

INFRASTRUCTURE AGREEMENT

This Infrastructure Agreement (“**Agreement**”) is made this _____ day of _____, 2021 (“**Effective Date**”) by and between the City of The Dalles, Oregon, an Oregon municipal corporation (“**City**”), Moraine Industries LLC, a Delaware limited liability company (“**Moraine**”), and Design, LLC, a Delaware limited liability company (“**Design**”; Moraine and Design are referred to together in the Agreement as “**Design**”; each of the City and Design are a “**Party**,” and together, the “**Parties**”) pursuant to the City’s home-rule authority.

RECITALS

- A. Design owns and operates data centers (“**Existing Development**”) on real property located on Wasco County Tax Parcels 2N 13E 21C 1100 & 2N 13E 28 101 (“**Existing Development Property**”) and desires to further develop the real property (“**New Development**”) located on Wasco County Tax Parcels 2N 13E 28 700 & 2N 13E 33 200 (“**New Development Property**”) to meet its business needs.
- B. The Existing Development Property and New Development Property (together, the “**Design Property**”) are described in the list of legal descriptions attached to and made part of this Agreement as **Exhibit A**.
- C. The Design Property is located within the City’s Industrial Zone. Permitted uses within the Industrial Zone include Design’s existing and proposed uses. All development on the Design Property conforms or will conform to applicable density, height, and size limitations, as may be modified through City development approvals.
- D. Design is unwilling to risk substantial commitment of private capital without sufficient assurances from the City that adequate water supply and sanitary sewer capacity is and will continue to be available to support the Existing Development and the New Development.
- E. The City operates a potable water system that has an existing supply which is not being used and which is not reserved by others.
- F. The City operates a sanitary sewer system that has existing capacity which is not being used and which is not reserved by others.
- G. The City desires to work cooperatively with Design to ensure adequate water supply and sanitary sewer capacity for all City users including the Existing

Development and the New Development, including identifying and making improvements to the City's water and sanitary sewer systems to ensure adequate supply and capacity in the future.

- H. The City also desires to make improvements to its water and sanitary sewer systems to ensure water and sanitary sewer system resiliency across the City's systems and to support future economic growth in the City.
- I. The City finds that the water and sanitary sewer projects contemplated by the Agreement are in the public interest of its citizens and that the projects will support the Existing Development and the New Development, as well as the economic growth and vitality of the City.
- J. The City thus desires to work cooperatively with Design to develop water and sanitary sewer infrastructure for the future delivery of water and sanitary sewer service to all City users, including the Existing Development and the New Development.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual promises and performance of the obligations of each Party set out in the Agreement, and other good and valuable consideration, the receipt and sufficiency of which are expressly acknowledged by the Parties, the City and Design hereby agree to the following terms and conditions:

- 1. **Effective Date.** The Agreement shall be effective upon the Effective Date.
- 2. **Term of Agreement.** The Agreement shall terminate when each Party has fulfilled its respective obligations under the Agreement but no later than fifteen (15) years from the Effective Date, unless otherwise terminated as provided in Section 17.6 below.
- 3. **City Council Action.** The Agreement was duly approved and adopted by The Dalles City Council through its Resolution No. 21-028 on November 8, 2021.
- 4. **The Projects.**
 - 4.1. In order to provide the necessary water supply and sanitary sewer capacity to the Existing Development and the New Development, as well as to increase overall City water and sanitary system resiliency and meet the existing and future needs of all residential, commercial, and industrial properties within the City, the City and Design agree to work cooperatively to complete the nine (9) water and sanitary sewer projects ("Projects," each a "Project") described in the Projects and Estimated Costs Summary, attached to and made part of this Agreement as **Exhibit B.**
 - 4.2. The City and Design agree to share in the construction and cost of the Projects as outlined in the Projects and Estimated Costs Summary and described further below.

4.3. The Projects will be completed in accordance with the timelines provided in Sections 5.3 and 6.3 below.

5. Design's Obligations.

5.1. **Design Constructed Projects.** Design will be responsible for all work necessary to complete Projects 1, 2, 3, 4, 5, 6, 7, and 8 (“**Design Constructed Projects**,” each a “**Design Constructed Project**”), including all (i) design and engineering; (ii) land acquisition or site control; (iii) bidding and contracting; (iv) permitting; and (v) construction. All projects will be constructed to City standards. City and Design shall conduct pre-design conferences for each Design Constructed Project to finalize project specifications and development timelines, and to discuss City standards and permitting requirements. City and Design shall work collaboratively to achieve concurrence on final project specifications and timelines. City shall have an opportunity to review and approve all project plans prior to submission to Oregon Health Authority (“**OHA**”) Drinking Water Program for plan review. Design shall pay fees for OHA-required plan reviews and City shall “sponsor” plan review applications.

5.1.1. **Predesign Conference and Concurrence.** Design will request a coordination meeting with the City in advance of beginning detailed design for each Design Constructed Project. This predesign conference will be used to finalize project specifications, set performance metrics, develop a design and construction schedule, identify permitting required, and agree on the timing for the transfer of the Design Constructed Project to the City. Design will request written concurrence for Design Constructed Projects from the City prior to issuing final construction contracts.

5.2. **Additional Contributions.** In addition to completing the Design Constructed Projects, Design has made or will make the following contributions to the City’s ongoing efforts to upgrade its water and sanitary sewer systems:

5.2.1. As part of Projects 2 and 3, Design will convey the water rights that consist of Water Right Certificate Nos. 46835, 46836, 46839, and a portion of 82480, comprising 6.01 cfs to the City for incorporation into the municipal water system and submit to the Oregon Water Resources Department (“**OWRD**”) water rights transfer applications to convert use from industrial to municipal use and, to the extent necessary, change the authorized place of use and points of appropriation (i.e., wells). Upon receipt of all necessary OWRD approvals, Design will relocate two (2) existing groundwater wells located on the Design Property Tax Parcel 2N 13E 28 700 to new locations on Design Property Tax Parcel 2N 13E 33 200.

5.2.2. Design will furnish the City a deed, easement, or other mutually acceptable right of entry, for Projects 1, 2, 3, 4, 5, 6, 7, and 8 for City ownership, operations and maintenance.

5.2.3. Design previously funded an Aquifer Storage and Recovery (“ASR”) Feasibility Study to confirm suitability for implementation, and subsequently funded permitting and preliminary design work for implementation of ASR by the City, including obtaining an ASR Limited License from OWRD authorizing pilot testing of ASR (including Oregon Department of Environmental Quality underground injection control permitting), plan review approval from OHA for the first ASR well, preliminary design of the first ASR well and pump station, and a draft design build contract for drilling and construction of one or more ASR wells.

5.3. Project Timelines and Delivery. Design anticipates initiation and completion of Projects 1,2, 3, 4, 5, 6, 7, and 8 according to the timing indicated in **Exhibit B**. If Design is unable to place in service one or more Design Constructed Projects within the timeframes outlined or if one or more Design Constructed Projects are not needed, Design shall notify the City of the need to revise the project list and/or timeline and work cooperatively with the City on a revised project list and/or schedule for the Design Constructed Project or Projects. If Design does not receive its land use or building permits for New Development; or if Design is unable to obtain the permits needed for the Projects identified above; it is not required to build the Design Constructed Projects. If the City and Design determine during the predesign conference and concurrence period that additional water and sewer capacity requirements for the New Development are not needed, the City and Design will agree which Design Constructed Projects can be deferred or deleted.

5.4. Monthly Reports. During design and construction of the Design Constructed Projects, Design shall provide the City a monthly report describing the status of each ongoing Design Constructed Project.

5.5. Meet and Confer. During the term of the Agreement or until both Parties confirm that the Projects have been satisfactorily completed, Design shall meet with the City twice each calendar year to discuss the implementation of the Agreement and the status of each ongoing Design Constructed Project.

6. City’s Obligations.

6.1. City Constructed Project. The City will be responsible for all work necessary to complete Project 9 (“**City Constructed Project**”), including all (i) design and engineering; (ii) land acquisition or site control; (iii) bidding and contracting; (iv) permitting; and (v) construction.

6.2. City Funding. The City’s responsibility to complete the City Constructed Project is contingent upon the availability of public funds, but the City should make every effort

to allocate funds consistent with the terms of the Agreement, including revising its Capital Improvement Plan as necessary to allocate funds to the Projects. If, after making every effort to secure the necessary funding, the City is unable to fund the City Constructed Project, the City shall notify Design of the need to revise such City Constructed Project and Estimated Costs Summary and work cooperatively with Design on a revised funding package for the City Constructed Project.

6.3. Project Timelines and Delivery. The City shall commence its design and engineering of the City Constructed Project within twelve (12) months of the Effective Date. The City shall commence work on the City Constructed Project within twelve (12) months of the Effective Date. If the City is unable to complete the tasks and place in service the City Constructed Project within the timeframes outlined in this Section 6.3, the City shall notify Design of the need to revise the timeline and work cooperatively with Design on a revised schedule for the City Constructed Project.

6.4. Monthly Reports. During design and construction of the City Constructed Project, the City shall provide Design a monthly report describing the status of the ongoing City Constructed Project.

6.5. Meet and Confer. During the term of the Agreement or until both Parties confirm that the Project has been satisfactorily completed, the City shall meet with Design twice each calendar year. During these meetings, the City shall update Design regarding the progress of and schedule for completion of each ongoing City Constructed Project.

6.6. Supply and Capacity. Provided Design is successful in transferring its water rights to the City as outlined in Section 5.2.1 or the City is otherwise satisfied that it has received sufficient additional supply to serve the Existing Development and the New Development, the City agrees to provide Design a sufficient, reliable, and adequate water supply and sanitary sewer capacity to serve the Existing Development and the New Development within its reasonable ability to do so. It is estimated that the Existing Development and the New Development at full build-out will require water supply and sanitary sewer capacity in the volumes outlined in the Water Supply and Sanitary Sewer Capacity Demands Summary attached to and made part of this Agreement as Exhibit C. To the maximum extent allowed by law, the Parties agree Exhibit C is exempt from public disclosure under the Oregon Public Records Law and is subject to the confidentiality provisions set forth in Section 15. The contents of Exhibit C shall be redacted in the recorded version of the Agreement. This Agreement does not change or waive any of the previous requirements outlined in the development agreement entered into between Design and the City as of October 14, 2015.

6.7. Design Constructed Projects. Consistent with Sections 12 and 13, the City agrees to formally accept the Design Constructed Projects for ownership, operation, and maintenance upon Design's completion of the Design Constructed Projects and the Design Constructed Projects meeting the final inspection procedures outlined in The

Dalles Municipal Code 10.10.080. The City agrees to maintain all permitting requirements, including air emissions for projects requiring emergency generators.

- 6.8. **Master Plan Update.** Within twelve (12) months after the Effective Date, the City shall initiate a project to update its Water System Master Plan (“Master Plan”) to cover all projected development within the City in the next ten (10) years. During the master plan process, the City will provide updates to Design regarding improvements necessary to support the build-out of the Industrial Zone. This master planning effort is expected to consider the findings and conclusions from the following technical memos regarding the City’s existing facilities and necessary upgrades: (i) “Focused Assessment of Water Infrastructure”, prepared by RH2 Engineering, Inc. on December 10, 2020; (ii) “Water Supply Analysis for Buildable Lands Assessment in the 310 Zone”, prepared by GSI Water Solutions, Inc. on January 4, 2021; and (iii) “Review of Proposed Well Siting at 2929 West 2nd Street in The Dalles, Oregon in Relation to Water Quality” on July 27, 2020.
- 6.9. **Water & Sewer System Resiliency.** Design is aware of the City’s effort to prepare a Risk and Resilience Assessment to identify the threats, vulnerabilities, and consequences to critical infrastructure. The City agrees to identify, fund, design, and install countermeasures the City determines are necessary to ensure resiliency of the water and sewer system such that any interruption to operation can be corrected within 24 hours, within the City’s financial capability to do so.
- 6.10. In order to continue to evaluate ASR, the City agrees to the additional steps to establish an ASR water level monitoring program as outlined in Project 9 (utilizing existing wells identified in the ASR Limited License as observation wells). The City will work cooperatively with Design to continue the license of the ASR system described in the City’s ASR Limited License.
7. **System Development Charges.** The Parties agree that Design’s actual cost of designing and constructing certain Design Constructed Projects shall become a credit towards water or sanitary sewer system development charges (“**SDCs**”) for the New Development as allowed by City’s Municipal Code. Those Design Constructed Projects eligible for SDC credits are noted in **Exhibit B**.
8. **Rate Study.** The City shall not discriminate against Design in connection with the setting of fees, rates, or other charges for connection to or use of the water or sanitary sewer system by the Existing Development or the New Development. Within twelve (12) months after the Effective Date, the City agrees to initiate a water system rate study (“**Rate Study**”) to review both residential and commercial/industrial water rates. This Rate Study shall identify rates that are sufficient to provide for fixed and variable operating costs, water system resiliency and the capital costs needed to operate, improve, and expand its system for all customers. When establishing any new rates the City will ensure Design is not charged capital cost recovery for the Design Constructed Projects.

9. **Aquifer Storage and Recovery (“ASR”)**. The City and Design both value the benefits of an ASR system including water resiliency, water quality, and water supply capacity expansion. As such, Design will construct Project 2 with ASR compatibility. The City solely controls the supply sources for ASR; and as such, agrees to make good faith efforts to supply treated surface water to Project 2 for recharge at the permitted limits defined in the ASR license. The ASR supply rates shall be at no additional cost to Design.
10. **Temperature Total Maximum Daily Loads (“TMDLs”)**. Design may discharge sewer from the New Development Property at a temperature determined by modeling consistent with the methodology utilized at the Existing Development. The measurement point shall be mutually acceptable to both Parties and be physically located near the New Development Property boundary.
11. **Memorandum of Understanding**. Within twenty-four (24) months after the Effective Date, the Parties agree to consider a Memorandum of Understanding (“MOU”) regarding operational characteristics of water supply and delivery by the City in the 310 Zone, with a goal to reduce overall water usage of industrial customers by minimizing the mineral profile and improving overall water quality, including a plan to supply treated surface water to Design’s Project 2 with ASR compatibility.
12. **No Further Upgrade Obligations**.
 - 12.1. The Parties agree, once Design completes and the City formally accepts the Design Constructed Projects for ownership, operation, and maintenance, the City shall receive any transferred warranty obligations from Design’s contractor. Provided the contractor warrants the improvements against defects in the materials and workmanship provided for a period of one year from the date of the City’s final acceptance of the work as required by The Dalles Municipal Code Section 10.10.090, the City shall have no further recourse against Design for additional repairs or upgrades to the City’s water or sanitary sewer systems related to the Existing Development and the New Development identified in this Agreement notwithstanding the terms of Section 12.2.
 - 12.2. The City agrees to work cooperatively with Design to develop potential solutions if there are any future changes to Middle Columbia-Hood Temperature TMDL requirements beyond those in Section 5 of this Agreement.
 - 12.3. Notwithstanding anything to the contrary therein, Design shall have no obligation to perform water or sanitary sewer system repairs or upgrades under the following prior agreements: (i) November 20, 2008, Delayed Improvement Agreement, recorded in the Official Records of Wasco County, Oregon as Document No. 2008-005261; (ii) December 27, 2005, Delayed Improvement Agreement, recorded in the Official Records of Wasco County, Oregon as Document No. 2006-005493; and (iii) December 27, 2005 Waiver of Remonstrance Agreement, recorded in the official records of Wasco County, Oregon as Document No. 2006-005495.

13. Maintenance and Repair. The City shall be solely responsible for owning, operating, and maintaining the Projects and any other portions of the City's water and sanitary sewer systems serving the Existing Development and the New Development, including but not limited to the Projects and the Design Constructed Projects.
14. Permits and Approvals. The City shall expedite processing of all permits and any other approvals or actions requested by Design with respect to the Design Constructed Projects or the New Development. The City shall also assist and cooperate in good faith with Design in connection with obtaining any approvals and permits from other governmental or quasi-governmental agencies having jurisdiction over the Design Constructed Projects or the New Development.
15. Confidentiality. Except as provided otherwise in the Non-Disclosure Agreement between Design and the City dated March 18, 2013, the terms of which are incorporated by this reference, and except as provided below in this Section 15, the City and Design, for the benefit of each other, hereby agree each Party will hold all information obtained by it related to the Agreement in strictest confidence. Design acknowledges the City is subject to the Oregon Public Records Law and any public disclosure necessary to comply with such law is not a breach of this Section 15. To the extent permissible by law, the City agrees to engage in all discussions and exchange of information relating to the Agreement in City Council Executive Session. If the City receives a public records request for a copy of the Agreement or any other information regarding Design or the Projects, the City shall provide timely notice to Design and reasonably cooperate with Design in preserving confidentiality and protecting Design's trade secrets and other confidential information, at no additional cost or expense to the City.
16. Indemnification. In accordance with the Oregon Tort Claims Act and the Oregon Constitution, each Party hereby agrees to indemnify the other Party and hold it harmless from and against any and all claims, demands, liabilities, costs, expenses, penalties, damages, and losses, including, without limitation, reasonable attorneys' fees, resulting from any misrepresentation or breach of warranty or breach of covenant made by such Party in the Agreement; provided, however, in no event shall either Party indemnify against the other Party's sole negligence.
17. General Provisions.
 - 17.1. Good Faith and Reasonableness. The Parties intend obligations of good faith and fair dealing apply to the Agreement generally and no negative inferences should be drawn by the absence of an explicit obligation to be reasonable in any portion of the Agreement.
 - 17.2. Force Majeure. The Parties shall not be liable for any failure to perform hereunder as a result of an external event or events beyond their respective control, including, without limitation, fire, flood, hurricanes, tornadoes, earthquakes, terrorism, global pandemic, or other acts of God. However, if any such event interferes with the performance by a Party hereunder, such Party shall diligently and in good faith act to

the extent within its power to remedy the circumstances affecting its performance or to complete performance in as timely a manner as is reasonably possible.

- 17.3. **Cooperation in the Event of Legal Challenge.** In the event of any legal change instituted by a third party, the Parties agree to cooperate in defending such action.
- 17.4. **Binding Effect.** The Agreement shall be binding upon and inure to the benefit of the Parties and their respective heirs, personal representatives, successors, and assigns; however, Design shall not assign or otherwise transfer any interest without prior written consent from City except as otherwise provided under Section 17.5.
- 17.5. **Assign and Successors.** Design shall have the right to assign the Agreement to any entity owned or controlled by, or under common control with, Design (the fact of which will be established by written representation of Design), and Design shall give the City written notice in such event. Any other assignments shall require the City's written consent.
- 17.6. **Amendment or Termination.** The Agreement may be amended, modified, supplemented, or terminated by the mutual written consent of the Parties or their successors-in-interest or assigns.
- 17.7. **Recitals.** The recitals of the Agreement are material terms of the Agreement and shall be binding upon the Parties.
- 17.8. **Severability.** If any provision of the Agreement, or its application to any person, is held to be unenforceable for any reason, it shall be adjusted rather than voided, if possible, in order to achieve the intent of the Parties to the extent possible.
- 17.9. **Notice.** All notices given under the Agreement shall be in writing and may be delivered by personal delivery, courier service, or deposit in the United States mail, postage prepaid, as certified mail, return receipt requested, and addressed as follows:

City: Julie Krueger
City Manager
313 Court Street
The Dalles, OR 97058
Telephone: (541) 296-5481
Email: jkrueger@ci.the-dalles.or.us

With a copy to: Jonathan M. Kara
w/Campbell Phillips PC
City Attorney
313 Court Street
The Dalles, OR 97058
Telephone: (541) 371-5585
Email: jkara@campbellphillipslaw.com

Design: General Counsel
Design LLC
1600 Amphitheatre Parkway
Mountainview, CA 94043
Telephone: 650-618-1833
Email: legal-notices@google.com

With a copy to: Sarah Stauffer Curtiss
Stoel Rives LLP
760 SW Ninth Avenue, Suite 3000
Portland, OR 97205
Telephone: (503) 294-9829
Email: sarah.curtiss@stoel.com

- 17.10. Applicable Law. The Agreement is governed by and shall be construed in accordance with the laws of the State of Oregon.
- 17.11. No Third-Party Beneficiaries. The only parties to the Agreement are the City and Design. There are no third-party beneficiaries under the Agreement, and, except for assignees and successors-in-interest to the Parties, the Agreement shall not be construed to benefit or be enforceable by any other person.
- 17.12. Authority. The City represents and warrants, as of the Effective Date: (i) the City has the full power and authority to enter into the Agreement and to perform its obligations hereunder; (ii) the Agreement is a valid and binding obligation, enforceable against the City in accordance with its terms; and (iii) the execution and delivery of the Agreement by the City has been validly authorized by all necessary governmental action, complies with the City's appropriation process, and does not conflict with any other agreements entered into by the City.
- 17.13. Counterparts. The Agreement may be executed in counterparts, each of which shall be deemed to be an original, and such counterparts shall constitute one and the same instrument.
- 17.14. Entire Agreement and Exhibits. The Agreement constitutes the entire agreement between the Parties as to the subject matter covered by the Agreement. The exhibits attached to the Agreement are an integral part of the Agreement and are fully incorporated into the Agreement where they are referenced in the text of the Agreement.
- 17.15. Recording. The City shall cause the Agreement to be recorded in the Wasco County Clerk's Office at the City's expense.

IN WITNESS WHEREOF, the Parties have executed this Infrastructure Agreement as of the Effective Date.

CITY:

City of The Dalles
an Oregon municipal corporation
By: _____
Name: _____
Its: _____

DESIGN:

Design, LLC,
a Delaware limited liability company
By: _____
Name: _____
Its: _____

MORAINE:

Moraine Industries LLC
a Delaware limited liability company
By: _____
Name: _____
Its: _____

STATE OF OREGON)
) ss.
COUNTY OF)

This instrument was acknowledged before me on _____, 2021, by _____
_____, _____ of the City of The Dalles, Oregon,
an Oregon municipal corporation, on its behalf.

Notary Public - State of Oregon
My commission expires:
Commission No:

This instrument was acknowledged before me on _____, 2021, by _____, _____ of Design LLC, a Delaware limited liability company, on its behalf.

Notary Public
My commission expires:
Commission No.: