

RESOLUTION NO. 2019-14

**A RESOLUTION OF THE MAYOR AND TOWN COUNCIL OF
FOUNTAIN HILLS, MARICOPA COUNTY, ARIZONA,
AUTHORIZING THE INTERGOVERNMENTAL AGREEMENT
BETWEEN THE TOWN OF FOUNTAIN HILLS, ARIZONA AND
THE FOUNTAIN HILLS SANITARY DISTRICT FOR RESTROOM
FACILITIES AND WELL CONTROL ROOMS IN FOUNTAIN
PARK**

ENACTMENTS:

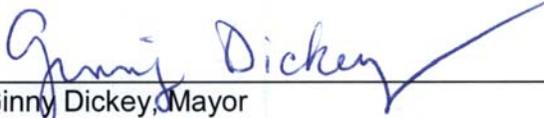
NOW THEREFORE BE IT RESOLVED BY THE MAYOR AND TOWN COUNCIL OF FOUNTAIN HILLS as follows:

SECTION 1. That the Intergovernmental Agreement between the Town of Fountain Hills, Arizona and the Fountain Hills Sanitary District, to provide for two restroom facilities and well control rooms in Fountain Park, is hereby approved in substantially the form attached hereto as Exhibit A and incorporated herein by reference.

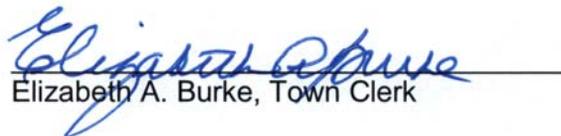
SECTION 2. That the Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to execute said document and take all steps necessary to carry the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Mayor and Council of the Fountain Hills, Maricopa County, Arizona, this 5th day of March, 2019.

FOR THE TOWN OF FOUNTAIN HILLS:


Ginny Dickey, Mayor

ATTESTED TO:


Elizabeth A. Burke, Town Clerk

REVIEWED BY:


Grady E. Miller, Town Manager

APPROVED AS TO FORM:


Aaron D. Arnson, Town Attorney

**INTERGOVERNMENTAL AGREEMENT
BETWEEN THE TOWN OF FOUNTAIN HILLS
AND THE
FOUNTAIN HILLS SANITARY DISTRICT
RELATING TO VAULT/BATHROOM STRUCTURES**

This Intergovernmental Agreement (“Agreement” or “IGA”) is entered into this 5th day of March, 2019 (the “Effective Date”), by and between the Town of Fountain Hills, Arizona, a municipal corporation of the State of Arizona (“Town”) and the Fountain Hills Sanitary District, a political subdivision of the State of Arizona (“District”). Town and District shall be referred to herein individually as a “Party” and collectively as the “Parties.”

RECITALS

- A. Town owns and operates Fountain Park for general public use, including the provision of restroom facilities as it deems necessary and appropriate.
- B. District owns and operates three Aquifer Storage and Recovery (“ASR”) Wells within the boundaries of Fountain Park, referred to as ASR Wells 1, 2 and 4.
- C. ARIZ. REV. STAT. § 11-952 authorizes the governing bodies of Town and District to contract for services or jointly exercise any powers common to the Town and District or to contract with each other for joint or cooperative action.
- D. When installed approximately 18 years ago, each ASR well included a ten-foot diameter metal vault, buried below grade with a concrete slab and hatch-style lids exposed at ground level, located on top of each well (each, a “Vault”) to house the well flow control equipment and provide access to the wellhead.
- E. Due to age, wear and safety issues with the existing Vaults, District intends to replace or significantly update and improve all three Vaults in the normal course of updating its facilities.
- F. District and Town have discussed a concept for a joint use facility at two of the well locations. A mutually agreeable alternative for the third well will be discussed and developed at a later date.
- G. Based on the mutually agreeable concept described above, District has authorized securing designs and construction cost estimates of two nearly identical above grade structures, one near Well 2 (eastern side of Fountain Lake) and one near Well 4 (northern tip of Fountain Lake).
- H. The current design has each structure’s exterior measuring approximately 16 feet by 40 feet (or approximately 640 square feet), with approximately one-third of each structure dedicated for District’s exclusive use as a well equipment control room and approximately two-thirds of each structure used for two partitioned restrooms, each containing two stalls, one sink, and a small janitor’s closet, which, pursuant to the terms and conditions of this Agreement, the public may use.
- I. District is still evaluating alternatives and feasible construction cost budgets. The decision

to proceed with construction, which has not yet been made, rests exclusively with the District Board of Directors.

J. In order to encourage District to proceed with construction of the restrooms and, if constructed, permit their use by the public, Town is willing to assume full responsibility for the operation and maintenance of the restrooms under the terms and conditions set forth herein.

NOW, THEREFORE, in consideration of the promises and consideration described herein, Town and District agree as follows:

AGREEMENT

1. **INCORPORATION:** The Recitals and introductory paragraphs set forth above are incorporated herein and are part of the Agreement.
2. **PURPOSE:** To establish the respective rights, responsibilities and obligations of District and Town relating to any combination access, well equipment and bathroom structures District may construct at any of District's ASR Wells within Fountain Park ("Joint Use Structure").
3. **DURATION:** This Agreement shall commence on the Effective Date, and its initial term shall terminate on June 30, 2040. Subject to compliance with ARIZ. REV. STAT. § 11-952(F), as applicable, this Agreement shall thereafter be automatically renewed from year to year, until terminated by either Party in accordance with Section 14 herein or as otherwise permitted by this Agreement.
4. **DESIGN AND CONSTRUCTION:** District shall be solely responsible for designing, constructing, equipping and furnishing the Joint Use Structures, including any landscaping and relocation of existing sidewalk or irrigation facilities and paying the cost thereof. The Joint Use Structures will be designed with an architectural look similar to the existing Ramadas and restrooms within Fountain Park, unless otherwise agreed in writing by the Parties.
5. **CONSULTATION WITH TOWN:** In a good faith effort to reach a mutually beneficial design of the Joint Use Structure, the District has solicited input from Town staff and Town Council and has provided Town a copy of the proposed site and floor plans, an illustration of its elevation (exterior view), and necessary site modifications, including relocating a small portion of sidewalk, and duly considered the comments supplied by Town relating to the design of the restroom portion and the architectural look of the Joint Use Structure. District agrees that in designing and constructing the Joint Use Structures, District shall incorporate Town's comments and input with respect to the design of the restroom portion and the architectural look of the Joint Use Structure received as of January 31, 2019 to the extent reasonably possible.
6. **COORDINATION WITH FOUNTAIN PARK ACTIVITIES:** District shall in earnest try to schedule and conduct construction activities associated with the Joint Use Facilities in a manner to avoid or minimize unnecessary disruption of normal activities and regularly scheduled activities within Fountain Park. However, District retains the right to access its facilities as District deems necessary regardless of activities scheduled within the Fountain Park. During construction, District shall be responsible for vehicular and pedestrian traffic control, fencing and any other

measures appropriate to safeguard the public and the construction site associated with the District's construction activities for the Joint Use Structures.

7. ALTER ACCESS TO ASR WELLS: As part of any construction of a Joint Use Structure, District may relocate the sidewalk in the area of the ASR Well to a location that will allow District's access to well and associated Joint Use Structure for normal daily maintenance activities without interfering with the pedestrian walking path or impacting with the grass. District shall be responsible for the costs of any sidewalk relocation.

8. INTENDED SCOPE OF USE BY PUBLIC: Town and District recognize the restroom facilities included in the Joint Use Facilities are intended as additional restroom facilities to supplement the currently existing restroom facilities owned and operated by Town elsewhere within Fountain Park.

9. DISTRICT RESPONSIBILITIES: After a Joint Use Structure is constructed and accepted by District, District will, subject to Section 16 (Insurance) and Section 17 (Indemnification):

- a. Provide and pay for the upkeep of the exterior of the Joint Use Structure, including without limitation to the roof and exterior walls, but excluding surrounding landscape;
- b. Pay all electrical costs associated with use of the Joint Use Structure, including without limitation to the ASR well, well equipment control room, exterior lighting, and the restrooms;
- c. Secure the well equipment control room and access thereto in a manner deemed sufficient by District;
- d. Provide and pay for any security equipment District deems necessary and appropriate for the well equipment control room of the Joint Use Structure;
- e. Secure and pay for all appropriate insurances on the Joint Use Structure, employees and contractors of District entering the Joint Use Structure, including but not necessarily limited to:
 - Property insurance;
 - Liability insurance with minimum coverage of not be less than \$2,000,000 per occurrence/aggregate (District coverage to be primary only for claims arising from action or inaction of District employees and contractors); and
 - Workers Compensation insurance;
- f. Have sole and exclusive use of the one-third portion of each Joint Use Structure containing the well equipment control room; and
- g. Have full and complete discretion on whether to proceed with construction of the

two Joint Use Structures that are the subject of this Agreement.

10. TOWN RESPONSIBILITIES: After a Joint Use Structure is constructed and accepted by District, Town will, subject to Section 16 (Insurance) and Section 17 (Indemnification):

- a. Provide and pay for maintenance and cleaning of the interior of the restrooms, including without limitation providing all supplies, such as paper products, light bulbs, soaps;
- b. Provide and pay for the repair and replacement of the interior of restrooms, including, without limitation, toilets, sinks, tile, stalls, etc., as well as the drinking fountains on the outside of the Joint Use Structures;
- c. Provide and pay for maintenance of landscaping surrounding each Joint Use Structure;
- d. Provide and pay for any security equipment, including without limitation locks for the restroom doors, Town deems necessary and appropriate for the restroom area of the Joint Use Structure;
- e. Pay for all potable water costs associated with use of the Joint Use Structure, whether by District, Town or the public;
- f. Determine the hours the public will have access to the restrooms; provide signage to notify the public thereof; secure the restrooms when public access is not permitted; and take appropriate steps to provide for the safety and security of the public the Town permits to access the restrooms; and
- g. Secure and pay for all appropriate insurances associated with use of the restrooms in each Joint Use Structure by Town employees, contractors and the public, including but not necessarily limited to:
 - Liability insurance with minimum coverage of not be less than \$2,000,000 per occurrence/ aggregate (Town policy to be primary except for claims arising from action or inaction of District employees and contractors); and
 - Workers Compensation insurance;

11. OWNERSHIP: District shall own the Joint Use Structures, including all equipment installed therein, regardless whether replaced by Town. Town shall have no ownership interest in the Joint Use Structures or the equipment therein.

12. NO LIMIT OF AUTHORITY: This Agreement only applies to the Joint Use Structures. This Agreement does not limit District's rights to construct and maintain any other District facility, including replacement, rehabilitation or improvement of the existing Vaults and/or wells at ASR Wells 1, 2 and 4, existing sewer facilities, or District effluent mains and facilities, except for such Joint Use Structures.

13. AGREEMENT SUBJECT TO APPROPRIATION: Town and District understand that the provisions of this Agreement for payment of funds by District or Town shall be effective when funds are appropriated for purposes of this Agreement and are actually available for payment. Each Party shall be the sole judge and authority in determining the availability of funds for it to perform any act under this Agreement and shall keep the other Party fully informed as to the availability of funding for the Agreement. The obligation of either Party to make any payment pursuant to this Agreement is a current expense of the Party, payable exclusively from that Party's annual appropriations, and is not a general obligation or indebtedness of the Party.

14. TERMINATION; CANCELLATION: Either Party may terminate or cancel this Agreement:

- a. At the end of the then current term, provided notice of termination is provided to the other Party not less than thirty (30) days' prior thereto;
- b. In the event no Joint Use Facility has been substantially constructed within two years of the Effective Date upon written notice provided to the other Party no later than thirty (30) days following the second anniversary of the Effective Date;
- c. For the material breach of the terms of this Agreement provided the terminating Party (i) is not in material breach of this Agreement, (ii) has unsuccessfully pursued the meet and confer process set forth in Section 21; (iii) and thereafter provided the other Party not less than thirty (30) days written notice of its intent to terminate and of a final opportunity to cur; or
- d. Pursuant to the provisions of ARIZ. REV. STAT. § 38-511.

15. CONFIDENTIALITY: Town and District will make commercially reasonable efforts to safeguard confidential information (i.e., information, regardless of form, that is known to Town or District solely due to the negotiation or performance of this Agreement or is by law required to be maintained in confidential manner, including without limitation 16 C.F.R. Part 681 and ARIZ. REV. STAT. §§ 41- 4172, 44-1373, -7501 and-7601, as applicable) against disclosure by employing the same means to protect such confidential information as that Party uses to protect its own non-public, confidential or proprietary information.

16. INSURANCE: In addition to and without limiting the duties and obligations set forth in Sections 9 and 10 of this Agreement, the Parties, at all times during the term of this Agreement, shall maintain at their own expense insurance policies, including commercial general liability and, as applicable, property insurance, to cover the risk of loss that may arise out of the terms, obligations, operations and actions as set forth in this Agreement. The Parties, however, agree that existing insurance policies maintained by the Parties shall be presumed to satisfy the insurance requirements of this Agreement, provided that each will secure such additional coverage and add the other Party to existing policies as an additional insured if the other Party provides written notification that such action is reasonably deemed necessary to provide full and adequate coverage of risks that may arise out of the terms, obligations, operations and actions as set forth in this Agreement. The acquisition of insurance or the maintenance and operation of a self-insurance

program may fulfill the insurance requirement.

17. INDEMNIFICATION: To the fullest extent permitted by law, each Party shall indemnify and hold harmless each other, each other's agents, representatives, officers, officials and employees for, from and against all claims, damages, losses and expenses of third parties, including, but not limited to attorney fees, court costs, expert witness fees, and the cost of appellate proceedings, relating to, arising out of, or alleged to have resulted from the negligent acts, errors, omissions or mistakes of the indemnifying Party related to the Joint Use Facilities. The Parties' duty to indemnify and hold harmless each other, each other's agents, representatives, officers, officials and employees shall arise in connection with any claim, damage, loss or expense that is attributable to bodily injury, sickness, disease, death, or injury to, impairment, or destruction of property, including loss of use resulting therefrom, caused by any negligent acts, errors, omissions or mistakes, related to the Joint Use Facilities or the use thereof, excluding those arising from the negligent acts, errors, omissions or mistakes of the Party seeking indemnification or of its agents, representatives, officers, officials and employees.

18. RELATIONSHIP OF PARTIES: Each party to this Agreement shall act in its individual capacity and not as an agent, employee, partner, joint venture, associate, or any other representative capacity of the other. Each party shall be solely and entirely responsible for its acts or the acts of its agents and employees during the performance of this Agreement.

19. SHARED EMPLOYEE PROVISIONS: The Parties do not intend this Agreement to involve the sharing of employees between the Parties for the purposes of ARIZ. REV. STAT. § 23-1022, the Arizona Workers' Compensation laws or otherwise.

20. E-VERIFY: Under Arizona law, Town and District are also obligated to include certain provisions in every contract relating to E-verify, records and audits. To the extent applicable under ARIZ. REV. STAT. § 41-4401, Town and District and their respective subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and compliance with the E-verify requirements under ARIZ. REV. STAT. § 23- 214(A). The Parties' or a subcontractor's breach of the above-mentioned warranty shall be deemed a material breach of this Agreement and may result in the termination of the Agreement by either Party under the terms of this Agreement. The Parties each retain the legal right to randomly inspect the papers and records of the other Party and the other Party's subcontractors who work under this Agreement to ensure that the other Party and its subcontractors are complying with the above-mentioned warranty. The Parties warrant to keep their respective papers and records open for random inspection during normal business hours by the other Party. The Parties and their respective subcontractors shall cooperate with the other Party's random inspections including granting the inspecting Party entry rights onto their respective properties to perform the random inspections and waiving their respective rights to keep such papers and records confidential.

21. REMEDIES AND ATTORNEYS FEES: In the event of an alleged breach of this Agreement by either party, as a condition precedent to pursuing legal action, the non-breaching party shall provide written notice of the action alleged to constitute the breach and request to meet and confer with the other Party ("M&C Notice"). The Parties' representatives shall meet and

confer at a mutually convenient time and place within 30 days of delivery of the M&C Notice and in good faith attempt to reach a reasonable resolution. If no mutually agreeable resolution is reached within 60 days of delivery of the M&C Notice, the Parties may pursue any and all remedies available at law or equity, to address the action(s) identified in the M&C Notice. The successful party in any such court action shall be entitled to an award of its reasonable attorney fees and costs of litigation incurred, provided the successful Party acted in good faith to resolve the matter through the meet and confer process set forth herein.

22. NOTICE AND REQUESTS: Any notice or other communication required or permitted to be given under this Agreement, including a change of the names or address of listed below, shall be in writing and shall be deemed to have been duly given if (i) delivered to the party at the address set forth below, (ii) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below or (iii) given to a recognized and reputable overnight delivery service, to the address set forth below:

If to Town: Town of Fountain Hills
16705 East Avenue of the Fountains
Fountain Hills, Arizona 85268
Attn: Grady E. Miller, Town Manager

With copy to: Pierce Coleman PLLC
4711 East Falcon Drive, Suite 111
Mesa, Arizona 85215
Attn: Aaron D. Arnson, Town Attorney

If to District: Fountain Hills Sanitary District
16941 East Pepperwood Circle
Fountain Hills, Arizona 85268
Attn: Dana Trompke, District Manager

With Copy to: William P. Sullivan PLLC
3240 East Union Hills Drive, Suite 117
Phoenix, AZ 85050
Attn: William Sullivan, District Attorney

23. ENTIRE AGREEMENT: This Agreement embodies the entire understanding of Town and District and supersedes any other agreement or understanding between the Parties relating to the subject matter of this Agreement.

TOWN OF FOUNTAIN HILLS

Date: _____

Grady Miller, Town Manager

ATTEST:

Town Clerk

FOUNTAIN HILLS SANITARY DISTRICT

Date: _____

ATTEST:

Dana Trompke, District Manager

Administrative Services Manager

In accordance with the requirements of ARIZ. REV. STAT. § 11-952(D), the undersigned attorneys acknowledge that (i) they have received the above Agreement on behalf of their respective clients and (ii) as to their respective clients only, each attorney has determined that this Agreement is in proper form and is within the powers and authority granted under the laws of the State of Arizona.

Attorney for the Town of Fountain Hills

Attorney for the Fountain Hills Sanitary District