

**SOUTHEAST METRO STORMWATER AUTHORITY  
SUBDIVISION IMPROVEMENT AGREEMENT  
FOR PROJECT NAME, FINAL DEVELOPMENT PLAN;  
CASE NO. LU-0803-005/D08-1017**

This Colorado Subdivision Improvement Agreement (this "Agreement") is entered into this \_\_\_\_ day of \_\_\_\_\_, 2009, by and between the SOUTHEAST METRO STORMWATER AUTHORITY, a political subdivision and a public corporation of the State of Colorado ("SEMSWA"), Arapahoe County Water and Wastewater Authority, a political subdivision and a public corporation of the State of Colorado ("ACWWA") and Trust Company of America, Inc. (Collectively referred to herein as "Developer"). SEMSWA and Developer are collectively referred to as "Parties," or occasionally in the singular as "Party." This Agreement includes the attached Exhibits A, 1, 2 and 2-A.

**WITNESSETH:**

WHEREAS, Developer owns certain real property in fee simple in the City of Centennial and within the Service Area of SEMSWA and ACWWA as more particularly described in **Exhibit A**, attached to the Agreement (the "Property"); and

WHEREAS, Developer (or its representative) desires to develop the Property and has submitted to the City of Centennial for approval and execution a Final Development Plan for the Trust Company of America Parking Lot Expansion Project (the "Project"), designated the Final Development Plan, Case No. LU-0803-005/D08-1017 (hereinafter referred to as the "FDP"), a copy of which is on file in the Land Use Services Office of the City of Centennial and made a part hereof by reference; and

WHEREAS, Developer agrees that the development of the Property as specified in the FDP will require increased stormwater management services from SEMSWA and will require the installation of certain public Stormwater Improvements primarily of benefit to the proposed development; and

WHEREAS, the City of Centennial is willing to approve and execute said FDP upon the agreement of Developer to the matters hereinafter described and subject to all the requirements, terms and conditions of the ordinances, rules, regulations and standards of Centennial including but not limited to: the Land Development Code (including zoning and subdivision regulations); the Roadway Design and Construction Standards; the Stormwater Management Manual; the Grading, Erosion, and Sediment Control Manual; and all other governing regulations (collectively, the "Standards") in effect at the time the Construction Plans (as hereinafter defined) are approved by Centennial; and

WHEREAS, through an Intergovernmental Agreement, the City of Centennial has delegated the authority, implementation and enforcement of its Stormwater regulations and Stormwater management programs to SEMSWA. Developer acknowledges that SEMSWA shall be a party to the City of Centennial, Colorado Subdivision Improvement Agreement it has entered into with the City of Centennial in Case No. LU-0803-005/D08-1017 by way of this Agreement; and matters herein relating to public stormwater improvements, including, but not limited to the approval, permitting, inspection, and acceptance of such improvements shall be described and agreed to as further defined in this Agreement.

WHEREAS, ACWWA is a party to this Agreement solely as the current holder of the MS-4 permit covering the area that includes the proposed L-2 Improvements and ACWWA's sole obligations hereunder are set forth exclusively in Section II.B. hereof.

WHEREAS, Developer acknowledges and agrees that the matters hereinafter set forth are reasonable conditions and requirements to be imposed by SEMSWA in consideration of the approval and execution of the FDP, and that such matters are necessary to protect, promote, and enhance the public welfare.

NOW, THEREFORE, in consideration of these premises, the mutual obligations herein contained, and Centennial's approval and execution of the FDP, it is agreed as follows:

## **Section I.           Obligation to Provide Stormwater Improvements**

- A. The Developer is obligated to provide for the construction and installation of certain public on-site stormwater improvements as identified and described within the approved Phase III Drainage Report for the Development, and as identified and shown on the FDP as "On-site Improvements". Developer is further obligated to construct and install certain specified off-site public stormwater improvements ("Off-site Improvements") that serve the FDP. Collectively, the On-site Improvements and the Off-site Improvements shall be referred to as the "Stormwater Improvements", all of which are more particularly described in terms of quantities and type on **Exhibit 1** to this Agreement. Certain of the On-site Improvements are related to the installation of a temporary on-site detention pond and related improvements on the Property ("Phase I"), which are intended to be used until such time as the holder of the MS 4 Permit, (either SEMSWA or ACWWA) has accepted substantial completion of the so-called Regional Pond L-2 Improvements (the "L-2 Improvements") and thereafter until completion of Phase II (as defined below). The remainder of the On-site Improvements on the Property and all of the Off-site Improvements (collectively, "Phase II") are related to certain final Stormwater Improvements that will drain into the L-2

Improvements, which are to be located off-site from the Property and to be constructed and installed by SEMSWA, as provided above.

- B. Developer has heretofore submitted to the City of Centennial and SEMSWA and the City of Centennial and SEMSWA have approved, final construction and engineering plans and drawings, including GESC drawings, for Phase I (collectively, the "Phase I Construction Plans") and for Phase II (collectively, the Phase II Construction Plans"). The Phase I Construction Plans and the Phase II Construction Plans, which are respectively described as such on Exhibit 1, to this Agreement, are sometimes referred to herein collectively as the "Construction Plans" or "Plans." SEMSWA acknowledges that the Plans are suitable for the construction of all Stormwater Improvements in a form approved by SEMSWA as more specifically described in the Standards, bear the stamp of a Colorado licensed engineer with experience in the design and engineering of such Stormwater Improvements and are in conformity with and subject to the ordinances, regulations, rules, and standards of the City of Centennial, SEMSWA, and any other governmental or quasi-governmental authorities having jurisdiction over the Project. Developer shall secure and comply with all necessary permits issued by the City, SEMSWA and other governmental or quasi-governmental authorities having jurisdiction over the development of the Property. Developer shall not modify the Construction Plans for any of the Stormwater Improvements without the prior written approval of SEMSWA. SEMSWA will communicate its approval or disapproval of any such modification within fifteen (15) business days after their receipt of Developer's request.
- C. The required engineering services for the construction of the Stormwater Improvements shall consist of, but not be limited to, surveys, designs, plans and profiles, estimates, as-built drawings, construction supervision, testing, and the submission of necessary documents to SEMSWA as required by the applicable Standards in effect at the time the Construction Plans are approved.
- D. Except as otherwise expressly provided in this Agreement, Developer agrees to provide and pay for all labor, materials, tools, supplies, equipment, water, light, power, transportation, services and all other facilities and materials necessary for the execution and satisfactory completion of the Stormwater Improvements in accordance with the Construction Plans. The costs for which Developer shall be responsible shall also include drainage plans, surveys, preliminary design, final design, construction, construction inspection, and the preparation of as-built drawings and administrative and legal expenses attributable to the Improvements to be constructed.

## **Section II. Construction of Stormwater Improvements**

- A. SEMSWA acknowledges that Developer (or its representative) is the owner of fee title to the property and that simultaneously herewith Developer, at Developer's expense, is granting (or causing to be granted) to SEMSWA good and sufficient easements on all lands upon which the Phase I Stormwater Improvements will be located which easements will by their terms automatically terminate upon initiation of use of the Phase II Stormwater Improvements. Developer shall complete construction of Phase I at Developer's expense. Until initiation of use of the Phase II Stormwater Improvements, and subject to Final Acceptance of the Phase I Stormwater Improvements by SEMSWA in conformance with applicable provisions of the Standards, such Phase I Stormwater Improvements will be utilized for stormwater retention and drainage for the Project and SEMSWA agrees that such Phase I Stormwater Improvements are and will be sufficient for the Project. All such Phase I Stormwater Improvements shall remain the property of Developer, as provided in Section IV below, and may be totally dismantled upon initiation of use of Phase II Stormwater Improvements.

Conditioned upon ACWWA's transfer of its MS4 Permit to SEMSWA or SEMSWA's acquisition of an MS-4 permit applicable to the area where the L-2 Improvements are proposed to be located, SEMSWA hereby covenants and warrants, to Developer, that Phase II will, upon completion, be permitted to drain stormwater into the L-2 Improvements and that capacity in the L-2 Improvements will accept all such stormwater through the existing drainage easement affecting the Property that has been heretofore created by Plat (except to the extent that swales may be located in the easement described in the foregoing Subsection A); and the Plans for Phase II will not hereafter be modified, except to the extent that GESC drawings and related matters may need to be modified as a result of modifications to GESC laws, rules and regulations of applicable governmental authorities, subsequent to the date hereof mandating such modifications (collectively, "GESC modifications") or as otherwise required for public health, safety and welfare. SEMSWA agrees to give Developer prompt written notice of completion of the L-2 Improvements; and, if the GESC drawings have at that time expired, Developer agrees to apply to SEMSWA for reapproval of such GESC drawings (which shall be required solely to comply with GESC Modifications) and related Plans within 90 days after receipt of such notice from SEMSWA. Developer shall commence construction of Phase II by the later of: the date that is 120 days after receipt of such notice from SEMSWA; or 15 days after Developer's receipt of written notice of SEMSWA's reapproval of the GESC drawings and related matters relating to Phase II; and shall diligently pursue such construction to completion. Upon final acceptance by SEMSWA of the Phase II Stormwater Improvements in conformance with applicable provisions of the Standards, they shall be conveyed to SEMSWA at no cost to SEMSWA and free and clear of all liens,

restrictions and encumbrances. The time constraints applicable to construction of Phase II shall be subject to force majeure.

- B. If (i) the MS 4 Permit has not been transferred from ACWWA to SEMSWA, or SEMSWA has not otherwise obtained an MS-4 permit applicable to the area of the proposed L-2 Improvements, and if (ii) the proposed L-2 Improvements are complete at the time that Phase II is complete; then ACWWA agrees that Phase II will be permitted to drain stormwater into the L-2 Improvements and that capacity in the L-2 Improvements will accept all such stormwater; provided that ACWWA makes no representation or agreement as to when, if ever, the proposed the L-2 Improvements will in fact be commenced or completed. Following SEMSWA's receipt of an MS-4 permit applicable to the area of the proposed L-2 Improvements, ACWWA shall have no obligation under this Agreement whatsoever. SEMSWA shall furnish notice to all parties within 30 days of its receipt of an MS-4 permit applicable to the area of the proposed or completed L-2 Improvements which notice shall include an assumption by SEMSWA of ACWWA's obligations hereunder.

To the extent allowed by law and to the extent required for SEMSWA to perform its obligations hereunder, ACWWA hereby delegates to SEMSWA the authority to so perform.

- C. Developer shall provide notice to SEMSWA at least Forty-Eight (48) hours before commencing construction of the Stormwater Improvements or prior to SEMSWA's inspection of any such Stormwater Improvement during or after construction. To the extent that any decisions become necessary during construction as to the quality or acceptability of the materials furnished, the work performed or the manner of performance of the work, Developer shall give SEMSWA three (3) business days notice and the opportunity to make any such decisions. In the event SEMSWA fails to respond within three (3) business days of receiving notice, Developer shall be entitled to make the required decision and the same shall be binding on SEMSWA, provided that the methods and/or materials selected by Developer are in compliance with approved Construction Plans and applicable provisions of the Standards.
- D. The Stormwater Improvements shall be constructed and installed in accordance with the Construction Plans and in accordance with applicable provisions of the Standards and all other applicable ordinances, resolutions and regulations, including but not limited to all building, fire, plumbing, and safety codes, in effect at the time of construction. If SEMSWA reasonably determines that construction or installation is not in compliance with the approved Construction Plans or applicable ordinances, rules and regulations, it shall notify Developer of the required corrections, which Developer shall make within ten (10) business days of receipt of such notification or, if the nature of the corrections is such that

the same cannot be reasonably completed within ten (10) business days , then Developer shall undertake such corrections within ten (10) business days and shall diligently prosecute the same to completion. In the event the Developer fails to make or commence the required corrections within said ten (10) day period, SEMSWA may direct Developer to stop work until corrections are made to the satisfaction of SEMSWA.

- E. Developer shall at its sole cost and expense engage a Colorado registered professional engineer to provide inspection, and testing if required by SEMSWA, during the construction process. Copies of all such tests shall be provided to SEMSWA promptly upon request. Developer shall contact SEMSWA immediately upon the failure of any performance testing, and of any problems that arise which may prevent construction or installation in accordance with the approved Construction Plans.
- F. At all times during said construction, and in accordance with this Addendum, SEMSWA shall have the right to require Developer to conduct testing and inspection, at Developer's expense. If Developer fails to do so within ten (10) business days of a notice from SEMSWA detailing the required test or inspection, or if SEMSWA reasonably believes that any required tests or inspections were either performed incorrectly or falsified, SEMSWA may conduct the same and charge the cost to Developer. No excavation, facility or components of the Stormwater Improvements, shall be covered until inspected by SEMSWA, or until such inspection is waived in writing. Construction shall not proceed beyond required inspections or testing unless approved by SEMSWA. No liability shall attach to SEMSWA by reason of any inspections, observations, testing, or reviews, or by reason of the issuance of any approval or permit for any work subject to this Agreement. Developer shall reimburse SEMSWA for all costs incurred by SEMSWA in the performance of the above services, including associated attorney fees, within thirty (30) days after receipt of SEMSWA's invoice for said services.

### **Section III. Completion**

- A. Except where a shorter time period is prescribed, i. All Phase I Stormwater Improvements herein described, and all matters herein agreed to be performed related to Phase I shall be installed, constructed, or performed by Developer within two (2) years from the date of this Agreement, and ii. All Phase II Stormwater Improvements herein described, and all matters herein agreed to be performed related to Phase II shall be installed, constructed or performed by Developer within two (2) years from the date of commencement of construction of Phase II ("Periods"). Extensions of time up to an additional one year period for completion of Stormwater Improvements may be granted by SEMSWA in writing for good cause shown. "Good Cause" shall be determined by SEMSWA in its sole discretion; notwithstanding the foregoing, Good Cause may include: (a)

force majeure events; (b) unreasonable delay in the receipt of approval, notice, inspection, testing or other required response from SEMSWA; and (c) any extension agreed upon in writing by Developer and SEMSWA. Any extension of time to complete the Stormwater Improvements beyond the two year period shall require the Developer to submit updated construction plans and cost estimates for completion of the remaining Stormwater Improvements and to provide additional or replacement Collateral in an amount equal to one hundred percent (100%) of the cost to construct the Stormwater Improvements remaining to be completed (which cost estimate shall include a cost contingency of 15% of the total estimated costs to construct remaining Stormwater Improvements).

#### **Section IV. Ownership and Maintenance of Stormwater Improvements**

- A. Except as otherwise specifically noted elsewhere in this Agreement and in **Exhibit 1** of this Agreement, the completed Off-site Stormwater Improvements referenced in **Exhibit 1** shall become the sole property of SEMSWA, free and clear of all liens, encumbrances, and restrictions upon acceptance by SEMSWA. Prior to and as a condition of acceptance, Developer shall furnish to SEMSWA unconditional lien waivers that all claims and payments to be made in connection with construction of said Off-site Stormwater Improvements have been satisfied.
- B. Except for those On-site Improvements located within the public rights-of-way as specifically noted in **Exhibit 1**, the completed On-site Improvements referenced in **Exhibit 1** shall be owned and maintained by Developer and its successors and assigns, including but not limited to any homeowners or owners association formed in regard to the subject development; provided that SEMSWA shall have the right to enter upon and access Developer-owned Stormwater Improvements for purposes of repair and emergency maintenance as deemed necessary by SEMSWA in the interest of the public health, safety and welfare.
- C. The Developer and its successors and assigns shall be required to operate and maintain the Stormwater Improvements to ensure that they function as designed, and to provide the required annual inspections and reporting activities in accordance with the Maintenance Agreement(s) and the Operations and Maintenance (O&M) Manual(s) for the Stormwater Improvements.

#### **Section V. Construction Plans and As-Built Drawings**

- A. Prior to undertaking construction of the Stormwater Improvements, Developer shall furnish SEMSWA, at Developer's sole cost, two (2) copies of the Construction Plans and all supplemental Plans, drawings and specifications relating to the Stormwater Improvements.

- B. When Developer has completed the Stormwater Improvements as provided herein, Developer shall provide two (2) copies of As-built drawings showing the Stormwater Improvements in their as-built locations at the time of Developer's request for Probationary Acceptance of the Stormwater Improvements by SEMSWA. As-built drawings shall be prepared under the direction of a Colorado registered professional engineer based on information provided by the general contractor and a survey of surface features of the constructed site within the public right-of-way and easements indicating that the constructed Stormwater Improvements are in substantial compliance with the Construction Plans or that any material deviations have received prior written approval from SEMSWA.

## **Section VI. Collateral**

- A. The Developer shall provide SEMSWA with a construction cost estimate for all costs and expenses associated with the construction and completion of all Stormwater Improvements to be constructed by Developer in accordance with this Agreement. Such cost estimate shall be set forth in **Exhibit 1**. The purpose of said cost estimate is only for determining the amount of security to secure Developer's obligations under this Agreement ("Collateral") and may be revised from time to time to reflect actual costs. Such cost estimates shall include a cost contingency of fifteen percent (15%) of the total estimated construction costs of the Stormwater Improvements.
- B. In order to secure the performance of the construction and installation of the Stormwater Improvements herein agreed by Developer, the Developer shall provide SEMSWA with Collateral in the form of a cash deposit or one or more irrevocable letters of credit ("Letter of Credit") in the same form as attached to the Agreement as **Exhibit 2** with SEMSWA as the beneficiary in the total amount of one hundred percent (100%) of the estimated cost for completion of all the Stormwater Improvements as set forth in **Exhibit 1**. A Letter of Credit form of Collateral shall be issued by Comerica Bank, or other financial institution doing business in Colorado that is acceptable to SEMSWA. Developer shall ensure that the Collateral remains unencumbered and free from claims of others so that any requests of SEMSWA for payment or enforcement may be immediately and unequivocally honored without cost to SEMSWA. Such security shall be maintained, in the amount required by this Agreement, and subject to partial releases as contemplated in Section VII of this Agreement, through Final Acceptance of the Stormwater Improvements by SEMSWA. If at any time prior to Final Acceptance, SEMSWA determines that the Collateral is not sufficient to cover all costs of construction of the Stormwater Improvements, Developer shall be required to post additional or supplemental Collateral in an amount deemed sufficient and approved by



SEMSWA to pay for all costs of construction, including any administrative costs and contingency amount.

- C. If Developer fails to perform or observe any obligation or condition to be performed by Developer under this Agreement pertaining to the Stormwater Improvements, and such default remains uncured for more than thirty days after Developer's receipt of written notice thereof from SEMSWA, SEMSWA may cure the default at Developer's expense and draw on the Collateral from time to time to pay the costs incurred in connection therewith. In the event Developer fails to complete, install or perform any portion of work and/or Stormwater Improvements within said Periods or any period of extension granted by SEMSWA, SEMSWA may complete such remaining work and Stormwater Improvements within a reasonable time by such means and in such manner as it may deem advisable, at Developer's expense. SEMSWA shall be entitled to draw against such Collateral to pay for SEMSWA's actual costs and expenses incurred in contracting for said work and Stormwater Improvements, including the cost of obtaining required permits from the City of Centennial and SEMSWA or any other applicable jurisdiction plus a five percent (5%) administrative fee, plus legal expenses incurred, to cover costs associated with completing the Stormwater Improvements described herein.
- D. In the event the amount of Collateral is not sufficient for SEMSWA to complete the Stormwater Improvements as determined by SEMSWA in its sole discretion, SEMSWA shall be entitled to reimbursement from Developer upon demand for such cost overruns, including but not limited to labor and material costs as well as engineering and legal fees. In the event the Developer fails to maintain Collateral in the amount required pursuant to the terms of this Agreement through Final Acceptance of the Stormwater Improvements, Developer shall be in default of this Agreement and SEMSWA shall be authorized to make demand on the then-existing Collateral.

## **Section VII. Partial Release of Collateral**

- A. Developer may request partial releases of Collateral upon Probationary Acceptance of the Stormwater Improvements as provided in Section IX of this Agreement. The request for partial release must be in writing and shall include copies of bills, invoices and schedules of values for work performed and Stormwater Improvements completed. Upon receipt of such written request for partial release, SEMSWA shall inspect the completed work and Stormwater Improvements within thirty (30) days and shall process such partial release in a manner similar to a request for Probationary Acceptance. Within such thirty (30) day period, SEMSWA will either approve the request for partial release or deny the same with detail as to any aspect of the Stormwater Improvements that SEMSWA determines are not acceptable. When SEMSWA is satisfied that such

work and Stormwater Improvements as specified by Developer have been completed in accordance with the terms hereof, SEMSWA shall approve such request for partial release and SEMSWA shall authorize in writing the release of a portion of the Collateral as is necessary to pay the cost of the work performed and Stormwater Improvements installed pursuant to the terms of this Agreement.

- B. The procedures for completion of Stormwater Improvements and work by SEMSWA and payment to SEMSWA therefore from the Collateral shall apply whether there be one or more defaults on the part of Developer in performing the terms, conditions, and covenants contained in this Agreement.
- C. Notwithstanding the foregoing, SEMSWA shall not be required to make any partial release of the Collateral if doing so would reduce the outstanding amount of the Collateral below an amount equal to 100% of the then current estimate of the costs to be incurred to complete the construction of the remaining Stormwater Improvements (including a fifteen (15%) percent contingency amount). No partial release of any portion of the Collateral shall be deemed an acceptance of an Improvement by SEMSWA. Acceptance of Stormwater Improvements shall be accomplished in accordance with Section IX of this Agreement.

#### **Section VIII. Retainage of Collateral**

SEMSWA shall retain ten percent (10%) of the total amount of the Collateral until all of the Stormwater Improvements have been granted Final Acceptance by SEMSWA in accordance with this Agreement ("Final Acceptance"). Until Final Acceptance, SEMSWA may notify Developer of any defective Stormwater Improvements and Developer shall complete, repair or replace the same within thirty (30) days. In the event Developer fails to so complete, repair or replace such defective Stormwater Improvements, SEMSWA may draw upon the retainage portion of the Collateral to complete, repair or replace the same. Any amount of Collateral remaining at the time of Final Acceptance shall be released to Developer.

#### **Section IX. Standards for Acceptance**

- A. SEMSWA, in accordance with its regulations and under the following terms and conditions, shall accept for maintenance responsibility the Public Stormwater Improvements that are constructed under this Agreement on SEMSWA's or ACWWA's property or easements, or within Centennial or Arapahoe County public rights-of-way. SEMSWA may approve other On-Site Stormwater Improvements for their conformance with applicable construction standards, but shall not accept maintenance responsibility.

1. Probationary Acceptance and Warranty Period. As soon as all of the Stormwater Improvements are installed in accordance with the terms of this Agreement, Developer shall submit a written request to the Director of SEMSWA'S Technical Operations requesting Probationary Acceptance, as defined below, in accordance with the Standards. Within thirty (30) days of receipt of such request, if SEMSWA determines that Stormwater Improvements have been constructed in accordance with the approved Construction Plans, SEMSWA will issue to the Developer a certificate of Probationary Acceptance granting Probationary Acceptance of such Stormwater Improvements and setting the terms of the probation and warranty period. The probation and warranty period will terminate one year from the date of Probationary Acceptance. Upon Probationary Acceptance, SEMSWA will allow a reduction of the Collateral to not less than 10% of the total cost to construct the Stormwater Improvements, as specified in **Exhibit 1**.
  2. Final Acceptance. Stormwater Improvements constructed pursuant to this Agreement are eligible for Final Acceptance in accordance with the Standards no sooner than nine (9) months following the Probationary Acceptance date. Developer shall request Final Acceptance by SEMSWA in writing. After inspection for Final Acceptance, SEMSWA will identify and provide a written list of deficiencies based on a physical inspection of the Stormwater Improvements. Developer shall correct all deficiencies to SEMSWA's satisfaction within three (3) months from the date said deficiency list was issued. When all deficiencies have been corrected and all payments and other performances herein agreed to be made and performed by Developer have been made and completed in accordance with the approved Construction Plans and this Agreement, SEMSWA will issue a Notice of Final Acceptance to the Developer within the time period provided in the Standards. Upon issuance of said Notice of Final Acceptance, all Stormwater Improvements specified in said Notice shall be deemed to be constructed in accordance with the Standards, and shall be approved by SEMSWA. Stormwater Improvements that are constructed under this Agreement on SEMSWA's or ACWWA's property or easements and within Centennial or Arapahoe County public rights-of-way shall be accepted for SEMSWA maintenance responsibility. At such time, SEMSWA will release any remaining Collateral.
- B. SEMSWA, will verify that the On-site Improvements installed under this Agreement are constructed in accordance with SEMSWA requirements and standards. SEMSWA will not accept maintenance responsibility for the On-site Improvements, unless specifically agreed to and defined in a Maintenance Agreement between the Developer and SEMSWA recorded

in the records of the Clerk and Recorder of Arapahoe County, Colorado. Probationary and Final Acceptance of the On-site Improvements, as specifically identified in **Exhibit 1**, shall be handled in the same manner as defined above.

## **Section X. Remedies**

- A. SEMSWA's rights and remedies provided in this Agreement shall not be exclusive and are in addition to any other rights or remedies provided by law. Upon breach of any provision of this Agreement by Developer beyond any notice and right to correct specified herein, SEMSWA may initiate any one or more of the following actions:
  - 1. Recommend to the City of Centennial, a delay in processing of any pending land development related application;
  - 2. Issue stop work orders;
  - 3. Refuse to issue or approve any Stormwater Public Improvements or Grading, Erosion and Sediment Control (GESD) permits, or recommend to the City to refuse to issue or approve City of Centennial permits, including but not limited to, right-of-way access, street cut, over-lot grading or building permits, certificates of occupancy, or final plats;
  - 4. Draw from the Collateral to cover the costs associated with correcting the Developer's breach;
  - 5. Recommend to the City of Centennial to issue a citation to the Developer or any contractor or subcontractor for violating requirements of the Centennial Municipal Code; or
  - 6. Initiate legal proceedings in any appropriate court of law. If such action is taken, SEMSWA shall be entitled to its reasonable attorneys' fees.
- B. Any amounts due and owing to SEMSWA under this Agreement that are not paid in a timely manner may be certified to the Arapahoe County Treasurer for collection with taxes.

## **Section XI. Compliance with Law**

Developer, in developing the Property and constructing the Stormwater Improvements herein described, shall fully comply with all applicable rules, regulations, standards, and ordinances of SEMSWA, the City of Centennial and other governmental agencies and bodies having jurisdiction over the Project in effect at the time of construction. In the event of a conflict between applicable rules, regulations, standards and ordinances, the most restrictive upon Developer shall control.

## **Section XII. Construction Site Maintenance**

- A. Developer shall take all reasonable steps necessary to prevent its construction activities from damaging adjacent properties, including SEMSWA's property. If any adjacent property is damaged or destroyed by and during the construction of the Stormwater Improvements, Developer shall, at its cost, promptly repair or replace the same to a condition similar or equal to that existing before such damage or injury.
- B. During construction, Developer shall use proper air quality control and erosion and sedimentation control and maintain streets and roads in such a manner that they may be reasonably traveled upon. If SEMSWA determines in its sole discretion that stormwater pollution emanating from the Property related to construction activities is unacceptable, it may order measures be taken, and Developer shall comply with such order. In the event that Developer does not comply with such abatement measures within two (2) days, SEMSWA may order construction to cease until Developer has complied with such abatement measures and Developer shall so comply. If SEMSWA determines that Developer's stormwater pollution could result in an enforcement and / or penalty proceeding by the State of Colorado or the Federal Government, SEMSWA may order an immediate stoppage of work and seek a temporary restraining order against the Developer until the Developer has complied. The Collateral shall be sufficient to include costs associated with re-vegetation of areas destroyed by such construction. Developer may secure construction areas within the Property from the general public during construction, except for necessary local traffic, representatives of SEMSWA and other appropriate jurisdictions on official business, and emergency service providers.

## **Section XIII. Maintenance and Workmanship of Stormwater Improvements.**

- A. Developer shall keep and maintain all the Stormwater Improvements in good order and condition until SEMSWA issues a Notice of Final Acceptance pursuant to Section IX of this Agreement. Developer shall, at its cost, repair or replace any damage or destruction of the Stormwater Improvements that occurs prior to such Final Acceptance by SEMSWA, except to the extent that such damage or destruction is caused by agents or employees of SEMSWA.
- B. Unless otherwise specified, all materials for Stormwater Improvements shall be new and both workmanship and materials shall be of good quality.

## **Section XIV. Contractual Obligation**

Developer agrees that the provisions and requirements of this Agreement are entered into with full knowledge, free will and without duress. Developer agrees and desires

that the agreements contained herein regarding the payment of fees, installation and dedication of the Stormwater Improvements, and conditions for subdivision and building approvals, including the incorporation of any provision of applicable Standards, are imposed by contract, independent of the continued validity or invalidity of any of the provisions of state law or Standards. The agreements to pay fees, and construct and dedicate public Stormwater Improvements or provide security are reasonable and binding commitments on the part of Developer and reasonably relate to Developer's estimates of the extent and timing of impacts that are expected to occur from the development of the Property, and are in rough proportion to such impacts.

## **Section XV. Miscellaneous**

- A. Section Headings. The section headings in this Agreement are inserted herein only for convenience of reference and in no way shall they define, limit or describe the scope or intent of any provision of this Agreement.
- B. Assignment and Release. This Agreement may not be assigned or delegated by the Developer without the written consent of SEMSWA. Any such written assignment shall expressly refer to this Agreement, specify the particular rights, duties, obligations, responsibilities, or benefits so assigned, and shall not be effective unless approved by resolution of the SEMSWA Board of Directors. No assignment shall release the Developer from performance of any duty, obligation, or responsibility unless such release is clearly expressed in such written document of assignment. Prior to approving any release of the Developer, SEMSWA may, at its sole discretion, require the party assuming any duty, obligation, or responsibility of the Developer to provide to SEMSWA written evidence of financial or other ability to meet the particular duty, obligation or responsibility being assumed by the party. This Agreement shall be freely assignable by SEMSWA or ACWWA.
- C. Binding Effect. This Agreement shall inure to the benefit of, and be binding upon, the Parties and their respective legal representatives, successors and assigns. This Agreement shall continue upon subdivision of the Property and bind the subdivision and all purchasers, lessors and subsequent owners of any property within the subdivision until all provisions of this Agreement are satisfied.
- D. Recording; Benefit. This Agreement shall be recorded with the Clerk and Recorder of Arapahoe County, Colorado and its obligations shall run with the land. Developer shall pay the associated recording fee imposed by Arapahoe County.
- E. Notices. Any notice required or permitted by this Agreement shall be in writing and shall be deemed to have been sufficiently given for all purposes if sent by certified or registered mail, postage and fees prepaid, addressed to the Party to whom such notice is intended to be given at the

address set forth on the signature page below, or at such other address as has been previously furnished in writing to the other Party. Such notice shall be deemed to have been given when deposited in the U.S. Mail.

- F. Additional Documents or Action. Parties agree to execute any additional document and to take any additional action necessary to carry out this Agreement.
- G. Waiver of Breach. The waiver by any Party to this Agreement of a breach of any term or provision of this Agreement shall not operate or be construed as a waiver of any subsequent breach by any Party.
- H. Indemnification. Developer hereby expressly binds itself to indemnify and save harmless SEMSWA and ACWWA and their respective directors, officers and employees, against all suits or actions of every kind and nature brought, or which may be brought against them or any of them, or loss, cost or expense incurred by them or any of them for, or on account of, any injury or damage received or sustained by any persons, firms or corporations during the construction of the Stormwater Improvements and through Final Acceptance as a result of Developer's breach of any of its obligations hereunder, or the negligent or willful misconduct of Developer or any of its employees, agents or contractors.

Developer shall also indemnify and hold SEMSWA and ACWWA harmless from any liability either of them may have on account of any change in direction, nature, quality, or quantity of historical drainage flow, resulting from the development of the Property, or from construction of streets and storm sewers within or serving the Property, or damages to the Property resulting from natural conditions including but not limited to expansive soils, geologic hazard, wildfire hazard or flood hazard, if Developer is established to be negligent.

SEMSWA and ACWWA shall assert, to the fullest extent permitted by law, immunity from suit under the Colorado Governmental Immunity Act, § 24-10-101 *et seq.* C.R.S., as well as the limitations upon liability provided herein.

- I. Contractors. Developer shall give notice of the terms of this Agreement in all contracts for construction of the Stormwater Improvements and provide a copy of this Agreement to the contractors and subcontractors.
- J. Entire Agreement. This Agreement represents the entire agreement between the Parties and, supersedes any prior oral or collateral agreements or understandings.
- K. Amendment. This Agreement may be amended only by an instrument in writing signed by the Parties.

- L. No Third Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to SEMSWA and the Developer, and nothing contained in this Agreement shall give or allow any such claim or right of action by any third party except the City and ACWWA. It is the express intention of SEMSWA and Developer that any person other than SEMSWA or Developer and their successors and assigns receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only except the City and ACWWA.
- M. Governing Law, Venue and Enforcement. This Agreement shall be governed by the laws of the State of Colorado. Venue for any action arising from this Agreement shall lie with any appropriate court within Arapahoe County, Colorado. The Parties agree and acknowledge that this Agreement may be enforced at law or in equity, including an action for damages or specific performance.
- N. Authorization of Parties' Representative. The undersigned hereby represent that they serve as representatives of the Party for which they have executed this Agreement and are fully authorized to execute this Agreement on behalf of such party.

IN WITNESS WHEREOF, the Parties hereto have set their hands and seals the day and year first above written.

SOUTHEAST METRO STORMWATER  
AUTHORITY

By: \_\_\_\_\_  
Executive Director  
76 Inverness Drive, Suite A  
Englewood, CO 80112-5106

ARAPAHOE COUNTY WATER AND  
WASTEWATER AUTHORITY

By: \_\_\_\_\_  
General Manager  
13031 E. Caley Avenue  
Centennial, Colorado 80111

OWNER/DEVELOPER:  
Trust Company of America, Inc.

By: \_\_\_\_\_



Title: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_

STATE OF COLORADO                    )  
  ) ss.  
COUNTY OF \_\_\_\_\_            )

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_  
20\_\_\_\_,     by       \_\_\_\_\_                    as       \_\_\_\_\_                    [Title]     of  
\_\_\_\_\_.

Witness my hand and official seal:

My Commission expires: \_\_\_\_\_.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of Notary

\_\_\_\_\_  
Address of Notary

[S E A L]

**EXHIBIT 1 TO AGREEMENT  
ENGINEER'S COST ESTIMATE OF STORMWATER IMPROVEMENTS**

**EXHIBIT 2 TO AGREEMENT  
FORM OF LETTER OF CREDIT**

**IRREVOCABLE LETTER OF CREDIT**

Southeast Metro Stormwater Authority

Number: \_\_\_\_\_  
Date: \_\_\_\_\_  
Expiration: \_\_\_\_\_

Dear Sir or Madam:

[Name of Bank] ("Bank") hereby establishes in favor of Southeast Metro Stormwater Authority ("Beneficiary"), for the account of Trust Company of America, Inc. ("Customer"), an Irrevocable Letter of Credit in the amount of \_\_\_\_\_ Dollars (\$xxx,xxx) available by immediate payment upon presentation at Bank's office at [Bank's address – provide Colorado branch or affiliate] of Beneficiary's sight draft(s) in an amount not exceeding \$xxx,xxx, and each sight draft must bear the reference: "Drawn on [Bank] Irrevocable Letter of Credit No. \_\_\_\_\_, dated \_\_\_\_\_."

In addition, Beneficiary's sight draft(s) must be accompanied by this Irrevocable Letter of Credit and an Affidavit of Certification in the form attached hereto as Exhibit 2-A (the "Affidavit"). The Affidavit shall certify that Customer has failed to meet its obligations under the terms of a Subdivision Improvement Agreement relating to LU-0803-005/D08-1017, Trust Company of America, Inc. Final Development Plan. Upon presentation of such Affidavit in compliance with the terms contained herein, Bank shall honor the accompanying sight draft(s) and shall not be required to determine questions of fact or law between Beneficiary and Customer.

This Irrevocable Letter of Credit sets forth the full understanding of the parties hereto and Bank hereby promises to Beneficiary that any drafts drawn under or in substantial compliance with the terms of this Irrevocable Letter of Credit will be duly honored if presented to [Bank] on or before \_\_\_\_\_.

This Irrevocable Letter of Credit is nontransferable.

This Irrevocable Letter of Credit is subject to the most recent edition of the Uniform Customs and Practice for Documentary Credits published by the International Chamber of Commerce. The forum for all disputes regarding this letter of credit shall be the District Court for the County of Arapahoe, State of Colorado.

Very truly yours,

[Name of Bank]

\_\_\_\_\_  
Title

## EXHIBIT 2-A TO AGREEMENT

IRREVOCABLE LETTER OF CREDIT NO. \_\_\_\_\_

Dated: \_\_\_\_\_

## AFFIDAVIT OF CERTIFICATION

STATE OF COLORADO )  
 )  
COUNTY OF ARAPAHOE ) ss.

I, \_\_\_\_\_, being duly sworn, state as follows:

Title and Authority of Affiant. I am \_\_\_\_\_ for Southeast Metro Stormwater Authority, Colorado and am authorized to act on behalf of the Southeast Stormwater Authority, Colorado in this matter.

**Certification.** Under penalty of law, I hereby certify that the Customer has failed to meet its obligations under the terms of a Subdivision Improvement Agreement relating to the \_\_\_\_\_ Final Development Plan, and the Southeast Metro Stormwater Authority is entitled to draft this Letter of Credit.

SOUTHEAST METRO STORMWATER  
AUTHORITY

By: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, by \_\_\_\_\_.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_.

Notary Public

( S E A L )