

MAINTENANCE AGREEMENT

THIS MAINTENANCE AGREEMENT ("Agreement") is made and entered into at Erie, Colorado this ____ day of _____, 2018, (the "Effective Date") by and between the TOWN OF ERIE, a Colorado municipal corporation ("Town") and COLLIERS HILL MASTER ASSOCIATION, INC., a Colorado nonprofit corporation (referred to herein after as the "Association").

RECITALS

WHEREAS, the Town is the owner of the following two parcels of real property situated in the Bridgewater Development ("Bridgewater Development"): 1) Tract H-2, Daybreak Filing 1A, First Amendment, Town of Erie, designated as Town-owned park property, as more particularly described on **Exhibit "A,"** attached hereto and incorporated herein by this reference ("Park Property"); and, 2) a landscaping buffer area located in the Colliers Hill Boulevard right-of-way contiguous to the Park Property, and more particularly described on **Exhibit "B,"** attached hereto and incorporated herein by this reference ("Landscape Property")

WHEREAS, the Association is responsible for the maintenance of the Landscape Property; and,

WHEREAS, the developer of the Bridgewater Development has previously installed planting beds, landscaping, sod, and trees ("Improvements"), and a water irrigation systems ("Irrigation System") on portions of the Landscape Property; and,

WHEREAS, the Town and the Association desire to have the Landscape Property included in the design, construction and use of the Town park planned for the Park Property; and,

WHEREAS, the Town and the Association desire to keep the Improvements and Irrigation System in place on the Landscape Property, and the Town has agreed to be responsible for maintenance of certain specific portions and aspects of the Landscape Property and Improvements, as set forth herein below, while the Association shall remain responsible for maintenance of certain specific portions and aspects of the Improvements, Irrigation System and Landscape Property, as set forth herein below; and,

WHEREAS, the Town and the Association desire to set forth herein their agreement as to maintenance of the Landscape Property, the Improvements, the Irrigation System and the liability related thereto.

NOW, THEREFORE, in consideration of the mutual promises, covenants and obligations of the parties hereto, the terms, covenants and conditions hereof, the consideration set forth herein, and intending to be legally bound, the Town and the Association agree as follows:

1. Maintenance of Improvements and Irrigation System on Landscape Property.

A. The Town shall assume maintenance of the Landscape Property, but excluding the following: the North Planting Bed, South Planting Bed (as those two terms are

defined herein below) and the Irrigation System. The Landscape Property, excluding the North Planting Bed, South Planting Bed and the Irrigation System, is herein after referred to as the "Town-maintained Property." The Town shall, at its sole cost, expense and liability, keep and maintain the Improvements on Town-maintained Property.

B. The Association shall retain the maintenance of the North Planting Bed, South Planting Bed (as those two terms are defined herein below) and the Irrigation System. The Association-maintained portion of the Landscape Property is herein after referred to as the "Association-maintained Property." The Association shall keep and maintain the Improvements and Irrigation System located on the Association-maintained Property in good condition and repair; shall have the sole responsibility for the upkeep, maintenance, replacement, and repair of the Improvements and Irrigation System; and, shall have sole responsibility for all liability related to the Improvements and Irrigation System. The Association shall pay the cost of the water used by the Improvements and Irrigation System and shall replace the Improvements and Irrigation System if and when necessary in order to keep and maintain the Improvements and Irrigation System in good condition, all at the sole cost of the Association. The Town shall have no cost for the upkeep, maintenance, replacement, or repair of the Improvements and Irrigation System, nor shall the Town have any liability for any claims, losses or damages related to the Improvements and Irrigation System. The Association shall pay all fees and costs associated with providing water to the Improvements and Irrigation System. The Town shall have no cost for providing water to the Improvements.

C. The Association will continue to water irrigate the Landscape Property with the Irrigation System.

D. The Town will modify the northern landscape planting bed, as that planting bed is more particularly identified on **Exhibit "B"** ("North Planting Bed") and remove one ornamental tree from the southern portion of the North Planting Bed in order to allow a sidewalk connection into the Park Property from Colliers Boulevard., the adjacent street.

E. The North Planting Bed and the Improvements and the Irrigation System located thereon shall be maintained by the Association.

F. The southern landscape planting bed shaped in a half-moon design, as that planting bed is more particularly identified on **Exhibit "B"** ("South Planting Bed") and the Improvements and the Irrigation System located thereon shall be maintained by the Association.

G. The Town will maintain the two (2) existing trees located to the west of the South Planting Bed, as those trees more particularly identified on **Exhibit "B"** ("Two Trees"). The Association shall remove the Two Trees from the Irrigation System, and the Town shall provide new and separate water irrigation for the Two Trees from the Park Property. Maintenance of the Two Trees shall include removal or replacement of the trees if so determined necessary in the sole determination of the Town.

H. The Town may install vault and hardware for a water irrigation system related to the Park Property in a location on the Landscape Property as more particularly described and designated on **Exhibit "B"** ("Vault Area").

2. Term. This Agreement shall commence as of the Effective Date set forth above and shall automatically renew annually, unless otherwise terminated as provided for in Paragraph 8, below.

3. No Interest In Land. The Association understands, acknowledges and agrees that this Agreement does not create or grant to the Association any interest or estate in or to the Town-maintained Property. The Association retains all legal right, title, ownership and interest in and to the Landscape Property. The sole purpose of this Agreement is to enumerate the responsibilities and liabilities of the Association and the Town with regard to the Landscape Property throughout the term of this Agreement.

Notwithstanding the expenditure of time, money or labor by the Association on the Landscape Property, this Agreement shall in no event be construed to create an assignment coupled with an interest in favor of the Association. The Association shall expend any time, money or labor at the Association's own risk and peril.

4. Limited Scope of Rights. This Agreement is limited in its scope to the rights and responsibilities set forth herein. Any alterations, expansions, or changes to the Improvements or in activities of the Association within or on the Landscape Property, other than the replacement of existing Improvements and Irrigation System, shall be first submitted in writing to the Town, in advance, for approval or denial by the Town. The Town's approval of such request may be withheld at the sole discretion of the Town.

5. Use by the Public. The Association understands, acknowledges and agrees that Landscape Property is open for use by the public. The Association may not in any manner interfere with the public's use of the Landscape Property.

6. No Assignment. Neither party shall assign this Agreement or any of the obligations and responsibilities hereunder without first obtaining the prior written consent of the non-assigning party, which consent shall not be unreasonably denied.

7. Default. In the event either defaults in the performance of any of the covenants or agreements to be kept, done or performed by it under the terms of this Agreement, the non-defaulting party shall notify the defaulting party in writing of the nature of such default. Within fifteen (15) days following receipt of such notice the defaulting party shall correct such default; or, in the event of a default not capable of being corrected within fifteen (15) days, the defaulting party shall commence correcting the default within fifteen (15) days of receipt of notification thereof and thereafter correct the default with due diligence. If the defaulting party fails to correct the default as provided hereinabove, the non-defaulting party, without further notice, shall have the right to declare that this Agreement is terminated pursuant to Paragraph 8 hereof effective upon such date as the non-defaulting party shall designate. The rights and remedies provided for herein may be exercised singly or in combination.

8. Termination. This Agreement and the rights granted herein are fully terminable in accordance with the following terms and conditions:

A. Town Termination Upon Notice. The Town may terminate this Agreement, without liability for breach, by giving notice of such termination to the Association. If notice of termination is given, this Agreement shall terminate thirty (30) days from the date of the notice of termination. The notice provision established by this paragraph 8.A. shall conclusively be deemed to be reasonable.

B. Recording Of Notice Of Termination. Upon termination of this Agreement the Town may cause to be recorded with the Clerk and Recorder of Weld County, Colorado a written Notice of Termination.

C. Termination Upon Default. This Agreement may be terminated by the non-defaulting party upon the default of the defaulting party in the performance of the terms of this Agreement, in accordance with the provisions of Paragraph 7 of this Agreement.

D. No Compensation to the Association. In the event of termination of this Agreement for any reason, the Association shall not be entitled to receive a refund or compensation of any type for the Improvements, Irrigation System or for any new improvements or landscaping which it has installed on the Landscape Property.

9. Insurance. Association shall procure and maintain, and shall cause any subcontractor of Association to procure and maintain, the minimum insurance coverages listed below. Such coverages shall be procured and maintained with forms and insurers acceptable to the Town. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by Association pursuant to this Agreement. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

A. Workmen's Compensation Insurance and Employer's Liability Insurance to cover obligations imposed by applicable laws for any employee of Association or a subcontractor engaged in the performance of work on the Town Property or under this Agreement.

B. General liability insurance in an amount and coverage as set forth in the Revocable License Agreement executed concurrently herewith.

C. The policy required by subparagraph B, above, shall be endorsed to include the Town and the Town's officers and employees as additional insureds. Every policy required above shall be primary insurance, and any insurance carried by the Town, its officers, or its employees, or carried by or provided through any insurance pool of the Town, shall be excess and not contributory insurance to that provided by the Association. The Association shall be solely responsible for any deductible losses under any policy require above.

D. A certificate of insurance shall be completed by the Association's insurance agent and provided to the Town as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be reviewed and approved by the Town prior to commencement of the Agreement. The certificate shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be cancelled until at least thirty (30) days prior written notice has been given to the Town. Association shall notify the Town

within ten (10) days if the coverages afforded under the policies are materially changed. The completed certificate of insurance shall be sent to: Town Clerk, Town of Erie, P.O. Box 750, Erie, Colorado 80516.

E. Notwithstanding any other portion of this Agreement, failure on the part of Association to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of this Agreement for which the Town may immediately terminate this Agreement, or, at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all money so paid by the Town shall be repaid by the Association to the Town upon demand.

F. The parties hereto understand and agree that the Town is relying on, and does not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, Section 24-10-101, *et seq.*, C.R.S., as from time to time amended, or any other law, protection or limitation otherwise available to the Town, its officers, or its employees.

10. Association's Waiver Of Claims Against Town. As a part of the consideration received for this Agreement, the Association hereby waives any and all claims which the Association now has or may or might hereafter have or acquire against the Town for loss or damage to the Improvements and Irrigation System which now exist or which may hereafter be added by the Association on the Landscape Property arising from the use by the Town, or the public, of the Landscape Property for any purpose.

11. Indemnification. Association shall indemnify and hold harmless the Town against and from any and all claims arising from Association's use of the Landscape Property, the Improvements, the Irrigation System, the Association's maintenance, repair, replacement, or upkeep of the Improvements and Irrigation System or any claim arising from any breach or default on Association's part under the terms of this Agreement, or from any act, omission, or negligence of Association, or any officer, agent, employee, guest or invitee of Association, and from all costs, attorneys' fees, and liabilities incurred in or about the defense of any such claim or any action or proceeding brought thereon. Association assumes all risk of damage to Improvements and Irrigation System, of the Association's presence upon or about the Landscape Property, and from any and all causes other than Town's negligence or intentional malfeasance. Association waives all claims with respect thereof against Town.

12. Notices. Any notice required or permitted under this Agreement shall be in writing and shall be sufficient if personally delivered or mailed by certified mail, return receipt requested, addressed to the following:

If to the Town:

Town Administrator
Town of Erie
645 Holbrook Street
P.O. Box 750
Erie, Colorado 80516

If to the Association:

Colliers Hill Master
Association, Inc.
7208 S. Tucson Way #125
Centennial, CO 80112
Attn: Mark Eames

Notices mailed in accordance with the provisions of this Paragraph shall be deemed to have been given upon mailing. Notices personally delivered shall have been deemed to have been given upon delivery. Either party may change its address by giving notice thereof to the other party in the manner provided for herein.

13. Attorney's Fees. If any action is brought in a court of law by either party to this Agreement concerning the enforcement, interpretation or construction of this Agreement, the prevailing party, either at trial or upon appeal, shall be entitled to reasonable attorney's fees as well as costs, including expert witness's fees, incurred in the prosecution or defense of such action.

14. Waiver. The failure of either party to exercise any of its rights under this Agreement shall not be a waiver of those rights. A party waives only those rights specified in writing and signed by the party waiving its rights.

15. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes any prior agreement or understanding relating to the subject matter of this Agreement. Any such prior agreement shall be deemed to be null and void and of no further effect.

16. Modification. This Agreement may be modified or amended only by a duly authorized written instrument executed by the parties hereto.

17. Paragraph Headings. Paragraph headings are inserted for convenience only and in no way limit or define the interpretation to be placed upon this Agreement.

18. Terminology. Wherever applicable, the pronouns in this Agreement designating the masculine or neuter shall equally apply to the feminine, neuter and masculine genders. Furthermore, wherever applicable within this Agreement, the singular shall include the plural, and the plural shall include the singular.

19. Situs, Venue and Severability. The laws of the State of Colorado shall govern the interpretation, validity, performance and enforcement of this Agreement. For the resolution of any dispute arising hereunder, venue shall be in the Courts of the County of Weld, State of Colorado. If any provision of this Agreement shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this Agreement shall not be affected thereby.

20. Remedies. Upon the occurrence of any default of the requirements of this Agreement, the non-defaulting party shall have the option to pursue any one or more of the remedies it may have pursuant to law and equity, including, but not limited to, the obtaining of an injunction and the pursuit of damages.

7

EXHIBIT A

Tract H-2, Daybreak Filing 1A, First Amendment, Town of Erie



EXHIBIT B

A portion of the Colliers Hill Boulevard right-of-way located adjacent to Tract H-2, Daybreak Filing 1A, First Amendment, Town of Erie, consisting of a portion of the Colliers Hill Boulevard right-of-way from the west side of the existing five foot sidewalk (located in the Colliers Hill Boulevard right-of-way) and extending to the east property line of Tract H-2, and from the property line of Tract H-2 immediately to the north of the oil and gas road at the south end extending to the southwest corner of Orion Circle and Colliers Hill Boulevard (Orion Circle is yet to be completed), all as shown on the map attached hereto.

