

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

RESOLUTION 12-25

Approval of a Maintenance Agreement with Centennial 360 Metropolitan District and Authorization of the Executive Director to Execute the Agreement

WHEREAS, the City of Centennial (City) and the Southeast Metro Stormwater Authority (SEMSWA) have entered into an Implementing Intergovernmental Agreement (IIGA) providing for the transfer of the Colorado Department of Public Health and Environment (CDPHE) issued National Pollution Discharge Elimination System (NPDES) for Municipal Separate Storm Sewer System – Phase II requirements permit from the City to SEMSWA; and

WHEREAS, SEMSWA has adopted the City of Centennial Stormwater Management Manual (Manual) that sets for the criteria for the design of stormwater improvements and allowable connections to the public stormsewer system; and

WHEREAS, as part of IIGA, SEMSWA has assumed responsibility for reviewing and approving stormwater improvements in accordance with the Manual; and

WHEREAS, the Manual requires that an Operation and Maintenance Manual (O&M) be provided in accordance with the construction of stormwater facilities for the purpose of educating and providing guidance for entities responsible for maintenance and management of stormwater facilities, including executing a Maintenance Agreement to ensure the long term maintenance of the stormwater facility; and

WHEREAS, the SEMSWA Board of Directors approved a standard form of a Stormwater Facilities Maintenance Agreement in Resolution No. 32, Series of 2007; and

WHEREAS, the Standard Stormwater Facilities Maintenance Agreement doesn't account for the unique Maintenance Agreement arrangement at Peakview Heights whereby the stormwater improvements are owned by Peakview Land, LLC and FMF Peakview, LLC and maintained by the Centennial 360 Metropolitan District, a quasi-municipal corporation and political subdivision of the State of Colorado formed pursuant to C.R.S Title 32.

WHEREAS, in order to address the situation in which the Peakview 360 Metropolitan District is responsible for the maintenance of the detention and water quality facilities at Peakview Heights and to provide reasonable assurances to SEMSWA that the maintenance of the detention and water quality facilities will, in fact, be properly performed, a Peakview Heights Stormwater Maintenance Agreement has been prepared by SEMSWA staff and legal counsel and is attached hereto as **Exhibit A**; and

WHEREAS, the Peakview Heights Stormwater Maintenance Agreement meets the requirements of the Manual and SEMSWA staff and legal counsel have approved the **Exhibit A** Agreement and recommend that the same be approved by the Board of SEMSWA.

NOW, THEREFORE, BE IT RESOLVED THAT:

1. The Board Approves the Peakview Heights Stormwater Maintenance Agreement attached hereto as **Exhibit A**.
2. The Board authorizes the Executive Director to execute the Peakview Heights Stormwater Maintenance Agreement attached hereto as **Exhibit A**.

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

Date: _____

ATTEST:

Secretary

Chairperson

APPROVED AS TO FORM:
Attorney for
Southeast Metro Stormwater Authority

By _____
Edward J. Krisor

STORMWATER FACILITY MAINTENANCE AGREEMENT

THIS STORMWATER FACILITY MAINTENANCE AGREEMENT (this “**Agreement**”) is entered into effective as of the 11 day of May, 2012, by and between the SOUTHEAST METRO STORMWATER AUTHORITY, a political subdivision of the State of Colorado (“**SEMSWA**”); CENTENNIAL 360 METROPOLITAN DISTRICT, a quasi-municipal corporation and a political subdivision of the State of Colorado (the “**District**”); PEAKVIEW LAND, LLC, a Colorado limited liability company (“**Peakview**”); and FMF PEAKVIEW LLC, a Delaware limited liability company (“**FMF**,” and together with Peakview, the “**Owners**”).

Recitals

A. Peakview is the owner of that certain parcel of land legally described on Exhibit A, attached hereto and incorporated herein by this reference (the “**Peakview Property**”).

B. FMF is the owner of that certain parcel of land legally described on Exhibit B, attached hereto and incorporated herein by this reference (the “**FMF Property**,” and together with the Peakview Property, the “**Development Property**”).

C. The Development Property and Tracts A, B and C, Peakview Heights Filing No. 2, First Amendment, County of Arapahoe, State of Colorado (collectively, the “**Property**”) is intended to be developed as a mixed-use residential, office and retail project.

D. The District previously was organized to provide for, among other matters, the construction, installation, maintenance and operation of certain public improvements, including, without limitation, storm drainage and water quality improvements, to benefit the Property, all in accordance with the District’s approved service plan.

E. A Phase III Drainage Report for the Property, titled Peakview Heights Filing No. 2, prepared by J3 Engineering, was approved October 25, 2011 (the “**Plan**”) by the City of Centennial (“**City**”), a copy of which has been provided to SEMSWA.

F. The Plan provides for and sets forth stormwater management facilities, including drainage facilities, intended to reduce, detain, convey, and manage stormwater runoff (referred to as “drainage facilities”) and facilities intended to provide water quality benefits (referred to as “water quality facilities”) within the confines of the Property (such stormwater management facilities, including the drainage facilities and the water quality facilities, are hereinafter collectively referred to as “**Facilities**”).

G. A Stormwater Management Facility Operation and Maintenance Manual has been prepared for the Property by J3 Engineering (the “**O&M Manual**”), in accordance with the requirements of the City Stormwater Management Manual.

H. The Facilities shall be maintained and operated by the District in accordance with the O&M Manual.

I. SEMSWA, the District and the Owners desire to enter into this Agreement to memorialize their understandings and agreements with respect to certain obligations to reimburse to SEMSWA if SEMSWA incurs expenses in connection with SEMSWA's maintenance or repair of the Facilities, as set forth herein.

NOW THEREFORE, in consideration of mutual benefits and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

Agreement

1. To ensure that the Facilities are and remain in proper working condition, the District shall perform the maintenance for all the Facilities in accordance with the SEMSWA Stormwater Management Manual, the O&M Manual, applicable SEMSWA standards imposed and applied uniformly throughout SEMSWA's service boundaries and other applicable legal requirements. Notwithstanding anything to the contrary contained in this Agreement, (i) in the event of any conflict between the terms and conditions of this Agreement and the terms and conditions of the O&M Manual, the terms and conditions of the O&M Manual will control the rights and the obligations of the District and SEMSWA; and (ii) in the event of any conflict between the terms and conditions of this Agreement and the terms and conditions of the SEMSWA Stormwater Management Manual, the terms and conditions of the SEMSWA Stormwater Management Manual shall control the rights and obligations of the District and SEMSWA.

2. In the event the District fails to comply with the obligations set forth in Section 1 of this Agreement, SEMSWA shall provide written notice of such failure to the District and to the Owners. If the District thereafter fails to comply within twenty (20) business days of receipt of such notice (or, if the requested action reasonably requires more than twenty (20) business days to complete, if the District fails to commence or cause commencement of the work within such twenty (20) business day period and to thereafter diligently pursue the work to completion), then SEMSWA may take any action available to SEMSWA under law or in equity to correct the deficiency. Notwithstanding the foregoing, in the event of an "Emergency" (as defined below), SEMSWA or its agents may enter immediately upon the Property and take whatever reasonable steps it deems necessary to correct the deficiency, without prior notice to the District or to the Owners (provided, however that SEMSWA will provide notice to the District and Owners as soon as reasonably possible, and in no event later than 72 hours after commencement of SEMSWA's action to correct the deficiency). For purposes of this Section 2, an "Emergency" shall be deemed to be circumstances or events which create a risk to people or property or place SEMSWA in imminent danger of violating its NPDES MS4 Permit. It is expressly understood and agreed that SEMSWA is under no obligation to maintain or repair the Facilities and in no event shall this Agreement be considered to impose any such obligation on SEMSWA.

3. If SEMSWA performs work or expends any funds pursuant to the terms of this Agreement, including labor, equipment, supplies and materials, and/or if any third party levies or imposes any fines or assessments against SEMSWA (and SEMSWA pays such fines or assessments) as a result of the District's failure to comply with the SEMSWA Stormwater Management Manual and/or the obligations set forth in Section 1 of this Agreement, the District

shall reimburse SEMSWA within forty-five (45) days after SEMSWA delivers written notice of such expenses (including a reasonably detailed written invoice and other appropriate backup documentation) to the District and Owners in accordance with Section 9. If the District fails to reimburse SEMSWA within such forty-five (45) day period, SEMSWA may proceed as set forth in Section 4.

4. If SEMSWA is unable to obtain full reimbursement of its expenses from the District as provided in Section 3, the Owners shall reimburse SEMSWA within thirty (30) days after SEMSWA provides written notice (in accordance with Section 9) to the Owners of the same, along with a certification of SEMSWA's outstanding and unpaid expenses. If the Owners fail to reimburse SEMSWA within such thirty (30) day period, the Owners hereby authorize SEMSWA to (a) file a mechanic's lien on the Development Property in the amount of the unpaid expenses, foreclose on such lien and request and be awarded its costs and attorney fees; or (b) file a lawsuit against the Owners in the amount of the unpaid expenses and be awarded its costs and attorney fees, SEMSWA being entitled to a joint and several judgment against such Owners. Any amounts owed to SEMSWA under this Section 4 shall be the joint and several obligation of the Owners of record of the Development Property on the date notice was given to the Owners pursuant to this Section 4 and all of the successors-in-interest of such Owners.

5. To the extent permitted by law, if at all, and as limited by the Colorado Governmental Immunity Act, the District shall indemnify and hold harmless SEMSWA, its agents and employees, for any and all damages, accidents, casualties, occurrences or claims which might arise or be asserted against SEMSWA arising out of or resulting from the District's operation or maintenance of the Facility. Nothing in this Agreement shall be construed to waive, limit, or otherwise modify, in whole or in part, any governmental immunity that may be available by law to the District, its respective officials, employees, contractors, or agents, or any other person acting on behalf of the District and, in particular, governmental immunity afforded or available to the District pursuant to the Colorado Governmental Immunity Act, Title 24, Article 10, Part 1 of the Colorado Revised Statutes.

6. The responsibilities and obligations of the Owners shall constitute a covenant running with the land and shall be binding upon the Owners, their respective successors and assigns, so long as they own a fee interest in the Development Property, or any portion thereof, served by the Facilities.

7. The District does not intend hereby to create a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever. The performance of those obligations of the District hereunder requiring budgeting and appropriation of funds are subject to annual budgeting and appropriations. SEMSWA and Owners expressly understand and agree that the District's obligations hereunder shall extend only to monies appropriated for the purposes of this Agreement by the board of directors and shall not constitute a mandatory charge, requirement or liability in any ensuing fiscal year beyond the then-current fiscal year. No provision of this Agreement shall be construed or interpreted as a delegation of governmental powers by the District, or as creating a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever of the District or statutory debt limitation, including, without limitation, Article X, Section 20 or Article XI, Section 6 of the Constitution of the State of Colorado. No provision of this Agreement shall be construed to pledge or to create a lien on any class or source of District

funds. The District's obligations under this Agreement exist subject to annual budgeting and appropriations, and shall remain subject to the same for the entire term of this Agreement.

8. This Agreement shall be recorded in the Arapahoe County Clerk and Recorder's Office.

9. Any notice, approval, consent or other communication to be given under this Agreement shall be given in writing in the manner set forth below, addressed to the party to be served at the addresses set forth below, or at such other address for which that party may have given notice under the provisions of this Section 9. Any notice, approval consent or other communication given by (a) mail shall be deemed to have been given three (3) business days after it is deposited in the United States mail, first class and postage prepaid; (b) overnight common carrier courier service shall be deemed to be given on the business day (not including Saturday) immediately following the date it was deposited with such common carrier; (c) delivery in person or by messenger shall be deemed to have been given upon delivery in person or by messenger; or (d) electronic facsimile be deemed to have been given on the date of transmission of the entire communication, provided that (i) such transmission occurs during 8:00 a.m. and 5:00 p.m., MST, on normal business days, and (ii) the sender's machine confirms successful delivery thereof.

Notices shall be delivered to:

If to District:

Centennial 360 Metropolitan District
7374 S. Alton Way, #203
Centennial, CO 80112
Attention: Kristopher Barnes
Facsimile: 866.305.0930

With a copy to:

Icenogle Seaver Pogue, P.C.
4725 S. Monaco Street, Suite 225
Denver, CO 80237
Attn: Alan D. Pogue
Facsimile: 303.292.9101

If to SEMSWA:

Southeast Metro Stormwater Authority
76 Inverness Drive East, Suite A
Attention: Ashley Byerley
Englewood, Colorado 80112
Facsimile: 303.267.9552

With a copy to:

Edward J. Krisor
Attorney At Law
3900 S. Wadsworth Blvd., Suite 320
Lakewood, CO 80235-2220
Facsimile: (303) 985-2337

If to FMF:

FMF Peakview LLC
c/o Forestar (USA) Real Estate Group, Inc.
6300 Bee Cave Road, Building 2, Suite 500
Austin, TX 78746
Attention: Wayne Macdonald and Robert Buzbee
Facsimile: 512.433.5204

With a copy to:

Brown McCarroll, LLP
2001 Ross Avenue, Suite 2000
Dallas, TX 75201-6929
Attention: R. Tyler Johnson
Facsimile: 214.999.6170

And a copy to:

Forestar Group
6300 Bee Cave Road, Building 2, Suite 500
Austin, TX 78746
Attention: Brad Stein
Facsimile: 512.433.5204

If to Peakview:

Peakview Land, LLC
c/o Resolute Investments, Inc.
7374 S. Alton Way, #203
Centennial, CO 80112
Attention: Kristopher Barnes
Facsimile: 866.305.0930

With a copy to:

Husch Blackwell LLC
1050 17th Street, Suite 1500
Denver, CO 80265
Attention: Michelle Z. McDonald

Facsimile: 303.685.4869

10. Headings. The captions of the paragraphs are set forth only for the convenience and reference of the parties and are not intended in any way to define, limit or describe the scope or intent of this Agreement.

11. Severability. If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement will continue in full force.

12. Integration. This Agreement, along with the O&M Manual, represents the entire agreement between the parties with respect to the subject matter hereof and there are no oral or collateral agreements or understandings.

13. Amendment. This Agreement may be amended only by an instrument in writing signed by the parties or their successors or assigns.

14. Governing Law. This Agreement shall be construed under and governed by the laws of the State of Colorado.

15. Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original, and all such counterparts taken together will constitute one and the same instrument.

{Remainder of Page Intentionally Blank}

DISTRICT:

CENTENNIAL 360 METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado

By: *Kristopher Barnes*
Kristopher Barnes, President

ATTEST:

[Signature]
James O'Malley, Secretary

STATE OF COLORADO)
) ss.
COUNTY OF Arapahoe)

The foregoing instrument was acknowledged before me on this 10 day of May, 2012, by Kristopher Barnes as President and ~~Robert Abeyta~~ ^{James O'Malley} as Secretary of CENTENNIAL 360 METROPOLITAN DISTRICT, a quasi-municipal corporation and political subdivision of the State of Colorado.

WITNESS my hand and official seal.

My Commission expires: 4/14/2015

[Signature]
Notary Public



PEAKVIEW:

PEAKVIEW LAND, LLC, a Colorado limited liability company

By: [Signature]
Name: GARY ROHR
Title: PRESIDENT OF RESOLUTE INVESTMENTS, INC. MANAGER

STATE OF COLORADO)
) ss.
COUNTY OF Arapahoe)

The foregoing instrument was acknowledged before me on this 10 day of May, 2012, by Gary Rohr as President, Resolute Investments, Inc., Manager of PEAKVIEW LAND, LLC, a Colorado limited liability company.

WITNESS my hand and official seal.

My Commission expires: 4/14/2015.

[Signature]
Notary Public



FMF:

FMF PEAKVIEW LLC, a Colorado limited liability company

By: Brad J
Name: Brad Walters
Title: Vice President

STATE OF COLORADO)
) ss.
COUNTY OF Travis)

The foregoing instrument was acknowledged before me on this 9th day of May, 2012, by Brad Walters as VP of FMF PEAKVIEW LLC, a Colorado limited liability company.

WITNESS my hand and official seal.

My Commission expires: 11/15/2015

Erin L Scarborough
Notary Public



EXHIBIT A

Lot 1, PEAKVIEW HEIGHTS FILING NO. 2, FIRST AMENDMENT, County of Arapahoe,
State of Colorado.

EXHIBIT B

Lot 2, PEAKVIEW HEIGHTS FILING NO. 2, FIRST AMENDMENT, County of Arapahoe,
State of Colorado.