

**RESOLUTION NO. 2013-52**

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING AN INTERGOVERNMENTAL AGREEMENT WITH MARICOPA COUNTY FLOOD CONTROL DISTRICT RELATING TO THE DESIGN OF THE ASHBROOK WASH IMPROVEMENTS.

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

SECTION 1. The Intergovernmental Agreement with the Flood Control District of Maricopa County relating to the design of improvements to Ashbrook Wash between Bayfield Drive and Del Cambre Boulevard, including the crossings at Bayfield Drive and Saguaro Boulevard (the "Agreement") is hereby approved in substantially the form attached hereto as Exhibit A and incorporated herein by reference.

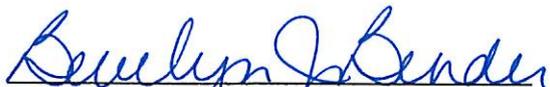
SECTION 2. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to cause the execution of the Agreement and to take all steps necessary to carry out the purpose and intent of this Resolution.

**PASSED AND ADOPTED** by the Mayor and Council of the Town of Fountain Hills, Arizona, December 5, 2013.

**FOR THE TOWN OF FOUNTAIN HILLS:**

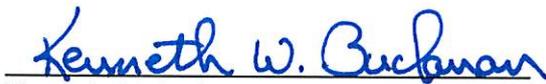
**ATTESTED TO:**

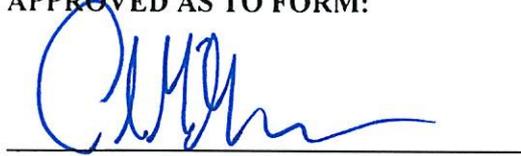
  
Linda M. Kavanagh, Mayor

  
Bevelyn J. Bender, Town Clerk

**REVIEWED BY:**

**APPROVED AS TO FORM:**

  
Kenneth W. Buchanan, Town Manager

  
Andrew J. McGuire, Town Attorney

**EXHIBIT A  
TO  
RESOLUTION NO. 2013-52**

**[Agreement]**

**See following pages.**

When Recorded Return to:  
Flood Control District of Maricopa County  
2801 West Durango Street  
Phoenix, AZ 85009-6399

**INTERGOVERNMENTAL AGREEMENT**

Between

**THE TOWN OF FOUNTAIN HILLS**

and the

**FLOOD CONTROL DISTRICT OF MARICOPA COUNTY**

for the

**DESIGN**

of the

**ASHBROOK WASH IMPROVEMENTS – BAYFIELD DRIVE TO DEL CAMBRE AVENUE**

**IGA FCD 2013A009**

Agenda Item C-69-14-032-300

This Intergovernmental Agreement (Agreement) is entered into by and between the Town of Fountain Hills, a municipal corporation, acting by and through its Town Council hereinafter called the TOWN, and the Flood Control District of Maricopa County, a municipal corporation and political subdivision of the State of Arizona, acting by and through its Board of Directors, hereinafter called the DISTRICT. The DISTRICT and the TOWN are hereinafter collectively called the PROJECT PARTNERS.

This Agreement shall become effective as of the date it has been executed by all parties and will be recorded by the Maricopa County Recorder.

**STATUTORY AUTHORIZATION**

1. The DISTRICT is empowered by Arizona Revised Statutes (A.R.S.) Section 48-3603, as revised, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the DISTRICT.
2. The TOWN is empowered by A.R.S. Section 11-951 et. seq. as amended, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the TOWN.

**BACKGROUND**

3. The Fountain Hills Area Drainage Master Study included a Roadway Crossing Study component (STUDY), completed in June 1997, and identified a need to improve certain roadway crossings within the TOWN. The STUDY recommended structural solutions to mitigate flooding hazards due to restrictions at Bayfield Drive and Saguaro Boulevard.
4. In June 2011, a Floodplain Evaluation Technical Memorandum (MEMORANDUM) was prepared by

DISTRICT staff in response to a Capital Improvement Program request by the TOWN to participate in improvements to Ashbrook Wash. The MEMORANDUM confirmed that channel restrictions from Bayfield Drive downstream to Del Cambre Boulevard, including restrictions at the Bayfield Drive and Saguaro Boulevard crossings, result in the potential for residential structure flooding during a 100-year event.

5. This Agreement is for the design of improvements to Ashbrook Wash between Bayfield Drive and Del Cambre Boulevard, including the crossings at Bayfield Drive and Saguaro Boulevard (Exhibit A), hereinafter referred to as the PROJECT. The anticipated features include replacing the culvert crossings, removal of vegetation and minor channel improvements. This Agreement is limited to design as required for the PROJECT. The PROJECT PARTNERS acknowledge that a subsequent agreement will be required to complete rights-of-way acquisition, utility relocations, construction, construction management, as well as to ensure on-going maintenance and operation of the PROJECT.

The PROJECT will:

- Provide flood protection to properties adjacent to Ashbrook Wash between Bayfield Drive and Del Cambre Boulevard from flooding caused by 100-year flows overtopping Ashbrook Wash.
  - Remove approximately 11 existing homes from the potential flooding due to a 100-year storm event.
  - Safely convey flood flows under Bayfield Drive and Saguaro Boulevard.
6. On December 11, 2013, the Board of Directors of the DISTRICT adopted Resolution FCD 2013R005, authorizing the DISTRICT to cost-share in the PROJECT, and to negotiate Intergovernmental Agreements for the design, rights-of-way acquisitions, construction, construction management, and operation and maintenance of the PROJECT.

#### **PURPOSE OF THE AGREEMENT**

7. This Agreement identifies and defines the responsibilities of the DISTRICT and the TOWN, for PROJECT activities related to design of the PROJECT.

#### **TERMS OF AGREEMENT**

8. The PROJECT, as referenced herein, is defined by paragraph 5 of this Agreement.
9. The PROJECT COST, as referenced herein, solely encompasses the following costs directly associated with the PROJECT and incurred after the effective date of this Agreement:
  - 9.1 Costs of design contracts.
  - 9.2 Costs of obtaining Federal Emergency Management Agency (FEMA) Conditional Letters of Map Revision (CLOMRs) intended to reduce the limits of the current delineated floodplain due to the construction of the PROJECT.
  - 9.3 Costs of obtaining United States Army Corps of Engineers Section 404 Permits for the PROJECT, and costs associated with the mitigation efforts required by this permit process.
  - 9.4 Each PROJECT PARTNER will pay for, and not seek reimbursement for, its own personnel and internal administrative costs associated with this PROJECT, including costs associated with the issue of PROJECT permits, unless specifically identified otherwise in this Agreement.

10. The PROJECT COST associated with this Agreement is estimated to be \$150,000.
  - 10.1 The PROJECT COST is estimated based on the best information available at the time of this Agreement, and is subject to change without amendment to this Agreement. Upon recognition of anticipated cost increases above this estimated PROJECT COST, PROJECT PARTNERS shall communicate these anticipated increases.
  - 10.2 If final design services (preparation of plans and specifications) are not accomplished under contract but in-house by the DISTRICT, the PROJECT COST shall be assigned a value of \$120,000 (eight percent (8%) of the estimated construction cost of the PROJECT for the preparation of plans and specifications) plus actual costs for outside permits (such as obtaining the CLOMR and 404 Permit) and for outside design services (such as geotechnical and utility locating services).
11. DISTRICT funding for this Agreement shall be from secondary flood control tax levy revenue and is contingent upon funding availability within the DISTRICT's Capital Improvement Program.
12. The TOWN's funding for this Agreement shall be from its Capital Improvement Project fund.
13. The DISTRICT shall:
  - 13.1 Design the PROJECT to meet the recurrence interval of the 100-yr flood as determined by generally applied technical data and methodology in use at the time of PROJECT design, and this level of protection is specifically approved by the Board of Directors of the Flood Control District of Maricopa County.
  - 13.2 Fund fifty percent (50%) of the PROJECT COST, making the DISTRICT's estimated share \$75,000.
  - 13.3 Serve as the lead agency for PROJECT design.
    - 13.3.1 Upon award of a design contract for the PROJECT, or start of design if accomplished by in-house DISTRICT effort, invoice the TOWN for fifty percent (50%) of its share of the PROJECT COST associated with design.
    - 13.3.2 Upon completion of a design contract for the PROJECT, or final plans and specifications if accomplished by in-house DISTRICT effort, invoice the TOWN for its remaining share of all PROJECT COST associated with design incurred to date.
    - 13.3.3 Provide to the TOWN interim project submittals and allow three (3) weeks for review and comment. Incorporate the TOWN comments into the PROJECT as appropriate. If the TOWN has not responded within the three (3) week review period, the DISTRICT will assume that the TOWN has no comments.
    - 13.3.4 Non-flood control features, if compatible with the PROJECT function, may be included in the PROJECT design at the request of the TOWN, with the design cost solely at the TOWN's expense.
  - 13.4 Serve as the lead agency for obtaining United States Army Corps of Engineers Section 404 Permit, and for completing mitigation efforts required by this permit process.

- 13.4.1 Invoice the TOWN for its share of the PROJECT COST associated with the Section 404 Permit as it is incurred, no more frequently than quarterly, and no less frequently than annually.
- 13.5 Serve as the lead agency for obtaining FEMA CLOMR to reduce the limits of the current delineated floodplain due to the PROJECT.
  - 13.5.1 Invoice the TOWN for its share of the PROJECT COST associated with the CLOMR as it is incurred, no more frequently than quarterly, and no less frequently than annually.
- 13.6 Serve as the lead agency for PROJECT public involvement activities.
- 14. The TOWN shall:
  - 14.1 Fund fifty percent (50%) of the PROJECT COST, making the TOWN's estimated share \$75,000.
  - 14.2 Within thirty (30) calendar days of receipt, pay all invoices issued by the DISTRICT in accordance with the terms of this Agreement.
  - 14.3 Participate in PROJECT public involvement activities.
  - 14.4 Within three (3) weeks of receipt of interim project submittals, provide review comments to the DISTRICT.
  - 14.5 Within one (1) week of receipt of the PROJECT construction plans, return the signed construction plans cover sheet to the DISTRICT.
  - 14.6 Coordinate, design, construct or cause to be constructed all future utilities within the PROJECT area to accommodate the PROJECT.
- 15. Each PROJECT PARTNER, and the PROJECT PARTNERS collectively, shall:
  - 15.1 Comply with A.R.S. Sections 41-4401 and 23-214, subsection A.
    - 15.1.1 Each party to this Agreement retains the legal right to inspect the records of the other party's and any contractors' or subcontractors' employees performing work under this Agreement to verify compliance with A.R.S. Sections 41-4401 and 23-214, subsection A.
    - 15.1.2 Failure by either party to this Agreement to comply with A.R.S. Sections 41-4401 and 23-214, subsection A shall be deemed a breach of this Agreement and is subject to penalties up to and including termination of the Agreement.
  - 15.2 Require that any contractor selected for the PROJECT:
    - 15.2.1 Warrant its compliance with all federal immigration laws and regulations that relate to its employees and their compliance with A.R.S. section 23-214(A);
    - 15.2.2 Agree that a breach of the warranty under paragraph 15.2.1 shall be deemed a material breach of contract and is subject to penalties up to and including termination of the contract;

- 15.2.3 Agree that the other party to this Agreement retains the legal right to inspect the papers of the contractor or subcontractor employee(s) who work(s) on this Agreement to ensure that contractor or subcontractor is complying with the warranty under paragraph 15.2.1;
- 15.3 Have the right, following mutual written agreement of all PROJECT PARTNERS, to delegate its responsibilities under this Agreement to another party. Any delegation, however, shall not relieve the delegating PROJECT PARTNER of its original responsibilities as defined herein.
- 15.4 In the case of any dispute over any items in this Agreement, agree to use their best efforts and enter into good faith negotiations to resolve the disputed matters. However, this shall not limit the rights of the PROJECT PARTNERS to seek any remedies provided by law.
- 15.5 Agree to equally share the cost of a PROJECT compliance and cost audit to be initiated within sixty (60) days of PROJECT completion, if requested by either PROJECT PARTNER. An independent auditing firm agreed to by the PROJECT PARTNERS will perform the audit. Any payments or reimbursements necessary to bring the PROJECT into compliance with the audit findings shall be made within forty five (45) days of acceptance by the PROJECT PARTNERS.
16. If mutually acceptable to the PROJECT PARTNERS, PROJECT invoicing may be conducted periodically based on actual PROJECT COST incurred, no more frequently than quarterly, in lieu of invoicing timelines otherwise established in this Agreement.
17. Except as to the claims described in the paragraph following this paragraph, Each party to this Agreement (indemnitor) shall, to the extent permissible by law, indemnify, defend and hold harmless the others (indemnitees) including agents, officers, directors, governors and employees thereof, from and against any loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of indemnitor's negligent or wrongful acts or omissions pursuant to this Agreement. Such indemnification obligation shall encompass any personal injury, death or property damages resulting from the indemnitor's negligent or wrongful acts or omissions, as well as reasonable attorney's fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the indemnitee. Indemnitee shall be liable for its own negligence or wrongful acts as provided by law.
- 17.1 The parties agree and acknowledge that in no event shall the indemnitor owe or be obligated to pay any amounts which the indemnitee has no obligation to pay or has not actually paid, whether due to inability to pay or due to having entered into an agreement or arrangement that provides the indemnitee has no obligation to pay regardless of the indemnitee's ability to pay or due to any other reason, including but not limited to liabilities for which a covenant not to execute has been provided to the indemnitee or any other agreement where liabilities are created with no obligation on the part of the indemnitee to pay.
- 17.2 However, as to any claims arising from the TOWN offering to make or making the PROJECT available for any non-flood control uses, whether public or private uses, the TOWN shall, to the extent permissible by law, indemnify, defend and save harmless the DISTRICT, including agents, officers, directors, governors and employees thereof, from any loss or expense incurred as a result of such a claim or suit, even if the DISTRICT is or is alleged to be partially at fault. Such indemnification obligation is intended to be a specific indemnity obligation rather than the general indemnity obligations set forth in the previous paragraph regarding all other types of claims or suits and shall encompass any personal injury, death or property damages, as well as reasonable attorney's fees, court costs, and other expenses relating to the defense of such claims or litigation.
18. All notices or demands upon any party to this Agreement shall be in writing and shall be delivered in person or sent by mail addressed as follows:

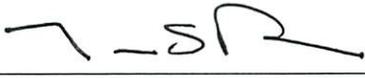
Flood Control District of Maricopa County  
Chief Engineer and General Manager  
2801 West Durango Street  
Phoenix, AZ 85009-6399

Town of Fountain Hills  
Town Manager  
16705 East Avenue of the Fountains  
Fountain Hills, AZ 85268

19. This Agreement shall expire either (1) five years from the date of recording with the County Recorder, or (2) upon completion of the PROJECT and after all funding obligations and reimbursements have been satisfied in accordance with this Agreement, whichever is the first to occur. However, by mutual written agreement of all parties, this Agreement may be amended or terminated. This Agreement is subject to cancellation by either party pursuant to the provisions of Arizona Revised Statutes Section 38-511.
20. Attached to this Agreement or contained herein are the written determinations by the appropriate attorneys for the parties to this Agreement, that these agencies are authorized under the laws of the State of Arizona to enter into this Agreement and that it is in proper form.
21. If legislation is enacted after the effective date of this Agreement that changes the relationship or structure of one or more parties to this Agreement, the parties agree that this Agreement shall be renegotiated at the written request of either party.

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY  
A Municipal Corporation

Recommended by:

  
\_\_\_\_\_  
Timothy S. Phillips, P.E.                      Date  
Chief Engineer and General Manager

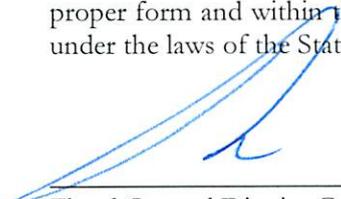
Approved and Accepted:

By:                       MAR 12 2014  
\_\_\_\_\_  
Chairman, Board of Directors                      Date

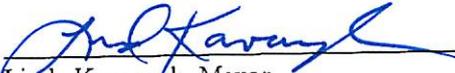
Attest:

By:                       MAR 12 2014  
\_\_\_\_\_  
Clerk of the Board                      Date

The foregoing Intergovernmental Agreement FCD 2013A009 has been reviewed pursuant to Arizona Revised Statutes 11-952, as amended, by the undersigned General Counsel, who has determined that it is in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

  
\_\_\_\_\_  
Flood Control District General Counsel                      Date  
2/3/14

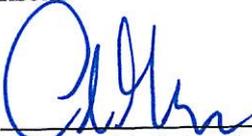
TOWN OF FOUNTAIN HILLS  
A Municipal Corporation,

By:  12/5/13  
Linda Kavanagh, Mayor Date

Attest:

By:  12/5/13  
Bevelyn J. Bender, Town Clerk Date

The foregoing Intergovernmental Agreement IGA FCD 2013A009 has been reviewed pursuant to Arizona Revised Statutes 11-952, as amended, by the undersigned attorney who has determined that it is in proper form and within the power and authority granted to the Town of Fountain Hills under the laws of the State of Arizona.

By:  12.5.13  
Andrew J. McGuire, Town Attorney Date

IGA FCD 2013A009  
EXHIBIT "A"

