#### Interoffice Memorandum



May 18, 2020

TO:

Mayor Jerry L. Demings

and Board of County Commissioners

FROM:

Raymond E. Hanson, P.E., Director

**Utilities Department** 

SUBJECT:

**BCC AGENDA ITEM - Consent Agenda** 

June 2, 2020 BCC Meeting

Agreement for Establishing the Retail Rate for Reclaimed

Water for Flamingo Crossings West Contact Person: Andres Salcedo, P.E.

**Deputy Director, Utilities Department** 

407-254-9719

Flamingo Crossings, LLC and ACC OP DCP LLC (collectively, the "operator") desire to use County reclaimed water for irrigation using a six-inch reclaimed water meter. The current County-published Reclaimed Water Charge Schedule (the "schedule") provides reclaimed water rates for meters sized between 5/8 inches and three inches. This agreement establishes a retail rate for the operator's six-inch reclaimed water meter.

The operator agrees to pay a fixed monthly charge of \$441.65, equivalent to the current fixed monthly charge for a six-inch wholesale meter with an allowed monthly usage of up to 499,000 gallons and a volume charge of \$1.08 per 1,000 gallons of reclaimed water for use above the monthly allowance, equivalent to the current volume charge for use above the monthly allowance for a retail meter.

Effective each October 1, a three percent automatic annual increase (the "increase") will be applied to the fixed monthly charge and volume charge in effect immediately preceding the increase; however, this will be waived each year the Board repeals the increase for its rates, fees, and charges in the schedule. If the schedule is modified by the Board to include a rate for retail customers with a six-inch meter, the charges payable by the operator will automatically adjust to match the newly modified schedule.

Orange County Attorney's Office and Risk Management Division staff have reviewed the agreement and find it acceptable as to form. Orange County Utilities staff recommends approval.

**Action Requested:** 

Approval and execution of Agreement for Establishing the Retail Rate for Reclaimed Water for Flamingo Crossings West by and between Orange County, Flamingo Crossings, LLC, and ACC OP DCP LLC.

District 1.

BCC Mtg. Date: June 2, 2020

# AGREEMENT FOR ESTABLISHING THE RETAIL RATE FOR RECLAIMED WATER FOR FLAMINGO CROSSINGS WEST

THIS AGREEMENT FOR ESTABLISHING THE RETAIL RATE FOR RECLAIMED WATER FOR FLAMINGO CROSSINGS WEST (the "Agreement") is made and entered into as of the date of last execution below (the "Effective Date"), by and between ORANGE COUNTY (the "County"), a charter county and political subdivision of the state of Florida, whose address is 201 S. Rosalind Avenue, Orlando, Florida 32801, FLAMINGO CROSSINGS, LLC (the "Owner"), a Florida limited liability company, whose address is 1375 Buena Vista Drive, Lake Buena Vista, Florida 32830, and ACC OP DCP LLC (the "Lessee"), a Delaware limited liability company, whose address is 12700 Hill Country Boulevard, Suite T-200, Austin, Texas 78738. The Owner and the Lessee may be referred to in this Agreement collectively as the "Operator." The County, the Owner, and the Lessee may also be referred to in this Agreement individually as a "Party" or collectively as the "Parties."

#### **RECITALS**

WHEREAS, the County owns, operates and maintains water reclamation facilities (the "Facilities") which produce reclaimed water that may be used for productive and beneficial purposes in accordance with permits issued by the Florida Department of Environmental Protection; and

WHEREAS, the Property (as defined below) is located within the County's reclaimed water service territory and, therefore, the County is the appropriate provider of reclaimed water service; and

WHEREAS, the County publishes the Reclaimed Water Charge Schedule for reclaimed water meters sized between 5/8 inches and three inches, with the fixed monthly charges, allowed monthly usage, and volume charges for usage above allowed monthly usage collectively defined as the "Reclaimed Retail Rates"; and

WHEREAS, the Operator desires to use reclaimed water from the Facilities utilizing a six-inch reclaimed water meter (the "Meter Assembly") for irrigation on portions of the Owner's property leased by the Lessee and described in Exhibit "A," attached to and made a part of this Agreement by this reference (the "Property"); and

WHEREAS, the Owner shall be responsible for all costs and expenses associated with the Meter Assembly installation and any other costs required to connect to the Facilities; and

WHEREAS, the Parties desire to enter into this Agreement to establish a retail rate for the Meter Assembly serving the Property because the Reclaimed Water Charge Schedule does not include an established rate for reclaimed water service through a six-inch meter for non-wholesale customers as of the Effective Date.

**NOW, THEREFORE**, in consideration of the mutual covenants contained in this Agreement, and for other good and valuable consideration, the receipt of which is acknowledged by the Parties, the Parties agree as follows:

#### SECTION 1. RECITALS INCORPORATED.

All of the recitals set forth above are true and correct, and are incorporated in and made a part of this Agreement by this reference.

#### **SECTION 2. TERM OF THE AGREEMENT.**

The term of this Agreement begins on the Effective Date and continues for an initial term of 10 years from the Effective Date and will automatically be extended for successive one-year terms unless the County or the Operator provides written notice to all other Parties of its intent to terminate this Agreement at least one year prior to the end of the initial term or any successive term, or unless and until the Orange County Board of County Commissioners (the "Board") revises by resolution the County's Reclaimed Water Charge Schedule to include reclaimed water service through a six-inch meter for non-wholesale customers. During the term of the lease between the Owner and the Lessee, the aforesaid termination right of the Operator shall be exercisable by the Lessee alone (without requiring joinder of the Owner) and from and after expiration or earlier termination of the lease between the Owner and the Lessee, the aforesaid termination right of the Operator shall be exercisable by the Owner alone (without requiring joinder of the Lessee).

The County may terminate this Agreement and the provision of reclaimed water service to the Property as set forth herein due to the failure of the Operator to pay the County for reclaimed water used by the Operator in accordance with Section 3.

#### **SECTION 3. RATES AND PAYMENT.**

- a) The Operator will pay the fixed monthly charge, the allowed monthly usage, and the volume charges for usage above the allowed monthly usage set forth in this Agreement unless and until the Reclaimed Water Charge Schedule is modified by resolution of the Board to include a rate for non-wholesale customers with a six-inch meter, at which time the fixed monthly charge, the allowed monthly usage, and the volume charges for usage above the allowed monthly usage, if applicable, payable by the Operator will automatically adjust to match the newly modified Reclaimed Water Charge Schedule.
- i. As of the Effective Date, the Operator agrees to pay the following charges for the Meter Assembly serving the Property: (1) a fixed monthly charge of \$441.65, which is equivalent to the current fixed monthly charge for a six-inch wholesale meter and includes an allowed monthly usage of up to 499,000 gallons, and (2) a current volume charge for usage

above the monthly allowance of \$1.08 per 1,000 gallons of reclaimed water usage, which is equivalent to the current volume charges for usage above the allowed monthly usage for a retail meter. Effective October 1<sup>st</sup> of each year, an automatic annual increase of three percent will be applied to the fixed monthly charge and the volume charge for usage above the allowed monthly usage to the charges in effect immediately preceding the automatic annual increase. However, this automatic annual increase will be waived each year in which the Board repeals by resolution the annual automatic three percent increase for its rates, fees, and charges contained in the then current Reclaimed Water Charge Schedule.

b) The Operator agrees to pay monthly invoices generated by the County for reclaimed water used by the Operator. Said invoice will include the County's fixed monthly charge and the volume charge based upon and applied to the metered volume of reclaimed water used by the Operator on a monthly basis. The County may cease delivery of reclaimed water to the Operator if any invoice is not paid in full within 30 days of the date of the invoice. Reclaimed water service will be reinstated upon full payment of the invoice and any additional charges incurred. All County standard billing procedures and charges, as amended from time to time by the Board, apply. Payments must be made to the following address:

Orange County Utilities PO Box 628068 Orlando, FL 32862-8068

c) Notwithstanding anything contained in this Agreement to the contrary, in the event that the rates, fees or charges for the services and facilities of the County reclaimed water system are not paid when due (regardless of whether the Owner or Lessee is responsible for payment of utilities under the lease between the Owner and Lessee), any unpaid balance thereof and all interest accruing thereon shall be a lien on the Property. Such lien shall be superior and paramount to the interest on such Property of any owner, lessee, tenant, mortgagee, or other person except the lien of county taxes. In the event that any such rates, fees or charges are not paid when due, the unpaid balance thereof and all interest accrued thereon, together with attorney's fees and costs, may be recovered by the County in a civil action, and any such lien and accrued interest may be foreclosed or otherwise enforced by the County in a civil action or suit in equity.

#### **SECTION 4. NOTICES.**

Any notice required or allowed to be delivered hereunder must be in writing and will be deemed to be delivered when (a) hand-delivered to the official designated in this Section 4, or (b) received when such notice is sent by the United States mail, postage prepaid, certified mail, return receipt requested, all to be addressed to a Party at the address set forth opposite the Party's name below, or such other address as the Party shall have specified by written notice to the other Parties delivered in accordance therewith.

If to the County: Orange County Utilities Department

9150 Curry Ford Road

Orlando, Florida 32825-7600

Attn: Director

With copy to: Orange County Administrator's Office

Orange County Administration Building 201 South Rosalind Avenue, 5<sup>th</sup> Floor

Orlando, Florida 32801-3527

If to the Owner: Flamingo Crossings, LLC

215 Celebration Place, 5<sup>th</sup> Floor Celebration, Florida 34747-5400

If by Mail: P.O. Box 10321

Lake Buena Vista, FL 32830-0321

Attn: Real Estate Manager

With copy to: Walt Disney World Resort – Legal Department

P.O. Box 10000

Lake Buena Vista, Florida 32830-1000 Attn: General Counsel – Real Estate

If to the Lessee: ACC OP DCP LLC

c/o American Campus Communities

12700 Hill Country Boulevard

Suite T-200

Austin, Texas 78738-6307 Attn: Chief Investment Officer

With copy to: ACC OP DCP LLC

c/o American Campus Communities 12700 Hill Country Boulevard

Suite T-200

Austin, Texas 78738-6307 Attn: General Counsel

#### SECTION 5. DISCLAIMER OF THIRD PARTY BENEFICIARIES.

This Agreement is solely for the benefit of the formal Parties hereto, and no right or cause of action shall accrue upon or by reason hereof, to or for the benefit of any third party not a formal Party hereto.

#### **SECTION 6. SEVERABILITY.**

If any part of this Agreement is found invalid or unenforceable by any court, such invalidity or unenforceability will not affect the other parts of this Agreement if the rights and obligations of the Parties and if the intentions of the Parties can continue to be effective. To that end, this Agreement is declared severable.

#### **SECTION 7. ASSIGNMENT.**

The Operator's right to sell or transfer (i) the Property, (ii) any portion of the Owner's interest in the Property, or (iii) the Lessee's interest in the Property, will not be restricted by this Agreement. The Party selling or transferring (the "Transferring Party") its interest in the Property (the "Transferred Interest") shall provide written notice to the County within 30 days following such sale or transfer. At the County's request, the successor party(ies) (the "Successor") shall execute an acknowledgement and agreement whereby the Successor acknowledges the existence of and agrees to be bound by the terms of this Agreement (the "Acknowledgement"). Such Acknowledgement must be delivered to the County within 30 days after the County's request. Upon delivery by the Successor of the executed Acknowledgement, the Transferring Party shall be released of any and all claims, liability, or obligations under the terms of this Agreement related to the Transferred Interest and arising from and after the date of such sale or transfer. If the Successor does not deliver the executed Acknowledgement to the County binding the successor party to the terms of this Agreement as specified above, the County may terminate this Agreement.

#### SECTION 8. TERMINATION OR EXPIRATION OF LEASE.

The Owner will assume all the obligations and responsibilities of Lessee upon the expiration or termination of the lease between Owner and Lessee.

#### SECTION 9. NON-WAIVER.

The failure of any Party to insist upon the other Parties' compliance with its obligations under this Agreement in any one or more instances shall not operate to release all other Parties from its duties to comply with such obligations in all other instances.

#### **SECTION 10. INDEMNIFICATION.**

To the fullest extent permitted by law, the Operator assumes liability for, and will indemnify, defend and hold harmless the County and its respective officials, officers, employees, and agents from and against all liability (including negligence and strict liability), claims, suits, actions, and losses for personal injury, property damage, or financial loss including attorneys' fees and costs (as specified in Section 13 below) arising at any time from any aspect of this Agreement, other than claims and losses arising from the negligence of the County, its employees, or agents. Nothing contained herein shall constitute a waiver of the County's sovereign immunity or the provisions of Section 768.28, Florida Statutes.

#### **SECTION 11. LIMITATION OF LIABILITY.**

Notwithstanding any other provision of this Agreement, in no event shall any Party have liability to the other Parties under this Agreement, whether based in contract, in tort, or otherwise, for any special, incidental, indirect, exemplary, or consequential damages.

#### **SECTION 12. SOVEREIGN IMMUNITY.**

The County does not waive and retains all defenses and protections provided to it under Florida and other applicable law, including without limitation, the defense of Sovereign Immunity as currently set forth in Section 768.28, Florida Statutes, for tort actions brought against the County and such immunity shall be applicable to any claim or action brought under this Agreement even if said claim or action sounds in contract rather than in tort.

#### **SECTION 13. ATTORNEY'S FEES AND COSTS.**

If any Party files suit or brings a judicial action or proceeding against the other Parties to recover any sum due hereunder or for default or breach of any of the covenants, terms or conditions contained in this Agreement, each Party will be responsible for its costs, fees and expenses incurred (including the fees and expenses of attorneys and paraprofessionals) in connection with such suit, action, or proceeding (whether or not such costs, fees, and expenses are taxable to the other Parties as such by any law) through any and all final appeals arising out of such suit, action, or proceeding.

#### **SECTION 14. GOVERNING LAW.**

The Parties agree that the Parties entered into this Agreement in the state of Florida. This Agreement and its provisions are to be construed, controlled, and interpreted according to the laws of the state of Florida, without giving effect to any choice of law or rules thereof which may direct the application of laws of another jurisdiction.

#### **SECTION 15. JURISDICTION.**

Any legal proceeding of any nature brought by any Party against the other Parties to enforce any right or obligation under this Agreement, or arising out of any matter pertaining to this Agreement, must be exclusively submitted for trial before the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida; or, if the Circuit Court does not have jurisdiction, then before the United States District Court for the Middle District of Florida (Orlando Division); or if neither of such courts shall have jurisdiction, then before any other court sitting in Orange County, Florida, having subject matter jurisdiction. The Parties consent and submit to the exclusive jurisdiction of any such court and agree to accept service of process outside the State of Florida in any matter to be submitted to any such court pursuant to this Agreement and expressly waive all rights to trial by jury for any matters arising under this Agreement.

#### **SECTION 16. HEADINGS.**

The headings or captions of sections and descriptive headings in this Agreement are inserted for convenience only, and will not affect the construction or interpretation of this Agreement.

#### **SECTION 17. ENTIRE AGREEMENT.**

This instrument constitutes the entire Agreement and understanding between the Parties and shall supersede and replace any and all prior or contemporaneous representations, negotiations, statements, understandings, or agreements between the Parties, whether verbal or written, relating to the matters set forth herein. The Parties fully understand the terms and conditions of this Agreement, have entered into this Agreement voluntarily, and have received or had the opportunity to receive independent advice and legal counsel.

#### **SECTION 18. MODIFICATION.**

Any and all modifications to the provisions herein shall be by mutual agreement of the Parties, in writing, and executed by the Parties thereto.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties hereto have caused these presents to be executed as of the dates indicated below by their duly authorized representatives.



ORANGE COUNTY, FLORIDA
By: Board of County Commissioners

Jerry L. Demings
Orange County Mayor

Date: **JUN 0** 2 2020

ATTEST: Phil Diamond, CPA, County Comptroller As Clerk of the Board of County Commissioners

By:	Katil fried	
	Denuty Clerk	

Print Name: Katie Smith

## OWNER: Flamingo Crossings, LLC

	By: Walt Disney Imagineering Research & Development, Inc., a Delaware limited liability company, its Manager
	Print Name: Page P. Piecce
	Title: Vice President
	Date: 4/14/2020
Signed, sealed, and delivered in our presence as witnesses:	
Signature:	
Print Name: BRIAN BOWERS	
Signature: Dynale Fluore	
Print Name: Bandi Ferrone	
STATE OF Florida COUNTY OF Ilange	
Development, Inc., a Delaware limited liability co LLC, a Florida limited liability company, on bel	day of , 2020, by of Walt Disney Imagineering Research & ompany, the Manager of Flamingo Crossings,
known to me or [] has producedidentification.	as
(Notary Seal)	veli tenone y Public
Total y Fubile State of Florida	Printed or Stamped
Brandi Ferrone My Commission GG 162103 Expires 03/14/2022 My Commiss	ion Expires: <u>3/14/2022</u>

LESSEE: ACC OP DCP LLC, a Delaware limited liability company

By: American Campus Communities Operating Partnership LP, a Maryland limited partnership, its Managing Member

	Print Name: William Talbot
	Title: Vice President
	Date: April 22, 2020
Signed, sealed, and delivered in our presence as witnesses:	
Signature: Husull Uts Clll	
Print Name: Lisa Mutschley	
Signature: BUUDE MUCHEACH	
Print Name: SHANNON MACCALANT	by
presence or [] online notarization, this a Nilliam Talbet as Vice President Partnership LP, a Maryland limited partnership, Delaware limited liability company, on behalf of me or [] has produced identification.	of American Campus Communities Operating the Managing Member of ACC OP DCP LLC, a f said entities, who [X] is personally known to as
(Notary Seal) Kara	ary Public
KAREN L WILSON Notary Public, State of Texas Comm. Expires 03-19-2021	ne Printed or Stamped
Notary ID 12935277-9 My Commi	ission Expires: March 19, 2021

## **EXHIBIT "A"**

Owner's Property

### SKETCH OF DESCRIPTION

SECTIONS 21 AND 28, TOWNSHIP 24 SOUTH, RANGE 27 EAST ORANGE COUNTY, FLORIDA

PROJECT NAME: FLAMINGO CROSSINGS LLC HOUSING-WEST SITE WORK ONLY BUILDING DEPARTMENT PERMIT NUMBER: B18905812

#### DESCRIPTION

That part of Parcel 1 as described in the Special Worronty Deed recorded in Official Records Book 10274, Page 4901 of the Public Records of Oronge County Florida, and being more porticularly described as follows:

Commence of the Southwest corner of the Southeast 1/4 of Section 21, Township 24 South, Range 27 East, Orange County, Florida; thence North 89 degrees 58 minutes 51 seconds West 39.71 feet along the South boundary of the Southwest 1/4 of said Section 21 to a point on the East boundary of said Parcel 1; thence along said East boundary the following four (4) courses and distances: North 89 degrees 58 minutes 51 seconds West 261.02 feet; thence North 00 degrees 11 minutes 15 seconds East 358.93 feet; thence North 68 degrees 34 minutes 31 seconds West 44.23 feet; thence South 52 degrees 06 minutes 19 seconds West 351.54 feet to the POINT OF BEGINNING; thence South 40 degrees 06 minutes 17 seconds East 208.02 feet along said East boundary of Parcel 1 to a point on the South boundary of the Southwest 1/4 of said Section 21; thence continue North 89 degrees 58 minutes 51 seconds West 179.07 feet along said South boundary to the Northwest corner of the East 1/2 of the Northwest 1/4 of the Northwest 1/4 of Section 28, Township 24 South, Range 27 East, Orange County, Florida; thence South 00 degrees 18 minutes 44 seconds West 1325.20 feet along the East boundary of the West 1/2 of the Northwest 1/4 of soid Section 28 to a point on the South boundary of the Northwest 1/4 of the Northwest 1/4 of soid Section 28; thence North 89 degrees 50 minutes 09 seconds West 1988.94 feet along soid Northeast 1/4 of the Northwest 1/4 of said Section 28; thence North 89 degrees 50 minutes 09 seconds West 1988.94 feet along soid South boundary and the South boundary of the Northwest 1/4 of the Northwest 1/4 of soid Section 28 to a point on the West boundary of the Northwest 1/4 of soid Section 28; thence North 00 degrees 20 minutes 07 seconds East 1320.16 feet along soid West boundary to the Southwest Corner of soid Section 21; thence North 00 degrees 46 minutes 30 seconds East feet olong soid West boundary to the Southwest Corner of soid Section 21; thence North 00 degrees 46 minutes 30 seconds East 1029.90 feet olong the West boundary of the Southwest 1/4 of the Southwest 1/4 of soid Section 21 to a point on the South right of way line of Western Way as recorded in Document Number 20190189218 of the Public Records of Orange County, Florida; thence South 65 degrees 54 minutes 15 seconds East 142.83 feet along said South right of way line to the beginning of a non-tangent curve concave Easterly and having a radius of 326.00 feet; thence leaving said South right of way line from a tangent bearing of Sauth 22 degrees 10 minutes 24 seconds West run Southerly 114.49 feet along the arc of said curve through a central angle of 20 degrees 07 minutes 19 seconds to the end of said curve and the beginning of a reverse curve concave Westerly and having a radius of 546.00 feet and a central angle of 07 degrees 56 minutes 06 seconds; thence run Southerly 75.62 feet along the arc of said curve to the end of said curve; thence South 65 degrees 57 minutes 18 seconds East 371.46 feet; thence South 69 degrees 54 minutes 53 seconds East 378.12 feet; thence South 89 degrees 26 minutes 54 seconds East 285.22 feet; thence North 48 degrees 38 minutes 14 seconds East 63.19 feet; thence North 06 degrees 30 minutes 33 seconds East 80.64 feet to a point on said South right of way line and being a point on a non-tangent curve concove Northerly and having a radius of 2127.32 feet; thence from a tangent bearing of South 82 degrees 50 minutes 21 seconds East run Easterly 522.14 feet along the arc of said curve and said South right of way line through a central angle of 14 degrees 03 minutes 47 seconds to the end of said curve; thence North 89 degrees 56 minutes 24 seconds East 29.49 feet along said South right of way line to a point on said East boundary of Parcel 1; thence south 34 degrees 19 minutes 16 seconds (4) courses and distances: South 46 degrees 15 minutes 21 seconds East 65.69 feet; thence South 34 degrees 19 minutes 16 seconds East 120.76 feet; thence South 32 degrees 10 minutes 23 seconds East 271.63 feet; thence South 40 degrees 06 minutes 17 seconds East 115.45 feet to the POINT OF BEGINNING.

CONTAINING 88.043 ocres (3835130 square feet) more or less.

#### NOTES

- 1. THIS IS NOT A SURVEY.

- THIS IS NOT A SURVEY.
   This Plat represents a Sketch of the
   Description prepared by JONES, WOOD and GENTRY, INC. per client's instruction and does not indicate ownership.

   Bearings shown hereon are based on the South boundary of the Southwest 1/4 of Section 21, Township 24 South, Range 27 East, Orange County, Florida, having an assumed bearing of North 89 degrees 58 minutes 51 seconds West.

IT IS CERTIFIED THAT THE SKETCH REPRESENTED HEREON WAS MADE UNDER MY RESPONSIBLE HEREON WAS MADE UNDER MY RESPONSIBLE
CHARGE AND MEETS THE STANDARDS OF PRACTICE
SET FORTH BY THE FLORIDA BOARD OF PROFESSIONAL
SURVEYORS AND MAPPERS IN RULE 5J-17,
FLORIDA ADMINISTRATIVE CODE, PURSUANT TO
CHAPTER 472 FLORIDA STATUTES, UNLESS IT BEARS SIGNATURE AND THE ORIGINAL RAISED A FLORIDA LICENSED SURVEYOR AND MAPPER THIS DRAWING, SKETCH, PLAT OR MAP/REPORT IS FOR INFORMATIONAL PURPOSES ONLY AND IS NOT VALID.

an decime bearing or therein do degree do immedia or dear		
FOR:	FLAMINGO	CROSSINGS, LLC
DATE:_	05-13-19	DRAWN BY: AA
NOT VALID WITHOUT SIGNATURE AND THE ORIGINAL RAISED SEAL OF A FLORIDA LICENSED SURVEYOR AND MAPPER		
DAN	EL E. GENTRY	JR., Florida Registration Number 5047

JONES, WOOD & GENTRY, INC.

PROFESSIONAL SURVEYORS AND MAPPERS -- LB1

2600 EAST ROBINSON STREET ORLANDO, FLORIDA, 32803 407-898-7780

JOB NO. 29177 Shed 29177 WEST LEASE SOD R2.DWG Sheet 1 of 2 Sheets

