

# COTTONWOOD HEIGHTS

## RESOLUTION NO. 2016-23

### A RESOLUTION AUTHORIZING TERMINATION OF AN AGREEMENT FOR PUBLIC WORKS SERVICES WITH TERRACARE ASSOCIATES, LLC

**WHEREAS**, effective \_\_ October 2013 the city of Cottonwood Heights (“City”) and Terracare Associates, LLC (“Provider”) entered into an “Agreement for Public Works Services” (as previously amended, the “Services Agreement”) whereunder Provider agreed to perform certain municipal public works services (the “Services”) for City as specified in the Agreement; and

**WHEREAS**, thereafter, City’s city council (the “Council”) has studied different methods for delivery of the Services in an effort to further enhance such services within City’s jurisdiction and, after much study and discussion, the Council desires for City to self-provide the Services; and

**WHEREAS**, consequently, City and Terracare mutually desire to terminate the Services Agreement on the terms and conditions specified in a “Mutual Contract Closeout Agreement” (the “Closeout Agreement”), a photocopy of which is annexed hereto as an exhibit; and

**WHEREAS**, the Council has reviewed the Closeout Agreement and met in regular session on 26 April 2016 to consider, among other things, authorizing and directing City’s entry into such agreement; and

**WHEREAS**, after careful consideration, the Council has determined, and hereby determines, that it is in the best interests of the health, safety and welfare of the citizens of the City to approve and direct City’s entry into the Closeout Agreement;

**NOW, THEREFORE, BE IT RESOLVED** by the city council of the city of Cottonwood Heights that the Council hereby approves City’s entry into the Closeout Agreement and hereby authorizes and directs City’s mayor and recorder to promptly execute and deliver the Closeout Agreement on behalf of City.

This Resolution, assigned no. 2016-23, shall take effect immediately upon passage.

**PASSED AND APPROVED** this 26<sup>th</sup> day of April 2016.



**ATTEST:**

By Linda W. Dunlavy  
Linda W. Dunlavy, Recorder

**COTTONWOOD HEIGHTS CITY COUNCIL**

By Kelvyn H. Cullimore, Jr.  
Kelvyn H. Cullimore, Jr., Mayor

#### VOTING:

Kelvyn H. Cullimore, Jr.	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael L. Shelton	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
J. Scott Bracken	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael J. Peterson	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Tee W. Tyler	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>

**DEPOSITED** in the office of the City Recorder this 26<sup>th</sup> day of April 2016.

**RECORDED** this 26 day of April 2016.

# Mutual Contract Closeout Agreement

**THIS MUTUAL CONTRACT CLOSEOUT AGREEMENT** (this "*Contract Closeout*") is entered into effective 26 April 2016 between the city of **COTTONWOOD HEIGHTS**, a Utah municipality whose address is 1265 East Fort Union Blvd., Suite 250, Cottonwood Heights, UT 84047 ("*City*"), and **TERRACARE ASSOCIATES, LLC**, a Colorado limited liability company whose address is 9742 Titan Park Circle, Littleton, CO 80125 ("*Contractor*"). City and Contractor are each referred to herein as a "*Party*" and are collectively referred to as the "*Parties*."

## RECITALS:

A. Effective \_\_ October 2013, the Parties entered into an "Agreement for Public Works Services" (as previously amended, the "*Agreement*") whereunder Contractor agreed to perform certain municipal public works services (the "*Services*") for City on the terms and conditions specified in the Agreement.

B. The Parties have decided that it is in their mutual best interests to closeout the Agreement effective 1 October 2016, whereupon City will commence self-providing the public works services it requires.

C. Consequently, the Parties now desire to mutually closeout the Agreement as specified in this Contract Closeout.

D. The Parties intend to set forth herein all of the terms and conditions relating to such closeout, and to supersede hereby and consolidate herein all prior agreements and negotiations, oral and/or written, concerning the closeout

## AGREEMENT:

**NOW, THEREFORE**, in consideration of the premises, the mutual covenants and undertakings of the parties hereto, and for other good and valuable consideration, the receipt and legal sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **Contract Closeout.** The Parties agree to CLOSEOUT the Agreement as follows:
  - (a) *Initial Phase.* From the date hereof through 30 June 2016, the Parties shall continue to have and perform all of their respective rights and obligations under the Agreement, with Contractor providing the Services and City compensating Contractor for such performance, all as specified in the Agreement.
  - (b) *Transitional Phase.* From 1 July 2016 through 30 September 2016, Contractor will perform such Services under the Agreement that City specifies, and shall be compensated by City for such provision on a basis that is reasonably acceptable to the Parties. Although City shall have the ultimate right to direct which Services are to be performed by Contractor during this time period, the Parties anticipate formulating a mutually acceptable plan for provision of the Services between July 1st and September 30th that will allow City to ramp up its self-provision of the Services, and will allow Contractor to ramp down its provision of the Services for City, on a logical, reasonable and cost-effective basis. During this time period, the

Parties shall cooperate in good faith to effectuate a smooth and harmonious transition of performance of the Services from Contractor to City. Pertinent records shall be delivered by Contractor to City during this time period as provided in Section 11.3 of the Agreement.

(c) Final Closeout. Final closeout of the Agreement shall be effective as of 11:59 p.m. on 30 September 2016 (the "End Date"), subject to City's right to extend the Services under Section 11.2 of the Agreement.

2. **Financial Reconciliation**. Financial reconciliation under the Agreement shall occur as provided in section 10.5 of the Agreement, as follows:

10.5. Final Invoice. Upon the effective date of a termination following a Termination Notice, Contractor shall prepare a final accounting and final invoice ("*Final Invoice*") of charges for all performed but unpaid Services, allowable charges under this Agreement and authorized reimbursable expenses. The Final Invoice shall be delivered to City within 45 calendar days after the date of termination. Thereafter, no other invoice, bill, or other form of statement of charges owing to Contractor shall be submitted to or accepted by City. The Final Invoice shall be paid in conformity with the times allowed for paying monthly invoices under this Agreement minus any damages assessed pursuant to Subsection 10.6. If payment has been made for Services not completed, Contractor shall return these sums to City within ten business days after receipt of notice that those sums are due.

3. **Vehicles**. Contractor hereby waives any right to require City to purchase Contractor's vehicles used for providing the Services as specified in section 7.9 of (or elsewhere in) the Agreement.

4. **Survival of Terms and Conditions**. All terms and conditions of the Agreement that clearly require continued performance, compliance, or effect beyond the End Date of the Agreement shall survive the End Date and shall be enforceable in the event of a failure to perform or comply. Those terms and conditions include Section 13.1 ("*Audits*"); Section 14 ("*Indemnification*"); Section 16 ("*Records and Ownership of Documents*"); Section 17 ("*Intellectual Property Rights; Confidentiality*"); and Section 19 ("*Mutual Non-Solicitation*").

5. **Mutual Waiver of Rights and Release of Liability**. Except as otherwise provided in this Contract Closeout, effective as of the End Date the Parties each hereby mutually and irrevocably (a) waive all of its respective rights under the Agreement, and (b) release the other of and from its respective obligations arising under the Agreement.

6. **Default**. If a Party defaults hereunder, then the other Party may, following at least ten business days' prior written notice and opportunity to cure to the defaulting Party, pursue any and all remedies available in law or equity.

7. **Additional Provisions**. The following provisions are also integral parts of this Contract Closeout:

(a) Binding Agreement. This Contract Closeout shall be binding upon and shall inure to the benefit of the Parties and their respective permitted successors and assigns.

(b) Captions. The headings used in this Contract Closeout are inserted for reference purposes only and shall not be deemed to define, limit, extend, describe, or affect in any way the meaning, scope or interpretation of any of the terms or provisions of this Contract Closeout or the intent hereof.

(c) Counterparts. This Contract Closeout may be signed in any number of counterparts with the same effect as if the signatures upon any counterpart were upon the same instrument. All signed counterparts shall be deemed to be one original.

(d) Severability. The provisions of this Contract Closeout are severable, and should any provision hereof be void, voidable, unenforceable or invalid, such void, voidable, unenforceable or invalid provision shall not affect the other provisions of this Contract Closeout.

(e) Waiver of Breach. Any waiver by either Party of any breach of any kind or character whatsoever by the other, whether such be direct or implied, shall not be construed as a continuing waiver of or consent to any subsequent breach of this Contract Closeout.

(f) Cumulative Remedies. The Parties' rights and remedies shall be construed cumulatively, and none of such rights and remedies shall be exclusive of, or in lieu or limitation of any other right, remedy or priority allowed by law.

(g) Amendment. This Contract Closeout may not be modified except by an instrument in writing signed by the Parties.

(h) Time of Essence. Time is the essence of this Contract Closeout.

(i) Interpretation. This Contract Closeout shall be interpreted, construed and enforced according to the substantive laws of the state of Utah. Jurisdiction and venue of any litigation involving this Contract Closeout shall be in the Third District Court of Salt Lake County, Utah. This Contract Closeout has been negotiated at arms' length by the Parties, each represented by counsel of its choice and each having an equal opportunity to participate in the drafting of the provisions hereof. Accordingly, in construing the provisions of this Contract Closeout neither Party shall be presumed or deemed to be its drafter or preparer.

(j) Attorneys' Fees. If any action or proceeding is brought by either Party regarding this Contract Closeout, the prevailing Party shall be entitled to recover its costs and reasonable attorneys' fees, whether such sums are expended with or without suit, at trial, on appeal, or in any bankruptcy, receivership or insolvency proceeding.

(k) Notice. Any notice or other communication required or permitted to be given hereunder shall be deemed to have been received (a) upon personal delivery or actual receipt thereof or (b) within three days after such notice is deposited in the United States mail, postage prepaid and certified and addressed as set forth above.

(1) Facsimiles. Each Party may rely on facsimile, email and other electronic transmissions of this Contract Closeout, and of any signature(s) hereon, received from the other Party to the same effect as if such copy of this Contract Closeout had been manually executed and delivered by the transmitting Party.

**DATED** effective the date first above written.

**CONTRACTOR:**

**TERRACARE ASSOCIATES, LLC**, a Colorado corporation qualified to do business in Utah

By:   
Name: Justin Stewart  
Title: V.P.

**CITY:**

**COTTONWOOD HEIGHTS**, a Utah municipality

**ATTEST:**

By: \_\_\_\_\_  
Linda W. Dunlavy, Recorder

By:   
Kelvyn H. Cullimore, Jr., Mayor