

MEMORANDUM

TO: MAYOR AND CITY COMMISSION

FROM: CITY ATTORNEY'S OFFICE

DATE: June 18, 2018

RE: Polk Regional Water Cooperative (PRWC) State Revolving Fund Guaranty Agreement

Attached hereto for your consideration and approval is a proposed Guaranty Agreement with the Florida Department of Environmental Protection (FDEP) State Revolving Fund (SRF).

Shortly after the PRWC was formed, its governing body selected three different projects as their priority projects to explore in more detail. That would involve a more detailed preliminary design report along with engineering and testing, and a financial feasibility analysis. The budget for that effort was adopted at just over \$22 million. The Southwest Florida Water Management District (SWFMD) agreed to a 50% share with the PRWC membership funding the other 50%. The commitment of each PRWC member was allocated in accordance with existing water demand. Lakeland as the second largest user has a share of about 30%, or \$2.87 million. The FDEP administers the Drinking Water SRF that offers low interest loans to local governments for approved projects. The PRWC approached them for assistance, and to borrow nearly \$10 million to assist its members in funding their share of the studies. Since the PRWC is in its early stages, and has no creditworthiness, the SRF required that the obligation of the PRWC be guaranteed by each individual member, up to its proportionate share of its allocation of the costs. The attached Guaranty Agreement complies with their requirement.

The important consideration for Lakeland, and several of the other members, is to ensure that this guaranty is enforceable, but does not impair or conflict with existing bond covenants on other borrowings. After considerable negotiation with FDEP, the attached agreement is supported by Lakeland's bond counsel.

As indicated, Lakeland's pledge is only to the extent of its share of the costs, which is about \$2.87 million, and its obligation only kicks in if PRWC is unable to perform, which is unlikely. It is recommended that the appropriate City Officials be authorized to execute the attached Guaranty Agreement.

attachment

**GUARANTY AGREEMENT FOR
POLK REGIONAL WATER COOPERATIVE
DRINKING WATER STATE REVOLVING FUND
PLANNING LOAN AGREEMENT**

As Security for a Loan from
FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION

June _____, 2018

The City of Lakeland, a FLORIDA [local] governmental entity (the Guarantor); and the State of Florida Department of Environmental Protection (DEP) agree as follows:

1. **AGREEMENT TO GUARANTY.** Guarantor requests that the DEP make the Loan (as herein defined) to Polk Regional Water Cooperative (Borrower) as contemplated and in accordance with the Interlocal Agreement, Exhibit 1. In consideration of the DEP making said Loan, subject to the terms hereof, Guarantor absolutely and unconditionally promises to pay and guaranties prompt payment to DEP, when due, up to \$2,876,855.00, which amount is equal to the Guarantor's percentage portion of the Loan Amount, set forth in the Cost Share Table, Exhibit 2, plus its cost share percent of any capitalized interest and service fee, (the "Guaranteed Amount") of the Loan. The term "Loan Amount" for purposes of this Guaranty shall mean the indebtedness of Borrower to DEP as evidenced by Borrower's Loan Agreement, which evidences a loan (the "Loan") from DEP to Borrower in the sum of \$9,914,390 plus capitalized interest and service fee, and all additional amendments, extensions, renewals, modifications, or substitutions thereof. In the event the anticipated Collateral (as herein defined) is shown by the Guarantor's annual budget to be insufficient to make the payments hereunder for such Fiscal Year when due, the Guarantor shall include in such budget such other legally available non-ad valorem funds which shall be sufficient, together with the Collateral, to make such payments. Such other legally available non-ad valorem funds, shall be budgeted in the regular annual governmental budget and designated for application as provided herein. The Guarantor shall notify the DEP immediately in writing of any such budgeting of other legally available non-ad valorem funds. Nothing in this covenant shall be construed as creating a pledge, lien, or charge upon any such other legally available non-ad valorem funds; requiring the Guarantor to levy or appropriate ad valorem tax revenues; or preventing the Guarantor from pledging to the payment of any bonds or other obligations all or any part of such other legally available non-ad valorem funds. This Agreement shall not be or constitute a general obligation or indebtedness of the Guarantor as a "bond" within the meaning of Article VI, Section 12 of the Constitution of Florida, but shall be payable solely from Collateral and the covenant to budget and appropriate legally available non-ad valorem funds, in accordance with the terms hereof. DEP shall never have the right to compel the exercise of any ad valorem taxing power or taxation of any real or personal property thereon or the use or application of ad valorem tax revenues to make payments hereunder, or be entitled to payment hereunder from any funds of Guarantor except as described herein.
2. **EXTENSIONS.** Guarantor consents to all renewals, extensions, modifications and substitutions of the Loan which may be made by DEP upon such terms and conditions as DEP may see fit from time to time without further notice to Guarantor and without limitation as to the number of renewals, extensions, modifications or substitutions.
3. **PRIMARY LIABILITY.** Guarantor is primarily liable under this Agreement for the Guaranteed Amount, regardless of whether DEP pursues any of its remedies against Borrower, against any other maker, surety, guarantor or endorser of the Loan or against any other collateral securing the Loan.
4. **NO OTHER CONDITIONS.** The liability of the Guarantor is not conditioned on the signing of this Agreement by any other person and further is not subject to any condition not expressly set forth herein.
5. **EVENTS OF DEFAULT.** Guarantor shall be in default upon the occurrence of any of the following events, circumstances or conditions ("Events of Default"):
 - (A) Failure by Guarantor to make a payment up to the Guaranteed Amount, within 30 days of notice from the Department that Borrower has failed to make a payment under the Loan Agreement when due;
 - (B) A default or breach by the Guarantor under any of the terms of this Agreement;

(C) The making or furnishing of any verbal or written representation by or on behalf of the Guarantor, statement or warranty to DEP which is or becomes false or incorrect in any material respect by or on behalf of Guarantor, or

(D) A good faith belief by DEP at any time that DEP is insecure with respect to Guarantor, or that the prospect of any payment is impaired, or that the Collateral (as herein defined) is impaired.

6. **REMEDIES ON DEFAULT.** At the option of DEP, all or any part of the Guaranteed Amount under this Agreement shall become immediately due and payable without notice or demand, upon the occurrence of an Event of Default or at any time thereafter. In addition, upon the occurrences of any Event of Default, DEP, at its option, may immediately invoke any or all other remedies provided in this Agreement. DEP is entitled to all rights and remedies provided at law or equity regardless of whether expressly stated in this Agreement. By choosing any remedy, DEP does not waive its right to an immediate use of any other remedy if the event of default continues or occurs again.

7. **DUTIES, WAIVERS AND CONSENTS BY GUARANTOR.** Regarding the Loan and this Agreement, to the extent not prohibited by law, Guarantor:

(A) consents to any waiver granted Borrower and agree that any delay or lack of diligence in the enforcement of the Loan, or any failure to file a claim against Borrower or other collateral or otherwise protect against any loss of collateral, in no way affects or impairs Guarantor's liability.

(B) waives reliance on any anti-deficiency statutes, through subrogation or otherwise, and such statutes in no way affect or impair Guarantor's liability. In addition, Guarantor waives any rights of subrogation, contribution or reimbursement and any other right Guarantor may have to enforce any remedy which DEP now has or in the future may have against Borrower or another guarantor or as to any collateral or security interest DEP may now or in the future hold for the indebtedness.

(C) waives protest, presentment for payment, demand, notice of acceleration, notice of intent to accelerate and notice of dishonor.

(D) consents to any renewals and extensions for payment on the Loan, regardless of the number of such renewals or extensions.

(E) consents to DEP's release of any borrower, endorser, guarantor, surety, accommodation maker or any other co-signer of the Loan.

(F) consents to DEP's right of set-off.

(G) shall not sell, lease, or dispose of any part of the Water or Sewer System (hereinafter defined to only mean the Guarantor's Water and Sewer System) which would materially reduce operational integrity, unless the written consent of the DEP is first secured.

(H) shall not allow any person to provide any services which would compete with the Water or Sewer Systems which would materially adversely affect the value of the Collateral (as herein defined).

(I) shall maintain rates and charges for the services furnished by the Water and Sewer Systems which will be sufficient to provide revenues equal to or exceeding 1.15 times the portion of their semi-annual loan payment based on the percentage of the Loan Amount, set forth in the Cost Share Table, Exhibit 2.

(J) shall not permit connections to, or furnish any services afforded by, their Water or Sewer Systems without making a charge therefore based on the Guarantor's uniform schedule of rates, fees and charges.

(K) shall operate and maintain their Water and Sewer Systems in a proper, sound and economical manner and shall make all necessary repairs, renewals and replacements.

(L) may make any additions, modifications or improvements to their Water and Sewer Systems which they deem desirable and which do not materially reduce the operational integrity of any part of their Water or Sewer System. All such improvements shall become part of the Systems.

(M) shall use its best efforts to levy, collect and receive all rates, fees and other charges due for use of its Water or Sewer Systems; or shall establish liens on premises served by the Water or Sewer Systems for the amount of all delinquent rates, fees and other charges where such action is permitted by law.

(N) shall, to the full extent permitted by law, discontinue the services of the Water and Sewer Systems and use its best efforts to shut off water service furnished to persons who are delinquent beyond customary grace periods in the payment of Water and Sewer System rates, fees and other charges.

8. **COLLATERAL.** Guarantor's obligation under this Agreement to pay the Guaranteed Amount is secured by, and Guarantor hereby grants and assigns a security interest in all net revenues from its Water and Sewer System, and, to the extent permitted by law, Reuse, Stormwater and/or Solid Waste revenues if collected as an Enterprise Fund along with Water and Sewer System revenues, subject to any senior debt secured thereby, as may be described in Exhibit 3, which is incorporated herein, if applicable. Any obligation hereunder are junior and subordinate in all respects to such senior debt and additional senior debt pursuant to Section 11 hereof as to lien on and source of security for payment from such net revenues and connection fees, if applicable.
9. **NO DUTY BY DEP REGARDING THE COLLATERAL.** DEP is under no duty to preserve or protect any Collateral until DEP is in actual or constructive possession of the Collateral. For purposes of this paragraph, DEP shall only be deemed to be in "actual" possession of the Collateral when DEP has physical, immediate and exclusive control over the Collateral and has accepted such control in writing. Further, DEP shall only be deemed to be in "constructive" possession of the Collateral when DEP has both the power and the intent to exercise control over the Collateral.
10. **RELEASE OF COLLATERAL.** Guarantor agrees that any collateral which secures all or part of this Agreement may be assigned, exchanged, released in whole or in part or substituted or impaired without notice to Guarantor and without defeating, discharging, or diminishing the liability of the Guarantor. Guarantor's obligation is absolute and DEP's failure to perfect any security interest or any act or omission by DEP which impairs the Collateral shall not relieve Guarantor of Guarantor's liability under this Agreement.
11. **ADDITIONAL DEBT OBLIGATIONS.** Guarantor may issue additional debt obligations on a parity with, or senior to, the lien of DEP on the Collateral provided that the revenues, which may take into account reasonable projections of growth of the Water and Sewer Systems and revenue increases, plus revenues to be pledged to the additional proposed debt obligations will equal or exceed 1.15 times the annual combined debt service of the Guaranteed Amount (assuming that Guarantor would be responsible for Guarantor's percentage portion of the regularly scheduled payments on the Loan) and the obligations proposed to be issued by Guarantor and will satisfy the coverage requirements of all other debt obligations secured by the Collateral. Senior debt is described in Exhibit 3, which is incorporated herein, if applicable.
12. **PARTIAL RELEASES AND TERMINATION.**
 - (A) **PARTIAL RELEASES.** Upon the Department's receipt of payment noting said payment reflects all or a portion of the Guarantor's Guaranteed Amount and, upon request (but not more frequently than annually), the DEP shall release the security interest on the Guarantor's Collateral by an amount equal to the Guarantor's payment ("Partial Release").
 - (B) **TERMINATION.** This Guaranty shall terminate upon the Department's receipt of the Guarantor's Guaranteed Amount ("Termination"). Upon request, the DEP shall execute and deliver to Guarantor documentation acknowledging such Termination.
13. **WARRANTY AND RELIANCE BY GUARANTOR.** Guarantor represents and warrants that this Agreement was entered into at the request of Borrower, and that Guarantor is satisfied regarding Borrower's financial condition and existing indebtedness, authority to borrow and the use and intended use of all Loan proceeds. Guarantor further represents and warrants that Guarantor has not relied on any representations or omissions of DEP or any information provided by DEP respecting Borrower, Borrower's financial condition and existing indebtedness, Borrower's authority to borrow or Borrower's use and intended use of all loan proceeds.
14. **RELIANCE BY DEP.** Guarantor acknowledges that DEP is relying on this Agreement in making the Loan to Borrower, and Guarantor has signed this Agreement to induce DEP to make the Loan. Guarantor further acknowledges and agrees that the requirement for Guarantor's signature is necessary for the Borrower to be considered creditworthy is necessary since DEP would not have otherwise made the Loan.
15. **WAIVER OF JURY TRIAL.** To the extent permitted by law, Guarantor and DEP hereby waive the right, which either party may have, to a trial by jury in respect to any litigation arising from this Agreement, or any other documents executed contemporaneously or in conjunction, with this Guaranty. Guarantor and DEP each

acknowledge that this paragraph has either been brought to the attention of each party's legal counsel or that each party had the opportunity to do so.

16. GENERAL PROVISIONS.

(A) **AUTHORITY.** Any individual signing this Agreement on behalf of a governmental entity represents and warrants that he or she has full authority to do so. The signatory to this Agreement respectively warrants that he/she is fully authorized to enter into this Agreement on behalf of that entity; and that the making, execution and performance of this Agreement has been duly approved by the entity's governing body.

(B) **TIME IS OF THE ESSENCE.** Time is of the essence in Guarantor's performance of all duties and obligations imposed by this Agreement.

(C) **NO WAIVER BY FORBEARANCE.** DEP's course of dealing, or DEP's forbearance from, or delay in, the exercise of any of DEP's rights, remedies, privileges or right to insist upon Guarantor's strict performance of any provisions contained in this Agreement, shall not be construed as a waiver by DEP, unless any such waiver is in writing and is signed by DEP.

(D) **AMENDMENT.** The provisions contained in this Agreement may not be amended, except through a written amendment which is signed by Guarantor and DEP.

(E) **INTEGRATION CLAUSE.** This written Agreement represents the entire understanding between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties.

(F) **FURTHER ASSURANCES.** Guarantor agrees, upon request of DEP and within the time DEP specifies, to provide any information, and to execute, acknowledge, deliver and record or file such further instruments or documents as may be required by DEP to secure the Loan Agreement or confirm any lien.

(G) **GOVERNING LAW.** This Agreement shall be governed by the laws of the State of Florida and its regulations.

(H) **FORUM AND VENUE.** In the event of litigation pertaining to this Agreement, the exclusive forum, venue and place of jurisdiction shall be in a court of competent jurisdiction in Leon County Florida, where the principal office of DEP is located.

(I) **SUCCESSORS AND LIABILITY OF GUARANTOR.** Guarantor may not assign, transfer or delegate any of its rights or obligations under this Agreement.

(J) **NUMBER AND GENDER.** Whenever used, the singular shall include the plural, the plural the singular, and the use of any gender shall be applicable to all genders.

(K) **DEFINITIONS.** The terms used in this Agreement, if not defined herein, shall have their meanings as defined in the, Loan Agreement, or other documents executed contemporaneously, or in conjunction, with this Agreement.

(L) **PARAGRAPH HEADINGS.** The headings at the beginning of any paragraph, or any subparagraph, in this Agreement are for convenience only and shall not be dispositive in interpreting or construing this Agreement.

(M) **UNENFORCEABLE PROVISIONS.** If any provision of this Agreement shall be held unenforceable or void by a court of law, then such provision to the extent not otherwise limited by law shall be severable from the remaining provisions and shall in no way affect the enforceability of the remaining provisions nor the validity of this Agreement. This Agreement is valid despite the genuineness, validity or enforceability of any of the Loan documents.

GUARANTOR:

The City of Lakeland, a FLORIDA [Local] Governmental entity,

By: _____

Print H. William Mutz

Its Mayor

STATE OF FLORIDA, COUNTY OF Polk

The foregoing instrument was acknowledged before me
on _____ by _____, on behalf of said Governmental Entity,
he/she is personally known to me or has produced _____
as identification.

Notary Public

(Name typed, printed or stamped)

EXHIBITS "1" AND "2"

OMITTED FOR CONVENIENCE

EXHIBIT "3"

A. For clarification purposes, references to the Guarantors obligations being secured by the Guarantor's Water and Sewer System, and Reuse, Stormwater and/or Solid Waste revenues if collected as an Enterprise Fund along with Water and Sewer revenues shall mean the Pledged Revenues (as defined below), which obligations under the Guaranty shall be junior and subordinate in all respects to the Bonds (as defined in the Bond Ordinance) as to lien on, and source of and security for payment from the Gross Revenues (as defined in the Bond Ordinance) and the Connection Charges (as defined in the Bond Ordinance).

The Guaranty shall not be or constitute a general obligation or indebtedness of the Guarantor as a "bond" within the meaning of Article VII, Section 12 of the Constitution of Florida, but shall be payable solely from the Pledged Revenues in accordance with the terms hereof and the covenant to budget and appropriate non-ad valorem revenues to the extent and in the manner provided in the Guaranty. DEP shall never have the right to compel the exercise of any ad valorem taxing power or taxation of any real or personal property thereon or the use or application of ad valorem tax revenues to make payments hereunder, or be entitled to payment under the Guaranty from any funds of Guarantor except from the Pledged Revenues and non-ad valorem revenues budgeted and appropriated for such purposes in the manner and to the extent described herein.

"Bond Ordinance" shall mean Ordinance No. 4369, enacted by the City Commission of the Guarantor on August 5, 2002, as amended and supplemented by Ordinance No. 5282, enacted by the City Commission on December 5, 2011.

"Pledged Revenues" shall mean the Gross Revenues (as defined in the Bond Ordinance) legally available under Section 9.02(1)(e) of the Bond Ordinance.

B. The outstanding senior lien bonds means collectively:

"Wastewater System and the Water System" shall mean the System, as defined in the Ordinance.

\$37,325,000 in Water and Wastewater Revenue Refunding and Improvement Bonds, Series 2012A

\$10,600,000 in Water and Wastewater Revenue Note, Series 2015