RESOLUTION NO. 2014-38

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING AN INTERGOVERNMENTAL AGREEMENT WITH MARICOPA COUNTY FLOOD CONTROL DISTRICT RELATING TO THE CONSTRUCTION OF THE ASHBROOK WASH IMPROVEMENTS.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS as follows:

SECTION 1. The Intergovernmental Agreement with the Flood Control District of Maricopa County relating to the utility relocations, construction, construction management, and operation and maintenance of the improvements to Ashbrook Wash between Bayfield Drive and Del Cambre Boulevard, including the crossings at Bayfield Drive and Saguaro Boulevard (the "Agreement") is hereby approved in substantially the form and substance attached hereto as Exhibit A and incorporated herein by reference.

SECTION 2. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to cause the execution of the Agreement and to take all steps necessary to carry out the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Arizona, September 4, 2014.

FOR THE TOWN OF FOUNTAIN HILLS:

Linda M. Kavanagh, Mayor

ATTESTED TO:

Bevelyn J. Bender, Town Clerk

REVIEWED BY:

Kenneth W. Buchanan, Town Manager

APPROVED AS TO FORM:

Andrew J. McGuire, Town Attorney

EXHIBIT A
TO
RESOLUTION NO. 2014-38

[Agreement]

See following pages.

OFFICIAL RECORDS OF
MARICOPA COUNTY RECORDER
HELEN PURCELL
ELECTRONIC RECORDING
20140737199 11/06/2014 11:25
FCD2014A007-10-1-1--N

When Recorded Return to:
Flood Control District of Maricopa County
2801 West Durango Street
Phoenix, AZ 85009-6399

INTERGOVERNMENTAL AGREEMENT

Between

THE TOWN OF FOUNTAIN HILLS

and the

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY

for the

UTILITY RELOCATIONS, CONSTRUCTION, CONSTRUCTION MANAGEMENT, AND OPERATION AND MAINTENANCE

of the

ASHBROOK WASH IMPROVEMENTS – BAYFIELD DRIVE TO DEL CAMBRE AVENUE

IGA FCD 2014A007

Agenda Item C-69-15-016-3-00

This Intergovernmental Agreement (Agreement) is entered into by and between the Town of Fountain Hills, a municipal corporation, acting by and through its Town Council, hereinafter called the TOWN, and the Flood Control District of Maricopa County, a municipal corporation and political subdivision of the State of Arizona, acting by and through its Board of Directors, hereinafter called the DISTRICT. The DISTRICT and the TOWN are hereinafter collectively called the PROJECT PARTNERS.

This Agreement shall become effective as of the date it has been executed by all parties and will be recorded by the Maricopa County Recorder.

STATUTORY AUTHORIZATION

1. The DISTRICT is empowered by Arizona Revised Statutes (A.R.S.) Section 48-3603, as revised, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the DISTRICT.

2. The TOWN is empowered by A.R.S. Section 11-951 et. seq. as amended, to enter into this Agreement and has authorized the undersigned to execute this Agreement on behalf of the TOWN.

BACKGROUND

3. The Fountain Hills Area Drainage Master Study included a Roadway Crossing Study component (STUDY), completed in June 1997, and identified a need to improve certain roadway crossings within the TOWN. The STUDY recommended structural solutions to mitigate flooding hazards due to restrictions at Bayfield Drive and Saguaro Boulevard.

4. In June 2011, a Floodplain Evaluation Technical Memorandum (MEMORANDUM) was prepared by DISTRICT staff in response to a Capital Improvement Program request by the TOWN to participate in improvements to Ashbrook Wash. The MEMORANDUM confirmed that channel restrictions from Bayfield Drive downstream to Del Cambre Boulevard, including restrictions at the Bayfield Drive and Saguaro Boulevard crossings, result in the potential for residential structure flooding during a 100-year event.

5. This Agreement is for the implementation of improvements to Ashbrook Wash between Bayfield Drive and Del Cambre Boulevard, including the crossings at Bayfield Drive and Saguaro Boulevard (Exhibit A), hereinafter referred to as the PROJECT. The features include replacing the culvert crossings, removal of vegetation, minor channel improvements, and associated utility relocations.

   The PROJECT will:

   - Provide flood protection to properties adjacent to Ashbrook Wash between Bayfield Drive and Del Cambre Boulevard from flooding caused by 100-year flows overtopping Ashbrook Wash.
   - Remove approximately 11 existing homes from the potential flooding due to a 100-year storm event.
   - Safely convey flood flows under Bayfield Drive and Saguaro Boulevard.

6. On December 11, 2013, the Board of Directors of the DISTRICT adopted Resolution FCD 2013R005, authorizing the DISTRICT to cost-share in the PROJECT, and to negotiate Intergovernmental Agreements for the design, rights-of-way acquisitions, construction, construction management, and operation and maintenance of the PROJECT.

7. On March 12, 2014, the Board of Directors of the DISTRICT approved Intergovernmental Agreement FCD 2013A009, defining the responsibilities and cost share of the PROJECT PARTNERS related to the design of the project.

8. The design of the project is ongoing and is anticipated to be complete by November 2014.

PURPOSE OF THE AGREEMENT

9. This Agreement identifies and defines the responsibilities of the DISTRICT and the TOWN, for PROJECT activities related to utility relocations, construction, construction management, operation and maintenance.

TERMS OF AGREEMENT

10. The PROJECT, as referenced herein, is defined by paragraph 5 of this Agreement.

11. The PROJECT COST, as referenced herein, solely encompasses the following costs directly associated with the PROJECT and incurred after the effective date of this Agreement:

    11.1 Costs of relocating conflicting utilities in place by prior rights. Utilities in place without prior rights will be relocated at their owners' expense; associated costs are not components of the PROJECT COST.

    11.2 Costs of obtaining a Federal Emergency Management Agency (FEMA) Letter of Map Revision (LOMR) intended to reduce the limits of the current delineated floodplain due to the construction of the PROJECT.

11.3 Costs of construction, construction management and post-design contracts.

11.3.1 Shared costs of landscaping and aesthetic features will not exceed the DISTRICT's "Policy for the Aesthetic Treatment and Landscaping of Flood Control Projects" (POLICY). Landscaping, aesthetic features and park amenities, in addition to those allowed by the DISTRICT's POLICY and if compatible with the PROJECT function, may be included in PROJECT contracts at the request of the TOWN; the additional construction and associated construction management costs being solely at the TOWN's expense.

11.3.2 If construction management services are not accomplished under contract, construction management costs shall be assigned a value of eight percent (8%) of the actual construction cost of the PROJECT plus actual costs for materials testing and survey work associated with construction management.

11.4 Each PROJECT PARTNER will pay for, and not seek reimbursement for, its own personnel and internal administrative costs associated with this PROJECT, including costs associated with the issue of PROJECT permits, unless specifically identified otherwise in this Agreement.

12. The PROJECT COST associated with this Agreement is estimated to be $1,900,000.

12.1 The PROJECT COST is estimated based on the best information available at the time of this Agreement, and is subject to change without amendment to this Agreement. Upon recognition of anticipated cost increases above this estimated PROJECT COST, PROJECT PARTNERS shall communicate these anticipated increases.

13. DISTRICT funding for this Agreement shall be from secondary flood control tax levy revenue and is contingent upon funding availability within the DISTRICT's Capital Improvement Program.

14. TOWN funding for this Agreement shall be from its Capital Improvement Project fund.

15. The DISTRICT shall:

15.1 Fund fifty percent (50%) of the PROJECT COST, making the DISTRICT's estimated share $950,000.

15.2 Serve as the lead agency for obtaining a FEMA LOMR to reduce the limits of the current delineated floodplain due to the construction of the PROJECT.

15.2.1 Invoice the TOWN for its share of the PROJECT COST associated with the LOMR as it is incurred, no more frequently than quarterly, and no less frequently than annually.

15.3 Serve as the lead agency for utility relocations required for the PROJECT.

15.3.1 Coordinate with the TOWN for the relocation of conflicting utilities within the TOWN's rights-of-way.

15.3.2 Invoice the TOWN for its share of the PROJECT COST associated with the utility relocations as it is incurred, no more frequently than quarterly, and no less frequently than annually.

15.4 Serve as the lead agency for PROJECT construction and construction management.

15.4.1 Upon award of a construction contract for the PROJECT, invoice the TOWN for fifty percent (50%) of its share of the PROJECT COST associated with construction and construction management.

15.4.2 Upon completion of a construction contract for the PROJECT, prepare a final accounting including change orders and construction management costs not previously paid, and invoice the TOWN for the remainder of its share of all PROJECT COST incurred to date.

15.5 If it incurs non-flood control costs that are not a component of the PROJECT COST at the request of the TOWN, per paragraphs 11.3.1 of this Agreement, invoice the TOWN for these costs plus the cost of construction management as these costs are incurred, no more frequently than quarterly, and no less frequently than annually.

15.6 Serve as the lead agency for PROJECT public involvement activities.

15.7 Participate in a final inspection of the PROJECT with the TOWN.

15.8 The DISTRICT may participate with the TOWN in an annual inspection of the PROJECT. Any deficiencies relating to flood control, and for which the TOWN is responsible, shall be corrected by the TOWN within thirty (30) calendar days. If the TOWN has not taken corrective action within this time, the DISTRICT reserves the right to perform the corrective action, and will invoice the TOWN for the total costs incurred by the DISTRICT.

15.9 The DISTRICT reserves the right to review and comment on the design and/or construction of any future changes or modifications to the PROJECT that may affect the hydraulic function of the PROJECT.

16. The TOWN shall:

16.1 Fund fifty percent (50%) of the PROJECT COST, making the TOWN's estimated share $950,000.

16.2 Within thirty (30) calendar days of receipt, pay all invoices issued by the DISTRICT in accordance with the terms of this Agreement.

16.3 Participate in PROJECT public involvement activities.

16.4 Cause to be relocated at no cost to the PROJECT all utilities within its jurisdiction that are in place by permit and/or without prior rights.

16.5 Provide all TOWN owned and controlled rights-of-way necessary for the PROJECT, and not specifically purchased for this PROJECT, at no cost to the PROJECT.

16.6 Participate in the final inspection of the project with the District.

16.7 Be responsible for all operations and maintenance of the PROJECT.

16.7.1 The maintenance activities to be performed include, but are not limited to, maintaining the flood control function of the PROJECT, including sediment and vegetation removal and any and all aesthetic, park, and public use features, maintenance of landscaping, irrigation, multi-use trails and berms, removal of trash and debris, electricity and other operation costs for the facilities, vandalism repair and replacement, and structural repair and replacement of the flood control structures.

16.8 Schedule, and invite the DISTRICT to participate in, an annual inspection of the PROJECT. Any deficiencies relating to flood control for which the TOWN is responsible shall be corrected by the TOWN within thirty (30) calendar days. If the TOWN has not taken corrective action within this time, the DISTRICT reserves the right to perform the corrective action and the TOWN shall reimburse the DISTRICT for the total costs incurred by the DISTRICT within thirty (30) calendar days of receipt of an invoice from the DISTRICT.

16.9 Be responsible for assuring the safety and appropriateness of any non-flood control uses of the PROJECT prior to offering to make or making the PROJECT available for such uses.

16.10 Obtain DISTRICT review and comments on the design and/or construction of any future changes or modifications to the PROJECT that may affect the hydraulic function of the PROJECT, and resolve and/or incorporate the DISTRICT's comments into these future PROJECT modifications.

17. Each PROJECT PARNTER, and the PROJECT PARTNERS collectively, shall:

17.1 Comply with A.R.S. Sections 41-4401 and 23-214, subsection A.

17.1.1 Each party to this Agreement retains the legal right to inspect the records of the other party's and any contractors' or subcontractors' employees performing work under this Agreement to verify compliance with A.R.S. Sections 41-4401 and 23-214, subsection A.

17.1.2 Failure by either party to this Agreement to comply with A.R.S. Sections 41-4401 and 23-214, subsection A shall be deemed a breach of this Agreement and is subject to penalties up to and including termination of the Agreement.

17.2 Require that any contractor selected for the PROJECT:

17.2.1 Warrant its compliance with all federal immigration laws and regulations that relate to its employees and their compliance with A.R.S. section 23-214(A);

17.2.2 Agree that a breach of the warranty under paragraph 17.2.1 shall be deemed a material breach of contract and is subject to penalties up to and including termination of the contract;

17.2.3 Agree that the other party to this Agreement retains the legal right to inspect the papers of the contractor or subcontractor employee(s) who work(s) on this Agreement to ensure that contractor or subcontractor is complying with the warranty under paragraph 17.2.1.

17.3 Have the right, following mutual written agreement of all PROJECT PARTNERS, to delegate its responsibilities under this Agreement to another party. Any delegation, however, shall not relieve the delegating PROJECT PARTNER of its original responsibilities as defined herein.

17.4 In the case of any dispute over any items in this Agreement, agree to use their best efforts and enter into good faith negotiations to resolve the disputed matters. However, this shall not limit the rights of the PROJECT PARTNERS to seek any remedies provided by law.

17.5 Take reasonable and necessary actions within its authority to ensure that only storm water is discharged into the PROJECT, and that such discharges into the PROJECT comply at the point of discharge with any applicable requirements of the U.S. Environmental Protection Agency Clean Water Act, Arizona Pollutant Discharge Elimination System or any other applicable discharge requirements, including any permit requirements.

17.6 Agree to equally share the cost of a PROJECT compliance and cost audit to be initiated within sixty (60) days of PROJECT completion, if requested by either PROJECT PARTNER. An independent auditing firm agreed to by the PROJECT PARTNERS will perform the audit. Any payments or reimbursements necessary to bring the PROJECT into compliance with the audit findings shall be made within forty five (45) days of acceptance by the PROJECT PARTNERS.

18. If mutually acceptable to the PROJECT PARTNERS, PROJECT invoicing may be conducted periodically based on actual PROJECT COST incurred, no more frequently than quarterly, in lieu of invoicing timelines otherwise established in this Agreement.

19. Each party to this Agreement shall, as "Indemnitor," to the extent permissible by law, indemnify, defend and hold harmless the other Project Partner ("Indemnitee") including agents, officers, directors, governors and employees thereof, from and against any and all loss or expense incurred as a result of any claim or suit of any nature whatsoever, which arises out of any act or omission of Indemnitor pursuant to this Agreement, including but not limited to, reasonable attorneys' fees, court costs, and other expenses relating to the defense against claims or litigation, incurred by the Indemnitee. Notwithstanding the above, Indemnitee shall be liable for its own negligence or wrongful acts as provided by law. In no event shall the Indemnitor owe or be obligated to pay any amounts which the Indemnitee has not actually paid or has no actual obligation to pay. In the event any agreement to pay to resolve issues of liability is not enforceable, or any agreement or settlement results in an actual obligation lower than the full amount of liability, the Indemnitor's obligation to pay shall be limited to the amount Indemnitee has paid or would be obligated to pay in the absence of any agreement to indemnify. Should the TOWN offer to make or make the PROJECT available for any non-flood control uses, the TOWN shall, to the extent permissible by law, indemnify, defend and save harmless the DISTRICT, including agents, officers, directors, governors and employees thereof, from any and all loss or expense incurred as a result of any claim or suit relating to the TOWN's non-flood control uses, including but not limited to reasonable attorneys' fees, court costs, and other expenses relating to the defense of such claims or litigation; provided, however, that the DISTRICT shall be liable for its own negligence or wrongful acts as provided by law.

20. All notices or demands upon any party to this Agreement shall be in writing and shall be delivered in person or sent by mail addressed as follows:

    Flood Control District of Maricopa County
    Chief Engineer and General Manager
    2801 West Durango Street
    Phoenix, AZ 85009-6399

    Town of Fountain Hills
    Town Manager
    16705 East Avenue of the Fountains
    Fountain Hills, AZ 85268

21. This Agreement shall expire either (a) five years from the date of recording with the County Recorder, or (b) upon completion of the PROJECT and after all funding obligations and reimbursements have been satisfied in accordance with this Agreement, whichever is the first to occur. However, by mutual written agreement of all parties, this Agreement may be amended or terminated. Paragraphs 15.9, 16.7, 16.8, 16.9, 16.10, 17, 19 and 20 of this Agreement shall survive the expiration of this Agreement.

22. This Agreement is subject to cancellation by either party pursuant to the provisions of Arizona Revised Statutes Section 38-511.

23. Attached to this Agreement or contained herein are the written determinations by the appropriate attorneys for the parties to this Agreement, that these agencies are authorized under the laws of the State of Arizona to enter into this Agreement and that it is in proper form.

24. If legislation is enacted after the effective date of this Agreement that changes the relationship or structure of one or more parties to this Agreement, the parties agree that this Agreement shall be renegotiated at the written request of either party.

FLOOD CONTROL DISTRICT OF MARICOPA COUNTY
A Municipal Corporation

Recommended by:

9/25/14

William D. Wiley, P.E. Date
Chief Engineer and General Manager

Approved and Accepted:

By: OCT 22 2014
Chairman, Board of Directors Date

Attest:

By: OCT 22 2014
Clerk of the Board Date

The foregoing Intergovernmental Agreement FCD 2014A007 has been reviewed pursuant to Arizona Revised Statutes 11-952, as amended, by the undersigned General Counsel, who has determined that it is in proper form and within the powers and authority granted to the Flood Control District of Maricopa County under the laws of the State of Arizona.

9/24/14

Flood Control District General Counsel Date

TOWN OF FOUNTAIN HILLS
A Municipal Corporation,

By: _____ 9-4-14
Linda Kavanagh, Mayor Date

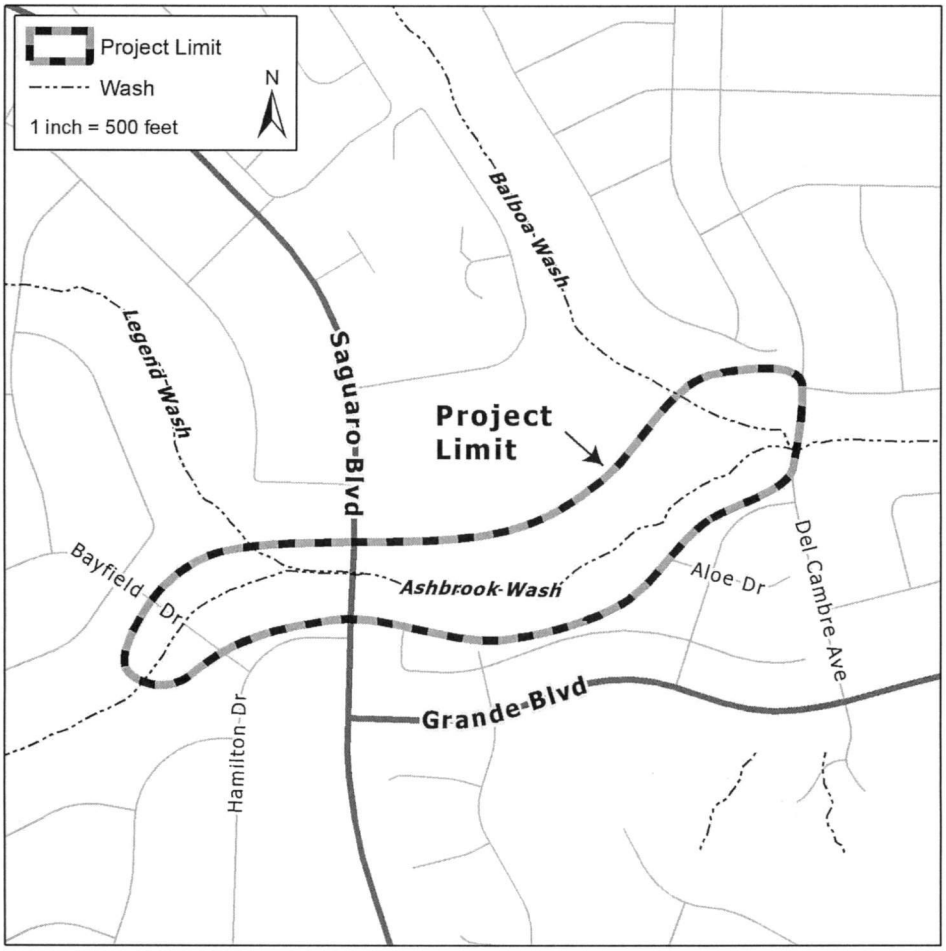
Attest:

By: _____ 9-4-14
Bevelyn J. Bender, Town Clerk Date

The foregoing Intergovernmental Agreement IGA FCD 2014A007 has been reviewed pursuant to Arizona Revised Statutes 11-952, as amended, by the undersigned attorney who has determined that it is in proper form and within the power and authority granted to the Town of Fountain Hills under the laws of the State of Arizona.

By: _____ 9.4.14
Andrew J. McGuire, Town Attorney Date

EXHIBIT "A"


Project Limit
Wash
1 inch = 500 feet
N
Balboa Wash
Legend Wash
Saguaro Blvd
Project Limit
Bayfield Dr
Ashbrook Wash
Aloe Dr
Del Cambre Ave
Grande Blvd
Hamilton Dr