

ATTACHMENT A

DONATION AGREEMENT BETWEEN THE CITY OF NEWPORT BEACH AND CRYSTAL COVE CONSERVANCY

This Donation Agreement ("Agreement") is entered into this ____ day of August, 2018 ("Effective Date"), by and between the City of Newport Beach, a California municipal corporation and Charter City ("City"), and Crystal Cove Conservancy, a California non-profit corporation located at #5 Crystal Cove, Newport Coast, California 92657 ("The Conservancy"). City and The Conservancy are at all times individually referred to as "Party" and collectively as "Parties" herein.

RECITALS

A. The Newport Beach City Council has a positive history of directing revenue towards non-profit organizations, community groups, community events, enhancement projects or worthy programs which the City Council deems beneficial to residents' quality of life.

B. The Conservancy is a non-profit organization that oversees the management, operation and restoration of the beach cottages in the Crystal Cove Historic District.

C. The City and The Conservancy previously had an agreement in place whereby the City contributed twenty thousand dollars (\$20,000) a year to assist The Conservancy with the restoration of historic cottages in Crystal Cove.

D. The Conservancy intends to embark upon Phase III restoration work to restore the remaining seventeen (17) cottages located in the Crystal Cove Historic District; restoration is anticipated to cost thirty-five million dollars (\$35,000,000) and take five (5) years to complete ("Project").

E. The Conservancy is actively seeking contributions and requested a donation from the City to fund a portion of the Project.

F. The City Council determined that the Project will benefit the City's residents' quality of life by providing additional coastal recreational opportunities.

NOW, THEREFORE, in exchange for valuable consideration, the Parties agree as follows:

1. DONATION

The City agrees to donate to The Conservancy up to Two Hundred Fifty Thousand Dollars and 00/100 (\$250,000.00) over a five (5) year period paid out in five (5) equal installments of Fifty Thousand Dollars and 00/100 (\$50,000.00) a year ("Donated Funds"). The Donated Funds shall be disbursed in Fifty Thousand Dollar and 00/100

(\$50,000.00) increments by City to The Conservancy on July 1 of each calendar year this Agreement is in effect, beginning on July 1, 2019.

2. TERM

The term of this Agreement shall commence on the Effective Date and shall continue in full force and effect until July 2, 2023, unless terminated earlier as provided herein.

3. RESTRICTIONS ON USE OF DONATED FUNDS

The Donated Funds are subject to the following expenditure conditions ("Approved Uses"):

- (a) The Donated Funds shall be expended solely for the purposes provided in Exhibit "A," which is attached hereto and incorporated herein by reference; and
- (b) The Donated Funds shall not be used for any activity that would violate City, state or federal statutory or decisional law such as regulations affecting non-profit or tax exempt organizations exempt from taxation pursuant to the Internal Revenue Code.

The Conservancy further warrants to City that the Donated Funds will be spent solely for the Approved Uses and the Donated Funds shall be used by The Conservancy during this Agreement's term otherwise the Donated Funds shall be returned to City, as provided in Section 5 below.

4. REPORTING AND ACCOUNTING REQUIREMENTS

- (a) At all times during the term of this Agreement, The Conservancy shall maintain true, proper, and complete books, records, and accounts (collectively, "Books and Records") in which shall be entered fully and accurately all transactions taken with respect to the operations of The Conservancy under the Project and the expenditure of the Donated Funds. The Conservancy shall maintain the Books and Records in accordance with generally accepted accounting principles.
- (b) City reserves the right to designate its own employee representative(s) or its contracted representative(s) with a Certified Public Accounting firm who shall have the right to audit The Conservancy's accounting procedures and internal controls of The Conservancy's financial systems as they relate to the Project and to examine any cost, revenue, payment, claim, other records or supporting documentation resulting from any items set forth in this Agreement. Any such audit(s) shall be undertaken by City or its representative(s) at mutually agreed upon reasonable times and in conformance with generally accepted auditing standards. The Conservancy agrees to fully cooperate with any such audit(s).

This right to audit shall extend during the length of this Agreement and for a period of three (3) years or longer, if required by law, following the date of any Donated Funds tendered under this Agreement. The Conservancy agrees to retain all necessary records/documentation for the entire length of this audit period.

- (c) The Conservancy shall, on May 1 of each calendar year of the term of this Agreement, furnish the City with a Balance Sheet and Income Statement describing the receipt and disbursement activities of The Conservancy with respect to the Donated Funds. In its sole and absolute discretion the City may also require The Conservancy to submit: (i) quarterly check registers and descriptions of each disbursement; (ii) budget-to-actual-results; and (iii) a statement of position describing the assets and liabilities of The Conservancy. In the event that an independent audit is conducted, The Conservancy shall forward a copy of the audited report to the City for review, including any Management Letter, Report on Internal Controls, or Reportable Conditions letter generated during the course of the audit. The purpose of this requirement is to ensure The Conservancy has expended the Donated Funds on Approved Uses and not to require a dollar-for-dollar accounting with a particular invoice.
- (d) The Conservancy agrees to exercise prudent financial management processes including proper oversight of all assets, budget preparation, and timely reporting including budget-to-actual-comparisons.
- (e) All Approved Uses shall be performed by The Conservancy or under The Conservancy's supervision. The Conservancy represents that it possesses the professional and technical skills required to perform the services required by this Agreement, and that it will perform all services with a standard of care and in a manner commensurate with the community professional standards.

5. USE OF DONATED FUNDS

The Donated Funds shall be used solely by The Conservancy for the Approved Uses and for no other use. In the event that the Donated Funds are not used for the Approved Uses or are not expended by or before the expiration or earlier termination of this Agreement, The Conservancy shall notify the City in writing, and shall be obligated to return the remaining Donated Funds to City within thirty (30) calendar days.

6. INDEMNIFICATION

To the fullest extent permitted by law, The Conservancy shall indemnify, defend and hold harmless City, its City Council, boards, committees and commissions, officers, agents, volunteers and employees (collectively, the "Indemnified Parties") from and against any and all claims (including, without limitation, claims for bodily injury, death or

damage to property), demands, obligations, damages, actions, causes of action, suits, losses, judgments, fines, penalties, liabilities, costs and expenses (including, without limitation, attorney's fees, disbursements and court costs) of every kind and nature whatsoever (individually, a Claim; collectively, "Claims"), which may arise from or in any manner relate (directly or indirectly) to this Agreement (including the negligent and/or willful acts, errors and/or omissions of The Conservancy, its principals, officers, agents, employees, vendors, suppliers, consultants, subcontractors, anyone employed directly or indirectly by any of them or for whose acts they may be liable or any or all of them).

Notwithstanding the foregoing, nothing herein shall be construed to require The Conservancy to indemnify the Indemnified Parties from any Claim arising from the sole negligence or willful misconduct of the Indemnified Parties. Nothing in this indemnity shall be construed as authorizing any award of attorney's fees in any action on or to enforce the terms of this Agreement. This indemnity shall apply to all claims and liability regardless of whether any insurance policies are applicable. The policy limits do not act as a limitation upon the amount of indemnification to be provided by The Conservancy.

7. INDEPENDENT CONTRACTOR

In the performance of this Agreement, The Conservancy, and the agents, volunteers and employees of The Conservancy, shall act in an independent capacity and are not officers, employees, volunteers or agents of the City. The manner and means of performing the Approved Uses are under the control of The Conservancy, except to the extent they are limited by statute, rule or regulation and the expressed terms of this Agreement. Nothing in this Agreement shall be deemed to constitute approval for The Conservancy or any of The Conservancy's employees, volunteers or agents, to be the agents, volunteers or employees of City. The Conservancy shall have the responsibility for and control over the means of performing the Approved Uses, provided that The Conservancy is in compliance with the terms of this Agreement. Anything in this Agreement that may appear to give City the right to direct The Conservancy as to the details of the performance or to exercise a measure of control over The Conservancy shall mean only that The Conservancy shall follow the desires of City with respect to the results of the Approved Uses.

8. PROHIBITION AGAINST TRANSFERS

The Conservancy shall not assign, hypothecate or transfer this Agreement or any of the services to be performed under this Agreement, directly or indirectly, by operation of law or otherwise without prior written consent of City. Any attempt to do so without written consent of City shall be null and void.

9. NOTICES

All notices, demands, requests or approvals to be given under this Agreement shall be given in writing and conclusively shall be deemed served when delivered personally or on the third (3rd) business day after the deposit thereof in the United States mail, postage prepaid, first class mail, addressed as hereinafter provided.

All notices, demands, requests or approvals from The Conservancy to City shall be addressed to the City at:

Attn: City Manager
City of Newport Beach
100 Civic Center Drive
P.O. Box 1768
Newport Beach, CA 92658-8915
(949) 644-3000

All notices, demands, requests or approvals from City to The Conservancy shall be addressed to The Conservancy at:

Attn: Alix Dunn, President & CEO
Crystal Cove Conservancy
#5 Crystal Cove
Newport Coast, CA 92657
(949) 376-6200

10. TERMINATION

- (a) *Termination for Cause.* The Conservancy shall be in default under this Agreement if The Conservancy fails or refuses to perform any duty required by the Agreement or performs in a manner inconsistent with the terms, conditions and restrictions in this Agreement. In such event, City shall give The Conservancy thirty (30) calendar days written notice to cure, if the default can be cured and City shall be entitled to terminate this Agreement if The Conservancy has not cured the default within the thirty (30) calendar day cure period. City shall be entitled to immediately terminate this Agreement if the default cannot be cured through corrective action. If terminated under this section, remaining Donated Funds shall be returned to the City pursuant to Section 5.
- (b) *Termination without Cause.* City may terminate this Agreement at anytime with or without cause upon seven (7) calendar days written notice to The Conservancy, any remaining Donated Funds in The Conservancy's possession at the time of termination shall be returned to City pursuant to Section 5. Upon termination, City shall have no obligation to provide any further Donated Funds to The Conservancy.
- (c) *Specific Performance.* The Conservancy agrees that the City has the legal right, and all necessary conditions have been satisfied, to specifically enforce The Conservancy's obligations pursuant to this Agreement.

11. WAIVER

A waiver by either Party of any breach, of any term, covenant or condition contained herein shall not be deemed to be a waiver of any subsequent breach of the same or any other term, covenant or condition contained herein, whether of the same or a different character.

12. INTEGRATED CONTRACT

This Agreement represents the full and complete understanding of every kind or nature whatsoever between the Parties hereto, and all preliminary negotiations and agreements of whatsoever kind or nature are merged herein. No verbal agreement or implied covenant shall be held to vary the provisions herein.

13. INTERPRETATION

The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against either Party by reason of the authorship of the Agreement or any other rule of construction which might otherwise apply.

14. AMENDMENTS

This Agreement may be modified or amended only by a written document executed by both The Conservancy and the City and approved as to form by the City Attorney.

15. SEVERABILITY

If any term or portion of this Agreement is held to be invalid, illegal, or otherwise unenforceable by a court of competent jurisdiction, the remaining provisions of this Agreement shall continue in full force and effect.

16. CONTROLLING LAW AND VENUE

The laws of the State of California shall govern this Agreement and all matters relating to it and any action brought relating to this Agreement shall be adjudicated in a court of competent jurisdiction in the County of Orange.

17. EQUAL OPPORTUNITY EMPLOYMENT

The Conservancy represents that it is an equal opportunity employer and it shall not discriminate against any subcontractor, employee or applicant for employment because of race, religion, color, national origin, handicap, ancestry, sex, age or any other impermissible basis under law.

18. COMPLIANCE WITH ALL LAWS

The Conservancy shall, at its own cost and expense, comply with all statutes, ordinances, regulations and requirements of all governmental entities, including federal, state, county or municipal, whether now in force or hereinafter enacted.

19. NO ATTORNEYS' FEES

In the event of any legal dispute arising out of this Agreement the prevailing Party shall not be entitled to attorneys' fees.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be executed on the day and year first above written.

**APPROVED AS TO FORM:
THE CITY ATTORNEY'S OFFICE**

By: _____

Aaron C. Harp
City Attorney

CITY OF NEWPORT BEACH
a California municipal corporation

By: _____

David Kiff
City Manager

ATTEST:

CRYSTAL COVE CONSERVANCY
a California non-profit corporation

By: _____

Leilani I. Brown
City Clerk

By: _____

Alix Dunn
President

By: _____

Secretary

Attachment: Exhibit "A"—The Conservancy's Phase III Restoration Proposal

Exhibit "A"
The Conservancy's Phase III Restoration Proposal

Scope of the Project:

- Seventeen (17) Cottages- all scheduled to be overnight rentals;
- Complete infrastructure including roads, water supply, wastewater removal, electrical, fire protection, retaining walls, and boardwalk for pedestrian and electric cart access; and
- CDP permit (Coastal Development Permit).

Estimated Cost:

\$ 35.0 million.

Estimated Additional Annual Revenues Upon Completion:

\$1.2 million - all from overnight cottage rentals.

Estimated time to complete the entire project:

5 years depending on fund raising results.

Scope of Improvements:

- Construct 100% new infrastructure including soil stabilization walls, access roadway, water system, sewer system and new electrical supply system;
- Restore seventeen (17) historic cottages including 100% new utilities and life safety systems; and
- Restore the landscape of the entire site.