

WATER SUPPLY AGREEMENT

THIS AGREEMENT is made by and between the CITY OF SALEM, OREGON, an Oregon municipal corporation ("City") and Orchard Heights Water Association, Inc., (an Oregon cooperative corporation), ("Orchard Heights").

RECITALS:

- (1) Orchard Heights is an Oregon cooperative corporation formed for the purpose of operating and constructing a private water system from exclusively private funds.
- (2) Currently, the Orchard Heights system receives water from the City of Salem at several connection points at the following locations: Daisy Lane NW; Landigard Road NW; Doaks Ferry Road NW; and Emerald Lane NW.

This agreement will enable City's municipal water to be provided to all other Orchard Heights members, who currently receive their domestic water supply from the existing Orchard Heights water system. This water supply will give Orchard Heights members security of water supply and protection against failure of their existing system.

- (3) The Orchard Heights system will connect to the City's municipal system within the W1 pressure zone that is in the elevation range 247 to 412 feet above mean sea level. The reservoir top water elevation is 503 feet above mean sea level.
- (4) To obtain a water supply for its members for residential uses, Orchard Heights will need to construct several facilities to facilitate water supply from the City's water system, including:

- 1) Tapping onto the City's 18-inch W1 water main in Orchard Heights Road NW adjacent to the BPC power line easement;

- 2) Constructing an 8-inch water main from the tapping location to the Orchard Heights booster pump station site (the "Connection Location");

- 3) Building a booster pump station, and;

- 4) Building a private rising main to Orchard Heights lower reservoir on Orchard Heights Road NW.

The connection to the City system shall be at a point identified by the City. Orchard Heights will be responsible for the cost of tapping the 18-inch water main. The tapping shall be terminated with a valve from which the 8-inch water main is connected. This section of water main shall meet City of Salem standards and be inspected during construction by a City inspector.

- (5) In consideration for the City water, Orchard Heights will pay the City the appropriate connection fees, SDC fees, and applicable water rates.
- (6) Orchard Heights desires to obtain water from the City and the City desires to provide water service under the terms and conditions stated in this Agreement.
- (7) It is understood by both parties that the City will eventually annex portions of Orchard Heights service area.

NOW, THEREFORE, in consideration of the following mutual promises and obligations, the City and Orchard Heights agree as follows:

1. **Effective Date.** The effective date of this Agreement is the date of the last signature hereon ("Effective Date").
2. **Water Service.**
 - 2.1 **Service Area.** The Orchard Heights water service area shall be that area as shown on Exhibit A.
 - 2.2 **Service Eligibility.** Any lot existing as of the effective date of this agreement having any portion of its property within the service area may be eligible to obtain one water service connection from Orchard Heights for a single residential dwelling.
 - 2.3 **Service Connection Location.** The City shall deliver up to 200 gallons per minute of water at W1 pressure to the City-designated "Connection Location." The City shall install a bulk supply meter in a vault constructed by Orchard Heights at the Connection Location for monitoring and billing purposes. The anticipated site of the Connection Location is at 3017 Orchard Heights Road NW.
3. **Public Water System.** Orchard Heights shall design and construct the new main to the meter at its sole cost and expense for the purpose of delivering water from the tapping Location to Connection Location. To ensure operational compatibility with the City's system, Orchard Heights shall hire an Oregon-licensed Professional Engineer to design the water main, which shall include back flow protection, isolation, a blow off assembly adjacent to the Connection Location, and shall conform to all other City design standards. The design of the water main shall be approved by the City. Furthermore, Orchard Heights shall hire competent licensed contractors to install and commission the water main, which shall not be put into service until approved by a City inspector.
 - 3.1 **Location.** Orchard Heights shall locate the water main in the public right-of-way and pay any applicable fees.

- 3.2 Transfer to the City:** Once completed, the main shall be deeded to the City of Salem at no cost to the City.
- 3.3 Future Purpose.** The 8-inch rising main will only be used to supply water to Orchard Heights until the Orchard Heights service area is annexed to the City.
- 4. Private Water System.** All facilities past the Connection Location shall be privately owned by Orchard Heights, and all design, construction, operation, maintenance and disposal shall be at the sole cost of Orchard Heights
- 5. Exclusive Service Area.** Orchard Heights shall not serve more than one single family residential home, now existing or hereinafter constructed, per lot or parcel existing in the Service Area as of the effective date of this agreement. Orchard Heights will not use the water supplied under this Agreement to support or serve any further subdivision of lots or parcels in the Orchard Heights Service Area.
- 6. Bulk Meter Fee.** At the time Orchard Heights is issued a construction permit for its system, they shall pay a Bulk Supply Meter Fee for each bulk supply meter installed and connected to the City system, which Bulk Supply Meter Fee shall include the applicable Water Systems Development Charge (SDC) determined by meter size.
- 7. Water Rates.** Orchard Heights shall pay to the City such water usage fees (Rate) as are in effect as of the Effective Date of this Agreement or as may hereafter be modified. The Rate shall be calculated by multiplying the usage as metered at the Connection Location(s) by the City's then current Rate. The Rate shall be automatically increased, without amendment to this Agreement, upon the City's adoption of any generally applicable increase in the Rates.
- 7.1 Billing.** The City will bill Orchard Heights on a monthly or otherwise agreed-upon billing period, for the quantity of water supplied by the City to Orchard Heights as metered at the connection location(s) during the preceding billing cycle at the rate in effect at the time of billing.
- 7.2 Late Payment / Penalties.** Any Rate or other payment required of Orchard Heights by this Agreement shall, if not paid within 15 days after it is due, bear interest at the rate of 9 percent per annum (but not in any event at a rate greater than the maximum rate of interest permitted by law) from the due date until paid. If Orchard Heights fails to make any Rate payment, or other payment required by this Agreement, within 15 days after it is due, the City may elect to impose a late charge of five cents per dollar of the overdue payment, to reimburse the City for the costs of collecting the overdue payment. Orchard Heights shall pay the late charge on demand by the City. The City may levy and collect a late charge in addition to all other remedies available for Orchard Heights default, and collection of a late charge shall not waive the breach caused by the late payment.

- 7.3 Sewer System Fees.** No rates shall be charged for sewer service until such time as sewer service is provided by the City. Nothing in this Agreement shall require construction of a public sewer system.
- 8. Annexation.** If portions of the Orchard Heights service area are annexed to the City, members of the Orchard Heights Water Association in the annexed area will become individual City customers.
- 8.1 Water SDCs.** Upon annexation of properties now part of the Orchard Heights service area, and that existed at the time of this agreement, shall receive a credit for the SDC paid by Orchard Heights as part of the Bulk Meter Fee, which credit will take the place of any SDC owed at the time of the annexation by those members when they connect to the City water system. Any lots created after the date of this agreement will be charged SDC fees consistent with the prevailing rates at the time of connection to the City's water system.
- 8.2 Individual Meter and Water Service Connection.** Upon annexation of Orchard Heights water system customers to the City, each customer will be individually connected to the City's water supply system. If there is an existing connection and water meter, no water meter or connection fees will be charged. The City will inspect the existing individual water meters, monitor their condition, repair or replace as necessary, register the meters into the City's meter replacement program, and register the service connection to the City's billing system. Upon annexation of the Orchard Heights Water System customers to the City, the individual homes shall be billed directly by the City for service as registered by their individual meter.
- 9. Meter Testing/Monitoring.** Only City's crews or authorized City agents can adjust or change the calibration of any meters read by the City for the purposes of billing unless written approval is obtained from the City Public Works Director or the Director's designee.
- 10. Permits; Regulatory Obligations.** Nothing in this Agreement relieves Orchard Heights from the requirements to obtain permits or pay fees for the design, review, inspection, and construction of the Water System. By its signature hereon, Orchard Heights agrees that it shall be responsible for compliance with any and all statutes, ordinances, rules, and regulations which are or which may become applicable to its activities in operating the Water System, including, without limitation, obligations for testing and treatment.
- 11. Quality/Disruption of Service.** Nothing in this Agreement shall be construed to require the City to provide, or to guarantee or warrant, instantaneous peak flows to Orchard Heights members as if they were located in a functioning W1 pressure zone. The City shall not be obligated to deliver sufficient quantities of water to meet Orchard Heights needs.

- 11.1 Rationing.** The City reserves the right to limit water to Orchard Heights on a pro-rata basis during emergency, conservation, and/or curtailment events; however, the City shall not limit water available to Orchard Heights unless the City is limiting water to all other city customers in G-0 and/or W1 service zones, and any limitation shall be only to the extent imposed on all other G-0 and/or W1 service areas.
- 11.2 Remedies.** Orchard Heights shall not be required to pay a rate on water that is not delivered at the connection location(s). Orchard Heights expressly waives the right to pursue any other right or remedy in law or equity other than the remedy specified in this paragraph, and specifically waives the right of specific performance and the right to sue for damages, in the event of a total or partial loss in the delivery of water.
- 12. Indemnity.** Orchard Heights agrees to defend, indemnify, release, and hold the City, its officers, agents, and employees and affiliates harmless from and against any and all losses, damages to persons or property, injuries or deaths of persons, liability, claims, liens, demands and causes of action of every kind and character, including environmental liability and the amounts of judgments penalties, interest, court costs and legal fees incurred by the City in defense of same ("Claims") arising in favor of any person, corporation or other entity, including the City and Orchard Heights' and their officers, employees, contractors and agents as the result of any breach by Orchard Heights of any term, covenant or condition of this Agreement, or as the result of Orchard Heights construction, operation, or maintenance of its Water System. Orchard Heights warrants to the City that its indemnity obligation will be supported by liability insurance to be furnished by Orchard Heights; provided that recovery under or in respect to this indemnity shall not be limited to the proceeds of any such insurance. Orchard Heights indemnity obligation under this Agreement shall extend to the full amount of any such claim, and shall extend to the negligent or intentional acts and omissions of any officer, employee, agent of Orchard Heights, or any person on or using the property pursuant to this Agreement.
- 13. Insurance.** During the term of this Agreement, Orchard Heights shall maintain in force at its own expense, the following insurance:
- 13.1 General Liability Insurance Coverage.** Orchard Heights shall obtain and keep in effect at its own cost comprehensive or commercial general liability insurance covering bodily injury and property damage with a combined single limit, or the equivalent, of not less than \$2,000,000 for each occurrence of bodily injury or property damage, which shall include contractual liability coverage for the indemnity provided under this contract, the City, its officers, employees and agents are additional insured with respect to claims arising out of Orchard Heights's activities under this Agreement. Orchard Heights's insurance shall be primary without regard to any insurance or self-insurance coverage of the City. The City reserves the right to require periodic adjustment of insurance coverage based upon then current industry standards or statutory tort claim limits.

- 13.2 Workers Compensation Insurance.** If mandated by law, workers' compensation insurance in compliance with ORS 656.017, which requires subject employers to provide Oregon workers' compensation coverage for all their subject workers.
- 13.3 Change of Coverage; Notice; Certificates of Insurance.** There shall be no cancellation, material change, reduction of limits, or intent not to renew the insurance coverages without 30 days written notice from the Orchard Heights insurers to the City. As evidence of the insurance coverage required by this agreement, the Orchard Heights shall furnish certificates of insurance to the City of Salem
- 14. Rate of Pay; Indemnification.** If any project or any portion thereof is constructed by Orchard Heights, which meets the definitions of a "public work" under ORS 279C.800 and applicable administrative rules adopted by the Oregon Bureau of Labor and Industries, Orchard Heights and its contractor and all subcontractors shall pay as the minimum hourly rate of wage not less than the prevailing rate of wage and shall comply with all applicable laws, pursuant to the provisions of ORS Ch 279C, including but not limited to required disclosure of rates and fees in the advertisement for bids, the request for bids, the contract specifications, the accepted bid and elsewhere in the contracts between Orchard Heights and contractor and subcontractors. Orchard Heights shall indemnify, defend and hold the City, its officers, agents, and employees and affiliates, harmless from and against any and all claims, costs, expenses, losses, actions, or damages made or suffered by any person which results directly or indirectly from Orchard Heights contractor's or subcontractor's compliance or failure to comply with all laws applicable to the project, including but not limited to the prevailing wage rate laws. In the event any such action or claim is brought against the City, Orchard Heights shall, upon notice of the commencement thereof, defend the same at its sole cost and expense, promptly defend and thereafter satisfy any judgment adverse to the City or to the City and Orchard Heights, jointly, and reimburse the City for any loss, cost, damages, or expense (including legal fees) suffered or incurred by the City.
- 15. Term and Termination.** The term of this Agreement is for seven years and will automatically expire on June 30, 2018, but may be extended by agreement of both parties. Provided, however, this Agreement can be terminated at any time and for any reason by either party by giving six months (6) notice in writing.
- 16. Amendment.** This Agreement may not be modified or amended except by mutual agreement of the City and Orchard Heights. No modification or amendment of any provision of this Agreement shall be valid or binding unless the modification or amendment is in writing and signed by both parties.

17. **Waiver.** The terms of this Agreement shall not be waived except by written instrument. Any such waiver, if made, shall be effective only in the specific instance and for the specific purpose given, and shall be valid and binding only if it is signed by both the City and Orchard Heights. Failure by the City to enforce any right under this agreement shall not be deemed to be a waiver of that right or of any other right.

18. **Assignment.** Orchard Heights may not assign its rights under this Agreement without the prior written consent of the City, which shall be in the City's sole discretion. The City may freely assign its rights under this agreement.

19. **Notices.** Any notices sent to the City shall be mailed by first class mail, postage prepaid to:

Public Works Director
Public Works Department
555 Liberty Street SE, Room 325
Salem OR 97301

With a Copy to:

City Attorney
Legal Department
555 Liberty Street SE, Room 205
Salem OR 97301

Any notices sent to Orchard Heights shall be mailed by first class mail, postage prepaid to:

Orchard Heights Water Association
PO Box 5196
Salem OR 97304

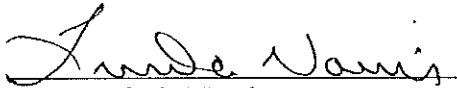
20. **No Third Party Beneficiaries.** Orchard Heights and the City are the only parties to this Agreement and are the only parties entitled to enforce its terms. Nothing in this Agreement gives, is intended to give, or shall be construed to give or provide, any benefit or right, whether directly, indirectly or otherwise, to third persons.

21. **No Agency.** Neither the City or Orchard Heights nor the officers, employees, or agents of the City or Orchard Heights are, or shall be deemed, agents of the other. Both the City and Orchard Heights shall be separately and exclusively responsible for acts, errors, and omissions of its own officers, employees, and agents except to the extent provided under the indemnity and insurance provisions of this Agreement.

22. **Compliance with All Laws.** The City and Orchard Heights will at all times comply with all applicable laws, ordinances, rules, regulations and executive orders of the federal, state and local government now existing or hereinafter in effect, which may in any manner affect the performance of the Agreement, including, without limitation, the provisions of ORS 279C.505, 279C.515, 279C.510, and 270C.530, which by this reference are made a part hereof.
23. **Entire Agreement.** This Agreement constitutes the entire agreement between the City and Orchard Heights, and supersedes any and all prior negotiations, discussions, agreements, and understandings between the City and Orchard Heights. There are no understandings, agreements or representations, oral or written, regarding this Agreement except as specified or referenced herein. Orchard Heights by the signature of its authorized representative below hereby acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms and conditions.
24. **Authority to Execute.** Each person executing this Agreement on behalf of the City and Orchard Heights, respectively, warrants his or her authority to do so.
25. **Rule of Construction.** Both the City and Orchard Heights acknowledge and affirm they are each represented by or have sought the advice of legal counsel in connection with this Agreement and the work contemplated hereby, and have read and understood and are fully informed of the contents of the Agreement and the legal consequences thereof, and that by the City and Orchard Heights signatures hereon, acknowledge and affirm that the terms of this Agreement shall not be construed against either the City or Orchard Heights as a drafter hereof.
26. **Governing Law; Interpretation; Venue.** The laws of Oregon shall govern this Agreement. Exclusive venue for litigation of any action arising under the Agreement shall be in the Circuit Court of the State of Oregon for Marion County. The City and Orchard Heights expressly waive any and all rights to maintain an action under the Agreement in any other venue and expressly consent that, upon motion by either the City or Orchard Heights, any case may be dismissed or its venue transferred, as appropriate, so as to effectuate the choice of venue in this paragraph.
27. **Severability.** If a court of competent jurisdiction holds any portion of this Agreement to be void or unenforceable as written, the City and Orchard Heights intend that (1) that portion of this Agreement be enforced to the extent permitted by law, and (2) the balance of this Agreement remain in full force and effect.

IN WITNESS WHEREOF, under the laws of the State of Oregon, the City and Orchard Heights have caused this Agreement to be executed in their respective names by their duly authorized representatives as of the dates set forth below.

CITY OF SALEM, OREGON



Name: Linda Norris

Title: City Manager

Date: 4/26/11

Orchard Heights Water Association Inc.



Name: Preston Van Meter

Title: President

Date: 4/29/2011