

**FIRST AMENDMENT
TO AMENDED AND RESTATED AGREEMENT
FOR LEASE OF REAL PROPERTY (WATER SYSTEM)**

This First Amendment (“**Amendment**”) to the Amended and Restated Agreement for Lease of Real Property (Water System), dated December 17, 2019 (“**Lease**”), is entered into on the date of full execution of this Amendment (“**Effective Date**”), by and between the City of Cupertino, a California municipality (“**City**”) and San Jose Water Company, a California corporation (“**Lessee**”) (individually, a “**Party**” and collectively, the “**Parties**”) with reference to the following recitals:

RECITALS

- A. Any capitalized terms not otherwise defined in this Amendment have the same meaning as specified in the Lease.
- B. Pursuant to Lease Section 2 (Term of Lease), the Lease Term shall expire on September 30, 2022.
- C. The City intends to initiate a new request for proposals (“**RFP**”) process pursuant to Public Utilities Code section 10061, to solicit proposals for leasing the Water System following expiration of the Lease.
- D. Because the timing and outcome of the RFP process cannot be predicted, the City wishes to have the option of extending the Term of the current Lease long enough to allow the City to transition to whichever course of action the City adopts at the conclusion of the RFP process, depending on the City’s determination of the best interest for the Water System.
- E. The best interest for the Water System, as determined by the City Council for the City following the RFP process, may include transitioning to a new lease agreement, transitioning to City operation of the Water System, or seeking to sell the Water System.
- F. Therefore, the Parties have agreed to amend the Lease in order to extend the Term of the Lease, upon request by the City, for an additional six months, two years, or three years, depending on the City’s best interest determination and associated transition needs, with a commensurate extension of Lessee’s obligations regarding the Capital Improvements Funds.

- G. Based on the foregoing and for good and valuable mutual consideration, the receipt and adequacy of which is acknowledged by both Parties, the Parties agree to amend the Lease as set forth below.

TERMS

1. **Term Extension.** Upon written request by City, submitted to Lessee no later than April 30, 2022 in accordance with Lease Section 21 (Notices), Lease Section 2 (Term of Lease) shall be amended as specified in the City's written request for one of the three options set forth below, with all remaining provisions in Lease Section 2, including the option for earlier termination, to remain in full force and effect.

A. *Six-Month Extension.* If the City requests a six-month Term extension, the Term shall be extended from twenty-five (25) years to twenty-five (25) years and six (6) months ("**Six-Month Extension**").

B. *Two-Year Extension.* If the City requests a two-year Term extension, the Term shall be extended from twenty-five (25) to twenty-seven (27) years ("**Two-Year Extension**").

C. *Three-Year Extension.* If the City requests a three-year Term extension, the Term shall be extended from twenty-five (25) to twenty-eight (28) years ("**Three-Year Extension**").

2. **Capital Improvements Funds.** Lessee's obligations with respect to Capital Improvement Funds as set forth in Lease Section 7 (Operation of Water System) shall be amended as follows, depending on whether City requests a Six-Month Extension, Two-Year Extension, or a Three-Year Extension:

A. *Amendments to Subsection 7.A(2).* Lease subsection 7.A(2) (Lessee's Capital Improvements) shall remain in full force and effect, except as follows:

(1) *Six-Month Extension.* If the City requests a Six-Month Extension, the second paragraph in Lease subsection 7.A(2) (Lessee's Capital Improvements) shall be modified to require Lessee to expend an additional three hundred fifty thousand dollars (\$350,000), for a total expenditure of five million three hundred fifty thousand dollars (\$5,350,000) for Capital Improvements Funds, and to do so by March 31, 2023 instead of by September 30, 2022.

(2) *Two-Year Extension.* If the City requests a Two-Year Extension, the second paragraph in Lease subsection 7.A(2) (Lessee's Capital Improvements) shall be modified to require Lessee to expend an additional one million six hundred thousand dollars (\$1,600,000), for a total expenditure of six million six hundred thousand dollars (\$6,600,000) for Capital Improvements Funds, and to do so by September 30, 2024 instead of by September 30, 2022.

(3) *Three-Year Extension.* If the City requests a Three-Year Extension, the second paragraph Lease subsection 7.A(2) (Lessee's Capital Improvements) shall be modified to require Lessee to expend an additional two million five hundred thousand dollars (\$2,500,000), for a total expenditure of seven million five hundred thousand dollars (\$7,500,000) for Capital Improvements Funds, and to do so by September 30, 2025 instead of by September 30, 2022.

B. *Amendments to Subsection 7.A(10).* Lease subsection 7.A(10) (Capital Improvements Funds) shall remain in full force and effect, except as follows:

(1) *Six-Month Extension.* If the City requests a Six-Month Extension, Lessee must, within 45 days following the date of City's request, submit a scope of work for expenditure of three hundred fifty thousand dollars (\$350,000) in addition to the five million dollars (\$5,000,000) specified therein for Capital Improvement Projects for City authorization; and the second to last sentence shall be amended to provide that Lessee shall not be obligated to expend any amount in excess of the amended total of five million three hundred fifty thousand dollars (\$5,350,000) of the Capital Improvements Funds on Capital Improvement Projects. If the City terminates the Lease before the expiration of the Six-Month Extension, Lessee shall only be responsible for a prorated amount of the additional expenditure, calculated as one-sixth (1/6) of three hundred fifty thousand dollars (\$350,000) for each month, including partial months, that the Six-Month Extension is in effect. If Lessee has invested more than the three hundred fifty thousand dollars (\$350,000) at expiration of the Lease or more than the prorated portion in the case of early Lease termination due to an emergency event requiring additional expenditure of Capital Improvement Funds authorized in writing in advance by the City, the City shall remit to Lessee an amount equal to the difference between such amount and the actual amount that Lessee invested pursuant to the City's

authorization within thirty (30) days of Lease expiration. The terms and conditions set forth in this paragraph will survive termination or expiration of the Lease.

(2) *Two-Year Extension.* If the City requests a Two-Year Extension, Lessee must, within 45 days following the date of City's request, submit a scope of work for expenditure of one million six hundred thousand dollars (\$1,600,000) in addition to the five million dollars (\$5,000,000) specified therein for Capital Improvement Projects for City authorization; and the second to last sentence shall be amended to provide that Lessee shall not be obligated to expend any amount in excess of the amended total of six million six hundred thousand dollars (\$6,600,000) of the Capital Improvements Funds on Capital Improvement Projects. If the City terminates the Lease before the expiration of the Two-Year Extension, Lessee shall only be responsible for a prorated amount of the additional expenditure, calculated as one twenty-fourth (1/24) of one million six hundred thousand dollars (\$1,600,000) for each month, including partial months, that the Two-Year Extension is in effect. If Lessee has invested more than the one million six hundred thousand (\$1,600,000) at expiration of the Lease or more than the prorated portion in the case of early Lease termination due to an emergency event requiring additional expenditure of Capital Improvement Funds authorized in writing in advance by the City, the City shall remit to Lessee an amount equal to the difference between such amount and the actual amount that Lessee invested pursuant to the City's written authorization, within thirty (30) days of Lease expiration. The terms and conditions set forth in this paragraph will survive termination or expiration of the Lease.

(3) *Three-Year Extension.* If the City requests a Three-Year Extension, Lessee must, within 45 days following the date of City's request, submit a scope of work for expenditure of two million five hundred thousand dollars (\$2,500,000) in addition to the five million dollars (\$5,000,000) specified therein for Capital Improvement Projects for City authorization; and the second to last sentence shall be amended to provide that Lessee shall not be obligated to expend any amount in excess of the amended total of seven million five hundred thousand dollars (\$7,500,000) of the Capital Improvements Funds on Capital Improvement Projects. If the City terminates the Lease before the expiration of the Three-Year Extension, Lessee shall only be responsible for a prorated amount of the additional expenditure, calculated as one thirty-sixth (1/36) of two million

five hundred thousand dollars (\$2,500,000) for each month, including partial months, that the Three-Year Extension is in effect. If Lessee has invested more than the two million dollars five hundred thousand (\$2,500,000) at expiration of the Lease or more than the prorated portion in the case of early Lease termination due to an emergency event requiring additional expenditure of Capital Improvement Funds authorized in writing in advance by the City, the City shall remit to Lessee an amount equal to the difference between such amount and the actual amount that Lessee invested pursuant to the City's written authorization, within thirty (30) days of Lease expiration. The terms and conditions set forth in this paragraph will survive termination or expiration of the Lease.

4. Addendum. The City's written request for a Term extension shall be deemed an addendum to this Amendment and incorporated by reference herein.

5. General Provisions.

A. Limitations. Except as expressly modified by this Amendment, all provisions of the Lease shall remain in full force and effect.

B. Recitals. The recitals to this Amendment are true and correct and are hereby made part of this Amendment.

C. Interpretation and Severability. The terms of this Amendment have been negotiated by the Parties and the language used in this Amendment is deemed to be the language chosen by the Parties to express their mutual intent. This Amendment shall be construed without regard to any presumptions or rules of construction against the drafting party. In the event of any ambiguity or inconsistency affecting interpretation of this Amendment, this Amendment shall be interpreted to effectuate the Parties' intent as set forth in the recitals. If any provision in this Amendment, or portion thereof, is determined by a court of competent jurisdiction to be illegal, invalid, or unenforceable, the remaining provisions or portions thereof, shall remain in full force and effect.

D. Effective Date. The Effective Date of this Amendment is the date of full execution of this Amendment by the Parties, as set forth in the initial paragraph of this Amendment.

[Signature page follows.]

WHEREFORE, the Parties agree to the terms of this Amendment as witnessed by their signatures below.

CITY OF CUPERTINO

By: _____ Date: _____
Darcy Paul, Mayor

ATTEST:

By: _____
Kirsten Squarcia, City Clerk

APPROVED AS TO FORM:

By: _____
Christopher D. Jensen, City Attorney

LESSEE: SAN JOSE WATER COMPANY

By: _____ Date: _____
[name, title]