

**AGREEMENT FOR THE CONSTRUCTION OF WATER
FACILITIES TO BE DEDICATED TO THE
OLIVENHAIN MUNICIPAL WATER DISTRICT**

PROJECT TITLE

District Project No. WNUMBER; Agreement No. XXAGRXXX

THIS AGREEMENT is entered into by and between the OLIVENHAIN MUNICIPAL WATER DISTRICT (hereinafter “District”), a municipal water district organized and operating pursuant to California Water Code Section §71000 et seq., and DEVELOPER, (hereinafter “Developer”).

R-E-C-I-T-A-L-S

1. Developer desires to improve certain real property located at (PROJECT SITE) in the County of San Diego consisting of approximately (ACRES) acres and commonly described as Tax Assessor Parcel No. (APN) (the “Project”). The real property is legally described on Exhibit “A” attached hereto and incorporated herein by reference (hereinafter “Property”).
2. The Project is within the water service jurisdiction of the District.
3. Developer understands that all water received by the District is imported from other agencies. Accordingly, Developer understands there is no guarantee that water will be available when service is requested.

C-O-V-E-N-A-N-T-S

1. **Conditions Precedent**. Each of the following items is an express condition precedent to the obligation of the District to provide any water service to the Project.
 - 1.1. **Fees and Charges**. Developer agrees to pay all fees and charges at the time they are due as established by the District, in its sole discretion, from time to time.
 - 1.2. **Planned Excavation**. Developer or Developer’s Contractor shall be responsible for scheduling an onsite meeting with the District inspector prior to any planned excavation related to verification of facility locations. Also, Developer or Developer’s Contractor shall provide any necessary traffic control related to location of the aforementioned facilities.

1.3. **Underground Service Alert.** Developer or Developer's Contractor must comply with the Underground Service Alert of Southern California (Digalert) procedures when performing any excavation and comply with California Government Code Section 4216 governing excavation in California. In addition, District approval must be given for excavation around facilities designated as "Stand By Required" as located in the proposed work area.

1.4. **Work Hours and Responsibilities.** Work on and around District facilities shall only occur Monday through Friday, excluding District Holidays, unless advanced written permission has been given by the District. In coordination with the District, the Developer is to notify all underlying property owner/s when construction is to occur within a District easement. Notification shall include anticipated timeframe, overview of work, developer's contact information, and a copy of the approved plans. The Pre-Construction Meeting shall not occur until the underlying property owner has been notified. Developer shall provide documentation of aforementioned notification to the District any time prior or during the Pre-Construction Meeting.

2. **Water Facilities.** Developer agrees to design and construct the water facilities required by this Agreement in strict accordance with the plans and specifications which have been approved by the District. All fees and costs of whatever type or nature necessary to design, build, and dedicate the required water facilities to the District shall be borne by Developer.

3. **Liability Insurance.** Upon execution of this Agreement, Developer or Developer's contractor shall provide proof of liability insurance coverage with an insurance company licensed to do business in the State of California, and acceptable to the District. The liability insurance coverage shall include each of the following types of insurance:

- A. General Liability: Provide \$1,000,000 of coverage per occurrence and \$2,000,000 minimum aggregate.
 - (1) Comprehensive Form
 - (2) Premises-Operations
 - (3) Explosion and Collapse Hazard
 - (4) Underground Hazard
 - (5) Products/Completed Operations Hazard
 - (6) Contractual Insurance
 - (7) Broad-form Property Damage, Including Completed Operations
 - (8) Independent Contractors
 - (9) Personal Liability

- B. Automobile Liability: Provide \$1,000,000 of coverage for combined single limit (each accident)

- (1) Comprehensive Form, Including Loading and Unloading
- (2) Owned
- (3) Hired
- (4) Non-owned

The policy shall include contractual coverage sufficiently broad to insure the matters set forth in the section entitled “Indemnity” in this Agreement. All liability insurance shall include occurrence coverage with a deductible amount not exceeding \$5,000.00. Also included in such insurance shall be a “cross-liability” or “severability of interest” clause. All such insurance coverage shall name the Olivenhain Municipal Water District (District), the District’s Engineer/Architect, the District’s Representatives, Consultants, and each of the District’s Directors, Officers, Agents, and Employees as additional insureds and must include a Waiver of Subrogation and must be Primary and Non-Contributory. The insurance certificate and endorsement shall be non-cancelable without thirty (30) days prior written notice to the District. Insurers must be authorized to do business and have an agent for service of process in the State of California and have an “A” financial strength rating and a financial size rating of at least Class VI in accordance with the most current A.M. Best’s Rating Guide.

4. **Workers’ Compensation Insurance.** Prior to commencement of construction of the water facilities, the Developer or the Developer’s Contractor shall submit proof of insurance showing that the Developer’s Contractor has obtained, for the period of the contract, full workers’ compensation insurance coverage for no less than the statutory limits covering all persons whom Developer’s contractor employs or may employ in carrying out the work under this agreement. Upon execution of this Agreement, Developer’s contractor shall also execute the “**Certificate Regarding Workers’ Compensation**” which is attached hereto and incorporated herein by reference.

5. **Fee Sites and Easements.** At the appropriate time, if applicable, the District shall order a preliminary title report covering all properties in which fee interests and easements are to be granted to the District. The costs of the preliminary title report shall be borne solely by Developer. Developer agrees to provide the District with such fee sites and easements as the District may require, as determined by the District, in its sole discretion. Easements may be required extending the full length of Developer’s property for looping of water facilities or to tie Developer’s water lines to the District’s system. The width and length of such easements shall be determined by District staff, in its sole discretion. All fee sites shall be free and clear of all liens, loans, and encumbrances which could affect title to the fee interest. All easements shall have recorded subordination agreements for all trust deeds or other liens to insure that the District has prior rights in any easements being conveyed to the Dis-

trict. Developer shall procure a policy of title insurance in favor of the District covering the fee sites and easements to be granted in amounts determined acceptable by the District, in its sole discretion, subject only to those conditions of record acceptable to the District. All fees and costs to procure fee sites and easements required by the District shall be borne solely by Developer. Nothing in this Agreement shall obligate the District to exercise its condemnation authority to acquire any fee site or easement determined necessary by the District. All fee sites and easements required by the District in accordance with this section shall be in recordable form, acceptable to the District, prior to acceptance of the work by the Board of Directors.

6. **Temporary Service Outages (Shutdowns).** In the event District facilities require a temporary outage to facilitate the work described herein, a shutdown shall be scheduled with the appropriate District staff at least 10 days prior to commencement of construction. Planned shutdowns are not guaranteed and may be subject to cancellation by the District at any time due to system operational status, including but not limited to, shutdowns already initiated and in progress.

7. **Construction of Water Facilities.** Developer shall not commence construction of any water facilities required by this Agreement until Developer has received authorization from the District to proceed as determined at the mandatory pre-construction meeting. In addition, any project requiring shutdown of District facilities resulting in service outages, shall be scheduled as stated in Section 6. All work performed on the water facilities to be constructed shall be: (1) done in strict compliance with the approved plans and specifications; (2) in a good and workmanlike manner as determined by the District; and (3) in accordance with the District's current published standards and criteria for projects and standards and criteria which may be required by the District as a result of unique conditions discovered during construction, in the District's sole discretion. All work performed on the water facilities by Developer shall be subject to inspection by the District's designated representatives and Developer agrees to comply with all instructions given by the District's representatives during construction of the work including repaving of a construction trench if work is performed in an existing roadway. All fees and costs to construct, inspect, and administer the construction of the water facilities shall be borne solely Developer.

8. **Time for Commencement and Completion of Water Facilities.** Developer agrees to commence construction of the water facilities required by this Agreement by no later than (START DATE) and to complete all construction work by no later than (END DATE). The failure of Developer to commence or complete construction of the water facilities by the dates specified in this section re-

ardless of cause shall constitute a material breach of this Agreement, entitling the District to pursue the remedies specified in Section 18.

9. **Compliance With Applicable Law.** Developer shall ensure that all work performed on the Project is performed in a manner which complies with all applicable federal, state, county, and local government rules and regulations, including all rules and regulations of the District as these rules and regulations may be modified or changed from time to time. Developer shall be solely responsible for obtaining and paying for all permits, licenses, and approvals necessary to construct the water facilities. Developer shall provide verification that permits, licenses, and approvals have been obtained promptly upon demand from the District. Developer shall comply with the contractor license requirements as provided by California Business and Professions Code section 7059 as amended.

10. **Prevailing Wages.** Developer has been alerted to the requirements of California Labor Code section 1770 et seq., which would require the payment of prevailing wage rates and the performance of other requirements if it were determined that this Agreement constitutes a public works contract. Developer has also been advised and understands that the Office of the Attorney General of the State of California has rendered an Opinion (No. 86-803) concluding that prevailing wages must be paid by a private developer where a public agency retains control over construction of the project and the facilities are ultimately dedicated to the public agency. Developer has further been advised that the California Department of Industrial Relations presently disagrees with the position taken by the Office of the Attorney General in Opinion No. 86-803.

10.1. It shall be the sole responsibility of Developer to determine whether to pay prevailing wages for any or all work required by this Agreement. As a material part of this Agreement, Developer agrees to assume all risk and liability arising from any decision not to pay prevailing wages for work required by this Agreement.

10.2. As a further material part of this Agreement, Developer agrees to hold harmless and indemnify the District and its officers, employees, consultants, and agents from any and all claims, liability, loss, costs, damages, expenses, fines, and penalties of whatever type or nature, including all costs of defense and attorney's fees, arising from any alleged failure of the Developer, or Developer's contractors or subcontractors, to comply with the prevailing wage laws of the State of California. If the District or any of the indemnified parties are named as a party in any dispute arising from the failure of Developer or Developer's contractors or subcontractors to pay prevailing wages, Developer agrees that the District and the other indemnified parties

may appoint their own independent counsel, and Developer agrees to pay all attorney's fees and defense costs of the District and the other indemnified parties as billed, in addition to all other damages, fines, penalties, and losses incurred by the District and the other indemnified parties as a result of the action.

11. **Acceptance of Work.** Upon completion of the water facilities required by this Agreement to the District's satisfaction, the water facilities which have been constructed shall be presented to the Board of Directors of the District for acceptance and the filing of a notice of completion. The District shall have no obligation to accept the water facilities or file a notice of completion if the design and construction of the work is not satisfactory to the District, in the District's sole discretion. No notice of completion will be filed without "record mylar drawing." Developer understands and agrees that by recordation of the notice of completion, all right, title, ownership, and interest in said facilities constructed under this Agreement are granted, conveyed, transferred, assigned, and delivered to the District, its successors, and assigns. Developer agrees to promptly execute all documents requested by the District to reflect sole title and ownership to the water facilities in the District.

12. **Liability for Work Prior to Formal Acceptance.** Until the Board of Directors of the District has formally accepted all work performed in accordance with this Agreement, Developer shall be solely responsible for all damages or injuries to any person or property from any cause.

13. **Liability After Acceptance of Work:** After the Board of Directors has accepted any of the water facilities required by this Agreement, Developer and its successors or assigns shall remain liable for all injury or damage to persons or property of every kind and description, including damage to the work itself, caused in whole or in part by any breach of this Agreement, caused in whole or in part by the active or passive negligence of Developer or its directors, officers, employees, agents, subcontractors, independent contractors, suppliers or consultants in designing or constructing any of the water facilities, or caused in whole or in part by the active or passive negligence or intentional misconduct of the Developer or the Developer's directors, officers, employees, agents subcontractors, independent contractors, suppliers or consultants. No assignment or transfer of all or any of the Project or the Property shall relieve Developer or its successors' interest from any liability covered by this paragraph and the District shall be free to pursue any claim or action against the Developer, its successors in interest, or any of them as the District may determine, in its sole discretion.

14. **Guarantee.** Developer shall and hereby does guarantee all work and materials for the water facilities to be free from all defects due to faulty materials or workmanship for a period of one

(1) year after the date of formal acceptance of the work by the Board of Directors of the District. Developer or Developer's contractor shall maintain insurance coverage for the project during the one-year warranty period. Developer shall repair or remove and replace any and all such work, together with any other work which may be displaced in so doing, that is found to be defective in workmanship and/or materials within said one-year period, without expense whatsoever to the District, ordinary wear and tear and unusual abuse or neglect by the District excepted. In the event Developer fails to comply with the above mentioned conditions within two (2) weeks after being notified in writing, the District is hereby authorized to proceed to have the defects remedied and made good at the expense of Developer, who hereby agrees to pay the cost and charges therefor, immediately upon demand. Such action by the District will not relieve Developer of the guarantee required by this section. This section does not in any way limit the liability of Developer for any design defects or any defects in the work subsequently discovered by the District.

15. **Indemnity**. Developer or Developer's directors, officers, agents, employees, subcontractors, independent contractors, suppliers and consultants shall be jointly or severally responsible and liable for any and all design defects and for any and all defects in work performed by Developer or its consultants, engineers, contractors, subcontractors, independent contractors, or suppliers. This shall include liability and responsibility for injury or damage to the work itself or to any District property or facilities, whether real or personal. As a material term of this Agreement, Developer and its successors or assigns hereby agree to hold harmless, indemnify and defend the District and its directors officers, employees, agents, consulting engineers, and representatives from any and all claims, suits, causes of action, losses, costs, fees, expenses, damages, fines, taxes and penalties, of every kind and description, including all attorney's fees and court costs incurred by the District, caused in whole or in part by the active or passive negligence or the intentional misconduct of the Developer or the Developer's directors, officers, agents, employees, independent contractors, subcontractors, suppliers or consultants except claims and causes of action caused by the sole active negligence or intentional misconduct of the District or its directors, officers, employees, or agents. This indemnity shall include claims by the District for damage arising from any improper design or workmanship of the water facilities except to the extent the injury or damage has been caused by the sole active negligence or intentional misconduct of the District or its directors, officers, employees, or agents. In the event that any suit is instituted naming the District or any other indemnified parties as a defendant, the District and such other indemnified parties shall be entitled to appoint their own independent counsel to represent them, and Developer and its successors and assigns agree to pay all attorney's fees, all expert fees and costs, and all litigation costs associated with this defense with thirty (30) days of receipt of the bill.

16. **Project Deposit.** Developer shall provide the District with an initial project deposit in the amount of \$X,XXX to cover all District fees and costs including, but not limited to, full reimbursement for all staff time and attorney's fees incurred by the District related to the Project. When the project deposit has been drawn down to \$X,XXX, Developer agrees to deposit such additional sums as the District may determine from time to time to cover all fees and costs of the District. In addition, if the scope of work changes after the initial project deposit is made, District will provide a revised estimate to Developer and request an additional project deposit amount to cover the work. The additional project deposit shall be received within ten (10) calendar days from date of notification; adequate project deposit funds must be in place in order for work on District facilities to continue.

17. **Personal Liability.** No director, officer, employee, agent, consultant, engineer, or architect of the District shall be personally responsible for any liability arising under or by virtue of this Agreement.

18. **District Remedies for Breach.** In the event Developer fails to strictly comply with any term, covenant, or condition of this Agreement or fails to complete performance of any matter specified in this Agreement on the date it is due, including payment of all fees and charges when due, then, following notification to Developer providing Developer ten (10) days in which to effect a cure to the District's satisfaction, the District shall be entitled to **elect** all or any of the following remedies, at the District's option:

18.1. Unilaterally terminate this Agreement and all rights of Developer to water service for the Project. The termination shall be effective as of the date the District mails notice of termination to Developer, or

18.2. Enforce any provision of this Agreement by specific performance. If this remedy is elected by the District, Developer agrees that specific performance is appropriate and expressly waives the right to contest the right of the District to seek specific performance in any subsequent action or proceeding between the parties; or

18.3. File suit against Developer for damages arising from breach of this Agreement. If these damages include amounts payable to the District as specified in this Agreement, including all District fees and charges, then these amounts shall earn interest at the rate of one and one-half percent (1½%) per month until paid in full.

18.4. Apply any fees previously paid by Developer to the District, including any development fees, to any damages and/or interest incurred by the District and unilaterally terminate water service and this Agreement.

19. **Cumulative Rights and Remedies.** The rights and remedies granted to the District pursuant to this Agreement shall be in addition to any rights or remedies granted to the District as a result of other agreements with Developer. All such other agreements shall remain valid and enforceable as written and all such agreements shall be interpreted in a manner so as to be consistent with each other and in a manner which provides the greatest rights and remedies to the District. In the event of a conflict between this Agreement and any other agreement between the parties, whether oral or written, the terms of this Agreement shall be applied.

20. **Decisions Concerning Water Service.** All decisions concerning water service for the Project shall be determined by the District, in its sole discretion.

21. **No Guarantee of Water.** Developer has been advised, and understands, that this Agreement does not guarantee that water will be available when service is requested or that meters will be allowed upon completion of the Project and that the District has made no commitment whatsoever to serve water to any portion of the Project until the District approves meters for the Project and Developer has paid all development fees and other fees and charges of the District.

22. **Not a Grant of Water Rights.** Developer understands that this Agreement does not grant Developer or Developer's heirs, successors, or assigns any water rights and that no such water rights exist. The District shall authorize installation of the meter(s) for the Project when all fees and charges have been paid. Water service may commence upon installation of the meters.

23. **Availability of Water.** Developer has been advised, and understands, that all water provided by the District is imported and that the ability of the District to provide water service to the Project is contingent upon the amount of water available to the District at the time the District considers issuance of meters for the Project. The amount of water which the Developer may receive for the Project at the time the District is considering installation of meters shall be determined by District staff, in its sole discretion, based upon District staffs' determination of the amount of water available to serve the Project at the time the meters are to be installed. Developer further agrees to comply with all provisions of the District's water conservation ordinance as that ordinance may be modified from time to time and that all water usage limitations imposed by the District from time to time. Nothing in this

Agreement is intended to limit the powers of the District to restrict the use of any water for the Project or any part of the District as provided in Water Code sections 71640 to 71644 or the right of the District to adopt future ordinances restricting the use of water within the Project or within any service area of the District. The District shall not be liable to Developer or any subsequent owner of all or any portion of the Project for any losses, costs, fees, or expenses of any kind caused by any curtailment or termination of water service determined necessary by the District as a result of a water shortage or a threatened water shortage.

24. **No Liability of District for Water Pressure Changes or Quality of Water.** As a material term of this Agreement, Developer has been informed, and understands all water provided to the District is imported from other agencies. Developer has been further advised that the pressure and quality of this water may change due to circumstances beyond the control of the District. As a material term of this Agreement, the Developer for itself and its successors and assigns hereby agrees that the District shall have no liability whatsoever to the Developer or any future owner of all or any portion of the Property for any claims, causes of action, actions, fees, costs expenses, losses or damages, of any kind or nature, arising from or due to changes in water pressure or the quality of any water being provided by the District. The Developer, for itself and all future assignees, transferees and owners of all or any part of the Property, hereby expressly waives the right to pursue any claim or cause of action against the District for changes in water pressure or water quality at any time in the future. By executing this Agreement, Developer acknowledges that this waiver has been made voluntarily with full knowledge of the Developer's legal rights.

25. **Miscellaneous Provisions.**

25.1. **Venue.** In the event of any legal or equitable proceeding to enforce or interpret the terms and conditions of this Agreement, the parties agree that venue shall lie only in the federal or state courts in or nearest to the North County Judicial District, County of San Diego, State of California.

25.2. **Modification.** This Agreement may not be altered in whole or in part except by a written modification approved by the Board of Directors of the District and executed by all parties to this Agreement.

25.3. **Attorney's Fees.** In the event any action or proceeding is initiated to challenge, invalidate, enforce, or interpret any of the terms of this Agreement, the prevailing party shall be

entitled to all attorney's fees and litigation fees, costs, and expenses in addition to any other relief granted by law. This provision shall apply to the entire Agreement.

25.4. Entire Agreement. This Agreement, together with all exhibits attached hereto, contains all representations and the entire understanding between the parties with respect to the subject matter of this Agreement. Any prior correspondence, memoranda, or agreements, whether or not such correspondence, memoranda, or agreements are in conflict with this Agreement, are intended to be replaced in total by this Agreement and its exhibits. Developer warrants and represents that no District representative has made any oral representations or oral agreements not contained in this Agreement. Developer further warrants and represents that Developer has not relied upon any oral statement or promises made by any District representative in executing this Agreement.

25.5. Assignment. Developer shall not be entitled to assign or transfer all or any portion of its rights or obligations contained in this Agreement without obtaining the prior written consent of the District, which consent shall not be unreasonably withheld. Any purported assignment without the District's prior written consent shall be void. In the event Developer sells or transfers the Property or the Project without obtaining the prior written consent of the District, the District shall have the unilateral right to terminate all further water service to the Property and the Project.

25.6. Binding Effect. This Agreement shall inure to the benefit of and be binding upon the parties and their respective purchasers, successors, heirs, and assigns.

25.7. Unenforceable Provisions. The terms, conditions, and covenants of this Agreement shall be construed whenever possible as consistent with all applicable laws and regulations. To the extent that any provision of this Agreement, as so interpreted, is held to violate any applicable law or regulation, the remaining provisions shall nevertheless be carried into full force and effect and remain enforceable.

25.8. Representation of Capacity to Contract. Each party to this Agreement represents and warrants that he/she has the authority to execute this Agreement on behalf of the entity represented by that individual.

25.9. Opportunity to be Represented by Independent Counsel. Each of the parties to this Agreement warrant and represent that they have been advised to consult independent legal

counsel of their own choosing and have had a reasonable opportunity to do so prior to executing this Agreement.

25.10. No Waiver. The failure of either party to enforce any terminate, covenant, or condition of this Agreement on the date it is to be performed shall not be construed as a waiver of that party's right to enforce this, or any other, term, covenant, or condition of this Agreement at any later date or as a waiver of any term, covenant, or condition of this Agreement.

25.11. Notices. All letters, statements, or notices required pursuant to this Agreement shall be deemed effective upon receipt when personally served, transmitted by facsimile machine, or sent certified mail, return receipt requested, to the following addresses:

To: "Developer":
(DEVELOPER)
(COMPANY NAME/ AND OR ADDRESS)
(CITY/STATE/ZIP)
Phone:
Email:

To: "District":
Olivenhain Municipal Water District
Attn: Kimberly A. Thorner, General Manager
1966 Olivenhain Road
Encinitas, CA, 92024
Fax: 760-753-1578

26. Effective Date. The effective date of this Agreement executed in counterparts in the North County Judicial District, County of San Diego, State of California, is date _____, 2023.

"DEVELOPER":
(DEVELOPER NAME)

Dated: _____

By: _____
(DEVELOPER NAME/TITLE)

"DISTRICT":
OLIVENHAIN MUNICIPAL WATER DISTRICT

Dated: _____

By: _____

Kimberly A. Thorner
General Manager

DRAFT

(LEGAL DESCRIPTION)

DRAFT