

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 Prairie Vista Investments, LLC, a Colorado Corporation ("Developer") and Prairie Vista Meadows 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: A portion of Section 23 and the Northwest Quarter of the Southwest Quarter of Section 24, all in Township 12 South, Range 64 West, El Paso County, Colorado.

Basis of Bearings; All bearings are grid bearings of the Colorado State Plane Coordinate System, Central Zone, North American Datum 1983,

The basis of grid bearing was determined by Global Positioning Satellite methods.

Beginning at the northwest corner of said Northwest Quarter of the Southwest Quarter, thence S $9^{\circ}18'03''$ E along the north line of said Northwest Quarter of the Southwest Quarter 1302.11 feet to the northeast corner thereof; thence S $0^{\circ}39'20''$ E along the east line of said Northwest Quarter of the Southwest Quarter 1324.94 feet to the southeast corner thereof; thence N $89^{\circ}24'54''$ W along the south line of said Northwest Quarter of the Southwest Quarter 1301.24 feet to the southwest corner thereof; thence S $89^{\circ}37'24''$ W along the south line of the North Half of the South Half of said Section 23 a distance of 5262.66 feet to the east line of the West 30 feet of said South, Half. thence N $0^{\circ}38'49''$ W along said east line 142.68 feet to the southeasterly right of way line of U.S. Highway No. 24; thence N $45^{\circ}55'22''$ E along said right of way line 1742.76 feet to the most westerly corner of Prairie Vista Meadows Subdivision; thence S $44^{\circ}04'38''$ E along the westerly line of Lot 19 and Lot 20 in said Subdivision 913.38 feet to the most southerly corner of said Lot 20; thence N $57^{\circ}44'32''$ E along the southeasterly line of Lot 20 and 21 in said Subdivision 1048.25 feet to the most westerly corner of a parcel of land described in a document recorded as Reception Number 205026383; thence southeasterly along the southerly line of said parcel, along a non-tangential curve concave to the northeast. the center of said curve bears N $58^{\circ}30'31''$ E, said curve having a central angle of $59^{\circ}11'45''$, a radius of 330.00 feet for an arc length of 340.94 feet; thence N $89^{\circ}18'45''$ E continuing along said southerly line 113827 feet to the west line of a parcel of land described in a document recorded as Reception Number 20418858; thence S $0^{\circ}41'15''$ E along the west line of said parcel 1.00 feet to the southwest corner thereof; thence N $89^{\circ}18'45''$ E along the south line of said parcel 1053.68 feet to the west line of said Northwest Quarter of the Southwest Quarter; thence N $0^{\circ}41'26''$ W along said west line 236.08 feet to the point of beginning.

Containing a calculated area of 157.649 acres, more or less.

2. WHEREAS, Developer desires to plat and develop on the Property a subdivision to be known as Prairie Vista Meadows Filing No. 2 ; 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, 2004, as amended, requires the County to condition approval of all subdivisions on a developers 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,

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 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 Homeowner's Association agree that they shall construct on **Lots 1, 2, 13, 14, 21 & 22** as indicated on the final plat of the subdivision and as described below a private water runoff detention basin [consisting of 3 detention ponds, one on, **Lots 21 & 22**, another on **Lots 13 & 14** and the last one on **Lots 1 & 2**. The Developer and the Homeowner's Association shall not commence construction of the detention basin until the El Paso County Development Services Department has 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 Development Services Department 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 therefor of the Developer, the Association, and the individual lot owners shall be as set forth in paragraph Two (2) above.

Detention basin 1 shall be located on the following parcel(s) within the Subdivision:
Lots: 21 & 22

Detention basin 2 shall be located on the following parcel(s) within the Subdivision:
Lots: 13 & 14

Detention basin 3 shall be located on the following parcel(s) within the Subdivision:
Lots: 1 & 2

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 and the Association hereby grant the County a nonexclusive perpetual easement upon the entire Tract(s) [or Lot(s)] 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: Anytime 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 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 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 Lot(s) **1, 2, 13, 14, 21, & 22** 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 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 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 El Paso County Development Services 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 Development Services Department. Accordingly, any and all documents, submissions, plan approval, inspections, etc. shall be submitted to and shall be made by the Director of the Development Services 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. 2004, 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. (2004) 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 (2004) as amended, and Federal Solid Waste Regulations 40 CFR Ch. I (2004) 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 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.