

DRAFT
**PRIVATE STORMWATER QUALITY STRUCTURAL BEST MANAGEMENT
PRACTICE AGREEMENT AND EASEMENT**

This PRIVATE STORMWATER QUALITY STRUCTURAL BEST MANAGEMENT PRACTICE AGREEMENT (Agreement) is made by and between THE BOARD OF COUNTY COMMISSIONERS OF EL PASO COUNTY, COLORADO (Board or County) and _____, a Colorado Corporation (“Developer”) and _____ 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:

2. WHEREAS, Developer desires to plat and develop on the Property a subdivision to be known as _____; and

3. WHEREAS, the development of this Subdivision will decrease the quality of the stormwater 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 stormwater quality structural Best Management Practices (BMPs) in the subdivision described as

4. WHEREAS, [insert legal citations] as periodically amended, promulgated pursuant to [insert legal citations], as amended, requires the County to condition approval of all subdivisions on a developer’s promise to so construct adequate drainage and BMPs in subdivisions; and

5. WHEREAS, [insert legal citations] provides for a developer’s promise to maintain a subdivision’s BMPs; and

6. WHEREAS, Developer and the Association desire to construct the described BMPs as the means for providing adequate stormwater quality control in the Subdivision; and,

7. 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 BMPs; and

8. WHEREAS, these BMPs when not properly cleaned, maintained, and repaired, threaten the public health, safety and welfare; and

9. WHEREAS, the County in order to so protect the public health, safety and welfare, may be required to expend valuable and limited public resources to so properly clean, maintain, and repair these BMPs when developer and homeowner's association 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 BMPs in this Subdivision; and

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

11. 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 BMPs; and

12. 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 incorporated 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 prorated 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 [Tract _____ or Lot _____] as indicated on the final plat of the subdivision and as described below a private stormwater quality control BMP _____ [specify BMP] [for multiple BMPs, insert the following here: consisting of _____ () [specify BMP] on Tract or Lot _____ for each type of BMP used in the Subdivision. The Developer and the Homeowners' Association shall not commence construction of the BMPs until the Planning Department and the ECM Administrator have approved in writing the plans and specifications for the BMPs. 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 BMP must be complete prior to occupation of the site.

In the event construction is not so substantially completed within the occupation, 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 structural BMP shall be located on the following parcel(s) within the Subdivision:
BMP: _____ Tract: _____ [or Lot: _____]

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 BMP, 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 BMP shall be planted or allowed to grow on the BMP.

5. Creation of Easement: Developer and the Association hereby grant the County a non-exclusive perpetual easement upon the entire Tract(s) [or Lot(s)] describe above. The purpose of the easement is to allow the County to access, inspect, clean, repair and maintain the BMP; 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 BMP.

6. County's Rights and Obligations: Any time the County determines, in the sole exercise of its discretion, that the BMP 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 BMP 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 BMP.

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 BMP. 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 provision 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 Provision 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 therefor 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 the Agreement is a condition of subdivision approval. Additional conditions of this Agreement include, but are not limited to the following:

- a. Conveyance of Tract(s) _____ from Developer to the Association (which will include a reservation of easement in favor of the County for purposed of accessing, inspecting, cleaning, maintaining, and repairing the BMP), and recording of the Deed for the same; and

[If not a conveyance of a fee interest but merely creating and conveying an easement on the affected lot(s), then substitute the following alternative Paragraph a:]

- a. Conveyance of easements on Lot(s) _____ from the Developer to the Association and to the County for purposes of accessing, inspecting, cleaning, maintaining, and repairing the BMP, 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 State; 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 organization 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 BMP; 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 BMP.
- 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 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 Engineering Criteria Manual Administrator: Any and all actions and decisions to be made hereunder by the County shall be made by the Engineering Criteria Manual (ECM) Administrator. Accordingly, any and all documents, submissions, plan approval, inspections, etc. shall be submitted to and shall be made by the ECM Administrator.

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 BMP, and such obligation arising under this Paragraph shall be joint and several. Nothing in the 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 BMP 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. (2001) 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 (2001) as amended, and Federal Solid Waste Regulations 40 CFR Ch. I. (2001)

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 the El Paso County District Court.

IN WITNESS WHEREOF, the Parties affix their signatures below.

Executed this _____ day of _____, _____, by:
[DEVELOPER'S NAME]:

By: _____
(Insert name) _____, President

The foregoing instrument was acknowledged before me this _____ day of _____, _____, by _____, President, _____.

Witness my hand and official seal.
My commission expires: _____

Notary Public

Executed this _____ day of _____, _____, by:
_____ HOMEOWNERS ASSOCIATION, a Colorado nonprofit corporation.

By: _____
(insert name) _____, President

The foregoing instrument was acknowledged before me this _____ day of _____, _____, by _____, President, _____ Homeowners Association, a Colorado nonprofit corporation.

Witness my hand and official seal.

My commission expires: _____

Notary Public

Executed this _____ day of _____, _____, by:

**BOARD OF COUNTY COMMISSIONERS
OF EL PASO COUNTY, COLORADO**

By: _____
_____, Chairperson

Attest:

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:

Assistant County Attorney

