

Recording Requested By:

CITY OF MODESTO

After recordation mail to:
Community & Economic Development Department
c/o Infrastructure Financing Program
P.O. Box 642
Modesto, CA 95353

APN: _____

Address: _____

**DEFERRAL OF WASTEWATER CAPACITY FEES AGREEMENT
AND NOTICE OF LIEN**

This Deferral of Wastewater Capacity Fee Agreement and Notice of Lien (“Agreement”) is made, entered into and is effective on the ____ day of _____, 20____, by and between the CITY OF MODESTO, a municipal corporation (“City”) and _____ (“Owner”).

WHEREAS, Owner owns certain real property located within the City of _____, County of Stanislaus, State of California, more particularly described on Exhibit “A”, attached hereto and incorporated herein by reference (“Property”); and

WHEREAS, Owner desires to connect its Property to the City’s wastewater system;

WHEREAS, Owner desires to exercise deferral of the Wastewater Capacity Fee in the amount of \$_____ which is due and payable prior to connection to the wastewater system; and

WHEREAS, Owner certifies that no environmental mitigation measure imposed on Owner's project consists of payment of wastewater capacity fees, or the installation or construction of a public improvement the cost of which is eligible as a reimbursement from the wastewater fund; and

WHEREAS, the City has determined that it is appropriate to defer payment of the Wastewater Capacity Fee pursuant to Modesto City Council Resolution No. 2011-231, adopted on June 28, 2011.

NOW, THEREFORE, in consideration of the mutual covenants, promises and agreements herein contained, the parties hereto agree as follows:

1. Owner agrees to pay an administration fee of TWO HUNDRED FIFTY DOLLARS and 00/100 (\$250.00) to process the Agreement, and agrees that the City has no duty to proceed with issuance of a building permit until the administration fee is paid.
2. Owner agrees to pay a title report fee of FIVE HUNDRED DOLLARS and 00/100 (\$500.00) to obtain a current title report to verify the ownership of the Property.
3. Owner agrees to pay a recording fee of TWELVE DOLLARS and 00/100 (\$12.00) to remove the lien.
4. The City shall issue a permit and defer collection of the Wastewater Capacity Fee in the amount of \$_____ for the Property on the terms and conditions set forth in this Agreement.

5. Owner's desire to exercise deferral of the Wastewater Capacity Fee is authorized by City Council Resolution No. 2011-231, adopted on June 28, 2011.

6. Owner shall pay the Wastewater Capacity Fee in accordance with the following schedule:

- a. Owner shall pay ten percent (10%) (\$_____) of the Wastewater Capacity Fee at the time a permit issued.
- b. Owner shall pay the remaining ninety percent (90%) (\$_____), of the Wastewater Capacity Fee, plus interest, in no more than ten (10) annual installments. Each installment shall be at least twenty percent (10%) of the outstanding balance, plus all collection costs which have been incurred during the previous year; provided, however, the final installment shall be in the amount of the outstanding balance then due under this Agreement, including all interest accrued and collection costs incurred. A Deferred Payment Schedule is attached as Exhibit B.
- c. Each installment shall be paid on or before _____.
- d. Notwithstanding the foregoing, the remaining unpaid balance of the Wastewater Capacity Fee, including interest, shall immediately become due and payable on the sale, transfer or refinancing of the Property.
- e. Notwithstanding the foregoing, in the event Owner is fifteen (15) or more business days delinquent with respect to any installment payment, the outstanding balance of the Wastewater Capacity Fee shall be immediately become due and payable.

8. The annual interest rate shall be equal to the Wall Street Journal Prime Rate on the date this Agreement is fully executed (see Exhibit C). Interest accrual shall commence on that date and be compounded annually until all amounts due under this Agreement are paid in full.

9. Owner and each successive owner shall notify City of any sale or pending escrow to ensure timely payment of the Wastewater Capacity Fee.

10. As security for payment of the remaining balance of the Wastewater Capacity Fee, plus interest, Owner hereby consents to having the Wastewater Capacity Fee added to and collected with the annual real property tax assessment on the Property in the event the City elects to take such action. Owner understands, acknowledges and agrees that all the procedures and remedies provided by law for nonpayment and/or late payment which apply to real property tax collection shall likewise apply to the collection of the remaining balance of the Wastewater Capacity Fee in the event the City does so elect. Owner understands and agrees that the County of Stanislaus may charge a fee to City for collecting and disbursing to City the Wastewater Capacity Fee. Owner agrees to pay said fees, if any, along with the annual installments provided for in Paragraph 7.

11. In the event the City does not elect the procedure set forth in Paragraph 10, above, Owner agrees to make all payments required hereunder directly to City. If Owner fails to make any payment due herein, this Agreement is breached and, in addition to the procedures and remedies provided by law for the collection of real property taxes, the City shall have every other remedy entitled to it by law for the collection of liens, including but not limited to, withholding or revoking the certificate of occupancy, foreclosure on the Property, and recovering the unpaid balance plus interest as a personal obligation of Owner.

12. Owner agrees for it, and all subsequent owners of or parties who shall acquire any property interest in the Property (Owner assumes a duty to notify of this provision of this agreement) that City may cut off wastewater utilities to the Property to compel payment of the Wastewater Capacity Fee after City provides fifteen (15) calendar days' notice to Owner and to any parties know to City to have an interest in the Property, of breach of this Agreement, and fifteen (15) days for cure to be made to the City's sole satisfaction. City may require reasonable interest to be paid on Wastewater Capacity Fee amounts owed either in a lump sum with interest, if any, or arrange further payment terms in its sole discretion. Owner agrees to hold City harmless from and defend it from any proceeding, claim cost, loss or damage whatsoever arising out of or relating to City's exercise of its rights under this or any other provision of this agreement.

13. This Agreement shall be executed by the parties and recorded prior to the issuance of a permit. The following are the addresses of the parties:

CITY: City of Modesto
Attn: Infrastructure Financing Programs
P.O. Box 642
Modesto, CA 95353
209-577-5211 (phone)
209-491-5798 (fax)

OWNER: _____

14. This Agreement shall be recorded against the Property, at the expense of Owner, and shall constitute notice to all successors and assigns of the title to the Property and of the obligations herein set forth herein. The provisions of this Agreement shall constitute covenants

which shall run with the Property and the benefits and burdens hereof shall bind and inure to all successors in interest to the parties hereto.

15. All claims, controversies, or disputes arising out of, or relating to the formation of this Agreement, or the breach, termination execution, enforcement, interpretation, or validity of this Agreement, including the determination of the scope or applicability of this contract provision shall be determined by binding arbitration in Modesto, California, by one arbitrator, except as otherwise specified in this Agreement. The American Arbitration Association shall administer the arbitration under its Arbitration Rules then in effect, subject to the modifications of those rules contained in this paragraph. This agreement to arbitrate shall be specifically enforceable under the prevailing law of any court having jurisdiction, and the award rendered by the arbitrator may be entered in any court having jurisdiction. The appropriate venue for any arbitration or court proceeding relating to or arising out of this provision shall be in Stanislaus County, California.

This paragraph is not intended to and does not waive the claim filing requirements found in California Government Code section 900 et seq. In the event that a timely and legally sufficient, arbitrable claim is filed by Owner with City, and the claim is rejected in whole or in part by City, this paragraph shall result in the conclusive, final, and binding resolution of all the issues presented in the claim by Owner so long as any issues presented by the claim are arbitrable. Claims rejected by City or by operation of law, shall be submitted by Owner to arbitration pursuant to the Arbitration Rules of the American Arbitration Association within ninety (90) days after mailing of the written rejection by City to Owner. Otherwise, the claim or claims shall be deemed waived in their entirety.

The “fast track” rules of the American Arbitration Association shall apply to any claim or counterclaim less than ONE HUNDRED FIFTY THOUSAND AND 00/100 (\$150,000.00) DOLLARS. In arbitration not proceeding under the “fast track” rules, the arbitrator shall have the power to order that depositions be taken and other discovery be made. Both City and Owner shall have the right, upon written notice, to take no more than three (3) depositions of the other as a matter of right in an arbitration proceeding under the “fast track” rules.

Whether or not City and Owner may be engaged in interstate commerce, any controversy or dispute mentioned above shall be determined by, and the parties shall be bound by, the substantive law of the State of California, and not the Federal Arbitration Act at 9 USC Section 1 et seq.

The arbitrator may grant any remedy or relief deemed by the arbitrator just and equitable under the circumstances, whether or not such relief could be awarded in a court of law. The arbitrator shall be empowered to award monetary sanctions against a party for failure of cooperation in the arbitration. The arbitrator shall, in written award, allocate all the costs of the arbitration, including the fees of the arbitrator and the reasonable attorney fees of the prevailing party, against the party who did not prevail. The prevailing party shall be the party in whose favor the majority of the central issues in the case are resolved.

Notwithstanding anything in this provision to the contrary, the arbitrator shall have no power to award punitive damages or other damages not measured by the party’s actual damages (excluding litigation costs and fees) against any party. This limitation of the arbitrator’s powers under this Agreement shall not operate as an exclusion of the issue of

punitive damages from this Agreement to Arbitrate sufficient to vest jurisdiction in a court with respect to that issue.

Owner shall include in all subcontracts a specification whereby the subcontractor consents to being joined in an arbitration between City and Owner involving the work of the subcontractor to be joined. Owner's failure to do so shall be a breach of this Agreement.

The parties hereby waive any rights provided by Title 9.2 of the California Code of Civil Procedure, Section 1296. The arbitrator's award shall be deemed final, conclusive and binding to the fullest extent allowed by California law.

16. This Agreement shall be binding on the heirs, successors, and assigns of the parties hereto. This Agreement may be amended or modified only by written instrument signed by all parties. Any Amendment shall expressly refer to this Agreement.

17. The waiver of any action, obligation or commitment required by this Agreement shall be in writing and shall not constitute a waiver of any other or subsequent action, obligation or commitment required by this Agreement, unless specifically stated in writing.

18. This Agreement shall be governed according to the laws of California.

19. The language of all paragraphs, terms or provisions of this Agreement shall be interpreted as a whole, according to its fair meaning, and not for or against any party hereto.

20. Time is of the essence in the performance of all actions required pursuant to this Agreement.

21. This Agreement will terminate and be of no further force, effect or benefit to Owner if Owner fails to obtain a permit for the Property within one year from the effective date of this Agreement.

IN WITNESS WHEREOF, City has authorized the execution of this Agreement, in duplicate, by its City Manager and attestation by its City Clerk, on the ____ day of _____, 20____, and Owner has caused this Agreement to be executed in duplicate.

CITY OF MODESTO, a municipal corporation

OWNER:

By: _____
TINA ROCHA, IFP Administrator

By: _____
(signature)

By: _____
GREG NYHOFF, City Manager

(print name)

ATTEST:

By: _____
(signature)

By: _____
STEPHANIE LOPEZ, City Clerk

(print name)

(SEAL)

By: _____
(signature)

APPROVED AS TO FORM:
SUSANA ALCALA WOOD, City Attorney

(print name)

By: _____
ROLAND STEVENS,
Assistant City Attorney