

**FIRST AMENDED AND RESTATED AGREEMENT AMONG THE CITY OF COMMERCE
CITY, BUFFALO HIGHLANDS METROPOLITAN DISTRICT, BUFFALO HIGHLANDS, LLC,
AND C. LARSON FAMILY FARMS, INC, FOR THE CONSTRUCTION AND FUNDING OF
CERTAIN IMPROVEMENTS TO 96TH AVENUE AND THE DEDICATION
OF CERTAIN LANDS**

This **FIRST AMENDED AND RESTATED AGREEMENT** (the “Amended Agreement”) is made and entered into effective this ____ day of _____, 2014, by and among the **CITY OF COMMERCE CITY**, a Colorado home rule municipality whose principal business address is 7887 East 60th Avenue, Commerce City, Colorado 80022 (the “City”), **BUFFALO HIGHLANDS METROPOLITAN DISTRICT**, a quasi-municipal corporation and political subdivision of the State of Colorado whose principal business address is 141 Union Boulevard, Suite 150, Lakewood, CO 80228 (the “District”), **BUFFALO HIGHLANDS, LLC**, a Colorado limited liability company whose principal business address is 222 Milwaukee Street, Suite 300, Denver, CO 80206 (“Owner”), and **C. LARSON FAMILY FARM, INC.**, a Minnesota corporation whose local business address is 222 Milwaukee Street, Suite 209, Denver, CO 80206. (“Larson”).

WHEREAS, Owner, plans to develop the Buffalo Highlands Subdivision within the City (the “Property”);

WHEREAS, as a prerequisite to obtaining City approval for such development, and in accordance with the City’s Land Development Code (the “LDC”), Owner must construct certain public improvements to 96th Avenue in the vicinity of the Property, as set forth more specifically on **Exhibit A**, attached hereto and incorporated herein by this reference (the “Improvements”);

WHEREAS, the District was formed in 2002 for the purpose of constructing and funding various improvements at the Property including the Improvements;

WHEREAS, the 60-acre “old race track” site identified on the Buffalo Highlands PUD Zone Document as “Parcel K” is in need of remediation and restoration (“Parcel K Remediation”);

WHEREAS, the District has been assigned responsibility for construction of the Improvements and the Parcel K Remediation, but is currently not financially capable of completing such construction and remediation;

WHEREAS, the City requires that the Improvements be constructed in the near term to serve both the Property and other residents of the City;

WHEREAS, Owner and the City had previously entered into two (2) agreements involving the Property regarding land dedication and the funding and construction of some portion or all of the Improvements: that certain Agreement between Buffalo Highlands, LLC, and the City of Commerce City, dated December 20, 2004 (the “2004 Agreement”), and that certain Financing Agreement between Buffalo Highlands, LLC, and the City of Commerce City, dated June 21, 2011 (the “Financing Agreement”), (collectively referred to hereinafter as the “Prior Agreements”);

WHEREAS, the City has advanced all funds identified in the Financing Agreement as City obligations;

WHEREAS, Owner and the District have entered into assignments of certain portions of the Prior Agreements from Owner to the District, which assignments have been approved by the City;

WHEREAS, the parties thereafter entered into that certain Agreement among the City of Commerce City, Buffalo Highlands Metropolitan District, Buffalo Highlands, LLC, and C. Larson Family Farms, Inc, for the Construction and Funding of Certain Improvements to 96th Avenue and the Dedication of Certain Lands, executed April 12, 2013 (the “2013 Agreement”), to consolidate the Prior Agreements and provide for: (i) the present funding and construction of the Improvements; (ii) the consummation of the previously required and agreed-to land dedications; and (iii) the Parcel K Remediation and subsequent dedication to the City; and

WHEREAS, the parties desire to amend and restate the 2013 Agreement to better provide for the development of the Property and the construction of the Improvements.

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein, and for other good and valuable consideration, the sufficiency and receipt of which is expressly acknowledged, the parties hereby agree as follows:

I. AMENDMENT AND RESTATEMENT

The 2013 Agreement is hereby amended and restated in its entirety as set forth herein. In the event of any conflict between this Amended Agreement and the 2013 Agreement, the provisions of this Amended Agreement shall prevail, and any conflicting provision of the 2013 Agreement shall be considered null and void and of no force or effect.

II. CONSTRUCTION OF IMPROVEMENTS

A. Project Overview: Assignment of Prior Agreements’ Obligations. The following is a general description of the nature of the Improvements (sometimes referred to hereinafter as the “Project”). Specific design and engineering requirements and standards are set forth separately in this document and Exhibit A. The Improvements consist of the following:

1. A four-lane bridge over Second Creek in the 96th Avenue alignment (the “Bridge”);
2. The grading required for construction of a four-lane, 96th Avenue road segment between Nucla Street and Tower Road (the “New 96th Ave. Segment”); and
3. The paving of the northern two lanes of the New 96th Ave. Segment.
4. To the extent the requirements, responsibilities and obligations contained in the Prior Agreements (the “Prior Agreements’ Obligations”) are satisfied by the District’s performance of its obligations set forth in this Amended Agreement, the Prior Agreements’ Obligations are hereby assigned to and are the responsibility of the District and Owner shall be relieved of any such responsibility.

B. Construction.

1. The District shall construct, or cause to be constructed, at its sole cost and expense (except as otherwise expressly provided herein), the Improvements in accordance with the City of Commerce City Engineering Construction Standards and Specifications.
2. The Bridge shall be of a similar design to the one currently existing on 104th Avenue over Second Creek, as more specifically set forth in Exhibit A. The entire Bridge, except for the girders

and decking for the south two lanes, will be constructed by July 1, 2014, including stone facing and towers.

3. All construction shall comply with the standards and requirements for 4-lane arterial roadways as set forth in the City of Commerce City Engineering Construction Standards and Specifications.

4. Construction of the Improvements shall be completed such that final acceptance thereof by the City shall occur not later than August 1, 2014, or, in light of ongoing right-of-way acquisitions, such longer period of time as agreed to upon the Parties in writing. The District's failure to obtain final acceptance of the Improvements by August 1, 2014, or such longer period of time as agreed to upon the Parties in writing shall constitute a breach of this Amended Agreement.

C. Phasing.

1. The Improvements may be designed, bid, installed, and/or constructed in phases as herein provided.

a. "Phase I" includes the design, bidding, installation and construction of the road segment from Tower Road to sixty feet (60') west of the westernmost entrance to the Property.

b. "Phase II" includes the design, bidding, installation and construction of the Bridge and channel work on Second Creek.

c. "Phase III" includes the design, bidding, installation and construction of 96th Avenue from Nucla Street to Phase I.

2. The design, bidding, installation, and construction of Phases I and II may, but are not required to, commence concurrently. However, it is acknowledged that work on Phase II will likely continue beyond the completion of Phase I. It is anticipated that Phase III design, bidding, installation and construction has been initiated.

III. CONSTRUCTION MANAGEMENT

A. Construction Manager.

1. Edifice, LLC ("Edifice"), shall serve as the Construction Manager for the Improvements pursuant to the Construction Management Agreement by and between the District and Edifice dated July 3, 2013, as amended, and reassigned to the Owner on January 2, 2014.

2. Edifice shall hire a materials testing consultant for all Project testing.

3. Edifice shall provide for construction surveying either directly or through a subcontractor.

B. Design Engineer – Design Plans.

1. The District's design engineer, J3 Engineering Consultants (the "District Engineer"), shall provide design consultation to the Construction Manager and prepare the Project design plans for review and approval by the City.

2. The City shall review the Project design and may approve, approve with changes or conditions, or reject with direction for re-submittal the Project design documents. Such approval, approval with changes or conditions, or rejection with direction for re-submittal shall be provided by the City within five (5) calendar days of submittal. To the extent there are design changes necessitated by construction in the field, the approval will be within forty-eight (48) hours of review in the field. Such response by the City shall not be unreasonably withheld.

C. Construction Contract.

1. The District intends to enter into a Facilities Acquisition Agreement substantially in the form of **Exhibit C** attached hereto, with the Owner, whereby Owner shall construct, or cause to be constructed, the Improvements on behalf of the District.

2. Owner shall require all construction contracts to contain retainage provisions substantially in the form as required by Section 24-91-103, C.R.S.

D. Invoice and Change Approval.

1. All construction invoices shall be submitted to the Construction Manager for review and approval. Construction Manager and Inspector (as defined below) shall work mutually together to agree upon each invoice (including payment quantities), prior to the submittal to the District and the City for approval. In the event the Construction Manager disapproves any part or all of an invoice, the Construction Manager may (i) return such invoice to the submitting party with directions and/or conditions for re-submittal; or (ii) seek input from the City and the District regarding the invoice.

2. All invoices approved by the Construction Manager shall be forwarded to the District and City for review, approval, and payment in accordance with the process provide in the Loan Agreement.

3. Once the Construction Manager and Inspector agree upon payment quantities, invoices (other than those dealing with additional withholdings related to defective work) shall not be arbitrarily denied.

4. The Parties shall work together mutually regarding any design changes or field changes to the Improvements which would result in increased project costs. To the extent proposed design changes or field changes are anticipated to result in cost overruns that increase the cost of the Improvements, the District and Owner must approve such change orders in accordance with the Facilities Acquisition Agreement.

E. Inspection; Final Acceptance of Improvements.

1. All inspections shall be conducted by both City staff and JR Engineering, LLC, a third party inspector engaged by the City (the “Inspector”). The cost of the Inspector shall constitute a Project expense which must be approved by the District and the City.

2. To the extent design changes are recommended by the Construction Manager, the Construction Manager shall work with the District’s Engineer and the City’s Public Works department to obtain approval, or any revisions, to the design changes.

3. The City and the Inspector shall have the authority to issue stop-work orders on the Project upon prior notice to the District.

4. Final inspection and final acceptance of the Project shall be made only upon completion of the entire Project, and not until the remediation and restoration of Parcel K in accordance with the requirements contained herein, and the subsequent dedication of Parcel K to the City, as set forth below, is completed.

IV. LAND DEDICATION; PARCEL K REMEDIATION

A. Parcel K Remediation; Illegal Dumping.

1. Remediation and Restoration. The District shall remediate and restore, or shall cause the remediation and restoration of the 60-acre, "old race track" site identified on the Buffalo Highlands PUD Zone Document as "Parcel K."

a. Prior to the commencement of any remediation and restoration of Parcel K, the District shall:

i. Provide to the City an updated Phase I/II environmental assessment

ii. Submit a proposal to the City detailing how the District will: (a) remove any and all remnants of the former race tracks and any associated debris existing on the site; (b) re-grade all portions of the site as necessary to cause the site to appear natural (as determined by the City); (c) re-vegetate all disturbed areas and areas void of vegetation; and (d) address any remaining issues identified in the updated Phase I/II environmental assessment.

iii. Provide to the City a drainage report and modeling to demonstrate restoration of floodplain to conditions approximate to those that existed prior to construction of the race tracks and to demonstrate compliance with applicable city/state/federal floodplain requirements.

b. The general standard for the clean-up of Parcel K is compliance with all applicable the City, State and Federal rules, regulations, ordinances and statutes.

c. To the extent authority exists, Owner and the District shall require any oil and gas owners on the Property to conduct remediation and restoration related to their, or prior occupants', activities on the Property.

d. Remediation and restoration of Parcel K shall be completed not later May 31, 2014 together with an updated Phase I/II environmental assessment.

2. Illegal Dumping. The District shall prevent illegal dumping on Parcel K and, until such time as Buckley Road is closed to vehicular traffic or not later than thirty (30) days after final acceptance of the Improvements, whichever occurs first, the District shall be responsible for any remediation and restoration of the site (to its condition prior to the illegal dumping) made necessary by any such dumping. Such remediation and restoration shall include, but not be limited to, the removal of, whether existing on the surface of Parcel K, within the soil or underground: any junk or waste items; hazardous waste; petroleum products; and contaminated soil.

B. Easement.

1. Grant of Easement. Larson hereby grants to the Owner an easement upon Parcel K (the "Easement") for the purposes of access, remediation, restoration, environmental testing and sampling and such other activities necessary to carry out the intent of this Amended Agreement.
2. Easement Term. The Term of the Easement shall commence on the date first written above and end upon the earlier of the date upon which Buckley Road is closed to vehicular traffic or thirty (30) days after final acceptance of the Improvements.

C. Dedication.

1. Larson shall dedicate Parcel K to the City for use as park and/or open space to satisfy any park and open space requirements for Parcel K as established by the LDC. Larson's dedication of Parcle K to the City shall coincide with the dedication 96th Avenue and the Bridge.
2. Owner shall dedicate to the City the 67-acre Second Creek floodplain identified on the Buffalo Highlands PUD Zone Document as "Parcel J."
3. Representatives of Owner and/or the District shall contact the owners of the additional land needed for 96th Avenue right-of-way regarding the potential for donation to the City of such land. To the extent such necessary right-of-way is not donated to the City, the cost of acquisition thereof by the City shall constitute a Project expense, payable by the District within thirty (30) days of receipt of any invoice therefor from the City, which expenses may be paid from the Escrow Account, the Solid Waste Fund or Loan proceeds.

V. FUNDING – REIMBURSEMENT

A. Funding – Sources; Amounts; Disbursement.

1. Park Fees – Escrow.
 - a. There exists in the escrow account established by the 2004 Agreement (the "Escrow Account") approximately \$380,564.00, which may be used for preliminary engineering, construction management, legal and construction costs for the Improvements, the land acquisition required under Section IV.C.3. herein and Parcel K remediation and restoration (collectively, the "Permitted Expenses").
 - b. Owner, the City and the District hereby agree that the District is authorized, and is hereby assigned the right, to draw on the Escrow Agreement for the purposes set forth herein, and to the extent necessary, the 2004 Agreement is hereby amended to so provide.
 - c. The City shall no longer collect "Excess Park Fees" for placement into the Escrow Account for future bridge construction as set forth in the 2004 Agreement.
 - d. The City shall not collect from the District or residential builders within the District, and the District or residential builders within the District shall not owe to the City, any park fee-in-lieu payments, nor shall the District be required to dedicate any park land to the City in relation to Parcels A, B, C, D, E, F, G and H as such Parcels are identified in the Buffalo Highlands PUD Zone Document.

2. **Solid Waste Fund.** The City agrees to contribute \$500,000.00 to the Project from its Solid Waste Fund. Upon depletion of the existing Escrow Account funds to zero (0), the City shall disburse Solid Waste Fund monies to the District for the Permitted Expenses.

3. **Loan.**

a. The City and the District entered into that certain Loan Agreement dated July 16, 2013, as amended by City Resolution 2013-85 on December 16, 2013, attached hereto as **Exhibit B** and incorporated herein by this reference (collectively, the “Loan Agreement”).

c. Disbursement. The District may draw down the Loan in increments necessary to fund Permitted Expenses. Such draws shall occur as construction payments are approved by the City and the District. Without prior written consent from the City, the District will not be allowed to draw on the Loan until the Escrow Account and the Solid Waste Fund monies have been entirely depleted.

4. **Road Impact Fees.** The City will apply to the Project the Road Impact fees generated by the Buffalo Highlands development.

a. As Road Impact fees are collected from builders within the Buffalo Highlands development, the City will complete its quarterly accounting review of the Road Impact fees and will disburse to the District the amount of Road Impact fees collected from the contractors pulling building permits for use within the Buffalo Highlands development together with Road Impact fees collected from contractors pulling building permits along 96th Avenue.

b. As described in **Exhibit A**, the Road Impact Fees will be pledged to the payment of the Loan.

5. **Adams County Funding.** The City agrees to contact Adams County in an effort to obtain additional Project funding from the Payment In Lieu of Tax (“PILT”) money paid to Adams County by the federal government for the Arsenal and National Wildlife Refuge. In the event Adams County agrees to contribute funds to the Project, such contribution will be used to pay the Loan or to pay for the cost of the Improvements to the extent such costs exceed the Loan Amount.

B. **District Contribution Constitutes Owner’s Contribution.**

1. The District’s financial contribution to the Bridge and the initial two-lane construction or 96th Avenue shall constitute Owner’s contribution to the eventual allocation of the full build-out of 96th Avenue (the four-lane construction) cost and, if approved by the City Council, any upfront contributed cost in excess of the District’s calculated contribution will be reimbursed by the City from contributions made by other properties in the vicinity.

2. The City will require the owners of the adjacent property benefitting from the Improvements to reimburse the District pursuant to certain reimbursement agreements by and between the City and such property owners as more particularly described in Section 4.03 of the Loan Agreement.

VI. MISCELLANEOUS

A. Building Permits.

1. The City shall allow Owner (or the homebuilder acquiring the Property from the Owner) to obtain building permits, for model homes only, prior to the completion of the Project; provided, however, that the City shall not issue any Certificates of Occupancy for any model home before Phase I is completed.
2. Prior to completion of Phase I, the issuance of building permits within the Development for homes to be held out for sale will be at the sole and absolute discretion of the City.

B. Notices. Written notices required under this Amended Agreement and all other correspondence between the parties shall be directed to the following and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested:

If to the City:

Deputy City Manager
City of Commerce City
7887 East 60th Avenue
Commerce City, CO 80022

If to the District:

Buffalo Highlands Metropolitan District
141 Union Boulevard, Suite 150
Lakewood, CO 80228
Attn: Lisa Jacoby

With a copy to:

Public Works Director
City of Commerce City
8602 Rosemary St.
Commerce City, CO 80022

With a copy to:

McGeady Sisneros, P.C.
450 East 17th Avenue, Suite 400
Denver, Colorado 80203
ATTN: Mary Jo Dougherty

It to Owner:

Larry Luttrell
Buffalo Highlands, LLC
222 Milwaukee Street, Suite 300
Denver, CO 80206

If to Larson:

Larry Luttrell
C. Larson Family Farm, Inc.
222 Milwaukee Street, Suite 300
Denver, CO 80206

C. Miscellaneous Legal Provisions.

1. Independent Contractor; No Partnership or Agency. Notwithstanding any language in this Amended Agreement or any representation or warranty to the contrary, the relationship between the District and the City shall be as independent contractors, and neither the City nor the District shall be deemed or constitute an employee, servant, agent, partner or joint venturer of the other.
2. No Third-Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this Amended Agreement and all rights of action relating to such enforcement shall be strictly reserved to the parties. It is the express intention of the parties that any person other than the City and the District shall be deemed to be only an incidental beneficiary under this Amended Agreement.

3. No Assignment. The District shall not assign this Amended Agreement without the City's prior written consent, which consent shall not be unreasonably withheld, conditioned or delayed.

4. No Waiver. The waiver of any breach of a term, provision or requirement of this Amended Agreement shall not be construed as or deemed a waiver of any subsequent breach of such term, provision or requirement or of any other term, provision or requirement of this Amended Agreement.

5. Governing Law and Venue; Recovery of Costs. This Amended Agreement shall be governed by the laws of the State of Colorado. Venue for state court actions shall be in the 17th Judicial District in Adams County, Colorado, and venue for federal court actions shall be in the United States District Court for the District of Colorado. In the event legal action is brought to resolve any dispute among the parties related to this Amended Agreement, the prevailing party in such action shall be entitled to recover reasonable court costs and attorney fees from the non-prevailing party.

6. Governmental Immunity. No term or condition of this Amended Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, *et seq.*

7. Entire Agreement; Binding Effect. This Amended Agreement contains the entire agreement of the parties relating to the subject matter hereof and, except as provided herein, may not be modified or amended except by written agreement of the parties. This Amended Agreement shall be binding upon, and shall inure to the benefit of, the parties and their respective heirs, personal representatives, successors and assigns.

8. Time of the Essence. The District acknowledges that time is of the essence in the performance of this Amended Agreement. The District failure to complete any of the obligations contemplated herein during the term of this Amended Agreement, or as may be more specifically set forth in an Exhibit hereto, shall be deemed a breach of this Amended Agreement.

9. Authority. The parties represent and warrant that they have taken all actions necessary to legally authorize the undersigned signatories to execute this Amended Agreement on behalf of the parties and to bind the parties to its terms.

10. Counterparts. This Amended Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all such counterparts taken together shall be deemed to constitute one and the same instrument.

11. Headings. Paragraph headings used in this Amended Agreement are for convenience of reference and shall in no way control or affect the meaning or interpretation of any provision of this Amended Agreement.

12. Severability. In the event a court of competent jurisdiction holds any provision of this Agreement invalid or unenforceable, such holding shall not invalidate or render unenforceable any other provision of this Amended Agreement.

IN WITNESS WHEREOF, the parties have caused this Amended Agreement to be executed on the day and year first written above.

CITY OF COMMERCE CITY

ATTEST:

Laura J. Bauer, CMC, City Clerk

Sean Ford, Mayor

Recommended for approval:

James Hayes, Deputy City Manager
Department of Public Works

Maria D'Andrea, P.E., Director
Department of Public Works

Approved as to form:

Gregory D. Graham, Assistant City Attorney

Attest:

Secretary

Approved as to Legal Form

_____, District General Counsel

BUFFALO HIGHLANDS, LLC

Signature

Printed Name & Title

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing Agreement was acknowledged before me this ____ day of _____, 2014, by _____, _____ of Buffalo Highlands, LLC.

Witness my hand and official seal.

My Commission Expires _____.

Notary Public

C. LARSON FAMILY FARM, INC.

Signature

Printed Name & Title

STATE OF _____)
) ss.
COUNTY OF _____)

The foregoing Agreement was acknowledged before me this ____ day of _____, 2014, by _____, _____ of C. Larson Family Farm, Inc.

Witness my hand and official seal.

My Commission Expires _____.

Notary Public