

AGREEMENT REGARDING SECURITY DITCH

This Agreement Regarding Security Ditch (“Agreement”) is made this 30th day of August, 2022 by and between El Paso County, by and through the Board of County Commissioners of El Paso County, Colorado, (“County”), Security Sanitation District (“District”), and Fountain Valley Investment Partners, LLC (“Owner”). The County, the District, and the Owner may be referred to herein individually as a “Party” and collectively as “Parties.”

RECITALS

A. Owner is the owner in fee simple of a piece of property in unincorporated El Paso County legally described in Exhibit A, attached hereto and incorporated herein by this reference (the “Property”).

B. On November 29, 1961, the District acquired through a court decree entered in Civil Action No. 35615 and recorded at Book 1894 Page 09 a right-of-way easement for surface drainage needs of the District across the Property and legally described as set forth in Exhibit B, attached hereto and incorporated herein by this reference (the “Easement”).

C. On October 4, 1972, a quitclaim deed was recorded at Book 2528 Page 779 conveying the Easement from the District to the County.

D. At some point after creation of the Easement, a concrete-lined ditch was constructed within the Easement for the purpose of conveying stormwater runoff (the “Security Ditch”). No Party has to date located any records identifying who built the Security Ditch or when it was constructed.

E. The County asserts it has taken no direct or indirect action to accept the conveyance of the Easement and that it therefore does not possess any interest in the Easement. The District disputes this assertion.

F. The District asserts that it has conveyed the Easement to the County and has taken no direct or indirect action related to the Easement or the Security Ditch. The District has no need for the Easement and has disclaimed any interest to the Easement and the Security Ditch. Therefore, the District asserts that it does not possess any interest in the Easement or to the Security Ditch. The County disputes these assertions.

G. The Security Ditch has eroded and fallen into a state of disrepair that may pose a risk to public safety and adjacent private property.

H. Solely for the purpose of addressing the possible public safety and private property risks presented by the current condition of the Security Ditch, the County has offered to fund repairs to it pursuant to the terms and conditions set forth by the Parties herein.

NOW THEREFORE, in consideration of the mutual promises contained herein and other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, the parties agree as follows:

AGREEMENT

1. Incorporation of Recitals. The Recitals set forth above are hereby incorporated into this Agreement as if fully set forth herein.

2. Repairs by County. The County agrees to design and/or construct repairs to the Security Ditch (the "Repairs") at its own cost and within its sole discretion in a good and workmanlike manner but with no warranty that such repairs will meet specific design or construction standards. The nature, scope, and timing of the Repairs shall remain within the sole control of the County, but the County agrees, if requested, to provide the District and the Owner an opportunity to see to the scope of the Repairs before the Repairs begin. The County shall not and does not provide any Party other warranties of any kind whatsoever regarding the materials, labor, or construction of the Repairs.

3. Repairs Contingent on Funding. The County's design and/or construction of any Repairs pursuant to this Agreement is contingent upon the availability and appropriation of funding from the American Rescue Plan Act ("ARPA"). Should sufficient ARPA funding for the Repairs become unavailable or be appropriated for another purpose, the County shall have no obligation to commence or complete the Repairs.

4. Conveyance of Temporary Easements. The District and the Owner agree to provide, at no cost to and in a form reasonably approved by the County, any temporary construction easement or other temporary property interest in the Property deemed necessary by the County for design, construction, inspection, and oversight of the Repairs. The temporary easement or other temporary property interest will expire as stated in the executed documents.

5. No Precedent. The Parties hereby agree that this Agreement or any Party's performance hereunder shall not be used under any theory of law in any judicial proceeding or other forum, without limitation, as evidence of acceptance of a conveyance of a property interest in, of exertion of control over, or of ownership or possession of, the Property or Easement. It is specifically understood and agreed by the Parties that this Agreement shall never give rise to any argument, claim, defense or theory of acquiescence, acceptance, admission, waiver, bar, merger, stare decisis, res judicata, estoppel, laches or otherwise, nor to any administrative or judicial practice or precedent, by or against any of the Parties in any matter, case or dispute involving the Security Ditch, nor shall testimony concerning such acquiescence of any Party be allowed in any matter, case or dispute involving the Security Ditch. The Parties agree that they do not intend this Agreement to have the effect of precedent or preclusion on any factual or legal issue in any matter involving the Security Ditch.

6. No Obligation to Maintain. Nothing in this Agreement shall be construed to impose upon any Party hereto an obligation to maintain or repair the Security Ditch or the Repairs thereto, which shall remain as an unresolved issue between the Parties.

7. Governing Law/Forum/Interpretation. This Agreement has been executed by the parties hereto on the day and year first above written and shall be governed by the laws of the State of Colorado. Venue for any civil action relating to this Agreement shall be in El Paso County, Colorado.

8. Third-Party Beneficiaries. It is expressly understood and agreed that the enforcement of this Agreement and all rights of action relating thereto shall be strictly reserved to the Parties. Nothing contained in this Agreement shall give or allow any claim or right of action whatsoever by any other third person.

9. Assignability and Transfer. No Party to this Agreement shall assign or otherwise transfer this Agreement or any right or obligation hereunder without the prior written consent of the other Parties.

10. Severability. If any portion of this Agreement or application thereof to any Party or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the Agreement which can be given effect without the invalid provision or applications, and to this end the provisions of this Agreement are declared to be severable.

11. Waiver. The waiver of any breach of a term, provision, or requirement of this Agreement shall not be construed or deemed as waiver of any subsequent breach of such term, provision, or requirement, or of any other term, provision or requirement.

12. Headings. The headings of the several articles and sections of this Agreement are inserted only as a matter of convenience and for reference and do not define or limit the scope or intent of any provisions of this Agreement and shall not be construed to affect in any manner the terms and provisions hereof or the interpretation or construction thereof.

13. Force Majeure. No Party shall be liable for any delay in, or failure of performance of, any covenant or promise contained in this Agreement, nor shall any delay or failure constitute default or give rise to any liability for damages, and only to the extent that, such delay or failure is caused by "force majeure." As used in this Agreement, "force majeure" means acts of God, acts of the public enemy, unusually severe weather, fires, floods, epidemics, quarantines, strikes, labor disputes and freight embargoes, to the extent such events were not the result of or were not aggravated by the acts or omissions of the non-performing or delayed party.

14. Extent of Agreement. This Agreement, with attachments thereto, represents the entire and integrated agreement between the Parties and supersedes all prior negotiations, representations, or agreements, either written or oral. Any amendments to this Agreement must be in writing and be signed by all of the Parties. If any portion of this Agreement is found by a court of competent jurisdiction to be void and/or unenforceable, it is the intent of the Parties that the remaining portions of this Agreement shall be of full force and effect as long as the primary

purposes of this Agreement remain fulfilled. The provisions of this Agreement that by their terms are intended to survive termination or expiration hereof shall so survive.

ATTEST:



Chuck Broeraman
County Clerk & Recorder

Approved as to form




Lori L. Seago
County Attorney's Office

BOARD OF COUNTY COMMISSIONERS
OF EL PASO COUNTY, COLORADO

By: 

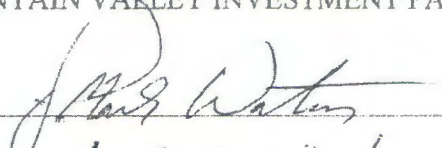
Stan VanderWerf, Chair

SECURITY SANITATION DISTRICT

By: 

Name: Roy E. Heald
Its: General Manager

FOUNTAIN VALLEY INVESTMENT PARTNERS, LLC

By: 

Name: J. MARK WATSON
Its: PARTNER

EXHIBIT A

A 50-foot strip of land in the northern half of Section 24, Township 15, Range 66 West of the 6th Principal Meridian, El Paso County, Colorado, lying northeasterly of the easterly right-of-way line of the Atchison Topeka and Santa Fe Railroad and southeasterly of the southerly right-of-way line of Fontaine Boulevard, excepting therefrom those tracts conveyed by instruments recorded in Book 2281 at Page 40, Book 2239 at Page 556, Book 2893 at Page 783, Book 2107 at Page 961, and Book 3708 at Page 888 of the El Paso County Records.

Such strip of land is identified by El Paso County Tax Schedule No. 65241-00-062 as of August 23, 2022.

EXHIBIT B

A perpetual right of way and easement over and across the hereinafter described real property as awarded by a certain Decree of the El Paso County District Court dated November 29, 1961, and recorded in Book 1894 at Page 09 of the El Paso County Records, to-wit:

A strip of land 30 feet in width lying in Section 24, Township 15 South, Range 66 West of the 6th Principal Meridian, El Paso County, Colorado, the westerly boundary line of which is described as follows, to-wit: Commencing at the intersection of the easterly right-of-way line of the Atchison Topeka and Santa Fe Railroad with the Northerly boundary line of the aforesaid Section 24 and running thence southeasterly, along and identical with said Easterly Railroad right-of-way line a distance of 2,550 feet, to a point, which point is the center of a natural drainage channel, locally known as Crews Gulch, excepting therefrom, however, that portion of the strip of land crossing the right-of-way of the County Road leading to The Fountain Valley School.