

**CHAMISA STORM DRAIN
DRAINAGE IMPROVEMENT AGREEMENT**

THE BOARD OF EDUCATION OF THE CITY OF ALBUQUERQUE, Governing Board of, for and on behalf of the Albuquerque Municipal School District No. 12, Counties of Bernalillo and Sandoval, State of New Mexico, a political subdivision of the State of New Mexico ("APS"), GELTMORE LAND CO, LTD., a New Mexico limited liability company ("Geltmore"), R. J. SCHAEFER REALTY & INVESTMENTS, INC., a New Mexico corporation ("Schaefer"), SHARIF A. (aka "Felix") RABADI, ("Rabadi"), BUILDERS INVESTMENTS COMPANY OF NEW MEXICO, LTD. Co, a New Mexico Limited Liability ("BIC"), and CLEARBROOK INVESTMENTS, INC., a New Mexico Corporation, ("Clearbrook") (collectively, the parties are referred to herein as the "Owners") agree:

RECITALS:

1. WHEREAS, the Owners own property south of Paradise Boulevard, and each separately described on Exhibit A (Property Ownership) attached hereto (each separately an "Owner's Property" and collectively the "Properties"); and
2. WHEREAS, the Albuquerque Metropolitan Arroyo Flood Control Authority ("AMAFCA") has agreed to construct a storm drainage outlet located in the vicinity of the intersection of Lyons Boulevard and Paradise Boulevard, to be known as the Piedras Mercadas Diversion Storm Drain Project (the "AMAFCA Project"); and
3. WHEREAS, AMAFCA and the City of Albuquerque (the "City") require that the Owners participate in the construction of a storm drainage project to convey storm drainage from the Properties to the AMAFCA Project as more specifically set forth herein; and
4. WHEREAS, the Owners have engaged Tierra West, LLC to design a storm drainage facility across the Properties as more specifically described on the Chamisa Drainage Management Plan, Exhibit B attached hereto (the "Storm Drainage Facility"); and
5. WHEREAS, Tierra West, LLC has estimated the total cost of design and construction of the Storm Drainage Facility as reflect in Exhibit C hereto and titled Opinion of Probable Cost; and
6. WHEREAS, each Owner's Property is estimated to discharge storm water flows to the Storm Drainage Facility in the amounts as set forth on Exhibit D attached hereto entitled Pro Rata Calculation Sheet; and

7. WHEREAS, the Owners have agreed to share in the costs for entitlement, design and construction of the Storm Drainage Facility, as more fully set forth herein; and
8. WHEREAS, AMAFCA and the City require that each Owner execute this Agreement as a condition to AMAFCA's agreement to construct the AMAFCA Project and for AMAFCA and the City to approve development of each Owner's Property;

NOW THEREFORE, THE PARTIES HERETO IN CONSIDERATION OF THE MUTUAL PROMISES AND COVENANTS SET FORTH HEREIN AGREE AS FOLLOWS:

Section One – General

- 1.1 The purpose of this Agreement is to provide for the entitlement, design and construction (herein referred to as the "Costs") of the Storm Drainage Facility.
- 1.2 The parties to this Agreement each agree to the commitments contained herein for the construction of the Storm Drainage Facility.
- 1.3 Each party to this Agreement agrees to timely provide its, his or her contribution as stated herein.
- 1.4 Each party agrees to timely execute any further documents reasonably required to effectuate the provisions of this Agreement.

Section Two – Each Party Agrees:

- 2.1 That its share of the Storm Drainage Facility Costs will be as shown on Exhibit D under the column entitled "Pro Rata Amount".
- 2.2 Each party to construct its portion or contribute its share of the Costs for the Storm Drainage Facility, no later than 5 years after receipt of notice from Tierra West, LLC that the City has approved the plans and specifications for the Storm Drainage Facility for the main storm drainage system for Lyons Boulevard through the basin. The contribution to AMAFCA to increase the Lyons outfall will be made within seven (7) days after authorization by the AMAFCA Board of Directors to advertise for construction of the Lyons outfall. Contributions to AMAFCA will be limited to \$285,000.00 total payment. In the event that any Owner fails to make its contribution, then this Agreement shall terminate and the Owners' contributions shall be returned. The payments will be made to (Name of Escrow Entity) to hold and disburse to Tierra West, LLC in accordance with separate escrow instructions of even date herewith.
- 2.3 In the event that actual Costs exceed the Exhibit D estimates, each Owner, except APS, will deposit its pro rata share of any excess within 60 days after

notice from Tierra West, LLC, such notice to be accompanied by a reasonable breakdown and description of additional costs. In the event that the deposited funds exceed the actual Costs, the escrow agent will disburse any such excess to the Owners, except APS, in accordance with their pro rata shares.

- 2.4 If any Owner fails to timely make its contribution and the other Owners advance the defaulting Owner's contribution, a lien will be placed against the defaulting Owner's Property by the remaining Owners, in an amount equal to the promised contribution plus related attorney fees and costs associated with the placing of the lien, together with interest at the rate of 10% per annum from the date of disbursement. Such lien may be foreclosed in accordance with law as is provided for the foreclosure of mortgages. Such lien will be evidenced by a notice of lien filed by the Owners making such contribution.
- 2.5 Each Owner covenants and warrants that it is the owner in fee simple of each Owner's Property, that it has a good lawful right to convey such Property or any part thereof, and has all requisite approvals and authority to enter into this Agreement, and that it will forever warrant and defend the title to such Property against all claims from all persons or entities.
- 2.6 Each Owner agrees to grant a storm drainage easement to the other Owners and to AMAFCA, in the form substantially as attached hereto as Exhibit E. **[Such easement shall be granted upon completion of the plans and specifications and preparation of a legal description for location of the easement, by Tierra West, LLC.]**
- 2.7 The permanent drainage detention pond being placed on the southeast corner of the APS property shall be designed and constructed to accept all developed and proposed drainage discharge from the APS property. APS shall have the right, at any time after construction of the permanent detention pond, to remove the northerly ponds on the APS property and divert all storm drainage and site run-off to the permanent detention pond.
- 2.8 APS shall have no obligation to maintain the drainage facilities contemplated hereunder and shall have no liability for the maintenance or safety of such facilities.
- 2.9 Each Owner agrees that no bids or proposals for construction shall be solicited unless and until all owners have reviewed and approved the storm drainage facility construction documents.

Section Three – All Parties Further Agree:

- 3.1 All parties will strive for prompt action and timely response.

- 3.2 If any situation arises which adversely affects a party's participating in the Agreement, said party will immediately, and in writing, notify the other parties.
- 3.3 Any circumstance, including the above, which materially affects this Agreement will be promptly and equitably resolved by all parties, and if necessary, an amendment to this Agreement shall be executed.
- 3.4 The Agreement shall not be assignable by any of the parties to this Agreement without the written consent of the other parties to the Agreement, which shall not be unreasonably withheld.
- 3.5 Any future alteration to the Project or any change or modification in operation which affects the Project's capacity or functioning shall be agreed to, in writing, and in advance of such change or alteration, by all parties to this Agreement.
- 3.6 Strict accountability shall be required for all funds received and disbursed under the terms of this Agreement and upon request; any party shall furnish to the other an accounting of expenditures.
- 3.7 This Agreement may be modified only by mutual written Agreement of the parties hereto.
- 3.8 The parties understand and agree that the obligation of each party under this Agreement shall be performed in compliance with all applicable laws, statutes and ordinances. Nothing herein is intended to constitute any agreement for the parties to perform any activity in violation of the Constitution or Laws of the State of New Mexico or the Ordinances of the City of Albuquerque.
- 3.9 If any clause or provision in this Agreement is illegal, invalid, or unenforceable, under present or future laws effective during the term of this Agreement, then and in that event, it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby.
- 3.10 It is specifically agreed between the parties executing this Agreement that this Agreement does not and is not intended to create in the public, or any member thereof, any rights whatsoever, such as, but not limited to, the rights of a third party beneficiary, or to authorize anyone not a party to the agreement to maintain a suit(s) for wrongful death(s), bodily and/or personal injury(ies) to person(s), damage(s), and/or any other claim(s) whatsoever pursuant to the provisions of this Agreement.

Section Four – Notices:

Notices to the extent required or others as necessary under this Agreement shall be hand delivered and signed for or mailed certified mail return receipt requested, postage prepaid, to the address below the signature blocks hereto.

A party may designate by notice to the other parties a new address to which any notice may thereafter be given.

Section Five – Successors and Assigns:

The Agreement and the rights, interests, and obligation hereunder shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns.

Dated: _____, 2004

The Board of Education
of the City of Albuquerque


By: _____
Michael J. Vigil, Chief Business Officer

Date: _____

Address:
Michael J. Vigil
Chief Business Officer
Board of Education
City of Albuquerque
P.O. Box 25704
Albuquerque, NM 87125-0704

Copy to:
Charles O. Atwood
Director, Real Estate Department
Albuquerque Public Schools
P.O. Box 25704
Albuquerque, NM 87125-0704

GELTMORE LAND CO, LTD., a New Mexico
limited liability company

By: 
Name: HARRY L. SILVERMAN
Title: MEMBER

Address:
Harry Silverman
~~4408 Canyon Court NE~~
~~Albuquerque, NM 87111-3010~~
6211 San Mateo Blvd. NE
Suite 130
ALBUQUERQUE, NM 87109

BOULEVARD LIMITED PARTNERSHIP

A New Mexico limited partnership

By: **R. J. SCHAEFER REALTY & INVESTMENTS, INC.**, a New Mexico corporation its Managing Partner

By: Robert J. Schaefer

Name: Robert J. Schaefer

Title: President

Address:

Robert J. Schaefer
5600 Wyoming Boulevard NE
Suite 275
Albuquerque, NM 87109

SHARIF Shah-Sabael
~~RAH~~ **RABADI**

Address:

4415 Sherre Dr. NE
ALBU, NM 87111

Attn: _____

**BUILDERS INVESTMENTS COMPANY OF
NEW MEXICO, LTD. Co**, a New Mexico
Limited Liability Company

By: Mike Marra

Name: Mike Marra

Title: Member

Address:

6300 Jefferson St. NE

Suite 102

Attn: Mike MARRA

CLEARBROOK INVESTMENTS

By:  _____

Name: Scott Henry _____

Title:  _____

Address:

8901 Adams NE, Suite A
Albuquerque, NM 87113