

Infrastructure Agreement Template

Responses to Director's Comments:

The draft Infrastructure Agreement was presented to the Board at the 05/07/2013 Board Meeting and comments were generated by notes taken during the Meeting and transmitted via e-mail after the meeting.

Review Comments

Comment No.	Comment	Response
1	Reinstate Exhibit "E" to the template	Noted.
2	For projects where construction lasts more than two years, how will the Agreement cover the project if the Agreement expires?	OK as is, no conflict. If construction extends beyond 2-yrs, developer must extend/amend the Agreement per Section 17.
3	Developer cannot design facilities at the time of construction?	This is a described time that is most protective of the District. e.g. If standards have been changed/ revised or made more stringent (e.g. a regulatory change) after the approval of the design but before construction takes place, the Developer will be required to revise and resubmit the design prior to starting construction.
4	Use consistent expression; either recycled or reclaimed, add recycled to Section 7.2.	Noted - the term "Recycled" is used.
5	Replace "and" with "after".	Noted- also, the clauses were rearranged.
6	Specify a date for the capacity charges assessment.	We can't- the fee schedule is subject to change; a space for the date at the time of executing the agreement was added.

Comment No.	Comment	Response
7	Add provisions that enforce collecting capacity charge fees starting one year after the execution of the Infrastructure Agreement, collect the total capacity charges fees within five years of executing the IA.	<ol style="list-style-type: none"> 1- Government Code Section 66007 <u>prohibits</u> any local agency from requiring payments of fees imposed on development prior to the final inspection or the occupancy of any units. Imposing such provisions will expose the District to legal liability. 2- Per the same Government Code section, the District can collect utility service fees at the time an application for utility service is received - which occurs within the meter installation process. Compliance with this statute is demonstrated in the proposed template. 3- The collection of capacity charge fees is a trigger for monthly service charges being assessed for a new account – but the District can’t collect fees for services that are not being provided. 4- This could be potentially disadvantageous to the District because it will enable the developer to “grandfather” an older fee schedule and would prevent the District from collecting higher per-unit capacity charge due to an increase in the ENR index or as a result from a Rate Study increase. 5- Please be advised that this IA is only applicable for <u>Developer funded</u> projects. In other words, the District doesn’t carry any financial obligation when the development doesn’t move forward.

Comment No.	Comment	Response
8	Why should the District waive the requirement of licensed contractors perform under certain provisions of the business and professions codes of the state?	Because sometimes work can be performed more cost-effectively by other means allowed by the State regulations. e.g. A combination of a contractor's licenses adequate to perform a work task can substitute for a task that normally requires a Class "A" license.
9	Adobe Acrobat Format should only be used for specifications.	Scanned signed drawings are also beneficial and it saves staff time and cost in reproduction and organizing the project record.
10	Why is the warranty bond only 20%?	That is the highest, most commonly used percentage for warranty bonds. The percentage is based on the probable cost of repairing brand new infrastructures in the event of unforeseen circumstances or manufacturers' defect. Some agencies require only 10%.
11	Add provisions that require the contractor to provide warranty information before materials and equipments are installed.	The provisions requested in this comment exist within District Standards. District Standards require materials submittals that include warranty provisions. This Agreement requires District Standards be met.
12	How do you address projects that require more than two years to complete construction?	Developer must extend/amend the Agreement per Section 17.
13	Add District Counsel signature block	The District Counsel has reviewed the version of the agreement that is going before the board for adoption. Requiring District Counsel signature constantly defeats the purpose of having a formal model/template and entails additional legal fees and expenses that are not necessarily. However, if a non-standardized agreement such as a special Reimbursement Agreement is needed, Staff will seek the District Counsel input and acceptance.

Comment No.	Comment	Response
14	Revise the Employer’s Liability and the Automobile Insurance minimum to a \$2 million from \$1 million.	ACWA JPIA, the firm that provides insurance services to the District, has reviewed and accepted the insurance requirements presented in Exhibit D. The Employer’s Insurance and the Automobile Insurance are different in intent and nature from General Liability Insurance (which is set at \$2 million as suggested).
15	Address the evidence of insurance to the General Manager instead of Management Services Administrator	The District’s Management Services Administrator is the District staff member assigned to track and maintain insurance related information within the District. The General Manager is not best suited to maintain and evaluate insurance certificates.
16	Should FORA be defined term?	Noted.
17	Define the term “Agency of Land Use Jurisdiction”	To properly and legally define this term, several pages of definition would be required. District Counsel provided the term as one currently recognized in the industry. The term appears descriptive enough that it might be viewed as self-explanatory.
18	Does MCWD allocating the prepaid wastewater capacity at the MRWPCA affect our rights to recycled water?	The Army prepaid for the plant capacity at the MRWPCA and then it conveyed these rights to MCWD. This pre-paid plant capacity is provided to customers on a first-come first-served basis within the Ord Community. In Central Marina, PCA determines, on a project-specific basis, the required fees and if plant capacity is sufficient (based on the project’s proposed sewer flow generation). Staff’s understanding of the “buy-in agreement” with MRWPCA is that the more sewage flow sent to MRWPCA from MCWD’s jurisdiction, the more recycled water MCWD is entitled to.

Comment No.	Comment	Response
19	The way Section 1.4 is written shows the District's role as reactive, not proactive.	<p>That's correct. These Agreements do not represent a contract between a Developer and MCWD to actually construct the project – that is done between a contractor and the Developer. In other words, these Agreements are used for projects that are driven and funded by a Developer – not MCWD. The District is not hiring anybody to do anything through these Agreements.</p> <p><u>However</u>, in the event that the Developer will be constructing an identified infrastructure CIP (whether out of need or to take advantage of an opportunity), a different, customized agreement would be required. These project-specific agreements would need to be Board authorized and would specify methods of reimbursement based on benefit and myriad other terms and conditions.</p>
20	What are the capacity charge fees (text has a place holder)? Can we change the trigger for the payment of capacity charges to make it earlier?	<p>Capacity charges for Marina are currently \$5,450/EDU - water, \$3,950/EDU - sewer and for Ord the capacity charges are \$5,750/edu - water, \$2,150 - sewer. The place holder was intentionally created to allow for capacity charge rates to be modified over time and in recognition that these Agreements can be used for projects within Central Marina and the Ord Community.</p> <p>Please see answer of comment #7 regarding a requirement to pay capacity charge fees earlier.</p>

Comment No.	Comment	Response
21	How are plan review fees determined? Will they be updated as part of the rate study?	They are assessed in a manner intended to recover all MCWD costs and expended resources. The recovery of all actual cost expended by MCWD in providing service to the project is a provision of the Agreement. Theoretically yes, the on-going rate study might be recommending all rates be updated.
22	How is the inspection fee determined? Will it be updated as part of the rate study?	They are assessed in a manner intended to recover all MCWD costs and expended resources. The recovery of all actual cost expended by MCWD in providing service to the project is a provision of the Agreement. Theoretically yes, the on-going rate study might be recommending all rates be updated.

Comment No.	Comment	Response
23	<p>Can the District assess a penalty fee if the developer fails to construct the project during the two year term of the agreement?</p> <p>Can we include a provision that protects us from having to own an unused, newly installed pipeline for an extended period of time awaiting occupancy to occur?</p>	<p>No – the penalty fee and/or provision would be difficult to justify. Fees and rates paid to MCWD need to be paid at the time service is provided and their magnitudes need to be directly correlated to the costs MCWD incurs to provide those services. Also, please see response for comment #7</p> <p>In addition:</p> <p>District would find it difficult to justify imposing fees for owning newly installed infrastructure that was conveyed to the district but not yet in operation. Newly installed infrastructure that is not in use requires very little, if any, maintenance and don't incur costs for operation (because they are not in use). Determining a fair penalty would be difficult based on such vanishingly small expenditures. However, a penalty that a Developer might experience is the difference between the capacity charge fees at the time of executing the Agreement and the capacity charge fees at the time of the actual installation of the meter. The fees presumably consistently increase due to ENR indexing and periodic rate studies.</p> <p>Finally, Developers suffer financially when they become unable to move forward with their projects after installing water and sewer infrastructure. Not using installed infrastructure is typically not their choice - significant private investment has been locked-up by the installed infrastructures.</p>
24	<p>Why didn't the agreement state that our projects are Public Works construction subject to prevailing wages requirements?</p>	<p>District Counsel determined that Section 29 as presented is the most protective of the District's interests (i.e. limits MCWD liability).</p>
25	<p>Exhibit "E"-Notice of Capital Surcharge to Development within Ord community.</p>	<p>Noted – Exhibit "E" has been reinstated.</p>

