

ORDINANCE 2012-55

AN ORDINANCE OF THE TOWN OF MALABAR, BREVARD COUNTY, FLORIDA GRANTING TO THE CITY OF PALM BAY, ITS SUCCESSORS AND ASSIGNS, A WATER AND SEWER UTILITY FRANCHISE TO USE THE PUBLIC PLACES OF THE TOWN OF MALABAR; PROVIDING AUTHORITY; SERVICE AREA; FRANCHISE GRANT; SCOPE OF GRANTS; EXCLUSIVITY; IMPOSING PROVISIONS AND CONDITIONS RELATING THERETO; PROVIDING FOR MONTHLY PAYMENTS TO THE TOWN OF MALABAR; PROVIDING THAT THE GRANTOR SHALL NOT BE LIABLE FOR CERTAIN ACCIDENTS AND DAMAGES; PROVIDING THE FRANCHISEE'S RATE; SPECIFYING THE CONSIDERATION FOR THE FRANCHISE; PROVIDING FOR TERMINATION OF THE FRANCHISE AGREEMENT; PROVIDING FOR AN EXAMINATION OF THE FRANCHISEE'S RECORDS; PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town Council of the Town of Malabar, Florida recognizes that the Town of Malabar and its citizens need and desire the continued benefits of water and sewer service; and

WHEREAS, the City of Palm Bay operates a public utility which has the demonstrated ability to supply such services; and

WHEREAS, the City of Palm Bay and the Town of Malabar desire to enter into a Franchise Agreement providing for the payment of fees to the Town of Malabar in exchange for the nonexclusive right and privilege of providing water and sewer services, and

WHEREAS, the Town Council of the Town of Malabar deems it to be in the best interest of the Town of Malabar and its citizens to enter into the Franchise Agreement;

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF MALABAR, FLORIDA:

Section 1. This Ordinance is enacted pursuant to the provisions of Chapter 166, Florida Statutes, and other applicable provisions of law. Nothing herein is intended to conflict with the provisions of the Agreement of Purchase and Sale of Water and Wastewater System; Grant of Exclusive City Services Easement; and Bill of Sale (collectively the "Settlement Agreement") executed between the Town of Malabar and the City of Palm Bay dated _____, 2012. Should there be a conflict between this Ordinance and the Settlement Agreement, the provisions of the Settlement Agreement shall control.

Section 2. There is hereby granted to the City of Palm Bay (hereinafter called the "Grantee"), for the period of ten (10) years from the effective date hereof, the nonexclusive right, privilege and franchise (hereinafter called "franchise") to occupy, to construct, operate and maintain in, under, upon, along, over and across the present and future roads, streets, alleys, bridges, easements, rights-of-way and other public places (hereinafter called "public rights-of-way") throughout all of the incorporated areas, as such incorporated areas may be constituted from time to time, of the Town of Malabar, Florida, and its successors (hereinafter called the "Grantor") without limitation and all other facilities installed in conjunction with or ancillary to all of the Grantee's operations (hereinafter called "facilities"), for the purpose of supplying water and sewer services to the Grantor.

Section 3. The facilities of the Grantee shall be installed, located or relocated so as to not unreasonably interfere with traffic over the public rights-of-way or with reasonable ingress and egress to abutting property. It is the intent of the foregoing provision that all lanes of travel shall remain accessible for use by vehicular traffic. To avoid conflicts with traffic, the location and relocation of all facilities shall be made as representatives of the Grantor may prescribe in accordance with the Grantor's reasonable rules and regulations, as revised, repealed or

promulgated from time to time, with reference to the placing and maintaining in, under, upon, along, over and across said public rights-of-way; provided, however, that such rules or regulations (a) shall not prohibit the exercise of the Grantee's right to use said public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic, (b) shall not unreasonably interfere with the Grantee's ability to furnish reasonably sufficient, adequate and efficient water and sewer service to all of its customers, and (c) shall not require the relocation of any of the Grantee's facilities installed before or after the effective date hereof in public rights-of-way unless or until widening or other work changing the configuration of the paved, or if the public right-of-way is unpaved, on the traveled portion of any public right-of-way used by motor vehicles causes such installed facilities to unreasonably interfere with motor vehicular traffic. When any portion of a public right-of-way is excavated by the Grantee in the location or relocation of any of its facilities, the portion of the public right-of-way so excavated shall within a reasonable time be replaced by the Grantee at its expense and in as good condition as it was at the time of such excavation.

Section 4. The Grantor shall in no way be liable or responsible for any accident, personal injury, property damage or any claim or damage that may occur in the construction, installation, operation, removal, repair, relocation, or maintenance by the Grantee its employees, agents, contractors, subcontractors, sub-lessees or licensees, in connection with or relation to its facilities hereunder. The acceptance of the franchise granted pursuant to this Franchise Agreement by the Grantee shall be deemed an agreement on the part of the Grantee to indemnify the Grantor, its officials, employees, and agents, and hold it harmless against any and all liability, loss, cost, damage or expense which may accrue to the Grantor by reason of the negligence, default or misconduct of the Grantee or other third party arising from the construction, installation, operation, removal, repair, or maintenance of its facilities hereunder. The Grantor agrees that neither it nor its officers, employees, or agents, all in their official capacity, shall be indemnified to the percentage of its or their fault in an accident or other occurrence that Grantor or its officers, employees, agents, or volunteers, all in their official capacity, is responsible for in any incident for damages or injuries (including but not limited to injury or death) arising from the gross negligence and wanton, willful, and intentional misconduct of the Grantor or its officers, employees, agent, or volunteers. For an additional Ten Dollars (\$10.00) paid to the Grantee, and for other good and valuable consideration, the receipt of which is hereby acknowledged by the Grantee, the Grantee agrees that it has received sufficient consideration for its agreement to indemnify the Grantor as set forth above.

Section 5. As a consideration for this franchise, the Grantee shall pay to the Grantor, commencing 30 days after the effective date hereof, and each month thereafter for the remainder of the term of this franchise, an amount which will equal 6% (six percent) of the Grantee's billed revenues (which also include connection/disconnection charges, impact fees, readiness-to-serve charges, demand charges, meter charges, and the like), less actual write-offs, from the sale of water to residential, commercial and industrial customers within the incorporated areas of the Grantor for the monthly billing period.

Section 6. Failure on the part of the Grantee to comply in any substantial respect with any of the provisions of this franchise shall be grounds for forfeiture, but no such forfeiture shall take effect if the reasonableness or propriety thereof is protested by the Grantee until there is final determination (after the expiration or exhaustion of all rights of appeal) by a court of competent jurisdiction that the Grantee has failed to comply in a substantial respect with any of the provisions of this franchise, and the Grantee shall have six months after such final determination to make good the default before a forfeiture shall result with the right of the Grantor at its discretion to grant such additional time to the Grantee for compliance as necessities in the case require. Such final determination by a court of competent jurisdiction, including any final appellate determination or ruling, shall allow Grantor to proceed with its choice of remedies, provided, however, that the Grantor may, in its discretion, grant such

additional time to the Grantee for compliance as the Grantor determines are in the best interests of Grantor and Grantor's citizens. Non-substantial or non-material defaults or failures by the Grantee shall be remediable pursuant to any available legal remedies.

Section 7. Failure on the part of the Grantor to comply in substantial respect with any of the provisions of this ordinance, including but not limited to: (a) denying the Grantee use of public rights-of-way for reasons other than unreasonable interference with motor vehicular traffic; (b) imposing conditions for use of public rights-of-way contrary to Florida law or the terms and conditions of this franchise; (c) unreasonable delay in issuing the Grantee a use permit, if any, to construct its facilities in public rights-of-way, shall constitute breach of this franchise and entitle the Grantee to withhold all or part of the payments provided for in Section 5 hereof until such time as a use permit is issued or a court of competent jurisdiction has reached a final determination in the matter. The Grantor recognizes and agrees that nothing in this franchise agreement constitutes or shall be deemed to constitute a waiver of the Grantee's delegated sovereign right of condemnation and that the Grantee, in its sole discretion, may exercise such right.

Section 8. Service Rules and Regulations. Grantee is duly empowered to establish, amend and enforce Service Rules and Regulations for its operations to the extent that they do not conflict with this Ordinance or the Settlement Agreement, without prior approval of the Grantor provided:

- a. They have been filed with the Town Administrator of the Grantor, and
- b. They are not unjust, inequitable, or discriminatory.

Nothing in this Section prohibits the Grantor from challenging the Service Rules and Regulations on the basis of unreasonableness, discrimination or inconsistency with this agreement.

Section 9. Work in Public Areas. a. All work performed in Public Areas by Grantee shall be done in a workmanlike manner, and within reasonable times, in accordance with the ordinances, rules or other policies of the Grantor.

b. If the Grantor deems it necessary or advisable to connect fire hydrants or other devices to combat fire, no charge shall be made to the Grantor or the respective fire department for the connection. This does not prohibit Grantee or any governmental entity from charging a private developer for such cost.

c. Cost of removing or relocating of lines or facilities from the Public Areas at the request of the Grantor shall be borne by Grantee, unless otherwise agreed by the Grantor and Grantee. This does not prohibit Grantee, or any governmental entity from charging a private developer for such cost.

Section 9. Ownership of Lines and Equipment. a. All water supply facilities used, useful or held for use in connection with supply of water service under the terms of this franchise and installed and furnished shall remain the sole property of Grantee.

b. No person or entity shall have the right to connect to the facilities or to obtain any water services furnished by Grantee, except with the consent of and upon full compliance with the Service rules and Regulations of Grantee and upon payment of any contribution in aid of construction, connecting charges, fees or rates which may be established and required. No waiver of rates or charges may be granted by Grantee where to do so would result in discriminatory rates or charges.

Section 10. Assignment. This franchise shall not be assigned or transferred by Grantee, without first obtaining the written consent of the Grantor. Consent shall be granted only upon a showing that it is in the best interests of the ratepayers and the residents of the Service Area, and that the assignee is fully capable of and willing to perform fully and in a timely manner, all obligation contained in this agreement. The Grantor shall act upon a written application under this paragraph within 120 days after it is filed by Grantee and the proposed assignee.

Section 11. Grantor Actions. The Grantor agrees to adopt or amend all legislation and to take all actions reasonable and necessary for the protection and enforcement of Grantee's rights under this agreement.

Section 12. Compliance with Other Law; Plans; Permits. a. Grantee will conduct its operations in such a manner as to comply with any local, state or federal laws, rules and regulations which may apply to its business.

b. Grantee will submit all plans for future installations to the Grantor.

c. Grantee will obtain any permits required by the Grantor and will be responsible for having all work performed by duly licensed persons or entities.

d. The Grantor shall have the right to inspect the work or the facilities in their respective Service Areas to see that they are constructed according to applicable plans, specifications and requirements.

Section 13. Reservation of Rights. Except as otherwise set forth in this agreement, the Grantor reserves all other rights granted to them by Florida law.

Section 14. Failure to Comply. Failure on the part of Grantee to comply in any material respect with the provisions of the franchise shall be grounds for forfeiture of the grants contained herein. However, no such forfeiture shall be exercised until written notice of such failure to comply has been given. Upon receipt of such notice, Grantee shall have 90 days within which to comply or show cause for its failure to do so.

Section 15. Purchase of Property. Grantee hereby grants to the Grantor the right of first refusal prior to any sale of the assets of Grantee within the Service Area to any other person or entity. In the event of a proposed sale Grantee shall offer the assets to the Grantor on the same terms and conditions as contained in the proposed sale, and the Grantor shall have 90 days in which to exercise the right of first refusal.

Section 16. Commitment to Provide Service. Grantee agrees that it will use its best efforts, skill and experience to provide first-class central water supply and distribution and wastewater service to the Service Area described herein.

Section 17. That the Grantor and Grantee agree that the Franchise Agreement created by this ordinance and Grantee's acceptance hereof, shall terminate by its own terms at 12:01 a.m. ten (10) years after the effective date of the Franchise Agreement.

Section 18. The Grantor may, upon reasonable notice and within 90 days after each anniversary date of this franchise, at the Grantor's expense, examine the records of the Grantee relating to the calculation of the franchise payment for the year preceding such anniversary date. Such examination shall be during normal business hours at the Grantee's office where such records are maintained.

Section 19. The provisions of this ordinance are interdependent upon one another, and if any of the provisions of this ordinance are found or adjudged to be invalid, illegal, void or of no effect, the entire ordinance shall be null and void and of no force or effect.

Section 20. As a condition precedent to the taking effect of this ordinance, the Grantee shall file its acceptance hereof with the Grantor's Clerk within 30 days of adoption of this ordinance. The effective date of this ordinance shall be the date upon which the Grantee files such acceptance.

The foregoing Ordinance was moved for adoption by Council Member Rivet. The motion was seconded by Council Member Beatty and, upon being put to a vote, the vote was as follows:

Council Member Carl Beatty	Aye
Council Member David White	Excused
Council Member Steven (Steve) Rivet	Aye
Council Member Jeffrey (Jeff) McKnight	Excused
Council Member Marisa Acquaviva	Aye

Passed and adopted by the Town Council, Town of Malabar, Brevard County, Florida this 20th day of August, 2012.

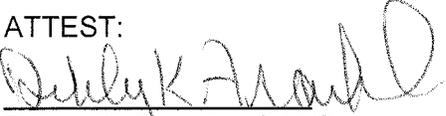
BY:

TOWN OF MALABAR


 Mayor Phillip R. Crews
 Council Chair

First Reading: 08/06/2012
Second Reading: 08/20/2012

ATTEST:


 Debby K. Franklin, C.M.C.
 Town Clerk/Treasurer

(seal)

APPROVED as to form and content:

Karl W. Bohne
 Karl W. Bohne, Jr.
 Town Attorney