

**RESOLUTION AUTHORIZING INTERGOVERNMENTAL REIMBURSEMENT
AGREEMENT WITH SECOND CREEK FARM METROPOLITAN DISTRICT NO. 1
RELATIVE TO FUNDING FOR 88TH AVENUE IMPROVEMENTS**

RESOLUTION NO. 2019-88

WHEREAS, pursuant to the Purchase and Sale Agreement between the City and Second Creek Holdings LLC, the City of Commerce City (“City”) agreed to buy, and Second Creek Holdings LLC agreed to sell, certain real property adjacent to 88th Avenue west of Tower Road (“PSA”);

WHEREAS, in the PSA, the City agreed to contribute \$399,501.04 plus the actual costs of undergrounding certain related utilities, representing the City’s pro rata share of the south half of 88th Avenue abutting the property, on a reimbursement basis to the metropolitan district constructing the improvements pursuant to a reimbursement agreement between the City and such district;

WHEREAS, Second Creek Holdings LLC has indicated that the cost of utility undergrounding is \$206,452.00, including credits, which will be funded through United Power undergrounding funds, and that the Second Creek Farm Metropolitan District No. 1 (“District”) will design and construct 88th Avenue;

WHEREAS, the City and the District desire to establish terms and conditions for the reimbursement as contemplated by the PSA;

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF COMMERCE CITY, COLORADO, AS FOLLOWS:

1. The Intergovernmental Reimbursement Agreement, substantially in the form attached as Exhibit “A” (“IGA”), is found to be in the best interests of the public and is hereby approved.
2. Upon successful finalization of the IGA and approval as to form by the City Attorney, the City Manager is hereby authorized to execute, and the City Clerk to attest, the contract on behalf of the City.

RESOLVED AND PASSED THIS 5TH DAY OF AUGUST 2019.

CITY OF COMMERCE CITY, COLORADO

Sean Ford, Mayor

ATTEST:

Laura J. Bauer, MMC, City Clerk

**EXHIBIT A TO RESOLUTION
(NOT FOR EXECUTION)**

INTERGOVERNMENTAL REIMBURSEMENT AGREEMENT

THIS INTERGOVERNMENTAL REIMBURSEMENT AGREEMENT (“Agreement”) is made and entered into this ____ day of _____, 2019 (“Effective Date”), by and between SECOND CREEK FARM METROPOLITAN DISTRICT NO. 1, a quasi-municipal corporation and political subdivision of the State of Colorado (“District”), and the CITY OF COMMERCE CITY, a Colorado home rule municipality (“City”).

WHEREAS, pursuant to the Purchase and Sale Agreement effective _____, 2019, between the City and Second Creek Holdings LLC, the City agreed to buy, and Second Creek Holdings LLC agreed to sell, certain real property (“PSA”);

WHEREAS, in the PSA, the City also agreed to contribute \$399,501.04 plus the actual costs of undergrounding certain related utilities, representing the City’s pro rata share of the South half of 88th Avenue abutting the property, on a reimbursement basis to the metropolitan district pursuant to a reimbursement agreement between the City and such district;

WHEREAS, Second Creek Holdings LLC has indicated that the cost of utility undergrounding is \$206,452.00, including credits, as detailed in Exhibit “A,” and that the District will design and construct 88th Avenue, and utility undergrounding will be performed by United Power;

WHEREAS, the City and _____ have entered into a Public Improvement Agreement effective _____, 2019 (“PIA”), detailing certain improvements to be constructed in connection with the development of adjacent property, including the Work;

WHEREAS, the District and the City desire to enter this Agreement to establish terms and conditions for the reimbursement as contemplated by the PSA;

NOW, THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, the sufficiency of which is expressly acknowledged, the District and the City agree as follows:

1. Advance of Funds; Construction.

a. The District will undertake and complete the construction of each element of work to design and construct 88th Avenue adjacent to the property purchased by the City pursuant to the PSA (the “Work”) and will timely make payment of all costs related to the Work as the same become due and payable. Utility undergrounding is anticipated to be completed by United Power.

b. A copy of all surveys, geotechnical reports, environmental studies, drainage analyses and other investigations regarding the Property and delivered to the District in connection with the Work shall be provided to the City at or prior to the Completion Date, except as protected from disclosure by law.

2. Reimbursement.

a. The City will reimburse the District an amount not to exceed \$399,501.04 for the design and construction of 88th Avenue (“Reimbursement Amount”). Utility undergrounding work is anticipated to cost \$206,452.00 (“Utility Reimbursement Amount”) and shall be payable solely from undergrounding funds maintained by the City pursuant to its franchise agreement with United Power. Notwithstanding anything to the contrary contained in this Agreement or the PSA, these amounts will not be subject to increase for any reason. The District will complete the work even if the cost to do so exceeds the Reimbursement Amount or the Utility Reimbursement Amount.

**EXHIBIT A TO RESOLUTION
(NOT FOR EXECUTION)**

b. Within 30 days after the completion of the Work (including final settlement with the District Contractor), the District will provide written certification, (the "Certification"), which will contain the final Reimbursement Amount the date when the Work was completed (the "Completion Date"). The City must report any errors related only to the Reimbursement Amount within 30 days and waives any claims related to such errors not timely reported to the District.

c. Within 30 days of the resolution of any errors or, if none, within 45 days of the Certification, the City will pay the Reimbursement Amount.

d. Notwithstanding anything to the contrary contained in this Agreement or the PSA, the City shall be under no obligation to pay the Reimbursement Amount until the District has provided the following as follows:

i. final Lien Releases for all labor, suppliers, material, contractors and subcontractors utilized in connection with the Work;

ii. an as-built record drawing survey for the Work, substantially in accordance with the Plans and Specifications, as modified in accordance with this Agreement, by a licensed engineer or architect (the "Record Drawing Survey"); and

iii. The Contractor's warranty.

3. Term. This Agreement will be effective from the Effective Date until the date the Reimbursement Amount and the Utility Reimbursement Amount have been paid. Notwithstanding the foregoing, this Agreement will be deemed null and void if the Closing, as defined in the PSA, does not occur.

4. Notice. Any notice given pursuant to this Agreement will be sent by certified mail, return receipt requested, overnight delivery service, or hand delivery to the address given above or to any other address given in writing by an addressee to the other party. Notice to the City shall be given to the City Manager and copied to the City Attorney. Such notice, if given by mail, shall be deemed received three (3) days after mailing in accordance with this Section.

5. General Provisions.

a. Incorporation by Reference. The recitals to this Agreement and **Exhibit A** to this Agreement are incorporated by reference.

b. No Third-Party Beneficiaries. The parties expressly intend that any person other than the City and the District will be deemed to be only an incidental beneficiary under this Agreement.

c. No Waiver. No waiver of any provision of this Agreement shall constitute a waiver of any other provision of this Agreement, nor shall any such waiver be a continuing waiver. A party's failure to insist upon strict performance of any of the terms, covenants, conditions or agreements contained in this Agreement shall not be deemed a waiver of any rights or remedies that said party may have and shall not be deemed a waiver of any subsequent breach or default in the performance of any of the terms, covenants, conditions or agreements contained in this Agreement by the same party. Except as expressly provided in this Agreement, no waiver shall be binding on any party unless executed in writing by the party making such waiver.

d. Governmental Immunity. No term or condition of this Agreement will 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.*

**EXHIBIT A TO RESOLUTION
(NOT FOR EXECUTION)**

e. Nonliability of Officials and Employees. No elected or appointed official, employee, agent, consultant or contractor of the City or the District shall be personally liable to any person for any breach of this Agreement.

f. Non-Appropriation. Notwithstanding any other term or condition of this Agreement, all obligations of the District and the City under this Agreement, including all or any part of any payment or reimbursement obligations, 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 entity's legally required budgeting, authorization, and appropriation process. Further, neither the District nor the City, by this Agreement, creates a multiple fiscal year obligation or debt either within or without this Agreement. Neither the District nor the City, by this Agreement, binds future legislatures to make such appropriations.

g. Governing Law; Jurisdiction and Venue; Attorneys' Fees. This Agreement will be governed by the laws of the State of Colorado. Venue for any litigation arising out of or relating to this Agreement will be in the 17th Judicial District in Adams County, Colorado.

h. No Partnership or Agency – Independent Contractor Relationship. Notwithstanding any language in this Agreement or any representation or warranty to the contrary herein, the relationship between the District and the City will be as independent contractors, and neither the City nor the District will be deemed or constitute an employee, servant, agent, partner or joint venture of the other.

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

j. Severability. To the extent that this Agreement may be executed and performance of the obligations of the parties may be accomplished within the intent of this Agreement, 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 will not affect the validity of any other term or provision hereof.

k. Rules of Construction. Neither party will be deemed to have drafted this Agreement. This Agreement has been reviewed by all parties and will be construed and interpreted according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all parties. No term of this Agreement will be construed or resolved in favor of or against the City or the District on the basis of which party drafted the uncertain or ambiguous language. Where appropriate, the singular includes the plural and neutral words and words of any gender will include the neutral and other gender. Section headings used in this Agreement are for convenience of reference only.

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

m. Compliance. The District shall at all times during the term of this Agreement comply, in all respects with all federal, state or local immigration laws, statutes, rules, codes, orders and regulations.

(signature page(s) follow)

**EXHIBIT A TO RESOLUTION
(NOT FOR EXECUTION)**

IN WITNESS WHEREOF, the City and the District execute this Agreement as of the Effective Date.

CITY OF COMMERCE CITY, a Colorado home
rule municipality

Sean Ford, Mayor

ATTEST:

Laura J. Bauer, MMC, City Clerk

APPROVED AS TO FORM:

Robert D. Sheesley, City Attorney

**SECOND CREEK FARM METROPOLITAN
DISTRICT NO. 1**, a Colorado quasi-municipal
corporation

By: _____

Name: _____

Signature: _____