

WATER UTILITY
FRANCHISE AGREEMENT
ORDINANCE NO. 01-03

AN ORDINANCE GRANTING TO THE TOWN OF FORT MYERS BEACH PUBLIC WORKS SERVICES, INC., ITS SUCCESSORS AND ASSIGNS, A FRANCHISE TO USE THE PUBLIC PLACES OF THE TOWN OF FORT MYERS BEACH, FLORIDA, PROVIDING AUTHORITY; SERVICE AREA; FRANCHISE GRANT; SCOPE OF GRANTS; TERM; EXCLUSIVITY; FRANCHISE FEE; AUDIT; RATES AND CHARGES; RATE AND CHARGE PROTESTS; SERVICE RULES AND REGULATIONS; WORK IN PUBLIC AREAS; OWNERSHIP OF LINES AND EQUIPMENT; ASSIGNMENT; TOWN ACTIONS; COMPLIANCE WITH OTHER LAW; PLANS; PERMITS; RESERVATION OF RIGHTS; FAILURE TO COMPLY; PURCHASE OF PROPERTY; COMMITMENT TO PROVIDE SERVICE; SEVERABILITY; APPROVAL; AND PROVIDING AN EFFECTIVE DATE.

IT IS HEREBY ORDAINED BY THE TOWN OF FORT MYERS BEACH AS FOLLOWS:

Section 1: Authority. This Ordinance is enacted pursuant to the provisions of Chapter 95-494, Laws of Florida, Chapter 166, Florida Statutes, and other applicable provisions of law.

Section 2. Service Area. The Service Area is described as follows:

A corporate limit lying offshore from Estero Island, which line is described as follows: all that part of Lee County that is located and situated within Estero Island, including a corporate limit line offshore 1,000 feet in the Gulf of Mexico and 1,000 feet in the inland bays, and parallel with the shore line of said Estero Island, excluding all of San Carlos Island, Black Island and, structures exclusively attached thereto.

Section 3. Franchise Grant. The TOWN hereby grants to THE TOWN OF FORT MYERS BEACH PUBLIC WORKS SERVICES, INC. (hereinafter called SERVICES) a franchise, which includes the right and privilege to construct, maintain, equip and operate a water supply and distribution system and to provide a water utility service within the TOWN Service Area.

Section 4. Scope of Grants. The franchise grants set forth in Sections 2 and 3 above include the right and privilege for SERVICES to use and occupy the public streets, roads, bridges, rights of way, utility easements and public lands (collectively, Public Areas) within the respective Service Areas, in accordance with established practices within the respective jurisdictions, as necessary for the operation of the water system.

Section 5. Term. The franchise grants are for a period of 30 years from the effective date.

Section 6. Exclusivity. Due to the nature of the water resource and of the location of the Service Areas, the franchise grants shall be deemed exclusive.

Section 7. Franchise Fee; Audit. a. A franchise fee will not be imposed at this time. Franchisors reserve the option of imposing a franchise fee in the future. If a franchise fee should be imposed it shall not exceed 3% of gross revenues.

b. If and when a franchise fee should be imposed, it would be based upon the applicable

percentage of the gross revenues for the previous quarter derived from water utility or supply operations. Without limitation, this includes all charges to customers for any reason. At the option of SERVICES, franchise fees may be separately set forth on customer billings.

c. If and when a franchise fee should be imposed, the TOWN and the County shall be permitted to examine SERVICES's books, records and accounts to verify accuracy of franchise fee payments. Such inspections to be conducted at reasonable times and hours.

Section 8. Rates and Charges. a. The rates and charges (which also include connection/disconnection charges, impact fees, readiness-to-serve charges, demand charges, meter charges, and the like) in effect on the effective date of this agreement shall remain in effect until adjusted by SERVICES, as further provided for in this Section.

b. Applications for all rate and charge adjustments shall be filed with the TOWN Council in the form of a "Petition for Rate Adjustment" with supporting documentation at least four months prior to the proposed effective date for the adjustment.

c. The Council of the TOWN shall have the jurisdiction to review, consider and approve rates and charges, prior to their implementation.

e. The Council of the TOWN shall hold at least one public hearing after due public notice prior to approval of any adjustments to rates and charges. Action shall be taken by resolution and shall constitute final agency action.

Section 9. Rate and Charge Protests. a. Any rate payer of SERVICES may protest a proposed rate or charge by filing a written protest with the TOWN Manager prior to or at the hearing or by appearing at the hearing of the Town Council and registering such protest.

b. A legal challenge to the action of the TOWN Council shall be filed in accordance with the Florida Rules of Appellate Procedure as they apply to challenging final agency action.

Section 10. Service Rules and Regulations. SERVICES 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 agreement, without prior approval of the TOWN provided:

a. They have been filed with the TOWN Manager of the TOWN, and

b. They are not unjust, inequitable, or discriminatory.

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

Section 11. Work in Public Areas. a. All work performed in Public Areas by SERVICES shall be done in a workmanlike manner, and within reasonable times, in accordance with the ordinances, rules or other policies of the TOWN.

b. If the TOWN deems it necessary or advisable to connect fire hydrants or other devices to combat fire, no charge shall be made to the TOWN or the respective fire control districts for the connection. This does not prohibit SERVICES 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 TOWN or the County shall be borne by SERVICES, unless otherwise agreed by the TOWN or the County and SERVICES. This does not prohibit SERVICES, or any governmental entity from

charging a private developer for such cost.

Section 12. 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 SERVICES.

b. No person or entity shall have the right to connect to the facilities or to obtain any water services furnished by SERVICES, except with the consent of and upon full compliance with the Service rules and Regulations of SERVICES 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 SERVICES where to do so would result in discriminatory rates or charges.

Section 13. Assignment. This franchise shall not be assigned or transferred by SERVICES, without first obtaining the written consent of the TOWN. 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 TOWN shall act upon a written application under this paragraph within 120 days after it is filed by SERVICES and the proposed assignee.

Section 14. TOWN Actions. The TOWN agrees to adopt or amend all legislation and to take all actions reasonable and necessary for the protection and enforcement of SERVICES's rights under this agreement.

Section 15. Compliance with Other Law; Plans; Permits. a. SERVICES 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. SERVICES will submit all plans for future installations to the TOWN.

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

d. The TOWN 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 16. Reservation of Rights. Except as otherwise set forth in this agreement, the TOWN reserves all other rights granted to them by Florida law.

Section 17. Failure to Comply. Failure on the part of SERVICES 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, SERVICES shall have 90 days within which to comply or show cause for its failure to do so.

Section 18. Purchase of Property. a. Subject to current provisions contained in SERVICES's charter, the TOWN may at any time during this agreement purchase the property (assets and/or business).

b. SERVICES hereby grants to the TOWN the right of first refusal prior to any sale of the assets or business of SERVICES to any other person or entity. In the event of a proposed sale, SERVICES shall offer the assets or business to the TOWN on the same terms and conditions as contained in the proposed sale, and the TOWN shall have 90 days in which to exercise the right of first refusal.

Section 19. Commitment to Provide Service. SERVICES agrees that it will use its best efforts, skill and experience to provide first-class central water supply and distribution service to the Service Area described herein.

Section 20. Severability. If any portion of this agreement is determined to be invalid or unenforceable, that portion shall be severed and the remainder shall remain in force, unless to do so would materially impair the bargain of the parties. If any portion of this agreement pertaining to the right of the parties to establish of rates and charges, or pertaining to franchise fees is determined to be invalid or unenforceable by a court of competent jurisdiction, the agreement shall become null and void and be of no further effect.

Section 21. Approval. This agreement is subject to approval by appropriate action by Board of Directors of SERVICES and the Council of the TOWN.

SECTION 22: EFFECTIVE DATE: This Ordinance shall become effective immediately upon its passage and adoption, provided the Company shall have signified its acceptance of the franchise hereby granted, in writing, within thirty (30) days from the date this Ordinance is duly adopted, the Company's acceptance of said franchise being a condition precedent to the effectiveness of the provisions of this Ordinance.

The foregoing ordinance was enacted by the Town Council upon a motion by Council Member Murphy and seconded by Council Member Cain and, upon being put to a vote, the result was as follows:

Daniel Hughes	<u>aye</u>
Garr Reynolds	<u>aye</u>
Ray Murphy	<u>aye</u>
Terry Cain	<u>aye</u>
Howard Rynearson	<u>aye</u>

DULY PASSED AND ENACTED this 7th day of May, 2001.

ATTEST:

By: Marsha Segal-George
Marsha Segal-George, Town Clerk

TOWN OF FORT MYERS BEACH

By: Daniel Hughes
Daniel Hughes, Mayor

Approved as to form by:

Richard V.S. Roosa
Richard V.S. Roosa, Town Attorney