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El Paso County, CO



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**PRIVATE DETENTION BASIN /
STORMWATER QUALITY BEST MANAGEMENT PRACTICE
MAINTENANCE AGREEMENT AND EASEMENT**

This PRIVATE DETENTION BASIN / STORMWATER QUALITY BEST MANAGEMENT PRACTICE MAINTENANCE AGREEMENT AND EASEMENT (“Agreement”) is made by and among EL PASO COUNTY (the “County”) by and through THE BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO (the “Board”), CND-CLOVELEAF, LLC, a Colorado limited liability company (“Developer”), WOSC, LLC, a Colorado limited liability company (“Offsite Owner”), and CLOVERLEAF METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado (the “Metro District”). The above may occasionally be referred to herein singularly as “Party” and collectively as “Parties.”

Recitals

A. WHEREAS, the Metro District was organized as part of a common plan to provide certain public services and facilities serving the needs of the development known as Cloverleaf Filing No 2; and

B. WHEREAS, the Metro District is authorized pursuant to its Service Plan to provide various public improvements and services, including the design, financing, installation, construction, acquisition, operation, and maintenance of flood and surface drainage improvements, including but not limited to detention ponds, both within and without its boundaries; and

C. WHEREAS, the Metro District will own, operate and maintain those public improvements not dedicated to another governmental entity; and

D. WHEREAS, Developer is the owner of certain real estate (the “Property”) in El Paso County, Colorado, which Property is legally described in **Exhibit A**, attached hereto and incorporated herein by this reference, and lies within the Metro District; and

E. WHEREAS, Developer desires to plat and develop on the Property a subdivision to be known as Cloverleaf Filing No. 2 (the “Subdivision”); and

F. WHEREAS, Offsite Owner owns property adjacent to the Property upon which Developer has been granted an easement to construct and maintain a detention pond to serve the Property (the “Offsite Pond Area”); and

G. WHEREAS, the development of this Property will substantially increase the volume of water runoff and will decrease the quality of the stormwater runoff from the Property, and, therefore, it is in the best interest of public health, safety and welfare for the County to condition approval of this subdivision on Developer’s promise to construct adequate drainage, water runoff control facilities, and stormwater quality structural Best Management Practices (“BMPs”) for the Subdivision; and

H. WHEREAS, Chapter 8, Section 8.4.5 of the El Paso County Land Development Code, as periodically amended, promulgated pursuant to Section 30-28-133(1), Colorado Revised Statutes (C.R.S.), requires the County to condition approval of all subdivisions on a developer’s promise to construct adequate drainage, water runoff control facilities, and BMPs in subdivisions; and

I. WHEREAS, the Drainage Criteria Manual, Volume 2, as amended by Appendix I of the El Paso County Engineering Criteria Manual (“ECM”), as each may be periodically amended, promulgated pursuant to the County’s Colorado Discharge Permit System General Permit (“MS4 Permit”) as required by Phase II of the National Pollutant Discharge Elimination System (“NPDES”), which MS4 Permit requires that the County take measures to protect the quality of stormwater from sediment and other contaminants, requires subdividers, developers, landowners, and owners of facilities located in the County’s rights-of-way or easements to provide adequate permanent stormwater quality BMPs with new development or significant redevelopment; and

J. WHEREAS, Section 2.9 of the El Paso County Drainage Criteria Manual provides for a developer’s promise to maintain a subdivision’s drainage facilities in the event the County does not assume such responsibility; and

K. WHEREAS, developers in El Paso County have historically chosen water runoff detention basins as a means to provide adequate drainage and water runoff control in subdivisions, which basins, while effective, are less expensive for developers to construct than other methods of providing drainage and water runoff control; and

L. WHEREAS, Developer desires to construct for the Subdivision five (5) detention basin/stormwater quality BMP(s) (“Detention Basin/BMP(s)”) as the means for providing adequate drainage and stormwater runoff control and to meet requirements of the County’s MS4 Permit, and to provide for operating, cleaning, maintaining and repairing such Detention Basin/BMP(s); and

M. WHEREAS, Developer desires to construct the Detention Basin/BMP(s) designated as Pond 1, Pond 2, Pond 3, Pond 4, and Sand Filter on the map attached hereto as **Exhibit B** and incorporated herein by this reference, within the areas legally described in **Exhibit C**, attached hereto and incorporated herein by this reference; and

N. WHEREAS, Developer shall be charged with the duty of constructing the Detention Basin/BMP(s), and, following conveyance and acceptance of the Detention Basin/BMP(s) for maintenance by the Metro District, the Metro District shall be charged with the duties of operating, maintaining and repairing the Detention Basin/BMP(s) on the parcels and easements described in **Exhibit C**; and

O. WHEREAS, it is the County’s experience that subdivision developers and property owners historically have not properly cleaned and otherwise not properly maintained and repaired such detention basins/BMPs, and that such detention basins/BMPs, when not so properly cleaned, maintained, and repaired, threaten the public health, safety and welfare; and

P. WHEREAS, the County, in order to protect the public health, safety and welfare, has historically expended valuable and limited public resources to so properly clean, maintain, and repair such detention basins/BMPs when developers and property owners have failed in their responsibilities, and therefore, the County desires the means to recover its costs incurred in the event the burden falls on the County to so clean, maintain and repair the Detention Basin/BMP(s) serving this Subdivision due to the Developer’s or the Metro District’s failure to meet its obligations to do the same; and

Q. WHEREAS, the County conditions approval of this Subdivision on the Developer's promise to so construct the Detention Basin/BMP(s), and further conditions approval on the Developer's and/or Metro District's promise to reimburse the County in the event the burden falls upon the County to so clean, maintain and/or repair the Detention Basin/BMP(s) serving this Subdivision; and

R. WHEREAS, the County could condition subdivision approval on the Developer's promise to construct a different and more expensive drainage, water runoff control system and BMPs than those proposed herein, which more expensive system would not create the possibility of the burden of cleaning, maintenance and repair expenses falling on the County; however, the County is willing to forego such right upon the performance of Developer's and the Metro District's promises contained herein; and

S. WHEREAS, the County, in order to secure performance of the promises contained herein, conditions approval of this Subdivision upon the Developer's and Offsite Owner's grant herein of a perpetual drainage easement and access easement over the portions of the Property and the Offsite Pond Area described in **Exhibit C** to both the County and the Metro District for the purpose of allowing the County and/or the Metro District, following acceptance of the Detention Basin/BMP(s), to periodically access, inspect, and, when so necessary, to clean, maintain and/or repair the Detention Basin/BMP(s); and

T. WHEREAS, pursuant to Colorado Constitution, Article XIV, Section 18(2) and Section 29-1-203, Colorado Revised Statutes, governmental entities may cooperate and contract with each other to provide any function, services, or facilities lawfully authorized to each.

Agreement

NOW, THEREFORE, in consideration of the mutual promises contained herein, the sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Incorporation of Recitals: The Parties incorporate the Recitals above into this Agreement.
2. Covenants Running with the Land: Developer and the Metro District agree that this entire Agreement and the performance thereof shall become a covenant running with the land, which land is legally described in **Exhibit A**, and that this entire Agreement and the performance thereof shall be binding upon themselves and their respective successors and assigns.
3. Construction: Developer shall construct on those portions of the Property and the Offsite Pond Area described in **Exhibit C** five (5) Detention Basin/BMP(s). Developer shall not commence construction of a Detention Basin/BMP(s) until the El Paso County Planning and Community Development Department ("PCD") has approved in writing the plans and specifications for such Detention Basin/BMP(s) and this Agreement has been signed by all Parties and returned to the PCD. Developer shall complete construction of the Detention Basin/BMP(s) in substantial compliance with the County-approved plans and specifications for the Detention Basin/BMP(s). Failure to meet these requirements shall be a material breach of this Agreement and shall entitle the County to pursue any remedies available to it at law or in equity to enforce the same. Construction of the Detention Basin/BMP(s) shall be substantially completed within one (1) year (defined as 365 days), which one-year period will commence to run on the date the approved plat of this Subdivision is recorded in the records of the El Paso County Clerk and Recorder. Rough grading of the Detention Basin/BMP(s) must be completed and inspected by the El Paso County Planning and Community Development Department prior to commencing road construction.

In the event construction of the Detention Basin/BMP(s) for the Subdivision (the "Project") is not substantially completed within the one (1) year period, then the County may exercise its discretion to complete the Project and shall have the right to seek reimbursement from the Developer and its respective successors and assigns for its actual costs and expenses incurred in the process of completing the Project. The term "actual costs and expenses" as used herein and in Paragraph 7 shall be liberally construed in favor of the County and shall include, but shall not be limited to, labor costs, tool and equipment costs, supply costs, and engineering and design costs, regardless of whether the County uses its own personnel, tools, equipment and supplies, etc. to correct the matter. In the event the County initiates any litigation or engages the services of legal counsel in order to enforce the provisions arising herein, the County shall be entitled to its damages and costs, including reasonable attorney fees, regardless of whether the County contracts with outside legal counsel or utilizes in-house legal counsel for the same.

4. **Maintenance:** Subject to Paragraph 17 below, the Developer and Metro District agree for themselves and their respective successors and assigns that they will regularly and routinely inspect, clean, and maintain the Detention Basin/BMP(s) and otherwise keep the same in good repair, all at their own cost and expense. No trees or shrubs that will impair the structural integrity of the Detention Basin/BMP(s) shall be planted or allowed to grow on the Detention Basin/BMP(s).

5. **Creation of Easement:** Developer hereby grants to the County and the Metro District, and Offsite Owner hereby grants to the County, a non-exclusive perpetual drainage easement and access easement, together with all rights and privileges as are incidental to the full use and enjoyment of the easement rights, upon, over, above, through and across those portions of the Property and the Offsite Pond Area, respectively, described in **Exhibit C** (collectively, the "Easement"). The purpose of the Easement is to allow the County and the Metro District, as applicable, to access, inspect, clean, repair and maintain the Detention Basin/BMP(s); however, the creation of the easement does not expressly or implicitly impose on the County a duty to so inspect, clean, repair or maintain the Detention Basin/BMP(s), and the Metro District does not have the obligation to inspect, clean, repair and maintain the Detention Basin/BMP(s) until the Metro District accepts the Detention Basin/BMP(s) for maintenance.

6. **County's Rights and Obligations:** Any time the County determines, in the sole exercise of its discretion, that the Detention Basin/BMP(s) are not properly cleaned, maintained and/or otherwise kept in good repair, the County shall give reasonable notice to the Developer or to the Metro District once the Metro District accepts the Detention Basin/BMP(s) for maintenance, and their respective successors and assigns, that the Detention Basin/BMP(s) need to be cleaned, maintained and/or otherwise repaired. The notice shall provide a reasonable time to correct the problem(s). Should the responsible parties fail to correct the specified problem(s) within the reasonable time provided or such other period of time with which the County agrees, the County may enter upon the Property and the Offsite Pond Area to so correct the specified problem(s). Notice shall be effective to the above by the County's deposit of the same into the regular United States mail, postage pre-paid. Notwithstanding the foregoing, this Agreement does not expressly or implicitly impose on the County a duty to so inspect, clean, repair or maintain the Detention Basin/BMP(s).

7. **Reimbursement of County's Costs:** Subject to Paragraph 17 below, the Developer and the Metro District agree and covenant, for themselves and their respective successors and assigns, that they will reimburse the County for its actual costs and expenses incurred in the process of completing construction of, cleaning, maintaining, and/or repairing the Detention Basin/BMP(s) pursuant to the provisions of this Agreement.

8. **Contingencies of Subdivision Approval:** Developer's and the Metro District's execution of this Agreement is a condition of Subdivision approval. Additional conditions of this Agreement include, but are not limited to, the following:

- a. Conveyance of the tracts and easements described in Exhibit C by separate instrument, if necessary, from Developer to the Metro District, which will include a reservation of easement in favor of the County for purposes of accessing, inspecting, cleaning, maintaining, and repairing the detention basin/BMP(s).

The County shall have the right, in the sole exercise of its discretion, to approve or disapprove any documentation submitted to it under the conditions of this Paragraph, including but not limited to, any separate agreement or amendment, if applicable, identifying any specific maintenance responsibilities not addressed herein. The County's rejection of any documentation submitted hereunder shall mean that the appropriate condition of this Agreement has not been fulfilled.

9. **Agreement Monitored by El Paso County Planning and Community Development Department and/or El Paso County Department of Public Works:** Any and all actions and decisions to be made hereunder by the County shall be made by the Director of the El Paso County Planning and Community Development Department and/or the Director of the El Paso County Department of Public Works. Accordingly, any and all documents, submissions, plan approvals, inspections, etc. shall be submitted to and shall be made by the Director of the Planning and Community Development Department and/or the Director of the El Paso County Department of Public Works.

10. **Indemnification and Hold Harmless:** To the extent authorized by law, Developer and the Metro District agree, for themselves, their respective successors and assigns, that they will indemnify, defend, and hold the County harmless from any and all loss, costs, damage, injury, liability, claim, lien, demand, action and causes of action whatsoever, whether at law or in equity, arising from or related to their respective intentional or negligent acts, errors or omissions or that of their agents, officers, servants, employees, invitees and licensees in the construction, operation, inspection, cleaning (including analyzing and disposing of any solid or hazardous wastes as defined by State and/or Federal environmental laws and regulations), maintenance, and repair of the Detention Basin/BMP(s), and such obligation arising under this Paragraph shall be joint and several. Nothing in this Paragraph shall be deemed to waive or otherwise limit the defense available to the County pursuant to the Colorado Governmental Immunity Act, Sections 24-10-101, *et seq.* C.R.S., or as otherwise provided by law.

11. **Severability:** In the event any Court of competent jurisdiction declares any part of this Agreement to be unenforceable, such declaration shall not affect the enforceability of the remaining parts of this Agreement.

12. **Third Parties:** This Agreement does not and shall not be deemed to confer upon or grant to any third party any right to claim damages or to bring any lawsuit, action or other proceeding against either the County, the Developer, the Metro District, or their respective successors and assigns, because of any breach hereof or because of any terms, covenants, agreements or conditions contained herein.

13. **Solid Waste or Hazardous Materials:** Should any refuse from the Detention Basin/BMP(s) be suspected or identified as solid waste or petroleum products, hazardous substances or hazardous materials (collectively referred to herein as "hazardous materials"), the Developer and the Metro District

shall take all necessary and proper steps to characterize the solid waste or hazardous materials and properly dispose of it in accordance with applicable State and/or Federal environmental laws and regulations, including, but not limited to, the following: Solid Wastes Disposal Sites and Facilities Acts, §§ 30-20-100.5 – 30-20-119, C.R.S., Colorado Regulations Pertaining to Solid Waste Disposal Sites and Facilities, 6 C.C.R. 1007-2, *et seq.*, Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k, and Federal Solid Waste Regulations 40 CFR Ch. I. The County shall not be responsible or liable for identifying, characterizing, cleaning up, or disposing of such solid waste or hazardous materials. Notwithstanding the previous sentence, should any refuse cleaned up and disposed of by the County be determined to be solid waste or hazardous materials, the Developer and the Metro District, but not the County, shall be responsible and liable as the owner, generator, and/or transporter of said solid waste or hazardous materials.

14. Applicable Law and Venue: The laws, rules, and regulations of the State of Colorado and El Paso County shall be applicable in the enforcement, interpretation, and execution of this Agreement, except that Federal law may be applicable regarding solid waste or hazardous materials. Venue shall be in the El Paso County District Court.

15. Governmental Immunity. Nothing in this Agreement shall be construed to be a waiver, in whole or in part, of any right, privilege or protection afforded the County or its Board, the Metro District or its Board of Directors, or their respective officers, employees, servants, agents or authorized volunteers pursuant to the Colorado Governmental Immunity Act, Sections 24-10-101, *et seq.*, C.R.S.

16. Annual Appropriations. The Metro District does not intend hereby to create a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever.

17. Limitation on Developer and Metro District's Obligations and Liabilities: The obligation and liability of the Developer hereunder shall only continue until such time as all of the following occur: (i) the Final Plat for the Subdivision as described in Paragraph E of the Recitals set forth above is recorded; (ii) the Developer completes the construction of the Detention Basin/BMP(s); and (iii) the Detention Basin/BMP(s) are conveyed to and accepted for ownership and maintenance by the Metro District. By execution of this agreement, the Metro District agrees to accept conveyance of the Detention Basin/BMP(s) from the Developer and all responsibilities and duties assigned to it under this Agreement, upon completion of items (i), (ii) and (iii) herein.

18. Contract Modification. The Agreement may not be amended, altered or otherwise changed except by a written agreement signed by the Parties.

19. Counterpart Execution. This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

[The remainder of this page intentionally left blank.]

IN WITNESS WHEREOF, the Parties affix their signatures below.

Executed this 26th day of JAN, 2022, by:

CND-CLOVERLEAF, LLC

By: [Signature]
Aziz Siddiqui, Area Land Development Manager

The foregoing instrument was acknowledged before me this 26th day of JANUARY, 2022, by Aziz Siddiqui as Area Land Development Manager of CND-Cloverleaf, LLC.

Witness my hand and official seal.

My commission expires: 5/22/2022

[Signature: Christine Falagario]
Notary Public

