canal Overview Map

ATTACHMENT B
Subdivision Map of the Property

ATTACHMENT C
Quitclaim Deed