



**CITY AND COUNTY OF SAN FRANCISCO  
LONDON BREED, MAYOR**

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**ACQUISITION AND REIMBURSEMENT AGREEMENT**

**BY AND BETWEEN**

**THE CITY AND COUNTY OF SAN FRANCISCO,  
OPERATING BY AND THROUGH THE SAN FRANCISCO PORT COMMISSION**

**AND**

**SEAWALL LOT 337 ASSOCIATES, LLC,  
A DELAWARE LIMITED LIABILITY COMPANY**

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**ELAINE FORBES  
EXECUTIVE DIRECTOR**

**SAN FRANCISCO PORT COMMISSION**

**KIMBERLY BRANDON, PRESIDENT  
WILLIE ADAMS, VICE PRESIDENT  
JOHN BURTON, COMMISSIONER  
GAIL GILMAN, COMMISSIONER  
DOREEN WOO HO, COMMISSIONER**

**AUGUST 15, 2018 (REFERENCE DATE)**

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**EXHIBITS**

AA Exhibit A: Horizontal Improvements  
AA Exhibit B: Cost Estimates of Components by Phase  
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## ACQUISITION AND REIMBURSEMENT AGREEMENT

This **ACQUISITION AND REIMBURSEMENT AGREEMENT** (this “**Acquisition Agreement**”), dated as of the Reference Date, is between the **CITY AND COUNTY OF SAN FRANCISCO** (the “**City**”), acting by and through the **PORT COMMISSION OF THE CITY AND COUNTY OF SAN FRANCISCO** (the “**Port**”), and **SEAWALL LOT 337 ASSOCIATES, LLC**, a Delaware limited liability company (“**Developer**”). Developer and the Port are each a “**Party**” to this Acquisition Agreement.

Standard provisions and rules of interpretation in Part A of the attached Appendix to Transaction Documents (the “**Appendix**”) apply to this Acquisition Agreement. Terms used but not defined in this Acquisition Agreement are defined in Part B of the Appendix, as amended by that certain First Amendment to Disposition and Development Agreement dated June 25, 2020 (the “**First DDA Amendment**”). For purposes of clarification and the avoidance of doubt, all references to the “Appendix,” “DDA,” and “Financing Plan” shall be as amended by the First DDA Amendment.

### RECITALS

A. The Port and Developer have entered into the DDA, which includes the Financing Plan. The DDA obligates Developer to construct Horizontal Improvements at or serving the Project Site. **AA Exhibit A** (Horizontal Improvements) lists the Horizontal Improvements for the Project. The Port will meet its Project Payment Obligation under the Financing Plan, in part, by reimbursing Developer for the Horizontal Development Costs of Horizontal Improvements. This Acquisition Agreement describes two categories of Horizontal Improvements: (i) Horizontal Improvements that will be acquired by an Acquiring Agency, in which case this Acquisition Agreement describes the process for acquiring the Horizontal Improvement or Component thereof and (ii) as described in Section 5, Horizontal Improvements that will be owned by a private party and will not be purchased by an Acquiring Agency, in which case this Acquisition Agreement describes a reimbursement process that does not involve acquisition but is authorized pursuant to Government Code Section 53314.9.

B. The Port’s Approved Payment Requests will direct one or more Payment Agents to reimburse Developer with Developer Return accrued to the date of payment to the Developer.

C. The Port and the City have entered, or will enter, into the Tax Allocation MOU under which the City agrees to take actions necessary to make the Public Financing Sources available for the Acquisition Prices of, or reimbursement for, Horizontal Improvements as described in the Financing Plan and this Acquisition Agreement. In addition to the Public Financing Sources, the Port will satisfy the Project Payment Obligation with: (1) DRP Advances; (2) at its election, Port Capital Advances; and (3) other sources described in *FP § 1.6 (Other Sources)*.

D. This Acquisition Agreement describes the procedures by which, at Developer’s request, the Port will:

1. inspect on its own behalf, or cause authorized representatives of Other Acquiring Agencies to inspect, the Horizontal Improvements listed in **AA Exhibit A** (Horizontal Improvements), as amended under this Acquisition Agreement;
2. review and amend the phasing and Components of Horizontal Improvements, as set forth in **AA Exhibit B** (Cost Estimates of Components by Phase), as amended under this Acquisition Agreement;
3. authorize the payment to Developer of the Acquisition Prices of Horizontal Improvements or Components as Project Payment Sources become available to the Port in accordance with the Financing Plan; and
4. authorize the reimbursement of Developer with respect to Horizontal Improvements that are Authorized Private Improvements (as defined in Section 5) as Project Payment Sources become available to the Port in accordance with the Financing Plan.

## AGREEMENT

### 1. PURPOSE AND INTENT.

#### 1.1. Implementation.

(a) Purpose. This Acquisition Agreement: (i) implements and is subject to all limitations of the DDA and the Financing Plan; (ii) will become effective on the date this Acquisition Agreement is fully executed and delivered; and (iii) describes the procedures by which Horizontal Development Costs of the Horizontal Improvements are authorized for payment under the Financing Plan. The estimated Horizontal Development Costs of the Horizontal Improvements by Phase (including, for those Horizontal Improvements to be acquired, by Component) are set forth in **AA Exhibit B** (Cost Estimates of Components by Phase).

(b) Amounts Paid. The amounts paid for Horizontal Improvements, whether in the form of Acquisition Price or reimbursement, will include Developer Return accrued up to the date of payment. Developer will specify the actual Horizontal Development Costs of the portion of the Horizontal Improvement or Component for which payment or reimbursement is sought and provide the amount of Developer Return accrued up to a specified date and the daily rate at which Developer Return will continue to accrue until paid. Through its entries on the worksheet attached to each Payment Request, the Port will specify:

(i) the additional amount of Developer Return that has accrued between the date calculated for insertion into Developer's Payment Request and the date calculated for insertion into the attached Port worksheet on the Approved Payment; and

(ii) the interest rate at which Developer Return will accrue on a daily basis until a Payment Agent disburses funds in accordance with the Approved Payment.

(c) Relationship to Other Documents. Procedures in this Acquisition Agreement:

(i) are intended to complement and implement procedures in *DDA art. 3 (Phase Approval)*, *DDA art. 12 (Improvement Plans)*, *DDA art. 14 (Horizontal Development)*, *ICA art. 4 (Review Procedures for Improvement Plans, Inspections and Acceptance)*, and the Financing Plan; and

(ii) will never override requirements or conflicting provisions in any other Transaction Document; provided, however, that no provision in the Transaction Documents which references the ownership of Horizontal improvements by Developer or the applicable Acquiring Agency shall prevent third parties from owning Authorized Private Improvements (as defined below) or prevent Developer from obtaining reimbursement of Horizontal Development Costs and Developer Return for Horizontal Improvements which are Authorized Private Improvements.

#### 1.2. Horizontal Improvements List.

(a) Construction Phasing. The Parties intend **AA Exhibit A** (Horizontal Improvements) to document all Horizontal Improvements for which Developer could incur Horizontal Development Costs.

(b) Exclusive List. Under this Acquisition Agreement and *DDA art. 3 (Phase Approval)*, Developer will submit revisions to **AA Exhibit A** (Horizontal Improvements) from time to time to reflect changes in the scope of Horizontal Improvements for the Project that the Port has approved under *DDA § 3.7 (Changes to Phase)* or *DDA § 3.8 (Changes to Project)* as appropriate. Unless the changes are Material Modifications, the proposed changes will not require approval by the Board of Supervisors. The Port will not be required to use any Project Payment Source to pay for any Horizontal Improvement hereunder that is not listed in **AA Exhibit A** (Horizontal Improvements), as revised and approved. **AA Exhibit A** (Horizontal

Improvements) does not limit the financing of other Developer costs eligible for reimbursement under the DDA and the Financing Plan, including, but not limited to, the Entitlement Sum.

### 1.3. Horizontal Development Costs.

(a) Horizontal Development Cost Estimates. **AA Exhibit B** (Cost Estimates of Components by Phase) lists Developer's preliminary estimates of the Horizontal Development Costs of the Horizontal Improvements by Components (if applicable) and Phase for planning and informational purposes only. Actual Horizontal Development Costs to be paid will be reflected in the Phase Budget approved under *DDA art. 3 (Phase Approval)*, as amended under *DDA § 3.5(h) (Phase Budget Updates and Revisions)*, *DDA § 13.6 (Documentation of Costs)*, or otherwise by the Parties' agreement. In accordance with *DDA § 3.5(i)(iv) (Effect of Phase Budget Approval)*, the Phase Budget, including all allowances, contingencies, and approved amendments, will establish the upper limit of Horizontal Development Costs eligible for reimbursement.

(b) Exclusive List. To the extent that Components may be financed under this Acquisition Agreement, the Parties intend **AA Exhibit B** (Cost Estimates of Components by Phase) to be a list of all Components of the Horizontal Improvements and their estimated Horizontal Development Costs. **AA Exhibit B** (Cost Estimates of Components by Phase) will not be complete at execution of this Acquisition Agreement, but Developer will provide a description of Components and Acquisition Cost Updates through information provided under *DDA § 3.4(h) (Phase Budget Updates and Revisions)* and *DDA § 13.6 (Documentation of Costs)*. Each Acquisition Cost Update will supersede the prior version.

### 1.4. Project Payment Sources.

(a) Limitations. The Port will not be obligated to pay Developer any amounts due under the Financing Plan except from Project Payment Sources. The Port and Developer acknowledge that:

(i) Public Financing Sources may be applied to pay for a Horizontal Improvement approved by a Payment Request only to the extent that the amount is eligible for payment under Governing Law and Policy, including the Interest Cost Limitation, even if the costs were included in **AA Exhibit A** (Horizontal Improvements), **AA Exhibit B** (Cost Estimates of Components by Phase), and Acquisition Cost Updates;

(ii) limitations on the use of Public Financing Sources for the payment of a Horizontal Improvement or Component do not limit the Port's application of other Project Payment Sources for the payment for a Horizontal Improvement or Component; and

(iii) Developer will make commercially reasonable efforts to provide the Port timely with updated Horizontal Development Cost information so that the Port is able to budget for the availability of Project Payment Sources to pay for Horizontal Improvements and Components in **AA Exhibit B** (Cost Estimates of Components by Phase) and Acquisition Cost Updates.

(b) Escrow Bonds. Developer acknowledges that if the Port and Developer agree to issue escrow bonds for the Project, and Bond Proceeds are deposited in an escrow fund, escrowed amounts will become Project Payment Sources: (i) only after satisfaction of all escrow requirements and release from the escrow fund; and (ii) in the amounts specified in the applicable Indenture. The Port agrees to take all reasonable actions necessary to cause the release of funds from an escrow fund after all conditions for their release have been satisfied.

(c) No Payment Guarantee. The Port makes no warranty, express or implied, that Project Payment Sources will be sufficient to pay for the Horizontal Improvements.

### 1.5. Deposits of Project Payment Sources.

(a) Bond Proceeds. The proceeds of any Mello-Roos Bonds and Tax Allocation

Bonds will be deposited, held, invested, reinvested, and disbursed as provided in the respective Indentures, all in a manner consistent with the Financing Plan. The portion of Bond Proceeds that is used to fund reserves for debt service, to capitalize interest on the Bonds, and to pay costs of issuance and administration will not be available to make payments to Developer.

(b) Tax Revenues. Project Tax Revenues will be deposited in accounts within the Special Fund Trust Account subject to a Special Fund Administration Agreement and held and disbursed as specified in the Financing Plan.

(c) Parcel DRPs. Parcel DRPs will be deposited into Escrow Accounts established in accordance with the Vertical DDAs between the Port and Vertical Developers or the DRP Fund and disbursed in accordance with escrow instructions at the Close of Escrow for each Parcel Lease or as otherwise specified in the Financing Plan.

(d) Investment Policy. Developer acknowledges that Port, in its proprietary capacity and as CFD Agent and IFD Agent, will direct the investment of Project Payment Sources in accordance with the Port's and the City's investment policies, all applicable laws, and any applicable Indentures. The Port will have no responsibility to Developer with respect to any investment of Project Payment Sources before their use under this Acquisition Agreement, including any loss of all or a portion of the principal invested or any penalty for liquidation of an investment so long as the investments were made in accordance with all applicable laws and any applicable Indenture, even if a loss diminishes the amount of available Project Payment Sources.

## 2. CONSTRUCTION OF HORIZONTAL IMPROVEMENTS.

**2.1. Obligation to Construct.** The obligation to construct and fund construction of the Horizontal Improvements is governed solely by the DDA. This Acquisition Agreement does not obligate Developer to construct or pay for any Horizontal Improvement.

**2.2. Relationship to Public Works Contracting.** This Acquisition Agreement provides for the acquisition and/or financing of Horizontal Improvements from time to time from Project Payment Sources and is not intended to be a public works contract. In that regard, the Port and Developer agree to all of the following statements.

(a) Local Concern. Developer's construction of Horizontal Improvements and Components is of local, not statewide, concern.

(b) Private Work. Neither the California Public Contract Code nor the City's public works requirements apply to Developer's construction of the Horizontal Improvements.

(c) Private Contracts. Developer will award all contracts for the construction of the Horizontal Improvements.

(d) No Advantage. Requiring Developer to comply with the Public Contract Code and the City's public works requirements would be incongruous and would not produce an advantage to the City, the Port, or the Project.

(e) Compliance with DDA. Developer agrees that *DDA § 13.4 (Contracting Procedures)* will apply to all contracts for construction of the Horizontal Improvements, including Deferred Infrastructure under *DDA § 14.5 (Deferred Infrastructure)*.

(f) Consultation with Port. Developer agrees to conduct construction progress meetings in accordance with *DDA § 13.7 (Progress Meetings)*.

(g) Third-Party Work. Construction of the Horizontal Improvements may be performed by Developer, by contractors employed by Developer, or by a third-party (including but not limited to a Vertical Developer or contractor) that constructs the Horizontal Improvements on behalf of Developer.



### 2.3. Independent Contractor.

(a) No Obligation to Contractors. In performing under the DDA, Developer is an independent contractor and not the agent or employee of the Port, the City, the CFD, or the IFD. Except as otherwise provided in this Acquisition Agreement or in the Financing Plan, none of the Port, the City, the CFD, or the IFD has any obligation to make payments to any contractor, subcontractor, agent, consultant, employee, or supplier of Developer.

(b) Port Determination. The Port has determined that it would obtain no advantage by directly undertaking the construction of the Horizontal Improvements, and that the DDA requires that the Horizontal Improvements be constructed by Developer as if they had been constructed under the direction and supervision, or under the authority, of the City or the applicable Acquiring Agency.

## 3. ACQUISITION OF HORIZONTAL IMPROVEMENTS.

**3.1. Purchase and Sale.** For Horizontal Improvements other than the Authorized Private Improvements, Developer agrees to sell Horizontal Improvements at their Acquisition Prices to the Acquiring Agencies, and, for all Horizontal Improvements, the Port agrees to use Project Payment Sources to pay Developer the Horizontal Development Costs of Horizontal Improvements and the associated Developer Return as Project Payment Sources become available as described in the Financing Plan.

**3.2. Component Financing.** The following provisions apply to the acquisition of Horizontal Improvements, but do not apply to the reimbursement of Horizontal Development Costs or payment of Developer Return with respect to Authorized Private Improvements.

(a) Horizontal Improvements Valued at \$1 Million or Less. Section 53313.51(a) of the CFD Law and section 53395.8(g)(12)(A) of the IFD Law authorize the use of Public Financing Sources to purchase a Component of a Horizontal Improvement with an estimated Horizontal Development Cost of \$1 million or less so long as the Component is capable of serviceable use. Subject to the availability of Project Payment Sources, the Port agrees to pay to Developer in accordance with these provisions before Developer has completed the Horizontal Improvement of which the Component is a part, unless it is the final Component of the Horizontal Improvement.

(b) Horizontal Improvements Valued Over \$1 Million. If the estimated Horizontal Development Cost of a Horizontal Improvement is over \$1 million, section 53313.51(b) of the CFD Law and section 53395.8(g)(12)(B) of the IFD Law authorize the purchase of Components of that Horizontal Improvement *whether or not* the Components are capable of serviceable use. Subject to the availability of Project Payment Sources, the Port agrees to pay to Developer the Acquisition Prices of Components in accordance with these provisions before Developer has completed the Horizontal Improvement of which the Component is a part, unless it is the final Component of the Horizontal Improvement.

(c) Progress Payments. The CFD Law and the IFD Law authorize progress payments for Horizontal Improvements. **AA Exhibit B** (Cost Estimates of Components by Phase) will list the Components of Horizontal Improvements. When Project Payment Sources are available, the Port will make progress payments for either:

- (i) Components that are segments of a Horizontal Improvement (e.g., a segment of a water line); or
- (ii) incremental completion of a Component (e.g., percent completion of earthwork).

(d) Payment of Costs. Both Soft Costs and Hard Costs may be paid as part of the Acquisition Price of any Component to the extent consistent with the allocation of costs under **Subsection 4.1(d)** (Cost Allocation). Developer may also request progress payments for Soft

Costs and Hard Costs as allocated during construction of the Horizontal Improvements listed in **AA Exhibit A** (Horizontal Improvements).

(e) Acceptance Not A Condition. A Component does not have to be accepted by the Acquiring Agency as a condition precedent to the payment of its Acquisition Price.

**3.3. Defective or Nonconforming Work.** The following provision applies to the acquisition of Horizontal Improvements, but does not apply to the reimbursement of Horizontal Development Costs or payment of Developer Return with respect to Authorized Private Improvements. This Section will apply if an Acquiring Agency finds any of the work done or materials furnished for a Horizontal Improvement or Component to be defective or nonconforming to approved Improvement Plans and applicable laws. If the finding is made before the Port has paid the entire Acquisition Price for the Horizontal Improvement to Developer, the Port may withhold the payment until the defect or nonconformity is corrected to the Acquiring Agency's satisfaction. If the finding is made after the Port has paid the Acquisition Price to Developer, then the DDA, the Public Improvement Agreement by and between Developer and the City, and/or any agreement between Port and Developer entered into in connection with construction of the Public Spaces, as applicable will govern the Port's rights and remedies.

#### **4. PAYMENT REQUESTS.**

**4.1. Initiating Payment.** The following provisions apply to the acquisition of Horizontal Improvements, but do not apply to the reimbursement of Horizontal Development Costs or payment of Developer Return with respect to Authorized Private Improvements.

(a) Delivery to Chief Harbor Engineer. To initiate the process for authorizing payment, Developer must deliver to the Chief Harbor Engineer a Payment Request in the form of **AA Exhibit C** (Form of Payment Request) that contains all relevant information in an organized manner.

(b) Completeness Determination. The Chief Harbor Engineer will have 10 days after Developer delivers a Payment Request to review it for completeness. During the 10-day period, the Chief Harbor Engineer will have the right to request additional information and documentation reasonably necessary to complete the review, and will have an additional 10 days after Developer delivers the requested information or documentation to make a completeness determination.

(c) Required Attachments. Required attachments to each Payment Request include:

(i) an inspection report signed by the authorized representative of each applicable Acquiring Agency validating that the Horizontal Improvement or Component for which payment is requested complies with Project Requirements and Regulatory Requirements;

(ii) acceptable forms of proof of payment for the Horizontal Development Costs to be reimbursed;

(iii) other documents specified in **AA Exhibit C** (Form of Payment Request) to the extent applicable;

(iv) a completed copy of **AA Exhibit C1** (Components Covered by Payment Request) specifying each contractor, subcontractor, materialman, and other person with whom Developer or its contractor has entered into contracts with respect to any Component included in the Payment Request;

(v) the contract amount for each contract; and

(vi) signed and acknowledged lien releases and waivers (in the required statutory forms) from all contractors, subcontractors, materialmen, consultants, and other persons that Developer retained in connection with the Component, in each

instance unconditionally or conditionally waiving all lien and stop notice rights with respect to the pending payment.

(d) Cost Allocation. Developer will provide its Cost Allocation Proposal for the categories of Horizontal Development Costs listed below. Developer's Cost Allocation Proposal in a Payment Request will be presumed to be reasonable for purposes of this Acquisition Agreement unless the Chief Harbor Engineer notifies Developer of the Port's good-faith reasonable objection to the Cost Allocation Proposal within 10 days after Developer delivers the Payment Request to the Port.

(i) Soft Costs that apply to more than one Horizontal Improvement or Component, such as design fees and inspection and review fees, will be allocated to the related Hard Costs.

(ii) Whenever Hard Costs and Soft Costs apply to both Horizontal Improvements and Vertical Improvements (e.g., trunk utility infrastructure up to the lateral demarcation of a Development Parcel and connections from the building to the trunk infrastructure) will be allocated between Horizontal Development Costs eligible for reimbursement and vertical development costs that are ineligible.

(iii) If not previously stated in **AA Exhibit B** or an Acquisition Cost Update for Horizontal Improvements to be purchased in Components, Developer must provide the amount of the Acquisition Price allocated to each Component or use a reasonable, objective method to allocate among Components.

(e) Phase Final Payment. The final Payment Request for a Phase also must include:

(i) a copy of the Chief Harbor Engineer's SOP Compliance Determination for the Horizontal Improvements in such Phase under *DDA § 14.6 (SOP Compliance)*;

(ii) Developer's signed assignment of warranties and guaranties for the Horizontal Improvements in such Phase, in a form acceptable to the Acquiring Agency;

(iii) as-built drawings and an executed assignment of the Improvement Plans, as required pursuant to DDA Section 12.4; and

(iv) an executed assignment of reimbursements, if any, from third parties payable with respect to the Horizontal Improvements in such Phase, such as utility or other reimbursements, which the Port will tender to the Special Fund Trustee for deposit into the DRP Fund, unless the Parties agree to apply the funds to the Payment Request.

**4.2. Processing Payment Requests.** The following provisions apply to both the acquisition of Horizontal Improvements and to the reimbursement of Horizontal Development Costs and payment of Developer Return with respect to Authorized Private Improvements.

(a) Port Review of Payment Request.

(i) The Chief Harbor Engineer will have 30 days after the Payment Request is complete to:

(1) determine whether it meets all applicable conditions of **Section 4.1** (Initiating Payment) or **Section 5.3** (Initiating Payment for Authorized Private Improvements), as applicable; and

(2) provide notice of its determination to Developer under **Subsection 4.2(b)** (Notice to Developer).

(ii) During the 30-day period, the Chief Harbor Engineer will have the right to request additional information and documentation reasonably necessary to complete the review. In that case, the Chief Harbor Engineer will have an additional 15 days to

provide notice of its determination after Developer delivers the requested information or documentation.

(b) Notice to Developer.

(i) If the Chief Harbor Engineer approves the Payment Request, it will deliver a countersigned copy of the Payment Request to Developer simultaneously with delivery of the original under **Subsection 4.3(a)** (Port Finance Director).

(ii) If the Chief Harbor Engineer does not approve the Payment Request, it must specify in writing the reasons for its disapproval. If the Payment Request is disapproved, Developer may revise and resubmit it for approval, and the Chief Harbor Engineer will review it within the amount of time that is reasonable in light of the materiality of the reasons for the disapproval, not to exceed the greater of 10 days and the remaining number of days in the 30-day period under **Subsection 4.2(a)** (Port Review of Payment Request).

(c) Deemed Approval. If the Chief Harbor Engineer fails to notify Developer within the 30-day period under **Subsection 4.2(a)** (Port Review of Payment Request) that a Payment Request is approved or disapproved, and the failure continues after the expiration of the electronic notice period under *App ¶ 2.2(c) (No Deemed Approval or Consent Without Notice)*, the Payment Request will be deemed approved.

**4.3. Processing Payments.** The following provisions apply to both the acquisition of Horizontal Improvements and to the reimbursement of Horizontal Development Costs and payment of Developer Return with respect to Authorized Private Improvements.

(a) Port Finance Director.

(i) Within five days after approving a Payment Request, the Chief Harbor Engineer must forward the original signed Approved Payment Request to the Port Finance Director. If the Chief Harbor Engineer has not forwarded the Approved Payment Request within that period, or the Payment Request is deemed approved under **Subsection 4.2(c)** (Deemed Approval), Developer will have the right to deliver directly to the Port Finance Director a Deemed Approved Payment Request, consisting of the Payment Request, together with proof of its delivery and later electronic notice to the Chief Harbor Engineer under **Subsection 4.2(c)** (Deemed Approval), with a copy to the Chief Harbor Engineer.

(ii) In addition to the Horizontal Development Costs in a Payment Request, the Port Finance Director will authorize payment of Developer Return by annotating the Payment Request with a preliminary calculation and the amount to be added for each day between the date of her calculation and the date the funds are disbursed.

(b) Disbursements. As Project Payment Sources become available, the Port Finance Director will direct disbursements by delivering a copy of a signed and annotated Approved Payment Request, which will serve as the Port's payment instructions, to each applicable Payment Agent, with copies to Developer, the CFD Agent, and the IFD Agent if applicable for their files. The Payment Agents will be directed to apply Project Payment Sources to pay (i) the Acquisition Prices of the Horizontal Improvements and their Components, or (ii) the reimbursement amount for the Authorized Private Improvements, in both cases subject to any limitations under Governing Law and Policy and any priorities established in the Financing Plan.

**4.4. Priority of Payment Requests.** The following provisions apply to both the acquisition of Horizontal Improvements and to the reimbursement of Horizontal Development Costs and payment of Developer Return with respect to Authorized Private Improvements.

(a) Numbering and Priority.

(i) For identification purposes only, Developer must number each Payment Request by Phase, numbered in the order in which it is submitted to the Port. The Port Finance Director will number each Payment Request approved under this Acquisition Agreement and Requisition approved under the Financing Plan by Phase and date of approval.

(ii) Approved Payments will be paid in accordance with the priorities specified in *FP § 2.5(f) (Priorities for Payment)*.

(b) Phase-Specific. Each Payment Request must be limited to Horizontal Development Costs that Developer incurred in a single Phase, subject to the right of Developer to include District Utility Infrastructure Costs incurred in Phase 1 in subsequent Phases pursuant to Section 2.5(f)(ii)(5) of the Financing Plan (as set forth in Section 2(c)(vi) of the First DDA Amendment), as the same may be amended, supplemented or modified from time to time.

(c) Public Financing. The Port and Developer acknowledge that Public Financing Sources may be applied to a Payment Request only to the extent that the Horizontal Development Costs are eligible for payment under Governing Law and Policy, including the Interest Cost Limitation.

(d) No Deadline to Pay. The Port will honor Payment Requests:

(i) in any number of installments as Project Payment Sources become available; and

(ii) until fully paid, subject only to limitations on the amount of Project Payment Sources available for the Project.

(e) All Undisputed Amounts Paid. Except as provided under the DDA with respect to a Material Breach, the Port agrees not to withhold payment on any undisputed portion of a Payment Request.

**4.5. Vesting.** The following provision applies to both the acquisition of Horizontal Improvements and to the reimbursement of Horizontal Development Costs and payment of Developer Return with respect to Authorized Private Improvements. Developer's right to payment under a Payment Request will vest when it is approved or deemed approved under **Section 4.2** (Processing Payment Requests). If Project Payment Sources are not available to pay the full amount of a Payment Request when approved, then the Port will direct payment to the extent Project Payment Sources are available and notify Developer of the amount of the remaining unpaid portion. Developer will have a vested right to the payment of the unsatisfied portion of the Payment Request as Project Payment Sources later become available.

## 5. REIMBURSEMENT FOR AUTHORIZED PRIVATE IMPROVEMENTS

**5.1. Authorized Private Improvements.** Some of the Horizontal Improvements may be privately-owned and operated by Developer or a third party and not acquired by an Acquiring Agency or any other governmental agency (collectively, the "**Authorized Private Improvements**"), including, but not limited to, the Non-Potable Water System (Blackwater Treatment Facility), the District Energy System, and the pipes and other conduits serving such facilities.

**5.2. Construction.** Although the Authorized Private Improvements will continue to be owned privately after the reimbursement by Port to Developer hereunder rather than being transferred to an Acquiring Agency, the Authorized Private Improvements will be

constructed in accordance with the requirements of the DDA and CFD Law. One or more Authorized Private Improvements may initially be financed and/or constructed in whole or in part by or on behalf of the owner of the Authorized Private Improvements (rather than the Developer), in which event Developer may still include any such financing costs and construction costs in its Payment Request for the reimbursement of Authorized Private Improvements so long as Developer pays such owner for such costs prior to submitting such Payment Request. Developer Return with respect to such costs will not start accruing until Developer pays such owner for such costs. Ownership of any Authorized Private Improvements may be transferred between Developer or any third parties at any time, and no such transfer of ownership shall impact the Port's reimbursement or other obligations hereunder.

### 5.3. Initiating Payment for Authorized Private Improvements.

(a) Delivery to Chief Harbor Engineer. To initiate the process for authorizing reimbursement of Horizontal Development Costs and payment of Developer Return with respect to Authorized Private Improvements, Developer must deliver to the Chief Harbor Engineer a Payment Request in the form of **AA Exhibit C** (Form of Payment Request) that contains all relevant information in an organized manner.

(b) Completeness Determination. The Chief Harbor Engineer will have 10 days after Developer delivers a Payment Request to review it for completeness. During the 10-day period, the Chief Harbor Engineer will have the right to request additional information and documentation reasonably necessary to complete the review, and will have an additional 10 days after Developer delivers the requested information or documentation to make a completeness determination.

(c) Required Attachments. Required attachments to each Payment Request include:

(i) an inspection report signed by the authorized representative of the Developer or the owner of such Authorized Private Improvement certifying that the Authorized Private Improvement was constructed in accordance with Regulatory Approvals and permits issued by the Port, City, and/or any other Regulatory Agency, as applicable;

(ii) acceptable forms of proof of payment for the Horizontal Development Costs to be reimbursed;

(iii) other documents specified in **AA Exhibit C** (Form of Payment Request) to the extent applicable.

(iv) a completed copy of **AA Exhibit C1** (Components Covered by Payment Request) specifying each contractor, subcontractor, materialman, and other person with whom Developer or its contractor has entered into contracts with respect to any Component included in the Payment Request;

(v) the contract amount for each contract; and

(vi) signed and acknowledged lien releases and waivers (in the required statutory forms) from all contractors, subcontractors, materialmen, consultants, and other persons that Developer retained in connection with the Component, in each instance unconditionally or conditionally waiving all lien and stop notice rights with respect to the pending payment.

(d) Cost Allocation. Developer will provide its Cost Allocation Proposal for the categories of Horizontal Development Costs listed below. Developer's Cost Allocation Proposal in a Payment Request will be presumed to be reasonable for purposes of this Acquisition Agreement unless the Chief Harbor Engineer notifies Developer of the Port's good-faith reasonable objection to the Cost Allocation Proposal within 10 days after Developer delivers the Payment Request to the Port.

(i) Soft Costs that apply to more than one Horizontal Improvement or Component, such as design fees and inspection and review fees, will be allocated to the related Hard Costs.

(ii) Whenever Hard Costs and Soft Costs apply to both Horizontal Improvements and Vertical Improvements (e.g., trunk utility infrastructure up to the lateral demarcation of a Development Parcel and connections from the building to the trunk infrastructure) will be allocated between Horizontal Development Costs eligible for reimbursement and vertical development costs that are ineligible.

(e) Final Payment. The final Payment Request for a Horizontal Improvement also must include:

(i) a copy of the Chief Harbor Engineer's SOP Compliance Determination for the Horizontal Improvement under *DDA § 14.6 (SOP Compliance)*; and

(ii) an executed assignment of reimbursements, if any, from third parties payable with respect to the Horizontal Improvements, such as utility or other reimbursements, which the Port will tender to the Special Fund Trustee for deposit into the DRP Fund, unless the Parties agree to apply the funds to the Payment Request.

**5.4. Processing Payment Requests.** Payment Requests for Authorized Private Improvements shall be processed pursuant to Sections 4.2, 4.3, 4.4 and 4.5 above.

## **6. MISCELLANEOUS.**

### **6.1. Communications and Notices.**

(a) Manner of Certain Communications. The following communications may be made in any written form for which receipt may be confirmed, including facsimile, electronic mail, and certified first class mail, return receipt requested:

(i) updates to **AA Exhibit A** (Horizontal Improvements) or **AA Exhibit B** (Cost Estimates of Components by Phase);

(ii) requests for information or clarification regarding a Payment Request; and

(iii) any Port notice regarding a Payment Request.

(b) Effective Date. Communications covered by this Subsection will be effective upon receipt, or, if delivered after 5 p.m. on a weekday or on a weekend or holiday, the next business day.

(c) Additional Information. In connection with processing any request under this Acquisition Agreement (including Payment Requests), the Port agrees that any additional information request by the Chief Harbor Engineer to Developer must be submitted as soon as practicable following the submission of the original materials, but in any event prior to applicable deadlines required by this Acquisition Agreement. The Chief Harbor Engineer will use good faith efforts to make each additional information request comprehensive and thorough to minimize the number of requests delivered, and Developer will use good faith efforts to provide a thorough, organized, and complete response to each request. Developer is authorized to communicate directly with the Port to facilitate any additional information request,

to facilitate the prompt resolution of any technical issues, and to minimize the amount of time it takes to resolve outstanding issues.

(d) Submittals. Developer must submit proposed Payment Requests to the Port for review and processing by certified first class mail - return receipt requested, personal delivery, or receipted overnight delivery. Payment Requests must be clearly marked: "Payment Request No. \_\_\_\_\_; Mission Rock; Attn: Chief Harbor Engineer" or, for deemed approval, "Port Finance Director." App ¶ A.5.3 (Effective Date) will apply to Developer's delivery of all Payment Requests. Developer will also comply with App ¶ 2.2(c) (No Deemed Approval or Consent Without Notice) before it will be deemed approved. Copies of communications covered by this Subsection must be delivered in the same manner as the original.

(e) Notices. All other notices must be given in the manner specified in App ¶ A.5 (Notices) to the addresses for notice provided below, or as changed in accordance with App ¶ A.5 (Notices).

Port:

Port of San Francisco  
Pier 1  
San Francisco, CA 94111  
Telephone: (415) 274-0400

Att'n: Chief Harbor Engineer  
Facsimile: (415) 274-0551  
Email: rod.iwashita@sfport.com

Or

Att'n: Deputy Director, Finance/Admin.  
Facsimile: (415) 274-0630  
Email: katharine.petrucione@sfport.com

Or:

Att'n: Phil Williamson  
Facsimile: (415) 274-0543  
Email: phil.williamson@sfport.com

With a copy to:

City Attorney's Office  
Port of San Francisco  
Pier 1  
San Francisco, CA 94111  
Att'n: General Counsel

Telephone: (415) 274-0509  
Facsimile: (415) 274-0494  
Email: michelle.sexton@sfcityatty.org



Developer:

SWL 337 Associates, LLC  
c/o Tishman Speyer Development, L.L.C.  
One Bush Street, Suite 500  
San Francisco, California 94104

Attn: Regional Director  
Email: cshannon@tishmanspeyer.com

c/o San Francisco Giants  
24 Willie Mays Plaza  
San Francisco, CA 94107

Attn: Jack Bair

Email: jbair@sfgiants.com

With a copy to:

Coblentz, Patch, Duffy & Bass, LLP  
One Montgomery Street, 30<sup>th</sup> floor  
San Francisco, CA 94104

Attention: Harry O'Brien  
Email: hobrien@coblentzlaw.com

(f) Day-to-Day Communications. Developer and the Port agree that day-to-day communications will be directed as follows.

(i) Developer: Margaret Kadin, (415) 344-6631,  
mkadin@tishmanspeyer.com

(ii) Port: Phil Williamson, Port Project Manager, (415) 274-0453,  
phil.williamson@sport.com.

**6.2. Amendment.** The Parties may amend this Acquisition Agreement from time to time by a signed writing. Changes to the form of the Payment Request as needed to make adjustments to clarify and expedite the payment process under this Acquisition Agreement, **AA Exhibit A** (Horizontal Improvements), and **AA Exhibit B** (Cost Estimates of Components by Phase) are ministerial in nature and will not require this Acquisition Agreement to be amended.


**6.3. Parties in Interest.** Nothing in this Acquisition Agreement, expressed or implied, is intended to or will be construed to confer upon or to give to any person other than the Port and Developer any rights, remedies, or claims under or by reason of this Acquisition Agreement or any covenants, conditions, or stipulations of this Acquisition Agreement; and all covenants, conditions, promises, and agreements in this Acquisition Agreement contained by or on behalf of the Port or Developer will be for the sole and exclusive benefit of the Port and Developer.

*[Signature Page Follows]*

Executed as of the last date set forth below.

**DEVELOPER:**

Seawall Lot 337 Associates, LLC,  
a Delaware limited liability company

By:   
6064403502B242E...

Date: 5/19/2021

**PORT:**

**CITY AND COUNTY OF SAN FRANCISCO**, a  
municipal corporation, operating by and through  
the San Francisco Port Commission

By:   
BD2F0B693FFE43F...

Elaine Forbes,  
Executive Director

Date: 5/20/2021

Authorized by Port Resolution No. 18-03  
and Board of Supervisors Resolution No. 42-18.

**APPROVED AS TO FORM:**

Dennis J. Herrera, City Attorney

By:   
1A6CEE23A2B745B...

Deputy City Attorney

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APPENDIX

(To be attached.)

**[Note: Before execution, the parties may elect to incorporate the Appendix by reference or attach an Appendix that includes only applicable definitions.]**

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**AA EXHIBIT A**

**Horizontal Improvements**

To be completed and attached before execution of Acquisition Agreement  
and  
amended through Phase Approval process.

[Page intentionally left blank.]

**AA EXHIBIT B**

**Cost Estimates of Components by Phase**

To be completed for each Phase Submittal  
and  
amended by Phase Quarterly Reports, change orders, and Phase Budget revisions.

PHASE:



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**AA EXHIBIT C**

**Form of Payment Request<sup>1</sup>**

PAYMENT REQUEST NO. \_\_\_\_\_

PHASE: \_\_\_\_\_

PRINCIPAL AMOUNT REQUESTED: \$\_\_\_\_\_ for actual costs of Horizontal Improvements.

To the Chief Harbor Engineer and the Port:

- 1. I am authorized to execute this Payment Request on behalf of Developer.
- 2. The costs for which payment is requested:
  - (a) have not been inflated in any respect;
  - (b) have not been previously paid;
  - (c) are not the subject of any previously submitted Payment Requests; and
  - (d) have been calculated in conformance with the DDA, including the Financing Plan, and the Acquisition Agreement.

3. This Payment Request applies to:

a progress payment for a portion of the following Component or Horizontal Improvement \_\_\_\_\_; or

the following Component or Horizontal Improvement \_\_\_\_\_.

The Acquiring Agency has inspected the Improvements for which payment is requested and determined that they have been constructed in accordance with the DDA. The Horizontal Development Costs for which payment is requested are not the subject of dispute with any contractor, subcontractor, materialman, or other person who supplied goods or labor, as evidenced by the attached lien releases. [Not applicable to Authorized Private Improvements.]

The Chief Harbor Engineer has inspected the Improvements for which payment is requested and determined that they have been constructed in accordance with the DDA. The costs for which payment is requested are not the subject of dispute with any contractor, subcontractor, materialman, or other person who supplied goods or labor, as evidenced by the attached lien releases.

4. Developer is in compliance with the DDA and the Acquisition Agreement.

5. Developer is not:

(a) delinquent in the payment of ad valorem real property taxes, possessory interest taxes, Mello-Roos Taxes, or special assessments levied on the Project Site; or

(b) in Material Breach of the DDA.

6. This Payment Request seeks approval of the following amounts:

Reimbursement of Developer costs in the amount of \$\_\_\_\_\_, of which \$\_\_\_\_\_ was expended on costs eligible for reimbursement from the Waterfront Set-Aside, plus:

Developer Market Rate Return, consisting of \_\_\_\_\_

<sup>1</sup> NTD: Subject to further review and comment based on discussion regarding allocation issues.

\$\_\_\_\_\_ of Allowed Return accrued to date, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day and  
 \$\_\_\_\_\_ of Additional Return accrued to date, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day; or

Alternative Developer Return accrued to date, consisting of

\$\_\_\_\_\_ of Allowed Return accrued to date, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day and  
 \$\_\_\_\_\_ of Additional Return accrued to date, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day; or

Reduced Return accrued to date, consisting of

\$\_\_\_\_\_ of Allowed Return accrued to date, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day and  
 \$\_\_\_\_\_ of Additional Return accrued to date, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day.

7. Please instruct the Payment Agents to disburse funds to

Developer's deposit account at the following financial institution by wire, according to the following instructions:

[Insert wiring instructions.]

Each third party listed below at the specified address and in the specified amounts:

Name	Amount (\$)	Address

By signing below, I certify that the above representations and warranties and all information provided in this Payment Request, including attachments and exhibits, are true and correct to the best of my knowledge based on reasonable investigation and inquiry.

By: \_\_\_\_\_  
 [Printed Name]  
 Authorized Representative of Developer

Date: \_\_\_\_\_

Attachments:

- Notice of approval
- Unconditional lien releases from:
- Conditional lien releases from:
- For Completed Horizontal Improvement:  
 Copy of Chief Harbor Engineer Approval or

Record of Deemed Approval  
[ ] AA Exhibit C1

**NOTICE TO CHIEF HARBOR ENGINEER**

Under section 4.2(c) of the Acquisition Agreement, if you fail to notify Developer that this Payment Request is approved or disapproved within 30 days after you determine that this Payment Request is complete, and the failure continues after the expiration of the electronic notice period under *App ¶ 2.2(c) (No Deemed Consent Without Notice)*, this Payment Request will be **deemed approved**.

Payment Request approved on \_\_\_\_\_

By: \_\_\_\_\_  
Chief Harbor Engineer

**OR** Proof of delivery to Chief Harbor Engineer to support deemed approval.

**WORKSHEET FOR PORT USE ONLY:**

Approved Payment No. \_\_\_\_\_

Date of calculation: \_\_\_\_\_

<b>Project Payment Sources</b>	<b>Authorized Uses</b>	<b>Amount to be disbursed (\$) for HDCs</b>	<b>Accrued Developer Return</b>
DRP Advance - Credit Bid <sup>1</sup>	o All Project Capital Costs		
DRP Advance - Cash <sup>1</sup>	o All Project Capital Costs		
Port Capital Advance <sup>2</sup>	o Developer's Capital Costs		
Pay-as-you-go Facilities Special Taxes	o All Project Capital Costs		
Bonds secured by Facilities Special Taxes and Special Debt Service	o Specified Project Capital Costs subject to the Interest Cost Limitation		
Bonds secured by Facilities Special Taxes only	o Specified Project Capital Costs		
Pay-as-you-go Project Area I Allocated Tax Increment – Project Funds	o Specified Project Capital Costs subject to the Interest Cost Limitation		
Pay-as-you-go Project Area I Allocated Tax Increment – Waterfront Set-Aside Funds	o Specified Project Capital Costs for shoreline restoration, removal of bay fill, or waterfront public access to or environmental remediation of the San Francisco waterfront, subject to the Interest Cost Limitation		
Tax Allocation Bonds – Project Funds	o Specified Project Capital Costs subject to the Interest Cost Limitation		
Tax Allocation Bonds - Waterfront Set-Aside Funds	o Specified Project Capital Costs for shoreline restoration, removal of bay fill, or waterfront public access to or environmental remediation of the San Francisco waterfront, subject to the Interest Cost Limitation		
Subtotals			
Totals			

1. Developer costs reimbursed by DRP Advances will be recorded on the allonge to the Promissory Note, together with specific amounts applied to Allowed Developer Return and Additional Developer Return. Public Financing Sources used to make Promissory Note payments may only be used for eligible uses. For example, pay-as-you-go Tax Increment and Bond

Proceeds secured by Tax Increment may not be used to pay any portion of amounts applied to Additional Developer Return, as recorded on the allonge, or to Additional Port Return payable under the Promissory Note. Pay-as-you-go Facilities Special Taxes and proceeds of Mello-Roos-only Bonds may be used for any purpose authorized under the SF Special Tax Law.

2. Developer costs reimbursed by Port Capital Advances will be recorded on the Port Capital Schedule, together with specific amounts applied to Allowed Developer Return and Additional Developer Return. Public Financing Sources used repay Port Capital Advances may only be used for eligible uses. For example, pay-as-you-go Tax Increment and Bond Proceeds secured by Tax Increment may not be used to pay any portion of amounts applied to Additional Developer Return, as recorded on the allonge, or to Additional Port Return accrued on Port Capital Advances. Pay-as-you-go Facilities Special Taxes and proceeds of Mello-Roos-only Bonds may be used for any purpose authorized under the SF Special Tax Law.

Payment Agents are authorized to disburse Project Payment Sources consistent with the authorized uses and amounts specified above, with:

- Developer Market Rate Return accrued up to the date specified above, consisting of \$\_\_\_\_\_ of Allowed Return, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day and \$\_\_\_\_\_ of Additional Return, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day; or
- Alternative Developer Return accrued up to the date specified above, consisting of \$\_\_\_\_\_ of Allowed Return, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day and \$\_\_\_\_\_ of Additional Return, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day; or
- Reduced Return accrued up to the date specified above, consisting of \$\_\_\_\_\_ of Allowed Return, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day and \$\_\_\_\_\_ of Additional Return, plus amounts accrued up to the date on which payment is made at the rate of \$\_\_\_\_\_ per day.

By: \_\_\_\_\_  
Port Finance Director

**AA EXHIBIT C1**

**Form: Components or Costs Covered by Payment Request**

PAYMENT REQUEST NO. \_\_\_\_\_

PHASE: \_\_\_\_\_

1. The Components (descriptions must match **AA Exhibit B**) or other costs for which payment is requested under this Payment Request are:

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2. Information for each contractor, subcontractor, materialman, and other contract for which payment is requested under this Payment Request is shown below.

Name	Contract Amount (\$)	Date Paid by Developer	Requested Amount (\$)	Previously Paid (\$)
Total Requested:				

Attachments:

Proof of Payment for each amount specified above