

**AMENDED AND RESTATED
WATER RESOURCES AGREEMENT
(PHASE 4A ERUS)**

This Amended and Restated Water Resources Agreement (“Agreement”) is made this ____ day of _____, 2017 between the City of Commerce City, a municipal corporation whose address is 7887 E. 60th Avenue, Commerce City, Colorado 80022 (“City”) and South Adams County Water and Sanitation District, a quasi-municipal corporation and political subdivision of the state of Colorado whose address is 6595 East 70th Avenue, Commerce City, CO 80022, acting by and through its South Adams County Water and Sanitation District Activity Enterprise (“District”) (the City and the District are together referred to as the “Parties.”)

RECITALS

WHEREAS, the District currently provides municipal water and wastewater service within its service area for the benefit of its residents and property owners located in Commerce City and Adams County, Colorado; and

WHEREAS, on April 13, 2016, the Board adopted Resolution 16-002, Regarding Sale of ERUs from the District’s Phase 4A Water Development (the “Phase 4A Resolution”), in which the Board established the terms and conditions of a water supply development program (the “Phase 4A Program”) under which qualified property owners may apply to purchase Equivalent Residential Unit credits (“ERU’s”) for development of lands within the District (the “Phase 4A ERUs”); and

WHEREAS, the Phase 4A Resolution provides that qualified property owners who purchase Phase 4A ERUs must, at the time of application, pay the storage component of the Phase 4A Water Connection Fee as set by the Board for the Phase 4A ERUs, and also either dedicate acceptable renewable water supplies to the District or make an upfront payment in lieu of water dedicated in an amount sufficient to cover the water resources component of the Phase 4A Water Connection Fee, as set by the Board for the Phase 4A ERUs; and

WHEREAS, the City acquires, holds, and re-transfers ERUs from the District from time to time for purposes of facilitating park and open space improvements, construction of public facilities, and economic development within the City and the District; and

WHEREAS, in furtherance of such municipal purposes and pursuant to a Phase 4A Water Resources Agreement dated August 31, 2016 (the “Prior Water Resources Agreement”), the City purchased from the District 265 Large User (as such term is defined in the Phase 4A Resolution) Phase 4A ERUs (“City’s Prior Phase 4A ERUs”) at a rate of \$8,500 per ERU in lieu of dedication of water, storage and other facilities; and

WHEREAS, the District’s long-term ability to continue the Phase 4A Program is dependent on obtaining additional augmentation water supplies; and

WHEREAS, the Parties have identified a significant source of additional augmentation water supply, the District wants to acquire such supply, the City wants to assist the District in obtaining such supply, and the City wants to acquire additional Phase 4A ERUs for its above-mentioned municipal purposes; and

WHEREAS, the District is negotiating to purchase additional augmentation water supply pursuant to a Purchase Agreement with shareholders of a Ditch Company (“Share Purchase Agreement”); and

WHEREAS, in order to allow the District to purchase the augmentation water pursuant to the Share Purchase Agreement, the District intends to sell and the City intends to purchase 1,197 Phase 4A ERUs; and

WHEREAS, the District intends to fund the purchase of the augmentation water supply in part with the proceeds of the sale of the Phase 4A ERUs, and the City will tender funds for payment of the same, which funds shall be available by the end of the Diligence Period under the Share Purchase Agreement, which is ninety (90) days after the Effective Date thereof (“End of Diligence Period”); and

WHEREAS, exercise or assignment of the Phase 4A ERUs and provision of municipal water and wastewater services shall be subject to the District’s Rules, as they may be amended from time to time, and subject further to the terms and conditions of the inclusion agreement(s) for property to which the Phase 4A ERUs will be applied, this Agreement, and the Phase 4A Resolution; and

WHEREAS, the District’s Board of Directors at its August 10, 2016 regular meeting clarified that the exception under Section 3.A. of the Resolution which authorizes sales of Phase 4A ERUs to the City does not require the City to have identified at the time of the purchase of the ERUs from the District the specific property to which such ERUs are to be applied, and development need not be imminent; and

WHEREAS, having identified specific augmentation water supply available for purchase and having gained a better understanding of the infrastructure requirements associated with that water supply, and as inducement to facilitate the City’s cooperation in securing the augmentation water supply, the District is willing to accept an upfront water payment of \$6,850 per ERU for the City, with the understanding that additional fees for the storage and infrastructure components will be determined, assessed, and due at the time the Phase 4A ERUs acquired hereunder are exercised; and

WHEREAS, in furtherance of inducing such City cooperation, the Parties intend that upon Closing and conveyance of the additional Phase 4A ERUs, the City’s Prior Phase 4A ERUs shall be administratively converted from 265 ERUs with paid storage components to 328.8 ERU’s with unpaid storage components based on an alternative upfront payment value of \$6,850 per ERU, such that the City’s Prior Phase 4A ERUs will have identical characteristics to the new Phase 4A ERUs purchased pursuant to this Agreement, and such City’s Prior Phase 4A ERUs will be commingled with the new Phase 4A ERUs and not tracked or separately identified; and

WHEREAS, upon the closing of the City's purchase of the Phase 4A ERUs, the conversion of the 265 City's Prior Phase 4A ERUs to 328.8 Phase 4A ERUs without paid storage component, and the administrative commingling of such Phase 4A ERUs, the Parties intend that the Prior Water Resources Agreement will be merged into this Agreement, and shall be superseded and of no further force or effect; and

WHEREAS, it is in the best interest of the District, and its landowners and customers, that this Agreement be entered into; and

AGREEMENT

NOW THEREFORE, in consideration of the mutual promises, covenants and provisions herein, the District and City agree as follows:

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

2. Financing of Purchase of Phase 4A ERUs.

- A. The City commits to purchase **1,197** Large User Phase 4A ERU's at a rate of \$6,850 per ERU. The City will purchase 1,197 of the ERU's prior to the End of the Diligence Period under the Share Purchase Agreement. These ERUs will cover 100% of the water resources fee component but shall not include the storage component fee subject to the contingency set forth in Paragraph 2.B. below.
- B. This Agreement is expressly contingent upon the acquisition by the City of financing to purchase the Phase 4A ERUs subject hereto. If said financing is not secured by the End of the Diligence Period, this Agreement shall terminate and all rights and obligations hereunder shall be null and void.
- C. Upon commencement of the due diligence phase of the Share Purchase Agreement, the District will conduct diligence in its sole discretion. The District reserves the right to exercise any inspection or other contingencies afforded it in the Share Purchase Agreement, and as between the District and the City, the District's decision to Close on the Share Purchase Agreement shall be in the District's sole discretion. In the event the District does not Close on the Share Purchase Agreement and that agreement is terminated, this Agreement will remain in effect and all ERU's contemplated in this amended agreement will be credited to the City upon payment to the District pursuant to Paragraph 2.A. above.
- D. Upon payment from the City to the District pursuant to the terms hereof, the District shall cause the City's Prior Phase 4A ERUs to be administratively converted on the District's official records from 265 ERUs with paid storage components to 328.8 ERU's with unpaid storage components based on an

alternative upfront payment value of \$6,850 per ERU. Upon such conversion, the City's Prior Phase 4A ERUs will have identical characteristics to the new Phase 4A ERUs purchased pursuant to this Agreement, and such City's Prior Phase 4A ERUs will be commingled in the District's records with the new Phase 4A ERUs and not tracked or separately identified.

- E. The District agrees to make available to the City the opportunity to purchase up to one ERU of connections for water and wastewater service from the District for the property for each Phase 4A ERU purchased, subject to the payment of applicable connection fees except the water resources component of the Phase 4A Water Connection Fees paid hereunder, the District's Rules, the terms and conditions of this Agreement, and the Phase 4A Resolution.

3. Use of Phase 4A ERUs to Obtain a Connection.

- A. With the prior consent of the District, which consent shall not be unreasonably withheld, the City may: (i) assign the Phase 4A ERUs to any person for use on real property within the District, or (ii) allocate the Phase 4A ERUs to any real property it owns located within the District.
- B. The issuance of a water or wastewater connection tap from the District for the Phase 4A ERUs described in this Agreement shall be subject to the payment of fees, in compliance with the District's Rules (as they may be amended from time to time) and the District's Design Specifications and Standards (as they may be amended from time to time), and subject to the District's ability to construct capital improvements needed to provide such public water and wastewater services.
- C. The City shall pay the then-current Phase 4A Water Connection Fee at the time of connection, minus a credit equal to the water resources component of the Phase 4A Water Connection fee paid by the City at the time of City's purchase of the Phase 4A ERUs, as set forth in section 2(A) hereof.
- D. The City acknowledges that this Agreement and the Phase 4A ERUs may not provide water resources to meet all of the water supply needs of particular property and that City will be obligated to enter into further water resources agreement(s) and dedicate additional water and storage to the District, to meet any additional water supply demands for particular property over and above the Phase 4A ERUs. Accordingly, the District's obligation to provide public water and wastewater service to specific property pursuant to this Agreement shall be limited to the Phase 4A ERUs which have been allocated to the property.
- E. The actual availability of the connections from Phase 4A ERUs in any year may be subject to allocation by the District in the event that (a) development in the District reaches an average rate of development of 1,800 ERUs per year prior to the time that the regional wastewater treatment plant becomes operational; or (b)

new ERU connections in the District in any one year has exceeded or will exceed 2,266 ERUs.

- F. In all cases, the City will also have to pay all applicable wastewater connection fees set forth in the District's then-current wastewater connection fee schedule. In addition, the City will be required to pay other charges, which may include, without limitation, tap-in charges, development plan review fees, meter charges, and/or rebate fees.

4. Assignment / Transfer of Phase 4A ERUs.

- A. The Phase 4A ERUs may be assigned by the City to a third party for use on specific, identified real property located within the boundaries of the District. After a third party property owner acquires Phase 4A ERUs from the City, such Phase 4A ERUs may be transferred to a subsequent owner of any portion of such property for use on the property, or transferred back to the City subject to payment of the then-current transfer fee and consent by the District, which consent shall not be unreasonably withheld. Upon such assignment, the assignee and the assigned Phase 4A ERUs shall be subject to the terms of this Agreement.
- B. After allocation to specific property and completion of development on the property, if fewer ERUs are needed than are required by approved development plans, the surplus Phase 4A ERUs may be transferred to another property within the boundaries of the District or back to the City, provided that the transferee is in compliance with all requirements of the Phase 4A Resolution. The Phase 4A ERUs are not otherwise transferable to different property.
- C. The assigned Phase 4A ERUs and the third party assignee shall be subject to all the terms of this Agreement, and the document effecting the assignment shall (i) include the assignee's express assumption of the terms of this Agreement, (ii) designate the property to which the Phase 4A ERUs shall be allocated, and (iii) be recorded together with this Agreement and the District's consent. The provisions contained in this Agreement, the Assignment Agreement, and the District's consent shall be deemed to survive the transfer of such property to which the ERUs are assigned, shall be binding on the respective Party's successors, transferees and assignees, and shall be and remain covenants running with the property.
- D. After allocation of Phase 4A ERUs to specific property, the City hereby agrees that it shall not sell any lands within the property without sufficient water resources unless the buyers of said land agree in writing that they are purchasing the lands without sufficient water resources for full development. To the extent permitted by law, the City, for itself and its successors and assigns, hereby agrees to release, hold harmless, indemnify, and defend the District from any liability which may arise as a result of a breach of this Section 4.D.

5. Construction of Water and Wastewater Lines.

- A. The Parties agree that with respect to development of a property, the District may require construction of a dual distribution system which shall include a “dual pipe” water supply system, which shall consist of (1) the potable water system, constituting piping for delivery of potable water for indoor uses, including but not limited to, drinking water facilities, bathing facilities, and other sanitary facilities, and outdoor vehicle washing and other non-irrigation outdoor uses, and (2) the irrigation water system, constituting piping for delivery of irrigation water for an outdoor irrigation system. The potable water system and the irrigation water system shall be constructed pursuant to the District’s specifications. The District may, at any time, deliver potable water through the Irrigation Water System in lieu of delivering irrigation water.
- B. If a dual distribution system is required, in order to serve the property, the District shall install at its sole cost the main water delivery facilities for the irrigation water system in accordance with the Master Utilities Plan of the District as such plan may be revised from time to time by the District.
- C. If a dual distribution system is required, City or its successors and assigns shall install, according to the District’s then-current specifications, and at its respective sole cost, all piping, and facilities required for delivery of water from the irrigation water system installed by the District to each lot or parcel to be served by the Phase 4A ERUs.
- D. As to extensions of the potable water or wastewater system necessary to serve property, City shall be required to extend water mains and construct related water or related wastewater system facilities at its own cost, as set forth in the District’s Rules and Regulations as they may be amended from time to time. Prior to cover-up and upon completion of construction of such dual water supply lines by City, the District shall make appropriate inspections and notation of its records to reflect such construction; provided, however, that as between the District and the City and its successors and assigns, the District shall not be responsible for any failure to observe or act on any defect.
- E. To the extent that any of the District’s public water or wastewater main lines or related facilities have to be relocated as a result of City’s development of property served by the Phase 4A ERUs, City agrees that it shall be responsible for any such relocation costs incurred by the District. The Parties further agree that the City’s obligations in this Paragraph are subject to and do not supersede any conflicting prior agreements of the Parties.

6. General Terms and Conditions.

- A. City agrees that no vested property rights are created by this Agreement or the Phase 4A Resolution except the rights associated with the Phase 4A ERU’s purchased hereunder.

- B. The Parties hereby acknowledge that this Agreement may be enforced by law or in equity by a decree of specific performance, damages, foreclosure of liens, the withholding of public water or other such legal and equitable relief as may be available, subject to the provisions of the statutes of the State of Colorado. Any such action shall lie in the Adams County District Court, State of Colorado.
- C. The Parties' obligations under this Agreement are subject to annual appropriations that are a legislative decision of the governing bodies of each Party. Neither Party, by this Agreement, binds future legislatures to make such appropriations. All obligations of each Party under this Agreement, whether direct or contingent, will only extend to payment of monies duly and lawfully appropriated and encumbered for the purpose of this Agreement through the respective Party's legally required budgeting, authorization, and appropriation process. Further, neither Party, by this Agreement, creates a multiple fiscal year obligation or debt either within or without this Agreement. The failure of any Party's governing body to budget, authorize, appropriate, or encumber monies to satisfy any obligation of this Agreement shall not constitute a breach by that Party.
- D. The Parties to this Agreement do not intend to benefit any person not a party to this Agreement other than the District not acting in its enterprise capacity. No person or entity, other than the Parties to this Agreement, shall have any right, legal or equitable, to enforce any provision of this Agreement.
- E. This Agreement constitutes the entire agreement between the Parties hereto concerning the subject matter hereof, and supersedes all prior conversations, proposals, negotiations, understandings and agreements, whether written or oral; all of which are merged herein. If any portion of this Agreement shall be deemed to be ineffective or without force and effect by any court of competent jurisdiction then the invalidity or unenforceability of such provision shall not affect the enforceability of the other provisions hereof.
- F. The provisions of this Agreement are deemed to be unique and special with regard to the Phase 4A Program, and do not create a precedent for past or future water resource agreements or other matters pertaining to other properties.
- G. This Agreement may be executed in two counterparts, each of which shall be an original, but all of which, together, shall constitute one and the same instrument. The Parties consent to the use of electronic signatures and agree that the transaction may be conducted electronically pursuant to the Uniform Electronic Transactions Act, § 24-71.3-101, et seq., C.R.S. The Agreement and any other documents requiring a signature may be signed electronically by either Party. The Parties agree not to deny the legal effect or enforceability of the Agreement, solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature on the grounds that it is

an electronic record or an electronic signature or that it is not in its original form or is not an original. Use of the term “electronic” in this paragraph includes digital information.

- H. This Agreement shall not be assignable by the City without the express consent of the District. However, at such time as Phase 4A ERUs are assigned to specific property, the Phase 4A ERUs shall be assignable to successors-in-interest to all of the property upon written notice to the District’s Tap Sales Administrator.
- I. The District reserves the right to stop selling the Phase 4A ERUs or change the terms of sale at any time. The District may reduce the amount of Phase 4A ERUs available for purchase, or terminate the availability of Phase 4A ERUs at any time. Such future determination will not affect the availability of the ERU’s contemplated in this agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the date indicated above.

SOUTH ADAMS COUNTY WATER AND
SANITATION DISTRICT, ACTING BY AND
THROUGH ITS SOUTH ADAMS COUNTY
WATER AND SANITATION DISTRICT
ACTIVITY ENTERPRISE

Aaron Phillips, President

ATTEST:

B. JoAnn Moss, Secretary

CITY OF COMMERCE CITY

By: _____
Sean Ford, Mayor

ATTEST:

Laura J. Bauer, City Clerk