

**MEMORANDUM OF UNDERSTANDING BY AND BETWEEN
THE CITY OF ENGLEWOOD, COLORADO
AND
THE CITY OF LITTLETON, COLORADO**

This Memorandum of Understanding (“MOU”) is entered into this ___ day of _____, 20__, by and between the City of Englewood, Colorado, a municipal corporation organized and existing under the laws of the State of Colorado (“Englewood”), acting through Shawn Lewis, its lawfully appointed City Manager, and the City of Littleton, Colorado, a municipal corporation organized and existing under the laws of the State of Colorado (“Littleton”), acting through Mark Relph, its lawfully appointed City Manager. Englewood and Littleton may sometimes be referred to herein, individually, as a “City”, or, collectively, as the “Cities”.

RECITALS

WHEREAS, on December 6, 1982, Englewood and Littleton entered into an Agreement between the Cities of Littleton and Englewood, Colorado for Joint-Use Wastewater Treatment Facilities (the “1982 Agreement”) pursuant to which the Cities agreed to construct a Joint-Use Wastewater Treatment Plant now known as South Platte Water Renewal Partners, f/k/a, the Bi-City Plant. f/k/a, the Littleton-Englewood Wastewater Treatment Plant (“SPWRP”);

WHEREAS, the Cities are each an equal owner of SPWRP;

WHEREAS, SPWRP is a regional wastewater treatment facility that provides wastewater treatment services to the Cities and several special connector districts who have contracted with one or both Cities;

WHEREAS, the 1982 Agreement states that “the basic concept of this Agreement is that neither City shall be a customer of the other, but rather the Cities shall operate the Bi-City Plant with costs of additions, and costs of operation and maintenance being divided between them in a fair and equitable manner.”;

WHEREAS, the 1982 Agreement establishes “[a] permanent committee to be known as the Supervisory Committee” that “consists of two administrative employees from each city, designated by the City Manager of each City” to “oversee all operations of the joint facility and attendant matters.”;

WHEREAS, the 1982 Agreement provides that decisions of the Supervisory Committee “shall be made by majority vote” but that “[i]n the event that a majority vote cannot be arrived at on any matters within their authority, then, and in that event, a fifth member of the Supervisory Committee shall be appointed for the purposes of reaching a determination of that issue.”;

WHEREAS, the 1982 Agreement provides that “[t]he City of Englewood shall operate the Bi-City Plant under the control of the Supervisory Committee” but is otherwise silent about the day-to-day management of SPWRP;

WHEREAS, the day-to-day activities of SPWRP are currently managed by the Director, South Platte Renewal Partners (“SPWRP Director”), who is an employee of Englewood that reports to the Supervisory Committee;

WHEREAS, the current SPWRP Director is Pieter Van Ry;

WHEREAS, the Utilities Department, City of Englewood (“Englewood Utilities”), provides water treatment, water distribution, sanitary sewer collection, storm water collection, and management services to Englewood;

WHEREAS, the day-to-day activities of Englewood Utilities are currently managed by an Acting Director, Utilities Department, City of Englewood (“Acting Utilities Director”), who reports to the Englewood City Manager;

WHEREAS, the Acting Utilities Director is also the Director, Public Works, City of Englewood (“Public Works Director”);

WHEREAS, Englewood, acting through its representatives on the Supervisory Committee, desires to create a single, full-time, position that will manage the day-to-day activities of both SPWRP and Englewood Utilities (the “Dual Director”), and allow the Acting Utilities Director to resume exclusive duties as the Public Works Director;

WHEREAS, Littleton, acting through its representatives on the Supervisory Committee, has agreed to permit the SPWRP Director to become the Dual Director, subject to the faithful adherence to and compliance with every provision of this MOU;

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Cities agree as follows:

TERMS AND CONDITIONS

1. Recitals. The Recitals are incorporated into the Terms and Conditions of this MOU as if fully set forth herein.

2. First Dual Director. Englewood shall employ the current SPWRP Director, Pieter Van Ry, as the Dual Director, pursuant to an Employment Agreement by and between the City of Englewood, Colorado and Pieter Van Ry (“Employment Agreement”). Littleton shall be an intended third-party beneficiary of the Employment Agreement.

3. Hiring New Dual Directors. In the event that the Dual Director no longer serves as the Director of SPWRP for any reason, the Supervisory Committee shall appoint an interim director from among the SPWRP Deputy Directors. The Englewood City Manager shall be responsible for hiring any new Dual Director or full-time SPWRP Director in accordance with then applicable Englewood hiring policies; provided that no person shall be appointed to serve in either capacity without consultation with and approval by the Supervisory Committee. Any Dual Director may be employed at will or by contract with Englewood; provided that if the employment

is by contract with Englewood, Littleton shall be an intended third-party beneficiary regardless of what the contract states; and such contract shall not limit the authority of the Supervisory Committee to terminate the Dual Director from service as Director of the SPWRP without cause or prevent the Englewood City Manager from firing the Dual Director for the cause specifically set forth below.

4. Primary Functions Associated with SPWRP and Englewood Utilities. The Dual Director's primary functions are set forth in Appendix A to the Employment Agreement, which is incorporated herein as Appendix A to this MOU. The primary functions associated with SPWRP may be amended from time to time by the Supervisory Committee, and the primary functions associated with Englewood Utilities may be amended from time to time by the Englewood City Manager; provided that the Dual Director is expected to spend generally 50% of his time on the functions associated with SPWRP and 50% on the functions associated with Englewood Utilities. This percentage may be modified to allow for the Dual Director to provide more time to SPWRP if the Supervisory Committee so directs, and any such modification shall be in writing and made an amendment to this agreement.

5. Reporting to SPWRP and Englewood Utilities. In performing the primary functions associated with SPWRP, the Dual Director shall report to the Supervisory Committee. In performing the primary functions associated with Englewood Utilities, the Dual Director shall report to the Englewood City Manager.

6. Conflicts of Interest. The Cities acknowledge that in performing duties associated with SPWRP, the Dual Director shall have and owe a fiduciary duty to both Englewood and Littleton, and that, in performing duties associated with Englewood Utilities, the Dual Director shall have and owe a fiduciary duty to Englewood, as a separate entity. The Cities further acknowledge that because the Dual Director shall have and owe fiduciary duties to both Englewood and Littleton, and Englewood, as a separate entity, this may or will cause actual and potential conflicts of interest. Some of these actual and potential conflicts of interest may be routine, such as when SPWRP contracts for services from Englewood; others, however, may be extraordinary, for example, if the City Manager of Englewood directed the Dual Director to take an action in performing functions associated with Englewood Utilities that would materially harm SPWRP or Littleton, or be in conflict with any obligation or duty authorized by the Supervisory Committee.

6.1. In general, the Cities expect and agree that most routine actual or potential conflicts of interest can be resolved within the business judgment of the Dual Director, with oversight from the Supervisory Committee and the Englewood City Manager without causing material harm to SPWRP or either City, and the Cities agree to waive such actual or potential conflicts of interest to the extent they are within the business judgment of the Dual Director, with oversight from the Supervisory Committee and the Englewood City Manager, and do not cause material harm to SPWRP or either City.

6.2. If a potential or actual conflict of interest arises that cannot be resolved within the business judgment of the Dual Director or that may cause or has caused material harm to SPWRP or one or both Cities, the Cities shall seek immediate resolution of the issue in a manner that is mutually agreeable to the Englewood City Manager and the Littleton City Manager. If such mutual agreement cannot be achieved, a fifth member shall

be appointed to the Supervisory Committee for the purposes of reaching a determination of the issue in conformance with Section 1, Paragraph 1, of the 1982 Agreement. In such situation, if the fifth member determines that a conflict cannot be resolved or waived, or that the Dual Director cannot continue to serve in such dual capacity without causing or likely causing material harm to SPWRP or one or both Cities, the Dual Director, or other person satisfactory to the Supervisory Committee, shall revert to the SPWRP Director; and the Public Works Director, or other person satisfactory to the Englewood City Manager, shall revert to the acting Utilities Director.

6.3. With respect to any material harm caused by any conflict of interest, except as expressly set forth herein, the Cities reserve to themselves all claims and defenses under the 1982 Agreement or other laws. Further, by entering into this MOU, the Cities do not intend this MOU to serve as a bar to any claim or defense under the 1982 Agreement or other laws, except as expressly set forth herein.

7. Performance Standards. Except as expressly set forth herein, the Englewood City Manager shall fix any such other terms and conditions of the Dual Director's employment, and as the Englewood City Manager may determine from time to time, relating to the performance of the Dual Director; provided that such terms and conditions are not in conflict with any other applicable statute, law, rule or regulation, or policies of Englewood.

8. Compensation. The Englewood City Manager shall fix the terms of compensation, including any salary and benefits, payable to the Dual Director. The Dual Director shall be paid as an employee of Englewood in accordance with Englewood's usual payroll practices. One-half of the Dual Director's compensation shall be allocated to Operations and Maintenance Costs under the 1982 Agreement; one-half of the Dual Director's compensation shall be paid by Englewood apart from the 1982 Agreement, unless otherwise modified as set forth in Paragraph 4, above. To the extent that such compensation includes additional or special compensation beyond Englewood's normal payment practices, such compensation shall be paid by Englewood unless otherwise modified by a formal resolution of the Supervisory Committee.

9. Termination of Dual Director for Cause. The Englewood City Manager shall terminate the Dual Director at any time for cause, which for the purposes of this MOU shall be defined as follows: (1) the conviction of the Dual Manager of a felony or misdemeanor involving moral turpitude; (2) working while under the influence of drugs or alcohol; (3) willful political activity involving the support of candidates for any elected municipal position while working on SPWRP or City time; (4) the abandonment by Dual Manager of his position without cause, as job abandonment is defined within the Englewood's personnel policy; and (5) Dual Director's inability to perform his duties because of permanent disability, or a loss of mental capacity as determined by a court of law, for a period of four (4) successive weeks beyond any leave and benefit time (critical position pursuant to the ADA).

10. Termination of the Dual Director without Cause. Because the Dual Director reports to both the Supervisory Committee and the Englewood City Manager, the Cities acknowledge that a situation could arise where the Englewood City Manager desires to terminate the Dual Director without cause, but the Supervisory Committee does not desire to terminate the Dual Director. In such an event, the Cities shall seek immediate resolution of the issue in a manner that is mutually agreeable to the Englewood City Manager and the Littleton City Manager. If such mutual

agreement cannot be achieved, a fifth member shall be appointed to the Supervisory Committee for the purposes of reaching a determination of the issue in conformance with Section 1, Paragraph 1, of the 1982 Agreement. In such case, the presumptive remedy will be that the Dual Director shall revert to the SPWRP Director; and the Public Works Director, or other person satisfactory to the Englewood City Manager, shall revert to the acting Utilities Director.

11. Termination of the MOU. This MOU is intended to be perpetual. However, either City may terminate this MOU at any time by giving forty-five (45) days written notice to the other City. In such an event, during the forty-five days, the Cities shall seek immediate resolution of any issues in a manner that is mutually agreeable to the Englewood City Manager and the Littleton City Manager. During the forty-five days, either City may ask for the appointment of a fifth member to the Supervisory Committee in conformance with Section 1, Paragraph 1, of the 1982 Agreement for the purposes of making any decision or taking any action within the purview of the Supervisory Committee. Unless otherwise agreed by the Cities, at the end of the forty-five days, the Dual Director shall revert to and become the SPWRP Director; and the Public Works Director, or other person satisfactory to the Englewood City Manager, shall revert to and become the Acting Utilities Director.

12. SPWRP and Englewood Utilities are Separate. Englewood Utilities is a Department of Englewood. SPWRP “represents the Cities attempt to efficiently pay for municipal wastewater treatment services, which they must provide to their residents, in accordance with legislation permitting them to provide such services jointly.” *Compass Ins. Co. v. City of Littleton*, 984 P.2d 606 (Colo. 1999). By entering into this MOU, the Cities do not intend to change the legal status of either Englewood Utilities or SPWRP. The Cities, however, acknowledge and agree that for practical purposes, they expect that Englewood Utilities and SPWRP will be managed and run as separate entities by the Dual Director; and that SPWRP will be managed and run for the equal benefit of both Cities consistent with the 1982 Agreement.

13. Breach of MOU. Except as specifically set forth herein, any breach (or action to compel performance with the terms and conditions) of this MOU shall be enforced under the 1982 Agreement, and the Cities reserve to themselves all claims and defenses under the 1982 Agreement or other laws. Further, by entering into this MOU, the Cities do not intend this MOU to serve as a bar to any claim or defense under the 1982 Agreement or other laws, except as expressly set forth herein.

14. Supervisory Committee. This MOU was authorized by a unanimous vote of the Supervisory Committee.

15. Force Majeure. Either City shall be excused from performing its obligations under this MOU during the time and to the extent that it is prevented from performing by a cause beyond its control, including, but not limited to: any incidence of fire, flood, or strike; acts of God; acts of the Government (except the Cities’); war or civil disorder; violence or the threat thereof; severe weather; commandeering of material, products, plants, or facilities by the federal, state, or local government (except the Cities’); or national fuel shortage, when satisfactory evidence of such cause is presented to the other City, and provided further, that such nonperformance is beyond the reasonable control of, and is not due to the fault or negligence of, the City not performing.

16. Indebtedness. No provision, covenant or agreement contained in this MOU, nor any obligations herein imposed upon either City shall constitute or create an indebtedness or debt of either City within the meaning of any Colorado constitutional provision or statutory limitation.

17. Subject to Annual Budget and Appropriation. Neither City intends to create a multiple-fiscal year direct or indirect debt or other financial obligation whatsoever as a product of this MOU. The performance of those obligations of either City hereunder requiring budgeting and appropriation of funds are subject to annual budgeting and appropriations.

18. No Partnership or Agency. Notwithstanding any language in this MOU or any representation or warranty to the contrary, neither City shall be deemed or constitute a partner, joint venturer or agent of the other City.

19. No Third-Party Beneficiaries. It is expressly understood and agreed that enforcement of the terms and conditions of this MOU and all rights of action relating to such enforcement shall be strictly reserved to the Cities. It is the express intention of the Cities that any person other than the Cities shall be deemed to be only an incidental beneficiary under this MOU.

20. Governmental Immunity. Nothing in this MOU or in any actions taken by the Cities pursuant to this MOU shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, Section 24-10-101, *et seq.*, C.R.S., as from time to time may be amended.

21. Statutory Liability Protection. The Cities may rely on, and do not waive or intend to waive the liability protections or any other rights, immunities, and protections provided by the Section 37-87-104, C.R.S., as from time to time may be amended, or any other law, protection or limitation otherwise available to the Cities and their respective officers, agents, fiduciaries, representatives and employees.

22. Notices. Any notices or other communications required or permitted by this MOU or by law to be served on, given to, or delivered to a City hereto, by the other City shall be in writing and shall be deemed duly served, given, or delivered when personally delivered to the City to whom it is addressed or in lieu of such personal services, when received in the United States mail, first-class postage prepaid addressed to:

If to Englewood:

Englewood City Manager,
City Manager's Office
1000 Englewood Parkway
Englewood, Colorado 80110

With a copy to:

Englewood City Attorney
City Attorney's Office
1000 Englewood Parkway
Englewood, Colorado 80110

If to Littleton:

Littleton City Manager,
City Manager's Office
2255 West Berry Avenue

Littleton, Colorado 80120

With a copy to:

Littleton City Attorney
City Attorney's Office
2255 West Berry Avenue
Littleton, Colorado 80120

In either case, with a curtesy copy to:

SPWRP's outside special counsel, if one exists. SPWRP's current outside special counsel is:

Hill & Robbins, P.C.
Attn: Matthew Montgomery
1660 Lincoln Street, #2720
Denver, Colorado 80264

Either City may change its address for the purpose of this paragraph by giving written notice of such change to the other City in the manner provided in this paragraph.

23. Headings. The headings and captions in this Agreement are intended solely for the convenience of reference and shall be given no effect in the construction or interpretation of this Agreement.

24. Controlling Law. This MOU is made and performed in Colorado. The laws of the State of Colorado shall be applied in the interpretation, execution and enforcement of this MOU.

25. No Wavier. No waiver of any of the provisions of this Agreement shall be deemed to constitute a waiver of any other of the provisions of this Agreement, nor shall such waiver constitute a continuing waiver unless otherwise expressly provided herein, nor shall the waiver of any default hereunder be deemed a waiver of any subsequent default hereunder.

26. Entire Agreement. This MOU, which incorporates the 1982 Agreement, constitutes the entire agreement between the Cities and sets forth the rights, duties, and obligations of each to the other as of this date. Any prior agreements, promises, negotiations, or representations not expressly set forth in this MOU are of no force and effect.

27. Modification. This MOU may not be amended, altered, or otherwise changed except by a written agreement between the Cities.

28. Severability. The invalidity or unenforceability of any portion of this MOU shall not affect the validity or enforceability of any other portion of this MOU. Any invalid or unenforceable portion or provision shall be deemed severed from this MOU and in such event the Cities shall negotiate in good faith to replace such invalidated provision in order to carry out the intent of the Cities in entering into this MOU.

29. Counterpart Execution. This MOU may be executed in counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

[Remainder of page intentionally left blank.]

DRAFT

IN WITNESS WHEREOF, the Cities have executed this MOU on the date first above written.

CITY OF ENGLEWOOD

City Manager

Approved as to form:

City Attorney

CITY OF LITTLETON

City Manager

Approved as to form:

City Attorney