

**AGREEMENT TO TEMPORARILY
LIQUIDATE EXCESS CAPACITY COST**

This agreement is dated March 1, 2016, and is between the JPJ Incorporated, a California Corporation doing business at 7030 North Fruit Avenue, Suite 101, Fresno, California 93711 (JPJ) and the COUNTY OF FRESNO, a political subdivision of the State of California (the County).

RECITALS

On December 19, 2000, the County Board of Supervisors adopted the Millerton New Town Infrastructure Plan (the Plan) for the Millerton New Town Infrastructure Plan Area (the Plan Area), which is roughly coextensive with County Service Area No. 34 (CSA 34). The Plan details the requirements for domestic water, wastewater, drainage, and reclaimed water use, and specifies the systems and facilities to be installed to serve planned developments, within the Plan Area. The Plan also provides implementation procedures for the installation and service of those systems and facilities, and establishes a method to spread to developers owning land within the Plan Area (the Landowners) the cost of constructing all of the systems and facilities required by the Plan.

With respect to wastewater treatment facilities required by the Plan (the Facility), the Landowners desired that the County would accept and commission the Facility with treatment capacity sufficient for full build-out of the Plan Area as contemplated in the Plan. The County accepted and commissioned the Facility as the Landowners desired, even though full build-out had not yet occurred, but on the condition that the Landowners, or some of them, agreed to be financially responsible for the cost of the Facility's operation and maintenance for capacity that exceeds what is required for current build-out.

By the "Agreement and Guaranty" dated January 31, 2012, between JPJ and the County (the Guaranty; identified as County agreement 12-057), JPJ agreed to "Pay the costs of operation and maintenance of the Facility that are over and above contributions from all other applicable sources of income for wastewater services in CSA No. 34, as

1 listed in Paragraph III.A.7. herein below. There shall be consultation between the
2 County and [JPJ] to ensure that available reserve funds have been utilized in a legally
3 appropriate manner to fund non-warranty Facility equipment failures or other non-
4 routine operational and maintenance expenses. [JPJ] shall be responsible . . . for the
5 entire cost of operation and maintenance of the Facility in excess of revenues received
6 from other applicable sources.” (Paragraph II.A.4. of Exhibit A to the Guaranty.)
7 Paragraph III.A.7. of Exhibit A to the Guaranty identified applicable sources of income
8 for operations and maintenance of the Facility to include, without being limited to, “a.
9 Applicable and legally approved user fees from developed lots and applicable and
10 legally approved assessments on developed and undeveloped lots, including the Golf
11 Course within [CSA 34, zone A (Brighton Crest)]. [¶] b. Any applicable developer
12 financing agreements. [¶] c. [JPJ].”

13 Under Proposition 218, the County may not impose assessments that exceed the
14 reasonable cost of the proportional special benefit conferred on a parcel by a public
15 improvement, the Facility, or the maintenance and operation of a public improvement.
16 Similarly, the COUNTY may not impose user fees for property-related services,
17 including wastewater service, that exceed the proportional cost of the service
18 attributable to the parcel upon which the fee is imposed.

19 Full build-out of the Plan Area as contemplated in the Plan has not yet occurred,
20 which means there remains excess capacity in the Facility that under Proposition 218
21 may not be charged to owners of developed lots, and JPJ remains obligated for Excess
22 Capacity Cost.

23 On March 1, 2016, the County conducted a public protest hearing under
24 Proposition 218 to adjust the wastewater user fees charged to property owners in CSA
25 34, zone A (Brighton Crest) and zone C (Bella Vista). Those fees include the cost of
26 operating and maintaining the Facility for the developed lots in Brighton Crest and Bella
27 Vista. Under those fees, the County estimates that the Excess Capacity Cost for the first
28 two years (from July 2016 through June 2018) is \$21.53 per connection per month.

1 During that period, the County is willing to receive that amount for the Excess Capacity
2 Cost, and JPJ desires to share the Excess Capacity Cost in that amount.

3 THE PARTIES THEREFORE AGREE AS FOLLOWS:

4 1. **Temporary Liquidation of Excess Capacity Cost.** For the period of July
5 2016 through June 2018 (the Relevant Period), the County will receive, and JPJ is liable
6 to pay, as the Excess Capacity Cost, the amount of \$21.53 per connection per month.
7 For purposes of this agreement, a “connection” is a developed lot in Brighton Crest or
8 Bella Vista for which the Facility is available to provide wastewater service.

9 2. **Invoices.** For each bi-monthly billing period during the Relevant Period for
10 wastewater user fees in Brighton Crest and Bella Vista, the County shall determine the
11 number of connections, multiply that by \$21.53 per month to determine Excess Capacity
12 Cost for that billing period, and then submit to JPJ an invoice for Excess Capacity Cost
13 for that billing period. If any Excess Capacity Cost previously invoiced under this
14 agreement remains outstanding when an invoice is issued, the County shall include that
15 amount, plus interest as provided in section 4 of this agreement, as separate line items
16 on the invoice.

17 3. **Payments.** Within 30 calendar days after JPJ has received each invoice
18 from the County under this agreement, JPJ shall remit to the County the payment of the
19 entire Excess Capacity Cost shown on the invoice.

20 4. **Interest on Late Payments.** If any Excess Capacity Cost invoiced under
21 this agreement is not paid within 30 calendar days after JPJ has received the invoice,
22 the amount invoiced shall accrue interest at the rate of 1.5 percent per month while it
23 remains outstanding.

24 5. **Notices.** The persons and their addresses having authority to give and
25 receive notices (including invoices) provided for or permitted under this agreement
26 include the following:

27 ///

28 ///

1 For the County:
2 County of Fresno
3 Department of Public Works and Planning
4 Resources Division, Special Districts
5 2220 Tulare Street, 6th Floor
6 Fresno, California 93721

7 For JPJ:
8 John Bonadelle
9 JPJ Incorporated
10 7030 North Fruit Avenue, Suite 101
11 Fresno, California 93711

12 All notices between the County and JPJ provided for or permitted under this agreement
13 must be in writing and delivered either by personal service, by first-class United States
14 mail, by an overnight commercial courier service, or by telephonic facsimile
15 transmission.

16 (A) A notice delivered by personal service is effective upon service to
17 the recipient.

18 (B) A notice delivered by first-class United States mail is effective three
19 County business days after deposit in the United States mail, postage prepaid,
20 addressed to the recipient

21 (C) A notice delivered by an overnight commercial courier service is
22 effective on County business day after deposit with the overnight commercial
23 courier service, delivery fees prepaid, with delivery instructions given for next day
24 delivery, addressed to the recipient.

25 (D) A notice delivered by telephonic facsimile is effective when
26 transmission to the recipient is completed (but, if such transmission is completed
27 outside of County business hours, then such delivery shall be deemed to be
28 effective at the next beginning of a County business day), provided that the
sender maintains a machine record of the completed transmission.

For all claims arising from or related to this agreement, nothing in this agreement
establishes, waives, or modifies any claims presentation requirements or procedures

provided by law, including but not limited to the Government Claims Act (Division 3.6 of Title 1 of the Government Code, beginning with section 810).

6. **No Modification of Guaranty.** This agreement does not amend or modify the Guaranty. This agreement has no effect on the parties' obligations under the Guaranty except to liquidate and make JPJ liable for the Excess Capacity Cost during the Relevant Period as provided in this agreement. This agreement is not a "successor agreement" as that term is used in section 3 of the Guaranty.

7. **Term.** This agreement is effective on the date stated in the introductory paragraph and terminates on July 31, 2018; provided, however, that JPJ's obligations to pay Excess Capacity Cost arising during the Relevant Period and to pay any interest under section 4 of this agreement survive the termination of this agreement.

8. **Indemnity.** For purposes of this section, "losses" includes all claims, causes of action, demands, liabilities, damages, costs, expenses (including attorney fees and costs), and losses of any kind to the County, JPJ, or to any other person or entity. JPJ shall indemnify the County (including its officers, agents, and employees) against any losses that arise from or relate to the performance or failure to perform by JPJ (or any of their officers, agents, or employees), or any of them, under this agreement, without regard to any negligence of the County. If requested by the County, JPJ shall defend actions or proceedings brought against the County (including its officers, agents, and employees) for any losses. The County may conduct or participate in its own defense, at its own cost, without affecting the JPJ's obligation to indemnify the County. JPJ's obligations under this section survive the termination of this agreement.

9. **Disclosure of Self-Dealing Transactions.** This section applies if JPJ is operating as a corporation, or during the term of this agreement changes its status to operate as a corporation. If any member of JPJ's board of directors is party to a self-dealing transaction during the term of this agreement, he or she shall disclose the transaction by completing and signing a "Self-Dealing Transaction Disclosure Form" (Attachment A to this agreement) and submitting it to the County before commencing

1 the transaction or immediately after. "Self-dealing transaction" means a transaction to
2 which JPJ is a party and in which one or more of its directors, as an individual, has a
3 material financial interest.

4 10. **Modification.** This agreement may not be modified, and no waiver is
5 effective, except by another written agreement that is signed by all parties.

6 11. **Non-Assignment.** JPJ may not assign their rights or delegate their
7 obligations under this agreement without the prior written consent of the County.

8 12. **No Waiver by Receipt.** Receipt of any payment by the County under this
9 agreement is not a waiver of any breach or default by JPJ and does not prejudice or
10 impair any remedy to the County with respect to any breach or default.

11 13. **Governing Law.** The laws of the State of California govern all matters
12 arising from or related to this agreement.

13 14. **Jurisdiction and Venue.** This agreement is signed and performed in
14 Fresno County, California. JPJ consents to California jurisdiction for actions arising from
15 or related to this agreement, and, subject to the Government Claims Act, all such
16 actions must be brought and maintained in the Fresno County Superior Court.

17 15. **Construction.** The final form of this agreement is the result of the parties'
18 combined efforts. If anything in this agreement is found by a court of competent
19 jurisdiction to be ambiguous, that ambiguity is to be resolved by construing the terms of
20 this agreement according to their generally accepted meaning, and not by construing
21 the terms of this agreement for or against either party.

22 16. **Section Titles.** The section titles in this agreement are for convenience
23 only and are not part of this agreement.

24 17. **Severability.** If anything in this agreement is found by a court of
25 competent jurisdiction to be unlawful or otherwise unenforceable, the balance of this
26 agreement remains in effect.

27 18. **Entire Agreement.** Subject to section 6 of this agreement, this agreement
28 is the entire agreement between JPJ and the County with respect to the subject matter

1 of this agreement, and it supersedes all previous negotiations, proposals, commitments,
2 writings, advertisements, publications, and understandings of any nature unless those
3 things are expressly included in this agreement.

4 19. **Authority.** Each person who signs this agreement represents and
5 warrants by signing that (A) he or she is duly authorized to execute and deliver this
6 agreement on behalf of the party for which he or she signs and (B) his or her signing of
7 this agreement is binding upon the party for which he or she signs. Each person who
8 signs this agreement on behalf of JPJ acknowledges by signing that the County is
9 relying upon the representations and warranties above in entering into this agreement.

10 20. **Counterparts.** This agreement may be executed in counterparts, each of
11 which is deemed an original, but all of which together constitute the same agreement.

12 *[SIGNATURE PAGE FOLLOWS]*

1 The parties are signing this agreement on the date stated in the introductory paragraph.

2 JPJ INCORPORATED

COUNTY OF FRESNO

3
4 (Authorized signature)

5 JOHN A. BONADELLE

6 (Print name and title)

Pres.

Ernest Buddy Mendes

Ernest Buddy Mendes

Chair, Board of Supervisors

Reviewed and recommended for approval.

Alan Weaver

Alan Weaver

Director of Public Works and Planning

8 ATTEST:

9 BERNICE E. SEIDEL, Clerk
Board of Supervisors

10 By

Deputy

Approved as to accounting form.

Vicki Crow, C.P.A.

AUDITOR-CONTROLLER/TREASURER-
TAX COLLECTOR

Alan E. Crow

Deputy

Approved as to legal form.

Daniel C. Cederborg

COUNTY COUNSEL

Daniel C. Cederborg

Deputy

20 ORG/FUND/SUBCLASS/ACCOUNT

21 9181/0830/16200/5068

22 9254/0830/16210/5068

ATTACHMENT A

SELF-DEALING TRANSACTION DISCLOSURE FORM

In order to conduct business with the County of Fresno (hereinafter referred to as "County"), members of a contractor's board of directors (hereinafter referred to as "County Contractor"), must disclose any self-dealing transactions that they are a party to while providing goods, performing services, or both for the County. A self-dealing transaction is defined below:

"A self-dealing transaction means a transaction to which the corporation is a party and in which one or more of its directors has a material financial interest"

The definition above will be utilized for purposes of completing this disclosure form.

INSTRUCTIONS

- (1) Enter board member's name, job title (if applicable), and date this disclosure is being made.
- (2) Enter the board member's company/agency name and address.
- (3) Describe in detail the nature of the self-dealing transaction that is being disclosed to the County. At a minimum, include a description of the following:
 - a. The name of the agency/company with which the corporation has the transaction; and
 - b. The nature of the material financial interest in the Corporation's transaction that the board member has.
- (4) Describe in detail why the self-dealing transaction is appropriate based on applicable provisions of the Corporations Code.
- (5) Form must be signed by the board member that is involved in the self-dealing transaction described in Sections (3) and (4).

(1) Company Board Member Information:			
Name:		Date:	
Job Title:			
(2) Company/Agency Name and Address:			
(3) Disclosure (Please describe the nature of the self-dealing transaction you are a party to):			
(4) Explain why this self-dealing transaction is consistent with the requirements of Corporations Code 5233 (a):			
(5) Authorized Signature			
Signature:		Date:	