

EXAMPLE

APPENDIX 3

**Construction and Transfer of
Water, Sewer and Recycled Water
Infrastructure Agreement**

EXAMPLE

CONSTRUCTION AND TRANSFER OF WATER, SEWER AND
RECYCLED WATER INFRASTRUCTURE AGREEMENT
BETWEEN MARINA COAST WATER DISTRICT AND
DEVELOPER

TABLE OF CONTENTS

1. RECITALS.....3

2. DESIGN AND CONSTRUCTION REQUIREMENTS.....3

3 EXISTING WATER AND SEWER INFRASTRUCTURE5

4. DISTRICT TO SERVE DEVELOPMENT.....6

5. CAPACITY CHARGE6

6. WATER AUGMENTATION PROJECT.....7

7. LICENSED CONTRACTOR.....7

8. PERMITS, EASEMENTS, AND RELATED COSTS8

9. FINAL INSPECTION AND REIMBURSEMENT OF DISTRICT COSTS8

10. UNDERGROUND OBSTRUCTIONS8

11. AS-BUILT PLANS, SPECIFICATIONS, VALUES, ETC.8

12. INDEMNITY, INSURANCE, AND SURETIES9

13. TRANSFER OF SYSTEM FACILITIES TO DISTRICT AFTER COMPLETION.....9

14. DEVELOPER ASSISTANCE10

15. WARRANTIES.....10

16. NO WATER, RECYCLED WATER AND SEWER SERVICE PRIOR TO COMPLETION AND
TRANSFER11

17. PERFORMANCE.....11

18. ASSIGNMENT11

19. DISPUTE RESOLUTION PROCEDURE.....11

20. WAIVER OF RIGHTS13

21. NOTICES13

22. SEVERABILITY14

EXAMPLE

23. PARAGRAPH HEADINGS14

24. SUCCESSORS AND ASSIGNEES.....14

25. INTEGRATED AGREEMENT14

26. NEGOTIATED AGREEMENT14

27. ATTORNEYS FEES14

28. EXHIBITS.....15

29. DISCLAIMER/INDEMNITY REGARDING PUBLIC WORKS15

30. NO THIRD PARTY BENEFICIARIES.....15

32. COUNTERPARTS15

Exhibits

EXHIBIT A -- CITY RESOLUTION

EXHIBIT B -- LEGAL DESCRIPTION

EXHBIT C -- MAP OF DEVELOPMENT

EXHIBIT D -- INDEMINIFCATION AGREEMENTS INSURANCE REQUIREMENTS

**EXHIBIT E -- NOTICE TO PROPERTY OWNERS OF SURCHARGE OF WATER & SEWER
SURCHARGE PAYMENTS**

EXAMPLE

CONSTRUCTION AND TRANSFER OF WATER, SEWER AND RECYCLED WATER INFRASTRUCTURE AGREEMENT

This Agreement made and entered into this _____, by and between **Marina Coast Water District**, 11 Reservation Road, Marina, CA, 93933, hereinafter called "District", and _____, a California limited partnership, with its principal offices at _____, hereinafter called the "Developer." This Agreement pertains to the construction and transfer of water, sewer and recycled water infrastructure. [Note: replace City with County throughout, if applicable.]

1. Recitals

1.1 The Developer owns and is developing an approximately ___ acre parcel of land, to be developed [in phases] on property described in Exhibit "B" attached hereto and made a part hereof, in the [City of ____][County of Monterey], California, ("City" or "County") all hereafter referred to as the "Development".

1.2 The City has approved an allocation of water and sewer capacity for the entire _____ Development. The total water allocated by the City to _____ is xxx AFY. However, neither the City nor the District may approve: (1) water allocations that exceed the allocations set by the Fort Ord Reuse Authority (FORA), or (2) sewer capacity established by the type and density of development as included in the FORA Consistency Determinations. The District's role in the Development is to approve the plans for, and inspect the construction of the water sewer, and recycled water "facilities", (defined to mean those certain infrastructure improvements provided for in this Agreement and as approved by District as part of its review of Development plans), accept the transfer of the title, to maintain and operate the systems, and to bill customers for water and sewer service at rates set for the District's Ord Service Area from time to time.

1.3. The District will only serve the Development if the Developer delivers to the District a certified copy of the resolution from the City attached to this Agreement as Exhibit A, approving the allocation of water for the Development from water allocated to the City by FORA.

1.4 Term. This Agreement commences upon execution by the parties and continues for two years (twenty-four months) or until completion of the development construction and the associated warranty period, whichever comes first, unless terminated earlier as provided in section 17 of this Agreement.

2. Design and Construction Requirements

2.1 The water, sewer, and recycled water facilities shall be designed, constructed and be operable to the District's requirements, which shall be a condition of the District's acceptance of the system facilities under this Agreement. District's requirements include, but are not limited to the following:

EXAMPLE

2.1.1 Developer shall design and construct the water, sewer and recycled water system facilities in accordance with the District's most recent *Standard Plans and Specifications for Construction of Domestic Water, Sewer, and Recycled Water Facilities* (hereafter *Standards*), Construction Inspection Manual and any other applicable State Regulatory Agency requirements, whichever are most stringent. Any conflict in Development requirements shall be worked out during the plan review process. A licensed civil engineer registered in the State of California shall prepare all plans and specifications.

2.1.2 The Developer shall comply with the District's most recent *Procedure Guidelines and Design Requirements* (hereafter *Procedures*) and the District's *Standards* when submitting project plans and specifications to the District for review and consideration of approval. District's review shall commence after determining compliance with District's *Procedures* regarding the submittals and any other applicable State Regulatory Agency requirements, whichever are most stringent. District review of the project plans and specifications shall commence after receipt of the initial deposit (see Paragraph 2.1.7). District may approve plans concurrent with the City's Approval.

2.1.3 The Developer shall comply with most recent District Code including, but not limited to, section 4.28 *Recycled Water*. More specifically, section 4.28.010 *Applicability* states that "[T]his chapter applies to publicly owned properties, to commercial, industrial and business properties, and to other such properties as may be specified from time to time by Marina Coast Water District ... "Section 4.28 does not require the use of recycled water for irrigation to privately owned residential lots. Improvement plans for the Development must contain recycled water lines to serve common areas and other non-residential lot irrigation within the Development. The Developer and the District will cooperatively identify recycled water turnout location(s). The Developer will also install the lateral lines from each turnout. The Developer, or its successors or assignees (such as an owners association) will obtain required permits for recycled water. This shall include, complying with the California Department of Health Services and other regulatory agency requirements prior to constructing any recycled water facilities.

2.1.4 The District will inspect the construction of water, sewer and recycled water facilities and verify that construction conforms to project plans and specifications. District responsibilities for inspection extends to five (5) feet from the building exterior at the point where the utility enters the structure. The District will also inspect special fixtures including, zero water use urinals, hot water recirculation systems, etc. The District will inform the Developer of required field changes and will contact the Developer and the City regarding easements outside publicly dedicated rights of way. The District will enter into a franchise agreement with the City for non-exclusive use within the public rights of way. Upon receipt of recorded private easements to serve the Development in accordance with the plans and specifications approved by the District, the District will quitclaim any easements not required to serve the Development and not required by the District.

2.1.5 The Developer shall be responsible for replacing or repairing any existing water and sewer facilities within its project limits in order for the District to maintain service to its customers as further described in paragraph 3 *Existing Water and Sewer Infrastructure* of

EXAMPLE

this Agreement, and the *In-Tract Policy*. This obligation is Limited to the period of Developer's construction of the infrastructure and the Warranty period of such work and in accordance with the District's most recent *In-Tract Policy*

2.1.6 All system facilities shall be tested to meet District requirements. No system facilities or portion thereof, including but not limited to pipes, pumps, electrical and instrumentation and control will be accepted without meeting District test requirements. The District shall have the right to inspect work in progress in the construction of either in-tract or out-of-tract water, recycled water and sewer infrastructure facilities or special fixtures, as describe above.

2.1.7 Plan Review Fees. The Developer, on a phased basis, agrees to pay all fees and charges, including additional plan check fees and construction inspection fees as required by the District for Developer's work. These fees will be assessed when the fee is paid. The District may also require a prepaid fee to cover staff time before preliminary level or concept level plan check begins. (See *Procedures* section 100.6.2) If the District Engineer determines consultant assistance is required for plan check review or portion thereof, the Developer agrees to prepay the additional plan check fees if that cost exceeds the balance on the initial deposit. The District shall obtain the Developer's written approval for any costs in excess of this amount, for which approval shall not be unreasonably withheld. Upon the execution of this Agreement by both parties, the Developer shall deposit with the District the applicable administration and plan check fees. Any surplus fees shall be returned to the Developer, or at Developer's request, used to pay subsequent fees, e.g., construction inspection fees.

2.1.8 Construction Inspection Fees. On a phased basis, the District shall require the construction inspection fee before undertaking a construction inspection review of the proposed water, recycled water and sewer facilities. As a condition precedent to the District's obligation to undertake a construction inspection review of the proposed water, recycled water and sewer facilities, the Developer shall provide to the District the construction inspection fee, which is currently five hundred dollars (\$500.00) per unit plus three percent (3%) of water, recycled water and sewer facilities construction costs, pursuant to Developer's Engineer's estimate. (See *Procedures* section 200.3.2) Any surplus inspection fees shall be returned to Developer.

2.1.9 Construction Bid Data. The Developer will submit actual construction bid data. The submitted data shall be in a unit cost format certified by both the contractor and the Developer as being the actual costs incurred in furnishing and installing the water, sewer and recycled facilities. The water, sewer and recycled construction costs must be reviewed and accepted by the District. The District shall maintain all such information as confidential and shall not disclose the same to any third party.

3 Existing Water and Sewer Infrastructure

3.1 The Developer will comply with the District's *In-Tract Policy* regarding any water, reclaimed water and sewer mains or appurtenances within the Development. Developer, or its successors or assignees, shall assume all responsibility, and will hold District harmless, for all

EXAMPLE

water/sewer infrastructure within the Development boundaries that will be removed or abandoned by Developer. Abandonment-in-place requires written approval by the District. The Developer is responsible to repair or replace water and sewer facilities within the Development boundaries during the construction of the Development which are for the exclusive use of the Development.

3.2 For Developments that use existing infrastructure as described in the *In-Tract Policy* (reference Policy no. 2), the Developer shall provide a completed, signed Utility Agreement with the District that provides anticipated higher costs of the remaining older system left in-place. The Utility Agreement shall include detailed language regarding form of payment and date certain for receipt of payment. Acceptable forms of payment include payment bond, irrevocable letter of credit, cash deposit, or construction "set-aside" loan. Developments that do not use existing infrastructure as described in the *In-Tract Policy* will follow Policy no. 1 of that document. Developer does not anticipate use of any existing infrastructure, therefore, this paragraph would not apply. However, should that change, as design progresses, the requirements of this paragraph shall be enforced as described in the *In-Tract Policy*, Developer will follow Policy no.1 of that document.

3.3 As part of District's review, District may require Developer to design and construct oversized infrastructure to accommodate water, recycled water and sewer service to areas other than the Development. The District or a third party will pay expenses relating to any installation or replacement of facilities needed for any third party users. Receipt of such payments may not delay District approvals. Any such obligation may be satisfied by a reimbursement agreement or other agreement reasonably satisfactory to Developer. Other than pipeline or related appurtenances that are repaired or replaced by the Developer, if the Developer repairs or replaces facilities that benefit properties other than the Development, the District may provide a portion of the replacement costs through a cost sharing Agreement or other Agreement acceptable to the District and the Developer, or in accordance with the then-current District payment structure required of all new developments, or as determined pursuant to the dispute resolution procedure in paragraph 19 *Dispute Resolution Procedures* if the parties cannot agree.

4. District to Serve Development

4.1 , District will provide water, recycled water and sewer service to the Development as shown on Exhibit C after final Board Acceptance of the conveyance of the water, recycled water, and sewer system facilities and final Board Acceptance of the system (see *Procedures* section 300.25). The District will bill and serve them. The bill will include the prepayment of applicable meter fees and charges, cross connection charges, and other applicable fees and charges approved pursuant to the agreement with FORA for service on the former Fort Ord. Once the applicable fees and charges are made, the District will immediately begin service with the installation of the water meter(s). The District's obligations in this section are subject to District's rules, regulations, policies and ordinances, which may be updated from time to time.

5. Capacity Charge

5.1 In July 2005, the District Board of Directors approved a capacity charge for water and sewer

EXAMPLE

services in the amount of \$2,800 per EDU and \$1,000 per EDU respectively. These charges are due when the first building permit is issued. The District Board of Directors reserves its right to review and revise these charges from time to time; subject to applicable law and the District's approval procedures for such charges.

5.2 Exhibit E is a notice that will be provided to the property owners informing them of the need for and amount of water and sewer surcharge that will be included on their District customer bills. The Developer hereby agrees that the Notice to Buyer(s) informing them of the Water and Sewer surcharge adopted by the District shall either be contained in the Department of Real Estate Public Report or a letter from the Developer to each prospective property buyer. The Developer agrees to provide this notice to each prospective property buyer prior to the execution of any contract to purchase property in the Development.

6. Water Augmentation Project [applicable only to the Ord Community]

6.1 In October 2004, the District Board of Directors certified its Regional Urban Water Augmentation Project Environmental Impact Report for a Water Augmentation Project. That project will provide additional water to the former Fort Ord. Alternatives included a 3,000 AFY recycled water project, a 3,000 AFY desalination project, or a 3,000 AFY hybrid project that includes a 1,500 AFY desalination plant and a 1,500 AFY recycled water project. In June 2005, the District and FORA Board of Directors approved the Hybrid Alternative and directed staff to initiate the scoping process. The selection of the Hybrid Alternative will result in the availability of recycled water. Therefore, improvement plans must be compatible with and anticipate the availability of a non-potable water supply to serve common area open spaces within the Development, as permitted by applicable laws and regulations. If an alternative water supply satisfies the foregoing requirements, Developer and District will cooperatively identify recycled water turnout location(s).

6.2 Developer, or its successors or assignees (such as an owners association), will obtain all permits that allow the use of recycled water, and agrees to take recycled water for non-potable use at the time it becomes available. The District shall establish a separate cost for recycled water in the same manner that it establishes the cost of potable water. Developer, or its successors or assignees agree that the District-established cost will be paid by the recycled water customers. .

7. Licensed Contractor

7.1 The Developer, or his authorized representative (contractor) performing the work, shall be licensed under the provisions of the Business and Professions Code of the State of California to do the work called for in the project. District reserves the right to waive this requirement at its discretion where permitted under state statute.

7.2 The Developer, or his contractor, shall be skilled and regularly engaged in the installation of water and sewer systems. The District may request evidence that the constructing party has satisfactorily installed other projects of like magnitude or comparable difficulty. Contractors must furnish evidence of their qualifications to do the work.

EXAMPLE

8. Permits, Easements, and Related Costs

8.1 Except as otherwise provided in this Agreement, the Developer shall obtain all necessary local, county and state permits (including encroachment permits) and conform to requirements thereof.. Developer shall obtain all easements, for other than public rights of way, necessary for ingress and egress to and from the facilities for the purpose of installation, operation, maintenance and removal of said facilities. Pipeline easements shall be 20 feet in width or as otherwise agreed by the District Engineer and Developer. Easements shall be in a form reasonably approved by the District and shall be submitted/conveyed to the District in recordable form before the District accepts the facilities

9. Final Inspection and Reimbursement of District Costs

9.1 The District's Engineer must inspect completed water, sewer and recycled water system facilities, or portion thereof. The District will not accept the facility until its Engineer has given written approval that it satisfies the District's requirements. Developer shall be responsible for all costs incurred by the District that are associated with interim and final inspection, completion, additional construction, and testing of the system facilities, subject to the limitations set forth in Paragraph 2 *Design and Construction Requirements*. Developer shall reimburse District for costs to correct any damages to facilities related to the construction of the Development. This reimbursement obligation is limited to the warranty period described in paragraph 15 *Warranties*. Developer shall remit to District prior to the conveyance of the water, sewer and recycled water system facilities to the District, payment of reimbursable costs, if any, incurred for inspection, administration and plan review, over and above deposits previously paid to the District. If there is a surplus in such accounts or any refunds due Developer, then District shall return to Developer the amount of such surplus or refunds.

10. Underground Obstructions

10.1 The District is not responsible for Developer's (or Developer's contractor's) acts and omissions during construction. Any location of underground utility lines or surface obstructions given to the Developer or placed on the project drawing by District are for the Developer's convenience, and must be verified by Developer in the field. The District assumes no responsibility for the sufficiency or accuracy of such information, lines, or obstructions.

11. As-Built Plans, Specifications, Values, Etc.

11.1 Developer shall, as a condition of District's acceptance of the water, sewer and recycled water system facilities, provide to the District in accordance with Section 400.13 of the *Procedures*. Developer agrees to supply the following:

11.1.1 A set of mylar drawing prints and AutoCAD digitized files of the improvement plans which show the water, sewer and recycled water system facilities, and a hardcopy and electronic copy of the specifications, and any contract documents used for the construction of the water, sewer and recycled water system facilities. These files may be in Adobe Acrobat format.

EXAMPLE

11.1.2 A complete, detailed statement of account, the form and content to be provided by the District at the time of conveyance, of the amounts expended for the installation and construction of the system facilities, with values applicable to the various components thereof, together with a list of any other materials and equipment (and their values) being transferred.

11.1.3 Any other documents required by Section 400.13 of the *Procedures*.

12. Indemnity, Insurance, and Sureties

12.1 . Insurance and Liability - The Developer agrees to have its contractor provide the indemnity, defense, and save harmless agreement to the District, its officers, agents, and employees as provided in Exhibit D, attached hereto and hereby incorporated by reference. Insurance policies shall provide that such insurance is primary insurance. Coverages described in Exhibit D shall be maintained through the term of this Agreement, and the Developer's contractor shall file with the District prior to the execution of this Agreement, and as policy renewals occur, a Certificate of Insurance evidencing that the insurance coverages required herein have been obtained and are currently in effect.

12.2. Performance and Payment Surety - Developer or its authorized representative to do the work (contractor) shall furnish the District with a surety in the amount of the District's estimate of the project construction cost to secure the completion of and payment for the work. The surety shall be in a form satisfactory to the District such as a performance and payment bond, irrevocable letter of credit, cash deposit, or construction "set-aside" letter. Such surety may include evidence that it was submitted to another public agency of an equivalent or greater amount covering the work to be done under this Agreement.

12.3. Submittal of Insurance Certificates and Surety - The required insurance certificates shall be delivered prior to commencement of construction and performance, and payment surety shall be delivered to the District prior to District approval of plans and specifications.

13. Transfer of System Facilities to District after Completion

13.1 Developer will execute and obtain all signatures of any other parties having any interest (including any Deed of Trust), and deliver a conveyance satisfactory in form and content to District. This conveyance shall transfer absolute and unencumbered ownership of the completed water, sewer and recycled water system facilities to the District together with all real property, interest in real property, easements and rights-of-ways (including any off-site easements or real property) other than those contained in public rights of way, and all overlying and other underground water rights that are a part of, appurtenant to, or belonging to any parcels now or hereafter served by the water, sewer and recycled water system facilities that are necessary or appropriate in the opinion of the District for the ownership and operation of the system. Provided all other conditions set forth herein are satisfied, the District shall accept the

EXAMPLE

conveyance. All costs of construction of the system facilities, for which the Developer is responsible, shall have been paid for by Developer, the time for filing mechanics liens shall have expired (or Developer shall provide other security to protect against liens, and the title to the water, sewer and recycled water system facilities and the interests in real property transferred shall be good, clear and marketable title, free and clear of all encumbrances, liens or charges. Developer shall pay costs of title insurance deemed necessary by the District. All construction, including final inspection punch list items must be completed prior to transfer, and the transfer shall not be completed until the conveyance transferring the water, sewer and recycled water system facilities has been formally accepted by the District. After transfer, the District shall own and be free in every respect to operate and manage the water, sewer and recycled water system facilities and to expand or improve, or interconnect with adjacent facilities, as it deems appropriate.

14. Developer Assistance

14.1 Developer shall, both before and after the transfer, secure and provide any information or data reasonably needed by District to take over the ownership, operation and maintenance of the system facilities.

15. Warranties

15.1 Developer hereby warrants that as of the time of the District's acceptance of the conveyance of the water, sewer and recycled system facilities (or when Developer thereafter completes the installation of any works or components subsequently installed, repaired, or replaced) the water, sewer and recycled system facilities and all components thereof, will be in satisfactory working order and quality; and that the water, sewer and recycled systems facilities and all components thereof have been constructed and installed in compliance with specifications and as-built plans being provided to the District, and in accordance with applicable requirements of any governmental agency having jurisdiction. Developer also warrants that as of the time of the District's acceptance of the conveyance of the water, sewer and recycled water system facilities (or when Developer thereafter completes the installation of any works or components subsequently installed, repaired, or replaced) the system facilities will operate in good and sufficient manner for the purpose intended for one (1) year after the date of acceptance (see *Procedures* section 300.24), or 180-days from the date new facilities are subsequently re-installed, repaired, or replaced (hereafter *replacement facilities*), whichever is later and the Developer shall indemnify District for any costs or expenses (including District's own labor costs) incurred by reason of failure, malfunction, replacements, repairs or any other expenses incurred by District during the one (1) year warranty period or 180-days for *replacement facilities*, whichever is later.

15.2 Developer shall furnish the District with a Warranty Bond (or other instrument satisfactory to the District) in the amount of twenty percent (20%) of the actual construction costs to protect the District against any failure of the work due to faulty materials, poor workmanship or defective equipment within a period of one (1) year following the date of acceptance or 180-days for *replacement facilities*, whichever is later.

EXAMPLE

16. No Water, Recycled Water and Sewer Service Prior to Completion and Transfer

16.1 The Developer shall not allow any occupant or person to commence operations or use of any part of the water, recycled water and sewer system facilities without the express written consent of the District. Such consent may not be unreasonably withheld. District may impose conditions or restrictions upon any consent to such prior service, such as posting a surety bond. District recognizes that the Development, and hence the water, sewer and recycled system facilities, will be built, accepted and transferred in multiple phases. Notwithstanding any of the foregoing, Developer may use the sewer, water and recycled system facilities before they are accepted for fire protection and construction purposes in all phases, subject to satisfaction of applicable testing.

17. Performance

Developer agrees to promptly design and construct the water and sewer and recycled water system and, transfer the same to the District in accordance with the terms of this Agreement. If construction of the water and sewer and recycled water system facilities of the Development has not been completed and accepted by District within twenty four (24) months from the date of execution of this Agreement (such date may be extended for delays beyond Developer's control, but in no event shall such delay exceed twelve (12) additional months), the District shall have the option to terminate this Agreement. If construction on any phase is not completed within twenty four months or as extended as provided above, then an Amendment to this Agreement will be necessary to address each such phase. Subsequent phases also may at District's discretion be addressed by Amendment(s) to this Agreement.

18. Assignment

Neither party may assign their rights or obligations under this Agreement within its term without the written consent of the other party. Rights to water, recycled water and sewer service will be deemed assigned to each property owner upon acquisition of his/her commercial unit in the Development. Upon assignment, the Developer's responsibilities relating to recycled water facilities, use and approvals will become the assignee's responsibility. This provision will cease to have any effect when the District accepts title to the water facilities or the Agreement is terminated.

19. Dispute Resolution Procedure

Disputes arising under this agreement shall be resolved as follows:

19.1. Prevention of Claims/ Meet and confer (3 days)

The parties agree that they share an interest in preventing misunderstandings that could become claims against one another under this agreement. The parties agree to attempt to identify and discuss in advance any areas of potential misunderstanding that could lead to a dispute. If either party identifies an issue of disagreement, the parties agree to engage in a face-to-face discussion of the matter within three calendar days of the initial request. If the dispute cannot be negotiated between the parties, the

EXAMPLE

matter shall first be brought to the attention of the District's Board of Directors who may seek to intervene in the negotiation or may direct staff to seek arbitration. If the parties are still unable to amicably resolve such disagreements or misunderstandings, they agree to enlist the informal assistance of a third party to help them reach an accord. If any disagreement remains unresolved for ten days, the parties agree to submit it to mediation.

19.2. Mediation (30 days)

Either party may demand, and shall be entitled to, mediation of any dispute arising under this agreement at any time after completing the meet and confer process described in subsection (a). Mediation shall commence not more than ten days after the initial mediation demand and must be concluded not more than thirty (30) days after the date of the first mediation demand. If mediation is not concluded within that time, then either party may demand arbitration.

Mediation shall be submitted first to a mediator with at least ten years experience in Monterey County. The mediator shall be selected by mutual agreement of the parties. Failing such mutual agreement, a mediator shall be selected by the presiding judge of the Monterey County Superior Court. In the interest of promoting resolution of the dispute, nothing said, done or produced by either party at the mediation may be discussed or repeated outside of the mediation or offered as evidence in any subsequent proceeding. The parties acknowledge the confidentiality of mediation as required by Evidence Code 1152.5.

No mediator shall submit, and no arbitrator or court shall consider, any mediator recommendations, declarations, or findings unless the parties give their written consent to the proposed mediator statement.

19.3. Arbitration (60 days)

If mediation fails to resolve the dispute, the mediator shall become the arbitrator, and shall proceed to dispose of the case under such rules or procedures as he or she shall select. If the mediator is unable or unwilling to serve as arbitrator, the parties shall select an arbitrator by mutual agreement. Failing such agreement, the arbitrator shall be selected by the Presiding Judge of the Superior Court. The decision of the arbitrator shall be final and not subject to judicial litigation.

Arbitration shall be commenced within thirty days of the arbitration demand and concluded within 60 days of arbitration demand.

Arbitration shall follow the so-called "baseball arbitration" rule in which the arbitrator is required to select an award from among the final offers presented by the contending parties. The arbitrator may not render an award that compromises between the final offers.

Unless the arbitrator selects another set of rules, the arbitration shall be conducted under the J.A.M.S. Endispute Streamlined Arbitration Rules and Procedures, but not necessarily under the auspices of J.A.M.S. Upon mutual agreement, the parties may agree to arbitrate under an alternative scheme or statute. The Arbitrator may award damages according to proof. Judgment may be entered on the arbitrator's award in any court of competent jurisdiction.

EXAMPLE

NOTICE: IN AGREEING TO THE FOREGOING PROVISION, YOU ARE WAIVING YOUR RIGHT TO HAVE YOUR RIGHTS UNDER THIS AGREEMENT TRIED IN A COURT OF LAW OR EQUITY. THAT MEANS YOU ARE GIVING UP YOUR RIGHT TO TRIAL BY JUDGE OR JURY. YOU ARE ALSO GIVING UP YOUR RIGHT TO DISCOVERY AND APPEAL EXCEPT AS PROVIDED IN THE ARBITRATION RULES. IF YOU REFUSE TO ARBITRATE YOUR DISPUTE AFTER A PROPER DEMAND FOR ARBITRATION HAS BEEN MADE, YOU CAN BE FORCED TO ARBITRATE OR HAVE AN AWARD ENTERED AGAINST YOU BY DEFAULT. YOUR AGREEMENT TO ARBITRATE IS VOLUNTARY.

BY INITIALING THIS PROVISION BELOW, THE PARTIES AFFIRM THAT THEY HAVE READ AND UNDERSTOOD THE FOREGOING ARBITRATION PROVISIONS AND AGREE TO SUBMIT ANY DISPUTES UNDER THIS AGREEMENT TO NEUTRAL BINDING ARBITRATION AS PROVIDED IN THIS AGREEMENT.

_____ s' INITIALS _____ 'S: INITIALS _____

20. Waiver of Rights

20.1 Waiver. No waiver of any breach or default by either party shall be considered to be a waiver of any other breach or default. The waiver by any party for the time for performing any act shall not constitute a waiver of the time for performing any other act or an identical act to be performed at a later time. None of the covenants or other provisions in this Agreement can be waived except by written consent of the waiving party.

21. Notices

21.1 All notices, demands, or other communications which this Agreement contemplates or authorizes shall be in writing and shall be personally delivered, or mailed by certified mail, return receipt requested, or delivered by reliable overnight courier, to the respective party as follows:

To District: Marina Coast Water District
Attn: Marc A. Lucca, General Manager
11 Reservation Road
Marina, California 93933

To Developer: _____

21.2 The address to which notice may be sent may be changed by written notification of each party to the other as above provided.

EXAMPLE

22. Severability

22.1 If any portion or provision of this Agreement is found to be contrary to law or policy of the law or unenforceable in a court of competent jurisdiction, then the portion so found shall be null and void, but all other portions of the Agreement shall remain in full force and effect.

23. Paragraph Headings

23.1 Paragraph headings are for convenience only and are not to be construed as limiting or amplifying the terms of this Agreement in any way.

24. Successors and Assignees

24.1 This Agreement shall be binding on and benefit the assignees or successors to this Agreement in the same manner as the original parties hereto.

25. Integrated Agreement

25.1 This Agreement integrates and supersedes all prior and contemporaneous Agreements and understandings concerning the subject matter herein. This Agreement constitutes the sole agreement of the parties and correctly sets forth the rights, duties and obligations of each to the others. Future amendments must be in writing signed by the parties. Any prior agreements, promises, negotiations or representations not expressly set forth in this Agreement are of no force and effect.

26. Negotiated Agreement

26.1 This Agreement has been arrived at through negotiation between the parties. Neither party is deemed the party that prepared the Agreement within the meaning of Civil Code Section 1654.

27. Attorneys Fees

27.1 If arbitration or suit is brought to enforce or interpret any part of this Agreement, the prevailing party shall be entitled to recover as an element of costs of suit, and not as damages, a reasonable attorneys' fee to be fixed by the arbitrator or Court, in addition to any other relief granted. The "prevailing party" shall be the party entitled to recover costs of suit, whether or not the suit proceeds to arbitrator's award or judgment. A party not entitled to recover costs shall not recover attorneys' fees. No sum for attorneys' fees shall be counted in calculating the amount of an award or judgment for purposes of determining whether a party is entitled to recover costs or attorneys' fees.

27.2 If either party initiates litigation without first participating in good faith in the alternative forms of dispute resolution specified in this agreement, that party shall not be entitled to recover any amount as attorneys' fees or costs of suit even if such entitlement is established by statute.

EXAMPLE

28. Exhibits

28.1 All exhibits referred to in this Agreement and attached to this Agreement are incorporated in this Agreement by reference.

29. Disclaimer/Indemnity Regarding Public Works

29.1 District has not determined whether the project would be considered a “Public Works” project for the purposes of California law, and makes no warranties or representations to Developer about whether the project would be considered a “Public Works” project. Developer is aware that if the project is considered a “Public Works” project, then Developer would have to pay “prevailing wages” under California Labor Code section 1771. If Developer fails to pay such prevailing wages, Developer acknowledges that it will be liable to, among other things, pay any shortfall owed as well as any penalties that might be assessed for failure to comply with the law. If Developer does not pay prevailing wages, and an action or proceeding of any kind or nature is brought against the District based on such failure, Developer will defend and indemnify District in the action or proceeding. District agrees to reasonably cooperate and assist Developer in any the defense of any such action.

30. No Third Party Beneficiaries

30.1 There are no intended third party beneficiaries to this Agreement.

31. Compliance with Laws

31.1 Developer will comply with all laws, rules and regulations in carrying out its obligations under this Agreement.

32. Counterparts

32.1 This Agreement may be executed in counterparts, and each fully executed counterpart shall be deemed an original document.

EXAMPLE

Signature Page

By: Developer

By MARINA COAST WATER DISTRICT

Marc A. Lucca, General Manager
Marina Coast Water District