



**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), CUSTOM CASTLES, INC., A COLORADO CORPORATION (“Developer”), and MATTHEW W. DUNSTON (Land Owner) and WALDEN PROPERTY OWNERS ASSOCIATION, INC. (Homeowners Association or Association), a Colorado nonprofit corporation. The above may occasionally be referred to herein singularly as “Party” and collectively as “Parties.”

Recitals

A. WHEREAS, Land Owner 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. Developer also owns or is under contract to acquire lots within the Property and is the Declarant under the Declaration of Protective Covenants dated August 2nd, 2005 and recorded August 9, 2005, at Reception No. 205122348 in the records of the Clerk and Recorder of El Paso County, Colorado, and the Amendment to Declaration of Protective Covenants recorded November 19, 2012, at Reception No. 212137692; and

B. WHEREAS, Land Owner and Developer desire to plat and develop on the Property a subdivision to be known as Walden Preserve Filing No. 2; 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 subdivision on Land Owner’s and Developer’s promises to construct adequate drainage, water runoff control facilities, and stormwater quality structural Best Management Practices (“BMPs”) for the subdivision; 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, Land Owner and Developer desire to utilize for the subdivision existing offsite detention basin/stormwater quality BMP(s) ("detention basin/BMP(s)" which term does not include facilities located on platted residential lots or easements located on platted residential lots) 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

I. WHEREAS, Land Owner and Developer desire to utilize the existing detention basin/BMP(s) on unplatted offsite property (the "Filing No. 1 Easement"), owned by Land Owner, legally described in Exhibit A to the Private Detention Basin Maintenance Agreement and Easement recorded at Reception No. 205122349 and the Detention Basin Maintenance Easement Grant recorded at Reception No. 205122350 of the records of El Paso County; and

J. WHEREAS, Association shall be charged in the Subdivision's Covenants with the duties of operating, maintaining and repairing all common areas and common structures within the Subdivision, including the detention basin/BMP(s) in the Filing No. 1 Easement area ; and

K. 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/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 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/BMP(s) serving this Subdivision due to the Land Owner's or the Developer's or the Association's failure to meet its obligations to do the same; and

M. WHEREAS, the County conditions approval of this Subdivision 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/BMP(s) serving this Subdivision; and

N. WHEREAS, the County could condition subdivision approval on the Land Owner's and the Developer's promises 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 Land Owner's, the Developer's, and the Association's promises contained herein; and

O. WHEREAS, the County, in order to secure performance of the promises contained herein, conditions approval of this Subdivision upon the existence of Land Owner's and the Developer's grant of the Filing No. 1 Easement for the purpose of allowing the County to periodically access, inspect, and, when so necessary, to clean, maintain and/or repair the detention basin/BMP(s); and

P. 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 Land Owner's and the Developer's creation, by and through this Agreement, of a covenant running with the land upon each and every lot in the Subdivision.; and

Q. WHEREAS, the Land Owner and Developer have other land which may be platted into lots in the future and which may further contribute to the flow of stormwater utilizing the detention basin/BMP(s) located in the Filing No. 1 Easement area (such land expressly made subject to this Agreement by reference to it in a document recorded in connection with a subsequent plat, together with Walden Preserve Filing No. 1, and Walden Preserve Filing No. 2 is collectively referred to herein as the "Development");

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: Land Owner, Developer, and the Association agree 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, 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 Land Owner, 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 Development owned by a particular lot owner, and the denominator is the total number of lots in the Development. 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 Development is 100; Lot 1 is owned by persons A and B; person B also owns Lot 2. Liability is as follows: the Land Owner, \$10,000; 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 Land Owner, 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. The provisions of this paragraph of this Agreement supersede the similar provisions in paragraph 2 of the Private Detention Basin Maintenance Agreement and Easement recorded in connection with Walden Preserve Filing No. 1 at Reception 205122349 so that the allocation of costs to each lot shall be proportionate to the total number of lots in the Development.

3. (Not Applicable)

4. Maintenance: The Land Owner, 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/BMP(s), 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/BMP(s) shall be planted or allowed to grow on the detention basin/BMP(s).

5. Creation of Easement: Land Owner and Developer have previously granted the County a non-exclusive easement upon and across that property described in the Filing No. 1 Easement. The purpose of the easement is to allow the County to access, inspect, clean, repair and maintain the detention basin/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 detention basin/BMP(s).

6. County's Rights and Obligations: Any time the County determines, in the sole exercise of its discretion, that the detention basin/BMP(s) is not properly cleaned, maintained and/or otherwise kept in good repair, the County shall give reasonable notice to the Land Owner, the Developer, the Association and their respective successors and assigns, including the individual lot owners within the Subdivision, that the detention basin/BMP(s) 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. 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/BMP(s).

7. Reimbursement of County's Costs / Covenant Running With the Land: The Land Owner, 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/BMP(s) pursuant to the provisions of this Agreement; however, the obligation and liability of the Land Owner and the Developer hereunder shall only continue until such time as the Land Owner and the Developer transfer 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 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. The scope of liability therefor of the Land Owner, the Developer, and the Association, and the individual lot owners shall be as set forth in Paragraph Two (2) above.

8. Contingencies of Subdivision Approval: Land Owner's, 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. A copy of the Amendment to the covenants of the Development submitting the Subdivision to the covenants previously filed for Walden Preserve Filing No. 1 and making the lot owners members of the Walden Property Owners Association and confirming that the Association is obligated to inspect, clean, maintain, and repair the detention basin/BMP(s); 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/BMP(s); and 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, 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. Distribution to Lot Purchasers: Upon the initial sale of any lot within the Subdivision, prior to closing on such sale, the Land Owner and the Developer shall give a copy of this Agreement to the potential Buyer.

10. Agreement Monitored by El Paso County Development Services Department and/or El Paso County Department of Transportation: 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 and/or the Director of the El Paso County Department of Transportation. Accordingly, any and all documents, submissions, plan approvals, inspections, etc. shall be submitted to and shall be made by the Director of the Development Services Department and/or the Director of the El Paso County Department of Transportation.

11. Indemnification and Hold Harmless: To the extent authorized by law, Land Owner, 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 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 detention basin/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. However, the obligation and liability of the Land Owner hereunder shall only continue until such time as the Land Owner and Developer transfer 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 Land Owner, the Developer, the Association, or 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 Waste or Hazardous Materials: Should any refuse from the detention basin/BMP(s) be suspected or identified as solid waste or petroleum products, hazardous substances or hazardous materials (collectively referred to herein as “hazardous materials”), the Land Owner, the Developer, and the Association 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 Land Owner, the Developer, and the Association, but not the County, shall be responsible and liable as the owner, generator, and/or transporter of said solid waste or hazardous materials.

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 waste or hazardous materials. Venue shall be in the El Paso County District Court.

IN WITNESS WHEREOF, the Parties affix their signatures below.

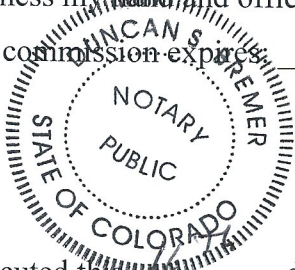
Executed this 16th day of November, 2012, by:

Matthew W. Dunston
MATTHEW W. DUNSTON

The foregoing instrument was acknowledged before me this 16th day of November, 2012, by MATTHEW W. DUNSTON.

Witness my hand and official seal.

My commission expires 7/7/2015



Duncan S. Bremer
Notary Public

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

Custom Castles, Inc., a Colorado corporation

By: *Matthew W. Dunston*
Matthew W. Dunston, Vice President

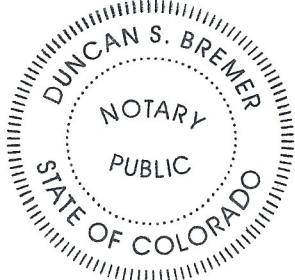
STATE OF COLORADO)
) ss.
COUNTY OF EL PASO)

The foregoing instrument was acknowledged before me this 16th day of November, 2012, by Matthew W. Dunston as Vice President of CUSTOM CASTLES, INC., a Colorado corporation.

Witness my hand and Official Seal.

My commission expires: 7/7/2015

(Seal)



Duncan S. Bremer
Notary Public

Executed this 16th day of November, 2012, by:

WALDEN PROPERTY OWNERS ASSOCIATION, INC., a Colorado nonprofit corporation.

By: Jon Levison
Jon Levison, President

The foregoing instrument was acknowledged before me this 16th day of NOVEMBER,

2012, by Jon Levison, President, WALDEN PROPERTY OWNERS ASSOCIATION, INC., a Colorado nonprofit corporation.

Witness my hand and official seal.

My commission expires: 7/07/2015



D. S. Bremer
Notary Public

Executed this 11th day of October, 2012, by:

BOARD OF COUNTY COMMISSIONERS
OF EL PASO COUNTY, COLORADO

By: *Amy Lathen*
Amy Lathen, Chair

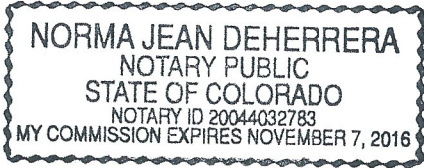
Attest:

Wayne Williams
County Clerk and Recorder

The foregoing instrument was acknowledged before me this 19th day of November, 2012, by Amy Lathen, Chair of the Board of County Commissioners of El Paso County, Colorado, as Attested to by Wayne Williams, County Clerk and Recorder.

Witness my hand and official seal.

My commission expires: 11-7-16



Norma Jean DeHerrera
Notary Public

Approved as to Content and Form:

[Signature]
Assistant County Attorney