

PRIVATE DETENTION BASIN MAINTENANCE AGREEMENT AND EASEMENT

This PRIVATE DETENTION BASIN MAINTENANCE AGREEMENT (Agreement) is made by and between THE BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO (Board or County) and PLW, Inc. dba Pikes Peak Water Company, a Colorado Corporation ("Developer") and Sunset Village HOMEOWNERS ASSOCIATION ("Homeowners Association" or "Association"), a Colorado nonprofit corporation. The above may occasionally be referred to herein singularly as "Party" and collectively as "Parties."

Recitals

1. WHEREAS, Developer is the owner of certain real estate (the Property or Subdivision) in El Paso County, Colorado, which Property is legally described as:

More particularly described as follows: See attached legal description (Exhibit A). Subdivision Legal

2. WHEREAS, Developer desires to plat and develop on the Property a subdivision to be known as Sunset Village, Filing No. 4; and

3. WHEREAS, the development of this Subdivision will substantially increase the volume of water runoff from the Property, and, therefore, it is in the interest of public health, safety and welfare for the County to condition approval of this subdivision on Developer's promise to construct adequate drainage and water runoff control facilities in the subdivision; and

4. WHEREAS, Chapter V, Section 49.2 of the El Paso County Land Development Code, as periodically amended, promulgated pursuant to Section 30-28-133(1), Colorado Revised Statutes, 2002, as amended, requires the County to condition approval of all subdivisions on a developer's promise to so construct adequate drainage and water runoff control facilities in subdivisions; and

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

6. 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

7. WHEREAS, Developer and the Association desire to construct a detention basin as the means for providing adequate drainage and water runoff control in the Subdivision; and,

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8. WHEREAS, the Association shall be charged in the Subdivision's Covenants with the duty of maintaining all common areas and common structures within the Subdivision, including the detention basin; and,

9. WHEREAS, it is the County's experience that subdivision developers and homeowners' associations historically have not properly cleaned and otherwise not properly maintained and repaired these detention basins, and that these detention basins, when not so properly cleaned, maintained, and repaired, threaten the public health, safety and welfare; and

10. WHEREAS, the County, in order to so protect the public health, safety and welfare, has historically expended valuable and limited public resources to so properly clean, maintain, and repair these detention basins when developers and homeowners' associations 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 in this Subdivision; and,

11. WHEREAS, the County conditions approval of this Subdivision on the Developer's and the Association's promise to so construct this detention basin, and conditions approval on the Association'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 in this Subdivision; and,

12. WHEREAS, the County could condition subdivision approval on the Developer's and Association's promise to construct a different and more expensive drainage and water runoff control system than that 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 Association's promises contained herein; and

13. WHEREAS, the County, in order to secure performance of the promises contained herein, conditions approval of this Subdivision upon the Developer's grant herein of a perpetual Easement over a portion of the Subdivision for the purpose of allowing the County to periodically access, inspect, and, when so necessary, to clean, maintain and/or repair the detention basin; and

14. WHEREAS, given that the Association could potentially avoid liability hereunder by dissolving and reforming as a different entity, and given the difficulties inherent in collecting an unsecured promise, the County, in order to secure performance of the promises contained herein, conditions approval of this Subdivision upon the Developer's creation, by and through this Agreement, of a covenant running with the land upon each and every lot in the Subdivision.

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 and Pro Rata Liability upon Individual Lot Owners: Developer and the Homeowners' Association agree that this entire Agreement and the performance

thereof shall become a covenant running with the land, which land is legally described in Paragraph One (1) of the Recitals set forth above, and that this entire Agreement and the performance thereof shall be binding upon themselves, their respective successors and assigns, including individual lot owners within the Subdivision.

However, any liability imposed under this Agreement against an individual lot owner shall not be joint and several with the Developer and the Association, but shall be pro rated on a per-lot basis as determined by the following formula and illustration: each individual lot owner(s) shall be liable for no more than the total monetary amount of liability multiplied by a fraction in which the numerator is the number of lots in the Subdivision owned by a particular lot owner, and the denominator is the total number of lots in the Subdivision. As to any lot(s) owned by more than one person or entity, the liability among co-owners shall be joint and several for the pro rata obligation of that lot. The application of this Paragraph is best illustrated by the following example. Assume the following parameters: total liability is \$10,000; total number of lots in the Subdivision is 100; Lot 1 is owned by persons A and B; person B also owns Lot 2. Liability is as follows: the Developer, \$10,000; the Association, \$10,000; Lot 1 is \$100.00, joint and several as to A and B, Lot 2 is \$100.00 owed solely by B. Thus person A's total liability is \$100.00 and person B's is \$200.00. Applying the principle that the County cannot collect more than it is owed, and assuming that the County cannot collect anything from the Developer and the Association, if the County collected the whole \$200.00 from B, then it could not collect the \$100.00 from A. Likewise, if the County collected the \$100.00 from A, then it could only collect \$100.00 from B.

3. Construction: Developer and the Homeowners' Association agree that they shall construct on [The land described in Exhibit B] as indicated on the final plat of the subdivision and as described below a private water runoff detention basin ("detention basin"). The Developer and the Homeowners' Association shall not commence construction of the detention basin until the Planning Department and the El Paso County Department of Transportation have approved in writing the plans and specifications for the detention basin. Failure to obtain such approval 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 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 must be completed and inspected by the El Paso County Department of Transportation prior to commencing road construction.

In the event construction is not so 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 the Homeowners' Association and their respective successors and assigns, including individual lot owners in the Subdivision, for its actual costs and expenses incurred in the process of completing construction. The term actual costs and expenses 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. The scope of liability therefore of the Developer, the Association, and the individual lot owners shall be as set forth in paragraph Two (2) above.

The detention basin shall be located on the following parcel (See Exhibit B):

4. Maintenance: The Developer and the Association agree for themselves, their respective successors and assigns, including individual lot owners within the Subdivision, that they will regularly and routinely inspect, clean and maintain the detention basin, 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 shall be planted or allowed to grow on the detention basin.

5. Creation of Easement: Developer hereby grants the County and the Association a non-exclusive perpetual easement upon the entire Tract described above. The purpose of the easement is to allow the County to access, inspect, clean, repair and maintain the detention basin; 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.

6. County's Rights and Obligations: Any time the County determines, in the sole exercise of its discretion, that the detention basin is not properly cleaned, maintained and/or otherwise kept in good repair, the County shall give reasonable notice to the Developer, the Association and their respective successors and assigns, including the individual lot owners within the Subdivision, that the detention basin needs 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), the County may enter upon the Property 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. However, this Agreement does not expressly impose on the County a duty to so inspect, clean, repair or maintain the detention basin.

7. Reimbursement of County's Costs/ Covenant Running With the Land: The Developer and the Association agree and covenant, for themselves, their respective successors and assigns, including individual lot owners within the Subdivision, that they will reimburse the County for its costs and expenses incurred in the process of cleaning, maintaining, and/or repairing the detention basin. However, the obligation and liability of the Developer hereunder shall only continue until such time as the Developer transfers the entire management and operation of the Association to the individual lot owners within the Subdivision. Notwithstanding the previous sentence, the Association and the individual lot owners within the Subdivision shall always remain obligated and liable hereunder, and as per the provisions of Paragraph Two (2) above.

The terms actual costs and expenses shall be liberally constructed in favor of the County, and shall include, but shall not be limited to, labor costs, tools 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's fees, regardless of whether the County contracts with outside legal counsel or utilizes in-house legal counsel for the same. The scope of liability therefore

of the Developer, the Association, and the individual lot owners shall be as set forth in Paragraph Two (2) above.

8. Contingencies of Subdivision Approval: Developer's and the Association'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 easements on Exhibit B from the Developer to the Association and to the County for purposes of accessing, inspecting, cleaning, maintaining, and repairing the detention basin, and recording of appropriate conveyance documents for the same; and
- b. The County's receipt of a copy of the Articles of Incorporation for the Association, as filed with the Colorado Secretary of States; receipt of the Certificate of Incorporation or other comparable proof for the same from the Colorado Secretary of State; a copy of the Bylaws of the Association; a copy of the organizational minutes or other appropriate document of the Association, properly executed and attested, establishing that the Association has adopted this Agreement as an obligation of the Association; and
- c. A copy of the Covenants of the Subdivision establishing that the Association is obligated to inspect, clean, maintain, and repair the detention basin; that the Association has adopted this Agreement as an obligation of the Association; and that a funding mechanism is in place whereby individual lot owners within the Subdivision pay a regular fee to the Association for, among other matters, the inspection, cleaning, maintenance, and repair of the detention basin.
- d. A copy of the Covenants of the Subdivision establishing that this Agreement is incorporated into the Covenants, and that such Agreement touches and concerns each and every lot within the Subdivision.

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. The County's rejection of any documentation submitted hereunder shall mean that the appropriate condition of this Agreement has not been fulfilled.

9. Distribution to Lot Purchasers: Upon the initial sale of any lot within the Subdivision, prior to closing on such sale, the Developer shall give a copy of this Agreement to the potential Buyer.

10. Agreement Monitored by Planning Department: 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 Department. Accordingly, any and all documents, submissions, plan approval, inspections, etc. shall be submitted to and shall be made by the Director of the Planning Department.

11. Indemnification and Hold Harmless: To the extent authorized by law, Developer and the Association agree, for themselves, their respective successors and assigns, including the individual lot owners in the Subdivision, 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 its 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, 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. 2001, as amended, or as otherwise provided by law. However, the obligation and liability of the Developer hereunder shall only continue until such time as the Developer transfers the entire management and operation of the Association to the individual lot owners within the Subdivision.

12. 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.

13. 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 or the Association, their respective successors and assigns, including any individual lot owners in the Subdivision, because of any breach hereof or because of any terms, covenants, agreements or conditions contained herein.

14. Solid or Hazardous Wastes: Should any refuse from the detention basin be suspected or identified as solid waste and/or hazardous waste, the Developer and the Association shall take all necessary and proper steps to characterize the waste 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. (2002) as amended, Colorado Regulations Pertaining to Solid Waste Disposal Sites and Facilities, 6 C.C.R. 1007-2, *et seq.*, as amended, Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (2002) as amended, and Federal Solid Waste Regulations 40 CFR Ch. I (2002) as amended. The County shall not be responsible or liable for identifying, characterizing, cleaning up, or disposing of such solid and/or hazardous waste. Notwithstanding the previous sentence, should any refuse cleaned up and disposed of by the County be determined to be solid and/or hazardous waste, the Developer and the Association, but not the County, shall be responsible and liable as the owner, generator, and/or transporter of said solid and/or hazardous waste.

15. 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 or hazardous wastes. Venue shall be in the El Paso County District Court.

IN WITNESS WHEREOF, the Parties annex their signatures below.

Executed this 17 day of December, 2002, by:
PLW, Inc, dba Pikes Peak Water Company

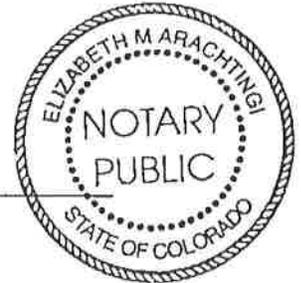
By: [Signature]
Rodney J. Preisser, President

The foregoing instrument was acknowledged before me this 17 day of December, 2002, by Rodney J. Preisser, President, PLW, Inc. dba Pikes Peak Water Company

Witness my hand and official seal.

My commission expires: 10-4-2006

[Signature]
Notary Public



Executed this 17 day of December, 2002, by:
Sunset Village HOMEOWNERS ASSOCIATION, a Colorado nonprofit corporation.

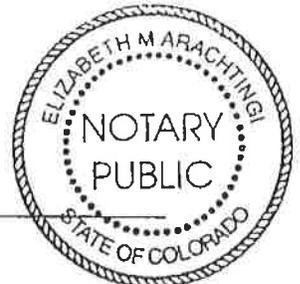
By: [Signature]
Rodney J. Preisser, President

The foregoing instrument was acknowledged before me this 17 day of December, 2002, by Rodney J. Preisser, President, Sunset Village Homeowners Association, a Colorado nonprofit corporation.

Witness my hand and official seal.

My commission expires: 10-4-2006

[Signature]
Notary Public



Executed this 17 day of December, 2002, by:

Thressa A. Sholdt El Paso Cty, CO

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BOARD OF COUNTY COMMISSIONERS
OF EL PASO COUNTY, COLORADO

By: [Signature], Chairperson

Attest:

Bonnie Wood
Deputy Clerk

The foregoing instrument was acknowledged before me this _____ day of _____, by _____, Chairperson of the Board of County Commissioners of El Paso County, Colorado, as Attested to by _____, Deputy Clerk to the Board of County Commissioners of El Paso County, Colorado.

Witness my hand and official seal.

My commission expires: _____

Notary Public

Approved as to Content and Form:

M. de Commons
Assistant County Attorney

EXHIBIT A

SUNSET VILLAGE FILING NO.4 - LEGAL DESCRIPTION

A TRACT OF LAND LOCATED IN THE NORTHEAST QUARTER OF SECTION 12, TOWNSHIP 15 SOUTH, RANGE 63 WEST OF THE 6TH P.M., EL PASO COUNTY, COLORADO, MORE PARTICULARLY DESCRIBED AS FOLLOWS: BEGINNING AT A POINT ON THE NORTH LINE OF SECTION 12, SAID POINT BEING 858.53 FEET WESTERLY ALONG SAID LINE FROM THE NORTHEAST CORNER OF SECTION 12 AND ALSO BEING THE NORTHWEST CORNER OF "SUNSET VILLAGE FILING NO. 3", AS FILED FOR RECORD WITH THE EL PASO COUNTY CLERK UNDER RECEPTION NO. 200120972; THENCE ALONG THE WESTERLY BOUNDARY OF "SUNSET VILLAGE FILING NO. 3" ON THE FOLLOWING NINE (9) COURSES; S00°37'21"E, 252.01 FEET; THENCE N89°22'39"E, 27.07 FEET; THENCE S00°37'21"E, 86.00 FEET; THENCE S10°02'47"W, 116.30 FEET; THENCE S28°06'18"W, 95.09 FEET; THENCE S43°42'13"W, 42.82 FEET; THENCE S46°20'43"W, 122.30 FEET; THENCE S43°39'17"E, 106.00 FEET; THENCE S46°20'43"W, 29.90 FEET; THENCE S43°39'17"E, 206.00 FEET TO A POINT ON THE NORTHWEST BOUNDARY LINE OF "SUNSET VILLAGE FILING NO 2", AS FILED FOR RECORD WITH THE EL PASO COUNTY CLERK UNDER RECEPTION NO. 99085530; THENCE SOUTHWESTERLY ALONG SAID LINE S46°20'43"W, 670.71 FEET TO THE SOUTHWEST CORNER OF SAID "SUNSET VILLAGE FILING NO. 2"; THENCE N35°46'00"W, 81.10 FEET; THENCE S58°58'56"W, 126.79 FEET; THENCE N47°13'56"W, 179.05 FEET; THENCE N34°38'22"W, 304.61 FEET; THENCE N25°20'10"W, 90.61 FEET; THENCE N70°27'45"E, 113.39 FEET; THENCE N66°04'43"E, 60.00 FEET; THENCE N62°25'47"E, 83.21 FEET; THENCE N46°20'43"E, 371.44 FEET; THENCE N33°06'19"E, 224.00 FEET; THENCE N89°22'39"E, 92.72 FEET; THENCE N00°37'21"W 358.01 FEET; THENCE N89°22'39"E, 228.00 FEET TO THE POINT OF BEGINNING, AND CONTAINING 14.315 ACRES MORE OR LESS.

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EXHIBIT B

LEGAL DESCRIPTION: DRAINAGE AND ACCESS EASEMENT

A PORTION OF THE NORTHEAST QUARTER OF SECTION 12, T15S, R63W OF THE 6 TH P.M., EL PASO COUNTY, COLORADO, DESCRIBED AS FOLLOWS; COMMENCING AT THE MOST WESTERLY BOUNDARY CORNER OF SUNSET VILLAGE FILING NO. 2 AS RECORDED UNDER RECEPTION NO. 99085530 IN THE RECORDS OF SAID EL PASO COUNTY, SAID BOUNDARY CORNER ALSO BEING ON THE SOUTHWESTERLY RIGHT-OF-WAY LINE OF JAYHAWK AVENUE; THENCE N 35°46'00" W, 61.03 FEET TO THE POINT OF BEGINNING; THENCE S 58°58'56" W, 168.52 FEET; THENCE S 86°40'57" W, 51.21 FEET; THENCE S 37°52'46" E, 174.76 FEET; THENCE S 52°07'14" W, 20.00 FEET; THENCE N 37°52'46" W, 188.53 FEET; THENCE S 86°40'57" W, 25.91 FEET; THENCE N 74°54'10" W, 134.27 FEET; THENCE N 61°06'09" W, 105.87 FEET; THENCE N 03°33'26" W, 104.47 FEET; THENCE N 55°21'38" E, 168.86 FEET; THENCE S 34°38'22" E, 147.24 FEET; THENCE S 47°13'56" E, 179.05 FEET; THENCE N 58°58'56" E, 126.79 FEET; THENCE S 35°46'00" E, 20.07 FEET TO THE POINT OF BEGINNING AND CONTAINING 1.439 ACRES MORE OR LESS.

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