



## PARTICIPATION REGULATIONS

In order to encourage and facilitate water and sanitary sewer system development within the corporate boundaries of the City of Fayetteville and to compensate project developers for the incremental costs incurred to enhance developer-installed systems at the request of the Fayetteville Public Works Commission (“PWC”) for the benefit of PWC customers who will not be served by the developer, PWC adopts these Participation Regulations (“Regulations”) setting forth the rules by which PWC will contribute to, and participate in, the cost of the construction and installation of water and/or sanitary sewer projects that are transferred by developers to PWC.

1. **Definitions.** The following capitalized terms that are not elsewhere defined in these Regulations shall have the respective meanings set forth below:

a. “Aggregate Cap” means one hundred forty-six thousand two hundred fifty dollars and zero cents (\$146,250.00) in Fiscal Year 2023 (ending June 30, 2023) and two hundred seventy thousand dollars and zero cents (\$270,000.00) in each Fiscal Year thereafter.

b. “CEO” means PWC’s Chief Executive Officer and General Manager or the designee of PWC’s Chief Executive Officer and General Manager. In these Regulations, all determinations to be made by the CEO shall be made in the CEO’s reasonable discretion, except as otherwise specifically provided.

c. “Contribution” means the total of the Development Participation Amount and the Incremental Participation Amount, which amount will be specified in the Participation Agreement.

d. “Developer” means the person or entity responsible for the completion of a Project and eligible for payment of the Contribution with whom PWC enters into a Participation Agreement.

e. “Development” means the (i) the construction of new residences, commercial buildings, and/or industrial buildings, (ii) the subdivision of land, (iii) the construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of any structure which increases the number of service units, or (iv) any use or extension of the use of land which increases the number of service units. A service unit is a unit of measure, typically an equivalent residential unit, calculated in accordance with generally accepted engineering or planning standards.

f. “Development Participation Amount” means the amount determined in accordance with Section 3 of these Regulations.



- g. “Effective Date” means the date on which a Participation Agreement is last executed by PWC and Developer.
- h. “Fiscal Year” means the twelve (12) continuous month period from July 1 to June 30.
- i. “Incremental Modifications” means the modifications to a Developer’s proposed Project specifically requested by PWC for the benefit of PWC customers (other than the customers in the Development itself) that increase the capacity of the proposed Project, whether by incorporating larger diameter mains, greater linear footage, or other system enhancements.
- j. “Incremental Participation Amount” means the amount determined in accordance with Section 4 of these Regulations.
- k. “Participation Agreement” means a written agreement to be prepared by the CEO and executed by the CEO and Developer for each Project for which a Contribution is to be paid, consistent with the terms of these Regulations and incorporating additional commercial terms determined by the CEO to be appropriate.
- l. “Project” means the systems of water and/or sewer mains and laterals, meter vaults, ancillary utility equipment, fixtures, and structures, approved by PWC, constructed and installed by Developer or its contractor in a manner compliant with PWC’s standards and all applicable laws, regulations, and permits, and accepted by the CEO, along with all reasonably necessary utility easements from Developer, as part of PWC’s system in order to deliver water and/or sanitary sewer service to the Development.
- m. “Project Completion Period” means the thirty-six (36) months immediately following the Effective Date, subject to reasonable extension at the discretion of PWC’s CEO for good cause.
- n. “Value” means the lesser of the Project asset value to PWC, as determined by the CEO, or the Project cost, as reported by Developer to PWC and subject to audit and revision by the CEO. For purposes of setting the Value in any Participation Agreement, PWC may consider the Project cost estimate of the Developer’s engineer that is to be included in each application for Contribution funding.

2. Eligibility for Contribution Funding. Projects located, in whole or in part, inside the corporate boundaries of the City of Fayetteville, as determined by the CEO, are eligible to receive a Development Participation Amount, determined in accordance with Section 3, on a first-come, first-served basis in each Fiscal Year until the Aggregate Cap is fully allocated to eligible Projects. First-come shall be determined by the CEO based upon the Effective Date



(and, if necessary, the time of day that the Participation Agreement is last executed by PWC and Developer). The Incremental Participation Amount is available to any Project that includes an Incremental Modification, whether the Project is located inside or outside the corporate boundaries of the City of Fayetteville. If a Project is so qualified, a Developer may be eligible to receive payments from PWC for both a Developmental Participation Amount and an Incremental Participation Amount. If a Developer submits, or intends to submit, applications to PWC for any Contributions for two or more Developments that are contiguous or otherwise related, as determined by the CEO (“Related Developments”), the Developer must submit to PWC as part of the Developer’s first application for Contribution for one of the Related Developments a comprehensive phasing plan for all of the Related Developments for PWC’s review and approval. PWC reserves the right to reject applications for Contribution for Related Developments that are submitted after the first Related Development application without an existing PWC-approved phasing plan and to reject any applications using or incorporating any other practice that manipulates or abuses the application review or Contribution award processes under these Regulations, as determined by the CEO. Each application for Contribution funding must include a Project cost estimate from the Developer’s engineer.

3. Calculation of the Development Participation Amount. For a Project located entirely within the corporate boundaries of the City of Fayetteville, as confirmed by the CEO, the Development Participation Amount shall be the lesser of eight percent (8%) of the Value or twenty-four thousand five hundred dollars and zero cents (\$24,500.00). If a Project is located partially within and partially outside the corporate boundaries of the City of Fayetteville, then the CEO shall prorate the Development Participation Amount based upon the portion of the Value in each such location, as determined by the CEO. If the allocation of the Aggregate Cap in the Fiscal Year to first-come Projects results in only partial funding being available for the Development Participation Amount for a later Project, the CEO may agree to provide a partial Development Participation Amount to the Project’s Developer.

4. Calculation of the Incremental Participation Amount. The Incremental Participation Amount shall be lower of the asset value to PWC, as determined by the CEO, of the Incremental Modifications or the cost thereof, as reported by Developer to PWC and subject to audit and revision by PWC’s CEO. The Incremental Participation Amount for which a Developer is eligible is not subject to an aggregate annual cap amount or a Project cap amount.

5. Audits and Inspections. If a Developer’s cost is used for any portion of a Contribution, Developer shall maintain, in accordance with prudent utility practice and generally accepted accounting principles consistently applied, records and books of account as may be necessary for substantiation of all Developer’s claimed cost. The CEO and the CEO’s authorized representatives shall be entitled to inspect and audit such records and books of account during normal business hours and upon reasonable advanced notice during the course of the Project work and for a period of two (2) years after the conclusion of the Project Completion Period. The CEO shall have the right, but not the obligation, to review from time-to-time



Developer's engineering plans and the construction of the Project, provided that the CEO does not unreasonably interfere with the completion of the Project construction.

6. Developer Responsibilities. Developer shall be responsible for retaining a qualified engineer and a qualified contractor to complete the Project, securing all necessary permits, providing surveying, drafting, engineering, construction project bidding and oversight, inspections, engineering and backfill certifications of the installation, securing and recording all reasonably necessary easements, seeking and obtaining approval from PWC for Developer's engineering and construction plans, providing as-built surveys, and ensuring the completion of the Project in a timely and workmanlike manner. Developer shall complete the design and construction of the Project at Developer's expense, in accordance with all laws and utility industry standards applicable to systems of water and/or sewer main and lateral construction in the City of Fayetteville and in accordance with all applicable specifications of PWC. Developer shall be solely responsible for the repair of any damage caused by its agents or employees. Developer must pay to PWC on the Effective Date all System Development Fees associated with the Development, except with regard to the subdivision of land, for which System Development Fees shall be paid to PWC at the later of the Effective Date or the time of application for a building permit. Developer shall, by the time of payment of the Contribution by PWC, transfer and assign to "the City of Fayetteville, by and through the Fayetteville Public Works Commission," by bill of sale and recordable deeds of easement in the form directed by the CEO, with appropriate property descriptions and other details acceptable to PWC, without any liens or encumbrances or security interests, the Project and all related easements needed for PWC to access, maintain, and modify the entire Project and deliver to PWC the certification from the designer of record of the Project, record drawings, and a certification from the Developer as to the Project's actual cost along with reasonable supporting records (collectively, the "Transfer"). Developer shall execute and deliver any other written instruments reasonably necessary to carry out any term, condition or assurance associated with the transfer of ownership of the Project and confirmation of Developer's warranty whenever occasion shall arise and request for such instruments shall be made by PWC to Developer.

7. PWC Responsibilities. PWC will commit in the Participation Agreement to serve the Development with water and/or sanitary sewer service, in accordance with the terms and conditions of the Participation Agreement and PWC's then-applicable rules, regulations, and rate schedules, which may be amended by PWC from time-to-time in its discretion, and Developer shall pay all applicable PWC fees and charges for installation and activation of such utilities. Upon completion of construction of a Project in compliance with all applicable laws, regulations, and permits and to the satisfaction of PWC and written acceptance of such Project by PWC within the Project Completion Period, which written acceptance may be given or withheld by the CEO (subject to the limitation that the acceptance not be unreasonably withheld, conditioned, or delayed so long as the Project is timely completed in actual conformance with the plans and specifications approved by PWC), PWC shall pay to Developer the Contribution. Upon and after the Transfer, PWC shall be solely responsible for operating and maintaining the Project, subject to the warranty and indemnification obligations set forth hereinbelow.



8. Connection and Termination. The Project shall not be connected to PWC's system until PWC determines all Project work has been satisfactorily completed and the CEO accepts it in writing and the connection point(s) of the Project have been appropriately tested and sterilized. If the Project has not been completed by Developer and accepted in writing by PWC by the conclusion of the Project Completion Period, PWC shall have the right to terminate the Participation Agreement upon written notice to Developer without liability to Developer.

9. Developer Warranty, Indemnification, and Insurance. Developer must warrant to PWC that the Project is free from any defects in materials and workmanship and fit for the purpose for which the Project was or is intended to be constructed. Said warranties shall remain in full force and effect for a period of one (1) year from the date of final written acceptance by the CEO of the Project. In the event repair and/or replacement of any aspect of the Project becomes necessary during the one (1) year warranty period, such repair and/or replacement shall be at Developer's sole expense and the warranty as to those utility structures and other items repaired and/or replaced shall continue to remain in effect for an additional period of one (1) year from the date of final acceptance by PWC of those repairs and/or replacements. If PWC must repair and/or replace said utility structures during the warranty period due to response time requirements, PWC may charge Developer for work completed. Developer must also indemnify and hold harmless PWC and its Commissioners, officers, employees, agents, and representatives and the City of Fayetteville and its council members, managers, employees, and agents (collectively, "Indemnitees") from and against all claims, actions, liabilities, damages, losses, costs, and expenses (including, without limitation, injury to or death of any persons and damage to property, economic and consequential damages and attorneys' fees) asserted by one or more third parties against one or more of the Indemnitees if the Fault of Developer or any of its employees, agents, representatives, subcontractors, or other persons or entities for which Developer may be liable or responsible as a result of any statutory, tort, or contractual duty (collectively the "Responsible Persons") is a proximate cause of the loss, damage, or expense indemnified. "Fault" means a breach of contract by Developer, negligent, reckless, or intentional act(s) or omission(s) constituting a tort under applicable statutes or common law by one or more Responsible Persons, or violation(s) of applicable statute(s) or regulation(s) by a Responsible Person. Developer shall reimburse each Indemnitee for its actually incurred reasonable attorney's fees, litigation and arbitration expenses, and costs to defend against third party claims alleged in any court, tribunal, or alternative dispute resolution procedure required of the Indemnitee by law or by contract, if the fault of one or more Responsible Persons is a proximate cause of the attorney's fees, litigation or arbitration expenses, or court costs to be indemnified. Developer's warranty and obligation to indemnify and hold harmless and reimburse the Indemnitees shall survive the termination of the Participation Agreement. Developer shall carry and maintain insurance as determined by the CEO, as set forth in the Participation Agreement. Developer shall not assign or transfer its rights under or interest in a Participation Agreement without the prior written consent of PWC.



10. Risk of Loss. PWC shall not bear any risk of loss or damage for any of Developer's finished or partially finished work on the Project until the Transfer.