

SUBORDINATE INSTALLMENT PURCHASE CONTRACT

between the

CITY OF SAN JOSE

and the

CITY OF SAN JOSE FINANCING AUTHORITY

**RELATING TO CERTAIN
WASTEWATER SYSTEM AND TREATMENT PLANT PROJECTS**

Dated as of October 1, 2017

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SUBORDINATE INSTALLMENT PURCHASE CONTRACT

This Subordinate Installment Purchase Contract, dated as of October 1, 2017 (this “Installment Purchase Contract”), between the City of San José, a municipal corporation duly organized and existing under and by virtue of its charter and the Constitution of the State of California (the “City”), and the City of San José Financing Authority, a joint exercise of powers entity duly organized and existing under and by virtue of the laws of the State of California (the “Authority”);

WITNESSETH:

WHEREAS, the City is empowered by its charter to own, operate and maintain systems, plants, buildings, works and other facilities for the collection, treatment and disposal of sewage, waste and storm water, including sewage treatment and disposal plants and works and facilities in connection therewith; and

WHEREAS, pursuant to such authority, the City owns and operates a Wastewater System (as defined herein); and

WHEREAS, pursuant to such authority, on May 6, 1959, the City and the City of Santa Clara entered into that certain Agreement Between San José and Santa Clara Respecting Sewage Treatment Plant regarding the ownership, operation, maintenance and use of the Treatment Plant (as defined herein); and

WHEREAS, pursuant to such authority, the City has determined to finance and refinance the acquisition, construction and installation from time to time of certain improvements, additions, and betterments to, and extensions and replacements of, the Wastewater System and the Treatment Plant (collectively, the “Projects”); and

WHEREAS, the Authority is empowered by its Joint Exercise of Powers Agreement, dated December 8, 1992, by and between the City and the former Redevelopment Agency of the City of San José, to assist the City in its financing needs by financing the Projects and refunding any bonds, notes or other evidences of indebtedness of the Authority or the City issued or incurred for such purpose (the “Refunded Obligations”); and

WHEREAS, the Authority and the City have entered into a Credit Agreement (as defined herein) pursuant to which the Authority will issue Notes (as defined herein) from time to time in one or more series to finance the Projects and/or, subject to the terms of the Credit Agreement, refund Refunded Obligations; and

WHEREAS, the Authority has agreed to sell the Projects to the City and/or refinance the purchase price of Projects previously financed and/or refinanced with Refunded Obligations, and the City has agreed to purchase the Projects from the Authority and pay the refinanced purchase price of Projects previously financed and/or refinanced with Refunded Obligations, as provided herein; and

WHEREAS, the City has agreed to make installment payments to the Authority hereunder (the “Installment Payments”) to pay the purchase price of the Projects and refinance

the purchase price of Projects previously financed and/or refinanced with Refunded Obligations, together with interest thereon, and pay other amounts payable by the Authority under the Credit Agreement, as provided herein; and

WHEREAS, the City has agreed to designate the Installment Payments as Subordinate Obligations under the Master Resolution (as defined herein) and, as such, the Installment Payments shall be payable solely from, and secured by a pledge of and lien on, the Net System Revenues (as defined herein) as Subordinate Obligations under and as provided in the Master Resolution; and

WHEREAS, the City and the Authority hereby certify that all acts, conditions and things required by law to exist, to have happened and to have been performed precedent to and in connection with the execution and entering into of this Installment Purchase Contract do exist, have happened and have been performed in regular and due time, form and manner as required by law, and the parties hereto are now duly authorized to execute and enter into this Installment Purchase Contract;

NOW, THEREFORE, IN CONSIDERATION OF THE PREMISES AND OF THE MUTUAL AGREEMENTS AND COVENANTS CONTAINED HEREIN AND FOR OTHER VALUABLE CONSIDERATION, THE PARTIES HERETO DO HEREBY AGREE AS FOLLOWS:

ARTICLE I

DEFINITIONS

SECTION 1.01. Definitions. Unless the context otherwise requires, the terms defined in this section shall for all purposes hereof and of any amendment hereof and of any report or other document mentioned herein or therein have the meanings defined herein, the following definitions to be equally applicable to both the singular and plural forms of any of the terms defined herein.

Authority

“Authority” means the City of San José Financing Authority, a joint exercise of powers entity duly organized and existing under and by virtue of the laws of the State of California.

City

“City” means the City of San José, a municipal corporation, duly organized and existing under and by virtue of its charter and the Constitution of the State of California.

Code

“Code” means the Internal Revenue Code of 1986 and the regulations of the United States Department of the Treasury issued thereunder, and in this regard reference to any particular section of the Code shall include reference to all successor sections of the Code.

Credit Agreement

“Credit Agreement” means the Credit Agreement, dated as of October 1, 2017, among the Authority, the City and Wells Fargo Bank, National Association, as originally executed and as it may from time to time be amended.

Event of Default

“Event of Default” means an event defined as such in Section 5.01 hereof.

Installment Payments

“Installment Payments” means the payments to be made by the City to the Authority for the purchase of the Projects as set forth in Section 3.02 hereof.

Installment Purchase Contract

“Installment Purchase Contract” means this Subordinate Installment Purchase Contract, dated as of October 1, 2017, between the City and the Authority, as originally executed and as it may from time to time be amended.

Master Resolution

“Master Resolution” means Resolution No. _____, a Resolution of the City Council of the City of San José Providing for the Allocation of Wastewater System Revenues, the Pledge of Wastewater Net System Revenues and Establishing Covenants to Secure the Payment of Obligations Payable from Wastewater Net System Revenues, adopted on October __, 2017.

Net System Revenues

“Net System Revenues” shall have the meaning ascribed thereto in the Master Resolution.

New Projects

“New Projects” means the improvements, additions, and betterments to, and extensions and replacements of, the Wastewater System and the Treatment Plant originally financed with the proceeds of the Notes.

Notes

“Notes” shall have the meaning ascribed thereto in the Credit Agreement.

Prior Projects

“Prior Projects” means the improvements, additions, and betterments to, and extensions and replacements of, the Wastewater System and the Treatment Plant originally

financed or refinanced with the proceeds of any Refunded Obligations that are refunded with proceeds the Notes in accordance with the terms of the Credit Agreement.

Projects

“Projects” means the New Projects and the Prior Projects.

Tax Certificate

“Tax Certificate” means each Tax Certificate executed by the Authority and the City at the time of issuance of any Tax-Exempt Notes relating to, among other things, the requirements of Section 148 of the Code, as each is originally executed and as each may from time to time be amended or supplemented.

Tax-Exempt Notes

“Tax-Exempt Notes” means any Notes the interest on which is excluded from gross income for federal income tax purposes whether or not such interest is includable as an item of tax preference or otherwise includable directly or indirectly for purposes of calculating tax liabilities, including any alternative minimum tax or environmental tax under the Code.

Treatment Plant

“Treatment Plant” shall have the meaning ascribed thereto in the Master Resolution.

Wastewater System

“Wastewater System” shall have the meaning ascribed thereto in the Master Resolution.

ARTICLE II

ACQUISITION, CONSTRUCTION, SALE AND PURCHASE OF THE NEW PROJECTS; REFINANCING OF PURCHASE PRICE OF PRIOR PROJECTS

SECTION 2.01. Acquisition, Construction, Sale and Purchase of the New Projects; Refinancing of Purchase Price of Prior Projects. The Authority agrees to acquire and construct the New Projects and to sell the New Projects to the City, and the City agrees to purchase the New Projects from the Authority, all as provided herein. In order to implement this provision, the Authority hereby appoints the City as its agent for the purpose of such acquisition and construction, and the City hereby agrees to enter into such engineering, design and construction contracts and to execute such purchase orders as may be necessary, as agent for the Authority, to provide for the complete acquisition and construction of the New Projects, and the City hereby agrees that as such agent it will cause the acquisition and construction of the New Projects to be diligently completed. In addition, the Authority agrees to refinance any remaining amount of the purchase price due by the City for the acquisition and construction of the Prior Projects.

In the event the Authority fails to observe or perform any agreement, condition, covenant or term contained herein required to be observed or performed by it, the City may institute such action or proceeding against the Authority as the City may deem necessary or convenient to compel the observance or performance of such agreement, condition, covenant or term, or to recover damages for the nonobservance or nonperformance thereof. The City may, at its own cost and expense and in its own name or in the name of the Authority, prosecute or defend any action or proceeding or take any other action involving third persons which the City deems reasonably necessary in order to protect or secure its rights hereunder, and in such event the Authority agrees to cooperate fully with the City and to take all action necessary to effect the substitution of the City for the Authority in any action or proceeding if the City shall so request.

SECTION 2.02. Title to the Projects. Upon the acquisition or construction of each of the New Projects by the City, as agent for the Authority, all right, title and interest therein shall automatically vest in the City, which automatic vesting shall occur without further action by the Authority; provided, that the Authority shall, if requested by the City or if necessary to assure such automatic vesting of such right, title or interest, execute and deliver any and all documents required to assure such vesting. All right, title and interest in the Prior Projects is vested in the City.

ARTICLE III

INSTALLMENT PAYMENTS

SECTION 3.01. Purchase Price. The purchase price to be paid by the City hereunder to the Authority for the purchase of the New Projects and/or the refinancing of the purchase price of the Prior Projects is equal to the aggregate amount of the principal installments of the Installment Payments, payable in installments of principal together with interest thereon and any other amounts payable by the Authority under the Credit Agreement, all as provided in Section 3.02 hereof (subject to any right of prepayment provided in Section 3.03 hereof).

SECTION 3.02. Payment of the Installment Payments. The City shall, subject to any right of prepayment provided in Section 3.03 hereof, pay the Authority the purchase price of the Projects by paying, without any offset or deduction of any kind, the following amounts on the following dates: (i) the principal installments of the Installment Payments, which principal installments shall be paid in the amounts and on the dates that principal of the Notes becomes due and payable under the Notes and the Credit Agreement (whether due to maturity, prepayment or otherwise); (ii) the interest installments of the Installment Payments, which interest installments shall be paid in the amounts and on the dates that interest on the Notes becomes due and payable under the Notes and the Credit Agreement; and (iii) the additional installments of the Installment Payments, which additional installments shall be paid in the amounts and on the dates that any amounts (other than principal of or interest on the Notes) become due and payable by the Authority under the Credit Agreement or the Fee Letter Agreement (as defined in the Credit Agreement).

SECTION 3.03. Prepayment of the Installment Payments. The City may prepay the principal installments of the Installment Payments at the same times, in the same amounts and upon the same terms and conditions as the principal of the Notes may be prepaid under the Notes and the Credit Agreement.

Notwithstanding any such prepayment, the City shall not be relieved of its obligations hereunder until all Installment Payments shall have been fully paid.

SECTION 3.04. Designation of Installment Payments as Subordinate Obligations. The City hereby designates this Installment Purchase Contract as, and this Installment Purchase Contract constitutes, a Contract (as defined in the Master Resolution). The City hereby further designates the Installment Payments as, and the Installment Payments shall constitute, Subordinate Obligations (as defined in the Master Resolution) under the Master Resolution and, as such, this Installment Purchase Contract is a Subordinate Obligation Contract (as defined in the Master Resolution). The City and the Authority hereby agree that this Installment Purchase Contract and the Installment Payments shall be secured as, and shall have all rights and benefits afforded to, Subordinate Obligation Contracts and Subordinate Obligations, respectively, under and as provided in and subject to terms of the Master Resolution.

ARTICLE IV

COVENANTS OF THE CITY

SECTION 4.01. Compliance with Installment Purchase Contract and Master Resolution. The City will punctually pay the Installment Payments in strict conformity with the terms hereof, and will faithfully observe and perform all the agreements, conditions, covenants and terms contained herein and in the Master Resolution required to be observed and performed by it, and will not terminate this Installment Purchase Contract or the Master Resolution for any cause whatsoever, including, without limiting the generality of the foregoing, any acts or circumstances that may constitute failure of consideration, destruction of or damage to the Wastewater System or Treatment Plant, commercial frustration of purpose, any change in the tax or other laws of the United States of America or of the State of California or any political subdivision of either or any failure of the Authority to observe or perform any agreement, condition, covenant or term contained herein required to be observed and performed by it, whether express or implied. The City will, so long as any Installment Payments remain unpaid, apply the Net System Revenues as provided in the Master Resolution.

SECTION 4.02. Tax Covenants. The City will at all times do and perform all acts and things permitted by law which are necessary or desirable in order to assure that the interest on the Tax-Exempt Notes will not be included in the gross income of the owners of the Tax-Exempt Notes for federal income tax purposes under the Code and will be exempt from State of California personal income taxes, and will take no action that would result in such interest being so included or not being so exempt. Without limiting the foregoing, the City and the Authority will at all times comply with the requirements of each Tax Certificate executed in connection with the delivery of Tax-Exempt Notes. This covenant shall survive any defeasance or discharge of the Installment Payments pursuant to Article VI or any prepayment of principal installments of the Installment Payments pursuant to Article III.

SECTION 4.03. Protection of Security and Rights of Authority. The City will preserve and protect the security hereof and the rights of the Authority to the Installment Payments hereunder and will warrant and defend such rights against all claims and demands of all persons.

SECTION 4.04. Further Assurances. The City will adopt, deliver, execute and make any and all further assurances, instruments and resolutions as may be reasonably necessary or proper to carry out the intention or to facilitate the performance hereof and for the better assuring and confirming unto the Authority of the rights and benefits provided to it herein.

ARTICLE V

EVENTS OF DEFAULT AND REMEDIES OF THE AUTHORITY

SECTION 5.01. Events of Default. If one or more of the following Events of Default shall happen, that is to say --

(a) if default shall be made in the due and punctual payment of any Installment Payment when the same shall become due and payable;

(b) if default shall be made by the City in the performance of any of the other agreements or covenants contained herein required to be performed by it, and such default shall have continued for a period of thirty (30) days after the City shall have been given notice in writing of such default by the Authority;

(c) if the City shall file a petition or answer seeking arrangement or reorganization under the federal bankruptcy laws or any other applicable law of the United States of America or any state therein, or if a court of competent jurisdiction shall approve a petition filed with or without the consent of the City seeking arrangement or reorganization under the federal bankruptcy laws or any other applicable law of the United States of America or any state therein, or if under the provisions of any other law for the relief or aid of debtors any court of competent jurisdiction shall assume custody or control of the City or of the whole or any substantial part of its property; or

(d) if an event of default (as defined in the Credit Agreement) shall have occurred;

then and in each and every such case during the continuance of such Event of Default the Authority may, by notice in writing to the City, declare the principal amount of the unpaid Installment Payments and the accrued interest thereon to be due and payable immediately, and upon any such declaration the same shall become immediately due and payable, anything contained herein to the contrary notwithstanding; provided, that if at any time after the principal amount of the unpaid Installment Payments and the accrued interest thereon shall have been so declared due and payable and before any judgment or decree for the payment of the money thereby due shall have been obtained or entered the City shall deposit with the Authority a sum sufficient to pay the unpaid principal amount of the Installment Payments due prior to such declaration and the accrued interest thereon, and the reasonable expenses of the Authority, and any and all other defaults known to the Authority (other than in the payment of the principal amount of the unpaid Installment Payments and the interest thereon due and payable solely by reason of such declaration) shall have been made good or cured to the satisfaction of the Authority or provision deemed by the Authority to be adequate shall have been made therefor then and in every case the Authority, by written notice to the City, may rescind and annul such declaration and its consequences, except that no such rescission and annulment shall extend to or shall affect any subsequent default or shall impair or exhaust any right or power consequent thereon.

SECTION 5.02. Other Remedies of the Authority. The Authority shall have the right --

(a) by mandamus or other action or proceeding or suit at law or in equity to enforce its rights against the City or any councilmember, officer or employee thereof, and to compel the City or any such councilmember, officer or employee to perform and carry out its duties under agreements and covenants required to be performed by it or him or her contained herein;

(b) by suit in equity to enjoin any acts or things which are unlawful or violate the rights of the Authority; or

(c) by suit in equity upon the happening of an Event of Default to require the City and its councilmembers, officers and employees to account as the trustee of an express trust.

SECTION 5.03. Non-Waiver. Nothing in this article or in any other provision hereof shall affect or impair the obligation of the City, which is absolute and unconditional, to pay the Installment Payments to the Authority at their respective due dates or upon prepayment as provided herein, or shall affect or impair the right of the Authority, which is also absolute and unconditional, to institute suit to enforce such payment by virtue of the contract embodied herein.

A waiver of any default or breach of duty or contract by the Authority shall not affect any subsequent default or breach of duty or contract or impair any rights or remedies on any such subsequent default or breach of duty or contract, and no delay or omission by the Authority to exercise any right or remedy accruing upon any default or breach of duty or contract shall impair any such right or remedy or shall be construed to be a waiver of any such default or breach of duty or contract or an acquiescence therein, and every right or remedy conferred upon the Authority by applicable law or by this article may be enforced and exercised from time to time and as often as shall be deemed expedient by the Authority.

If any action, proceeding or suit to enforce any right or exercise any remedy is abandoned or determined adversely to the Authority, the City and the Authority shall be restored to their former positions, rights and remedies as if such action, proceeding or suit had not been brought or taken.

SECTION 5.04. Remedies Not Exclusive. No remedy herein conferred upon or reserved to the Authority is intended to be exclusive of any other remedy, and each such remedy shall be cumulative and shall be in addition to every other remedy given hereunder or now or hereafter existing in law or in equity or by statute or otherwise and may be exercised without exhausting and without regard to any other remedy conferred by applicable law.

SECTION 5.05. Application of Moneys Collected. Any amounts collected pursuant to action taken under this Article V shall be applied in accordance with the provisions of the Credit Agreement, and to the extent applied to the payment of amounts due on the Notes or other amounts payable by the Authority under the Credit Agreement shall be credited against the Installment Payments.

ARTICLE VI

DISCHARGE OF OBLIGATIONS

SECTION 6.01. Discharge of Obligations.

(a) If the City shall pay or cause to be paid all the Installment Payments at the times and in the manner provided herein resulting in the repayment of all amounts owing under the Notes and the Credit Agreement and the termination of the obligation of Wells Fargo Bank, National Association to make advances thereunder, then the right, title and interest of the Authority herein and the obligations of the City hereunder shall thereupon cease, terminate, become void and be completely discharged and satisfied, except as provided in Section 4.02.

(b) All or any portion of any unpaid principal installment of the Installment Payments, together with the accrued interest thereon, shall on the date of prepayment therefor be deemed to have been paid within the meaning of and with the effect expressed in subsection (a) of this section if the City makes payment of such unpaid principal installment and the interest and prepayment premium, if any, thereon in the manner provided herein.

ARTICLE VII

MISCELLANEOUS

SECTION 7.01. Liability of City Limited to Net System Revenues. Notwithstanding anything contained herein, the City shall not be required to advance any money derived from any source of income other than the Net System Revenues for the payment of the Installment Payments or for the performance of any agreements or covenants required to be performed by it contained herein; provided, that the City may advance money for any such purpose so long as such money is derived from a source legally available for such purpose and may be legally used by the City for such purpose.

The obligation of the City to make the Installment Payments is a special obligation of the City and is payable solely from the Net System Revenues as provided herein and the Master Resolution, and does not constitute a debt of the City or the State of California or of any political subdivision thereof within the meaning of any constitutional or statutory debt limitation or restriction, and does not constitute an obligation for which the City is obligated to levy or pledge any form of taxation or for which the City has levied or pledged any form of taxation.

SECTION 7.02. Benefits of Installment Purchase Contract Limited to Parties and Beneficiary. Except as provided in Sections 7.03 and 7.04, nothing contained herein, expressed or implied, is intended to give to any person other than the City, the Authority and their assigns any right, remedy or claim under or pursuant hereto, and any agreement or covenant required herein to be performed by or on behalf of the City or the Authority shall be for the sole and exclusive benefit of the City, the Authority and their assigns. The parties agree that Wells Fargo Bank, National Association, as lender under the Credit Agreement, shall be a third party beneficiary hereunder.

SECTION 7.03. Assignment. This Installment Purchase Contract and any rights hereunder may be assigned by the Authority, as a whole or in part, without the necessity of obtaining the prior consent of the City. The City acknowledges the assignment of this Installment Purchase Contract and the Installment Payments by the Authority to Wells Fargo Bank, National Association under the Credit Agreement and agrees to perform its obligations herein and therein.

SECTION 7.04. Successor is Deemed Included in all References to Predecessor. Whenever either the City or the Authority is named or referred to herein, such reference shall be deemed to include the successor to the powers, duties and functions that are presently vested in the City or the Authority, and all agreements and covenants required hereby to be performed by or on behalf of the City or the Authority shall bind and inure to the benefit of the respective successors thereof whether so expressed or not.

SECTION 7.05. Waiver of Personal Liability. No councilmember, officer or employee of the City shall be individually or personally liable for the payment of the Installment Payments, but nothing contained herein shall relieve any councilmember, officer or employee of the City from the performance of any official duty provided by any applicable provisions of law or hereby.

SECTION 7.06. Article and Section Headings, Gender and References. The headings or titles of the several articles and sections hereof and the table of contents appended hereto shall be solely for convenience of reference and shall not affect the meaning, convenience or effect hereof, and words of any gender shall be deemed and construed to include all genders. All references herein to “Articles,” “Sections” and other subdivisions or clauses are to the corresponding articles, sections, subdivisions or clauses hereof; and the words “hereby,” “herein,” “hereto,” “herewith,” “hereunder” and other words of similar import refer to this Installment Purchase Contract as a whole and not to any particular article, section, subdivision or clause hereof.

SECTION 7.07. Partial Invalidity. If any one or more of the agreements or covenants or portions thereof required hereby to be performed by or on the part of the City or the Authority shall be contrary to law, then such agreement or agreements, such covenant or covenants or such portions thereof shall be null and void and shall be deemed separable from the remaining agreements and covenants or portions thereof and shall in no way affect the validity hereof, and the City and the Authority hereby declare that they would have executed this Installment Purchase Contract and each and every other article, section, paragraph, subdivision, sentence, clause and phrase hereof irrespective of the fact that any one or more articles, sections, paragraphs, subdivisions, sentences, clauses or phrases hereof or the application thereof to any person or circumstance may be held to be unconstitutional, unenforceable or invalid.

SECTION 7.08. Net Contract. This Installment Purchase Contract shall be deemed and construed to be a net contract, and the City shall pay absolutely net during the term hereof the Installment Payments and all other payments required hereunder, free of any deductions and without abatement, diminution or set-off whatsoever.

SECTION 7.09. California Law. This Installment Purchase Contract shall be construed and governed in accordance with the laws of the State of California.

SECTION 7.10. Notices. All written notices to be given hereunder shall be given by mail to the party entitled thereto at its address set forth below, or at such other address as such party may provide to the other party in writing from time to time, namely:

If to the City:

City of San José – Finance Department
Attention: Debt Management
200 East Santa Clara Street, 13th Floor
San José, CA 95113

If to the Authority:

City of San José Financing Authority
Attention: Debt Management
200 East Santa Clara Street, 13th Floor
San José, CA 95113

SECTION 7.11. Effective Date. This Installment Purchase Contract shall become effective upon its execution and delivery.

SECTION 7.12. Amendments. Subject to the terms of the Credit Agreement, this Installment Purchase Contract may be amended, changed or modified by a written instrument signed on behalf of the Authority and the City by a duly authorized representative of the Authority and the City, respectively.

SECTION 7.13. Execution in Counterparts. This Installment Purchase Contract may be executed in several counterparts, each of which shall be deemed an original, and all of which shall constitute but one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Installment Purchase Contract by their officers thereunto duly authorized as of the day and year first written above.

CITY OF SAN JOSE

By _____
[Finance Director]

CITY OF SAN JOSE FINANCING AUTHORITY

By _____
[Treasurer]

