

AGREEMENT AND COVENANT

10-14-11

This Agreement and Covenant ("Drainage Covenant"), between the City of Albuquerque, New Mexico ("City") Mesa Del Sol, LLC., a New Mexico limited liability company ("Mesa") and Forest City Mesa Residential Development, LLC, a New Mexico limited liability company ("FCM"), is made in Albuquerque, New Mexico and is entered into as of the date of recording this Agreement with the Bernalillo County Clerk.

RECITALS:

A. Mesa, and/or its affiliates, are the owners and the developers of the Mesa del Sol master planned community (the "**Project**"), a portion of which will be developed into the first phase of the residential area of the Project (the "**Phase I Residential Property**") which is described as follows:

All of the property shown and described on the Bulk Land Plat of Tracts A-1 thru A-6 Mesa del Sol Innovation Park filed in the Bernalillo County, New Mexico real estate records on December 6, 2010, in Plat Book 2010C, Page 0131, Document No. 2010123421 (the "Phase I Bulk Plat") a copy of the Phase I Bulk Plat is attached as Exhibit "C"

- B. This Agreement and Covenant is limited to the Phase I Residential Property.
- C. Mesa is the owner and FCM will be the developer of the Phase I Residential Property;
- D. Upon platting into residential lots (the "Phase I Residential Plats") the Phase I Residential Property may contain parcels which will have drainage improvements constructed thereon, including drainage retention ponds (the "Drainage Improvements") and recreational uses, including trails (the "Recreational Improvements"), which parcels are referred to herein as the "Open Space Parcels" [Notwithstanding the designation of these parcels as "Open Space Parcels", these parcels are not dedicated to the City as major public Open Space];
- E. Additional parcels may be created within the Phase I Residential Plats which only serve for purposes of construction and maintenance of Drainage Improvements ("**Drainage Parcels**");
- F. The Drainage Improvements on the Initial Open Space Parcel (Tract A-5) and the portions of Tract A-6 which will become Drainage Parcels are shown on Sheet 1 of the Grading and Erosion Control Plan for Mesa Del Sol Neighborhood Montage Unit 2, a copy of which is attached hereto as Exhibit "B" (the "Initial Drainage Improvements") and are regulated by the Drainage Report for Mesa Del Sol Residential Montage Unit 1 and 2 dated December 9, 2010, prepared by Bohannan Huston, Inc. (the "Initial Drainage Report").
- G. The Initial Open Space Parcel and the Drainage Parcels are currently owned by Mesa, but will be conveyed in the future to an incorporated association of owners of the property within the Phase I Residential Property (the "Association");

- H. The Drainage Improvements will be maintained by Mesa, until such time as the Open Space Parcels and/or Drainage Parcels are conveyed to the Association, at which time they shall be maintained by the Association. The term Drainage Improvements shall include those shown on supplements to this Drainage Covenant in the form as attached as Exhibit "A";
- I. The City has been, or will be, granted drainage easements by plat dedication (the "Drainage Easements") to permit the discharge of "public" storm waters on to the Initial Open Space Parcels and Drainage Parcels, and to give the City the right to maintain the Initial Drainage Improvements in the event that Mesa, or the Association, fails to do so.

NOW THEREFORE, the parties agree as follows:

1. <u>Mesa's Responsibility for Drainage Improvements</u>. Mesa will be solely responsible for constructing, maintaining, repairing and, if required, modifying the Drainage Improvements, all in accordance with standards required by the City as per the Initial Drainage Report on file at the City Engineer's office, as well as future drainage reports approved by the City Engineer for portions of the Phase I Residential Property which will be identified on Supplements to this Drainage Covenant in the form as attached as Exhibit "A". Mesa will be solely responsible for paying all related costs. Mesa will not permit the Drainage Improvements to constitute a hazard to the health or safety of the general public. Mesa will conform with all applicable laws, ordinances and regulations.

Mesa will be further responsible for ensuring that, within 96 hours of the conclusion of any single storm event, where the storm's "conclusion" is reasonably determined by the City, the pond water surface will be 18" or less in depth. In the event of successive and overlapping storm events, this requirement is applicable to the last and most recent storm event.

- 2. <u>Demand for Repair, Modification or Removal</u>. The City may send written notice ("**Notice**") to Mesa requiring Mesa to repair or modify the Drainage Improvements within sixty (60) days ("**Deadline**") and Mesa will comply promptly with the requirements of the Notice. Mesa will perform all required work by the Deadline, at Mesa's sole expense.
- 3. Failure to Perform by Mesa and Emergency Work by City. If Mesa fails to comply with the terms of the Notice by the Deadline stated, or, if the City determines that an emergency condition exists, the City may perform the work itself. The City then may assess Mesa for the cost of the work and for any other expenses or damages which result from Mesa's failure to perform. Mesa agrees promptly to pay the City the amount assessed. If Mesa fails to pay the City within thirty (30) days after the City gives Mesa written notice of the amount due, the City may impose a lien against the Phase I Residential Property, for the total resulting amount.
- 4. <u>City Use of Open Space Parcels/Drainage Parcels.</u> The City has the right to enter upon the Open Space Parcels/Drainage Parcels at any time and perform whatever inspection, installation, maintenance, repair, or modification of the Drainage Improvements ("**Work**") it deems appropriate without liability to Mesa pursuant to the terms hereof. If the Work affects the Recreational Improvements the City will not be financially or otherwise responsible for rebuilding or repairing the Recreational Improvements. Mesa will promptly repair the Recreational Improvements to the City's satisfaction. The cost of repairing the Recreational Improvements will be paid by Mesa.

- 5. Cancellation of Agreement and Release of Covenant. This Agreement may be canceled and Mesa's covenants released by the City at will by the City mailing to Mesa and Mesa notice of the City's intention to record a Cancellation and Release with the Bernalillo County Clerk. The Cancellation and Release will be effective thirty (30) days after the date of mailing the notice to Mesa unless a later date is stated in the notice or the Cancellation and Release. After the effective date, the City will record the Cancellation and Release with the Bernalillo County Clerk. No such cancellation shall prevent Mesa's continued use of the Open Space Parcels for the Drainage Improvements.
- 6. <u>Assessment</u>. Nothing in this Agreement shall be construed to relieve Mesa or FCM, its heirs, assigns and successors from an assessment against the Phase I Residential Property for improvements under a duly authorized and approved Special Assessment District.
- 7. <u>Notice</u>. For purposes of giving formal written notice to Mesa and FCM, the addresses are :

Mesa Del Sol, LLC. 5700 University West Blvd. SE, Suite 310 Albuquerque, NM 87106

Forest City Mesa Residential Development, LLC 5700 University West Blvd. SE, Suite 310 Albuquerque, New Mexico 87106

Notice may be given to Mesa and FCM either in person or by mailing the notice by regular U.S. mail, postage paid. Notice will be considered to have been received by Mesa and FCM within 3 days after the notice is mailed if there is no actual evidence of receipt. Mesa and FCM may change its addresses by giving written notice of the change by certified mail, return receipt requested, to the City Engineer at P.O. Box 1293, Albuquerque, New Mexico 87103.

- 8. <u>Indemnification</u>. Mesa agrees to defend, indemnify and hold harmless the City, its officials, agents and employees from and against any and all claims, actions, suits or proceedings of any kind brought against said parties as a result of Mesa's negligence, acts, or omissions in use of the Drainage Improvements. To the extent, if at all, Section 56-7-1 NMSA 1978 is applicable to this Agreement, this Agreement to indemnify will not extend to liability, claims, damages, losses or expenses, including attorney's fees, arising out of the negligence, acts, or omissions of the City, its officers, employees or agents.
 - 9. Term. This Agreement shall continue until revoked by the City.
- 10. <u>Binding on Mesa's Property</u>. The covenants and obligations of FCM set forth herein shall be binding on Mesa, its affiliates, its heirs assigns and successors and on the Phase I Residential Property and constitute covenants running with Phase I Residential Property until released by the City.
- 11. <u>Assignment to the Association</u>. Mesa intends to assign its rights and obligations pursuant to this Drainage Covenant to the Association, which assignment shall require the consent of the City which consent shall not be unreasonably withheld. Upon such assignment

and assumption by the Association of Mesa's obligation set forth herein, Mesa and FCM shall have no further obligation hereunder.

- 12. <u>Entire Agreement</u>. This Agreement contains the entire agreement of the parties and supersedes any and all other agreements or understandings, oral or written, whether previous to the execution hereof or contemporaneous herewith.
- 13. <u>Changes of Agreement</u>. Changes to this Agreement are not binding unless made in writing, signed by both parties.
- 14. <u>Construction and Severability</u>. If any part of this Agreement is held to be invalid or unenforceable, the remainder of the Agreement will remain valid and enforceable if the remainder is reasonably capable of completion.
- 15. <u>Captions</u>. The captions to the sections or paragraphs of this Agreement are not part of this Agreement and will not affect the meaning or construction of any of its provisions.

MESA:

MESA DEL SOL, LLC, a New Mexico limited liability company

By: FC Covington Manager, LLC, a New Mexico limited liability company, Member

By: Forest City NM, LLC, a
New Mexico limited liability company, Member

By: Forest City Commercial Group, Inc., an Ohio corporation, Sole Member

SA RESIDENTIAL DEVELOPMENT

FOREST CITY MESA RESIDENTIAL DEVELOPMENT, LLC, a New Mexico limited liability company

By: Forest City Residential Group, Inc., an Ohio

corporation

Its: Sometar

STATE OF NEW MEXICO	
COUNTY OF BERNALILLO)	SS.
New Mexico limited liability company, Members	acknowledged before me this 27 day of corporation, Sole Member, Forest City NM, LLC, a er of FC Covington Manager, LLC, a New Mexico I Sol, LLC, a New Mexico limited liability company.
	Notary Public
My Commission Expires: 1/-18-2	0/3
STATE OF NEW MEXICO)	SS.
COUNTY OF BERNALILLO)	. L
The foregoing instrument was duly by Last F. Forest City Residential Group, Inc., an Oh Residential Development, LLC, New Mexico	acknowledged before me this 27% day of jo corporation, Sole Member, Forest City Mesa limited liability company Notary Public
My Commission Expires: //-18-20/	3
APPROVED: Richard Dourte, City Engineer Dated: 4-14-14 CITY'S ACK	હોકોત)~(' NOWLEDGMENT
STATE OF NEW MEXICO)	
) ss COUNTY OF BERNALILLO)	
This instrument was acknowledged Albuquerque, a New Mexico municipal corpo Notary Public My Commission Expires: / C / / / / / / / / / / / / / / / / /	neer, Planning Department, for the City of
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EXHIBIT "A"

SUPPLEMENT TO AGREEMENT AND COVENANT

				AND COVENANT ("Supplement") is made
				supplements that certain Agreement and
Covenant entered into by a	and bet	ween t	the City	of Albuquerque (the "City") and Mesa del
Sol, LLC, a New Mexico lim	lited lia	bility co	ompany	/ (" Mesa ") dated, 201,
and filed in the Bernalillo	County	, New	Mexico	real estate records on,
201 In Book P	age	(tne "Di	rainage Covenant"), as follows:
•	_			Drainage Ponds " as used in the Drainage Exhibit(s) and
2. The term " D include those improvemen				ents" as used in the Drainage Covenant (s), and
3. The term " Dr reports shown on Exhibit "		Repo	rts " us	ed in the Drainage Covenant includes those
Executed as of the day an	d year	first se	et out a	bove.
	CITY	OF AL	BUQU	FROUE a
	CITY OF ALBUQUERQUE, a New Mexico Municipal Corporation			
	Bv:			
	By: Its			
	MESA DEL SOL, LLC,			
	a New Mexico limited liability company			
	By:		-	n Manager, LLC, a New Mexico ty company, Member
		Ву:		t City NM, LLC, a Mexico limited liability company, Member
			Ву:	Forest City Commercial Group, Inc., an Ohio corporation, Sole Member
				By:
				Its:

FOREST CITY MESA RESIDENTIAL DEVELOPMENT, LLC, a New Mexico limited liability company

Ву:	Forest City Residential Group, Inc., an Ohio corporation
	By:

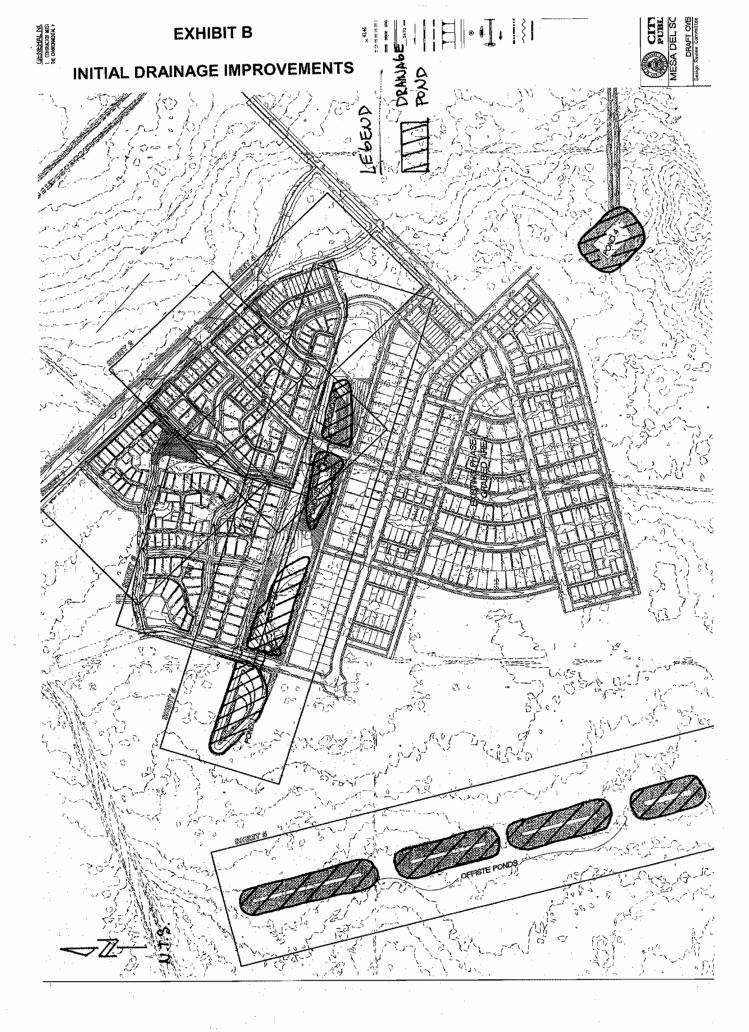


EXHIBIT C PHASE ONE BULK PLAT

