

**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 between EL PASO COUNTY by and through THE BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO (Board or County) and Grazing Yak Solar, LLC (Developer). The above may occasionally be referred to herein singularly as "Party" and collectively as "Parties."

Recitals

A. 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

B. WHEREAS, Developer desires to develop on the Property a land use to be known as the Grazing Yak Solar Project; and

C. 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 land use on Developer's promise to construct adequate drainage, water runoff control facilities, and stormwater quality structural Best Management Practices ("BMPs") for the land use; and

D. 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 so construct adequate drainage, water runoff control facilities, and BMPs in subdivisions; and

E. 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

F. 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

G. 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

H. WHEREAS, Developer desires to construct for the land use one detention basin/stormwater quality BMPs (“detention basin/BMPs”) as the means for providing adequate drainage and stormwater runoff control and to meet requirements of the County’s MS4 Permit, and to operate, clean, maintain and repair such detention basin/BMPs; and

I. WHEREAS, Developer desires to construct the detention basin/BMPs on the Property described in Exhibit A; and

J. WHEREAS, Developer shall be charged with the duties of constructing, operating, maintaining and repairing the detention basin/BMPs on the Property; and

K. 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 these detention basins/BMPs, and that these detention basins/BMPs, when not so properly cleaned, maintained, and repaired, threaten the public health, safety and welfare; and

L. 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 these 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 land use due to the Developer’s failure to meet its obligations to do the same; and

M. WHEREAS, the County conditions approval of this land use on the Developer’s promise to construct the detention basin/BMPs and to reimburse the County in the event the burden falls upon the County to clean, maintain and/or repair the detention basin/BMPs serving this land use; and

N. WHEREAS, the County could condition land use 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 promises contained herein; and

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

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 agrees that this entire Agreement and the performance thereof shall become a covenant running with the land, which land is legally described in Exhibit A attached hereto, and that this entire Agreement and the performance thereof shall be binding upon itself and its successors and assigns.

3. Construction: Developer shall construct on that portion of the Property described in Exhibit B attached hereto and incorporated herein by this reference, one detention basin/BMPs. Developer shall not commence construction of the detention basin/BMPs until the El Paso County Planning and Community Development Department (PCD) has approved in writing the plans and specifications for the detention basin/BMPs and this Agreement has been signed by all Parties and returned to the PCD. Developer shall complete construction of the detention basin/BMPs in substantial compliance with the County-approved plans and specifications for the detention basin/BMPs. 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/BMPs shall be substantially completed within one (1) year (defined as 365 days), which one year period will commence to run on the date the Erosion and Stormwater Quality Control Permit (ESQCP) is issued. Rough grading of the detention basin/BMPs must be completed and inspected by the PCD prior to commencing road construction.

In the event construction 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 successors and assigns, 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.

4. Maintenance: The Developer agrees for itself and its successors and assigns that it will regularly and routinely inspect, clean and maintain the detention basin/BMPs in accordance with the approved Stormwater Management Facility Operation and Maintenance Manual, and otherwise keep the same in good repair, all at its own cost and expense. No trees or shrubs that will impair the structural integrity of the detention basin/BMPs shall be planted or allowed to grow on the detention basin/BMPs.

5. Creation of Easement: Developer hereby grants the County a non-exclusive perpetual easement upon and across that portion of the Property described in Exhibit B. The purpose of the easement is to allow the County to access, inspect, construct, clean, repair and maintain the detention basin/BMPs; however, the creation of the easement does not expressly or implicitly impose on the County a duty to so inspect, construct, clean, repair or maintain the detention basin/BMPs. The County understands that the Property will be a secured site with controlled access. The Easement granted herein is therefore subject to the following restrictions:

- a. During construction of the detention basin/BMPs, the County shall be granted access to the Property described in Exhibit B during regular business hours without limitation for purposes of inspection. The County shall contact an employee at the

adjacent Golden West operations and maintenance (o&m) building to obtain such access, which will be provided that same day. The County understands that a Golden West or Grazing Yak employee may accompany County inspectors, but such employee shall not interfere with the County's inspection.

- b. Should the County need to either complete construction of the detention basin/BMPs or stabilize the site due to a prolonged interruption or an abandonment of construction, the Developer shall, immediately upon request, provide the County a key, code or other means necessary to afford the County an uninterrupted opportunity to complete such work. Upon completion, the County shall return any such means of access to the Developer.
- c. Upon completion and acceptance of construction of the detention basin/BMPs, the County shall be granted access to the Property described in Exhibit B during regular business hours for purposes of inspection, at a frequency necessary for the County to comply with its MS4 Permit or other applicable laws and regulations. The County shall contact an employee at the adjacent Golden West o&m building to obtain such access, which will be provided that same day. The County understands that a Golden West or Grazing Yak employee may accompany County inspectors, but such employee shall not interfere with the County's inspection.
- d. Should the County need to clean, maintain, or repair the detention basin/BMPS due to the Developer's failure to do so, as contemplated in this Agreement, the Developer shall, with twenty-four (24) hours' notice, provide access to the County during regular business hours for the period of time necessary to perform such cleaning, maintenance, or repair.
- e. In case of an emergency, defined as an imminent threat to person or property resulting from stormwater flows exiting the Property, and in the event the County cannot contact an employee at the Golden West o&m building, the County may contact the Calhan Fire Department (CFD) for access to the Property. Developer specifically authorizes the CFD to permit County access in this circumstance and released the CFD from any liability that may arise from relying on such authorization.

6. County's Rights and Obligations: Any time the County determines, in the sole exercise of its discretion, that the detention basin/BMPs are not properly cleaned, maintained and/or otherwise kept in good repair, the County shall give reasonable notice to the Developer and its successors and assigns, that the detention basin/BMPs needs to be cleaned, maintained and/or otherwise repaired. The notice shall provide a reasonable time to correct the problems. Should the responsible parties fail to correct the specified problems, the County may enter upon the Property to so correct the specified problems. 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/BMPs.

7. Reimbursement of County's Costs: The Developer agrees and covenants, for itself, its successors and assigns, that it will reimburse the County for its costs and expenses incurred in the

process of completing construction of, cleaning, maintaining, and/or repairing the detention basin/BMPs pursuant to the provisions of this Agreement.

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, 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.

8. Contingencies of Land Use/Land Disturbance Approval: Developer/Owner’s execution of this Agreement is a condition of land use/land disturbance approval.

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: Developer agrees for itself and its successors and assigns that it 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 its 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/BMPs, 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, 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/BMPs be suspected or identified as solid waste or petroleum products, hazardous substances or hazardous materials (collectively referred to herein as "hazardous materials"), the Developer 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, 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.

IN WITNESS WHEREOF, the Parties affix their signatures below.

Executed this _____ day of _____, 20____, by:

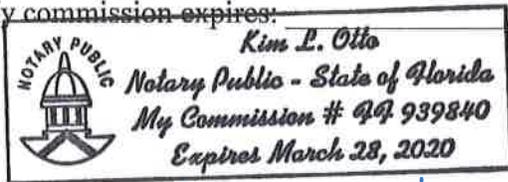
GRAZING YAK SOLAR, LLC

By: 
John Di Donato, Vice President

The foregoing instrument was acknowledged before me this 2 day of July, 2019, by John Di Donato, Grazing Yak Solar, LLC.

Witness my hand and official seal.

My commission expires: _____




Notary Public

Executed this 2nd day of July, 2019, by:

BOARD OF COUNTY COMMISSIONERS
OF EL PASO COUNTY, COLORADO

By: Mark Gill for
Craig Dossey, Executive Director
El Paso County Planning and Community Development Department
Authorized Signatory Pursuant to LDC

The foregoing instrument was acknowledged before me this 2nd day of July,
2019, by Craig Dossey, Executive Director, El Paso County Planning and Community Development
Department.

Witness my hand and official seal.

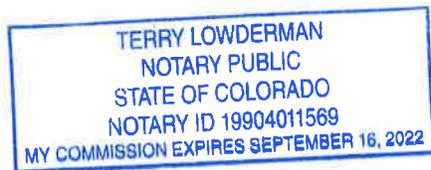
My commission expires: 9-16-2022

Terry Lowderman

Notary Public

Approved as to Content and Form:

M. Cole Emmons
Assistant County Attorney



**EXHIBIT A
GRAZING YAK SOLAR ARRAY LEGAL DESCRIPTION**

PARCEL CONTAINING THE SOLAR ARRAY:

TAX ASSESSOR SCHEDULE NO. 1200000390

A PARCEL OF LAND BEING THE WEST HALF OF SECTION 29, TOWNSHIP 12 SOUTH, RANGE 61 WEST OF THE 6TH PRINCIPAL MERIDIAN, EL PASO COUNTY, COLORADO, LESS AND EXCEPT ANY EXISTING RIGHTS OF WAY AND ALSO EXCLUDING THE FOLLOWING PARCEL OF LAND: THE NORTH 820 FEET OF THE WEST 2450 FEET OF THE WEST HALF OF SAID SECTION 29. CONTAINING 271.850 ACRES, MORE OR LESS

EXHIBIT B

