



# STAFF REPORT

## SAUSALITO CITY COUNCIL

---

### AGENDA TITLE:

Approve Retaining Wall Reimbursement and Maintenance Agreement (257 San Carlos Avenue)

### RECOMMENDED MOTION:

Approve Retaining Wall Reimbursement and Maintenance Agreement (257 San Carlos Avenue) and Authorize the Mayor to execute the Agreement with such changes as are approved by the City Manager and City Attorney provided that such changes do not affect the financial impact of the Agreement to the City

---

### SUMMARY

The retaining wall located between the property owned by the City at 29 Caledonia and the property owned by Phillip Jones and Sam Hock at 257 San Carlos is in a state of disrepair. The demolition of the old police station at 29 Caledonia is scheduled to begin in June and it is important that the retaining wall be replaced prior to the commencement of the demolition for the protection of both properties.

Attached as Attachment No. 1 is a draft Retaining Wall Reimbursement and Maintenance Agreement (the "Agreement"). Please note that the attached Agreement is the initial draft that was sent to Mr. Jones and Mr. Hock for review and comment. We anticipate that they will request revisions to this draft. The City Attorney will work with the Public Safety Facilities Council representatives (Councilmembers Kelly and Leone) to review any requested revisions and provide the Council with an updated Agreement and report on May 6<sup>th</sup>.

### BACKGROUND

The Agreement provides that Mr. Hock and Mr. Jones will undertake to have the retaining wall between the 2 properties replaced with a new retaining wall and the City will reimburse them for 40% of the actual construction costs. As you can see there is currently a blank in the definition of "Reimbursement Amount" for a "not to exceed" amount to be inserted. We anticipate providing you with that amount at the Council meeting on the 6<sup>th</sup>. The Agreement also provides that upon the completion of the new retaining wall the parties will jointly hire a surveyor to document the location of the new wall and will thereafter cooperate to undertake a lot line adjustment (or similar

---

Item #: 6A  
Meeting Date: 5-6-08  
Page #: 1

mechanism) to cause all of the property underlying the wall to be transferred to Mr. Hock and Mr. Jones. The owners of 257 San Carlos will be responsible for all future upkeep and maintenance of the new wall.

## FISCAL IMPACT

The City will be obligated to reimburse Mr. Hock and Mr. Jones for 40% of the cost of constructing the new retaining wall. It is anticipated that this amount will be approximately \$100,000.00 and will be taken from the public safety buildings fund.

## STAFF RECOMMENDATIONS

Approve Retaining Wall Reimbursement and Maintenance Agreement (257 San Carlos Avenue) and Authorize the Mayor to Execute the Agreement with such changes as are approved by the City Manager and City Attorney provided that such changes do not affect the financial impact of the Agreement to the City.

Alternatively the Council could:

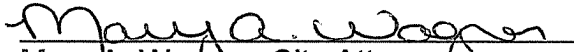
- Direct staff to make modifications to the Agreement and continue negotiations with Mr. Hock and Mr. Jones. This would result in a delay in the construction of the new retaining wall which could in turn delay the demolition of the old police station at 29 Caledonia. If the Council elects this option it would be useful to schedule a special City Council meeting for further consideration of the Agreement.
- Deny approval of the Agreement in which case alternatives methods would need to be undertaken to ensure that the existing wall remains stable during the demolition and construction of the new police station. The cost of such alternatives is currently unknown.

**ATTACHMENTS**

Attachment No. 1 – Draft Retaining Wall Reimbursement and Maintenance Agreement

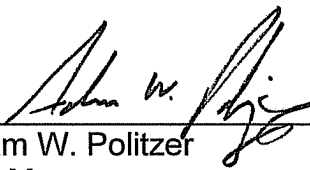
PREPARED BY:

REVIEWED BY:

  
\_\_\_\_\_  
Mary A. Wagner, City Attorney

\_\_\_\_\_  
Louise Ho, Finance Director

SUBMITTED BY:

  
\_\_\_\_\_  
Adam W. Politzer  
City Manager

---

Item #: 6A  
Meeting Date: 5-6-08  
Page #: 3

**RETAINING WALL REIMBURSEMENT AND MAINTENANCE AGREEMENT  
(275 San Carlos Avenue)**

**THIS RETAINING WALL REIMBURSEMENT AND MAINTENANCE AGREEMENT (275 San Carlos Avenue)** ("Agreement") is made and entered into effective as of the \_\_\_ day of \_\_\_\_\_ 2008 ("Effective Date") by and between the City of Sausalito, a municipal corporation ("City), and Sam Hock and Phillip Jones \_\_\_\_\_ [INSERT VESTING] (hereinafter referred to collectively as "H&J"). City and H&J may hereinafter be referred to collectively as the "Parties" and/or individually as a "Party."

**RECITALS**

The following Recitals are a substantive part of this Agreement:

A. City is the fee simple owner of real property in the City of Sausalito situated at and known as 29 Caledonia Street, Sausalito, California, and legally described in Exhibit A ("the City Property"). The City is in the process of constructing new public safety facilities on the City Property and the property owned by the City located at 300 Johnson.

B. H&J is the fee simple owner of real property in the City of Sausalito situated at and known as 257 San Carlos, Sausalito, California, and legally described in Exhibit B ("the H&J Property") which abuts the southern boundary of the City Property.

C. A retaining wall generally runs along the abutting boundary of the City Property and the H&J Property and then makes a 45-degree turn before exiting the joint boundary line and running next to the right of way on Caledonia Street as depicted on the Site Map attached as Exhibit C (the "Existing Retaining Wall"). The Existing Retaining Wall benefits both the City Property and the H&J Property. The Existing Retaining Wall is in disrepair and the Parties agree that it should be replaced.

D. Portions of the Existing Retaining Wall are located on H&J Property and portions encroach without permit onto City Property.

E. H&J proposes to replace the Existing Retaining Wall and due to the public benefit which includes but is not limited to the protection of the City Property and the new public safety facilities, City has agreed to contribute to the cost of replacing such Existing Retaining Wall as described herein.

**TERMS AND CONDITIONS**

NOW for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, IT IS HEREBY AGREED as follows:

1. Definitions. The following terms shall have the meanings ascribed to them in this Section 1 for purposes of this Agreement:

“City Manager” means the City Manager for the City or his designee.

“Construction Contract” is defined in Section 3.

“Construction Costs” means the actual cost of the construction of the New Retaining Wall incurred by H&J in accordance with the Construction Contract, which costs include: (i) demolition and temporary shoring measures related to the removal of the Existing Retaining Wall; (ii) labor, materials and equipment costs; (iii) the cost of City’s contract plan check firm which reviews the Plans at the direction of the City’s Building Department; and (iv) amounts of any change orders approved by the City Manager in accordance with Section 3.

“Payment Request” means a request from H&J for payment of the Reimbursement Amount, in the form of Exhibit E.

“Plans” means the plans, specifications, schedules and related Construction Contract for the New Retaining Wall approved pursuant to applicable standards of the City, attached hereto as Exhibit D. The Plans attached hereto upon execution of the Agreement will be submitted to the City’s Building Department for approval and upon completion of the plan check the approved plans (with any required modifications) will replace the Plans attached upon execution.

“Reimbursement Amount” means an amount equal to the lesser of: (i) forty percent (40%) of the Construction Costs; or (ii) \$\_\_\_\_\_. ***[AMOUNT EQUAL TO 40% OF APPROVED BID TO BE INSERTED]***

2. New Retaining Wall. On or before June 1, 2008 (the “Completion Date”) H&J shall cause the Existing Retaining Wall to be replaced with a new retaining wall constructed in accordance with the Plans and the terms and conditions of this Agreement (the “New Retaining Wall”). The New Retaining Wall shall be located within the general vicinity of the Existing Retaining Wall and shall not encroach onto City Property to any extent greater than the encroachment of the Existing Retaining Wall. The City agrees to waive the building permit application fee and the Parties shall each pay one half of the building plan check fee.

a. H&J acknowledge and agree that time is of the essence in the performance of this Agreement and that the completion of construction of the New Retaining Wall on or before the Completion Date is critical to the commencement and completion of construction of the new public safety facilities on the City Property.

b. City’s obligation to pay the Reimbursement Amount is expressly contingent on the completion of construction, final inspection and approval by the applicable governmental entity(ies) of the New Retaining Wall on or before the Completion Date.

c. In the event that the City reasonably believes that H&J will not cause the completion of construction of the New Retaining Wall on or before the Completion Date the City shall have the right but not the obligation to take over the Construction Contract (as set forth in Section 3 below) and H&J shall be required to

reimburse the City for any amounts expended by the City in completing the construction of the New Retaining Wall.

d. Within sixty (60) days of the completion of the construction, inspection and final approval of the New Retaining Wall the Parties shall hire a mutually agreed upon surveyor to survey and document the location of the New Retaining Wall. H&J shall pay 60% of the cost of the surveyor and the City shall pay 40%. Thereafter the Parties agree to cooperate to process a lot line adjustment or another mutually agreed upon mechanism to transfer ownership of the portion of the City Property underlying the New Retaining Wall to H&J. The Parties will determine and mutually agree on the necessity, nature and extent of an easement or right of entry for H&J over the southerly portion of the City Property to allow access for maintenance. In the event that the Parties determine such an easement or right is required, they shall direct the surveyor to prepare a legal description of the boundaries of such an easement.

3. Construction Contract. H&J shall enter into a fixed price or guaranteed maximum cost construction contract for the New Retaining Wall with a reputable and financially responsible general contractor, bonded and licensed in California, and with experience in completing projects similar to the New Retaining Wall (the "Construction Contract"). The Construction Contract shall include:

- a. Requirements for the payment of prevailing wage in accordance with State law;
- b. Provisions requiring the general contractor to insert, in each of its contracts with subcontractors, a provision pursuant to which the subcontractor agrees that it is aware that it must comply with prevailing wage requirements and agreeing that the general contractor may withhold payment under the subcontract in the event of any breach of such provisions;
- c. Requirements that all contractors working on the New Retaining Wall obtain a City business license; and
- d. A provision which shall cause the contractor to incur financial penalties in the event that the construction of the New Retaining Wall is not completed by the Completion Date; and
- e. A requirement that all change orders must be approved in writing by the City Manager.
- f. A requirement that the City be named as an additional insured party on all insurance.

The Construction Contract shall give City the right, but not the obligation, to cure defaults thereunder and to assume H&J's obligations and rights under the contract; provided that such right to cure and assume that contract shall not constitute a waiver of any rights held by City.

4. Change Order Requests. H&J shall submit to the City written requests for change order approval(s) along with such documentation required to support the request and such additional documents as may be requested by the City Manager. The City Manager shall approve or deny the change order request within five (5) business days of receipt of the written request, such approval shall not be unreasonably withheld. The failure of the City Manager to approve or deny a change order request within such five (5) day time period shall constitute a denial. Change orders approved in accordance with the requirements of this Section 4 shall be included as Construction Costs. Denied change orders shall not be included in as Construction Costs.

5. Not a Public Works Contract; Independent Contractor. This Agreement is for the reimbursement of a portion of the cost of construction of the New Retaining Wall and is not intended to be and shall not be construed to be a public works contract. The City and H&J agree that H&J shall award all contracts for the construction of the New Retaining Wall, and that this Agreement is necessary to assure the timely and satisfactory completion of the New Retaining Wall. In performing this Agreement, H&J is an independent contractor and not an agent or employee of the City. The City shall not be responsible for making any payments to any contractor, subcontractor, agent, consultant, employee or supplier of H&J. The City may at its option post notices of non-responsibility on City Property and/or on H&J Property.

6. Conditions of Construction. The New Retaining Wall shall be constructed by H&J in compliance with the following conditions:

(a) H&J shall have entered into a Construction Contract, which Construction Contract shall be subject to the reasonable review and approval of the City Manager;

(b) The New Retaining Wall shall be constructed in accordance with the Plans, all applicable building and zoning codes, permits of the City of Sausalito and any and all other applicable governmental requirements; and

(c) Provided that H&J otherwise complies with all applicable City requirements, the New Retaining Wall may exceed the height of the Existing Retaining Wall as indicated on the Plans (provided that it otherwise complies with all applicable Zoning and/or Building Code requirements) and may be constructed, including any footings or underpinnings, on or under both the H&J Property and the City Property as set forth on the Plans. The New Retaining Wall shall not encroach on City Property in any amount in excess of the encroachment of the Existing Retaining Wall.

7. Payment of Reimbursement Amount

(a) No payment hereunder shall be made by the City to H&J for the New Retaining Wall until such improvement has been inspected by the City to verify that the New Retaining Wall has been constructed in accordance with the Plans and complies with all applicable Building and Zoning Codes.

(b) Upon completion of the New Retaining Wall and issuance of a certificate of completion with respect to such improvement (or other similar approval)

thereof by the City, H&J shall deliver to the City Manager a complete Payment Request relating to the New Retaining Wall.

(c) Upon receipt of a Payment Request (and all accompanying documentation and such other documentation as the City Manager may reasonably request), the City Manager shall conduct a review in order to confirm that such request is complete, that the New Retaining Wall was constructed substantially in accordance with the Plans and complies with all applicable Building and Zoning Codes, and to verify and approve the Construction Costs. The City Manager shall conduct the review in an expeditious manner and H&J agrees to reasonably cooperate with the City Manager in conducting the review and to provide the City Manager with such additional information and documentation as is reasonably necessary for the City Manager to conclude the review. Within ten (10) business days of receipt of such Payment Request, the City Manager shall notify H&J whether such Payment Request is complete, and, if not, what additional documentation must be provided. If such Payment Request is complete, the City Manager will provide a written approval or denial of the request within ten (10) business days of its submittal. In the event that such written approval or denial is not delivered within ten (10) business days the Payment Request will be deemed denied and will have to be resubmitted under the above procedure.

(d) Upon approval of a Payment Request by the City Manager, the City Manager shall sign such Payment Request and cause the same to be processed for payment no later than thirty (30) days following approval. Such payment shall be in the form of a check payable to \_\_\_\_\_. The Reimbursement Amount paid pursuant to the Payment Request for the New Retaining Wall shall constitute payment in full for such improvements.

(e) In no event shall the City pay an amount greater than the Reimbursement Amount.

(f) If any of the work done or materials furnished for the New Retaining Wall are found by the City Manager to be defective or not in substantial accordance with the applicable Plans: (i) if such finding is made prior to payment of the Reimbursement Amount of the New Retaining Wall, the City Manager may withhold payment therefor until such defect or nonconformance is corrected, or (ii) if such finding is made after payment of the Reimbursement Amount, H&J shall correct such defect or nonconformance.

8. Support. H&J agrees that they shall not cut into, or, attach anything to, the New Retaining Wall or any part of it, or reduce soil levels, modify drainage or allow landscaping adjacent to the New Retaining Wall so as to compromise its lateral and subjacent support, nor intentionally or negligently conduct or permit any activity or occurrence on the H&J Property which shall cause any defacing or injury to the New Retaining Wall, or which shall necessitate any repair, or accelerate any maintenance to the New Retaining Wall, other than in the course of normal wear and tear through weathering. H&J agrees that they shall not plant or cause to be planted any plant, tree or other vegetation which could jeopardize or compromise the integrity of the New Retaining Wall.



9. Maintenance. H&J agrees to construct and maintain the New Retaining Wall in conformance and in compliance with the applicable Building and Zoning Codes and permits of the City of Sausalito and any and all applicable governmental requirements. H&J agrees to maintain the New Retaining Wall in accordance with reasonable maintenance standards as are the custom and practice generally applicable to comparable retaining walls located within Sausalito, California (collectively, the "Reasonable Standards").

10. Right of Entry. For the purpose of enabling H&J to construct the New Retaining Wall in accordance with the Reasonable Standards, H&J its agents and contractors, shall have a right of access over only those portions of the City Property immediately adjacent to the New Retaining Wall, without charges or fees, at normal construction hours during the period of such construction, so long as they comply with all applicable safety rules.

11. Damage to New Retaining Wall. In the event that either H&J at any time hereafter uses the New Retaining Wall as a support, or cuts into, or, attaches anything to, the New Retaining Wall or any part of it, or reduces soil levels, modifies drainage or allows landscaping on such H&J's Property so as to compromise its lateral and/or subjacent support, or intentionally or negligently conducts or permits any activity or occurrence on the H&J's Property, which shall cause any defacing or injury to the New Retaining Wall, or which shall necessitate any repair, or accelerate any maintenance to the New Retaining Wall, other than in the course of normal wear and tear through weathering, then H&J acknowledges and agrees that the City may take such steps as are reasonably necessary to cure or correct such breaches of covenant, including but not limited to pursuing any and all remedies available in law or equity, and H&J shall be liable for all resulting damages and costs of cure and correction in remedying said breaches of covenant, including costs of repairing the New Retaining Wall, and all attorneys' fees and other legal costs or fees incurred by the City in connection therewith. In addition, the City shall have the right to require H&J to remove any plant, tree and/or other vegetation which the City reasonably believes jeopardize or may compromise the integrity of the New Retaining Wall.

12. Indemnity. For purposes of this Agreement, "Claims" means any and all liabilities, actions, proceedings, losses, damages, costs, expenses (including, without limitation, all attorneys' fees and litigation expenses), causes of action, suits, claims, demands or judgments of any nature whatsoever, including, without limitation, third party claim and death of or injury to any person or damage to any property.

H&J shall pay, defend (with counsel reasonably acceptable to City), indemnify and hold harmless City, its elected and appointed officials, officers, employees, agents, volunteers and representatives, from and against any and all Claims based upon, arising from or connected in any manner with the breach or default in performance by H&J of any obligation, covenant, representation or warranty contained in this Agreement.

City shall pay, defend (with counsel reasonably acceptable to H&J), indemnify and hold harmless H&J, their employees, agents, and representatives, from and against any and all Claims based upon, arising from or connected in any manner with the breach

or default in performance by City of any obligation, covenant, representation or warranty contained in this Agreement.

If any action or proceeding should be brought against either Party based upon any such Claim and if the indemnified Party, upon notice from the indemnifying Party, shall cause such action or proceeding to be defended at the indemnifying Party's expense by counsel reasonably satisfactory to the indemnifying Party, without any disclaimer of liability by indemnified Party in connection with such Claim, the indemnified Party shall not be required to indemnify the indemnifying Party for reasonable attorney's fees and expenses in connection with such action or proceeding. The agreement of indemnification set forth in this Section 10 shall not extend to Claims arising prior to the Effective Date. The obligations of the Parties under this Section 10 shall commence to accrue on the Effective Date and shall survive any termination of this Agreement.

13. Miscellaneous.

(a) Construction. Headings in this Agreement are for convenience only and are not part of this Agreement. When the context so requires, words in the masculine, feminine or neuter gender shall include each other gender; and words in the singular or plural shall include each other. Unless otherwise indicated, all references to paragraphs and subparagraphs are to this Agreement. This Agreement is executed and delivered in the State of California and shall be construed and enforced in accordance with and governed by the laws of the State of California.

(b) Severability. In the event any portion of this Agreement shall be declared by any court of competent jurisdiction to be invalid, illegal or unenforceable, such portion shall be deemed severed from this Agreement and the remaining part of this Agreement shall remain in full force and effect, as fully as though such invalid, illegal and unenforceable portion had never been part of this Agreement.

(c) Incorporation by Reference. All Exhibits which are attached hereto are incorporated herein by this reference as though set forth in full.

(d) Attorneys' Fees. If any action is brought to enforce this Agreement, the prevailing party(s) shall be entitled to recover all costs and expenses of the action including reasonable attorneys' fees.

(e) Entire Agreement. This Agreement contains the entire agreement between the parties concerning the subject matter of this Agreement and supersedes any and all other prior agreements, understandings, or negotiations concerning such subject matter.

(f) Enforcement. Enforcement of this Agreement may be by any proceeding in law or in equity against any person or persons or entity or entities violating or attempting to violate any of the provisions of this Agreement, and any party enforcing this agreement may seek to enjoin or prevent such violating party or parties from doing so, may seek to cause any violation to be remedied and/or to recover damages for any violation.

(g) Notices. All notices or other communications required or permitted under this Agreement shall be in writing and shall be delivered personally or sent by United States mail, registered or certified, return receipt requested, postage prepaid, addressed as follows:

If to City: City of Sausalito  
420 Litho Street  
Sausalito, CA 94965  
Attn: City Manager

If to H&J: **[TO BE INSERTED]**

Attn:

Any party may, by notice to the other, designate a different address for notices which shall be substituted for that specified above. All notices and other communications given as provided in this paragraph shall be effective upon receipt.

(h) Counterparts. This Agreement may be executed in two or more counterparts, each of which shall be an original, but all of which shall constitute one and the same instrument.

(i) Successors and Assigns. This Agreement shall apply to and bind the heirs, personal representatives, successors and assigns of the Parties hereto and a Memorandum of Agreement shall be recorded against both the H&J Property and the City Property in the official records of the County of Marin.

**IN WITNESS WHEREOF,** the Parties have executed this Agreement on the day and year set forth below.

H&J: \_\_\_\_\_ H&J

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

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

CITY: CITY OF SAUSALITO, a municipal corporation

6A  
12

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

By: \_\_\_\_\_  
Mayor

ATTEST:

\_\_\_\_\_  
City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

F

D

EXHIBIT A

LEGAL DESCRIPTION OF THE H&J PROPERTY

[To be inserted]

DRAFT

EXHIBIT B

LEGAL DESCRIPTION OF CITY PROPERTY

[To be inserted]

DRAFT

EXHIBIT C

DEPICTION OF EXISTING RETAINING WALL

[To be inserted]



EXHIBIT D

PLANS

[To be inserted]

RR  
FF



## EXHIBIT E

### PAYMENT REQUEST

H&J hereby requests payment in the total amount of \$\_\_\_\_\_ as more fully described in the Attachment 1 hereto. (All terms as used herein are defined that certain Retaining Wall Reimbursement and Maintenance Agreement (the "Agreement") by and between the City and H&J.) In connection with this Payment Request, the undersigned hereby represents and warrants to the City as follows:

1. The undersigned is duly authorized by H&J, qualified to execute this Payment Request for payment on behalf of H&J and is knowledgeable as to the matters set forth herein.

2. This payment request is with respect to a completed New Retaining Wall and H&J has submitted or submits herewith to the City, if applicable, as-built drawings or similar plans and specifications for the items to be paid for as listed in Attachment 1 hereto with respect to any such improvements, and such drawings or plans and specifications, as applicable, are true, correct and complete.

3. All costs of the New Retaining Wall for which payment is requested hereby are Construction Costs (as defined in the Agreement referenced above) and have not been inflated in any respect. The items for which payment is requested have not been the subject of any prior payment request submitted to the City.

4. Supporting documentation (such as third party invoices, lien releases and cancelled checks) is attached with respect to each cost for which payment is requested.

5. The New Retaining Wall for which payment is requested hereby was constructed in accordance with the requirements of the approved Plans and applicable Building and Zoning Codes.

6. H&J is in compliance with the terms and provisions of the Agreement and no portion of the amount being requested to be paid was previously paid.

7. The Reimbursement Amount for the New Retaining Wall has been calculated in conformance with the terms of the Reimbursement Agreement.

8. City has certified the completion of the New Retaining Wall and H&J has attached all warranties, guarantees or other evidences of contingent obligations of third parties with respect to the New Retaining Wall.

I hereby represent and warrant that the above representations and warranties are true and correct.

H&J:

By: \_\_\_\_\_

Name: \_\_\_\_\_

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

DA

ATTACHMENT 1

SUMMARY OF IMPROVEMENTS  
TO BE REIMBURSED AS PART OF PAYMENT REQUEST

<u>Item No.</u>	<u>Component</u>	<u>Construction Costs</u>	<u>Disbursement Requested @ 40%</u>
-----------------	------------------	---------------------------	---

[List here all components for which payment is requested,  
and attach supporting documentation]

DRAFT

RAAT