

**WATER, WASTEWATER AND RECLAIMED WATER FRANCHISE AGREEMENT**

**BETWEEN**

**THE CITY OF FELLSMERE, FLORIDA**

**AND**

**INDIAN RIVER COUNTY, FLORIDA**

THIS WATER, WASTEWATER AND RECLAIMED WATER FRANCHISE AGREEMENT (hereinafter "Franchise Agreement") is entered into as of the \_\_\_ day of \_\_\_\_\_, 201\_, (hereinafter "Effective Date") by and between the City of Fellsmere, Florida (hereinafter "FELLSMERE") and Indian River County, Florida (hereinafter "COUNTY").

**WHEREAS**, FELLSMERE is a municipal corporation duly incorporated, validly existing, and in good standing under the laws of the State of Florida, with all governmental, corporate, and proprietary powers to enable it to conduct municipal government, perform municipal functions, and render municipal services and, consistent therewith, has the power and authority to execute and deliver this Franchise Agreement and to carry out its obligations hereunder; and

**WHEREAS**, COUNTY is in the business of furnishing, *inter alia*, water, wastewater and reclaimed water utility services; and

**WHEREAS**, FELLSMERE and COUNTY desire to enter into a Water, Wastewater, and Reclaimed Water Franchise Agreement, which will allow COUNTY to provide water, wastewater and reclaimed water utility services within those portions of the corporate limits of FELLSMERE in which it is more beneficial for the COUNTY to serve;

**NOW, THEREFORE**, in consideration of the foregoing and the mutual benefits to be derived from compliance by the parties with the covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged by the parties, the parties agree as follows:

**Section 1. Adoption of "Whereas" Clauses.** The foregoing "Whereas" clauses are adopted and incorporated herein.

**Section 2. Conditions Precedent.** Notwithstanding anything to the contrary contained herein, this Franchise Agreement shall not become effective until and unless the appropriate franchise ordinance or resolution is formally adopted by the City Council of FELLSMERE approving this Franchise Agreement and granting to COUNTY the Franchise contemplated herein.

**Section 3. Franchise Grant.** FELLSMERE hereby grants to COUNTY, with all rights and privileges attendant thereto, an exclusive Franchise to construct, maintain, and

operate water, wastewater and reclaimed water utility systems within the area of FELLSMERE set forth in Exhibit "A" ("Service Area"). Such water, wastewater and reclaimed water utility systems shall consist of all water, wastewater and reclaimed water facilities (including, pipes, fixtures, mains, valves, meters, tanks, lift stations, etc., and telephone and electric lines for water, wastewater, and reclaimed water utility system use) for the purpose of supplying water, wastewater and reclaimed water utility service to the Service Area and the inhabitants thereof.

**Section 4. Franchise Term and Renewal.** The term of this Franchise Agreement and the Franchise granted hereunder shall be for a period of Twenty-five (25) years commencing on the Effective Date. This Franchise Agreement shall automatically renew for an additional 25 years unless either party provides notice to the other party of its intent to terminate this Franchise Agreement at least 4 years prior to the expiration of this Franchise Agreement.

**Section 5. Utility Rates and Fees.** The rates for water, wastewater and reclaimed water utility services established and charged by COUNTY for customers within the Service Area shall be no greater than the rates for such utility services as published by the COUNTY for the various rate classifications served. Likewise, any and all other fees and charges established and imposed by COUNTY shall correspond to such fees and charges assessed by COUNTY and shall be no greater than those imposed by COUNTY in each rate classification. The foregoing rates, fees, and charges shall be adopted and applied to each customer's utility billing commencing with the customer's first utility bill that is produced subsequent to Thirty (30) days from the Effective Date. The rates, fees, and other charges assessed shall be adjusted by COUNTY at the same time as any other adjustment made by COUNTY of its corresponding charges and fees. COUNTY shall provide the City Manager of FELLSMERE for review and comment any proposed rate or fee adjustments no less than Thirty (30) days before the adjustment is scheduled to go before the COUNTY Board of County Commissioners for consideration. Notwithstanding any of the foregoing language to the contrary, all rates, fees and regulations established by COUNTY shall be otherwise reasonable, and the rates and fees charged by COUNTY shall at all times be subject to such regulation as may be provided by state law. Further, the parties recognize that the right to establish and regulate water, wastewater and reclaimed water rates, impact fees, service policies or other rules or regulations, and the construction, operation or maintenance of the water, wastewater and reclaimed water utility system shall be vested solely in COUNTY, except as such may be otherwise subject to the applicable laws of the Federal Government and the State of Florida or the provisions of this Franchise Agreement.

**Section 6. COUNTY Franchise Fee.** COUNTY may charge a franchise or fee-in-lieu-of-franchise fee up to six percent (6%) of the gross revenues received by COUNTY from the sale of water, wastewater and reclaimed water services in the Service Area. The franchise or fee-in-lieu fee shall be calculated as a percentage of the gross revenue derived from the sale of water, wastewater, and reclaimed water services as applicable. Such fee shall be shown on the customers' bills as a separate line item. FELLSMERE acknowledges and agrees that such fee is an acceptable, bargained-for fee.

FELLSMERE also acknowledges and agrees that a fee of six percent (6%) shall initially be charged by COUNTY on water, wastewater and reclaimed water services in the Service Area, and shall remain in effect during the term of this Franchise Agreement, unless revised by mutual consent of CITY and COUNTY. COUNTY acknowledges and agrees to provide FELLSMERE one-half of the fee charged. COUNTY shall remit the FELLSMERE portion of the franchise fee to FELLSMERE on a monthly basis for revenue received in the prior month.

**Section 7. FELLSMERE Utility Tax.** COUNTY shall collect and remit the FELLSMERE utility tax as set forth in Chapter 78 of the FELLSMERE Ordinance Code, as amended from time to time.

**Section 8. Developer Agreements.** COUNTY shall have the authority to enter into agreements with developers of real estate projects and other consumers within the Service Area. Developer agreements entered into by COUNTY shall be fair, just, and non-discriminatory, and generally have the same content as developer agreements for projects within the unincorporated areas of the COUNTY. Such agreements may include but are not limited to provisions relating to:

(a) Advance payment of contributions in aid of construction to finance water, wastewater, or reclaimed water utility system expansion and/or extension.

(b) Revenue guarantees or other such arrangements as may make the expansion/extension self-supporting.

(c) Capacity reservation fees.

(d) Pro rata allocation of water and wastewater plant expansion/main extension charges between two or more developers.

**Section 9. Franchise Service Area Boundary Changes.** The Service Area covered by this Franchise Agreement may be expanded or contracted to include or exclude lands by amendments between FELLSMERE and COUNTY approved by the FELLSMERE CITY Council and the COUNTY Board of County Commissioners.

**Section 10. Easements and Other Rights.** COUNTY shall have all rights, privileges, easements, licenses, leaseholds, prescriptive rights, and rights to use public and private roads, rights-of-way, highways, streets, and other areas owned, held, and/or used in connection with the construction, reconstruction, installation, maintenance, and operation of the water, wastewater and reclaimed utility systems (collectively "Easements"). FELLSMERE will assist COUNTY in obtaining any such Easements needed by COUNTY for performance of this Franchise Agreement. Any expense incurred by FELLSMERE in providing such assistance shall be reimbursed by COUNTY.

**Section 11. Consideration.** In consideration of the Franchise and the other rights and privileges granted herein to COUNTY, COUNTY shall provide, at its own expense, maintenance, repairs, and replacements of the water, wastewater and reclaimed water utility facilities used by COUNTY in its performance of this Franchise Agreement.

**Section 12. Service Standards.** COUNTY shall construct, maintain, and operate all water, wastewater and reclaimed water facilities and systems in accordance with the applicable regulations of the Federal Government and the State of Florida, as well as meet all level-of-service standards pursuant to applicable comprehensive plans.

**Section 13. Manner of Service.** In performance of this Franchise Agreement COUNTY shall:

- (a) Provide water, wastewater and reclaimed water utility services to customers in the Service Area.
- (b) Operate, regularly maintain, and promptly repair when necessary the water, wastewater and reclaimed water utility facilities and systems in order to continue adequate service to the Service Area.
- (c) Deal with customers in the Service Area in a manner no less favorable than COUNTY's dealings with its customers served.

**Section 14. Capital Improvement Plan.** COUNTY shall annually provide the draft of its detailed Five (5) year capital improvement plan, specific to water, wastewater and reclaimed water utility systems within the Service Area, to the FELLSMERE City Manager and City Planner for review and comment. Such comments shall be provided to COUNTY within Thirty (30) days for consideration in its completion of the capital improvement plan, which plan shall thereafter be provided to FELLSMERE City Manager.

**Section 15. Location of Facilities.** All water, wastewater and reclaimed water utility system facilities shall be so located and so constructed as to interfere as little as practicable with traffic over the streets, alleys, bridges, and public places, and with reasonable egress from and ingress to abutting property. The location or relocation of all such facilities shall be made under the supervision and with the approval of such representatives as the governing body of FELLSMERE may designate for the purpose, but not so as unreasonably to interfere with the proper construction, maintenance, repair, or operation of the water, wastewater and reclaimed water utility systems by COUNTY. When any portion of a street is excavated by COUNTY in the location or relocation of any utility facilities, the portion of the street so excavated shall, within a reasonable time and as early as practicable after such excavation, be replaced by COUNTY at its expense, and in as good condition as it was at the time of such excavation. Provided, however, that nothing herein contained shall be construed to make FELLSMERE liable to COUNTY for any cost or expense in connection with the construction, reconstruction, repair or relocation of the utility facilities in streets,

highways, or other public places made necessary by the widening, grading, paving or otherwise improving by FELLSMERE of any of the present or future streets, avenues, alleys, bridges, highways, easements, or other public places used or occupied by COUNTY, except, however, COUNTY shall be entitled to reimbursement of its costs as may be provided by law.

**Section 16. Liability and Indemnification.** FELLSMERE shall in no way be liable or responsible for any accident or damage that may occur in the construction, installation, maintenance, or operation by COUNTY of the water, wastewater and reclaimed water facilities hereunder, and the acceptance approval of this Franchise Agreement by COUNTY shall be deemed an agreement on the part of COUNTY to indemnify and hold FELLSMERE harmless against any and all liability, loss, cost, damage, or expense which may accrue to FELLSMERE by reason of the negligence or misconduct of COUNTY in its performance of such construction, installation, maintenance, repair, or operation of the water, wastewater and reclaimed water systems pursuant to this Franchise Agreement (but excluding to the extent any such claim is based on the negligence of FELLSMERE), including but not limited to attorneys' fees, experts' fees, and costs incurred for defending any and all such claims or suits against FELLSMERE, through trial and all appellate proceedings and proceedings for determination of entitlement to and amount of such fees and costs. Such indemnification obligation of COUNTY shall survive expiration or termination of this Franchise Agreement for any covered claim accruing prior to such expiration or termination. However, such obligation to indemnify FELLSMERE shall be subject to the limitations set forth in section 768.28, Florida Statutes, as may be applicable.

**Section 17. Assignment.** COUNTY may assign this Franchise Agreement and the Franchise, provided that such assignee assumes all the obligations of COUNTY hereunder and such assignment is approved by FELLSMERE, whose approval shall not be unreasonably withheld.

**Section. 18. Time of the Essence.** Time is of the essence in the performance of each and every provision of this Franchise Agreement.

**Section 19. Acts of God.** Provisions herein to the contrary notwithstanding, COUNTY shall not be liable for the non-performance or delay in performance of any of its obligations undertaken pursuant to the terms of this Franchise Agreement, where said failure or delay is due to any cause beyond COUNTY's control including, without limitation, "Acts of God," unavoidable casualties, and labor disputes.

**Section 20. Notices.** Any delivery of notice required or permitted to be made hereunder may be made by personal delivery, courier, or mailing a copy thereof addressed to the appropriate party as follows:

If to FELLSMERE:

City Manager  
City of Fellsmere

22 S. Orange Street  
Fellsmere, FL, 32948-6700

If to COUNTY

Director of Utilities  
1801 27<sup>th</sup> Street  
Vero Beach, FL 32960

Delivery when made by registered or certified mail shall be deemed complete upon mailing.

**Section 21. No Waiver.** The failure of either party hereto to enforce any of the provisions of this Franchise Agreement or the waiver thereof in any instance by either party shall not be construed as a general waiver or relinquishment on its part of any such provisions, but the same shall, nevertheless, be and remain in full force and effect.

**Section 22. Binding Affect.** All of the provisions of this Franchise Agreement shall be binding upon and inure to the benefit of and be enforceable by the legal representatives, successors, assigns, and nominees of the parties.

**Section 23. Governing Law; Venue; Attorney Fees.** This Franchise Agreement shall be construed, governed, and interpreted according to the laws of the State of Florida. Venue for resolution of any dispute arising under this Franchise Agreement or the Franchise shall be in Indian River County, Florida. The parties shall each bear their own attorney fees in any dispute arising under this Franchise Agreement.

**Section. 24. Entire Agreement; Amendments.** This instrument constitutes the entire agreement between the parties and supersedes all previous discussions, understandings, and agreements between the parties relating to the subject matter of this Franchise Agreement. Amendments to and waivers to the provisions of this Franchise Agreement shall be made by the parties only in writing by formal amendment. This Franchise Agreement may be executed in separate counterparts, each of which shall be deemed to be an original and all of which together shall constitute one and the same instrument.

**SIGNATURE PAGE FOLLOWS**

IN WITNESS THEREOF, the parties have set their hands and seals the date entered below.

ATTEST:

CITY OF FELLOSMERE

Deborah C. Krages  
Deborah C. Krages  
City Clerk

By: Joel Jyeon  
Mayor

(SEAL)

Date: November 16, 2018

Reviewed as to form and legal sufficiency:

\_\_\_\_\_  
Warren W. Dill  
City Attorney

**BOARD OF COUNTY COMMISSIONERS OF  
INDIAN RIVER COUNTY, FLORIDA**

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

Date: \_\_\_\_\_

Approved by BCC: \_\_\_\_\_

ATTEST:

Jeffrey R. Smith, Clerk of Circuit Court and  
Comptroller

By: \_\_\_\_\_  
Deputy Clerk

APPROVED BY:

\_\_\_\_\_  
Jason E. Brown, County Administrator

APPROVED AS TO FORM AND LEGAL  
SUFFICIENCY

\_\_\_\_\_  
Dylan Reingold, County Attorney