

WHEN RECORDED RETURN TO:

CITY OF CALISTOGA
 CITY CLERK
 1232 WASHINGTON STREET
 CALISTOGA, CA 94515

EXEMPT FROM RECORDING FEES
 SECTION 27383

**AGREEMENT FOR WATER AND WASTEWATER ALLOCATION
 AND CONNECTION FEE PAYMENT
 BETWEEN THE CITY OF CALISTOGA AND
 DAN FARRIS**

This Agreement for Water and Wastewater Allocation and Connection Fee Payment (“**Agreement**”), effective as of the date of last execution (“**Effective Date**”), is made by and between the City of Calistoga, a general law city and a municipal corporation (“**City**”), and Dan Farris, an individual and property owner (“**Property Owner**”) (the City and Property Owner may be referred to collectively as “**Parties**” or individually as “**Party**”), with reference to the following facts and intentions.

RECITALS

- A. Pursuant to Chapter 13.16 (Resource Management System) of the Calistoga Municipal Code, all connections to and expansions of water and/or wastewater service within Calistoga are required to (1) receive an allocation as provided for in Chapter 19.02 (Growth Management System), and (2) pay water and wastewater service connection fees to the City as provided for in Chapter 13.18 (Rates, Billing, Payments and Charges).
- B. State law requires that the costs of connecting to the water and wastewater system be apportioned to all customer classes based on the estimated reasonable cost of providing the service.
- C. The connection fees for water and wastewater were established based upon a fee study approved by the City of Calistoga on September 21, 2010. The connection fee is adjusted annually on January 1st of each year based on a construction cost index. For 2017, water connection fees are \$38,517 per acre foot and wastewater connection fees are \$112,456 per acre foot.
- D. The Property Owner owns commercially-zoned real property commonly known as 713 A/B and 715 Washington Street, Calistoga and identified as Napa County Assessor’s Parcel Number 011-234-012 (“**Property**”), upon which improvements were was constructed in 2007 which included one (1), three-bedroom apartment unit upstairs.
- E. The Property Owner acquired 0.204 acre-feet of water and 0.184 acre-feet of wastewater through a Payment Plan Agreement for Connections Fees recorded on January 9, 2014 in the Official Records of the Office of the County of Napa Recorder. An additional 0.0671 acre-feet of water and 0.0393 acre-feet of water was acquired on July 31, 2014 through a one-time payment of the applicable connection fees. As such, the Property’s established

annual baseline allocation, as defined by Chapter 13.16, is 0.2711 acre-feet of water and 0.2233 acre-feet of wastewater annually.

- F. The Property Owner has a desire to initiate and complete a conversion of one (1), three-bedroom apartment unit to two (2) apartment units to include one (1), one-bedroom and one (1), two-bedroom unit (“**Converted Property**”). The Property Owner desires to contribute appropriately to its fair share of any actual burden on the City utilities.
- G. The connection fees for a new connection or expanded use of an existing connection are one-time fees that are ordinarily calculated by multiplying the applicable connection fee times the factor set forth in the City’s Standardized Use Table, provided for in Chapters 13.16 and 13.18. The Standardized Use Table projects the annual acre foot of water usage and wastewater production of new development based upon the type of land use involved. However, since the Property is commercially zoned, has an existing commercial baseline and there is a reasonable record of historic water and wastewater usage, the Standardized Use Table is not sufficiently applicable.
- H. Given that the Property has existing, established uses and wishes to convert the existing apartment unit into two (2) units which does not increase the baseline allocation to the fullest extent of the City’s Standardized Use Table, the Parties each agree the projected water demand for the Property will not exceed 0.2711 acre-feet of water and 0.2233 acre-feet of wastewater.
- I. Once the Converted Property is completed and occupied, the Property Owner is committed to mitigating the additional usage/production, if any. Following periodic usage/production analyses, the Property Owner has agreed to pay any additional connection fees that may be required if the actual usage/production exceeds the Initial Water Allocation or the Initial Wastewater Allocation.
- J. Given these unique facts and circumstances, the Parties wish to establish the terms and conditions upon which water usage and wastewater production will be allocated to the Converted Property and the connection fees therefor will be paid to the City.

AGREEMENT

NOW, THEREFORE, in consideration of their mutual covenants and conditions, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

- 1. **Recitals.** The above recitals are true and correct and material to this Agreement.
- 2. **Nature of Converted Property.** Except as otherwise expressly provided herein, the Converted Property is equivalent to the use types listed in the Standardized Use Table and has a history of actual use. As a result of converting the Property, the water and wastewater service allocations shall continue to be based upon actual water demand and actual wastewater demand and the terms of payment of the connection fees shall be established by this Agreement.
- 3. **Domestic and Emergency Potable Water.**
 - 3.1. **Initial Water Allocation.** The initial allocation of 0.2711 acre-feet of water was acquired as expressed in Recital E above (“**Total Water Allocation**”).

- 3.2. Check-In.** Starting on the date of July 1, 2017, for a period of 24 months, the City shall annually review the Property’s average actual annual demand (365-day year) of water supplies based upon peak demand. The determination of average actual annual water demand shall be made by the City based upon review of its metering devices for the entire Property (“**Actual Water Demand**”); provided however, that City shall provide Property Owner with documentation of its determination and Property Owner may protest the determination to the City Manager in the event the Property Owner believes there to have been a reading or calculation error. The City shall provide the Property Owner with written notice of its determination of the Actual Water Demand (“**Water Notice**”) on or around August 1, 2019. The Property Owner’s receipt of the Water Notice shall trigger any applicable connection fee reconciliation obligations under Sections 3.3 and 3.4 of this Agreement.
- 3.3. Water Reconciliation Request.** A Water Reconciliation Request from the Property Owner may be granted by the City at any time during this Agreement, provided that the applicable connection fee is paid. In the event that the Property Owner needs more water than the Total Water Allocation, such request shall be subject to review based upon applicable City codes, regulations and rates in effect at the time.
- 3.4. Water Connection Fee Reconciliation.** In the event that Actual Water Demand exceeds the Total Water Allocation, then within 60 days of the City approving a Water Reconciliation Request, Property Owner shall pay the City an additional connection fee for the portion of the additional Water Allocation which is required. This connection fee shall be in an amount equal to the difference in the acre feet of water between the Actual Water Demand and the Total Water Allocation, multiplied by the water connection fee rates in effect at the time of the payment. Upon payment of the additional water connection fee, the water baseline for the Property inclusive of the Converted Property will be adjusted accordingly and documented in writing by the City.

4. Wastewater.

- 4.1. Initial Wastewater Allocation.** The initial baseline allocation of 0.2233 acre-feet of wastewater was acquired as expressed in Recital E above (“**Total Wastewater Allocation**”).
- 4.2. Check-In.** Starting on the date of July 1, 2017, for a period of 24 months, the City shall annually review the Property’s average actual annual demand (365-day year) of water supplies based upon peak demand. The determination of average actual annual wastewater demand shall be made by the City based upon review of its metering devices for the entire Property (“**Actual Wastewater Demand**”); provided however, that City shall provide Property Owner with documentation of its determination and Property Owner may protest the determination to the City Manager in the event the Property Owner believes there to have been a reading or calculation error. The City shall provide the Property Owner with written notice

of its determination of the Actual Water Demand (“**Wastewater Notice**”) on or around August 1, 2019. The Property Owner’s receipt of the Water Notice shall trigger any applicable connection fee reconciliation obligations under Sections 4.5 and 4.6 of this Agreement.

- 4.3. Wastewater Reconciliation Application.** A Wastewater Reconciliation Request from the Property Owner may be granted by the City at any time during this Agreement, provided that the applicable connection fee is paid. In the event the Property Owner needs more wastewater capacity than the Total Wastewater Allocation, such request shall be subject to review based upon applicable City codes, regulations and rates in effect at the time.
- 4.4. Wastewater Connection Fee Reconciliation** In the event that Actual Wastewater Demand exceeds the Total Wastewater Allocation, then within 60 days of the City approving a Wastewater Reconciliation Request, Property Owner shall pay the City an additional connection fee for the portion of the Reserved Water Allocation approved. This connection fee shall be in an amount equal to the difference in the acre feet of wastewater between the Actual Wastewater Demand and the Total Wastewater Allocation, multiplied by the wastewater connection fee rate in effect at the time of the payment. (Wastewater connection fee reconciliation = Actual Wastewater Demand)

5. Will Serve Obligation.

- 5.1. Effect of Connection Fee Payment.** Payment of water and wastewater connection fees will entitle the Converted Property to qualify for water and wastewater service from the City on the same terms and conditions applicable to existing customers/ratepayers, except as otherwise set forth herein. The Parties agree that this Agreement does not relate to water or wastewater service rates, which shall continue to be governed by applicable City codes, regulations and rates in effect at the time.
- 5.2. Baseline Adjustments.** The allocations of water and wastewater capacity set forth in Sections 3.1 and 4.1 shall constitute the “will serve” obligation of City with respect to the Converted Property. For the first 24 months, the Initial Water Allocation and Initial Wastewater Allocation shall constitute the baseline (as defined in Municipal Code Section 13.16.060) for the Converted Property. Thereafter, the baseline shall be adjusted as provided for in this Agreement. Thereafter, any water and wastewater usage that exceeds established baselines must comply with applicable City codes, regulations and rates in effect at that time, including, but not limited to, surcharge fees per Calistoga Municipal Code Section 13.16.060.
- 5.3. No Vested Rights.** Nothing in this Agreement is intended to or shall grant the Property Owner any vested right to water or wastewater service. Notwithstanding any other provision of this Agreement to the contrary, the Parties agree that the current rates are currently appropriate for satisfaction of the estimated economic burdens caused by the connections necessitated by the Converted Property. The City expressly reserves the right to adopt and apply to the Converted Property any and all City ordinances or resolutions which (a) may increase the costs for the

necessary connections upon a showing that such ordinances or resolutions are reasonably necessary to prevent the City from bearing any costs from City funds, in which case the Property Owner will pay any increased costs beyond the current fees, as demonstrated by generally accepted engineering principles, or (b) are reasonably to protect the public health and safety.

6. **Term and Termination.**

6.1. **Term.** The term of this Agreement shall continue from the Effective Date until terminated as provided for herein.

6.2. **Termination.** The Parties may terminate this Agreement by mutual written agreement. In the event of default on the part of the Property Owner of any of the terms of this Agreement, which default continues after 10 days written notice from the City, City may immediately terminate this Agreement. In the event of default on the part of the City of any of the terms of this Agreement, which default continues after 10 days' written notice from the Property Owner, Property Owner may immediately terminate this Agreement. Upon such termination, the Parties agree and acknowledge that: (1) all rights and obligations of the Parties set forth in this Agreement shall terminate and be of no further force and effect, unless expressly stated otherwise, and (2) all water and/or wastewater allocations and ongoing City monitoring shall be governed by applicable ordinances, policies and practices in effect at the time.

7. **Indemnity/Liability.**

7.1. **Indemnity.**

a. **Mutual Indemnity re: Damages or Breach Arising from Implementation of Agreement.**

- i. Property Owner shall indemnify, hold harmless, and defend (with counsel chosen by City) City, its officers, elected officials, employees, agents, volunteers, and consultants ("**City Parties**") from and against any and all actions, claims, demands, damages, disability, losses, and expenses including, but not limited to, attorney's fees and other defense costs and liabilities of any nature that may be asserted by any person or entity, to the extent arising out of the negligent act or omission from implementation of the Agreement, or breach of the Agreement, by the Property Owner, its officers, elected officials, employees, agents, volunteers, and consultants ("**Property Owner's Representatives**"). The Property Owner's obligations pursuant to this Section 7.1 shall not apply to any liabilities caused solely by the negligence or willful misconduct of the City Parties. Property Owner's duty to indemnify and hold harmless, as set forth herein, shall include the duty to defend as set forth in California Civil Code § 2778.
- ii. City shall indemnify, hold harmless, and defend (with counsel chosen by Property) the Property Owner's Representatives from and against any and all actions, claims, demands, damages, disability, losses, and

expenses including, but not limited to, attorney's fees and other defense costs and liabilities of any nature that may be asserted by any person or entity, to the extent arising out of the negligent act or omission from implementation of the Agreement, or breach of the Agreement, by the City Parties. The City's obligations pursuant to this Section 7.1 shall not apply to any liabilities caused solely by the negligence or willful misconduct of the Property Owner's Representatives. City's duty to indemnify and hold harmless, as set forth herein, shall include the duty to defend as set forth in California Civil Code § 2778.

- b. Indemnity re: Third Party Challenge to Authority to Enter Agreement. If any third party to this Agreement files a lawsuit against any City Parties and/or Property Owner's Representatives (whether a petition for a writ of mandate, complaint for declaratory and/or injunctive relief, or other lawsuit) which challenges the legality of this Agreement and/or any City Parties' and/or Property Owner's Representatives' authority to enter into this Agreement, Property Owner and City agree to cooperate in the defense of such lawsuit and to share equally litigation expenses (e.g., attorney's fees, costs, and expert witness fees, if any) incurred in defending against the lawsuit (50% each of the aggregate, out-of-pocket collective expenses). The City and the Property Owner shall have the right to choose their own counsel to represent their respective interests in any such lawsuit; however, the City and the Property Owner will meet and confer to determine whether either's counsel should take the lead in defending against such lawsuit. The City and the Property Owner will periodically exchange invoices reflecting their litigation expenses, will promptly calculate the aggregate total litigation expenses collectively incurred as of a reasonably-practicable recent date, and will make payments to each other so as to ensure that they share the aggregate litigation expenses equally (50% each). In addition, the Property Owner and the City shall be equally responsible for all damages, liabilities, or losses arising out of any lawsuit described in this Section 7.1(b).
- c. Misc. This Section 7.1 shall survive termination of this Agreement. The indemnification obligations are not limited in any way by any limitation on the amount or type of damages or compensation payable to or for the Parties or their agents under insurance policies or workers' compensation acts, disability benefits acts or other employee's benefits acts.

7.2. Acts of God. Neither City nor Property Owner shall have liability for damages or delays due to fire, explosion, lightning, pest damage, power surge or failures, flood, drought, earthquakes, acts of God, the elements, war, civil disturbances, or acts of civil or military authorities or the public enemy.

8. General Provisions.

- 8.1. Entire Agreement.** This Agreement is intended by the Parties as the final expression of their agreement with respect to such terms as are included herein and as the complete and exclusive statement of its terms and may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement, nor explained or supplemented by evidence of consistent additional terms.
- 8.2. Amendments.** The terms of this Agreement shall not be waived, altered, modified, supplemented or amended in any manner whatsoever except by written agreement signed by both City and Property Owner.
- 8.3. Compliance with Law.** Each and every provision of law and clause required by law to be inserted into this Agreement shall be deemed to be inserted herein and this Agreement shall be read and enforced as though it were included herein.
- 8.4. Construction of Agreement.** The terms and provisions of this Agreement shall be liberally construed to effectuate the purpose of this Agreement. In determining the meaning of, or resolving any ambiguity with respect to, any word, phrase or provision of this Agreement, no uncertainty or ambiguity shall be construed or resolved against either party under any rule of construction, including the party primarily responsible for the drafting and preparation of this Agreement. This Agreement shall be governed by and construed in accordance with the laws of the State of California and venue shall be in the appropriate court in Napa County, California. If any provision of this agreement is held invalid or unenforceable by a court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision of this Agreement.
- 8.5. Benefit of Counsel.** Each Party prior to entering into this Agreement has obtained the advice of legal counsel. Each Party executes this Agreement with full knowledge of its terms and conditions and their significance and with the express intention of affecting its legal consequences.
- 8.6. Waiver.** No failure on the part of either Party to exercise any right or remedy hereunder shall operate as a waiver of any other right or remedy that party may have hereunder.
- 8.7. Execution of Other Documents.** City and Property Owner shall cooperate fully in the execution of any and all other documents and/or any additional actions necessary to give full force and effect to the terms of this Agreement.
- 8.8. Execution of Counterparts.** This Agreement may be executed in counterparts, each of which shall constitute an original of the Agreement. Signatures transmitted via portable document format (“pdf”) to the other Party to this Agreement shall be deemed equivalent to original signatures on counterparts.
- 8.9. Authority.** Property Owner hereby represents and warrants that it possesses the financial resources to discharge the responsibilities it has assumed under this Agreement. City hereby represents and warrants that it possesses the financial resources to discharge the responsibilities it has assumed under this Agreement.

8.10. Successors and Assignment. With respect to the Property, this Agreement shall be binding on any successors-in-interest to the Property Owner's interest therein. However, Property Owner may not assign its rights under this Agreement to any other property, and any such attempted assignment is void and unenforceable.

8.11. Notices. Any notice or communication to the other Party required under this Agreement 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 providing overnight delivery. If personally delivered, a notice will 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 will 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 will 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 will 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 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 will be deemed to have been given and received on the date delivered as shown on a receipt issued by the courier. Any Party may at any time, by giving ten days written notice to the other Party, designate any other address in substitution of the address to which such notice or communication shall be given. Such notices or communications will be given to the Parties at their addresses set forth below:

CITY:

Dylan Feik
City Manager

City of Calistoga
1232 Washington Street
Calistoga, CA 94515
707-942-2806
Copy by email to:
DFeik@ci.calistoga.ca.us

PROPERTY OWNER:

Dan Farris
1831 Greenwood Avenue
Calistoga, CA 94515
Copy by email to:
danfarrisconstruction@yahoo.com

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

CITY OF CALISTOGA

PROPERTY OWNER

By: _____

Dylan Feik
City Manager

Date: _____

By: _____

Dan Farris

Date: _____

STATE OF CALIFORNIA, COUNTY OF NAPA

On _____, before me, _____, Notary
Public,

personally appeared _____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Place Notary Seal Above

Signature _____

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document

STATE OF CALIFORNIA, COUNTY OF NAPA

On _____, before me, _____, Notary
Public,

personally appeared _____,

who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

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Signature _____

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EXHIBIT A
PROPERTY DESCRIPTION

Lots 10, 11, 12 and 13 in Block K of Calistoga Proper, so-called as shown on the map entitled, "Map of Calistoga Showing its Extensions, Surroundings and the Hot Sulphur Springs, Napa County, Cal.", filed March 1, 1871 in the office of the County Recorder of said Napa County, said Block K being that block so lettered on said map and bounded on the Northwest by Gerard Street, on the Northeast by Washington Street, on the Southeast by Fir Street, and Southwest by Napa River.

EXCEPTING THEREFROM that portion conveyed in the Deed to Alexander Barsikian, et al, recorded August 17, 1981 in Book 1212 at page 934 of Official Records of Napa County.

ALSO EXCEPTING THEREFROM that portion as described in the Deed to Luigi Ferro, et ux recorded November 29, 1957 in Book 558 at page 140 of Official Records of Napa County.

Napa County Assessor's Parcel Number 011-234-012