

**AGREEMENT REGARDING THE USE OF TRANSIENT OCCUPANCY TAX
IMPOSED PURSUANT TO COUNTY BALLOT MEASURE C OF 2018**

This Agreement is entered into this 4th day of FEBRUARY, 2020, by and between the CRESCENT CITY HARBOR DISTRICT, a California Special District (“Harbor”), and the COUNTY OF DEL NORTE, a political subdivision of the State of California (“County”). The Harbor and County are collectively referred to in this Agreement as the “Parties.”

1. INTRODUCTION

- A. The Harbor is a California harbor district, formed in 1951, and organized under Part 3 of Division 8 of the Harbors and Navigation Code, commencing at Section 6010.
- B. The Harbor may acquire, construct, own operate, control or develop any and all harbor works or facilities within the limits of its established boundaries. (Harbors & Navigations Code §6075.) The Harbor may borrow and incur indebtedness and issue bonds. (Harbors & Navigations Code §6077.)
- C. The Harbor is empowered to sue and be sued in all courts and tribunals of competent jurisdiction. (Harbors & Navigations Code §6072.)
- D. A series of natural disasters, including 2006 and 2008 winter storms and 2006 and 2011 tsunamis, badly damaged portions of the Harbor’s infrastructure. As a result it was determined that all docks and pilings in the inner boat basin should be replaced. The Harbor funded required repairs through FEMA and Cal OES disaster funds, grants, and loans. The Harbor began reconstruction of the inner boat basin in May 2012 and it was dedicated in March 2014. (LAFCO Municipal Service Review 2015.)
- E. The Harbor obtained a long-term loan from the U.S. Department of Agriculture (hereafter the “USDA Loan”) to fund the Harbor’s share of the inner boat basin reconstruction costs following the 2006 and 2011 tsunamis. (LAFCO).
- F. The USDA loan is a fixed-rate, fixed-payment, fully amortized loan that requires that a single annual payment be made in the amount of {\$262,000} be made on September 1st of each year.
- G. A Transient Occupancy Tax (“TOT”) is a tax on the privilege of occupying a room in a hotel or other lodging for a period of less than 30 days.

(Revenue and Taxation Code §7280.) Such a tax may be levied by a city, county, or city and county, and by certain districts. However, TOT may not be levied by the Harbor.

- H. Measure C, a voter initiative, was approved by a majority of the voters at the November 6, 2018 General Election. Measure C amended the Del Norte County Code to increase the amount of the County's TOT from 8 percent to 10 percent, and expanded the definition of "hotel" to include space rented in a Recreational Vehicle (RV) Park. Measure C imposed a TOT of 2 percent on these RV Park spaces. The "funds derived from the increase" are to be used, first, to repay the USDA loan, and second, to fund harbor repairs and maintenance. Measure C's TOT increase is therefore a "special tax," one imposed for a specific purpose. (Cal. Const. Art. XIII C Section 1 (d).)
- I. The funds derived from the increase in tax revenue imposed by Measure C are to be deposited to "a special account established by the Auditor-Controller ("the Harbor Account.")
- J. Measure C requires a binding agreement between the Parties to use the funds for the two stated purposes of paying off the loan and funding harbor repairs and maintenance. This agreement is intended to be such a binding agreement.
- K. Because the The TOT increase is an exercise of the county tax power, is collected by the County, and is deposited in a fund created by the Auditor, to be disbursed by the County in accordance with the special purposes dictated by Measure C. It is, therefore, the County's legal obligation to ensure the funds are spent for the purposes dictated by Measure C.
- L. It is the intention of the Parties that the County will collect the tax, deposit it into the Auditor's Harbor account, withdraw agreed collection and agreed legal expenses, and then transfer the money to the Harbor to be spent according to this agreement, and that the Harbor will indemnify the County in any legal challenge related to the collection, enforcement, transfer or ultimate use of the funds derived from Measure C.

NOW, THEREFORE, THE PARTIES HAVE REACHED THE FOLLOWING BINDING AGREEMENT:

2. EFFECTIVE DATE AND TERM OF THIS AGREEMENT

- A. **Effective Date of Agreement.** This Agreement is effective immediately upon execution by the Parties.
- B. **Term.** This Agreement shall be in full force and effect from the effective date until terminated by either party upon 120 days' notice. If notice of termination is given, after the 120 days pass, the County will continue to

collect the tax and deposit it to the Harbor Account, but the remaining provisions of this agreement will no longer control, and no funds will be transferred to either the County or the Harbor unless and until the Parties reach a new agreement. Regardless of which Party initiated it, in the event of a notice of termination, both Parties agree to negotiate a new agreement expeditiously and in good faith, with an eye to having the new agreement in place before the 120-day period expires.

3. TAX COLLECTOR'S DUTIES

- A. **Collection of TOT.** The Del Norte County Tax Collector administers the "Uniform transient occupancy tax ordinance of Del Norte." (3.08.10, Del Norte County Code). Accordingly, the Tax Collector will collect the increased TOT imposed by Measure C.
- B. **Administrative Expenses.** In order to effectuate the purpose of Measure C, which is to raise money to fund specified Harbor expenses, it is necessary that the Tax Collector incur expenses and dedicate time to the registering of operators, collection of taxes, auditing of operators, potential enforcement against delinquent tax payers, and many other administrative tasks. The parties therefore agree that these expenses are necessary and appropriate uses of a portion of Measure C revenue in furtherance of the purpose of Measure C, and that two and one-half percent of the tax revenue collected by the County Tax Collector may be retained by the County to cover these increased administrative expenses. This two and one-half percent shall first be placed in the Harbor Account and then withdrawn at the same time as the disbursement to the Harbor under subsection 4.A., hereof. This amount is a good-faith estimate and may be amended over time as agreed to in writing by the Parties.
- C. **Penalties and Interest.** An operator who fails to remit the tax at the time required must pay penalties and interest. It is the interpretation of the parties that penalties and interest imposed upon delinquent operators is not included within the "funds derived from the increase" imposed by Measure C. Furthermore, the opportunity to collect penalties and interest is an important incentive for the Tax Collector to vigorously enforce the TOT ordinance, sometimes at great time and expense. It is therefore consistent with Measure C and furthers the purposes of Measure C that the Tax Collector should retain all revenue derived from penalties and interest imposed on delinquent taxes, and said revenue shall not be placed in the Harbor Account.
- D. **Earned Interest.** The County Treasurer will invest the funds in the Harbor Account in the same manner and according the same policy that she invests all other money under her management, subject to the prudent investor standard, pursuant to Government Code §27000.3. The Treasurer will deduct from interest earned the actual administrative costs of

investing, depositing and handling of funds and distribution of Measure C funds, as directed by Government Code §27013.

- E. **Legal Expenses.** Considerable County Counsel time has already been expended in interpreting Measure C and drafting this Agreement. The Parties anticipate that legal advice will continue to be necessary throughout the life of this agreement. Immediately upon execution of this Agreement, the County Auditor shall transfer \$5000.00 from the Harbor Account to County Counsel's account for compensation for services already performed. Thereafter, if and when County Counsel determines that legal services are required, County Counsel will notify legal counsel to the Harbor and these attorneys agree to confer to the extent permitted by attorney-client privilege and as the attorneys determine is in the best interest of their clients. In furtherance of the purpose of Measure C, County Counsel time, to the extent the time is expended to interpret, support, or defend Measure C or this agreement, is an allowable expense of administration in addition to the above-mentioned two and one-half percent. The Harbor must be notified of any County Counsel billing and will have 30 days in which to review any items of billing that will be a charge against the Measure C revenues. County Counsel time will be billed to the Tax Collector at the County Counsel's productive hourly rate. After the 30-days' notice to the Harbor, the Auditor-Controller may withdraw the resulting charges from the Harbor Account.

4. **TRANSFER OF FUNDS**

- A. **Transfer of Funds.** For the first disbursement after execution of this Agreement, Harbor must supply the Auditor with invoices, receipts, account statements or other documentation sufficient to show the amount of the loan payment made that year to the USDA, and the date in 2019 on which the payment was made. The first transfer of funds for the revenue period January 1, 2019 through October 31, 2019, will occur within fifteen (15) days after the documentation has been supplied.

On or before October 15, 2020, and continuing on or before October 15 each year thereafter, Harbor must supply the Auditor with invoices, receipts, account statements or other documentation sufficient to show the amount of the loan payment made that year to the USDA, and the date on which the payment was made. No earlier than November 1, nor later than November 20, the Auditor will reimburse the Harbor for its payment. Reimbursement must consist of available funds deposited in the Harbor Account after deduction of any charges made applicable by this Agreement, up to, but not exceeding, the amount of the payment made by the Harbor to the USDA.

- B. Reimbursement for Additional Payments on USDA loan.** In its sole discretion, and at any time, Harbor may make additional payments toward the principal balance of the USDA loan. To the extent that funds are available in the Auditor's Harbor Account, County must reimburse Harbor for such additional payments within 15 days of presentation of documentation of these additional payments.
- C. Full repayment of the loan.** Upon full repayment of the USDA loan, or upon discharge by some other means, the Harbor must provide the Auditor with documentation sufficient to prove the repayment or discharge. Upon such satisfactory documentation, and after the Harbor Facilities Plan has been approved pursuant to Section 5 of this agreement, Section 5 will become operative.
- D. Transfer after Harbor Facilities Plan approved.** Once the Harbor Facilities Plan (the "HFP") is approved, the Harbor shall supply the Auditor with invoices, receipts, account statements or other documentation sufficient to show the amount of payments made in accordance with the HFP, and the date on which the payments were made. The Auditor will then reimburse the Harbor for its payments. Reimbursement shall consist of available funds deposited in the Harbor Account, up to, but not exceeding, the amount of the payments made according to the approved Harbor Facilities Plan. Notwithstanding the foregoing, the Parties recognize that the HFP may be accomplished by loan financing and/or grants from third-party granting agencies. By further agreement of the Parties, Measure C funds may be used for "local match" for grants or for debt service on loans to finance all or part of the Harbor Facilities Plan or for other financing mechanisms to accomplish the elements of the Harbor Facilities Plan.
- E. Conditions for Transfer Pursuant to Harbor Facilities Plan Prior to Full Payoff of USDA Loan.** Prior to complete payoff of the USDA Loan but after approval of the HFP, transfer from the Auditor's Harbor Account to the Harbor may be made at such time as (1) the annual debt-service payment on the USDA Loan has been made, (2) on November 1 of the subject year a balance in excess of \$50,000 remains in the Auditor's Harbor Account, and (3) the Harbor has documented expenses that qualify as expenses pursuant to the HFP. Within 30 days thereafter the balance in excess of \$50,000 shall be disbursed to the Harbor as reimbursement of those qualifying expenses. It is the intent of the parties that this \$50,000 may be carried forward from year to year but that if all or part of the \$50,000 is required to make the USDA payment in a subsequent year, the \$50,000 must be drawn down for that purpose.
- F. Parties' Discretion to Make Direct Payments.** Upon request of the Harbor, County may make direct payments to the USDA or to other Harbor creditors pursuant to the approved Harbor Facilities Plan, out of the Harbor Account.

5. HARBOR FACILITIES PLAN

- A. **Harbor Facilities Plan.** Measure C requires funds derived from the TOT increase which are not used to repay the USDA loan, may be used for needed repairs and maintenance, “pursuant to a publically-approved Harbor Facilities Plan.” Measure C does not define or describe this plan.
- B. **Public Approval of Plan.** Measure C does not specify which political body must approve the plan. Because Measure C is an exercise of the County’s tax power, the County is legally responsible for ensuring compliance with the special purpose of the tax. Because the County is primarily responsible for the use of the funds, it is appropriate that the Harbor Facilities Plan be approved by the Board of Supervisors.
- C. **Notice of Hearing.** The Harbor Commission will prepare the Harbor Facilities Plan. After approval by the Harbor Commission, the Harbor Facilities Plan shall be submitted to the Board of Supervisors by the Harbor Commission, and be approved at a public hearing of the Board of Supervisors noticed pursuant to Government Code §65090. The approval of the Board of Supervisors shall not unreasonably be withheld. The Board of Supervisors may propose modifications of the Harbor Facilities Plan but no modifications may be adopted unless agreed to by the Harbor Commission.

6. INDEMNIFICATION

- A. The Harbor shall indemnify, defend and hold harmless the County, at the Harbor’s sole cost and expense, with counsel approved by the County, which approval shall not unreasonably be withheld:
 - i. In any action or proceeding to challenge, invalidate, compel or enjoin the collection or enforcement of the transient occupancy tax increase enacted by Measure C including any action to challenge the jurisdiction of the County;
 - ii. In any action or proceeding to challenge, invalidate, compel or enjoin the enforcement of this agreement, including, but not limited to, the withdrawal from the Harbor Account by the County of reimbursement for necessary and reasonable administrative and legal expenses in the amount specified in this agreement, except as to an action between the Harbor and the County;
 - iii. In any action or proceeding to challenge, invalidate or compel or enjoin the enforcement of a Harbor Facilities Plan approved by the Board of Supervisors;

- B. The Harbor shall further indemnify, defend and hold harmless the County, at the Harbor's sole cost and expense, including with counsel approved by the County, which approval shall not unreasonably be withheld, for any cost, expense, or exposure to liability or litigation brought about by any future decision by the California Supreme Court extending, limiting, or overturning its prior decision in *California Cannabis Coalition v. City of Upland* (2017) 3 Cal. 5th 924 and/or the validity of the passage of Measure C under the California Constitution.

9.0 MISCELLANEOUS

- A. **Amendment or Modification.** This Agreement may be modified or amended only by a written instrument executed by the parties.
- B. **Entire Agreement.** This Agreement is the entire agreement between the parties and supersedes all prior written and oral agreements, if any, with respect to the subject matter hereof.
- C. **Severability.** The provisions of this agreement are not severable. Should any provision of this agreement be invalidated in any legal proceeding, it shall be considered a frustration of the purpose of this agreement, and the agreement shall be void. However, if Measure C is not itself invalidated, the tax must continue to be collected while the Parties negotiate toward a replacement agreement.
- D. **Force Majeure.** In the event of a forced delay in the performance by either party of obligations under this Agreement due to the closure of the Project, acts of God or of the public enemy, acts of inaction of the other party of its employees or agents, strikes, lockouts, unusual delay in transportation, unavailability of materials, fires, floods, catastrophic weather or other natural disasters, epidemics, riots, insurrection, war or unavoidable casualties, the time for performance must be adjusted or extended, or renegotiated, in light of such changed circumstances.
- E. **Obligations to Continue During Term.** Unless specifically designated otherwise, all of the parties' obligations under this Agreement continue throughout the term of this Agreement.
- F. **Mutual Good Faith.** Throughout the term of this Agreement, the parties agree to exercise good faith and to observe the covenants contained herein.
- G. **No Third-Party Beneficiaries.** This Agreement is not intended to, and does not create any right on the part of a Third Party to bring an action to enforce any of its terms.
- H. **Standard of Reasonableness.** Unless specifically provided otherwise, all provisions of this Agreement will be governed by a standard of reasonableness.

- I. **Plain Meaning.** Where terms, phrases or words are not defined, they shall have their ordinary accepted meanings within the context with which they are used. The edition current on January 2002 of Webster's Third New International Dictionary of the English Language, Unabridged shall be considered as providing ordinarily accepted meanings.
- J. **Captions.** The captions of each paragraph, section, or subsection of contained in this Agreement are for ease of reference only and do not affect the interpretation or meaning of this Agreement.
- K. **Preparation of Agreement.** This Agreement was drafted and entered into after careful review and upon the advice of competent counsel; it shall not be construed more strongly for or against either party. This Agreement may not be unilaterally amended and must be construed as set forth herein to accomplish the purposes of Measure C and this Agreement.

Executed and delivered as of the date first written above in Crescent City, California.

CRESCENT CITY HARBOR
DISTRICT, A SPECIAL DISTRICT
OF THE STATE OF CALIFORNIA

COUNTY OF DEL NORTE, A POLITICAL
SUBDIVISION OF THE STATE OF
CALIFORNIA

Brian L. Stone

Brian L. Stone, President,
Harbor Commission

Lori L. Cowan

Lori L. Cowan, Chair,
Board of Supervisors

Gerry Hemmingsen

APPROVED AS TO LEGAL FORM

APPROVED AS TO LEGAL FORM

for Matthew R. Black, Deputy
Robert N. Black,
Attorney for the Harbor District

Elizabeth Cable
Elizabeth Cable,
County Counsel

Date: 02/25/2020

I hereby certify that according to the provisions of Government Code Section 25103, delivery of this document has been made.

Clerk of the Board
By: *Tyler Goughnour*