

RESOLUTION NO. 07-08

A RESOLUTION OF THE CITY COUNCIL OF MARCO ISLAND, FLORIDA, RELATING TO THE CITY'S SEPTIC TANK REPLACEMENT PROGRAM; APPROVING THE FORM OF A DEFERRED PAYMENT AGREEMENT; PROVIDING FOR CERTAIN EXTRAORDINARY PAYMENT ALTERNATIVES FOR PROPERTY OWNERS SUBJECT TO ASSESSMENTS FOR WASTEWATER CAPACITY IMPROVEMENTS AND WASTEWATER TREATMENT COLLECTION IMPROVEMENTS; AND PROVIDING AN EFFECTIVE DATE.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF MARCO ISLAND, FLORIDA, AS FOLLOWS:

SECTION 1. AUTHORITY. This resolution is adopted pursuant to Article VIII of the State Constitution and Chapter 166 and Chapter 180, Florida Statutes and other applicable provisions of law which provide that municipalities shall have the governmental, corporate, and proprietary powers to enable them to conduct municipal government, to perform municipal functions, and render municipal services, and exercise any power for municipal purposes, except when expressly prohibited by law.

SECTION 2. FINDINGS. It is hereby ascertained, determined, and declared that:

(A) The City Council (the "Council") of the City of Marco Island, Florida (the "City") adopted Resolution No. 06-46 on September 5, 2006 which articulated additional and extraordinary payment alternatives for owners of certain property subject to, or anticipated to be subject to, Assessments related to the City's septic tank replacement

program and the provision of Wastewater Capacity Improvements and Wastewater Treatment Collection Improvements (capitalized terms not otherwise defined herein shall have the meanings assigned in City Resolution No. 06-46).

(B) Resolution No. 06-46 provided that such extraordinary payment alternatives would be effectuated by execution of a Deferred Payment Agreement between the property owner and the City, that Deferred Payment Agreements shall be executed with the same formality as a deed and recorded in the Official Records of Collier County, Florida, and that the form of the Deferred Payment Agreement shall be authorized by resolution of the Council and reviewed by the City Attorney.

(C) The Council wishes to hereby approve and authorize the process and form of the Deferred Payment Agreement to be used in offering extraordinary payment alternatives.

SECTION 3. DEFERRED PAYMENT AGREEMENT; EXECUTION AND RECORDING.

(A) The form of the Deferred Payment Agreement in substantially the form attached hereto as Appendix A is hereby approved.

(B) The City Manager or City Finance Director is hereby authorized to execute Deferred Payment Agreements on behalf of the City, provided that in each case the City first obtains reasonable verification of the current record owner(s), any customary closing

affidavits, execution of the Deferred Payment Agreement by the record owner(s), and the City Attorney reviews the Deferred Payment Agreement for apparent sufficiency.

(C) Upon execution by all of the record title owners and the City Manager or City Finance Director, and review by the City Attorney, the Deferred Payment Agreement shall be recorded in the Public Records of Collier County, Florida. In order to encourage participation of owners anticipated to be affected in future assessment areas, the expense of record title verification, attorney review and associated recording will be borne by the City.

SECTION 4. SEVERABILITY.

(A) If any clause, section, or other part of this resolution shall be held by any court of competent jurisdiction unconstitutional or invalid, such unconstitutional or invalid part shall be considered as eliminated and in no way affects the validity of the other provisions in this resolution.

(B) This Resolution is not intended to, nor shall it be construed to, repeal or conflict with any prior or future City resolution or ordinance relating to any special assessment or the financing thereof.

SECTION 5. EFFECTIVE DATE. This Resolution shall take effect immediately upon its passage and adoption.

DULY ADOPTED this 5th day of February, 2007.

**CITY COUNCIL OF MARCO ISLAND;
FLORIDA**

(SEAL)

By: Terri DiSciullo
Terri DiSciullo, Chairwoman

ATTEST:

Approved as to Form:

Laura M. Litzan
Laura M. Litzan, City Clerk

Richard D. Yovanovich
Richard D. Yovanovich, City Attorney

APPENDIX A

FORM OF DEFERRED PAYMENT AGREEMENT

_____ [Space above This Line for Recording Data] _____

**DEFERRED PAYMENT AGREEMENT
(FOR FUTURE ASSESSMENT AREAS)**

THIS DEFERRED PAYMENT AGREEMENT (FOR FUTURE ASSESSMENT AREAS) (hereinafter referred to as "Agreement") is entered into between _____ (the "Owner") and the City of Marco Island, Florida, a municipal corporation (the "City"), this _____ day of _____, 20_____.

WHEREAS, the City has initiated an expansion program for its water and wastewater utility system (the "Utility System") with the intent to construct and provide, in a series of phases or assessment areas to be determined from time to time, within geographic areas served by, or capable of being served by, the Utility System, certain wastewater capacity improvements and wastewater treatment collection improvements in order to provide central wastewater service to owners of vacant parcels and owners and users of parcels served by on-site sewage treatment and disposal systems including, but not limited to, septic tanks and cess pits located within the City and adjacent unincorporated areas served by the Utility System, based on funding availability and physical and economic feasibility; and

WHEREAS, the City is levying non-ad valorem assessments, sometimes referred to as special assessments, upon parcels within each assessment area in order to finance construction of the wastewater collection improvements and wastewater treatment capacity improvements; and

WHEREAS, the City Council has expressed its intent and covenanted to provide owners of certain property extraordinary payment alternatives for the special assessments through execution of a Deferred Payment Agreement between the City and affected property owner; and

WHEREAS, in an extraordinary effort to increase and strengthen the revenue stream of the Utility System, reduce the costs of wastewater capital improvements to both owners anticipated to be affected by the extension of central wastewater facilities to their lands and generally to all rate payers of the Utility System by avoiding increased construction costs related to inflation and delay, the City Council, by resolution has provided for consensual agreements between the City and affected owners of residential properties anticipated to be subject to special assessments which fixes the maximum costs of such future assessments for wastewater capacity improvements and wastewater treatment collection improvements; and

WHEREAS, such option will effectively assure that the estimated costs for wastewater facility construction developed in 2006 can be fixed and made available to property owners within future assessment areas anticipated to be established after 2007 for such wastewater improvements, regardless of the actual construction costs at the time of installation.

NOW, THEREFORE, in consideration of the mutual promises, covenants representations and agreements contained herein, together with Ten Dollars (\$10.00) and other good and valuable consideration exchanged between the parties, the parties to this Agreement do undertake, promise and agree for themselves, their successors and assigns as follows:

**ARTICLE I
DEFINITIONS AND CONSTRUCTION**

SECTION 1.01. DEFINITIONS. As used in this Agreement the terms used herein shall have the meanings as defined in the City Code (as hereinafter defined) and any applicable assessment proceedings unless the context clearly requires otherwise. The term "City Code" shall mean the City of Marco Island, Florida, City Code of Ordinances, as amended, together with all resolutions, regulations and policies under which the City, now and in the future, funds, performs, plans, reviews, inspects, tests, extends, finances and provides wastewater utility services and facilities.

SECTION 1.02. CONSTRUCTION AND INTERPRETATION.

(A) Words that indicate a singular number shall include the plural in each case and vice versa, and words that import a person shall include firms and corporations.

(B) The terms "herein", "hereunder", "hereby", "hereof", and any similar terms, shall refer to this Agreement; the term "heretofore" shall mean before the date of execution of this Agreement; and the term "hereafter" shall mean on or after the initial date of execution of this Agreement.

(C) Words that reference only one gender shall include all genders.

(D) This Agreement does not and shall not be construed to relieve the Owner or any other person or entity from any obligation to address any permit, condition, term, approval, requirement, or restriction and shall not relieve the Owner or any

other person or entity of the obligation to comply with any law, ordinance, rule, or regulation governing said permitting requirements, conditions, terms, approvals, requirements, or restrictions.

(E) This Agreement is not and shall not be construed as a Development Agreement pursuant to the Florida Local Government Development Agreement Act, Sections 163.3220 and 163.3243, Florida Statutes, or its successor in function.

(F) This Agreement constitutes and acknowledges all notice to connect to the Utility System, including any notice otherwise required by Section 381.00655, Florida Statutes, its successor in function or the City Code.

(G) This Agreement shall be construed as consistent with the City Code.

(H) This Agreement shall not be construed as a restriction on the City's power to legislate under its police power or the contracting or bartering away of its police power.

(I) This Agreement shall be construed as resulting from joint negotiation and authorship. No part of this Agreement shall be construed as the sole product of any of the parties hereto.

SECTION 1.03. INCORPORATION. The findings, recitals and acknowledgements contained herein are true, correct, and are incorporated in this Agreement.

SECTION 1.04. SECTION HEADINGS. Any headings preceding the text of the several articles, sections or appendices in this Agreement and any table of contents or margin notes appended to copies hereof, shall be solely for the convenience of reference and shall neither constitute a part of this Agreement nor affect its meaning, construction or effect.

ARTICLE II REPRESENTATIONS

SECTION 2.01. OWNER REPRESENTATIONS.

(A) The Owner has all requisite power and authority to enter into and desires to perform under the terms of this Agreement.

(B) The Owner is the sole owner of record of the following described real property: **[insert legal description]** Tax Parcel Identification No. _____ (the "Subject Property").

(C) Any and all necessary action on the part of the Owner relating to the authorization of, and the Owner's execution and delivery of, this Agreement and the performance of the Owner's obligations under this Agreement, assuming due authorization, execution and delivery by the City, has been duly taken.

SECTION 2.02. CONSIDERATION FOR DEFERRED PAYMENT ALTERNATIVE.

(A) The Owner, by execution hereof:

- a. irrevocably binds all record owners of the Subject Property and their successors in interest; and
- b. covenants and establishes that this Agreement shall be construed in all respects as a consensual special assessment which shall be collected separate and apart from any other special assessments imposed as a result of any assessment proceedings, and which shall constitute a lien against the Subject Property equal in rank and dignity to the liens of all state, county, district or municipal taxes and other non-ad valorem assessments and, except as otherwise provided by law, such lien shall be at all times superior in dignity to all liens, titles and claims, until paid; and
- c. acknowledges with specificity and certainty that the Capital Improvements contemplated herein confer direct special benefits to the Subject Property in excess of any amount due to the City hereunder, and that such amounts due and payable hereunder represent a fair and reasonable apportionment, in all respects, of the costs and all charges attributed to the Subject Property in association with any consensual special assessment for wastewater capacity improvements or wastewater treatment collection improvements provided for herein; and
- d. acknowledges that upon entering into this Agreement, the City shall advance and fund, on behalf of the Owner, the Assessment attributable to the property of the Owner arising by virtue hereof; and
- e. agrees to pay the City's attorneys' fees in the event of any dispute involving this Agreement and all costs of foreclosure, enforcement, or any execution of or under this Agreement; and
- f. agrees to venue in State court in Collier County and waives trial by jury should any dispute arise.

(B) The Owner hereby acknowledges that this Agreement provides an alternative and extraordinary payment opportunity and is fundamental consideration given by the City in exchange for resolving all questions about the validity, appropriateness, and enforceability of the charges and costs associated with any wastewater capacity improvements and wastewater treatment collection improvements addressed herein and agrees that upon execution of this Agreement, any question or controversy regarding such matters shall forever be conclusively resolved.

(C) This Agreement shall not be interpreted to allow the Owner to avoid paying for a fair-share of any new growth or additional demand resulting from additions, reconstruction, or other improvements to the Subject Property which cause substantial additional demands upon the Utility System which were not considered or used in determining any special assessment or the amount due hereunder.

**ARTICLE III
DEFERRED PAYMENT**

SECTION 3.01. AGREEMENT AND ACKNOWLEDGEMENT. By execution of this Agreement and initialing the desired option below, Owner hereby agrees to and acknowledges the following:

(A) Cash Payment. _____ (Owner initials) By initialing this option, Owner elects to make a one-time voluntary cash payment of: **[\$_____]** for wastewater capacity improvements based upon **[____]** ERC(s); and **[\$_____]** for wastewater treatment collection improvements based upon **[____]** ERC(s), which assures Owner that the Subject Property will experience no additional costs for wastewater collection improvements or wastewater treatment capacity improvements. Such option will effectively afford Owner approximately a six percent (6%) discount for cash payment and an assurance that no additional special assessments or impact fees will be due for the wastewater collection improvements and wastewater treatment capacity improvements contemplated hereunder upon connection to the Utility System.

(B) Voluntary Assessment with Equal Payments Over Twenty (20) Years. _____ (Owner initials) By initialing this option, Owner elects to subject the Subject Property to an alternative consensual special assessment consisting of the principal amount of the estimated capital cost plus interest at an annual percentage rate of 5.10%. The principal amount of the estimated capital cost is: **[\$_____]** for wastewater capacity improvements based upon **[____]** ERC(s); and **[\$_____]** for wastewater treatment collection improvements based upon **[____]** ERC(s). The alternative consensual special assessment shall be collected separate and apart from, and in lieu of, any future assessments imposed for such improvements. Such option will effectively afford Owner the opportunity to fix the future cost of special assessments for wastewater collection improvements and wastewater treatment capacity improvements based upon current construction cost estimates and shall be paid in twenty (20) equal annual payments and collected on the same bill as taxes using the uniform method of collection authorized by Chapter 197, Florida Statutes, or its successor in function, or any other method of collection allowed by law.

(C) Voluntary Assessment with a Single Deferred Payment. _____ (Owner initials) By initialing this option, Owner elects to subject the Subject Property to an alternative consensual special assessment consisting of the principal amount of the estimated capital cost plus interest at an annual percentage rate of 5.65%. The principal amount of the estimated capital cost is: **[\$_____]** for wastewater capacity improvements based upon **[____]** ERC(s); and **[\$_____]** for wastewater treatment collection improvements based upon **[____]** ERC(s). The principal amount, together with all accrued interest, shall be due in a single payment no later than the twentieth (20th) anniversary of this Agreement and shall be collected separate and apart from, and in lieu of, any future assessments imposed for such improvements. Such option will effectively (a) fix the cost of future special assessments for wastewater collection improvements and wastewater treatment capacity improvements based upon current construction cost estimates, and (b) allow Owner to pay such consensual special assessment, and all accrued interest thereon, in a single payment due no later than the twentieth (20th) anniversary of this Agreement.

(D) This Agreement shall be executed with the same formality as a deed and recorded in the Official Records of Collier County, Florida.

(E) The separate lien created by this Agreement on the Subject Property is an alternative and consensual special assessment equal in rank and dignity with the liens of all state, county, district or municipal taxes and other non-ad valorem assessments, and when due shall be superior to all other liens, title and claims, including any mortgage, until paid.

(F) This Agreement shall not be subject to any subordination to any other lien or mortgage, and is binding upon the Owner's successors and assigns.

(G) The City shall separately account for all payments hereunder. In the event the wastewater collection improvements or wastewater treatment capacity improvements for which payment is made to the City hereunder are not commenced before the tenth (10th) anniversary of this Agreement or the City adopts a resolution determining not to construct such improvements, the then owner of the Subject Property shall have the right to request and obtain a refund of the amounts paid hereunder to the City together with interest at an annual percentage rate of 5.10%. In the event such refund is not timely claimed, or there is a dispute as to whom the refund is then due, the City shall be entitled to interplead such amount with the Clerk of the Circuit Court, and shall have no further obligation hereunder.

(H) Transfer of ownership of the Subject Property shall accelerate the full amount due hereunder as of the date of transfer, and that after such transfer the outstanding balance including accrued interest, shall thereafter accrue interest at the highest legal rate.

SECTION 3.02. LIMITATION. The options available under this Agreement shall only be offered to property owners in assessment areas established or anticipated to be established after 2007.

**ARTICLE IV
GENERAL PROVISIONS**

SECTION 4.01. POST EXECUTION RELATIONSHIP.

(A) From time to time after execution of this Agreement, the Owner shall, upon request of the City, execute, acknowledge and deliver, or shall cause to be executed, acknowledged and delivered, all such further acts or other documentation for confirming or correcting any scrivener's error or otherwise reasonably fulfilling the obligations and intent of the parties under this Agreement.

(B) Upon payment in full to the City of the special assessment described herein, including accrued interest, the City agrees to record a notice that the special assessment arising hereunder has been paid in full.

SECTION 4.02. TIME IS OF THE ESSENCE. Time is of the essence in this Agreement. Time periods specified in this Agreement shall expire at midnight on the date stated. Any time period provided for herein which ends on Saturday, Sunday or a legal holiday shall extend to 5:00 p.m. on the next business day.

SECTION 4.03. APPLICABLE LAW; JURISDICTION AND VENUE; INDEMNITY PROVISION.

(A) This Agreement shall be governed by and construed in accordance with the laws of the State of Florida.

(B) The parties to this Agreement expressly consent to the jurisdiction of and agree to suit in any court of the State of Florida and further agree that venue shall lie in Collier County, Florida.

(C) Owner shall hold harmless the City with respect to any loss or damage experienced by the Owner, including attorneys' fees, as a result of its good faith performance or interpleader hereunder.

SECTION 4.04. NOTICE. All notices, certificates or other communications hereunder shall be sufficiently given and shall be deemed given when hand delivered or mailed by registered or certified mail, postage pre-paid to the following addresses:

To City: City of Marco Island, Florida
Attn: City Manager
50 Bald Eagle
Marco Island, Florida 34145

To the Owner: At the address of the Owner relative to the Subject Property listed in the records of the Collier County Property Appraiser

SECTION 4.05. AMENDMENTS AND WAIVERS. This Agreement can only be amended by a written amendment executed by the Owner and the City. No waiver of any of the provisions of this Agreement shall be deemed or shall constitute a waiver of any other provision of this Agreement, whether or not similar, unless otherwise expressly provided.

SECTION 4.06. SEVERABILITY. In the event that any provision of this Agreement shall be held invalid or unenforceable by any court of competent jurisdiction, such holding shall not invalidate or render unenforceable any other provision hereof.

SECTION 4.07. ENTIRE AGREEMENT. This Agreement is the entire agreement between the parties pertaining to the subject matter hereof, and supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions of the agreements, understandings, negotiations and discussions of the parties, whether written or oral, and there are no warranties, representations or other agreements between the parties in connection with the subject matter hereof, except as specifically set forth herein.

IN WITNESS WHEREOF, the City and the Owner have caused this Agreement to be duly executed on the date first above written.

CITY OF MARCO ISLAND, FLORIDA

(SEAL)

By: _____
Finance Director

ATTEST:

Approved as to Form:

City Clerk



City Attorney

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me on _____, 20[____], by _____, Finance Director of the City of Marco Island pursuant to City Resolution No. _____. He/she is personally known to me or has produced a driver's license as identification.

Print Name: _____
NOTARY PUBLIC
State of Florida
Commission # _____
My Commission Expires: _____

Signed, sealed and delivered
In our presence:

Witness #1

By: _____
[Name, title]

(Witness #1 printed name)

Witness #2

(Witness #2 printed name)

STATE OF FLORIDA
COUNTY OF _____

The foregoing instrument was acknowledged before me on _____, 20[____], by _____ He/she is personally known to me or has produced a driver's license as identification.

Print Name: _____
NOTARY PUBLIC
State of Florida
Commission # _____
My Commission Expires: _____