

WHEREAS, upon completion of the Facilities, (i) Developer proposes to connect the Properties to existing Town utilities in order to develop the Properties in an appropriate and efficient manner, and (ii) Developer desires that the Town accept public dedication of the Facilities and assume their maintenance; and

WHEREAS, pursuant to NCGS § 160A-320, the Town may contract with a developer for construction of public enterprise improvements that are ancillary to the private land development project and reimburse the developer for costs associated with the improvements that are in addition to those required by the Town’s development regulations; and

WHEREAS, the Town has a duly adopted “Policy Regarding Town Participation in Utility Projects”, dated as of February, ____, 2021, guiding reimbursement of costs incurred by private developers in constructing extensions of public utility infrastructure, as may be subsequently amended or modified (which is hereby incorporated by reference and herein called the “**Policy**”), a copy of which is attached hereto as **Exhibit D**; and,

WHEREAS, Developer proposes to coordinate, finance, and construct the Facilities in accordance with plans agreed upon by the Parties and Developer requests reimbursement of eligible costs under the Policy. The Town agrees to reimburse such eligible costs under the terms provided herein, and Developer has agreed to construct the Facilities with a capacity in excess of that required to serve Developer’s proposed development; and

WHEREAS, the Town wishes to optimize the expansion of its utility infrastructure and to maximize the efficiency and cost effectiveness of utility services provided to citizens and residents of the Town by contracting with Developer to construct the Facilities and reimburse Developer for the cost of construction of the Facilities that exceed the needs of the proposed development; and

WHEREAS, pursuant to NCGS § 162A-207, the Town shall credit the value of costs in excess of the developments’ proportionate share of connecting facilities required to be oversized for use of others outside the development; and

WHEREAS, the Parties desire to memorialize their agreement for Developer to coordinate, finance, and construct the Facilities and for the Town to reimburse the Developer for certain eligible costs as set forth more particularly herein.

NOW, THEREFORE, in consideration of the agreements, mutual covenants, promises and benefits contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties agree and covenant as follows:

1. Recitals.

The foregoing recitals shall constitute an integral part of this Agreement, and this Agreement shall be construed in light thereof.

2. Construction of Facilities.

The Developer may, at its own expense, construct the Facilities more particularly described in **Exhibit B**, attached hereto and incorporated herein (the “**Plans**”). If Developer elects to construct the Facilities, Developer shall (i) pay the acquisition cost for the Pump Station site and all easements necessary for the construction of the Facilities, (ii) procure permits and approvals for the construction of the Facilities, including payment for all associated mitigation costs, (iii) design the Facilities, (iv) obtain surveying for design and construction of the Facilities, (v) construct and install the Facilities, all (a) in a good and workmanlike manner, (b) in compliance with this Agreement, Town specifications, and all applicable Federal, State and local laws, statutes, ordinances, rules, regulations, policies and specifications, and (c) in accordance with the approved construction plans described in Exhibit B. Developer represents to the Town and the Town concurs that the Facilities will be designed and constructed to exceed the size and/or capacity required to serve Developer’s proposed development; and therefore, the Facilities are subject to reimbursement pursuant to the Policy.

3. Certification, Inspection and Acceptance of Facilities.

Upon completion of the construction of the Facilities, Developer shall provide the Town with written certification and as-built drawings from Developer’s designated consulting engineering firm (“**Developer’s Engineer**”) that the Facilities are complete, have been constructed and installed in compliance with this Agreement and are within appropriate Town easements or fee simple parcels. The Facilities shall be offered for public dedication to the Town upon completion of construction, and shall be subject to inspection and acceptance by the Town. Upon the Town’s inspection and acceptance of the Facilities, Developer shall take any steps necessary to transfer title to and possession of the Facilities to the Town, including but not limited to all steps necessary to acquire and transfer to the Town all easement rights, rights-of-way, and all other rights of use, access, ingress and egress, necessary or desirable for the existence, improvement, use, operation, inspection, maintenance, repair, reconstruction, replacement and/or removal of the Facilities and such improvements, facilities, fixtures, equipment, markers and appurtenances thereto as may be necessary or desirable for the collection of wastewater. Thereafter, the Town shall own the Facilities and have exclusive possession and control of the Facilities.

4. Approved Project Costs.

The “**Approved Actual Project Costs**” means the actual and reasonable cost of constructing the Facilities as certified by the Developer’s Engineer, including, but not limited to materials; fees; the contractor’s labor, expenses, and profit; permits; mitigation; construction management; and testing and certification related to or necessary for the construction of the

Facilities, as approved by the Town's Water Resources Director ("**Town's Director**"), whose consent shall not be unreasonably withheld, conditioned or delayed. Costs that are not certified by the Developer's Engineer and approved by the Town's Director shall not be included in the Approved Actual Project Costs. The preliminary Approved Actual Project Costs will be determined as agreed upon by the Developer's Engineer and the Town's Director at the time of execution of this Agreement by the Parties based on preliminary estimates of costs. Certification of the Approved Actual Project Costs will be prepared by the Developer's Engineer within 90 days after the completion of the award of the construction contract for the Facilities or the completion of acquisition of all easements and/or properties required for construction of the Facilities, whichever is later, at which time this Agreement will be adjusted by the Parties to reflect the actual amount. Upon completion of the Facilities and acceptance by the Town, the Developer's Engineer shall certify the final Approved Actual Project Costs, accounting for all approved changes, and such amount shall be referred to herein as the "**Final Approved Actual Project Costs**".

The Town shall not participate in or be responsible to pay or reimburse any change order increasing the cost of the Facilities ("**Change Order**") unless agreed to by the Town and approved by the Town's Director in writing prior to execution of the Change Order. All change orders must be signed by the Town's Director. In other words, the costs associated with a Change Order shall be excluded from the Final Approved Actual Project Costs unless the Change Order is pre-approved by the Town's Director, which approval will not be unreasonably withheld, conditioned or delayed. Change Orders that are not acted upon by the Town's Director within ten (10) business days following receipt shall be deemed approved. Upon learning of a proposed Change Order, Developer shall immediately provide the Town with all documentation and information needed for the Town to evaluate the proposed Change Order. In addition, the actual costs incurred by Developer in constructing the Facilities shall reflect any cost savings that reduce the amount the Developer actually pays to construct the Facilities.

5. Credits

A. Developer shall receive a credit equal to fifty-eight and 33/100 percent (58.33%) of the Final Approved Actual Project Costs for construction of the Pump Station as more specifically identified in Exhibit C as "Contract 1", representing the cost difference between cost of construction of a Pump Station sized to meet the needs of the development and the cost of construction of the oversized Pump Station.

B. Additionally, the Developer shall receive credit for the cost difference between the Line Work sized for the development of the Properties versus the oversized Line Work required for the basin at the rates shown in Exhibit C, "Contract 2", for the actual amounts actually constructed. Credits received under this Subparagraphs 5A and 5B are equal to the Approved Incremental Construction Cost as defined in the Policy.

C. In addition to the credits under this Subparagraphs 5A and 5B, Developer shall also receive credit in an amount not to exceed fifteen percent (15%) of the Approved Incremental

Construction Cost (as defined in the Policy) for the costs of acquisition of the Pump Station site and easements necessary for the construction of the Facilities, but not to exceed the actual costs of such acquisitions and non-construction costs such as engineering and surveying; provided however, Developer must comply with the Mini-Brooks Act and any other state law or regulation applicable to procuring those services as if the Town were procuring said services.

6. Reimbursement. Reimbursement shall be payable as follows:

A. Upon completion of the Facilities and acceptance by the Town, the Town shall reimburse Developer for any Sewer Capital Reimbursement Fees previously paid for development of the Properties and shall off-set the amount of Sewer Capital Reimbursement Fees otherwise due to the Town for the development of the Properties, but not yet paid. The Sewer Capital Reimbursement Fees against Phase 1 of the Horton Park Project and the Colby Crossing Subdivision, which together comprise some 261 lots is expected to total \$959,175 (261 lots x \$3,675 fee per lot), the “**Phase One Offset**”. If, after the date of this Agreement, Sewer Capital Reimbursement Fees are increased by the Town, Developer shall be entitled to a Phase One Offset based on the amount of the fee actually paid or at the current rate due, but not yet paid.

B. The total Credits due under Paragraph 5 shall be reduced by the Phase One Offset amount to determine the remaining balance (“**Remaining Reimbursable Balance**”). The Developer shall receive the Remaining Reimbursable Balance in six (6) equal amount annual installments (“**Annual Installment**”) until paid in full in accordance with the Policy. Should additional phases of the Horton Park Project be developed prior to the full payout of the Remaining Reimbursable Balance, the Sewer Capital Reimbursement Fees associated with such additional development shall likewise be offset against the Remaining Reimbursable Balance. Any Sewer Capital Reimbursement Fees offset against additional development shall reduce the Remaining Reimbursable Balance by the exact amount of the Sewer Capital Reimbursement Fees. The initial Annual Installment payment shall be paid to Developer within sixty (60) days of acceptance of the Facilities by the Town, with subsequent Annual Installment payments on the anniversary of the payment of the initial Annual Installment.

C. No Double Reimbursement.

In no event shall the aggregate of the reimbursement to Developer under subparagraphs 6A and 6B above exceed the total credits due under paragraph 5

7. No Other Credits.

The credits and reimbursements provided in this Agreement shall be the only credits, reimbursements, payments, compensation, or other remuneration to which the Developer shall be entitled to in connection with the Facilities or this Agreement. The credits and

reimbursements provided in this Agreement may not be applied in any manner other than as stated in this Agreement.

8. Developer's Engineer and Town's Director.

The Developer's Engineer is Diehl and Phillips, P.A., and the Town's Director shall be the Town's Water Resources Director or his or her designee.

9. Formal Bidding Requirements.

Developer shall comply with Article 8 of Chapter 143 of the North Carolina General Statutes. Formal bidding is required and Developer shall advertise for and solicit at least three (3) competitive sealed bids for construction of the Facilities, then the bids shall be opened by the Town's Director or his or her designee in the Apex Public Works Administration Building and Developer shall award the contract to construct the Facilities to the lowest responsible bidder. The advertisement shall give prospective bidders at least thirty (30) days' notice prior to the due date of the bids. The Developer shall administer the construction contract without cost or expense to the Town, except as provided for in this Agreement, and the Town may require the Developer to file reports of its administration of the bidding process with the Town's Director.

10. Termination of the Town's Obligation.

The Town's obligation under this Agreement shall automatically terminate on the date of the tenth (10th) anniversary of the acceptance by the Town of the completed Facilities or the date on which the Developer has been reimbursed in full in the amount of the Final Approved Actual Project Costs under this Agreement, whichever occurs first. Thereafter, the Town shall have no further responsibility for any additional or other credits, payments, reimbursements, compensation, or other remuneration to the Developer in connection with this Agreement or the Facilities.

11. Acts Beyond Parties Control.

Neither party to this Agreement shall be in breach or default of any provisions hereof by reason of delay or failure in the discharge of performance of any duty or obligation hereunder due to acts of God, war, government laws or regulations, civil disorder, labor difficulties, inability to obtain materials, or any other such cause beyond the party's reasonable control (each and collectively, "**Force Majeure Delays**"). In the event of Force Majeure Delays, all time periods and time deadlines in this Agreement shall be extended automatically for the period of such force majeure delay.

12. Termination for Failure to Complete.

If Developer does not complete construction of the Facilities on or before the fifth (5th) anniversary of the full execution of this Agreement, absent Force Majeure Delays, the Town may terminate this Agreement, provide Capital Reimbursement Fee Credits as provided herein

as an offset against the Approved Incremental Actual Project Costs incurred, and have no further obligations to Developer.

13. Non Waiver of Breaches.

The waiver by either Party of any breach or violation of any term or provision of this Agreement by any other party hereto shall not operate as a waiver of any other breach or violation.

14. Agreement Does Not Create Agency.

Nothing in this Agreement shall constitute the appointment of Developer as an agent, employee or legal representative of the Town or form any fiduciary relationship of any kind, for any purpose; nor shall Developer make any representations to that effect. Developer shall have no authority to bind or commit the Town in any manner, but shall act and conduct himself in all respects on his own behalf. This Agreement creates no relationship of agency, joint venturers, partners, or associates between the Parties, and the Parties agree that they are each acting as principals.

15. Benefit, Binding Effect, and Assignment.

The rights, duties and obligations of the Parties under this Agreement shall be to the benefit of and binding upon the Parties and their respective permitted successors and permitted assigns. Neither this Agreement nor the respective rights, duties, obligations and responsibilities of the Developer under this Agreement may be assigned or transferred, in whole or in part, including without limitation by operation of law, by the Developer to any other person, firm or organization (including sub-agents thereof) without the prior written consent of the Town, which shall not be unreasonably withheld, conditioned or delayed. A request from Developer for any such assignment or transfer that is not acted upon by the Town within ten (10) business days after it is received by the Town shall be deemed approved. Notwithstanding the foregoing, the Town hereby agrees that Developer may assign at any time, without any further written consent from the Town, all of Developer's rights, duties, obligations and responsibilities under this Agreement to D.R. Horton -Terramor, LLC, a Delaware limited liability company, or to any wholly or partially owned subsidiary of D.R. Horton, Inc., a Delaware corporation, including without limitation Forestar (USA) Real Estate Group, Inc., a Delaware corporation.

16. Counterparts, Changes, and Complete Agreement.

This Agreement may be executed in counterparts to provide each party with a fully executed original. Except as otherwise provided herein, this Agreement may not be changed, modified or amended, except by an agreement in writing signed by all Parties. This Agreement, together with the attachments hereto, reflects the complete understanding of the Parties and constitutes their entire agreement with respect to the subject matter hereof, superseding all prior negotiations, communications, representations, promises, understandings, statements, contracts or agreements, oral or written, with respect to the subject matter hereof. No subsequent

modification to the Policy shall adversely affect Developer’s rights and obligations pursuant to this Agreement.

17. Governing Law.

This Agreement shall be governed by, construed and interpreted in accordance with the laws of the State of North Carolina excluding only its choice of laws provisions.

18. E-Verify.

Developer shall comply with and shall require that all of its contractors and subcontracts comply with the requirements for verification of work authorization set forth in Chapter 64, Article 2 of the North Carolina General Statutes (Employer E-Verify). The Town shall comply with the municipality verification of work authorization set forth in N.C.G.S. § 160A-169.1 (Municipality E-Verify).

19. Notices.

All notices, requests, demands and other communications made under this Agreement shall be in writing and shall be deemed duly given if delivered by hand or sent by registered or certified mail, postage prepaid, return receipt requested, or by reputable overnight courier service, charges prepaid, to the respective addressees set forth below or to other such addressees as any Party may specify by notice to the others in accordance with this paragraph. The Parties shall endeavor to send copies of the above to each of the addressees via email to the address provided below, but the failure to do so will not render a communication ineffective.

If to the Town, to:

Assistant Town Manager
Attention: Marty Stone
73 Hunter Street
Post Office Box 250
Apex, North Carolina 27502
Email: marty.stone@apexnc.org

And to:

Water Resources Director
Attention: Michael Deaton
73 Hunter Street
Post Office Box 250
Apex, North Carolina 27502
Email: michael.deaton@apexnc.org

And to:

Apex Town Attorney
Attention: Laurie Hohe

73 Hunter Street
Post Office Box 250
Apex, North Carolina 27502
Email: laurie.hohe@apexnc.org

If to Developer, to:

MFW Investments, LLC
Attention: Michael Whitehead
2702 Emerald Drive
Emerald Isle, North Carolina 28594
Email: mwhitehead@macgregordev.com

With a copy to: Developer's Legal Counsel:

Barringer Sasser, LLP
Attention: Brent D. Barringer
111 Commonwealth Court
Post Office Box 5566
Cary, North Carolina 27512-5566
Email: brent@barsaslaw.com

Except as otherwise provided, notices shall be effective when received, as evidenced by the acknowledgment of delivery issued with respect thereto by the postal authorities or the signed receipt of the Party to whom such notice is addressed. Rejection or other refusal to accept shall be deemed to be receipt of the notice sent.

SIGNATURES TO FOLLOW

DEVELOPER:

MFW Investments, LLC
a North Carolina limited liability company

By: _____
Michael F. Whitehead, Duly Authorized Member/Manager

State of North Carolina - County of Wake

I, a Notary Public of Wake County, North Carolina, hereby certify that Michael F. Whitehead, known to me or proved on the basis of satisfactory evidence to be the person described, personally appeared before me this day and acknowledged that he is a Member/Manager of MFW Investments, LLC, a North Carolina limited liability company, and further acknowledged the due and voluntary execution of the foregoing instrument on behalf of the said limited liability company for the purposes stated therein.

Witness my hand and Notarial stamp or seal this _____ day of _____, 2021.

NOTARY SEAL OR STAMP

Signature of Notary Public

Notary's Printed or Typed Name

My Commission Expires: _____

TOWN:

Town of Apex,
a North Carolina municipal corporation

Ralph Clark, Interim Town Manager

ATTEST:

Donna Hosch, Town Clerk

State of North Carolina - County of Wake

I, a Notary Public of Wake County, North Carolina, hereby certify that _____, known to me or proved on the basis of satisfactory evidence to be the persons described, personally appeared before me this day and acknowledged that he is the _____ of the Town of Apex, a North Carolina municipal corporation, and further acknowledged the due and voluntary execution of the foregoing instrument on behalf of the said limited liability company for the purposes stated therein.

Witness my hand and Notarial stamp or seal this _____ day of _____, 2021.

NOTARY SEAL OR STAMP

Signature of Notary Public

Notary's Printed or Typed Name

My Commission Expires: _____

EXHIBIT A

[SITE PLAN / RELATED PARCELS]

EXHIBIT B

[APPROVED CONSTRUCTION DRAWINGS]

EXHIBIT C

[INSERT BID FORM]

LOWEST BID FOR PUMP STATION WAS 2,043,847

LOWEST BID FOR LINE WORK WAS 2.25m

WE NEED TO EXTEND THE 90-DAY POST BID PERIOD

EXHIBIT D

Policy Regarding Town Participation in Utility Projects

1. A developer or property owner is required to install water and sewer facilities sufficient to meet the needs of their development. In order to provide for the orderly and efficient long term growth of the Town's water and sewer infrastructure, the Town of Apex may contract with a developer or property owner ("Developer") for the construction of utility improvements that are adjacent or ancillary to a private land development project and in excess of the needs of the private land development project ("Oversized Improvements"). Facilities shall be sized in accordance with the Town's Water and Wastewater Facilities Plan ("Plan") or as approved by the Director of Water Resources.
2. When Oversized Improvements are required by the Plan, the Developer shall be reimbursed for cost associated with the design and construction of improvements that are in addition to those required to serve the needs of the development in accordance with this Policy.
3. Developer shall be reimbursed the incremental cost differential for construction of water distribution lines, sanitary sewer collection lines, sewer pump stations, and sewer force mains under the following conditions:
 - a. The Oversized Improvements exceed the needs of the development; and
 - b. The waterline distribution line or sanitary sewer collection line, as applicable, is greater than an 8 inch line; and
 - c. The Developer complies with Article 8 of Chapter 143 of the North Carolina General Statutes when awarding contracts where the estimated public cost exceeds \$250,000; and
 - d. The Developer administers the construction contract without cost or expense to the Town and file reports of its administration with the Town's Water Resources Director or the Water Resources Director's designee; and
 - e. A Reimbursement Agreement is approved by the Town Council.
4. "Approved Incremental Construction Cost" shall be determined as follows: The incremental cost differential for the Oversized Improvements shall be determined by (a) conducting a publicly bid construction contract process showing the minimum required sizing sufficient to meet the needs of the development as the base bid and the Oversized Improvements as an alternate bid or (b) based on a set unit price cost differential using the Town's published costs for determining performance guarantees. In the case of a pump station, certified estimates will be provided by Developer Engineer and Town Engineer to analyze and reach agreement on an "Oversized Improvement Percentage". The Oversized Improvement Percentage would be applied to the publicly bid pricing to determine the Approved Incremental Construction Cost. Any or all of the above methods may be used for a single project or as agreed to in the Reimbursement Agreement. The Approved Incremental Construction Cost shall not include any change orders increasing the costs of the construction unless reviewed and approved by the Town's Water Resources Director or the Water Resources Director's designee in writing prior to execution of the change order.

5. In addition to the Approved Incremental Construction Cost, the Developer may be reimbursed for non-construction costs such as engineering, surveying, and land acquisition in an amount not to exceed 15% of the Approved Incremental Construction Cost; provided however, Developer must comply with the Mini-Brooks Act and any other state law or regulation applicable to procuring those services as if the Town were procuring said services (“Approved Incremental Design Cost”). The aggregate of the Approved Incremental Construction Cost and Approved Incremental Design Cost is the “Town’s Share.”

6. Upon completion of construction of the Oversized Improvements and acceptance of the facilities by the Town, Town’s Share shall be reimbursed as follows:

- a. Developer shall receive a credit against Developer owed Capital Reimbursement Fees (“Fee Credits”).
- b. Upon acceptance of the facilities and annually thereafter, Developer shall receive payments of any remaining Town Share (“Annual Payment”) in accordance with the following schedule:
 - Town Share less Fee Credits is less than or equal to \$800,000, Annual Payment shall be paid out over a period of time not to exceed 4 years.
 - Town Share less Fee Credits is between \$800,000 and \$1,200,000, Annual Payment shall be paid out over a period of time not to exceed 6 years.
 - Town Share less Fee Credits is between \$1,200,000 and \$1,600,000, Annual Payment shall be paid out over a period of time not to exceed 8 years.
 - Town Share less Fee Credits is greater than \$1,600,000, Annual Payment shall be paid out over a period of time not to exceed 10 years.

For example, if the Town’s share is \$600,000 and the Fee Credits equal \$100,000, the remaining \$500,000 will be spread among 4 equal Annual Payments of \$125,000.

- c. Reimbursement for water system improvements shall only be received from Water Capital Reimbursement Fee funds. Likewise, reimbursement for sewer system improvements shall only be received from Sewer Capital Reimbursement Fee funds.
- d. In no event shall the Fee Credits or the aggregate of the Fee Credits and Annual Payment received by the Developer exceed the amount of the Town’s Share.

7. The Town’s obligation to reimburse Developer under this Policy shall automatically terminate on the 10th anniversary of the acceptance of the completed facilities by the Town or the date on which the Developer has been reimbursed in full the amount of the Town’s Share, whichever occurs first.