

**UTILITY AGREEMENT  
FOR  
RESIDENTIAL WATER METER INSTALLATION**

THIS AGREEMENT ("Agreement") is entered into as of the \_\_\_\_\_ day of \_\_\_\_\_ 2016, by and among MONTEREY BAY MILITARY HOUSING, LLC, a Delaware limited liability company ("Owner"), and the MARINA COAST WATER DISTRICT, a California water district ("District"). Owner and District are sometimes referred to herein as a "Party" and collectively as "Parties."

**RECITALS**

A. In February of 1996 the President of the United States signed into law the Defense Authorization Bill (Public Law 104-106) creating the Military Housing Privatization Initiative which provides authority and financing for construction and improvement of military housing. Pursuant to the Defense Authorization Bill, Army has initiated a program known as the Residential Communities Initiative ("RCI") whereby Army will establish long-term business relationships with private sector companies for the purpose of improving military family housing communities. Army has formed a limited liability company known as MONTEREY BAY MILITARY HOUSING LLC ("Owner"). The Owner is controlled by the United States of America by the Department of the Army and Clark Realty Capital Monterey Bay, LLC.

B. The U.S. Army ("Army") owns certain real property within the Ord Military Community ("the OMC") area of the former Fort Ord in Monterey County, California, known generally as Fitch Park 2B, Moore's Landing East and West, Marshall Park and Lower Stillwell ("the Project Area") that currently do not have water meters installed. These residences are billed by the District on a flat unmetered rate. Lower Stillwell will be the last area to meter until Renovation/Demolition plans are developed and finalized by the Owner. This phase of metering will include an estimated 432 meter installations with a not to exceed amount of \$475,000. Owner has secured funding for the \$475,000.

**NOW THEREFORE**, in consideration of the mutual promises contained herein, District and Owner hereby agree as follows:

**ARTICLE 1. UTILITY AGREEMENT**

1.1. The District agrees to install 432, 3/4" meters, or as many as can be installed for \$475,000 within the Project Area under this Agreement, subject to the following conditions:

1.1.1. Owner shall reimburse the district for all costs related to the installation of water meters on existing housing within the project area; and

1.1.2. Sufficiently before the completion of the Phase 1 work under Section 1.1, and in a manner that allows for continuous progress to be made on the installation of water meters, owner

shall make all reasonable efforts to secure and provide additional funding to pay the District for all costs related to the installation of an estimated additional 432 water meters (Phase 2), for an estimated total of 864 water meters installed on existing housing within the Project Area.

1.2. District and Owner agree to work cooperatively in the installation of water meters on the residential units.

1.3. District agrees to maintain records of installation activities within the Project Area, and to provide bi-weekly updates of these activities and costs to the Owner, for the full term of the Agreement.

## **ARTICLE 2. PAYMENT**

2.1. On or before \_\_\_\_\_, Owner shall pay to the District an initial deposit payment in the amount of \$100,000 to cover expenses for procurement of materials needed for metering.

2.2. The payment for the project shall be based upon the actual cost of labor material and equipment estimated to be approximately \$1,100 per meter installed. Only actual costs to install the meters will be charged towards the deposited amount. Costs may be adjusted based on actual material costs and the then current District rates for labor and equipment. (See Exhibit I, for current District Labor and Equipment rates) If the meter installation costs are under the estimated \$1,100 per meter, then more meters will be installed in this phase until the budget amount of \$475,000 is expended. If the meter installation costs are more than the estimated \$1,100 per meter, then less meters will be installed.

2.3. District shall provide Owner with documentation of the costs associated with each meter installed.

2.4. The Owner will make additional deposits in increments of not less than \$55,000 towards the metering project account once the balance is at or below \$25,000, or as otherwise agreed in writing by both Parties. Such payment of additional deposits shall be made by Owner to District within 30 days of receipt of a notice of additional deposit payment due provided in accordance with Section 3.1.

2.5. Within forty five (45) days after installation of the final meter for Phase 1, the Parties agree to reconcile payments received and costs incurred and further agree to pay to the other Party any amounts owing or subject to reimbursement, unless otherwise agreed in writing by both Parties.

## **ARTICLE 3. MISCELLANEOUS**

3.1. NOTICE. Any notice or communication required hereunder between the District or Owner must be in writing, and may be given either personally, by facsimile (with original forwarded by regular U.S. Mail), by registered or certified mail (return receipt requested), or by Federal Express or other similar courier promising overnight delivery. If personally delivered, a notice shall be deemed to have been given when delivered to the party to whom it is addressed.

If given by facsimile transmission, a notice or communication shall be deemed to have been given and received upon actual physical receipt of the entire document by the receiving party's facsimile machine. Notices transmitted by facsimile after 5:00 p.m. on a normal business day or on a Saturday, Sunday or holiday shall be deemed to have been given and received on the next normal business day. If given by registered or certified mail, such notice or communication shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addressees designated below as the party to whom notices are to be sent, or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If given by Federal Express or similar courier, a notice or communication shall be deemed to have been given and received on the date delivered as shown on a receipt issued by the courier. Any party hereto may at any time, by giving ten (10) days written notice to the other party hereto, designate any other address in substitution of the address to which such notice or communication shall be given. Such notices or communications shall be given to the parties at their addresses set forth below:

If to District: Marina Coast Water District  
ATTN: James Derbin  
Operations and Maintenance Superintendent  
2840 4th Ave,  
Marina, CA 93933

If to Owner: Monterey Bay Military Housing  
Francis J. Coen  
Managing Director  
Clark Realty Capital, L.L.C.  
PO Box 17  
Seaside, CA 93955

3.2. TERM. The term of this Agreement shall start on the day and year duly executed by the parties and shall remain in effect until final payment is made under Section 2.5, unless extended pursuant to Section 3.3.

3.3. MODIFICATION. Modifications or amendments to this Agreement shall be in writing and executed by all parties. After completion of this work, this agreement may be amended to install an additional 432 meters, or as many as can be installed as determined under Section 2.2, for an additional \$475,000.

3.4. ASSIGNMENT. This Agreement and all of the terms and conditions contained herein shall inure to the benefit of and bind the successors and assigns of District and Owner. Nothing contained herein restricts or prohibits the sale or other transfer of property.

3.5. ENTIRE AGREEMENT. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original. This Agreement, together with the attached Exhibits, constitutes the final and exclusive understanding and agreement of the parties and supersedes all negotiations or previous agreements of the parties with respect to all or any part of

the subject matter hereof. The Exhibits attached to this Agreement are incorporated herein for all purposes.

3.6. DISPUTE RESOLUTION. Any dispute between the parties as to the proper interpretation, application or enforcement of this Agreement shall be subject to dispute resolution.

3.7. Dispute Resolution Procedure-Disputes arising under this Agreement shall be resolved as provided in this section.

3.8. Prevention of Disputes/Meet and confer - The parties agree that they share an interest in preventing misunderstandings that could become claims against one another under this agreement. The parties agree to attempt to identify and discuss in advance any areas of potential misunderstanding that could lead to a dispute. If either party identifies an issue of disagreement, the parties agree to engage in a face-to-face discussion of the matter within three (3) calendar days of the initial request. If the dispute cannot be negotiated between the parties, the matter shall first be brought to the attention of the District's Board of Directors at the first available regularly scheduled Board Meeting. As a contract dispute, the matter shall be considered by the District Board of Directors in closed session under the Brown Act without the Developer or Contractor in attendance. If any disagreement remains unresolved for ten (10) days after consideration by the District Board of Directors, the parties agree to submit it to mediation as provided in Section 3.9 below.

3.9. Mediation –

3.9.1. Either party may demand, and shall be entitled to, mediation of any dispute arising under this agreement at any time after completing the meet and confer process described in subsection 3.8. Mediation shall commence not more than ten (10) days after the initial mediation demand and must be concluded not more than thirty (30) days after the date of the first mediation demand. If mediation is not concluded within that time, then either party may demand arbitration in writing under Section 3.10.

3.9.2. Mediation shall be submitted first to a mediator with at least ten years experience with the types of issues in dispute. The mediator shall be selected by mutual agreement of the parties. Failing such mutual agreement, a mediator shall be selected by the Presiding Judge of the Monterey County Superior Court. In the interest of promoting resolution of the dispute, nothing said, done or produced by either party at the mediation may be discussed or repeated outside of the mediation or offered as evidence in any subsequent proceeding. The parties acknowledge the confidentiality of mediation as required by Evidence Code 1152.5.

3.9.3. No mediator shall submit, and no arbitrator or court shall consider, any mediator recommendations, declarations, or findings unless the parties give their written consent to the proposed mediator statement.

3.10. Arbitration -

3.10.1. If mediation fails to resolve the dispute, the parties shall select an arbitrator by mutual agreement. Failing such agreement, the arbitrator shall be selected by the Presiding

Judge of the Superior Court. No person who served as mediator shall serve as the arbitrator. The decision of the arbitrator shall be final and not subject to judicial litigation.

3.10.2. Arbitration shall be commenced within thirty (30) days of the arbitration demand and concluded within 60 days of the arbitration demand.

3.10.3. Arbitration shall follow the so-called “baseball arbitration” rule in which the arbitrator is required to select an award from among the final offers presented by the contending parties. The arbitrator may not render an award that compromises between the final offers.

3.10.4. Unless the arbitrator selects another set of rules, the arbitration shall be conducted under the J.A.M.S. Endispute Streamlined Arbitration Rules and Procedures, but not necessarily under the auspices of J.A.M.S. Upon mutual agreement, the parties may agree to arbitrate under an alternative scheme or statute. The Arbitrator may award damages according to proof. Judgment may be entered on the arbitrator’s award in any court of competent jurisdiction.

3.11. NOTICE: IN AGREEING TO THE FOREGOING PROVISION, YOU ARE WAIVING YOUR RIGHT TO HAVE YOUR RIGHTS UNDER THIS AGREEMENT TRIED IN A COURT OF LAW OR EQUITY. THAT MEANS YOU ARE GIVING UP YOUR RIGHT TO TRIAL BY JUDGE OR JURY. YOU ARE ALSO GIVING UP YOUR RIGHT TO DISCOVERY AND APPEAL EXCEPT AS PROVIDED IN THE ARBITRATION RULES. IF YOU REFUSE TO ARBITRATE YOUR DISPUTE AFTER A PROPER DEMAND FOR ARBITRATION HAS BEEN MADE, YOU CAN BE FORCED TO ARBITRATE OR HAVE AN AWARD ENTERED AGAINST YOU BY DEFAULT. YOUR AGREEMENT TO ARBITRATE IS VOLUNTARY.

3.12. BY INITIALING THIS PROVISION BELOW, THE PARTIES AFFIRM THAT THEY HAVE READ AND UNDERSTOOD THE FOREGOING ARBITRATION PROVISIONS AND AGREE TO SUBMIT ANY DISPUTES UNDER THIS AGREEMENT TO NEUTRAL BINDING ARBITRATION AS PROVIDED IN THIS AGREEMENT.

MCWD s’ INITIALS \_\_\_\_\_

Owner’s INITIALS \_\_\_\_\_

3.13. WAIVER. All waivers of the provisions of this Agreement shall be in writing and signed by the appropriate authorities of the District and the Owner.

3.14. CALIFORNIA LAW. This Agreement shall be construed and enforced in accordance with the laws of the State of California, without reference to choice of law provisions.

3.15. ATTORNEY'S FEES AND COSTS. If either party to this Agreement brings a suit or proceeding to enforce or require performance of the terms of this Agreement, the prevailing party in such suit or proceeding shall be entitled to recover from the other party reasonable costs and expenses, including attorneys' fees and the costs and fees of any experts reasonably engaged by the attorney.

3.16. SEVERABILITY. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this

Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, the party adversely affected may (in its sole and absolute discretion) terminate this Agreement by providing written notice of such termination to the other party.

3.17. OTHER AGREEMENTS. This Agreement is not intended to, and shall not, cancel, supersede, modify, or otherwise affect any other agreements that have been, or may be made, or any approvals or permits that have been issued between or by any party regarding the Project or the Facilities.

**SIGNATURE PAGE FOLLOWS**

**IN WITNESS WHEREOF**, the parties hereto have executed this Agreement the day and year first above written.

**DISTRICT:**

Marina Coast Water District, a California water district

By: Keith Van Der Maaten  
General Manager

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

**OWNER:**

MONTEREY BAY MILITARY HOUSING, LLC,  
a Delaware Limited Liability Company

By: Clark Realty Capital, L.L.C., a Delaware  
Limited Liability Company

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

Francis J. Coen, Managing Director  
Monterey Bay Military Housing, L.L.C.  
c/o Clark Realty Capital, L.L.C.

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

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

Jose Cruz  
Development Associate  
Clark Realty Capital, L.L.C.

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

**EXHIBIT 1**

**MCWD Labor and Equipment Rates**

**MARINA & ORD COMMUNITY  
WATER & WASTEWATER SYSTEM  
RATES, FEES and CHARGES  
FY 2016 - 2017  
Effective July 1, 2016**

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General Manager	\$147.00 per hour
District Engineer	\$122.00 per hour
Director of Administrative Services	\$102.00 per hour
Capital Projects Manager	\$86.00 per hour
Projects Manager	\$93.00 per hour
Associate Engineer	\$77.00 per hour
Engineering Administrative Assistant	\$63.00 per hour
Engineering Assistant	\$55.00 per hour
Lab Supervisor	\$80.00 per hour
O&M Superintendent	\$102.00 per hour
O&M Supervisor	\$89.00 per hour
Operations & Maintenance System Operator 3	\$76.00 per hour
Operations & Maintenance System Operator 2/Backflow Specialist	\$74.00 per hour
Operations & Maintenance System Operator 2	\$77.00 per hour
Operations & Maintenance System Operator 1	\$65.00 per hour
Conservation Specialist III	\$63.00 per hour
Conservation Specialist VII	\$45.00 per hour
Work Truck	\$20.00 per hour
Backhoe Tractor	\$30.00 per hour
Front Loader Tractor	\$58.00 per hour
Vactor Truck	\$30.00 per hour
Dump Truck	\$30.00 per hour
Ground Penetrating Radar Unit	\$10.00 per hour
CCTV Camera	\$65.00 per hour