

**STORMWATER FACILITY CONSTRUCTION AND REIMBURSEMENT
AGREEMENT BETWEEN
SUNBORNE 16 XVI LTD, ARAPAHOE COUNTY WATER AND WASTEWATER
AUTHORITY
AND THE SOUTHEAST METRO STORMWATER AUTHORITY**

THIS AGREEMENT is made and entered into this ____ day of _____, 2009 by and between the ARAPAHOE COUNTY WATER AND WASTEWATER AUTHORITY, a political subdivision and a public corporation of the state, operating and existing under and by virtue of the laws of the State of Colorado, hereinafter referred to as "ACWWA"; the SOUTHEAST METRO STORMWATER AUTHORITY acting by and through the SEMSWA Water Activity Enterprise operating and existing under and by virtue of the laws of the State of Colorado, hereafter referred to as "SEMSWA"; and SUNBORNE 16 XVI LTD , a Colorado Limited Liability Company, hereinafter referred to as "Lessee ".

RECITALS

WHEREAS, Lessee is the lease holder of the property described in Exhibit A, attached hereto and made a part hereof by this reference (hereinafter the "Property"), which Property lies within the boundaries of both the ACWWA and SEMSWA service areas; and

WHEREAS, ACWWA currently holds the Colorado Department of Public Health and Environment (CDPHE) issued National Pollution Discharge Elimination System (NPDES) for Municipal Separate Storm Sewer System (MS4) – Phase II requirements permit for the ACWWA service area; and

WHEREAS, ACWWA manages the stormwater system for the ACWWA service area, including the collection of System Development Fees (SDFs) for the purpose of constructing regional detention, water quality, and regional conveyance facilities as further described in the *Stormwater Management Study – Regional Water Quality and Detention Management* prepared by Wright Water Engineers (2002); and

WHEREAS, SEMSWA has entered into an Intergovernmental Agreement (Formation IGA) with Arapahoe County, the City of Centennial, ACWWA, East Cherry Creek Valley Water and Wastewater Authority, and Inverness Water and Sewer District for the purpose of transferring the standard and non-standard MS4 permits from the parties in the Formation IGA to SEMSWA; and

WHEREAS, Lessee desires to construct regional improvements for detention, water quality, and conveyance as is required to fulfill the requirements outlined in the Arapahoe County *Stormwater Management Manual*, hereinafter referred to as "The Criteria", and intends to fulfill the detention and water quality capture volume requirements for development of the Property, as further outlined in this Agreement, for its intended use; and

WHEREAS, as an alternative to Lessee constructing multiple on-site detention and or water quality improvements on the Property, Lessee desires to construct regional Pond L1-East, a part of ACWWA's and SEMSWA's regional stormwater facilities intended to serve the Property and other tributary areas. The proposed regional stormwater facilities are described in Exhibit B ("Stormwater Facilities"); and

WHEREAS, the Stormwater Facilities are identified in the ACWWA's *Stormwater Management Study – Regional Water Quality and Detention Management* as prepared by Wright Water Engineers (2002), as amended from time to time, as a regional facility, which serves the Property and other properties as further defined in the *Stormwater Management Study – Regional Water Quality and Detention Management*; and

WHEREAS, Lessee desires to proceed with development of the Property at this time and desires to construct the Stormwater Facilities to facilitate the development of the Property, provided Lessee is reimbursed for a portion of the Actual Capital Costs (as defined below) of the Stormwater Facilities; and

WHEREAS, ACWWA currently does not have adequate funds on hand to pay anticipated construction costs of the Stormwater Facilities. ACWWA expects to collect revenues through its stormwater system development fees (SDFs) adequate to defray a portion of the Actual Capital Costs of the Stormwater Facilities; and

WHEREAS, the parties desire to proceed with the construction of the Stormwater Facilities at Lessee's initial Actual Capital Cost, and desire to provide for reimbursement of a portion of the Actual Capital Costs pursuant to this Agreement.

AGREEMENT

In consideration of the mutual advantages accruing to the parties herein, and promises of performance of the obligations contained in the Agreement, the parties hereby agree as follows:

1. Definitions.

A. "Actual Capital Costs" means those reasonable costs which are incurred for the purpose of planning, designing, and constructing the Stormwater Facilities including, but not limited to:

- i. All costs of materials attributable to the actual construction or acquisition of the Stormwater Facilities, including all related components and materials used therein. For those items for which any construction contract provides that payment is to be made on a per unit basis, the construction cost shall be that amount actually paid pursuant to the construction contract so providing, which sum reflects the cost of the actual quantities used;
- ii. All labor costs incurred in the actual construction of the Stormwater Facilities;

- iii. All costs attributable to the construction or acquisition of the Stormwater Facilities or any part or component thereof incurred as a result of change orders approved in accordance with any construction contract;
- iv. All costs incurred for design engineering of the Stormwater Facilities, not to exceed \$268,000.00;
- v. All costs for construction administration, materials testing, inspection and other professional fees;
- vi. Any other reasonable costs, expenses or expenditures associated with the furtherance of the construction of the Stormwater Facilities;
- vii. SEMSWA's Executive Director shall verify final cost figures using actual contract administration documentation. SEMSWA's Executive Director shall disallow any cost that is not reasonably documented or is unreasonable or not customary for the type of Stormwater Facility constructed. If Lessee disagrees with Executive Director's disallowance of any cost, Lessee may, at a regularly scheduled Board meeting, appeal the decision to the SEMSWA Board of Directors and the Board shall make a final determination regarding allowance of any cost being disputed. Actual Capital Costs shall not include any financing cost or interest, Lessee overhead or profit.

2. Stormwater Facilities. The Stormwater Facilities, which are the subject of this Agreement, are those shown on the attached Exhibit B; and can further be described as improvements made to Pond L1-East, including, but not limited to outlet structure, forebays, micropool, maintenance access, trickle channel and other improvements located within the 100-year water surface elevation of Pond L1-East. With the exception of minor modifications to the existing outlet structure, this Agreement does not include facilities or improvements to Pond L1-West.

3. Construction of Stormwater Facilities. In compliance with applicable law and permits, Lessee agrees to construct the Stormwater Facilities in compliance with the Construction Drawings, Phase III Drainage Report, and the Floodplain Modification Study, which have been approved by Arapahoe County with recommendation for approval by SEMSWA.

4. Timeliness of Completion of Stormwater Facilities. Except where a shorter time period is prescribed, all of the Stormwater Facilities and all matters herein agreed to be performed shall be installed, constructed, or performed by Lessee within two (2) years from the date of this Agreement. However, SEMSWA and ACWWA may extend the time of performance by Lessee if they determine that a delay is justified on the basis of labor disputes, fire, unusual delay in transportation, unavoidable casualties, or causes beyond the Lessee's control. All construction shall be performed in a good and workmanlike manner and in accordance with applicable County and SEMSWA standards, rules, and regulations governing such construction, as determined by

SEMSWA. The execution of this Agreement in no way represents that ACWWA or SEMSWA will accept the Stormwater Facilities for ownership or maintenance purposes.

5. Indemnity. Lessee shall indemnify and hold harmless SEMSWA and ACWWA, their officers, directors, members and agents ("Indemnified Parties") from and against any and all injuries, damages, causes of action, or claims which may exist or be brought, or be instituted against any or all of the Indemnified Parties because of or in any manner arising from or connected with the performance or lack thereof under the terms of this Agreement and construction of the Stormwater Facilities and the Lessee agrees to pay any cost of defending, compromising, or negotiating any matters pertaining to such actions against any or all of the Indemnified Parties, including attorneys' fees and any judgment against which any or all of the Indemnified Parties may result from such actions.

6. Payment for Facilities. Lessee agrees to pay the Actual Capital Costs of the Stormwater Facilities, which have been estimated by Lessee's engineers to be \$780,000.00 as shown on Exhibit C attached hereto.

7. Reimbursement. Subject to the terms hereof, ACWWA shall reimburse to the Lessee the difference between the Actual Capital Costs of the Stormwater Facilities as approved by the SEMSWA's Executive Director, and one half of the ACWWA's stormwater system development fee due for the Property (Reimbursement Sum), from revenues collected from ACWWA's stormwater system development fee. The stormwater system development fee due for the Property has been calculated to be \$551,197.00 yielding an estimated Reimbursement Sum of \$504,401.00, provided, however, that the Reimbursement Sum shall be adjusted based on actual verified costs as provided in Section 8 below. ACWWA shall pay to Property Owner 5.0% of stormwater system development fees (less stormwater system development fees allocated to fixed annual payments under any ACWWA agreement) collected, if any, less costs of collection, from the properties located within the Lone Tree, Windmill and Dove Creek Basins ("Basins") in Arapahoe County, until the first to occur of either (a) such time as the Reimbursement Sum has been paid in full, or (b) thirty (30) years from the date the Reimbursement Sum payments begin, which is defined by the date at which the improvements have received a recommendation for Final Acceptance by SEMSWA. Regardless of whether the Reimbursement Sum has been paid in full at the end of the thirty (30) year period, Lessee irrevocably waives, releases, and discharges any claim that it may have for any unpaid portion of the Reimbursement Sum that may exist upon the expiration of such 30 year period. ACWWA payments shall be made on a semiannual basis each April 1 and October 1 for those periods for which stormwater system development fees have been collected in the Basins. No interest shall accrue on the Reimbursement Sum. ACWWA may prepay the Reimbursement Sum at any time without penalty. Nothing herein shall require ACWWA to impose a Stormwater System Development Fee, to maintain the Stormwater System Development Fee at any particular amount, it being expressly understood and agreed that ACWWA maintains its discretion to modify, amend, repeal, or replace the Stormwater System Development Fee from time to time. Payment will be made to the Lessee if, and only if, Stormwater System Development Fees are collected from within the Basins and if funds from such fees are available after payment of costs of collection of the Stormwater System Development Fee and payment of any annual payment obligations contained in prior reimbursement agreements.

8. Lessee Documentation. Upon final completion of the construction of the Stormwater Facilities, Lessee shall verify by sworn affidavit and document by receipts for payment, all Actual Capital Costs incurred in the construction of the Stormwater Facilities. SEMSWA shall have sixty (60) days to accept or challenge Lessee's verified project costs. Once SEMSWA has determined the final documented reasonable project costs, the Reimbursement Sum shall be fixed, and reimbursement shall begin as provided in paragraph 7, based on actual verified costs, and not the estimated costs.
9. Enforcement of Contract. Lessee, ACWWA, and SEMSWA acknowledge and agree that this Agreement may be enforced in law or equity, by a decree of specific performance, damages, or such other legal and equitable relief as may be available to any of the parties.
10. Survival of Obligations. The provisions of this Agreement shall be deemed to survive any transfer of the Stormwater Facilities and shall be binding upon and inure to the benefit of the successors, transferees, and assigns of the parties.
11. Section Headings. The section headings are inserted herein only for convenience of reference and in no way shall they define, limit or describe the scope or intent of any provisions of this Agreement.
12. Notice of Change in Lessee Status. Lessee shall furnish notice to ACWWA and SEMSWA of any change in address or assignment of this Agreement. Failure to do so shall cause Lessee or any successor or assign to forfeit any reimbursement due hereunder for the year or years in which ACWWA or SEMSWA are not so informed.
13. Receipt of Notice. Notice shall be deemed given and received, when mailed by first class United States mail, postage pre-paid, to the parties at the following addresses or as they may be otherwise designated by notice given from time to time.

Arapahoe County Water and Wastewater Authority
Attn: Gary Atkin, Manager
13031 E. Caley Ave.
Centennial, CO 80111

Southeast Metro Stormwater Authority
Attn: John McCarty, Executive Director
76 Inverness Drive East, Suite 100
Centennial, CO 80112

SunBorne Companies
Attn: Bret Packard
8001 South Interport Boulevard, Suite 300
Englewood, CO 80112

14. Annual Appropriations. All payments that may be made under this Agreement are subject to annual budget and appropriations of ACWWA and SEMSWA. No direct or indirect debt or multiple fiscal year financial obligation whatsoever is created by this Agreement.

15. Assignment to SEMSWA. ACWWA may assign and SEMSWA may accept the assignment of this Agreement all subject to the terms and conditions of the Formation IGA. If the Agreement is assigned by ACWWA and accepted by SEMSWA, thereafter Lessee shall look solely and exclusively to SEMSWA for performance of all of ACWWA's duties, liabilities and responsibilities, and fully releases and discharges all of ACWWA's duties, liabilities, and responsibilities hereunder. Until that time, ACWWA shall be solely responsible for reimbursement to Lessee set forth in Paragraph 7 above. Following any such assignment, SEMSWA may impose a separate System Development Fee in the Basins and in such event, paragraph 7 hereof shall be deemed modified to substitute the SEMSWA System Development Fee for the ACWWA System Development Fee.

IN WITNESS WHEREOF, the Parties hereto have caused their names and seals to be affixed the date and year first above written.

ARAPAHOE COUNTY WATER AND
WASTEWATER AUTHORITY

DATE: _____

President

ATTEST:

Secretary

SOUTHEAST METRO STORMWATER
AUTHORITY acting by and through
SEMSWA WATER ACTIVITY ENTERPRISE

Date: _____

By _____

Attest:

Secretary

Lessee: SUNBORNE 16 XVI LTD

By: _____

Name: _____

Title: _____

The foregoing instrument was acknowledged before me this _____ day of _____
_____, 2009, by _____, as _____ of _____

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

Signature

Name of Notary

Address of Notary

ATTACHMENTS

Exhibit A

Legal Description of Owner's Property

Exhibit B

Stormwater Facilities Subject To This Agreement

Exhibit C

Engineer's Estimate of Probable Cost of Exhibit B Facilities

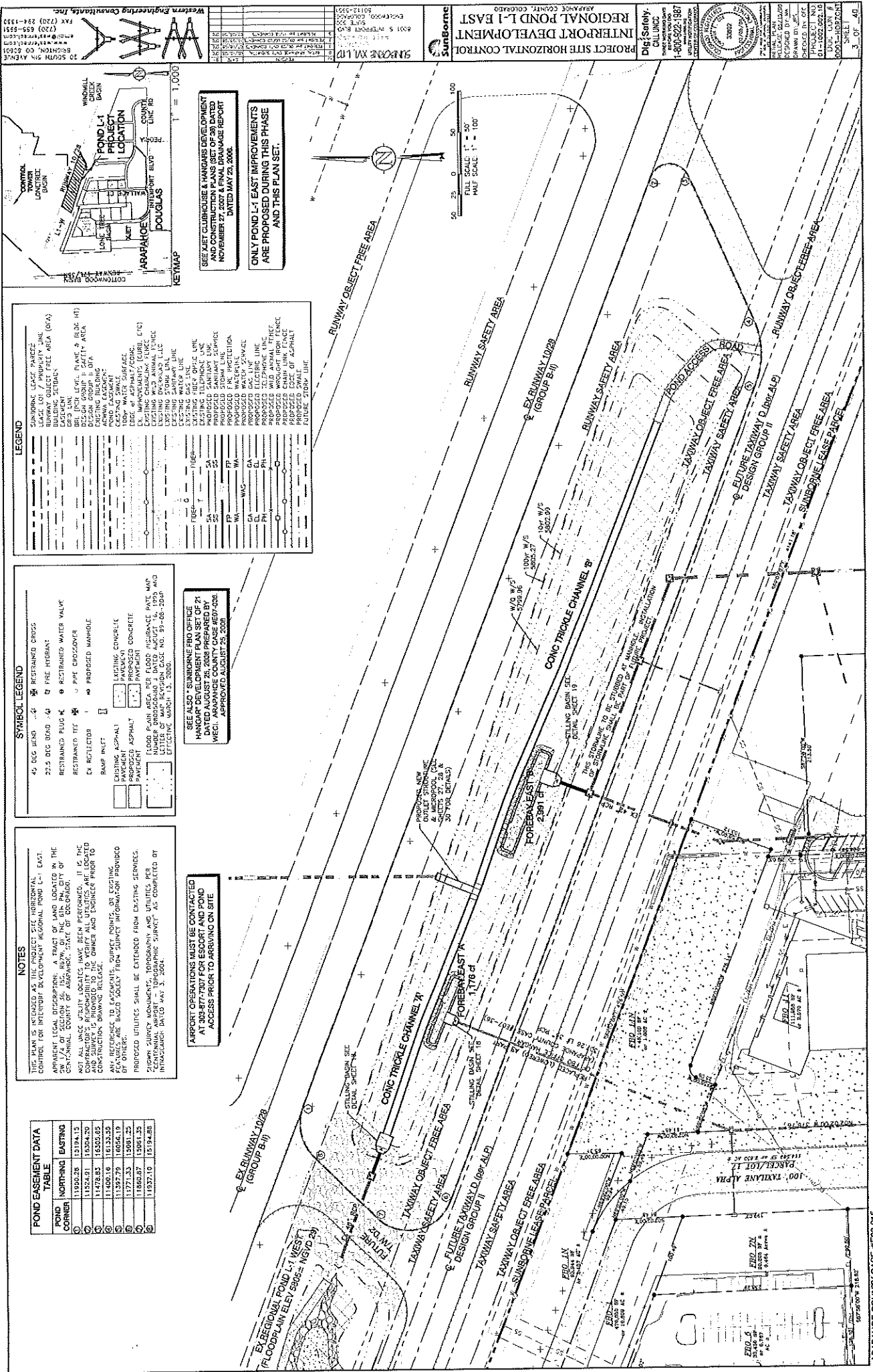
Does not appear to be referenced in the text.

EXHIBITS

Exhibit A



EXHIBIT B





L-1 Pond East Pricing

Phase	Description	Shaw	TSU	Fiore	Gilbert	Laughlin	All Phase	CCE	Christopher	Central	Great Western	Rio Grand	Concrete Pumping
1110	Shaw on-site general conditions	\$ 5,050											
1706	Rough Clean - street clean-up	\$ 1,750											
2002	Surveying	\$ 2,225											
2117	Protect Existing Items	\$ -											
2200	Earthwork per plans			\$ 203,751	\$ 88,711	\$ 123,650							
	Over excavation & backfill - under structures and channel not included at this time												
2200	GESC requirements - per plans			\$ 23,973	\$ 9,400	\$ 10,850							
2600	Utilities - per plans		\$ 373,888	\$ 132,323	\$ 105,321								
2820	Asphalt												
2900	Landscaping												
3000	Concrete Structures		Oulet Struct	\$ 140,678	\$ 203,274				excluded				
	Labor - formwork						\$ 100,380	included	included				\$ 6,942
	Mud - 407 cu yds						\$ -	excluded	excluded				
	Reinforcing							excluded	excluded		\$ 7,053	\$ 6,347	
	Pumping							excluded	excluded				
	Trickle channel & forebays							excluded	excluded				
	Structures		included					excluded	\$ 43,868	\$ 15,315			
								\$ 61,000	excluded	\$ 21,722			
							\$ 6,750						
5500	Metal grates & accessories	\$ 35,000											
	Contingency Allowance	\$ 44,025	\$ 373,888	\$ 500,725	\$ 406,706	\$ 134,500	\$ 107,130	\$ 61,000	\$ 43,868	\$ 37,037	\$ 7,053	\$ 6,347	\$ 6,942
	Subs sub-total												
	Buy out strategy	\$ 409,704											

Shaw Fee/Overhead/Agencies 8% \$32,776

Total Hard Construction Cost \$442,480

Design & Engineering - (WEC) ~~\$922,644~~ **268,000**

Permit & Plan Review - by Owner ?

Private Testing - By Owner ~~\$4,000~~ **5,000**

On Site Construction Admin ~~\$5,000~~ **6,500**

Project Management ~~\$77,000~~ **0**

Project Grand Total = \$851,124 $\$721,480 + 8\% \text{ Contingency} = \$779,738$
use \$780,000