

DRAFT
PRIVATE DRAINAGEWAY
STORMWATER QUALITY BEST MANAGEMENT PRACTICE
MAINTENANCE AGREEMENT AND EASEMENT

This PRIVATE DRAINAGEWAY 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 Colorado Springs 382 Limited Partnership (Developer) and political subdivision of the State of Colorado. The above may occasionally be referred to herein singularly as "Party" and collectively as "Parties."

Recitals

A. WHEREAS, the District provides various municipal services to certain real property in El Paso County, Colorado referred to as Cherry Creek Crossing Lot 111; and

B. WHEREAS, Developer is the owner of certain real estate (the Property or Subdivision) in El Paso County, Colorado, which Property is legally described in Exhibit A attached hereto and incorporated herein by this reference; and

C. WHEREAS, Developer desires to develop on the Property known as Cherry Creek Crossing, Lot 111, and

D. 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, and stormwater runoff control facilities for the Property; and

E. 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

F. 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 sub-dividers, 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

G. 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

H. WHEREAS, developers in El Paso County have historically chosen stabilized drainageways as a means to provide conveyance of runoff from subdivisions that discharge to major receiving waterways, such as the West Cherry Creek the subject of this agreement; and

I. WHEREAS, Developer desires to construct for the Subdivision drainageway facilities consisting of storm sewer and manholes, riprap energy dissipator, riprap swales and revegetation of disturbed areas ("drainageway BMP(s)") a length of approximately 280 feet north beginning at the outlet of the 54-inch Hodgen Road culvert to Double Tree Court along an unnamed drainageway 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

J. WHEREAS, Developer desires to construct the drainageway BMP(s) on property as set forth on Exhibit A attached hereto; and

K. WHEREAS, Developer shall be charged with the duty of constructing the drainageway BMP(s) and the County shall be charged with the duties of operating, maintaining and repairing the drainageway BMP(s) on the property described in Exhibit A; and

L. 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 drainageway BMPs, and that these drainageway BMPs, when not so properly cleared of debris, maintained, and repaired, threaten the public health, safety and welfare; and

M. 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 drainageway 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 drainageway BMP(s) serving this Subdivision due to the Developer's failure to meet its obligations to do the same; and

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

O. WHEREAS, the County could condition subdivision approval on the Developer's promise to construct a different and more expensive drainageway 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

P. 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 Property for the purpose of allowing the County to periodically access, inspect, and, when so necessary, to clean, maintain and/or repair the drainageway BMP(s); and

Q. 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 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 themselves, their respective 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, drainageway BMP(s). Developer shall not commence construction of the drainageway BMP(s) until the El Paso County Planning and Community Development Department (PCD) has approved in writing the plans and specifications for the drainageway BMP(s) and this Agreement has been signed by all Parties and returned to the PCD. Developer shall complete construction of the drainageway BMP(s) in substantial compliance with the County-approved plans and specifications for the drainageway 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 drainageway BMP(s) shall be substantially completed within one (1) year (defined as 365 days), which one (1) 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 drainageway BMP(s) must be completed and inspected by the El Paso County

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 respective 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 drainageway BMP(s), 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 drainageway BMP(s) shall be planted or allowed to grow within or adjacent to the drainageway.

5. Creation of Easement: Developer hereby grants the County a non-exclusive perpetual easement Described on Exhibit B upon and across that portion of the Property described in Exhibit A. The purpose of the easement is to allow the County to access, inspect, clean, repair and maintain the drainageway 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 drainageway BMP(s).

6. County's Rights and Obligations: Any time the County determines, in the sole exercise of its discretion, that the drainageway BMP(s) is not properly cleaned, maintained and/or otherwise kept in good repair, the County shall give reasonable notice to the Developer, the Metro District and their respective successors and assigns, that the drainageway BMP(s) needs to be cleared of debris, 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. Notwithstanding the foregoing, this Agreement does not expressly or implicitly impose on the County a duty to so inspect, clean, repair or maintain the drainageway BMP(s).

7. Reimbursement of County's Costs / Covenant Running With the Land: The Developer agree and covenant, for themselves, their respective successors and assigns, that they will reimburse the County for its costs and expenses incurred in the process of completing construction of, cleaning, maintaining, and/or repairing the drainageway BMP(s) 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 Subdivision Approval: Developers execution of this Agreement is a condition of subdivision approval. Additional conditions of this Agreement include, but are not limited to, the following:

- a. Creation of no-build drainage easement described in Exhibit A by Developer (which will include a reservation of easement in favor of the County for purposes of accessing, inspecting, cleaning, maintaining, and repairing the drainageway BMP(s)), and recording of the Deed for the same; and

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 drainageway 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, 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 drainageway 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, 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. Limitation on Developer’s Obligation and Liability: The obligation and liability of the Developer hereunder shall only continue until such time as the Final Plat as described in Paragraph Three (3) of the Recitals set forth above is recorded and the Developer completes the construction of the drainageway BMP(s) and transfers all applicable maintenance and operation responsibilities to the County. By execution of this agreement, the Developer agrees to accept all responsibilities and to perform all duties assigned to it, including those of the Developer, as specified herein, upon transfer of Exhibit A from Developer to the County.

IN WITNESS WHEREOF, the Parties affix their signatures below.

Executed this _____ day of _____, 2019, by:

Colorado Springs 382 Limited Partnership

By: _____
Nathan Miller, Authorized Signing Agent

The foregoing instrument was acknowledged before me this _____ day of _____, 2018, by Nathan Miller, Authorized Signing Agent, Colorado Springs Limited 382 Limited Partnership.

Witness my hand and official seal.

My commission expires: _____

Notary Public

Executed this _____ day of _____, 2018, by:

BOARD OF COUNTY COMMISSIONERS
OF EL PASO COUNTY, COLORADO

By: _____
Darryl Glenn, Chair

Attest:

Chuck Broerman
County Clerk and Recorder

The foregoing instrument was acknowledged before me this _____ day of _____, 2018, by Darryl Glenn, Chair of the Board of County Commissioners of El Paso County, Colorado, as Attested to by Chuck Broerman, County Clerk and Recorder.

Witness my hand and official seal.

My commission expires: _____

Notary Public

Approved as to Content and Form:

Assistant County Attorney

EXHIBIT A

LEGAL DESCRIPTION:

Cherry Creek Crossing Filing No. 1, Lot 111.

EXHIBIT B

No-build Drainage Easement, Lot 111 Cherry Creek Crossing Filing 1

EXHIBIT B
NO-BUILD DRAINAGE EASEMENT

November 20, 2018

A portion of Lot 111, Cherry Creek Crossing Filing No. 1, recorded December 9th, 1999 under Reception No. 99185572 in the records of El Paso County, Colorado, also located in the SE1/4 of Section 22, Township 11 South, Range 66 West of the 6th P.M., more particularly described as follows:

COMMENCING at the southwest corner of said Lot 111; thence along the west line of said Lot 111, N01°07'54"E (Bearings are relative to those shown on the plat of Cherry Creek Crossing Filing No. 1, recorded December 9th, 1999 under Reception No. 99185572 in the records of El Paso County, Colorado), a distance of 257.32 feet to the **POINT OF BEGINNING**; thence continuing along said west line, N01°07'54"E, a distance of 114.68 feet; thence continuing along said west line, 27.33 feet along the arc of a curve to the left, having a radius of 1,038.00 feet, a delta of 01°30'31" and a chord of 27.33 feet that bears N00°22'38"E, to the northwest corner of said Lot 111; thence along the north line of said Lot 111, N87°58'00"E, a distance of 12.43 feet; thence continuing along said north line, 177.02 feet along a curve to the left, having a radius of 530.00 feet, a delta of 19°08'12" and a chord of 176.20 feet that bears N78°23'53"E; thence leaving said north line, along the following five (5) courses:

- 1) S30°04'16"E, a distance of 19.21 feet;
- 2) 99.66 feet along the arc of a curve to the right, having a radius of 183.00 feet, a delta of 31°12'10" and a chord of 98.43 feet that bears S14°28'11"E;
- 3) S01°07'54"W, a distance of 70.29 feet;
- 4) N88°52'06"W, a distance of 73.85 feet;
- 5) S02°22'24"W, a distance of 162.32 feet,

to the northeast corner of an existing Permanent Easement, recorded under Reception No. 206076662, said records; thence along the north line of said Permanent Easement, N88°51'56"W, a distance of 59.87 feet, to the northeast corner of said Permanent Easement; thence leaving said Permanent Easement, along the following two (2) courses:

- 1) N00°00'06"W, a distance of 162.31 feet;
- 2) N88°52'06"W, a distance of 79.90 feet,

to the **POINT OF BEGINNING**.

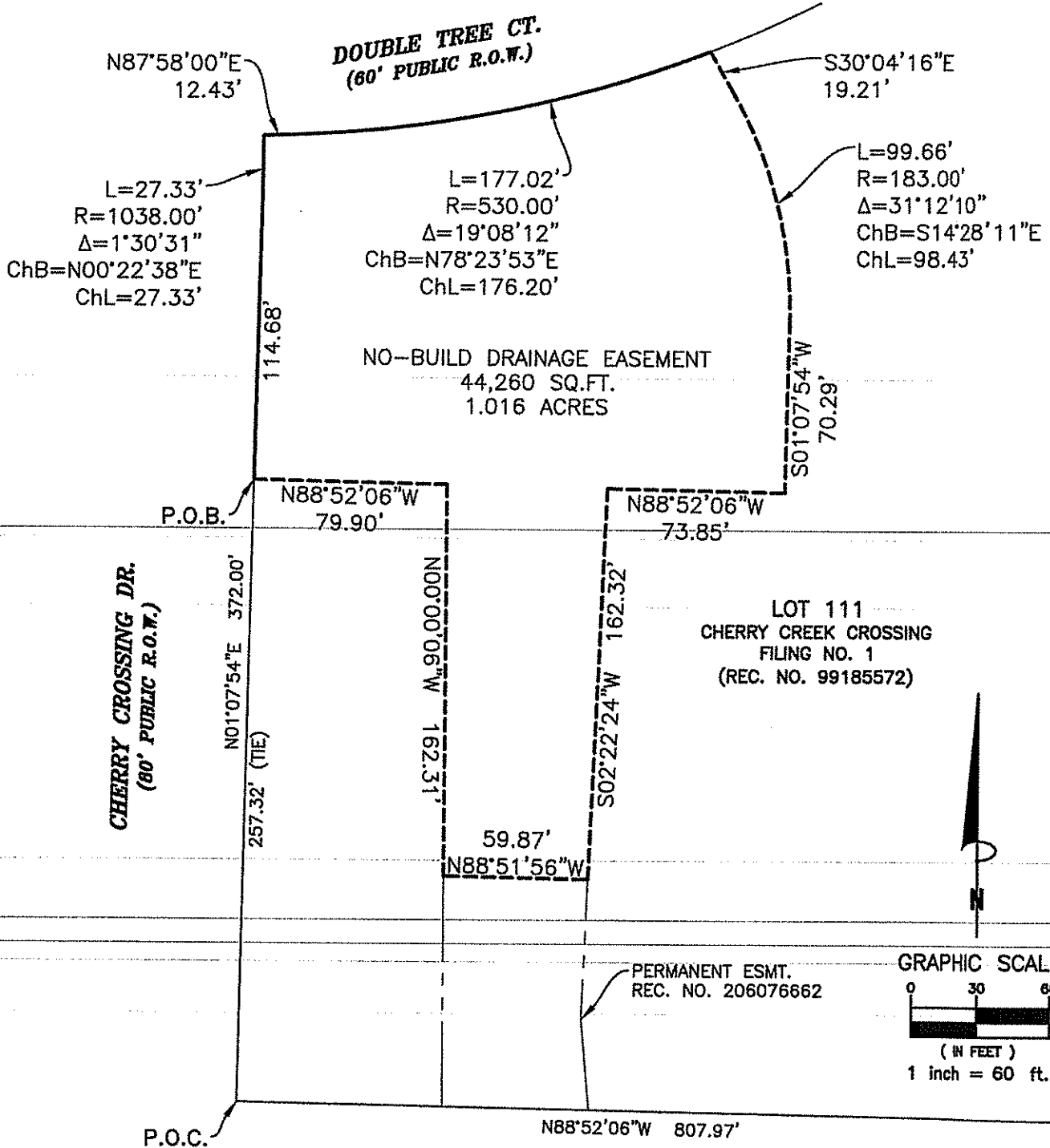
Containing 44,260 sq.ft. or 1.016 acres, more or less.

Stewart L. Mapes, Jr. - PLS
Colorado Professional Land Surveyor No. 38245
For and on behalf of Clark Land Surveying, Inc.



EXHIBIT B

NO-BUILD DRAINAGE EASEMENT



NOTE:

This EXHIBIT does not represent a monumented land survey, and is only intended to depict the attached LEGAL DESCRIPTION.

Project No:	Drawn: NSB	Date: 11/09/2018
181171	Check: SLM	Sheet 2 of 2