

**SCHOOL DISTRICT 27J  
CAPITAL FACILITY FEE FOUNDATION**

**PARTICIPANT AGREEMENT**

THIS PARTICIPANT AGREEMENT (the "Agreement") is made and entered into as of this \_\_\_ day of \_\_\_\_\_, 20\_\_\_, by and among the School District 27J Capital Facility Fee Foundation, a Colorado nonprofit corporation (the "Foundation"), Brighton Public School District 27J, a Colorado public school district (the "District"), and \_\_\_\_\_, a Colorado \_\_\_\_\_, (the "Participant").

**RECITALS**

WHEREAS, the District is a Colorado school district organized and existing for purpose of delivering school facilities, programs and services within its boundaries in Adams and Weld Counties; and

WHEREAS, Participant is engaged in or expects to be engaged in the construction of Residential Units (as hereinafter defined) within the Brighton School District 27J, Adams and Weld County, Colorado (the "District"), and specifically with regard to the property described in Exhibit "A," attached hereto and incorporated herein (the "Property"), which will necessitate the construction or expansion of school facilities; and

WHEREAS, Participant is either the record owner of the Property as of the date of this Agreement, or Participant intends to acquire the Property in connection with certain pending development approvals (in which case Participant's signature is accompanied by the signatures of the current record owners of the Property); and

WHEREAS, the Foundation is a Colorado nonprofit corporation organized under the Colorado Nonprofit Corporation Act, and operated exclusively for educational and charitable purposes, and as provided in Section 501(c)(3) of the Internal Revenue Code; and

WHEREAS, the Articles of Incorporation and the Bylaws for the Foundation provide that the purpose for which the Foundation has been organized is to collect and administer the release to the District of certain voluntary contributions by entities, including the Participant, that are engaged in or expect to be engaged in the construction of Residential Units within the District, such contributions to be applied towards the construction or expansion of school facilities (the "Capital Facility Fees"); and

WHEREAS, the Foundation, the Participant desires to provide for the payment of Capital Facility Fees to finance part of the costs of the acquisition, construction or

expansion of school facilities as determined in accordance with the Articles of Incorporation and the Bylaws of the Foundation; and

WHEREAS, the parties agree that the payment of Capital Facility Fees represents a donation which the District is authorized to accept pursuant to Section 22-32-110(1)(y), C.R.S., and that this Agreement serves to establish the procedures by which such donations are to be made; and

WHEREAS, the Foundation and the Participant have determined that it is in the public interest to establish the terms of mutual cooperation with respect to the funding of a portion of the costs of acquisition, construction or expansion of school facilities through the payment and expenditure of Capital Facility Fees; and

NOW, THEREFORE, in consideration of the covenants and mutual agreements herein contained, and of other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

#### COVENANTS AND AGREEMENTS

1. Participant/Other Participants. The parties acknowledge that other parties may from time to time determine to execute agreements providing for the payment of Fees to the Foundation (the "Other Participants"). Hereafter, the term "Participants" shall refer collectively to the Participant and the Other Participants which shall have executed agreements providing for the payment of Fees to the Foundation.

2. Structure and Operation of the Foundation. The Foundation shall be organized as a nonprofit corporation under Colorado law, and shall take such steps as shall be necessary to ensure its continued good standing thereunder. The Board of Directors of the Foundation shall consist of such number of members and/or *ex officio* members as may be specified from time to time in the Bylaws of the Foundation. The Board of Directors of the Foundation shall serve as an advisory body to the Board of Education of the District, and collect from the Participant and release to the District from time to time, Capital Facility Fees pursuant to this Participant Agreement. The Foundation may contract for management or consulting services to perform the administrative functions of the Foundation, and perform other services deemed necessary by the Board of Directors of the Foundation to serve the purposes of the Foundation, such services to be funded from revenues of the Foundation.

3. Payment of Capital Facility Fees. The Participant agrees to pay Capital Facility Fees to the Foundation for Residential Units constructed within the Property, according to the schedule of Capital Facility Fees then in effect at the time such amounts are paid. "Residential Units" shall include single-family detached homes, single-family attached homes, condominiums, townhomes, multi-family residential structures such as apartments, and mobile homes. Notwithstanding the foregoing, the Board of Directors may determine to exclude certain types of residential property with respect to which student-age occupancy is not permitted. Capital Facility Fees shall be due and payable at the time

of issuance of a building permit for a given Residential Unit. The projected number and type of Residential Units expected to be constructed on the Property is identified on Exhibit B, attached hereto and incorporated herein by this reference. To the extent the number of Residential Units is not based on the number included within the “Final Approval” for the Property, and thus is an estimate, such estimate shall be modified and Exhibit B replaced with the number and type of units specified in the “Final Approval” by the Foundation, subject to written notice thereof given to the Participant, “Final approval” as used herein shall mean the last approval that is required by the governing body of the jurisdiction within which the development is proposed, before Building Permits for construction within such development may be issued. The number of Residential Units set forth on Exhibit B additionally shall be subject to increase or decrease to the extent the Property is replatted to increase or decrease the number or type of units, upon presentation to the Foundation of a recorded plat with the number and type of Residential Units identified, in which case the Foundation shall replace Exhibit B with the updated number and type of Residential Units. The Foundation shall prescribe the precise manner in which such Fees shall be paid. Fees not paid when due shall be subject to interest at the option of the Foundation at a maximum rate of fifteen percent (15%) per annum (with the applicable rate to be fixed by the Board of Directors) until paid. If the Participant is engaged in the sale of Residential Units, the Participant agrees to cause any title company involved in closing sales transactions for Residential Units within the Property to include a line item representing the amount of Capital Facility Fees due for a given sales transaction, to be satisfied at or before closing thereof. For purposes of the foregoing, the Participant shall execute the form of Notice attached hereto as Exhibit D, and incorporated herein by this reference, providing such direction to the current title company(ies) used by the Participant for the Project, and shall issue such additional Notices as may be necessary to provide such direction to new title companies used by the Participant for the Project.

4. Schedule of Capital Facility Fees. The current schedule of Capital Facility Fees is set forth in Exhibit C, attached hereto and incorporated herein by this reference (the “Schedule”). The Capital Facility Fees set forth in the Schedule shall automatically increase every two years on January 1<sup>st</sup> (the “Adjustment Date”), commencing on January 1, 2015 (the “Initial Adjustment Date”). The increase in Capital Facility Fees applicable on any given Adjustment Date shall be equal to the cumulative percentage increase in the Engineering News-Record Index from the prior Adjustment Date to September 1 of the year immediately preceding the next Adjustment Date. Notice of the increase shall be given in writing to the Participant on or before October 1 of the year immediately preceding the next Adjustment Date. The increase shall become effective on the Adjustment Date.

5. Collection and Administration of Capital Facility Fees. Unless otherwise agreed by the Foundation and the District, all Capital Facility Fees shall be paid to the Foundation, which shall issue written receipts therefor to the Participant at the time payment is received. The Foundation shall account on a monthly basis for such funds according to generally accepted accounting principles, and shall complete an annual audit of receipts and expenditures of the Foundation by October 1 of each year. The accounting records of the Foundation shall be open for inspection and copying, subject to reasonable rules and regulations of the Foundation adopted to avoid undue interruption of the conduct

of the Foundation's business. The annual audit shall be mailed to the Participant at its written request.

6. Use of Capital Facility Fees.

a. Capital Facility Fees paid to the Foundation shall be used for the purpose of acquiring (inclusive of acquisition of water resources and/or water supplies), developing, constructing or expanding school facilities (including but not limited to elementary, middle school, K-8 school high school facilities, or any combination thereof, but excluding, school administration and/or transportation facilities), for the costs operating the Foundation, and for any other lawful purpose as may be set forth in the Foundations Articles of Incorporation or Bylaws, as they may exist from time to time. The District shall be required to demonstrate to the satisfaction of the Foundation Board of Directors that the proposed release of funds to the District is in compliance with the purposes for which such funds may be expended as set forth in this paragraph. The Foundation shall not substitute its judgment for that of the District in the determination of the expenditure of funds released hereunder; rather, the District shall retain the discretion to apply the funds in accordance with this Participant Agreement, in a manner which serves the best interests of the District. The Foundation shall only review the information submitted by the District in connection with the application to release funds for compliance with the purposes for which the funds may be used. The Participant additionally acknowledges and agrees that neither the Foundation nor the Foundation's Directors, Officers, agents, employees nor independent contractors shall be liable to the Participant for any decision to release funds to the District, or for the District's application of such funds in violation of the purposes set forth herein.

b. The Foundation shall not be authorized to expend Capital Facility Fees on any school facilities directly, in the name of the Foundation or otherwise, unless agreed to in advance by the Board of Education of the District.

7. Development Approvals. Provided that the Participant is not then in default of its obligations under any other Participant Agreement executed by the Participant (or by any successor corporation, subsidiary, or parent corporation) (the "Related Agreements"), the District agrees to issue a letter to the public entity having jurisdiction over the approval of proposed development within the Property, to be submitted prior to the first public hearing on such development, stating that the Participant has bound itself under this Agreement to fund a portion of the capacity required by the proposed development. Such letter shall remain on file with the public entity in connection with any continuation of the public hearing with respect to the development for which it was filed, subject to modification or withdrawal in the event the Participant subsequently defaults in its obligations to pay Capital Facility Fees hereunder for any Residential Units under any Related Agreements. Notwithstanding the foregoing, the parties agree and acknowledge that the payment of Capital Facility Fees represents mitigation of only a portion of the expected capital needs generated by new growth within the boundaries of the District, and that the ability of the District to deliver additional capital facilities on a timely basis is affected by other factors not exclusively within the control of the District, including but not limited to its ability to generate revenues from future bond issues, or to pass future

bond elections. Accordingly, nothing shall prohibit the District from participating in the referral process relating to development on the Property of the Participant for the purpose of communicating to the approving Public Entity factual information regarding the impacts of the proposed development, including matters relating to the present and future capacity of school facilities to accommodate new student demand from the proposed development in light of the then-current financial capabilities of the District, the expected timing of construction of new facilities, or other constraints on the District's ability to deliver required capacity on a timely basis. Additionally, nothing in this Agreement shall be construed to preclude the District from advocating or participating in any means by which the financing of capital facilities of the District may be advanced, or to otherwise constrain the exercise of its discretion to determine the manner in which educational services are to be delivered.

b. Participant Cooperation. The Participant agrees to cooperate with the Other Participants to encourage the payment of Capital Facility Fees by other persons or entities engaged in the construction and sale of residential units within the District, whether or not signatories to this Agreement, by any lawful means.

8. Recording of Memorandum of Agreement/Covenant Running with the Land. A Memorandum of this Participant Agreement may be recorded by the Foundation against the Property forty-five (45) days following the date of execution hereof, unless prior to such date all Capital Facility Fees have been paid in advance as permitted under Paragraph 3 hereof. Following full payment of all Capital Facility Fees hereunder, the Foundation shall record a Memorandum stating that this Participant Agreement has terminated and is of no further force and effect among the Parties.

9. Term of Agreement. This Agreement shall terminate upon the payment of the full amount of Capital Facility Fees for the number of units set forth in Exhibit B. Otherwise, this Agreement may be terminated by the Foundation or the School District at any time, upon 60 days written notice to the Participant and the School District, and otherwise upon the mutual agreement of the Parties. In the event of any termination, the Foundation shall be entitled to retain any prior Capital Facility Fees collected, and any Capital Facility Fees due and unpaid at the date of termination shall remain due and owing under the applicable terms hereof, which shall be deemed to survive such termination until paid.

10. Notices. All notices required or permitted to be given hereunder shall be in writing and shall be effective upon personal delivery or three (3) business days following deposit of the notices in the United States Mail, postage prepaid and addressed as follows, or to such other address designated by a party upon notice as hereinabove provided:

To the Foundation:

School District 27J  
Capital Facility Fee Foundation  
18551 E. 160<sup>th</sup> Avenue  
Brighton, CO 80601  
Attn: President

With a copy to:

White Bear Ankele Tanaka & Waldron  
Professional Corporation  
2154 E. Commons Ave.  
Suite 2000  
Centennial, CO 80122  
Attn: William P. Ankele, Jr.

To the District:

School District 27J  
18551 E. 160<sup>th</sup> Avenue  
Brighton, CO 80601  
Attn: Superintendent

To the Participant:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

11. Amendment. This Agreement cannot be amended or modified except by a writing executed by the Parties.

12. Applicable Law. This Agreement shall be construed and interpreted in accordance with the laws of the State of Colorado.

13. Entire Agreement. This Agreement constitutes the entire understanding between the parties hereto, and all prior agreements or understandings with respect to the subject matter hereof are deemed merged herein.

14. Waiver. No failure by any party to insist upon the strict performance of any agreement, term, covenant, or condition hereof or the exercise of any right or remedy consequent upon any default, and no acceptance of full or partial performance during the continuance of any such default, shall constitute a waiver of any such default of such agreement, term, covenant, or condition. No agreement, term, covenant, or condition hereof to be performed or complied with by any party, and no default thereof, shall be waived, altered, or modified except by a written instrument executed by the non-defaulting Party or Parties.

15. Remedies/Venue. In the event of a breach of this Agreement, the parties shall have such legal and equitable remedies as may then be available under the laws of the State of Colorado, and otherwise as expressly set forth in this Agreement. Venue for any action brought to enforce the terms hereof shall be in the Adams County District Court.

16. Attorneys' Fees. In the event of any dispute between the parties arising out of this Agreement, the prevailing party shall be entitled to recover its reasonable attorney's fees incurred in connection with such dispute, whether in court or by arbitrator.

17. Assignment; Delegation. The obligations of this Agreement may be assigned by a Participant to a purchaser of all or a portion of the Property upon the execution and delivery to the Foundation of an assignment agreement between the Participant and the assignee, in a form approved by the Foundation, by which the assignee agrees to bind itself to the terms hereof with respect to the number of Residential Units associated with the portion of the Property being conveyed. Following execution of such agreement and delivery to the Foundation, the Participant shall be released with respect to its obligations to pay Capital Facility Fees for the number of Residential Units represented by the portion of the Property so conveyed. Except as expressly set forth herein or as contemplated hereby, neither this Agreement, nor any of the parties' rights, obligations, duties or authorities hereunder may be assigned or delegated in whole or in part by any party without the prior written consent of the other parties, which consent shall not be unreasonably withheld. Any attempted assignment or delegation in violation of the foregoing shall be deemed void.

18. No Third Party Beneficiaries. None of the terms, conditions or covenants in this Agreement shall give or allow any claim, benefit, or right of action by any person or entity other than the District, the Foundation and the Participant. Any other person or entity affected by this Agreement shall be deemed an incidental beneficiary.

19. Severability. If this Agreement, or any portion of it, is for any reason held invalid by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

20. No Personal Liability of Board Members and Officers. The Directors and Officers of the Foundation shall not be subject to personal liability to any person or entity in connection with the performance or non-performance of any of the obligations of the Foundation hereunder, or any other undertaking of such Board Members and Officers pursuant to the Bylaws.

21. Counterpart Execution. This Agreement may be executed in one or more counterparts, each of which shall constitute an original, but all of which, when taken together shall constitute a single agreement.

22. Authority to Execute/Participant as Future Owner. This Agreement shall be executed by the Participant, which is either the record owner of the Property as of the date hereof, or has entered into a contract for the purchase thereof with the current owners. Where the Participant's interest in the Property is as a buyer under a contract for purchase, the signature(s) of the current owner(s) of the Property shall be affixed to this Agreement, in addition to that of the Participant. The Participant's signature as a buyer under a contract for purchase of the Property shall bind the Participant to the terms hereof as owner of the Property, at such time as the Property is actually acquired by the Participant. In the event the Participant does not become the owner of the Property, the signature(s) of the owner(s) thereof to this Agreement shall bind such owner(s) and the Property to the terms hereof.

IN WITNESS WHEREOF, the undersigned have executed this Agreement as of the day and year written above.

[The remainder of this page intentionally left blank]



PARTICIPANT

\_\_\_\_\_

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

Name: \_\_\_\_\_

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

ATTEST

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

Secretary

SCHOOL DISTRICT 27J  
CAPITAL FACILITY FEE FOUNDATION

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

President

ATTEST

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

Secretary

SCHOOL DISTRICT 27J

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

Superintendent of Schools

EXHIBIT A

**DESCRIPTION OF PROPERTY**

If a metes and bounds legal description, legal description to be superseded by legal description of property as subdivided

EXHIBIT B

NUMBER AND TYPE OF RESIDENTIAL UNITS

EXHIBIT C

SCHEDULE OF CAPITAL FACILITY FEES

- Single family attached/detached home \$980
- Condominiums/townhomes/multifamily \$560

**EXHIBIT D**  
**NOTICE TO TITLE COMPANY**

**NOTICE TO TITLE COMPANY  
CONCERNING PAYMENT OF CAPITAL FACILITY FEES**

The undersigned, being the authorized representative of \_\_\_\_\_, the Participant under that certain Participant Agreement between the Participant, the School District 27J Capital Facility Fee Foundation, and School District 27J, dated as of \_\_\_\_\_, hereby directs \_\_\_\_\_ (name of title company), to include a line item in the Settlement Statement for any lot within the \_\_\_\_\_ Subdivision, specifying the payment of Capital Facility Fees at the following rates for the following types of units, and accounting for same as part of Closing:

- Single family attached/detached home                      \$980/unit
- Condominiums/townhomes/multifamily                      \$560/unit

\_\_\_\_\_ (Participant)

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

Date: \_\_\_\_\_