

**MEMORANDUM OF AGREEMENT BETWEEN ESCAMBIA COUNTY, FLORIDA, THE EMERALD COAST UTILITIES AUTHORITY, AND THE CREEKWOOD HOMEOWNERS' ASSOCIATION OF PENSACOLA, INC. RELATING TO A WASTEWATER SYSTEM IMPROVEMENT PROJECT**

**THIS AGREEMENT** is made on this \_\_\_ day of \_\_\_\_\_, 2017, by and between Escambia County, Florida, a political subdivision of the State of Florida (hereinafter "County") with administrative offices located at 221 Palafox Place, Pensacola, Florida 32502; Emerald Coast Utilities Authority, a local governmental body, corporate and politic of the State of Florida, (hereinafter "ECUA") with administrative offices at 9255 Sturdevant Street, Pensacola, Florida 32514; and Creekwood Homeowners' Association of Pensacola, Inc., a not-for-profit corporation authorized to do business in the State of Florida (hereinafter "HOA") with a principal address of 4505 Woodbine Road, Pace, Florida 32571 (each at times also being referred to as a "Party" or collectively as "Parties").

**WITNESSETH:**

**WHEREAS**, ECUA provides water and wastewater services in certain defined areas in Escambia County, Florida;

**WHEREAS**, within the confines of Escambia County, Florida there exist subdivisions known as the Creekwood Subdivision as well as the Creekwood Oaks Subdivision;

**WHEREAS**, ECUA provides water service within the Creekwood and Creekwood Oaks Subdivisions and receives wastewater from those subdivisions;

**WHEREAS**, the collective owners of real property located within the Creekwood Subdivision comprise the HOA;

**WHEREAS**, the HOA owns, operates, and maintains various wastewater facilities within the Creekwood Subdivision, including but not necessarily limited to the sanitary sewer collection system within the Creekwood Subdivision and the lift station which services that system;

**WHEREAS**, the sanitary sewer lift station within the Creekwood Subdivision also receives flows from the Creekwood Oaks Subdivision;

**WHEREAS**, the sanitary sewer lift station servicing the Creekwood Subdivision is undersized and insufficiently designed to handle the flow which it currently receives;

**WHEREAS**, the deficiencies and inadequacies of the Creekwood Subdivision's sanitary sewer collection system have led to multiple sewer overflows in the past;

**WHEREAS**, the sanitary sewer collection system and lift station which services the Creekwood Subdivision and the Creekwood Oaks Subdivision is in need of repair and replacement;

**WHEREAS**, the Parties recognize that in light of the condition of the sanitary sewer collection system and lift station, such sewer overflows are highly likely to continue to occur in the future and therefore pose a real and substantial danger to the public health, safety, and welfare;

**WHEREAS**, the HOA has identified a need to make repairs to the existing sanitary sewer collection system and to construct a new sanitary sewer lift station facility;

**WHEREAS**, the County, ECUA, and the HOA are cooperating to repair the sanitary sewer collection system as well as to reengineer and reconstruct a sanitary sewer lift station facility in the Creekwood Subdivision in order to protect the public health, safety, and welfare;

**WHEREAS**, the County is willing to contribute the funds necessary to both design and repair the sanitary sewer collection system as well as to reengineer and reconstruct a sanitary sewer lift station facility in the Creekwood Subdivision;

**WHEREAS**, the sanitary sewer lift station which services the sanitary sewer collection system within the Creekwood Subdivision is located on real property which was owned by the HOA, but in order to facilitate expansion and improvement of the lift station site the HOA has deeded it to ECUA;

**WHEREAS**, the County owns real property surrounding the lift station which services the Creekwood Subdivision, over portions of which the County had given ECUA an easement in order to facilitate expansion of the lift station site as well as access to it;

**WHEREAS**, ECUA has agreed to oversee and manage the design of and repairs to the sanitary sewer collection system in the Creekwood Subdivision as well as the design of and construction of a new sanitary sewer lift station facility on the existing site at no cost to ECUA or its ratepayers;

**WHEREAS**, the HOA expressly understands and accepts that although the County will provide the funds necessary for the Project, all costs associated with the improvements, including design and engineering costs, will be billed to all affected property owners within the Creekwood Subdivision and Creekwood Oaks Subdivision pursuant to the ordinance establishing the Creekwood Subdivision's sewage and lift station improvement Municipal Services Benefit Unit (MSBU) and an accompanying MSBU special assessment;

**WHEREAS**, upon completion of the Project, the HOA shall convey, and ECUA shall accept, ownership of the sanitary sewer collection system and lift station to ECUA;

**WHEREAS**, upon completion of the Project, ECUA shall thereafter own, operate, and maintain the sanitary sewer collection system and lift station; and

**WHEREAS**, as a result, the County has determined it is in the best interest of the citizens of Escambia County to enter into this Agreement to participate in the Creekwood Subdivision Sanitary Sewer Lift Station Improvement Project as set forth herein.

**NOW, THEREFORE**, in consideration of the mutual terms and conditions, promises, covenants, and payments hereinafter set forth, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

### **ARTICLE 1**

#### **Purpose**

1.1 The recitals contained in the preamble of this Agreement are declared to be true and correct and are hereby incorporated into this Agreement.

1.2 This Memorandum of Agreement (hereinafter "Agreement") defines the responsibilities of each Party participating in the Creekwood Subdivision Sanitary Sewer System Improvement Project (hereinafter the "Project") as set forth herein.

### **ARTICLE 2**

#### **Responsibilities of Parties**

2.1 The County agrees to promptly reimburse to ECUA, in accordance with the terms of this Agreement, all of the Costs of the Project in the amount hereinafter set forth in Section 4.1. Those funds shall solely be used on the Project, the specifics of which are more particularly defined in Exhibit "A", which is attached hereto and incorporated by reference herein.

2.2 During the pendency of the Project, the HOA shall be responsible for operating and maintaining the sanitary sewer collection system and lift station within the Creekwood Subdivision. Upon completion of the Project, however, the HOA shall convey its wastewater collection system to ECUA, as further described in paragraph 2.5, below.

2.3 ECUA agrees to contract with Third Parties, as it deems appropriate in its sole discretion, to design, publicly bid, and construct the Project. All such work shall be carried out in a reasonably prompt and diligent manner.

2.4 ECUA is not agreeing to and is under no obligation to financially participate in the Costs of the Project or otherwise financially contribute to the Project. Indeed, all Parties understand and acknowledge that ECUA's participation in this Agreement is at no cost to either ECUA or its ratepayers. However, the Parties acknowledge that ECUA provides substantial benefit to the Project by advancing the Costs of the Project prior to and subject to reimbursement from the County; overseeing the public advertising, bidding, and awarding of the contract for the construction of the Project; and otherwise adding benefit to the Project through its expertise in sanitary sewer systems. Given the above, as well as ECUA's donating limited employee time towards the Project, at no time will any Party request financial participation on the part of ECUA on the Project.

2.5 Upon final completion of the Project, HOA shall convey to ECUA and ECUA shall accept ownership, without delay, of all Project improvements, as generally described in Exhibit "A", which will consist of the gravity collection system (excluding service laterals), manholes, the lift station, and the sewer force main. The conveyance shall be in a form substantially similar to Exhibit "B". Thereafter, ECUA shall own, operate, and maintain said facilities.

2.6 This Agreement, after being properly executed by the parties named herein, shall become effective upon filing with the Clerk of the Circuit Court of Escambia County. The County shall be responsible for such filing.

2.7 The HOA expressly understands and accepts that pursuant to the adoption of the Ordinance establishing the Creekwood Subdivision Sewage and Lift Station Improvement Municipal Services Benefit Unit (MSBU), all costs associated with the Project (hereinafter "Costs of the Project"), including but not limited to any design or engineering costs, will be billed as part of the MSBU special assessment to all affected property owners, even if the Project is not completed for some presently unanticipated reason. However, the Third Party selected to construct the Project, in accordance with paragraph 2.3, above, shall be required to post a Performance Bond as well as a Labor and Material Payment Bond in the full amount of the contract price as of the time the contract is awarded, as required by Section 255.05, Florida Statutes.

2.8 The Third Party selected to construct the Project, in accordance with paragraph 2.3, above, shall be required to present proof of insurance consistent with ECUA's Risk Management Requirements which, among other coverages, will provide no less than \$1,000,000 of General Liability and Pollution Liability insurance coverage for negligent acts during construction. Additionally, ECUA, the County, and the HOA shall be identified as either certificate holders or additionally insured parties on such insurance. The Third Party selected to construct the Project shall also be required to operate and maintain the wastewater system from the point it is issued Notice to Proceed until Final Completion is achieved. Moreover, the Parties agree that under no circumstances shall any public funds of either the County or ECUA be expended as a direct or indirect result of their participation in this Project or this Agreement, and any

such responsibility or purported responsibility shall be deemed to be Costs of the Project. Nothing contained in this paragraph 2.8 shall be interpreted to affect any claim a Party to this Agreement may have against a Third Party to this Agreement, such as the Contractor, its Surety, or its insurer.

### **ARTICLE 3** **Contract Time**

3.1 It is anticipated by the Parties that the time for completion of the Project, as generally described in Exhibit "A", shall be within approximately fourteen (14) months from ECUA's issuance of a Notice to Proceed to a selected contractor, absent rain delays or other unforeseen conditions and/or events.

### **ARTICLE 4** **Compensation and Method of Payment**

4.1 County agrees to reimburse ECUA for the Costs of the Project as generally described in Exhibit "A", including but not necessarily limited to equipment costs, engineering and design services, and construction costs, in an amount not to exceed Six Hundred Twenty-Five Thousand Dollars (\$625,000.00).<sup>1</sup> In the event that ECUA determines that the estimated Costs of the Project will exceed \$625,000 upon the opening of publicly advertised bids for construction of the Project, then within thirty (30) days thereof any Party may elect to terminate this Agreement and not proceed with construction of the Project. Any such election shall be made in writing and delivered to the other Parties in accordance with paragraph 4.6, below. In the event the Project proceeds beyond bidding and during the course of construction it is learned that the Costs of the Project will exceed \$625,000, then the Parties shall meet and decide how to proceed, if at all. If the decision is made by either the County or ECUA not to proceed with the Project, then ECUA shall promptly bring the Project to a close, with HOA responsible for all costs associated with terminating and closing the Project, and in such event HOA shall remain the owner of all improvements made during the Project. In the event of termination of the Agreement in accordance with this paragraph, ECUA shall be entitled to compensation as set forth in paragraph 8.2, below.

4.2 ECUA may periodically submit invoices to the County for reimbursement of the Costs of the Project, but requests for payment shall not be made more frequently than once a month. The County will promptly reimburse ECUA for its expenditures on the Costs of the Project. Final payment shall be made at the time that the improvements are conveyed to ECUA.

4.3 Upon request, ECUA shall provide to the County copies of any payment documentation and such other financial documents as the County may reasonably

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<sup>1</sup> This agreement to reimburse includes Costs of the Project incurred prior to entry into this Agreement as well as after.

require to verify Project costs.

**4.4 Invoices and other requests will be sent to:**

Escambia County  
Attn: Engineering Department  
3363 West Park Place  
Pensacola, Florida 32505

**4.5 Payments and other requests will be sent to:**

Emerald Coast Utilities Authority  
William E. Johnson, Jr., P.E., P.L.S.  
Engineering Director  
9255 Sturdevant Street  
Pensacola, Florida 32514

**4.6 All notices called for under this Agreement shall be made in writing and delivered by hand, certified mail with return receipt, or overnight courier, as follows:**

**To County:**

Escambia County  
Colby S. Brown  
Public Works Branch Director and Assistant County Engineer  
3363 West Park Place  
Pensacola, Florida 32505

**To ECUA:**

Emerald Coast Utilities Authority  
William E. Johnson, Jr., P.E., P.L.S.  
Engineering Director  
9255 Sturdevant Street  
Pensacola, Florida 32514

**To HOA:**

Pamela M. Long, President  
Creekwood Homeowners Association of Pensacola, Inc.  
8608 Eight Mile Creek Road  
Pensacola, Florida 32526

**ARTICLE 5**  
**Ownership of Improvements**

5.1 Title to the improvements specified in Exhibit "A" shall pass to ECUA as provided herein but only upon ECUA's acceptance of the work.

**ARTICLE 6**  
**Easements**

6.1 In order to facilitate this Project, the County has granted an easement to ECUA over real property in the vicinity of the lift station in the Creekwood Subdivision.

6.2 The HOA shall grant any easements necessary to ECUA for the repair and maintenance of all facilities described in Exhibit "A."

**ARTICLE 7**  
**Force Majeure**

7.1 In the event that performance by the Parties of any of its obligations under this Agreement shall be interrupted, delayed, or prevented by any occurrence not occasioned by the conduct of such party, whether such occurrence be an act of God or any other occurrence whatsoever this is beyond the reasonable control of such party, including a change in environmental law or regulation rendering performance impractical or impossible, then such party shall be excused from such performance for such period of time as is reasonably necessary after the occurrence to remedy the effects thereof, or until such performance is no longer impractical or impossible.

**ARTICLE 8**  
**General Provisions**

8.1 **Ownership of Documents:** Drawings, specifications, design, models, photographs, reports, surveys, and other data produced by the County in connection with this Agreement are and shall remain the property of the County whether the work for which they were made is completed or not. Moreover, drawings, specifications, design, models, photographs, reports, surveys, and other data produced by ECUA or its agents in connection with this Agreement are and shall remain the property of ECUA or its agents whether the work for which they were made is completed or not.

8.2 **Termination:** In addition to the termination rights articulated in paragraph 4.1, above, this Agreement may be terminated by either the County or ECUA for cause, or for convenience, upon thirty (30) days written notice by the terminating party to the other parties of such termination, in which event ECUA shall be paid compensation for all work performed by it and its contractor/s prior to the termination date, including all reimbursable expenses then due or incurred prior to the date of

termination.

**8.3 Records:** The Parties acknowledge that this Agreement and any related financial records, audits, reports, plans, correspondence, and other documents may be subject to disclosure to members of the public pursuant to Chapter 119, Florida Statutes, as amended. In the event a Party fails to abide by the provisions of Chapter 119, Florida Statutes, another Party may, without prejudice to any right or remedy and after giving that Party, seven (7) calendar days written notice, during which period the Party fails to allow access to such documents, terminate this Agreement.

**8.4 Assignment:** This Agreement or any interest herein, shall not be assigned, transferred, or otherwise encumbered, under any circumstances, by any Party, without the prior written consent of all other Parties.

**8.5 Headings:** Headings and subtitles used throughout this Agreement are for the purpose of convenience only, and no heading or subtitle shall modify or be used to interpret the text of any section.

**8.6 Governing Law:** This Agreement shall be governed by and construed in accordance with the laws of the State of Florida, and the Parties stipulate that venue for any matter which is the subject of this Agreement shall lie in Escambia County, Florida.

**8.7 Interpretation:** For the purpose of this Agreement, the singular includes the plural and the plural shall include the singular. References to statutes or regulations include all statutory or regulatory provisions consolidating, amending, or replacing the statute or regulation referred to. Words not otherwise defined that have well-known technical or industry meanings are used in accordance with such recognized meanings. References to persons include their respective permitted successors and assigns and, in the case of governmental persons, persons succeeding to their respective functions and capacities.

- (a) If any Party discovers any material discrepancy, deficiency, ambiguity, error, or omission in this Agreement, or is otherwise in doubt as to the meaning of any provision of the Agreement, the Party shall immediately notify all other Parties and request clarification of this Agreement.
- (b) This Agreement shall not be more strictly construed against any party hereto by reason of the fact that one Party may have drafted or prepared any or all of the terms and provisions hereof.

**8.8 Severability:** The invalidity or non-enforceability of any portion or provision of this Agreement shall not affect the validity or enforceability of any other portion or provision. Any invalid or unenforceable portion or provision shall be deemed severed from this Agreement and the balance hereof shall be construed and enforced as if it did not contain such invalid or unenforceable portion or provision.



8.9 Further Documents: The parties shall execute and deliver all documents and perform further actions that may reasonably be necessary to effectuate the provisions of this Agreement.

8.10 No Waiver: The failure of a Party to insist upon the strict performance of the terms and conditions hereof shall not constitute or be construed as a waiver or relinquishment of any other provision or of either Party's right to thereafter enforce the same in accordance with this Agreement.

8.11 All Prior Agreements Superseded: This document incorporates and includes all prior negotiations, correspondence, conversations, agreements, or understandings applicable to the matters contained herein, and the Parties agree that there are no commitments, agreements, or understandings concerning the subject matter of this Agreement that are not contained in this document. Accordingly, it is agreed that no deviation from the terms hereof shall be predicated upon any prior representations or Agreements whether oral or written. It is further agreed that no modification, amendment, or alteration in the terms and conditions contained herein shall be effective unless contained in a written document executed with the same formality and of equal dignity herewith.

**IN WITNESS WHEREOF**, the Parties hereto have made and executed this Agreement on the respective dates under each signature: Escambia County through its Board of County Commissioners, signing by and through its Chairman, duly authorized to execute same by Board action on the \_\_\_ day of \_\_\_\_\_, 2017 and Emerald Coast Utilities Authority, by and through its Chairman, duly authorized to execute same, and Creekwood Homeowners' Association of Pensacola, Inc., by and through its President, duly authorized to execute same.

**ESCAMBIA COUNTY, FLORIDA**, a political subdivision of the State of Florida acting by and through its duly authorized Board of County Commissioners.

By: \_\_\_\_\_  
Jeff Bergosh, Chairman

ATTEST: Pam Childers  
Clerk of the Court

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

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

Approved as to form and legal sufficiency.

By/Title: \_\_\_\_\_  
Date: 12/8/17

**EMERALD COAST UTILITIES  
AUTHORITY**, a local governmental body,  
corporate and politic, acting by and through its  
duly authorized Board.

By: \_\_\_\_\_  
Stephen E. Sorrell, Executive Director

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

ATTEST:

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

**CREEKWOOD HOMEOWNERS'  
ASSOCIATION OF PENSANCOLA, INC.**,  
a not for profit corporation, acting by and  
through its President.

By: \_\_\_\_\_  
\_\_\_\_\_, President

ATTEST:

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

\_\_\_\_\_  
Corporate Secretary

(Corporate Seal)