

Attachment A

Exclusive Negotiating Agreement

**EXCLUSIVE NEGOTIATING AGREEMENT WITH BURNHAM-WARD
PROPERTIES, LLC**

This EXCLUSIVE NEGOTIATING AGREEMENT (the “Agreement”) is made and entered into to be effective as of _____, 2024 (“Effective Date”), by and between the City of Newport Beach, a California municipal corporation and charter city (“City”), and Burnham-Ward Properties LLC, a California limited liability company (“Developer”). City and Developer are sometimes hereinafter individually referred to as a “Party” and collectively as the “Parties.”

R E C I T A L S

- A. City is a municipal corporation and charter city duly organized and validly existing under the laws of the State of California with the power to carry on its business as it is now being conducted under the statutes of the State of California and the Charter of the City.
- B. City is the owner of certain real property frontage and tidelands, together with certain abutting upland property commonly known as “Balboa Yacht Basin”, located in the City of Newport Beach, County of Orange, State of California, having County Assessor’s Parcel Number 050-210-02. The Balboa Yacht Basin located at 829 Harbor Island Drive, Newport Beach, California includes a public marina, public restrooms, shipyard, parking lot, garage buildings used for storage, and building with residential apartments, offices, and a restaurant (“Property”), as legally described and further depicted on Exhibit “A” attached hereto and incorporated herein by reference.
- C. Developer proposes to plan, design, permit, fund, and construct renovations to manage and maintain the buildings which are located on a certain portion of the Balboa Yacht Basin at the north side of the parcel depicted in Exhibit “B” which is attached hereto and incorporated herein by reference to this Agreement (“Site”) and provide those services over the course of a 50-year lease term (“Proposal”).
- D. The Proposal is subject to refinement and modification as mutually agreed to by the Parties during negotiations.
- E. The Parties desire to enter into this Agreement to establish a period during which they will cooperate to explore the feasibility of refining the Proposal and during which time Developer shall have the exclusive right to negotiate the Proposal with City with respect to the terms of an agreement or agreements to provide for the Proposal (“Proposed Lease”).

NOW, THEREFORE, it is mutually agreed by and between the Parties as follows:

1. Term of Agreement. The term of this Agreement (“Term”) shall be two (2) years after the Effective Date; provided, however, that the City Manager and Developer shall have the right to approve an extension of the Term for a cumulative maximum of six (6) months without the requirement of any official action by the City Council if the City Manager determines that satisfactory progress is being made to achieve the objectives and complete the tasks set forth herein additional time is necessary to finalize discussions or negotiations on mutually satisfactory terms.

2. Proposal Terms. The following nonexclusive list of items related to the Proposal are the subject of negotiations during the Term:

- (a) annual ground lease payment from the Developer to the City for the Site;
- (b) scope of development, the cost of which shall be borne solely by Developer, for the redevelopment of the Site;
- (c) preparation by the Developer of a detailed site plan, elevations, and utility plan, as applicable, for the Proposal that depicts the proposed building locations, elevations, building square footages and uses, parking, access points, landscaped areas, pedestrian and vehicular circulation, and utility relocation;
- (d) preparation of a *pro forma* provided by Developer and reviewed by the City for the Proposal that details satisfactory evidence of Developer's ability to finance and complete the Proposal including anticipated rents, estimated profit, appropriate return measurements, development and operational costs that includes (i) all costs of abatement and demolition and development of the buildings on the site; (ii) all costs associated with utility replacement and/or relocation to serve the site; (iii) all costs associated with possible work or modifications on and adjacent to the site and (iv) all other terms including Site taxes, possessory interest or other taxes and percentage rent on sales;
- (e) financial plan provided by Developer and reviewed by the City for the Proposal addressing the proposed methods of construction, permanent financing, and amounts and sources of equity and debt capital;
- (f) assessment of the physical and environmental condition of the Site conducted by the Developer and scope of work necessary for the renovation and/or demolition of the existing building including abatement of any asbestos and/or lead, the cost of which shall be borne solely by Developer; and
- (g) development schedule for the Proposal.

3. Submission of Documents for Review and Comment.

3.1 Within one hundred twenty (120) days of the Effective Date of this Agreement, Developer shall submit the following information to the City or its agents:

- (a) detailed scope of development, site plan, elevations, and utility plan (as applicable) that incorporates the information specified in Sections 2(b) and 2(c) of this Agreement;
- (b) detailed *pro forma* that incorporates the information specified in Section 2(d) of this Agreement;
- (c) detailed financing plan that incorporates the information specified in Section 2(e) of this Agreement; and

- (d) development schedule for completion of the Proposal.

In the event that the City requests changes to the aforementioned documents or additional information, Developer shall provide the information requested or resubmit a revised site plan, *pro forma*, financing plan, scope of development, and/or development schedule to the City within thirty (30) days of City's written request. The City shall review and either approve such submissions or return the submissions to Developer for further revision as soon as practical but, in any event, within forty-five (45) days.

Developer acknowledges and agrees that design and architectural review by the City and its consultants will be required at each stage of review of the Proposal and that sketches, plans, and ultimately working drawings, specifications and similar documents will be required to be submitted for review and approval ("City's Design Review"). Developer further acknowledges and agrees that the City, acting not as a Party but under its general police powers as a charter city and municipal corporation, may conduct all applicable review and that building design, including, but not limited to, the selection of building elevations, construction materials, parking layout and landscaping, which will not be final until approved by the City pursuant to Newport Beach Municipal Code including, but not limited to, Title 20 (Planning and Zoning) and Title 21 (Local Coastal Program Implementation Plan). Developer acknowledges and agrees that the City's Design Review rights provided herein, are distinct and separate from those additional rights which the City may exercise under its general police powers as a municipal corporation and charter city.

3.2 City shall submit the following information to Developer:

- (a) Within thirty (30) days of the Effective Date of this Agreement, City shall submit copies of reports, studies, surveys, leases and other data and information, if any, that the City has in its possession; and

- (b) Within one hundred twenty (120) days after the Submission of Documents, City shall deliver an appraisal of the Site for purposes of establishing the amount of rent payable to the City to lease the Site.

4. Good Faith Negotiations. During the entire Term of this Agreement, City and Developer shall negotiate in good faith pursuant to the terms set forth herein to achieve the objectives and accomplish the tasks described in this Agreement. Nothing herein shall be deemed a covenant, promise, or commitment by either Party to approve or enter into a Proposed Lease with the other Party on any particular terms or conditions. The Parties' approval and execution of this Agreement is merely an agreement with respect to certain tasks preliminary to the execution of the Proposed Lease and an agreement to enter into a period of negotiations according to the concepts presented herein, reserving full and final discretion with City and Developer as to the final terms of the Proposed Lease as required by law. If, for any reason, City and Developer have not each executed a mutually acceptable Proposed Lease by the expiration of this Agreement, and provided that the Parties have not committed a material default hereunder, this Agreement shall automatically terminate and shall be of no further force or effect.

During the period of exclusive negotiation, the City agrees to negotiate exclusively with the Developer during the Term of this Agreement to the extent permitted by law and shall not

solicit another party for the Property or enter into any agreement with any other party regarding the development of the Property. The City acknowledges and agrees that but for this exclusivity, the Developer would not have entered into this Agreement.

5. Administrative Costs and Expenses; Developer Deposit. Developer shall be responsible for all costs and expenses incurred by the City related to this Agreement including, but not limited to, costs of City staff time, consultant fees and attorneys' fees. Prior to City's execution of this Agreement, Developer shall deposit with City an initial sum of Twenty-Five Thousand Dollars (\$25,000.00) ("Deposit Amount") that the City will use to reimburse itself for the costs related to the preparation and implementation of this Agreement. Said funds shall be maintained in a separate account by the City ("Deposit Account"). Within ten (10) business days of a request by the City, Developer shall deposit additional sums to replenish the Deposit Account so that the amount of funds on deposit with the City is maintained at Twenty-Five Thousand Dollars (\$25,000.00). From and after the Effective Date, the Deposit Account may be used by the City to pay the City's costs including, without limitation, City staff time, consultant fees and attorneys' fees required in connection with the drafting, negotiation and execution of this Agreement, the Proposed Lease, or termination of this Agreement ("City Transaction Expenses") provided that City agrees that City Transaction Expenses to be charged Developer shall not exceed Fifty Thousand Dollars and 00/100 (\$50,000.00) prior to execution of the Proposed Lease.

6. Land Use & Environmental Requirements. The development of the Proposal shall be subject to all rules, regulations, standards, and criteria required by law and as set forth in the City's General Plan, Coastal Land Use Plan, Newport Beach Municipal Code, the California Environmental Quality Act, this Agreement, and the Lease. Developer shall be responsible for obtaining all approvals and entitlements necessary for the Proposal. Developer shall be also be responsible for all costs related to the Proposal incurred, including, but not limited to, City staff time, consultant fees, and other fees, associated in any way with obtaining necessary approvals and entitlements for the Proposal including the environmental review associated with the Proposal including, but not limited to, compliance with the California Environmental Quality Act (collectively, "Costs"). Developer shall place funds on deposit with the City to pay for the Costs pursuant to the City's fee schedule.

7. Physical Condition of the Site. City and Developer shall cooperate and exchange such information as may be available to either of them regarding the physical condition of the Site (or applicable portions thereof).

7.1 Entry for Investigation. Subject to the conditions hereafter stated and the rights of tenants in possession, City grants to Developer, its agents, employees, and consultants a limited license to enter upon any portion of the Property, at a time and manner reasonably approved by City and to minimize disruption or interference with any tenants, for the purpose of conducting engineering surveys, soil tests, investigations or other studies reasonably necessary to evaluate the condition of the Property, which studies, surveys, investigations and tests shall be done at Developer's sole cost and expense. Developer shall (a) notify City at least two (2) business days prior to each entry of the date and purpose of intended entry and provide to City the names and affiliations of the persons entering the Property; (b) conduct all studies in a diligent, expeditious and safe manner and not allow any dangerous or hazardous conditions to occur on the Property during or after such investigation; (c) comply with all applicable laws and governmental

regulations; (d) keep the Property free and clear of all materialmen's liens, lis pendens and other liens arising out of the entry and work performed under this paragraph; (e) maintain or assure maintenance of workers' compensation insurance (or state approved self-insurance) on all persons entering the Property in the amounts required by the State of California; (f) provide to City prior to initial entry a certificate of insurance evidencing that Developer has procured and paid premiums for an all-risk public liability insurance policy written on a per occurrence and not claims made basis in a combined single limit of not less than TWO MILLION DOLLARS (\$2,000,000.00) which insurance names City, its City Council, boards and commissions, officers, agents, volunteers and employees, and City's property manager, Bellport Group, Inc. ("Property Manager"), and any subsequent property managers (hereinafter "Indemnified Parties") as additional insured entitled to not less than thirty (30) days cancellation notice and is primary and non-contributing with insurance carried by Developer; and (g) return the Property to its original condition following Developer's entry. If requested by City in writing, Developer hereby agrees to provide to City a true and complete copy of all finalized tests, reports, studies and the like generated in connection with Developer's inspection of the Property. Developer agrees to indemnify, defend, protect and hold the Indemnified Parties and the Property free and harmless from any and all loss, liability, claims, damages, liens and expenses (including but not limited to attorneys' fees and costs) arising directly or indirectly from the active negligence or willful misconduct by Developer in the exercise of said license, or from Developer's failure to comply with the conditions to Developer's entry onto the Property provided herein. Which undertaking of indemnity shall expire two (2) years from the termination of this Agreement. The limited license herein granted shall be coextensive with the term of this Agreement or any extension thereof.

8. Hazardous Material Assessment. The Proposed Lease may address applicable clean-up issues, if any. In the event an environmental audit evidences a need for clean-up of any portion of the Site, the City, by this Agreement, does not agree in any respect to undertake or complete such clean-up. In the event that during the Term, the Developer conducts or causes to be conducted any environmental audits and/or testing on any portion of the Site, the Developer shall submit copies of any reports resulting from such tests or studies to the City. Such environmental audits and/or testing shall be conducted at the sole cost and expense of the Developer. Neither Party makes any representation or warranty as to the accuracy or completeness of reports prepared by third parties and delivered to the other Party. Developer shall indemnify, defend and hold harmless City from and against all claims, liabilities or damages, and including expert witness fees and reasonable attorneys' fees and costs, arising out of any such testing, inspection or investigatory activity on the Site by Developer. In addition, following any such testing, inspection or investigatory activity, Developer shall return, and repair if necessary, the Site to the condition it was in prior to the Developer's investigatory activities.

9. Miscellaneous.

9.1 Notices. Any notices, requests or approvals given under this Agreement from one Party to another may be personally delivered or deposited with the United States Postal Service for mailing, postage prepaid, to the address of the other Party as stated in this paragraph, and shall be deemed to have been given at the time of personal delivery or, if mailed, on the third day following the date of deposit in the course of transmission with the United States Postal Service. Notices shall be sent to the following addresses:

To City: City of Newport Beach
Community Development Department
100 Civic Center Drive
Newport Beach, CA 92660

With a copy to: City of Newport Beach
City Attorney
100 Civic Center Drive
Newport Beach, CA 92660

To Developer: Burnham Ward Properties LLC
Attn: Scott Burnham
860 Newport Center Drive, Ste. 100
Newport Beach, CA 92660

9.2 Termination. Each Party reserves the right to terminate this Agreement, with or without cause, upon ten (10) days prior written notice to the other Party, thereby withdrawing from such negotiations without any liability to the other Party, except that (i) each Party shall be obligated to promptly return to the other Party all information and materials which such Party has received from the other Party pursuant to this Agreement and (ii) the rights and obligations of the Parties set forth in Section 9.3 shall remain in full force and effect. The Parties, by their respective execution hereof, knowingly agree, notwithstanding anything herein to the contrary, that, except with respect to the rights and obligations set forth in Section 9.3 hereof, neither of them shall have any right to specific performance of this Agreement, nor any other equitable or damage remedies of any nature under the law. Each Party makes such release with full knowledge of Civil Code Section 1542 and hereby waive any and all rights thereunder to the extent of this release, if such Section 1542 is applicable. Section 1542 of the Civil Code provides as follows:

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

9.3 Developer Documents. In the event of termination of this Agreement, for any reason including, but not limited to, expiration, termination or breach of this Agreement, Developer shall deliver to the City, within ten (10) business days following written request from the City, a copy of all surveys, soils/environmental reports, site plans, *pro forma*, and other documents prepared by Developer or third parties that are associated in any way with this Agreement. Notwithstanding the foregoing, in no event, however, shall Developer be obligated to make available (or cause to be made available) any proprietary or confidential documents including reports or studies that have been superseded by subsequent reports or studies, or any of the following confidential and proprietary materials: (1) information contained in financial analyses or projections (including Developer's budgets, valuations, cost-basis information and

capital account information); (2) material that is subject to attorney-client privilege or that is attorney work product; (3) organizational, financial and other documents relating to Developer or its affiliates (other than evidence of due authorization and organization, and the financing plan required under this Agreement); or (4) material that Developer is legally required not to disclose other than by reason of legal requirements voluntarily assumed by Developer after the Effective Date. Developer makes no representation or warranty as to the accuracy or completeness of reports prepared by third parties and delivered to the City.

9.4 Cooperation. The Parties agree to cooperate with each other in promptly supplying information and analyses relating to the Proposal.

9.5 Assignment. Neither Party shall have the right to assign any of their rights or obligations set forth in this Agreement.

9.6 Entire Agreement, Amendments, and Waivers. This Agreement sets forth the entire agreement between the Parties with respect to the subject matter set forth herein and supersedes all prior discussions and negotiations between the Parties with respect thereto. No amendment to this Agreement shall be effective unless set forth in a writing signed by an authorized signatory of each Party. No waiver of any provision of this Agreement shall be enforceable against a Party unless it is set forth in a writing executed by such Party.

9.7 Assurances to Act in Good Faith. The City and Developer each agree to take all actions contemplated by this Agreement, including timely depositing funds as required herein, and shall use their respective best efforts to negotiate a Proposed Lease in accordance with the provisions of this Agreement.

9.8 Attorneys' Fees. In the event of any litigation between the Parties arising out of or concerning this Agreement, the prevailing Party shall not be entitled to recover from the other Party its actual and reasonable attorneys' fees.

9.10 Governing Law. This Agreement shall be governed by the laws of the State of California. Any legal action brought under this Agreement must be instituted in the Superior Court of Orange County, State of California, in an appropriate court in that county, or in the Federal District Court in the Central District of California.

9.11 Purpose of Agreement. It is expressly understood and agreed by the Parties that this is an Agreement regarding the conduct of good faith contract negotiations only and does not convey any interest in the Site whatsoever. This Agreement is not intended to constitute a binding agreement by the City to lease the Site or commit the City to develop all or any portion of Site, to financially participate with the Developer in the development of the Proposal, nor is it intended to constitute a binding agreement to enter into a Proposed Lease or any other contract. No Party shall be legally bound to consummate construction of the Proposal unless and until a Proposed Lease or other contract has been executed and delivered by the Parties. Notwithstanding any other provision hereof, neither the Developer nor the City shall be under any obligation to approve or execute any Proposed Lease during or upon conclusion of this Agreement. Any Party may refuse to approve and execute any Proposed Lease at its sole and absolute discretion, with or

without cause. In the event that a Proposed Lease is approved and executed by the Parties, this Agreement shall be superseded by such Proposed Lease. It is expressly understood that notwithstanding this Agreement, the Proposal may be modified or not implemented at all depending on a number of factors including but not limited to compliance with the California Environmental Quality Act.

9.12 No Commissions. The City shall not be liable for any real estate commission or any broker's fees which may arise in relation to the Proposal. The City represents that it has engaged no broker, agent, or finder in connection with this transaction, and the Developer agrees to hold the City harmless from any claim by any broker, agent, or finder retained by the Developer.

9.13 Time of Essence. Time is of the essence of each provision set forth in this Agreement.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement to be effective as of the date first set forth hereinabove.

APPROVED AS TO FORM:

CITY OF NEWPORT BEACH, a
California municipal corporation and charter
city

By: _____
Aaron C. Harp
City Attorney

By: _____
Grace K. Leung
City Manager

ATTEST:

DEVELOPER:
Burnham-Ward Properties LLC, a California
limited liability company

By: _____
Leilani I. Brown

By: _____
Scott Burnham
Its: Manager

Attachment: Exhibit A – Property Description
 Exhibit B – Property Depiction

EXHIBIT A

PROPERTY DESCRIPTION

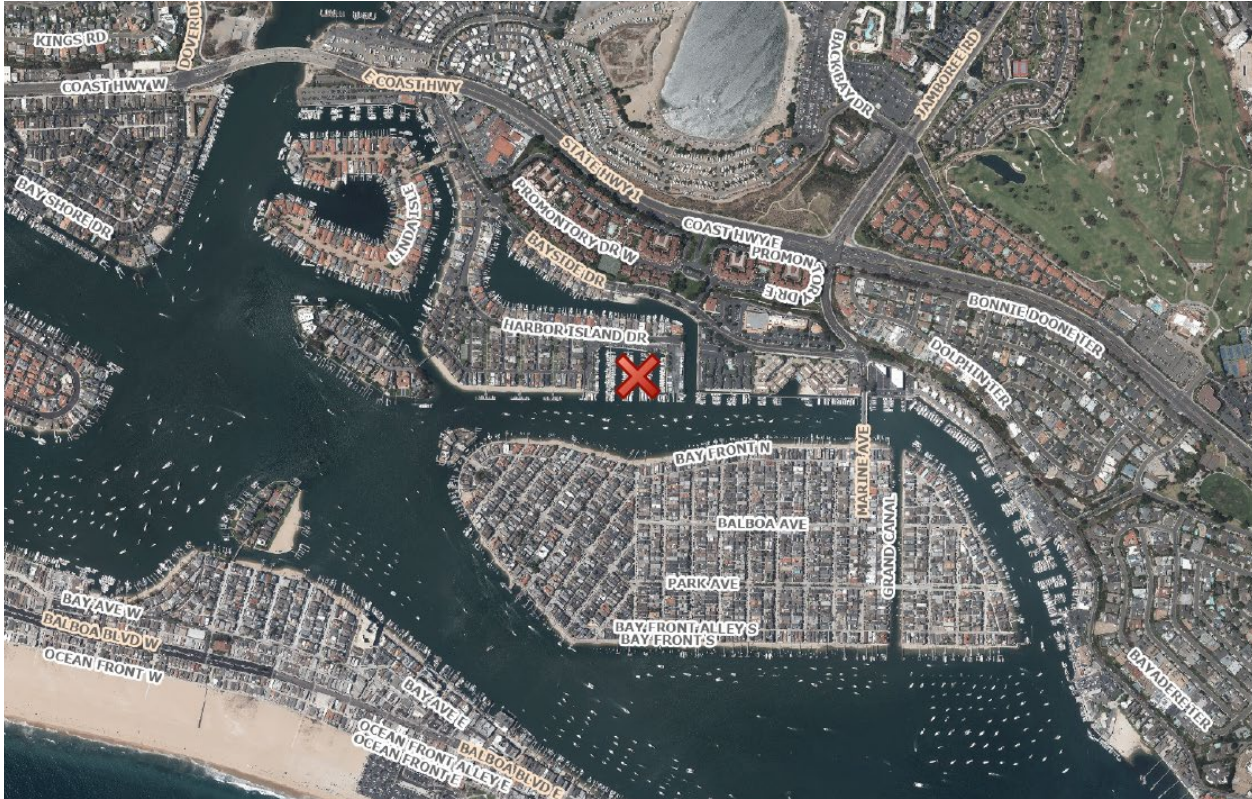
A parcel of land situated in the Northwest quarter (NW 1/4) of Section Thirty Five (35), Township Six (6) South, Range Ten (10) West, S.B.B.& M., Orange County, California, more particularly described as follows, to-wit:

Beginning at a point in the U.S. Bulkhead line between Station No. 200 and Station No. 101 as shown upon a map entitled "Harbor Lines, Newport Bay Harbor, California," approved May 2, 1936, by the Secretary of War, and on file in the office of the U.S. District Engineer at Los Angeles, California, said point of beginning being East 754.25 feet of said bulkhead Station No. 200, running thence North 424.71 feet to a point in the Northerly line of that certain parcel of land conveyed to City of Newport Beach by the Irvine Company, as described in a deed recorded September 25, 1929, in Book 306, Page 375, of official records of Orange County, California; thence South 85° 43' East 772.15 feet to the Northeasterly corner of the last mentioned parcel of land; thence South along the Easterly line of the last mentioned parcel of land 367.01 feet to a point in said U.S. Bulkhead line between Station No. 200 and Station No. 101, thence West along said bulkhead line 770 feet to the point of beginning, containing approximately seven (7) acres.

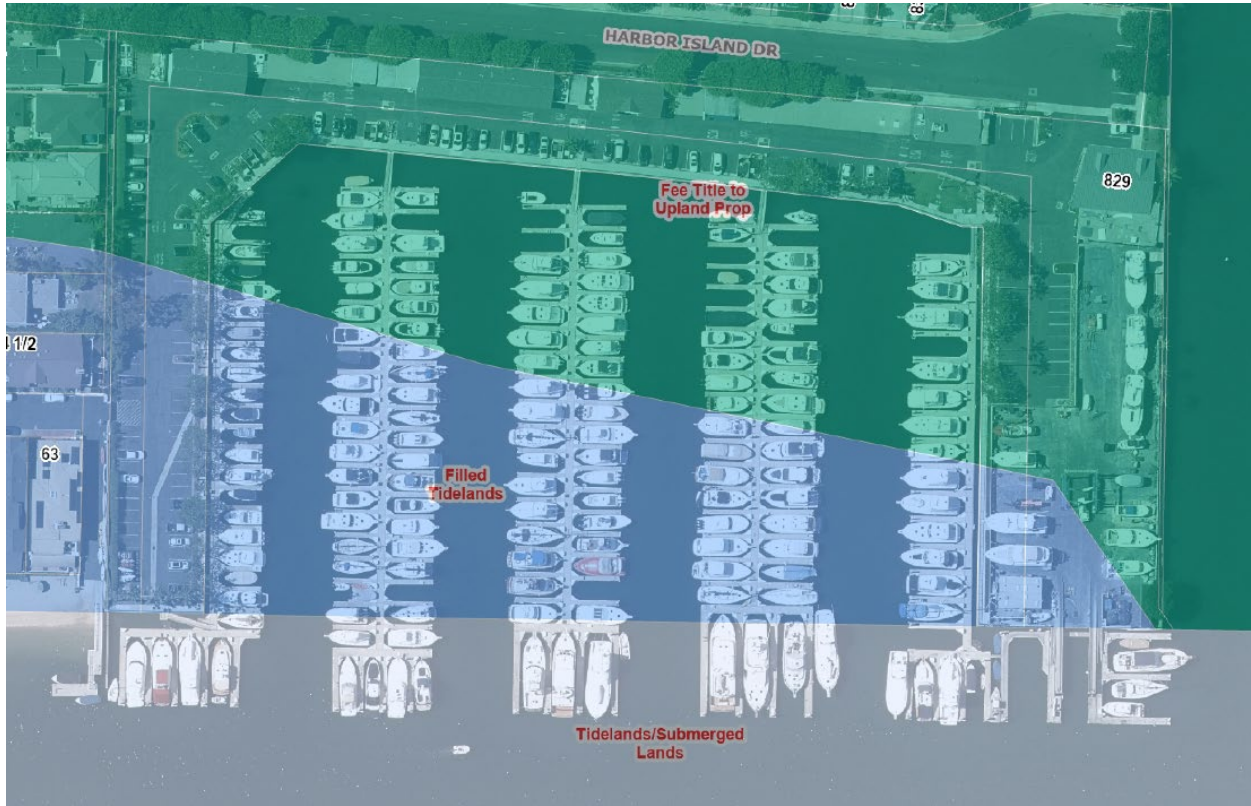
EXHIBIT B

PROPERTY DEPICTION

Aerial Vicinity Map



TIDELANDS BOUNDARY MAP



Balboa Yacht Basin Site Plan

