

**RECORDING REQUESTED BY
AND WHEN RECORDED, RETURN TO:**

City of Ontario
Municipal Utilities
1333 S. Bon View Ave.
Ontario, CA 91761

APN. 0210-181-34 and 0210-181-45 (ptn.)

SPACE ABOVE THIS LINE FOR RECORDER'S USE
Exempt from recording fees per Govt Code 27383

SPECIAL SEWER CONNECTION AGREEMENT

This Special Sewer Connection Agreement (“**AGREEMENT**”) is made this _____ day of _____, 2021, by and between the CITY OF ONTARIO, a California municipal corporation (“**CITY**”), the COUNTY OF SAN BERNARDINO, a political subdivision of the State of California (“**COUNTY**”) and TOPGOLF USA SBD, LLC, a Delaware limited liability company (“**TOPGOLF**”). Collectively, CITY, COUNTY, and TOPGOLF are referred to as the PARTIES, and individually, a PARTY. COUNTY and TOPGOLF are collectively referred to as OWNERS.

WHEREAS, the COUNTY is the owner of that certain real property generally located at the South East corner of North Archibald Avenue and Fourth Street, in the City of Ontario, State of California, commonly identified as Assessor’s Parcel Numbers 0210-181-34 and 0210-181-45, as more particularly described in Exhibit A, which is incorporated herein (“**PROPERTY**”).

WHEREAS, the COUNTY has leased a portion of the PROPERTY to TOPGOLF pursuant to Lease Agreement No. 19-279 dated April 30, 2019 (“**Lease**”) for the purposes of constructing and operating a golf entertainment complex, subject to the terms and conditions of the Lease.

WHEREAS, TOPGOLF requires the use of a sewer system for restroom facilities at its golf entertainment complex to be constructed on a portion of the PROPERTY.

WHEREAS, the PROPERTY is located within the CITY’s service boundaries for the provision of sewer services.

WHEREAS, the closest point of connection between the PROPERTY and the CITY’s existing sewer facilities is an 8” diameter main approximately 1,300 lineal feet south of the Property on Archibald Avenue.

WHEREAS, the closest point of connection between the PROPERTY and the existing sewer facilities of the Inland Empire Utilities Agency (“**IEUA**”) is a 24” diameter main approximately 900 lineal feet south of the Property.

WHEREAS, the PROPERTY is adjacent to (i.e. fronts the Property within North Archibald Avenue) an existing main pipe of the CUCAMONGA VALLEY WATER DISTRICT, a public agency that operates a sewer collection system (“**DISTRICT**”).

WHEREAS, a connection from the PROPERTY to DISTRICT's sewer collection system could be designed and constructed at significantly less cost to TOPGOLF than a similar connection to the CITY's system.

WHEREAS, the CITY is willing to consent to the connection of the PROPERTY to the DISTRICT's sewer system and TOPGOLF is willing to consent to the charging and billing of sewer service fees pursuant to the terms and conditions of this AGREEMENT.

WHEREAS, the COUNTY agrees to perform ongoing maintenance of the connection, subject to plan review and inspection by the COUNTY.

WHEREAS, TOPGOLF agrees to reimburse the COUNTY for its plan review, inspection, and ongoing maintenance costs.

NOW, THEREFORE, the CITY, COUNTY, and TOPGOLF hereby agree as follows:

1. Effective Date. This AGREEMENT shall be effective as of the date it is recorded in the Official Records of San Bernardino County ("**EFFECTIVE DATE**"). TOPGOLF shall deliver the executed copy of this AGREEMENT containing both TOPGOLF and COUNTY's signatures to CITY, which shall execute and cause it to be recorded in the Official Records of San Bernardino County and shall promptly deliver a recorded copy to TOPGOLF AND COUNTY.

2. Right to Defer Connection to City Sewer Facilities. To obtain sewer service, the OWNERS are required to design and construct a sewer connection to the nearest existing sewer main of the CITY. Notwithstanding the foregoing, and subject to the provisions of that certain agreement between the CITY and DISTRICT dated _____ authorizing the connection of the PROPERTY to the DISTRICT's sewer system ("**CITY-DISTRICT AGREEMENT**"), and subject to OWNERS' strict compliance with the terms of this AGREEMENT, OWNERS shall have the right to defer designing and constructing a sewer connection to the nearest existing sewer main of the CITY. Instead, OWNERS shall have the option of designing and constructing a connection to DISTRICT's sewer system. OWNERS agree that any and all construction, alterations, replacements, and removals of OWNERS' sewer connection, including, but not limited to, any underground and surface work, shall be subject to CITY'S and DISTRICT'S prior written approval, which shall not be unreasonably withheld, conditioned, or delayed. All construction of the OWNERS' connection facilities shall be constructed at TOPGOLF's sole expense in accordance with a construction plan approved by CITY and DISTRICT in writing, which shall not be unreasonably withheld, conditioned or delayed, and which plan shall include a performance schedule, plan for repair of the surface, and traffic control plans. TOPGOLF shall also obtain and maintain, at its sole cost and expense, all applicable permits and approvals from the CITY, DISTRICT, the City of Rancho Cucamonga and other appropriate local, regional, state and federal agencies, for TOPGOLF's connection facilities. At all times and at TOPGOLF's sole cost and expense, TOPGOLF shall maintain TOPGOLF's connection facilities in good condition and repair, maintain TOPGOLF's connection facilities in good working order, and pay any and all applicable taxes or fees levied by any government agency against TOPGOLF's connection facilities. Any damage caused by TOPGOLF or its contractors, agents, and employees in the construction or use of TOPGOLF's connection facilities shall be promptly repaired or otherwise compensated by TOPGOLF at TOPGOLF's sole cost and expense. Upon TOPGOLF's request, COUNTY shall execute all documents, obtain any approvals and otherwise cooperate with TOPGOLF, in each case, in connection with the performance of TOPGOLF's obligations under this Agreement. CITY shall grant TOPGOLF and/or COUNTY and each of their contractors, employees and agents a right of access to the PROPERTY in connection with the

performance of TOPGOLF and/or COUNTY's obligations under this Agreement, and CITY shall reasonably cooperate with TOPGOLF and/or COUNTY as required for TOPGOLF and/or COUNTY to exercise its rights and perform its obligations herein.

3. No Right to Assign or Transfer. COUNTY and TOPGOLF each understand that the rights granted under this AGREEMENT are personal to COUNTY and TOPGOLF, neither of which shall have the right to assign or otherwise transfer the rights herein without the CITY'S prior written consent, which shall not be unreasonably withheld, conditioned, or delayed. Notwithstanding anything to the contrary in the foregoing, at the expiration or earlier termination of the Lease, TOPGOLF's interest in this Agreement shall automatically be transferred to the COUNTY without consent or approval of CITY; provided, however, that COUNTY shall provide written notice of such transfer of interest to CITY as soon as practicable.

4. Conditions and Reservations. This Agreement is further subject to the following requirements:

a. Compliance with Applicable Laws. COUNTY and TOPGOLF shall comply with all Applicable Laws. Applicable Laws means (1) any federal, state or local statute, law, code, ordinance or regulation, including without limitation, the Clean Water Act (33 U.S.C. § 1251 et seq.) and its implementing regulations (40 C.F.R. part 122) the Porter-Cologne Water Quality Control Act (Water Code, § 13000 et seq.) and Chapter 7 of Title 6 of the Ontario Municipal Code regarding the Public Sewer System; (2) any formally adopted and generally applicable rule, requirement, determination, standard, practice, policy, guidance, implementation schedule, or other order of any governmental body having appropriate jurisdiction; (3) any established interpretation of law or regulation utilized by an appropriate governmental body if such interpretation is documented in writing by such governmental body and generally applicable; (4) any governmental approval from a governmental body having appropriate jurisdiction; and (5) any consent order or decree, settlement agreement or any other agreement between CITY or DISTRICT, the State of California, and United States Environmental Protection Agency, the State Water Resources Control Board or the Regional Water Quality Control Board, Santa Ana Region, or any other governmental body.

b. Billing and Reimbursement of Costs.

i. Rates:

Subject to the provisions of the CITY-DISTRICT AGREEMENT, TOPGOLF agrees that the CITY will process the monthly billing for sewer services to the PROPERTY, which monthly invoice shall include the following components: (i) CITY sewer service rates, which shall include the actual cost of CITY's pre-treatment program services ("**PRE-TREATMENT SERVICES CHARGE**") and the CITY's rates, "**CITY SEWER SERVICE RATES**") x usage by TOPGOLF; (ii) DISTRICT capacity charge installment payment ("**CAPACITY CHARGE**"), as applicable, (iii) Inland Empire Utilities Agency ("**IEUA**") fees; and (iv) an additional administrative charge to cover CITY's actual cost in making biennial payment to DISTRICT of (y) its rates ("**DISTRICT SEWER SERVICE RATES**") x usage by TOPGOLF; and (z) the CAPACITY CHARGE (together, "**ADMINISTRATIVE CHARGE**"). The CITY will charge the same CITY SEWER SERVICE RATES as charged to

similarly situated properties within the CITY'S service area; provided, however, that in the event the DISTRICT SEWER SERVICE RATES become greater than the CITY SEWER SERVICE RATES, CITY reserves the right to adjust its CITY SEWER SERVICE RATES as they pertain to TOPGOLF to ensure that under no circumstances will CITY expend its own funds to subsidize or pay for any portion of TOPGOLF's sewer service, in making payment to DISTRICT pursuant to the CITY-DISTRICT AGREEMENT, after deduction from the gross amount received from TOPGOLF of the IEUA fees, the PRE-TREATMENT SERVICES CHARGE and the ADMINISTRATIVE CHARGE. Prior to the effectiveness of any increase in CITY SEWER SERVICE RATES, CITY will provide as much advance written notice of any such adjustment as practicable. TOPGOLF will pay such billed amounts promptly as the amounts come due. TOPGOLF agrees to pay all fees and charges and make all deposits required by the CITY.

ii. Reimbursable Costs:

In addition to any construction inspection requirements imposed by DISTRICT, TOPGOLF's installation of the sewer connection is subject to prior plan review and inspection by COUNTY. Costs associated with COUNTY's plan review and inspection shall be reimbursed by TOPGOLF within 30 days of the date of invoice from COUNTY. COUNTY shall perform ongoing maintenance of that portion of the connection that is located within the public right of way, the costs for which shall be reimbursed by TOPGOLF on an annual basis, to be invoiced and remitted prior to the close of the COUNTY's fiscal year on June 30. An estimate of the aforementioned costs reflecting the County's 2020-21 rates is presented in Exhibit "B."

c. **Representations.** TOPGOLF understands and acknowledges that:

- i. California Constitution, article XIII D, section 4 ("Article XIII D") establishes certain procedural and substantive requirements which apply when any local agency, such as CITY, imposes a new or increases an existing property-related assessment.
- ii. The procedural requirements of Article XIII D include, among other things, the following:
 - A. The local agency shall identify the parcels upon which the assessment shall be imposed and provide written notice by mail of the proposed assessment to the record owner of each identified parcel.
 - B. The notice shall identify (i) the amount of the assessment; (ii) the basis upon which the amount was calculated; (iii) the reason for the assessment; and the (iv) date, time, and location of a public hearing on the proposed assessment.

- C. The local agency shall conduct a public hearing upon the proposed assessment not less than 45 days after mailing the notice of the public hearing and the proposed assessment, accompanied by an assessment ballot whereby the owner of property proposed to be assessed may express such owner's support for or opposition to such assessment. After the public hearing has been closed, the public agency shall tabulate all assessment ballots received prior to the closure of the public hearing. The agency shall not impose the assessment, if there is a majority protest. A majority protest exists if the assessment ballots submitted in opposition to the levy of assessments outweighs the assessment ballots submitted in support to the levy of the assessments. Each assessment ballot is weighted according to the amount of the assessment proposed to be levied on the parcel for which such assessment ballot has been submitted.
- iii. The substantive requirements of Article XIII D include, among other things, the following:
 - A. Revenues derived from any assessment shall not exceed the special benefit provided to the property and improvements.
 - B. Revenues derived from the assessment shall not be used for any purpose other than that for which the assessment was imposed.
 - C. The amount of the assessment levied on a parcel shall not exceed the special benefit received by such parcel from the improvements being financed by such assessment.
- iv. California Constitution article XIII D, section 6 also sets forth certain procedural and substantive requirements any time a local agency imposes a new or increases an existing property-related fee or charge. Procedural requirements include holding a public hearing, with notice provided at least 45 days in advance, at which public hearing a majority of affected property owners or customers of record may protest the property-related fee or charge. Additional substantive requirements apply, including requirements that the property-related fee or charge not exceed the proportional cost of service, and be used only for the services for which the fee or charge is imposed.
- v. The description of the procedural and substantive requirements established by and contained in Article XIII D set forth above are intended only to summarize certain of such procedural and substantive requirements.
- vi. TOPGOLF has had a reasonable opportunity to thoroughly read and review Article XIII D in its entirety and has further had a reasonable opportunity to consult with TOPGOLF's attorney regarding the requirements set forth in Article XIII D.

- vii. The PARTIES acknowledge, understand, and agree that this Agreement is entered into for the benefit of TOPGOLF, in order to accommodate TOPGOLF's request to connect to DISTRICT's, and not CITY's, sewer system. TOPGOLF further acknowledges, understands and agrees that CITY is entering into this AGREEMENT with TOPGOLF in reliance on TOPGOLF's acceptance of and agreement with CITY's ability to adjust the CITY SEWER SERVICE RATES, only as they pertain to TOPGOLF, as set forth in Section 4(b)i. above, and that CITY would not have entered into this Agreement had TOPGOLF not agreed to such ability. TOPGOLF further acknowledges, understands, and agrees that this Agreement is voluntary in nature, and is the result of an arms' length negotiation in which TOPGOLF had the opportunity to consult with independent counsel. As such, any rates or fees charged to TOPGOLF under this AGREEMENT are not "imposed" for purposes of article XIII C or article XIII D of the California Constitution, and the procedural and substantive requirements of Article XIII D summarized above do not apply and are otherwise waived. Such understanding, acknowledgement, and waiver are granted knowingly and in consideration for CITY'S willingness to allow TOPGOLF to defer connection to CITY's sewer system in favor of connection to DISTRICT's sewer system.

5. Indemnification.

a. TOPGOLF and COUNTY each agree, on behalf of itself, to indemnify, defend (with counsel reasonably approved by CITY) and hold harmless CITY and its authorized officers, employees, agents, and volunteers from any and all claims, actions, losses, damages, and/or liability arising out of this Agreement from any cause whatsoever, to the extent such claims, actions, losses, damages and/or liability were caused by acts, errors, or omissions, negligence, or intentional misconduct of TOPGOLF or TOPGOLF's officials, officers, agents, employees, contractors or invitees, and for any costs or expenses incurred by CITY on account of such claims, except where such indemnification is prohibited by law, and except to the extent such claims, actions, losses, damages and/or liability were caused by the sole negligence or willful misconduct of CITY.

b. TOPGOLF agrees to indemnify, defend (with counsel reasonably approved by COUNTY) and hold harmless COUNTY and its authorized officers, employees, agents, and volunteers from any and all claims, actions, losses, damages, and/or liability arising out of this Agreement from any cause whatsoever, to the extent such claims, actions, losses, damages and/or liability were caused by acts, errors, or omissions, negligence, or intentional misconduct of TOPGOLF or TOPGOLF's officials, officers, agents, employees, contractors or invitees, and for any costs or expenses incurred by COUNTY on account of such claims, except where such indemnification is prohibited by law, and except to the extent such claims, actions, losses, damages and/or liability were caused by the negligence or willful misconduct of COUNTY.

6. Default by TOPGOLF. In the event that TOPGOLF is in default of its obligations under this Agreement, CITY shall provide written notice of such default to TOPGOLF and COUNTY. If TOPGOLF or COUNTY fail to cure such default within thirty (30) days after receipt of CITY's notice or if the nature of the default is such that more than thirty (30) days are required to complete a cure and neither TOPGOLF nor COUNTY commences a cure within said thirty (30) days and thereafter does not diligently pursue the cure to completion, then CITY shall have the right to terminate the Agreement pursuant to Section 8.

7. Amendment or Modification. This Agreement may not be amended, modified or terminated except in writing executed by the parties and recorded in the Official Records of San Bernardino County.

8. Termination. The AGREEMENT shall terminate upon the first to occur: (i) termination of the CITY-DISTRICT AGREEMENT; (ii) termination of the lease between COUNTY and TOPGOLF; (iii) termination by mutual by agreement among all PARTIES; (iii) termination by CITY on thirty (30) days' written notice to COUNTY and TOPGOLF of TOPGOLF's failure to timely cure defaults pursuant to Section 6 of this AGREEMENT; or (iv) use of the sewer connection to DISTRICT is abandoned, which shall be deemed to occur after six (6) months of continuous non-use for the purposes set forth herein.

9. Notices. All notices, documents, correspondence and communications concerning this Agreement shall be addressed as set forth below, or as the parties may hereafter designate by written notice, and shall be sent through the United States mail with postage prepaid, certified or registered, return receipt requested. Any such mailing shall be deemed served or delivered upon the earlier of actual receipt or the date receipt is refused. Each party may change the address for notices by giving the other party prior written notice of the new address. Notwithstanding the above, the parties may also provide notices, documents, correspondence, or such other communications to the other by personal delivery or by Federal Express or similar courier service and so given shall be deemed to have been given upon the earlier of actual receipt or the date receipt is refused.

To ONTARIO:

City of Ontario
1333 S Bon View Avenue
Ontario, CA 91761
Attn: Utilities General Manager

To COUNTY:

County of San Bernardino
385 N. Arrowhead Avenue, Third
Floor
San Bernardino, CA 92415
Attn: Real Estate Services Department

To TOPGOLF:

Topgolf USA SBD, LLC
8750 N Central Expy, Suite 1200
Dallas, TX 75231
Attn: Legal Department

10. California Law. This AGREEMENT is entered into within the State of California, and all questions concerning the validity, interpretation and performance of any of its terms or provisions or any of the rights or obligations of the Parties hereto shall be governed by and resolved in accordance with the laws of the State of California. The Parties agree that any action or proceeding to enforce this AGREEMENT shall be brought in a court situated in San Bernardino County, California. The Parties hereby waive any right to transfer venue under Code of Civil Procedure Section 394.

11. Attorneys' Fees. In any action or proceeding, including appeals, brought to enforce or interpret any provision of this AGREEMENT, or where any provision hereof is validly asserted as a defense, each party shall bear its own attorneys' fees and costs, except that (i) TOPGOLF and

COUNTY shall bear those attorneys' fees and costs incurred by CITY as a result of TOPGOLF and COUNTY's indemnity obligations in Section 5.a; and (ii) TOPGOLF shall bear those attorneys' fees and costs incurred by COUNTY as a result of TOPGOLF's indemnity obligations in Section 5.b.

12. Third Party Rights. Nothing contained in this AGREEMENT and no performance or non-performance of actions under this AGREEMENT shall create a contractual relationship with or a cause of action in favor of a third party against any of the PARTIES to this AGREEMENT.

13. Cooperation; Further Acts. The PARTIES shall fully cooperate with one another, and shall take any additional acts or sign any additional documents as may be necessary, appropriate or convenient to attain the purposes of this AGREEMENT.

14. Authority. Each party represents and warrants to the other PARTIES that this AGREEMENT has been duly authorized and executed and constitutes the legally binding obligation of their respective organization or entity, enforceable in accordance with its terms.

15. Interpretation. The section headings used in this AGREEMENT have been inserted for convenience only and shall not be considered or referred to in resolving questions of interpretation or construction. Whenever the context hereof may so require, the singular shall include the plural and the masculine shall include the feminine and neuter. This AGREEMENT shall be construed according to its fair meaning without regard to authorship.

16. Final Agreement. This AGREEMENT contains the entire understanding and agreement with respect to the subject matter of this Agreement and all prior or contemporaneous documents, communications, understandings, representations, and statements, whether oral or written, shall be of no force or effect.

17. No Waiver. The delay or failure of any PARTY to enforce any term, covenant, or condition of this AGREEMENT or to exercise any of its right, power, or privilege hereunder shall not be construed as a waiver of the right by said PARTY to enforce this, or any other, term, covenant, or condition of, or right, power, or privilege of said PARTY under this AGREEMENT.

18. Severability. If any clause or provision in this AGREEMENT is ruled invalid by any court of competent jurisdiction, the invalidity shall not affect any of the remaining provisions herein, and this AGREEMENT shall be construed and enforced as if such invalid portion did not exist.

19. Counterparts. This AGREEMENT may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

20. Exhibits. Exhibit A and Exhibit B, attached hereto are incorporated herein by reference.

[Signatures on following page]

IN WITNESS WHEREOF, this AGREEMENT is executed by the PARTIES as of the dates specified below.

ONTARIO:

CITY OF ONTARIO,
a California municipal corporation

By: _____
Its: _____

ATTEST:

_____,
City Clerk

APPROVED AS TO FORM:
BEST BEST & KRIEGER LLP

By: _____
City Attorney

COUNTY:

COUNTY OF SAN BERNARDINO

By: _____
Its: _____

ATTEST:

_____, _____

APPROVED AS TO FORM:

COUNTY COUNSEL

By: _____

TOP GOLF:

Topgolf USA SBD, LLC

By: _____
William Davenport, Manager

ATTEST:

_____, _____

SIGNATURES MUST BE NOTARIZED

EXHIBIT A
LEGAL DESCRIPTION OF PROPERTY

Lot 4 of the MAP OF CUCAMONGA LANDS, recorded in Book 4 of Maps, Page 9, in the County of San Bernardino, State of California,

Excepting therefrom that portion conveyed to the San Bernardino County Flood Control District in Doc. No. 81-196541, recorded September 3, 1981, Official Records of said County,

Also excepting therefrom all that portion of said Lot 4 lying northerly and easterly of the following described line:

Commencing at a point on the southerly right of way line of Fourth Street (half width 60 feet) and the easterly line of said Lot 4; thence North 89°47'56" West, along the southerly line of said Fourth Street 504 feet to the true point of beginning; thence leaving said southerly line of Fourth Street, South 0°23'50" East, parallel with the east line of said Lot 4, 110.61 feet; thence South 85°04'42" East, 420.78 feet to a point on a line that is parallel with and 85 feet westerly of the East line of said Lot 4; thence South 0°23'50" East along said parallel line, 339.97 feet to its intersection with the north line of said land conveyed to the San Bernardino County Flood Control District in Doc. No. 81-196541, recorded September 3, 1981, Official Records of said County, being the point of termination.

Subject to all reservations and rights of way of record

Containing 13.7 Acres, more or less.

This legal description was prepared
by me or under my direction.



by:  4/11/2019
Thomas P. Herrin, PLS 8062 Date
County Surveyor

EXHIBIT B
ESTIMATE* OF ONGOING MAINTENANCE COSTS FOR THE SEWER CONNECTION

<u>Item</u>	<u>Cost</u>
<u>Plan review, inspection, and administrative labor</u>	<u>Not to exceed \$1,785.56 (one time)</u>
<u>Annual sewer inspection and maintenance</u>	<u>\$425.92 (annual, subject to 3% escalation)</u>

Annual sewer pipeline maintenance would include CCTV inspection and/or cleaning of the sewer lateral described as “line A” between the manhole at the sewer main at station 1+100 and the cleanout at station 1+20 per the Sewer and Water Plan (sheet 10) dated 12/02/20. Annual maintenance and inspection does not include any repairs. All repairs would be billed T&M to Topgolf based on the Special District’s Board approved fee schedule.

*Source- 2020-21 County Board-approved rates. The information in this estimate is subject to change.

