

DEFENSE AND INDEMNIFICATION AGREEMENT

This defense and indemnification agreement (“**Agreement**”) is entered into by and among County of Contra Costa, a political subdivision of the State of California (“**County**”), and the cities of Brentwood (“**Brentwood**”), Clayton (“**Clayton**”), Oakley (“**Oakley**”), Pittsburg (“**Pittsburg**”), each a municipal corporation (individually a “**Participating Agency**” and together “**Participating Agencies**”), and the East Contra Costa County Habitat Conservancy (“**Conservancy**”), by and through their undersigned counsel, including all employees, agents, representatives, legal assistants, staff, and agents of such counsel (collectively, the “**Parties**,” and each a “**Party**”). This Agreement is dated April 5, 2021 for the convenience of the Parties. The Agreement takes effect upon execution as provided for in Section 7.

RECITALS

- A. In 2007, the Cities and County formed a joint powers authority (the Conservancy) for purposes of implementing the East Contra Costa County Habitat Conservation Plan and Natural Community Conservation Plan (“**Plan**”) as authorized under state and federal law.
- B. To ensure that the Plan implementation fees generated by development and other covered activities adequately cover a share of Plan costs, the Plan requires a fee audit in years 3, 6, 10, 15, 20, and 25 of Plan implementation, where year 1 is the first full calendar year of Plan implementation (see Chapter 9 of the Plan). In 2007, the Cities and County adopted Plan implementation fees pursuant to the Plan (“**2007 Fees**”) and began collecting the fees in 2008. Consistent with the financial planning presented in Chapter 9 of the Plan, 2007 is year 0, 2008 is year 1, and 2016 is year 9 of Plan implementation.
- C. The Conservancy has completed an evaluation of existing Plan implementation fees and conservancy expenditures for year 10 (2017) as required by the Plan, based on data as of December 31, 2016 (year 9), and has recommended an updated implementation fee schedule for adoption by the Participating Agencies (the “**2017 Fees**”). The next audit is required in year 15, or 2022.
- D. Interested parties have submitted written and oral comments to the Conservancy regarding previous Plan fee audits and Conservancy recommendations for updated Plan implementation fees, which comments asserted legal error with respect to the Plan and Plan fees and the required periodic review of Plan fees and Conservancy expenses.
- E. The Parties have concluded there is a substantial likelihood of:
 - 1) continued administrative challenges; and
 - 2) litigation to be filed against the Conservancy, Cities, and County collectively and/or individually, challenging the proposed and existing fees, as well as a potential legal challenge to the Plan and the Conservancy’s actions and recommendations (individually and together the “**Covered Action**,” as defined in Section 2, below).

- F. The comments made by interested third parties pertain to facts and legal issues common to the Parties, and the Parties, as anticipated potential defendants, acknowledge that they share a common interest in defending against claims made by third parties, and they may wish to make joint efforts in preparation against any defense of anticipated actions or proceedings.
- G. The Parties have informally cooperated as to the overall actions of the Conservancy, the Plan, along with the proposed revisions to existing fees as well as the required periodic fee audits. The Parties wish to continue pursuing their separate, but common, interests in connection with the defense of the Plan, existing fees and proposed fees, and the periodic fee audits while sharing otherwise privileged information relevant to collective interests, and to make clear that, in doing so, they do not waive nor intend to waive any applicable privilege or other protection, whether attorney-client privilege, the work product doctrine, or any other protection available by law.

THEREFORE, in consideration of the mutual covenants herein contained, the Parties agree as follows:

1. Cooperation in Defense in Any Future Action.

The Parties shall cooperate in any Covered Action, as defined in Section 2, below, by and through their respective attorneys, and shall be subject to the terms of this Agreement.

2. Scope of Covered Actions.

Actions covered by this Agreement (each a “**Covered Action**”) involve any claim, action, or proceeding brought against a Participating Agency which seeks to invalidate (including injunctive and declaratory relief), either facially or as applied to an individual property owner or applicant, any of the following:

- a. The Plan;
- b. The Participating Agency’s 2007 Fees;
- c. The Participating Agency’s 2017 Fees, provided the 2017 Fees conform to the recommendation of the Conservancy Board as adopted on February 22, 2021;
- d. The Participating Agency’s 2022 Fees, provided the 2022 Fees conform to the recommendation of the Conservancy Board; or
- e. The five year accounting as required by Government Code section 66001 as performed in 2018.

Covered Actions do not include any claims, actions, or proceedings brought solely on grounds that a Participating Agency failed to satisfy all procedural steps (e.g., public notice, hearing, availability of public documents) in advance of the adoption of the 2017 Fees, or any claim arising from the intentional misconduct of the Participating Agency’s officers or employees.

3. Defense and Indemnity.

- a. Conservancy agrees to defend, indemnify, and hold harmless each Participating Agency, its agents, officers and employees from any claim, action, or proceeding against the Participating Agency or its agents, officers or employees for any Covered Action, as defined in Section 2, or actions seeking to impose personal liability against such officers,

agents, or employees resulting from their involvement in any and all proceedings or actions taken by a Participating Agency in connection with any Covered Action, as defined in Section 2. The Conservancy's duty to defend, indemnify, and hold harmless each Participating Agency shall include any claim for attorney's fees, costs of court, or expenses of litigation claimed by or awarded to any third-party in the Covered Action.

b. The Participating Agency will promptly notify Conservancy of any such claim, action, or proceeding that comes to the Participating Agency's attention.

c. Through legal counsel, Conservancy shall keep the defendant Participating Agency informed of the status of litigation, and at the option of the defendant Participating Agency, shall periodically consult with respect to the litigation. At the option of the defendant Participating Agency, the attorneys for the Conservancy and the Participating Agency's attorneys will jointly determine litigation strategy in any claim, action, or proceeding. At the option of the defendant Participating Agency and at no additional cost to the Conservancy, the defendant Participating Agency's attorneys will participate with the Conservancy's attorneys in any portion of the claim, action, or proceeding, including reviewing pleadings prior to filing, and participation in settlement discussion, mediation, and settlement conferences.

d. The Conservancy and each defendant Participating Agency will cooperate to negotiate mutually agreeable terms of settlement of any claim, action or proceeding involving a Covered Action. Conservancy shall not be required to pay or perform any settlement of such claim, action, or proceeding unless the settlement is approved in writing by Conservancy or its designees and the Participating Agency shall not be required to pay or perform any settlement of such claim, action, or proceeding unless the settlement is approved in writing by Participating Agency. Each Participating Agency shall retain complete discretion to approve or disapprove any proposed settlement of any claim, action, or proceeding involving a Covered Action. The Participating Agency shall not be required to consent to any settlement of such claim, action, or proceeding that imposes any financial liability upon the Participating Agency unless Conservancy agrees to fully assume, pay, and discharge such liability at no cost to the Participating Agency, and provides the Participating Agency with adequate security to ensure that such liability will be fully paid and discharged by the Conservancy. In the event that a Participating Agency and the Conservancy are unable to agree upon the terms and conditions of a settlement, a Participating Agency shall have the option to settle the Covered Action on terms within its sole discretion; however, the Conservancy shall not be required to pay any sums as part of the settlement.

e. The Parties shall cooperate with each other. A Participating Agency subject to a Covered Action and this Agreement shall, at no expense to the Conservancy, provide staff other than legal staff as reasonably necessary to respond to litigation.

f. A Participating Agency may, at its sole discretion and its sole expense, elect to participate in the defense of any Covered Action.

g. The Conservancy may elect to provide defense of matters not defined as a Covered Action which are filed in conjunction with a Covered Action. The Conservancy shall promptly notify a Participating Agency, in writing, of any limitation of coverage under this Agreement.

h. These defense and indemnity provisions shall constitute the sole and exclusive remedy for any claim that each Participating Agency may have against Conservancy arising out of or related to any claim, action, or proceeding against a Participating Agency or its agents, officers, or employees for any Covered Action as defined in Section 2.

4. Independent Representation.

Nothing in this Agreement shall be construed to affect, constrain, or inhibit the separate and independent representation of each Party by its respective counsel according to what counsel believes to be in that Party's best interests. The Parties recognize each other's right to conduct separate research, investigations and witness interviews, and devise separate legal strategies, without necessarily sharing any such information with any other Party to this Agreement. Nothing contained herein shall be deemed to create an attorney-client relationship between any Party and attorney that does not represent that Party.

5. No Disqualification of Counsel.

The fact that any counsel has executed this Agreement on behalf of a Party shall not be used as a basis for seeking to disqualify such counsel from representing that Party in any proceeding, and no counsel who has executed this Agreement on behalf of a Party shall be disqualified from examining or cross-examining any other Party's witnesses who testify in any proceeding because of such counsel's execution of the Agreement. The Parties further agree that each Party's attorneys may examine or cross-examine any other Party's witnesses who testify in any judicial proceeding.

6. Termination.

A Party may withdraw from this Agreement at any time by notifying counsel for the other Parties of its withdrawal from the Agreement, which will thereupon be terminated as to that Party. This Agreement shall expire upon the formal action of the Conservancy Board to recommend updated Plan implementation fees based on a periodic fee audit, which is currently scheduled for review in 2022.

7. Addition of Parties.

This Agreement shall be binding upon and as between the Parties executing it. This Agreement shall take effect upon execution by at least two Parties, and shall take effect as to each other Party on the date that Party executes it. The inclusion of the signature blocks is for convenience only, and the execution by all named Parties is not a condition precedent to its legal effectiveness. Upon written consent of each Party that has executed this Agreement, parties other than the Participating Agencies and the Conservancy may be permitted to join in this Agreement in the future.

8. Modification.

No modification of this Agreement shall be effective unless it is in writing and signed by all Parties that, at the time the modification is made, are signatories to this Agreement.

9. No Waiver.

No Party shall have the authority to waive any applicable privilege or doctrine on behalf of any other Party. No waiver of any privilege or doctrine by the conduct of any Party shall be applicable to any other Party.

10. No Third-Party Beneficiaries.

Unless specifically set forth, nothing in this Agreement is intended to, nor shall it be construed to, create rights inuring to the benefit of third parties.

11. Governing Law.

This Agreement shall be governed by the laws of the State of California.

12. Authority.

Each of the undersigned attorneys has been authorized by the Party that he or she represents to execute this Agreement on behalf of that Party.

13. Counterparts and Facsimile Signatures.

This Agreement may be executed in counterparts. A scanned or facsimile copy containing an authorized signature shall be deemed an original.

IN WITNESS WHEREOF the following counsel hereby execute and deliver this Agreement on behalf of themselves and their respective clients.

J. CHRISTOPHER BEALE
CONSERVANCY COUNSEL

Dated: _____, 2021

By: J. Christopher Beale
Attorney for EAST CONTRA COSTA COUNTY
HABITAT CONSERVANCY

MARY ANN MCNETT MASON
COUNTY COUNSEL

Dated: _____, 2021

By: Thomas L. Geiger
Assistant County Counsel
Attorneys for CONTRA COSTA COUNTY

DAMIEN BROWER

By: Damien Brower
City Attorney
Attorney for CITY OF BRENTWOOD

Dated: _____, 2021

MALATHY SUBRAMANIAN

By: Malathy Subramanian
City Attorney
Attorney for CITY OF CLAYTON

Dated: _____, 2021

DEREK COLE

By: Derek Cole
City Attorney
Attorney for CITY OF OAKLEY

Dated: _____, 2021

DONNA MOONEY

By: Donna Mooney
City Attorney
Attorney for CITY OF PITTSBURG

Dated: _____, 2021