

**CUSTODIAL AGREEMENT**

between

**BRIARGATE CENTER BUSINESS IMPROVEMENT DISTRICT,**

and

**U.S. BANK NATIONAL ASSOCIATION**

Dated as of December \_\_\_, 2018

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## CUSTODIAL AGREEMENT

**THIS CUSTODIAL AGREEMENT** (this “Agreement”) is made and dated as of this \_\_\_ day of December, 2018, between the **BRIARGATE CENTER BUSINESS IMPROVEMENT DISTRICT** (the “District”), and **U.S. BANK NATIONAL ASSOCIATION**, as custodian (in such capacity, the “Custodian”). Capitalized terms used in the following recitals but not defined therein shall have the meanings set forth in Section 1 of this Agreement.

### RECITALS

WHEREAS, the District is a quasi-municipal corporation and political subdivision of the State of Colorado, duly organized and existing as a business improvement district formed by the City of Colorado Springs, Colorado (the “City”) pursuant to Ordinance No. 02-24 adopted by the City Council of the City on February 12, 2002 and Section 31-25-1201 et seq., C.R.S. (the “Business Improvement District Act”) (all capitalized terms used and not otherwise defined herein shall have the respective meanings assigned in Section 1 hereof); and

WHEREAS, the District was created for the purpose of providing certain public improvements to and for the benefit of the properties within [and without] the boundaries of the District, all in accordance with the Business Improvement District Act; and

WHEREAS, at the direction of the Board of Directors of the District (the “Board”) pursuant to Section 31-25-1221, C.R.S., the District is authorized to incur indebtedness for the acquisition, construction, installation or completion of any improvements or facilities to carry out the purposes of the District; and

WHEREAS, the District previously issued its Limited Tax General Obligation Bonds, Series 2002A (the “Prior 2002A Bonds”) for the purpose of paying the costs of certain infrastructure; and

WHEREAS, for the purpose of refunding the Prior 2002A Bonds and financing the reimbursement of certain developer public improvement costs, the District incurred debt in the original principal amount of \$4,335,000 in the form of a loan (the “2012 Loan”) from U.S. Bank National Association (in such capacity, the “2012 Lender”), which loan was made pursuant to the terms of that certain Loan Agreement dated July 9, 2012 (the “2012 Loan Agreement”); and

WHEREAS, the Board of Directors of the District (the “Board”) has determined that it is in the best interests of the District, its inhabitants and taxpayers, to refund all of the outstanding 2012 Loan and, for such purpose, the District has requested that the Bank make a loan to the District; and

WHEREAS, the Bank has agreed, subject to the terms and conditions of this Agreement and the other Financing Documents, to make a loan in the original principal amount of \$[3,544,500] (the “Loan”) for such refunding purpose; and

WHEREAS, under the terms of the Loan Agreement, the District is required to establish certain funds and accounts to secure the payment of the principal of and interest on the Loan; and

WHEREAS, the District and the Lender desire to have the Custodian maintain the funds and accounts established hereunder in accordance with the provisions of this Agreement.

NOW, THEREFORE, in consideration of the foregoing and the mutual promises contained in this Agreement, the receipt and sufficiency of which are acknowledged, the parties hereto agree as follows:

**Section 1. Definitions.** Unless otherwise defined herein or the context otherwise requires, capitalized terms used herein shall have the meaning set forth below. These definitions shall be equally applicable to both the singular and the plural forms of the terms so defined. Certain terms have been defined in the introductory paragraph and the recitals to this Agreement.

In addition, the following terms as used in this Agreement shall have the following meanings, unless the context otherwise requires:

“*2012 Custodian*” means U.S. Bank National Association, Denver, Colorado, in its capacity as the custodian under the 2012 Custodial Agreement.

“*2012 Custodial Agreement*” means the Custodial Agreement dated July 9, 2012 between the District and the 2012 Custodian relating to the Funds and Accounts held in connection with the 2012 Loan.

“*Annual Fees*” means, with respect to the relevant Loan Year, the sum of the Custodial Fees and any other similar fees approved by Lender in connection with the Loan due in such Loan Year.

“*Authorized Person*” means the President of the District, or any other officer(s) or representative(s) of the District authorized by resolution duly adopted by the Board to act as an Authorized Person hereunder and under the other Financing Documents.

“*Bank*” means U.S. Bank National Association, a national banking association, in its capacity as the lender of the Loan, its successors and/or assigns, including, without limitation, any assignee of the Bank in accordance with the provisions of the Loan Agreement.

“*Closing Memorandum*” means the closing memorandum, dated as of the Closing Date, delineating all sources of funds, including moneys in the Funds and Accounts presently maintained by the 2012 Custodian under the 2012 Custodial Agreement and the proceeds of the Loan, and setting forth the uses of such funds, including the application of a portion of such Loan proceeds to the payment in full of the 2012 Refunded Loan and the payment of the costs, expenses and fees incurred in connection with the issuance of the Loan and the refunding of the 2012 Refunded Loan.

“*Costs of Issuance Fund*” means the “Briargate Center Business Improvement District Limited Tax General Obligation Refunding Loan 2018 Costs of Issuance Fund” established by

the provisions of Section 2.02 hereof to be held, administered and maintained by the Custodian pursuant to the provisions hereof.

“*Closing Date*” has the meaning set forth in the Loan Agreement.

“*Custodial Fees*” has the meaning set forth in Section 15 of this Agreement.

“*Fee Account*” means the account within the Loan Payment Fund by that name created and established pursuant to the provisions of Section 2 hereof to be held and administered by the Custodian pursuant to the terms hereof.

“*Funds and Accounts*” means, collectively, the Loan Payment Fund, the Pledged Revenue Fund, the Reserve Fund and the Costs of Issuance Fund.

“*Interest Payment Date*” means June 1 and December 1 of each year, commencing June 1, 2019, and continuing through and including the Maturity Date.

“*Loan Payment Fund*” means the “Briargate Center Business Improvement District Limited Tax General Obligation Refunding Loan 2018 Loan Payment Fund” established by the provisions of Section 2.02 hereof to be held, administered and maintained by the Custodian pursuant to the provisions hereof.

“*Loan Year*” means the period commencing December 2 of any calendar year through and including December 1 of the immediately succeeding calendar year.

“*Payment Account*” means the account within the Loan Payment Fund by that name created and established pursuant to the provisions of Section 2 hereof to be held and administered by the Custodian pursuant to the terms hereof.

“*Payment Date*” means an Interest Payment Date and/or a Principal Payment Date, as the context requires.

“*Payment Date*” has the meaning set forth in the Loan Agreement.

“*Permitted Investments*” means any investment or deposit permissible for the District under then applicable law.

“*Permitted Investments*” means any investment or deposit permissible under then applicable law.

“*Pledged Revenue Fund*” means the “Briargate Center Business Improvement District Limited Tax General Obligation Refunding Loan 2018 Pledged Revenue Fund” established by the provisions of Section 2.02 hereof to be held, administered and maintained by the Custodian pursuant to the provisions hereof.

“*Principal Payment Date*” means December 1 of each year, commencing December 1, 2018 and continuing through and including December 1, 2027, and the Maturity Date.

“*Reserve Fund*” means the “Briargate Center Business Improvement District Limited Tax General Obligation Refunding Loan 2018 Reserve Fund” established by the provisions of Section 2.02 hereof to be held, administered and maintained by the Custodian pursuant to the provisions hereof.

“*Reserve Requirement*” means \$80,000.

**Section 2. Creation of Funds and Accounts.** The following Funds and Accounts are hereby created and established, each of which shall be held, administered and maintained by the Custodian in accordance with the provisions hereof:

- (a) the Pledged Revenue Fund;
- (b) the Loan Payment Fund; and, therein, the Fee Account and the Payment Account;
- (c) the Reserve Fund; and
- (d) the Costs of Issuance Fund.

**Section 3. Pledged Revenue Fund.** The Custodian shall hold, maintain and administer the Pledged Revenue Fund for so long as any obligations of the District remain owing to the Bank under the Note or the Loan Agreement. The Pledged Revenue Fund constitutes a trust fund held for the benefit of the Bank and the money therein shall be disbursed only for the purposes and uses set forth herein and in the Loan Agreement.

(a) ***Use of Amounts in Pledged Revenue Fund.*** All amounts on deposit in the Pledged Revenue Fund shall be disbursed in accordance with Section 4 hereof.

(b) ***Funding of Pledged Revenue Fund.*** On the Closing Date, the District shall transfer (or cause to be transferred) all moneys in the Funds and Accounts held by the 2012 Custodian under the 2012 Custodial Agreement for application as provided in the Closing Memorandum. Thereafter, the District shall transfer (or cause to be transferred) all Pledged Revenue to the Custodian as soon as practical after the receipt thereof, but no later than 10 Business Days after such receipt and in no case less frequently than monthly. Upon the receipt of such Pledged Revenue, the Custodian shall credit such moneys to the Pledged Revenue Fund.

**Section 4. Flow of Funds.** In each Loan Year the Custodian shall disburse, transfer, credit and apply amounts on deposit in the Pledged Revenue Fund in the following order of priority:

- FIRST: to the credit of the Fee Account of the Loan Payment Fund, an amount equal to the Annual Fees for the applicable Loan Year;
- SECOND: to the credit of the Payment Account of the Loan Payment Fund, an amount which, when combined with amounts then on deposit

therein, if any, is equal to the principal of and interest on the Loan due and coming due in the applicable Loan Year;

THIRD: to the credit of the Reserve Fund, the amount necessary, if any, to cause the amount therein to equal the Reserve Requirement;

FOURTH: following receipt by the Custodian of a written request from the Bank for such payment (which request shall have been delivered to the District before such request is made to the Custodian), to the Bank, the amounts then due and owing to the Bank pursuant to Section 2.02(i)(ii) of the Loan Agreement; and

FIFTH: to the credit of the Loan Payment Fund, all moneys remaining in the applicable Loan Year after the credits set forth in clauses FIRST through FOURTH above, or, if consented to in writing by the Bank, such remaining moneys shall be transferred to or at the direction of the District for application to any lawful purpose. The District acknowledges that State law places certain restrictions on the use of ad valorem tax revenue derived from imposition of a debt service mill levy.

**Section 5. Loan Payment Fund.** The Custodian shall hold, maintain and administer the Loan Payment Fund for so long as any obligations of the District remain owing to the Bank under the Note or the Loan Agreement. The Loan Payment Fund (and the accounts therein) constitutes a trust fund held for the benefit of the Bank and the money therein shall be disbursed only for the purposes and uses set forth herein and in the Loan Agreement.

(a) ***Accounts within Loan Payment Fund.*** The Loan Payment Fund shall be divided into two accounts: the Fee Account and the Payment Account.

(b) ***Fee Account.*** The Fee Account shall be funded from Pledged Revenue each Loan Year as provided in Section 4, clause FIRST above. Amounts in the Fee Account shall be applied by the Custodian to the payment of Annual Fees due and owing in each Loan Year pursuant to invoices provided by the District to the Custodian not later than [October 1] of each year, commencing [October 1,] 2019.

(c) ***Payment Account.*** The Payment Account shall be funded from Pledged Revenue each Loan Year in the amount of the principal of and interest on the Loan due and coming due in the applicable Loan Year, as provided in Section 4 clause SECOND above.

(d) ***Application of Amounts in Payment Account.*** The amounts on deposit in the Payment Account of the Loan Payment Fund shall be maintained, transferred, paid, reimbursed and liquidated in the following priority:

(i) First, on each Interest Payment Date (including the Maturity Date), or upon demand of the Bank upon the occurrence of an Event of Default, to the

Bank an amount equal to the interest due on the Loan on such date (including accrued and unpaid interest and interest due as a result of compounding); and

(ii) Second, on each Principal Payment Date (including the Maturity Date) (and in each instance, once any same day transfer (or provision for such transfer) in paragraph (i) above has been made), to the Bank an amount equal to the principal due on the Loan in such amounts as set forth in Section 2.02(e) of the Loan Agreement.

(e) **Investment Earnings.** Amounts on deposit in the accounts of the Loan Payment Fund may be invested or deposited, at the written direction of the District, in Permitted Investments and shall be valued on the basis of their current market value, as reasonably determined by the Custodian's pricing service or by the District, which value shall be determined at least annually. All interest income from the investment or reinvestment of moneys credited to the respective accounts of the Loan Payment Fund shall remain therein.

**Section 6. Reserve Fund.** The Custodian shall hold, maintain and administer the Reserve Fund for so long as any obligations of the District remain owing to the Bank under the Note or the Loan Agreement, or any obligations of the District under the Note or the Loan Agreement are not discharged in accordance with the terms thereof. The Reserve Fund constitutes a trust fund for the benefit of the Bank and the money in such fund shall be disbursed only for the purposes and uses authorized herein and in the Loan Agreement.

(a) **Funding of Reserve Fund.** On the Closing Date, the District shall fund or cause the funding of the Reserve Fund in the amount of the Reserve Requirement. The District shall cause the 2012 Custodian to internally transfer the amount of \$80,000 from the reserve fund established under the 2012 Custodial Agreement to the Custodian for credit to the Reserve Fund to be held hereunder.

(b) **Draws Upon Reserve Fund.** The amounts on deposit in the Reserve Fund shall be maintained, transferred, paid, reimbursed and liquidated in the following priority:

(i) If, on the date which is five (5) days prior to any Payment Date, the amount then on deposit in the Loan Payment Fund is less than the principal and interest due on the Loan on such Payment Date, the Custodian shall transfer from the Reserve Fund to the Loan Payment Fund an amount which, when combined with moneys then on deposit in the Loan Payment Fund, will be sufficient to pay the principal and interest due on the Loan on such Payment Date. In the event that moneys in the Reserve Fund, together with moneys then on deposit in the Loan Payment Fund are insufficient for such purposes, the Custodian is to nonetheless transfer all moneys in the Reserve Fund to the Loan Payment Fund for the purpose of making partial payments on the Loan in accordance with the provisions of Section 5 above.

(ii) Subject to the receipt of sufficient amounts to replenish any draws on the Reserve Fund, the Reserve Fund shall be maintained in the amount of the



Reserve Requirement. If at any time the Reserve Fund is drawn upon so that the amount of the Reserve Fund is less than the Reserve Requirement, then the District is to deposit to the Reserve Fund amounts sufficient to bring the amount credited to the Reserve Fund to the Reserve Requirement. Such deposits and payments shall be made as soon as is practicable succeeding such use, but in no event shall such replenishment be made later than the last day of the calendar year immediately succeeding the year in which a draw is made on the Reserve Fund.

(iii) If on December 2 of any year, the balance in the Reserve Fund exceeds the Reserve Requirement, such excess shall be withdrawn by the Custodian and if so withdrawn, shall if a written request has been made by the Bank, first be transferred to the Bank to the extent any amounts are owing under the Loan Agreement or any amounts are owing under the Note pursuant to the Authorizing Resolution, and, if any excess amounts remain, shall thereafter be deposited in the Loan Payment Fund.

(iv) If at any time the balance in the Reserve Fund falls below the Reserve Requirement, the District hereby agrees to include the amount of such deficiency in the District's next annual mill levy certification (subject to the limitations of the Required Mill Levy) and, upon receipt, shall immediately deposit such amounts in the Reserve Fund; provided, however, that to the extent that the balance in the Reserve Fund has been restored to the Reserve Requirement prior to such certification, said adjustment need not be made.

(v) All amounts on deposit in the Reserve Fund on the Maturity Date shall be transferred to the Bank for payment of the Loan and shall be applied in any order of priority as determined by the Bank.

**Section 7. Costs of Issuance Fund.** The Costs of Issuance Fund shall be held, administered and maintained by the Custodian in accordance with this Section 7.

(a) ***Funding of Costs of Issuance Fund.*** The Costs of Issuance Fund shall be funded from proceeds of the Loan on the Closing Date in the amount set forth in the Closing Memorandum.

(b) ***Application of Moneys in Costs of Issuance Fund.*** The Custodian shall disburse amounts in the Costs of Issuance Fund for the payment of the fees, costs and expenses incurred in connection with the borrowing of the Loan and the refunding of the Refunded Loan in accordance with the Closing Memorandum and pursuant to invoices provided to the Custodian that are consistent therewith. The District's execution of this Agreement shall constitute authorization and instruction to the Custodian to disburse moneys in accordance with the Closing Memorandum and the Custodian may conclusively rely on such execution as authority from the District. Amounts to be disbursed from the Costs of Issuance Fund other than as provided in the Closing Memorandum must be approved in writing by the District prior to disbursement by the Custodian.

(c) **Termination of Costs of Issuance Fund.** On the date which is 90 days after the Closing Date, the Custodian shall transfer all amounts then remaining in the Costs of Issuance Fund, if any, to the Pledged Revenue Fund. At such time as no amounts remain therein, the Custodian shall terminate the Costs of Issuance Fund.

(d) **Investment Earnings.** Amounts on deposit in the Cost of Issuance Fund may be invested or deposited, at the written direction of the District, in Permitted Investments and shall be valued on the basis of their current market value, as reasonably determined by the Custodian's pricing service, or by the District, which value shall be determined at least annually. All interest income from the investment or reinvestment of moneys credited to the respective accounts of the Cost of Issuance Fund shall remain therein.

### **Section 8. Investment of Moneys in Funds and Accounts.**

(a) **Permitted Investments.** All moneys in any of the Funds and Accounts established, held, maintained and administered by the Custodian hereunder shall be promptly invested or reinvested by the Custodian, at the written or oral request (followed by written instructions) and direction of an Authorized Person of District, in Permitted Investments.

(b) **Direction of District.** Such investments shall mature or be redeemable at the option of the owner thereof no later than the respective dates when moneys held for the credit of such fund or account are reasonably anticipated to be needed for the purposes intended. The District shall direct the Custodian to invest and reinvest the moneys in Permitted Investments so that the maturity date, interest payment date, or date of redemption, at the option of the owner of such investment, shall coincide as nearly as practicable with the times at which money is reasonably anticipated to be needed for expenditure. Absent written direction, the Custodian will hold such amounts uninvested. The Custodian shall be entitled to conclusively rely on any written investment direction of the District as to the legality and suitability of such directed investment.

(c) **Custodian Not Responsible.** The Custodian shall not be responsible for any losses resulting from the investment of amounts in the Funds and Accounts held under this Agreement or for obtaining any specific yield or percentage of earnings on such investments.

The Custodian may make any and all investments permitted by the provisions of this Section 8 through its own investment department or that of its affiliates. As and when any amount invested pursuant to this Section may be needed for disbursement, the Custodian may cause a sufficient amount of such investments to be sold and reduced to cash to the credit of such funds.

The parties acknowledge that to the extent regulations of the Comptroller of Currency or other applicable regulatory entity grant a right to receive brokerage confirmations of security transactions of the escrow, the parties waive receipt of such confirmations, to the extent

permitted by law. The Custodian shall furnish a statement of security transactions on its regular monthly reports.

**Section 9. Security.** The District hereby pledges and grants to the Bank a first priority lien on and security interest in, as security for its obligations in with the Loan and under the Loan Agreement and the Note, in and to all of their respective rights, title and interest, if any, whether now existing or hereafter arising, in (a) the Pledged Revenue Fund, the Loan Payment Fund and the Reserve Fund and (b) all cash and investment securities on deposit therein. The Custodian hereby agrees that it will treat all property held by it in any fund or account hereunder as financial assets under Article 8 of the Uniform Commercial Code of the State of Colorado. The Custodian agrees to treat the Bank as entitled to exercise all securities entitlements with respect to the financial assets credited to the Pledged Revenue Fund, the Loan Payment Fund and the Reserve Fund and agrees that it shall at all times in the ordinary course of its business maintain securities accounts for others and act in that capacity as a custodian for others within the meaning of Article 8 of the Uniform Commercial Code of the State of Colorado. The Custodian hereby agrees that with respect to any uncertificated securities on deposit in the Pledged Revenue Fund, the Loan Payment Fund and the Reserve Fund, it will comply with entitlement orders originated by the Bank, without further consent by the District. The Bank hereby agrees that it will give entitlement orders with respect to any uncertificated securities on deposit in the Pledged Revenue Fund, the Loan Payment Fund and the Reserve Fund to the Custodian only in compliance with the provisions of this Agreement. Without limiting the foregoing, the Bank is hereby authorized to file one or more financing statements (including fixture filings), continuation statements or other documents for the purpose of perfecting, confirming, continuing, enforcing or protecting the lien and security interests granted herein or to otherwise enable the Bank to enforce its rights hereunder, without the signature of the District, and naming the District as a debtor and the Bank as secured party. The Custodian agrees not to enter into any agreements with respect to the Pledged Revenue Fund, the Loan Payment Fund and the Reserve Fund containing provisions substantially similar to the provisions contained herein with any secured creditor other than the Bank. The Custodian further agrees not to take a lien on or a security interest in the Pledged Revenue Fund, the Loan Payment Fund and the Reserve Fund except for its rights to receive payments as described herein.

**Section 10. Withdrawals and Applications of Funds.** To the extent the provisions of this Agreement so authorize, the Custodian is hereby authorized and directed to automatically transfer funds as described herein.

**Section 11. Events of Default.** The occurrence of the following shall constitute an “Event of Default” hereunder (subject to any applicable cure period): the Custodian’s receipt of notice from the Bank of the occurrence of any event of default under the Loan Agreement or the Authorizing Resolution.

Each party hereto agrees to give notice of any Event of Default of which it has knowledge to the Custodian promptly upon obtaining such knowledge and the Custodian shall promptly forward such notice to the other parties.

**Section 12. Remedies.** While any Event of Default remains uncured, the Bank and the Owners (through the rights assigned to them in the Authorizing Resolution by the District) shall have all of the following rights and remedies:

- (a) to foreclose their respective security interests in the Funds and Accounts by any available judicial procedure or without judicial process;
- (b) to exercise all rights and remedies available to the Bank or the Owners upon the occurrence of an event of default under the Authorizing Resolution or the Loan Agreement;
- (c) to cause the Custodian to transfer all amounts in the Funds and Accounts pursuant to the terms of this Agreement;
- (d) to exercise any and all other rights and remedies that the Bank may have by law or under any applicable agreement, including without limitation, all rights and remedies of a secured party under any applicable commercial code.

**Section 13. Cumulative Remedies.** The Bank's and the District's rights and remedies hereunder, under the Loan Agreement and under the Authorizing Resolution are cumulative and in addition to all rights and remedies provided by law or otherwise from time to time, and each such right or remedy may be exercised concurrently or independently and as often as the Majority Bank or the District deems advisable.

**Section 14. No Implied Waivers.** No waiver of any default shall be implied from any omission by any party to this Agreement to take action on account of such default if such default persists or is repeated. No waiver of any default shall affect any default other than the default expressly waived, and any such waiver shall be operative only for the time and to the extent stated. No waiver of any provision of any Financing Document shall be construed as a waiver of any subsequent breach of the same provision.

**Section 15. Custodian's Costs and Expenses.** The District shall from time to time, subject to any agreement then in effect with the Custodian, pay the Custodian compensation for its services and reimburse the Custodian for all its advances and expenditures hereunder, including but not limited to advances to and fees and expenses of accountants, agents, appraisers, consultants, legal counsel or other experts employed by it in the observance and performance of its rights and obligations hereunder; provided that the Custodian shall not have any lien for such compensation or reimbursement against any money held by it in any fund established hereunder, although the Custodian may take whatever legal actions are available to it directly against the District to recover such compensation or reimbursement.

**Section 16. Role of Custodian; No Discretionary Authority.** The Custodian hereby accepts all duties and responsibilities required or permitted to be performed by it pursuant to this Agreement and in accordance with the terms of the Authorizing Resolution, pursuant to which it is acting as custodian, and the Loan Agreement. The Custodian understands and acknowledges that, by reason of the execution hereof, with respect to any funds held by it under this Agreement it has assumed a role of custodian. The Custodian shall receive and disburse such funds solely in

accordance with the terms and provisions hereof, as well as the provisions of the Authorizing Resolution and the Loan Agreement.

**Section 17. Indemnification.** The District and the Custodian acknowledge that, except to the extent set forth in any separate instrument signed by the parties with respect to this Agreement, the Custodian's duties hereunder do not include any discretionary authority, control or responsibility with respect to the management or disposition of any asset or funds; that the Custodian has no authority or responsibility to render investment advice with respect to any asset or funds; and that the Custodian is not a fiduciary with respect to the District. In addition, it is agreed that the Custodian shall not be liable for any loss or diminution of assets or funds by reason of investment experience or for its actions taken in reliance upon an instruction from the District. The Custodian shall only be responsible for the performance of such duties as are expressly set forth herein or in instructions of the District that are not contrary to the provisions of this Agreement. The Custodian shall exercise reasonable care in the performance of its services hereunder. In no event shall the Custodian be liable for indirect or consequential damages. Custodian shall not be responsible or liable for any failure or delay in performance of its obligations under this Agreement arising out of or caused, directly or indirectly, by instructions, actions or omissions of the District or by circumstances beyond the Custodian's reasonable control, including, without limitation, loss or malfunctions of utility, transportation, computer (hardware or software) or communication service; nor shall any such failure or delay give District the right to terminate this Agreement, except as provided in Section 22 of this Agreement.

The Custodian shall be deemed to have received appropriate "instructions" or "directions" upon receipt of written instructions or directions, or in the case of cash movement, written or oral instructions or directions, (a) signed or given by Authorized Persons designated by the District under the Loan Agreement.

To the extent permitted by law, the District hereby agrees to indemnify Custodian and its controlling person, officers, directors, employees and Custodians (each an "Indemnified Party") and hold each Indemnified Party harmless from and against any cost, losses, claims, liabilities, fines, penalties, damages and expenses (including reasonable attorneys' and accountants' fees) (collectively, a "Claim") arising out of (i) District's actions or omissions or (ii) Custodian's action taken or omitted hereunder in reliance upon District's instructions, or upon any information, order, indenture, stock certificate, power of attorney, assignment, affidavit or other instrument delivered hereunder to Custodian, reasonably believed by Custodian to be genuine or bearing the signature of a person or persons authorized by District to sign, countersign or execute the same; provided, that District shall not indemnify an Indemnified Party for any Claim arising from the Indemnified Party's willful misfeasance, bad faith or negligence in the performance of its duties, or reckless disregard of its duties under this Agreement.

**Section 18. Miscellaneous.** Presentment, protest, notice of protest, notice of dishonor and notice of nonpayment are hereby waived with respect to any proceeds to which any Bank is entitled hereunder.

**Section 19. Successors and Assigns.** Subject to any applicable restrictions on assignment contained herein, in any Reimbursement Agreement or in the Authorizing

Resolution, this Agreement shall bind and shall inure to the benefit of, the successors and assigns of the District, the Custodian and the Bank.

**Section 20. Notices, Etc.** All notices, demands, instructions and other communications required or permitted to be given to or made upon any party hereto or any other Person shall be in writing and shall be personally delivered or sent by certified mail (return receipt requested), postage prepaid, or by confirmed facsimile or email and shall be deemed to be given for purposes of this Agreement on the day that such writing is initially delivered to the intended recipient thereof in accordance with the provisions of this Section 21. Unless otherwise specified in a notice sent or delivered in accordance with the foregoing provisions of this Section 21, notices, demands, instructions and other communications in writing shall be given to or made upon the respective parties hereto at their respective addresses (or to their respective facsimile numbers or email address) indicated below:

If to Custodian: U.S. Bank National Association  
DN-CO-T12CT  
950 17th Street, 12th Floor  
Denver, CO 80202  
Attention: Kathleen Connelly  
Telephone: (303) 585-4591  
Facsimile: (303)585-6865  
E-mail: kathleen.connelly@usbank.com

If to District: Briargate Center Business Improvement District  
c/o Collins, Cockrel & Cole  
390 Union Boulevard, Suite 400  
Suite 400  
Denver, CO 80228  
Telephone: (303) 986-1551  
Facsimile: (303) 986-1755  
Attention: Tim Flynn, Esq.  
E-mail: tflynn@cccfirm.com

If to the Bank (with respect to credit matters): U.S. Bank National Association  
Commercial Banking  
8<sup>th</sup> Floor  
950 17<sup>th</sup> Street  
Denver, CO 80202  
Telephone: (303) 585-4111  
Facsimile: (303) 585-4242  
Attention: Jason Edrington  
E-mail: jason.edrington@usbank.com

**Section 21. Integration; Modification; Waiver.** This Agreement, together with any other documents referred to herein, constitutes the entire agreement among the District, the Custodian, and the Bank with respect to the matters set forth herein. No modification of this

Agreement (including waivers of rights) shall be effective unless in writing and signed by each party hereto.

**Section 22. Counterparts.** This document may be executed in counterparts with the same force and effect as if the parties had executed one instrument, and each such counterpart shall constitute an original hereof. No provision of this Agreement that is held to be inoperative, unenforceable or invalid shall affect the remaining provisions, and to this end all provisions hereof are hereby declared to be severable. Time is of the essence of this Agreement. This Agreement shall be governed by, and construed in accordance with, the internal laws of the State of Colorado.

**Section 23. Waiver of Jury Trial.** Each of the parties hereto irrevocably waives, to the fullest extent permitted by law, any and all rights to trial by jury in any legal proceeding arising out of or relating to this Agreement or the transactions contemplated hereby. The District, the Bank and the Custodian each further agree that, in the event of litigation, it will not personally or through its agents or attorneys seek to repudiate the validity of this Section 20 and it acknowledges that it freely and voluntarily entered into this Agreement to waive trial by jury in order to induce the Bank to enter into the Loan Agreement.

**Section 24. Headings.** Section headings used in this Agreement are for convenience of reference only and shall not affect the construction of this Agreement.

**Section 25. Amendment and Termination.**

(a) This Agreement may be amended only upon written agreement by all of the parties hereto.

(b) This Agreement shall terminate on the date when the District has paid all amounts due and owing to (i) the Bank under the Loan Agreement and (ii) the Custodian under this Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed and delivered by their respective officers thereunto duly authorized as of the date first above written.

BRIARGATE CENTER BUSINESS  
IMPROVEMENT DISTRICT

By \_\_\_\_\_  
Name \_\_\_\_\_  
Title \_\_\_\_\_

U.S. BANK NATIONAL ASSOCIATION, as  
Custodian

By \_\_\_\_\_  
Name: Kathleen Connelly  
Title: Vice President

[Signature Page to Custodial Agreement]