

GARDEN IN A BOX PROGRAM AGREEMENT

THIS Garden In A Box Program Agreement (“Agreement”) is made this ____ day of _____, 2017 (“Effective Date”), by and between the Boulder Energy Conservation Center d/b/a the Center for ReSource Conservation (“CRC”) and the Town of Erie (“Erie”) individually referred to as a “Party,” or collectively as “Parties.”

Recitals

1. WHEREAS many people are interested in the concept of a low-water landscape;
2. WHEREAS those interested in the concept of a low-water landscape are often overwhelmed by the plant selection and design of such a landscape;
3. WHEREAS those interested in the concept of a low-water landscape have limited time and money to invest in the process of planning and designing such a landscape; and
4. WHEREAS in order to provide its residents with an easy and affordable way to learn about and install low-water landscapes, Erie wishes to engage CRC to organize and conduct the Garden In A Box Program (“Program”) for the term specified in Section III in partnership with Erie.

NOW THEREFORE, in consideration of the terms and conditions contained herein and other good and valuable consideration, the Parties agree as follows:

I. Program Obligations:

A. CRC Obligations

CRC shall provide the services described in the Garden In A Box Program Scope and Conditions of Work, attached hereto as Attachment A (“Services”).

B. Erie Obligations

1. Supplemental Work Order. Erie shall complete the Supplemental Work Order, attached hereto as Attachment B, no later than the time the Agreement is completed and returned to CRC or February 1, 2017 whichever comes first. In the Supplemental Work Order, Erie shall identify the precise nature of services requested, including but not limited to: the number of gardens it wants CRC to provide and the number of distributions it wants CRC to conduct.
2. Publicity. Erie shall be responsible for publicizing the availability of the Program to its Customers in one or more rounds of marketing. Efforts to publicize the Program to its Customers may include but are not limited to advertising mediums such as the Erie’s website, social media, bill inserts,

newsletter and direct mailing. If only one round will take place, the marketing must be in the form of a water bill insert.

CRC will develop a marketing “Toolkit” containing these advertisement mediums and individual advertisement components for the Erie to use. Erie and CRC will create a mutually agreed upon timeline, known as the “Marketing Calendar” which will state the dates on which both Erie and CRC will disseminate the chosen advertisements. Advertising content may be created by either CRC or Erie, however Erie must use the “Toolkit” components (i.e. verbiage, logos, photographs) for Program advertisements and all efforts must be approved by the CRC prior to publishing.

In the event that a sufficient number of requests exist, as determined by CRC, and all rounds of advertising have not been completed, CRC may waive the requirement that Erie conduct an additional advertising round. CRC shall provide Erie with notice of any such waiver.

3. Complete and Submit Signed Agreement and Attachments. Erie shall submit to CRC a signed copy of the Agreement and the Attachments, including a completed copy of the Garden In A Box Program Supplemental Work Order, no later than February 1st, 2017.

II. Price, Payment Amount, and Billing Procedure

- A. Payment of Program Price. Erie shall pay CRC the Program Price, pursuant to the Garden In A Box Program Payment Schedule and Terms, attached hereto as Attachment C.

III. Term

- A. Term of Agreement. The Term of this Agreement commences on the Effective Date and terminates on December 31, 2017 or on the date the Agreement is earlier terminated, as provided herein.

IV. General Provisions

- A. Record Keeping Requirements. CRC and Erie shall maintain all records, documents, communications, and other material that pertain to this Agreement (“Records”) for a period of three (3) years from the date of final payment under this Agreement, unless CRC or Erie requests that the records be retained for a longer period. CRC and Erie each shall provide access to such Records to the other during normal business hours for review and copying.
- B. No Delegation. Except as otherwise provided, the Parties’ duties and obligations shall not be assigned, delegated, or subcontracted except with the express prior written consent of the other Party. All subcontractors shall be subject to the requirements of this Agreement.

C. Indemnification. To the extent allowed by law, Erie, on behalf of itself and its successors and assigns, agrees to indemnify, defend, and hold harmless the CRC, its officers, directors, and employees from and against losses, liabilities, expenses, and costs, including, without limitation, reasonable attorney's fees and costs, arising out of (i) the negligent performance under this Agreement by Erie or any person employed by Erie; or (ii) any injury to persons or property to the proportional extent caused by the negligent or intentional acts or omissions of Erie or any person employed by Erie

CRC shall hold harmless and indemnify Erie, its officers, directors, and employees from and against losses, liabilities, expenses, and costs, including, without limitation, reasonable attorney's fees and costs, arising out of (i) the negligent performance of Services under this Agreement by the CRC or any person employed by the CRC; or (ii) any injury to persons or property to the proportional extent caused by the negligent or intentional acts or omissions of CRC or any person employed by the CRC.

D. No Third Party Rights. Except as otherwise provided, this Agreement shall inure to the benefit of, and be binding only upon, the Parties hereto and their respective successors and assigns. No third party beneficiary rights or benefits of any kind are expressly or impliedly provided herein.

E. Designated Representatives. For the purpose of this Agreement, the persons named below are designated the representatives of the Parties. Unless otherwise provided in this Agreement, all notice required to be given by the Parties shall be given either by hand delivery or e-mail, with confirmed receipt, or by registered or certified mail to the representative named below. The Parties may designate in writing a new or substitute representative:

For the Center for ReSource Conservation: For Erie:

Neal Lurie
President
Center for ReSource Conservation
2639 Spruce Street,
Boulder, CO 80302
o) 303-999-3820, ext 202
fax) 303-440-0703
E-mail: nlurie@conservationcenter.org

Bethany Peer
Administrative Assistant
Town of Erie
645 Holbrook Street
Erie, CO 80516
Office: 303-926-2870
Fax: 303-926-2706
Email: bpeer@erieco.gov

F. Default and Remedies. In the event either Party fails to comply with this Agreement, the other Party shall provide notice specifying the breach, and the breaching party shall be allowed thirty (30) days to cure, or such longer period if the cure will require additional time and so long as the breaching party is diligently acting to complete the cure. In the event the breaching party fails to cure the

breach, within the time allowed hereunder, the non-breaching party shall have all remedies available in law or in equity.

- G. Modifications. This Agreement is intended as the complete integration of understanding between the Parties. Both Parties may make modifications to this Agreement as needed, provided that no modification may be made to the number of gardens requested by Erie, as specified in the Supplemental Work Order, and guaranteed to be provided by CRC. Such modification shall not be effective until it is accepted in writing by a legally authorized representative of each Party.
- H. Severability. The terms of this Agreement are severable, and should any term or provision hereof be declared invalid or become inoperative for any reason, such invalidity or failure shall not affect the validity of any other term or provision hereof. The waiver of any breach of a term hereof shall not be construed as a waiver of any other term or the same term upon subsequent breach.
- I. Exhibits. All exhibits hereto shall be deemed incorporated herein by reference.
- J. Independent Contractor. CRC shall perform the Services under this Agreement as an independent contractor and the parties do not intend, nor shall it be construed that CRC or any CRC subcontractor or employee is an employee of Erie for any purposes whatsoever.
- K. Employee Financial Interest. The Parties aver that to their knowledge, no employee of Erie has any personal or beneficial interest whatsoever in the service or property described herein.
- L. Representations and Warranties. CRC and Erie each make the following specific representations and warranties, each of which was relied on by the other in entering into this Agreement.
 - 1. Legal Authority – Signatory. Each Party warrants that it possesses the legal authority to enter into this Agreement and that it has taken all actions required by its procedures, by-laws, and applicable laws to exercise that authority, and to lawfully authorize its undersigned signatory to execute this Agreement, or any part thereof, and to bind itself to its terms. If requested by the other Party, each Party shall provide the other with proof of its authority to enter into this Agreement within 15 days of receiving such request.
 - 3. Compliance with Laws. CRC shall at all times observe and comply with all laws, ordinances, and regulations of the state, federal, local, and city government, except as explicitly provided herein, which may, in any manner, affect the performance of the Agreement as well as the requirements of any agreements, permits, or other contracts between CRC and third parties governing the performance of the Services hereunder and disclosed to CRC.
- M. Choice of Law. Colorado law, and rules and regulations issued pursuant thereto, shall be applied in the interpretation, execution, and enforcement of this

Agreement. Any provision included or incorporated herein by reference which conflicts with said laws, rules, and regulations shall be null and void. Any provision incorporated herein by reference which purports to negate this provision in whole or in part shall not be valid or enforceable or available in any action at law, whether by way of complaint, defense, or otherwise. Any provision rendered null and void by the operation of this provision shall not invalidate the remainder of this Agreement, to the extent capable of execution. Venue shall be in the District Court, Boulder County, Colorado.

- N. Force Majeure: A “Force Majeure” event may make it impossible for CRC to perform its obligations under this Agreement. As used in this Agreement, Force Majeure means acts of God; acts of the public enemy; acts of any governmental entity in its sovereign or contractual capacity; fires; flood; epidemic; quarantine restrictions; strikes or other labor disputes; freight embargoes; or unusually severe weather which make it impossible to perform the obligations imposed by this Agreement. If a Force Majeure event occurs that affects CRC’s ability to perform, CRC shall provide written notice to Erie within 24 hours of learning about the event. Such an event shall excuse CRC from performing its obligations under this Agreement. However, such an event shall not excuse Erie’s obligation to pay the Base Program Price and the cost of any additional units and distributions requested in the Supplemental Work Order. In no event shall Force Majeure act to extend the Term of Agreement unless otherwise agreed by the Parties in writing.
- O. Intellectual Property Rights. CRC shall retain ownership of all data generated pursuant to the Program, and it may use that data to generate reports summarizing the Program to educate the public, including policy makers, green industry partners, and homeowners. This report and any data collected may also be presented to CRC partners.
- P. Termination. CRC may terminate this Agreement with or without cause by providing thirty (30) days advance notice to Erie. Such termination by CRC shall not affect Erie’s obligation to compensate CRC for work completed pursuant to this Agreement, up to and including the date of termination specified in such notice.

IN WITNESS WHEREOF, each Party has executed this Memorandum of Agreement or caused it to be executed on its behalf by its duly authorized representatives.

Center for ReSource Conservation

Town of Erie

By: _____

Name: _____

Title: _____

Date: _____

By: _____

Name: _____

Title: _____

Date: _____

ATTACHMENT A
Garden In A Box Program
Scope of Work

GARDEN IN A BOX PROGRAM
SCOPE OF WORK

I. Scope of Work

A. Design and Ordering of Gardens

1. Garden Design. CRC shall work with landscape designers to create at least 3 xeric garden designs, which shall be made available to Erie residents. Once those designs have been completed, CRC shall work with nurseries to secure plants. If necessary, CRC shall select appropriate substitute plants.

The gardens shall be assembled into kits, which shall include a design layout (including CRC's "Plant by Number" design), a variety of xeric plants, and helpful tips about xeric gardening, including planting and maintenance instructions for all of the plants. ("Gardens In A Box")

2. Ordering. Erie shall order, and CRC shall provide, a minimum of eighty (80) Gardens In A Box for the spring garden sale season, March-June 2017. Subject to availability, CRC shall order additional gardens as specified by Erie in the Supplemental Work Order.

CRC shall have the number of Gardens In A Box ordered by Erie available for Erie residents to order at the rate specified in section I.A.1 of the Payment Schedule and Terms.

B. Marketing, Customer Service, and Sales

1. Marketing of Program. CRC may design and pay for the placement of advertisements in a local newspaper, and write and disseminate press releases and public service announcements publicizing the Program. CRC shall also design and pay for a garden catalog relating to the Program, which Erie may make available to its customers.
2. Customer Service. CRC shall handle all incoming phone-calls and e-mails regarding the Program and respond to all questions.
3. Sales. CRC shall create and manage an online retail platform. CRC shall also process orders and take payment via cash, check, and credit card.

C. Distribution of Gardens In A Box

1. Garden In A Box Assembly. CRC shall organize and handle delivery of all plants, which shall be pre-packaged according to the designs developed by CRC.
2. Training of Erie Staff. CRC shall train Erie staff, if Erie elects to provide staff to aid in the distribution.
3. Distribution. CRC shall conduct the number of distributions specified by Erie in the Supplemental Work Order. Before the distribution(s), CRC staff and volunteers shall prepare

and organize all plants required for the distribution(s). CRC shall organize volunteers to help distribute Gardens In A Box at each requested distribution location.

CRC shall provide at least one of its staff members and one volunteer to conduct the distribution(s). CRC staff and/or volunteer(s) shall confirm that customers have pre-ordered and pre-paid for their Garden In A Box. CRC staff and/or volunteer(s) shall then assist customers in retrieving their requested Garden In A Box. At that time, CRC staff and/or volunteer(s) shall give the customer the planting and care guides for their requested Garden In A Box.

4. Undistributed Plants. If, after a distribution is completed, there remain undelivered Gardens In A Box, CRC shall make all reasonable efforts to include those Gardens In A Box in a later distribution requested by Erie, if any. If no future distribution is planned, CRC shall make all reasonable efforts to sell any remaining plants individually. Regardless of CRC's ability to sell undistributed Gardens In A Box or individual plants, Erie is still obligated to pay the Base Program Price and any additional charges associated with Erie requested number of distributions and Gardens In A Box, as specified in the Garden In A Box Supplemental Work Order, attached hereto as Attachment B, and the Garden In A Box Program Payment Schedule and Terms, attached hereto as Attachment C.
5. Time of Distributions. All distributions requested by Erie shall be conducted during the period from May 6th, 2017 to June 10th, 2017.

D. Program Updates

1. Bi-Weekly Updates. During peak garden sales season, between March 1st, 2017 and June 1st 2017, CRC shall provide to Erie updates about the Program on at least a bi-weekly basis.
2. Updates Upon Request. Updates shall also be provided to Erie within seven (7) days of any request.
3. Contents of Updates. Both regularly scheduled and requested updates shall include a summary of CRC's progress in meeting its obligations under the Agreement. This includes the number of gardens distributed at the time of the update, and the percentage of the gardens requested by Erie that this represents.

E. Post-Distribution Activities

1. Customer Satisfaction Surveys. After the Program Term has ended, CRC shall conduct a customer satisfaction survey of all customers purchasing Gardens In A Box.
2. Final Report. CRC shall also compile information about the Program. The survey results and the Program information shall be included in a final report detailing the Program results. CRC shall provide Erie with this report by December 31, 2017.

ATTACHMENT B
Garden In A Box Program
Payment Schedule and Terms

GARDEN IN A BOX PROGRAM
PAYMENT SCHEDULE AND TERMS

I. Payment Terms

A. Base Program Price

1. Price Charged to Erie's Residents. Five garden designs shall be made available for Erie's residents to choose from. The five options shall cost \$79-\$149 for water customers of Erie. CRC shall make all good faith efforts to keep the price charged to Erie's residents below retail cost.
2. Price Charged to Erie. To make the Garden In A Box Program available to Erie in the spring of 2017, Erie shall pay a base program price of \$4,640 ("Base Program Price").
3. Services Included in Base Program Price. The Base Program Price covers a portion of CRC's costs associated with managing and organizing the program as outlined in the Garden In A Box Scope of Work. In addition, the Base Program Price includes eighty (80) discounts of \$25 each for customers purchasing gardens during the spring season, March-June, 2017, who receive water through service provided by Erie. The Base Program Price also includes one (1) distribution within 15 miles of the Erie service area at mutually agreed upon locations.

B. A la Carte Prices

1. Additional Gardens and Distributions. Erie may order more gardens than the minimum order of eighty (80) gardens and will pay for the additional \$25 discounts.

C. Liability for Cost of Unsold Gardens.

1. Costs Associated with Minimum Garden Order. Erie shall not be liable for the costs associated with unsold gardens that are part of the minimum order of eighty (80) gardens.
2. Costs Associated with Additional Garden Order. Erie shall pay \$25 per any garden ordered in excess of the 80 garden minimum, which remains unsold on June 30, 2017.
3. No Refund. CRC shall not provide a refund to Erie for any unsold gardens.

II. Payment Schedule and Invoicing

- A. Invoicing. CRC shall bill Erie for all work completed pursuant to the Agreement. Payment shall be due within thirty (30) days of the date the invoice is issued by CRC. Said invoice shall be issued upon Erie's submission to CRC of a signed version of the Agreement.
- B. Payment Deadlines. For purposes of these payment deadlines, a payment shall be deemed to have been made upon the date of its actual receipt by CRC.