

# **WASTEWATER CAPACITY RESERVATION AGREEMENT**

**(DRAFT)**

AN AGREEMENT BY AND BETWEEN THE CITY OF CLEMSON (hereafter referred to as “the City”) and \_\_\_\_\_ (*complete name and address*) (hereafter referred to as “the Developer”) made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

WITNESSETH:

WHEREAS, the City owns and operates the Cochran Road Wastewater Treatment Plant (hereafter referred to as “WWTP”) which currently serves over 2,300 residential and commercial customers in a dynamic growth area located generally north of the Clemson University campus and west of Highway 93; and

WHEREAS, the 1,150,000 gallons per day (gpd) treatment capacity of the WWTP, as reported to SCDHEC, has previously been surpassed and required the City to complete and receive approval of a Preliminary Engineering Report from SCDHEC. This allows for future allocation of capacity up to 2,000,000 gpd under the SCDHEC Flow Advancing Agreement until actual plant flows reach 1,035,000 gpd; and

WHEREAS, the WWTP’s current average daily flow is approximately 800,000 gpd, with a SCDHEC trigger point for future engineering design of a plant expansion at 920,000 gpd (80%) and actual construction proceeding at 1,035,000 gpd (90%); and

WHEREAS, the City expects several development projects to come on line within the next two years, adding an estimated 165,000 gpd of actual flow and bringing the WWTP’s average daily flow to approximately 960,000 gpd; and

WHEREAS, the City desires to reserve 10,000 gpd for future undesignated economic development project purposes; and

WHEREAS, the City recognizes, based on the above flow scenario, that only 50,000 gpd of actual flow remains unallocated to meet any future customer needs until the WWTP is expanded to 2.0 MGD; and

WHEREAS, the City wishes to mitigate any significant delay in providing sewer service for future development and therefore intends to move forward with the design, construction and startup of the WWTP expansion project but recognizes that implementation will take up to four (4) years to complete or by approximately 2020; and

WHEREAS, the City Council has determined that tentative wastewater treatment capacity is considered allocated for a project when proposed project is placed onto the agenda of the City's Architectural Review Board for initial review, or, when building construction plans are transmitted to the City's Planning and Building Offices (for projects that do not require consideration of the Architectural Review Board). Said capacity will continue to be reserved for the development project if the developer proceeds with the City's scheduled review and approval process in accordance with the "Development Project Review and Approval Policy for Allocation of Sewer Treatment Capacity" approved by City Council, which was adopted on \_\_\_\_\_, 2016. In the event that the developer does not meet the stated schedule of the project review and approval policy, the tentative capacity that has been allocated to said development project shall be considered abandoned; and

WHEREAS, the Developer wishes to reserve a portion of the remaining unallocated actual flow capacity of the WWTP so that it will be available for final permitting to the Developer when the Developer's project is ready for plan review and approval; and

WHEREAS, the City is agreeable to providing an assurance of available capacity to the Developer for project development purposes under the reservation fee arrangements as stipulated below.

NOW, THEREFORE, in consideration of the mutual agreements between the parties as set forth herein and for other good and valuable consideration, the Parties do agree as follows:

1. The City hereby reserves \_\_\_\_\_ gallons per day of WWTP capacity to the Developer for the project titled \_\_\_\_\_, located at \_\_\_\_\_, described as \_\_\_\_\_ and subject to the terms and conditions of this Agreement. Said project is conceptually illustrated and defined in Attachment A to this Agreement.
2. The Developer will pay the City a reservation fee of \$\_\_\_\_\_ which is calculated based on \$3.50 per gpd of WWTP capacity reserved and proportioned over a three year period. The initial payment will be \_\_\_\_\_ (60%) for year one, then \_\_\_\_\_ (30%) at the beginning of year two, and then \_\_\_\_\_ (10%) at the beginning of year three.
3. If the Developer's project is permitted and completed during Year One, reservation fee payments will be suspended for Years Two and Three. Suspension of reservation fee payments will occur at the point in time when the project's building permit fee and impact fee(s) are paid to the City.
4. If the Developer's project is permitted and completed during Year Two, the reservation fee payment will be suspended for Year Three.

5. At the beginning of Year Three of this Agreement, the Developer will begin to pay monthly user charges at the prevailing rate to the City based on the total reserved capacity in the event that Developer's project is not permitted. The user fee will include base customer fee and volumetric charges calculated on a residential equivalency unit of 255 gpd, and in accordance with the City's residential equivalency calculation schedules.
6. All reservation fee payments will be in addition to any impact, plan review, building permit or other development fees levied by the City for the Developer's designated project.
7. This Agreement shall commence on the date of its execution and shall be in effect for a period not to exceed three years. It shall become null and void upon City permitting of the Developer's project or completion of the WWTP expansion by the City. This Agreement may be terminated by the Developer upon giving sixty (60) days written notice to the other Party of its intent to terminate. However, in the event that the Agreement is terminated, no refunds of prior reservation fee payments will be made by the City.

8. FORCE MAJEURE

In case any Party by reason of Force Majeure shall be rendered unable wholly or in part to carry out its obligations under this Agreement, then if such Party shall give notice and full particulars of such Force Majeure in writing to the other Party within fifteen (15) days of the existence of such Force Majeure, the obligation of the Party giving such notice so far as it is affected by such Force Majeure shall be suspended during the continuance of the inability then claimed, but for no longer period, and any such Party shall be required to resume performance of its obligations under this Agreement upon the termination of the aforementioned Force Majeure; provided, however, the Party unable to perform shall use its best efforts and act in good faith to avoid or overcome the impediment.

9. DEFAULT AND ENFORCEMENT REMEDY

In the event any Party breaches or fails to perform any material obligation of this Agreement, the other Party, after expiration of the time set forth in the notice to cure and the exhaustion of the initial procedure for the resolution of disputes set forth in subsequent articles of this Agreement, to the extent applicable, may seek declaratory relief, including, but not limited to, the right to terminate service, a writ of mandamus, or sue for specific performance of the obligation in the appropriate Common Pleas Court and may seek both a temporary and permanent mandatory injunction requiring performance by the defaulting Party or a temporary or permanent order restraining the defaulting Party. In addition, and as a part of the same proceeding, if prevailing, the plaintiff Party may recover attorneys' fees incurred and may recover for the actual loss of any net revenues

incurred by reason of and during the period of default caused by the failure of performance of this Agreement. In no event shall any Party be entitled to sue for or recover any consequential or punitive damages. Specific performance, declaratory or injunctive relief, recovery of damages for loss of net revenues, and reasonable attorneys' fees, limited by the defaulting Party's insurance coverage, shall be the sole remedies of the Plaintiff Party against the defaulting Party.

10. APPLICABLE LAW

This Agreement shall be construed and enforced exclusively in accordance with the laws of the State of South Carolina.

11. NOTICE TO CURE

Any Party defaulting shall be given a written notice and demand to cure the breach or failure to perform within sixty (60) days by the Party claiming a breach or failure who shall prepare a certificate of mailing.

12. SEVERABILITY

Should any part of this Agreement, for any reason, be declared invalid or void, such decision shall not affect the remaining portions which shall remain in full force and effect as if this Agreement had been executed with the invalid portion eliminated.

13. This Agreement shall be binding upon the parties hereto and their successors and assigns; provided, however, Developer may not assign this Agreement or otherwise transfer its rights or obligations hereunder without the City's written consent. It is also agreed that any potential transfer is conditioned upon the continuation of the specific development project described in Attachment A of this Agreement, including density, number of residential bedrooms, and associated commercial and/or mixed-use space as the original development project that is the subject of this Agreement.

14. In the event that a Consent Order or Administrative Order is issued by the SCDHEC, regardless of the reason for said order, the City of Clemson may be required to suspend the issuance of wastewater treatment capacity. Said suspension shall remain effective until such time that issues related to the Order are resolved to the satisfaction of SCDHEC and the City of Clemson, and the City shall not be liable to any developer, builder or other party to a development project that is delayed in the development process. However, in the event that the City is not able to issue wastewater treatment capacity, the City will reimburse the developer the Wastewater Capacity Fee that has been paid in the year of the suspension. No

reimbursement shall be made by the City of Clemson for any prior year Wastewater Capacity Fee in which a suspension did not occur. If the SCDHEC Order of suspension is repealed prior to the completion of the expansion of the wastewater treatment facility (and SCDHEC Certificate to Operate issued) , the City will agree to reinstate the Wastewater Capacity Reservation Agreement if the developer chooses to renew said agreement and pay any Fee that has been reimbursed by the City of Clemson due to the SCDHEC Order.

15. UNDERSTANDING AND AMENDMENT

This Agreement shall constitute the entire understanding among the Parties hereto, superseding any and all previous understandings, oral or written, pertaining to the subject matter contained herein. No Party hereto has relied, or will rely, upon any oral or written representation or oral or written information made or given to such party by any representative of the other Party or anyone on its behalf. This Agreement may be amended, changed, modified or extended with written consent of both Parties.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized officials as of the date first above written.

ATTEST:

***City of Clemson***

\_\_\_\_\_

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

Title: \_\_\_\_\_

ATTEST:

***(Name of Developer)***

\_\_\_\_\_

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

Title: \_\_\_\_\_

