# SURFACE USE AND MINING AGREEMENT

This *Surface Use and Mining Agreement* (hereinafter "*Agreement*") is made and entered into this ____ day of October, 2015 ("*Effective Date*") by and between **CITY OF BRIGHTON, COLORADO**, a home rule municipal corporation (the "*City*"), and **READY MIXED CONCRETE COMPANY** (hereinafter "*Company*"), a Colorado corporation. The City and Company may be referred to collectively herein as the "*Parties*" or individually as a "*Party*."

## RECITALS

**WHEREAS** the City owns certain real property located in portions of Sections 11, 12, 13 and 14, Township 1 South, Range 67 West, 6th P.M. Adams County, Colorado as shown on **Exhibit A**, commonly known as "Cell #1" of the City's Ken Mitchell Lakes Complex (aka Bromley Lakes);

**WHEREAS** Cell #1 is a decreed lined water storage reservoir used by the City to store water the City uses to meet certain of its water augmentation and replacement obligations;

**WHEREAS** the City wishes to expand the capacity of Cell #1 to store water by having the construction aggregate materials mined and removed from that portion of Cell #1 located in the NE ¼ of the NE ¼ of Section 14, Township 1 South, Range 67 West, 6th P.M. Adams County, as depicted in **Exhibit B** (the "Mining Area");

**WHEREAS** the Company wishes to excavate and remove the construction aggregate materials from the Mining Area and to reclaim the Mining Area as provided herein;

**WHEREAS** the Parties wish to memorialize between them by this Agreement the terms and conditions pursuant to which the Company may enter upon Cell #1 to mine the construction aggregate materials from the Mining Area.

**NOW, THEREFORE,** in consideration of the mutual covenants set forth herein and for other good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

## AGREEMENT

1.0 **Definitions**. For purposes of this Agreement, the following terms are defined as follows:

1.1 **Construction Aggregate Materials**. The term "*Construction Aggregate Materials*" shall mean and include all sand, gravel, stone, rock, silt, clay and shale on and in the Mining Area, together with the topsoil, overburden and other materials excavated from the Mining Area.

1.2 **Removed from the Mining Area**. The term "*Removed from the Mining Area*" refers to the gross tons of Construction Aggregate Materials that are excavated from the Mining Area, transferred by belt conveyor to the Company's production plant located on property adjacent to Cell #1 and weighed on the belt scale located at the primary feed point to the production plant.

2.0 **Grant of Right to Use Surface**. Subject to the provisions of Paragraph 4.1 below, the City hereby confirms, extends and grants to the Company, its successors and assigns, the exclusive right and privilege to enter upon Cell #1 and to conduct thereon such operations as the Company deems necessary or convenient in connection with excavating, removing and transporting Construction Aggregate Materials from the Mining Area to the Company's production plant. The rights herein granted shall specifically include the right: (i) to install and maintain a conveyor belt system, including any required electrical utilities, to transport Construction Aggregate Materials on and over Cell #1 along the approximate course shown on **Exhibit B**; (ii) to use any existing roads located on Cell #1; (iii) to remove any structures, equipment and facilities used to excavate, remove and transport Construction Aggregate Materials from the Mining Area; and (vi) conduct to the final satisfaction of any State or local governmental authority all post-mining reclamation of the Mining Area and Cell #1, where appropriate.

2.1 **Term**. The term of this Agreement shall commence upon the Effective Date, which in no case shall be earlier than the date the City Council of the City of Brighton approves this Agreement and, unless otherwise extended by mutual written agreement of the Parties, it shall terminate on December 31, 2015.

3.0 **Consideration**. The Company shall pay the City a royalty of Fifty Cents ($0.50) per ton for Construction Aggregate Materials Removed from the Mining Area (gross tons), which royalty shall be computed and paid within fourteen (14) days after the date the final Construction Aggregate Materials Removed from the Mining Area have been processed through the Company's production plant. The quantity of Construction Aggregate Materials Removed from the Mining Area shall be computed by reference to daily production reports generated and maintained by the Company. The daily production reports track the Construction Aggregate Materials weighed on the belt scale located at the primary feed point to the production plant. The daily production reports shall be made available by the Company to the City for inspection and review upon 24-hour prior notice made by the City to the Company as provided in Paragraph 10.1 below. The royalty computation for the royalty payment to be made to the City shall include copies of the related daily production reports. The Company estimates the quantity of Construction Aggregate Materials Removed from the Mining Area may be more or less than 400,000 tons. The City acknowledges and agrees that this quantity is an estimate and that no firm quantity or amount of royalty is guaranteed to be paid by the Company to the City hereunder.

4.0 **Compliance with Law**. The Company shall at its expense obtain and maintain all necessary permits and approvals for its mining activity, and shall not make any use of the Mining Area or Cell #1 which is contrary to any applicable local, State, or federal law, or any provision of any related permit or permission. The Company shall, before, during and after mining, as applicable, address and resolve to the City's reasonable satisfaction any comment, concern or requirement issued by the Division of Water Resources in response to the Company's DRMS application for the Mining Area. Including any leak test requirements. If this Agreement is inconsistent with any permit, law or regulation, then the permit, law or regulation shall control and this Agreement shall be deemed modified to that extent.

4.1 **City's Access**. Subject to limitations imposed by the Federal Mine Safety and Health Act of 1977 and the Colorado Mined Land Reclamation Board, the City shall be permitted access to the Mining Area for the purpose of inspecting the Company's operations thereon and for any other purpose that does not interfere with the Company's operations in the Mining Area.

4.2 **Workmanlike Manner**. The Company shall conduct its operations in the Mining Area in a good and diligent, workmanlike manner in accordance with accepted mining practices and as specified in the mine permit application set forth in **Exhibit C** hereto.

5.0 **Oil and Gas Well – Krough #2**. At present there is an oil and gas well called the Krough #2 located within the City's decreed lined water storage reservoir and the Mining Area. As the owner of the surface estate and oil and gas mineral estate in these areas, the City has contacted the Colorado Oil and Gas Conservation Commission ("COGCC") to explore the options available to permanently plug and abandon the Krough #2 well. The timely plugging and abandonment of the Krough #2 well under applicable COGCC authorities would allow the Company to mine within fifty (50) feet of the well (as shown in **Exhibit C**) in areas that the Company would have to otherwise leave unmined.

5.1 In the event the COGCC confirms that it is appropriate for the City to formally pursue the permanent plugging and abandonment of the Krough #2 well, the Parties agree to share equally in the cost of an expert third party consultant to be retained by RMCC to prepare, with input from the City, and file with the COGCC the materials required to permanently plug and abandon the well, to diligently pursue and obtain any required approval(s) to implement the well plugging and abandonment plan that is filed and to thereafter implement the approved well plugging and abandonment plan in compliance with any COGCC approval(s). Any documents required to be filed with the COGCC to obtain the authority to plug and abandon the Krough #2 well shall name the City as applicant.

5.2 The payment of the City's fifty percent (50%) share of the costs incurred as a condition of Paragraph 5.1 may be made by the City to the Company by either: (i) direct payment to Company in good funds consisting of electronic transfer funds, certified check or cashier's check; or (ii) the Company deducting the amount owed by the City from the royalty to be paid by the Company to the City under Paragraph 3.0 of this Agreement.

5.3 The Parties agree that time is of the essence where coordinating the plugging and abandonment of the Krough #2 well is concerned. To that end, if an expert third party consultant has not been retained by December 1, 2015 to develop the materials required to plug and abandon the Krough #2 well or, if an expert third party consultant has been retained and plans and submittals to plug and abandon the Krough #2 either not been made, or, if made, not approved by the COGCC by December 1, 2015, the Company may, in its sole discretion, opt out of mining the portion of the Mining Area located within 50 feet of the Krough #2 well. In such case, the City shall be solely responsible for paying the costs to permanently plug and abandon the Krough #2 well as provided for in Paragraph 8.1 above and the Company will not be responsible for paying any of those costs. In such case, any costs incurred by the Company under Paragraph 8.1 shall be reimbursed to the Company by the City.

5.4 The City agrees to release the Company from any and all liability associated with the plugging and abandonment of the Krough #2 well in accordance with Paragraph 9.0.

6.0 **Post-Mining Access**. Notwithstanding any other provision of this Agreement, the Company's right to access the Mining Area and Cell #1 after mining has been completed shall extend until that point in time that the mined land reclamation permit and financial surety (i.e., reclamation bond) posted by the Company with the Colorado Mined Land Reclamation Board to secure the

permit are released. The Company's continuing right of access shall be for the sole purpose of ensuring that the permitted and required reclamation is implemented and completed by the Company in a manner that will support release of the permit and the financial surety by either the Colorado Mined Land Reclamation Board or it staff, the Division of Reclamation Mining and Safety.

7.0 **Insurance**. At all times after the Effective Date, the Company shall obtain and maintain in full force and effect, the following:

7.1 **Worker's Compensation**. Worker's Compensation Insurance, including occupational disease in accordance with applicable statutory and regulatory requirements;

7.2 **Employer's Liability**. Employer's Liability Insurance, including coverage on all of the Company's employees engaged in mining and reclamation activities in the Mining Area;

7.3 **Automobile**. Automobile liability insurance in an amount of Five Hundred Thousand Dollars ($500,000) per person and Two Million Dollars ($2,000,000) per accident for bodily injury; and, for the Mining Area, One Million Dollars ($1,000,000) per each accident;

7.4 **CGL**. Commercial General Liability Insurance in an amount of One Million Dollars ($1,000,000) per person and Two Million Dollars ($2,000,000) per event for bodily injury, and for, Lot 1 Property damage, One Million Dollars ($1,000,000) per each accident, and Two Million Dollars ($2,000,000) aggregate.

7.5 **Certificates of Insurance**. Upon request, the Company shall furnish the City certificates of insurance or other evidence satisfactory to the City to the effect that such insurance has been procured by the Company and any Company contractors or subcontractors and the policies name the City as an additional insured. The certificates shall state that the policies of insurance are in full force and affect and cannot be canceled or otherwise terminated without thirty (30) days advance written notice to the City.

8.0 **Company to Indemnify the City**. The Company hereby covenants to indemnify, defend, and hold the City and its officers, directors, shareholders, partners, members, employees, agents, parent, subsidiary and affiliated entities, successors and assigns, its servants, employees and contractors harmless from any and all demands, claims, causes of action, liabilities, losses, damages or judgments for personal injury, death, or property damage asserted or brought against the City arising out of or connected with any operations or activities conducted or performed by the Company or its successors, assigns, agents, employees, or contractors under this Agreement. The Company shall control any litigation that is the subject of this indemnity and shall have the right, in its sole discretion, to settle or compromise any demand, claim, cause of action, liability, loss, damage, or judgment, and the City shall cooperate in all respects in any such litigation, settlement or compromise. The City shall provide the Company written notice of any demand, claim, cause of action, liability, loss, or damage asserted against the City as it pertains in any respect to any matter covered by this indemnity, within fourteen (14) days after the City obtains notice, whether actual or constructive, of the same first made.

9.0 **City to Indemnify Company**. To the maximum extent permitted by Colorado law, and subject to the limitations and requirements of the Colorado Governmental Immunity Act and TABOR, the City hereby covenants to indemnify, defend, and hold the Company and the Company's officers, directors, shareholders, partners, members, employees, agents, parent, subsidiary and

affiliated entities, successors and assigns, its servants, employees, and contractors harmless from any and all demands, claims, causes of action, liabilities, losses, damages or judgments for personal injury, death or property damage asserted or brought against the Company arising out of or connected with any activities conducted or performed by the City or its successors, assigns, agents, employees or contractors on or affecting the Mining Area. The City shall control any litigation that is the subject of this indemnity and shall have the right, in its sole discretion, to settle or compromise any demand, claim, cause of action, liability, loss, damage, or judgment, and the Company shall cooperate in all respects in any such litigation, settlement or compromise. The Company shall provide the City written notice of any demand, claim, cause of action, liability, loss, damage, or judgment asserted against the Company as it pertains in any respect to any matter covered by this indemnity, within fourteen (14) days after the Company obtains notice, whether actual or constructive, of the same first made.

10. **Miscellaneous**.

10.1 **Notices**. Any notice required or desired to be given hereunder shall be effective if made in writing and delivered in person or by recognized overnight courier, sent by facsimile transmission, or sent by certified or registered U.S. mail, return receipt requested, to the following addresses:

***If to Company:***

Ready Mixed Concrete Company
4395 Washington Boulevard
Denver, Colorado 80216
Attn: Bob Kepford
e-mail: bob.Kepford@boral.com

***If to City:***

The City of Brighton
Public Works Department
500 S. 4th Ave.
Brighton, CO 80601
Attn: Curt Bauers
e-mail: cbauers@brightonco.gov

***With Copies to*** *(neither of which shall constitute notice to Company)**:***

Vice President and General Counsel
Boral Industries Inc.
200 Mansell Court East, Suite 310
Roswell, Georgia 30076
Attn: Ernest C. McLean III
E-mail: ernestc.mclean@boral.com

Carver Schwarz McNab Kamper &
Forbes, LLC
1600 Stout Street, Suite 1700
Denver, Colorado 80202
Attn: Jeffrey W. Schwarz
e-mail: jschwarz@csmkf.com

***With Copy to*** *(which shall not constitute notice to the City)**:***

Mehaffy, Brubaker & Ernst, LLC
21 North 1st Avenue, Suite 290
Brighton, Colorado 80601
Attn: Christopher Ernst
e-mail: cmernst@mmllc.com

10.2 **Covenant of Further Assurances**. The Parties agree to execute and deliver such other documents, if any, and perform such other acts, if any, as may be reasonably necessary or desirable to carry out the purposes of this Agreement.

10.3 **No Waiver**. No consent or waiver by either Party to or of any breach of any representation, covenant or warranty (whether express or implied) shall be construed as a consent to or waiver of any other breach of the same or any other representation, covenant or warranty. No extension of time for performance of any obligation or act shall be deemed an extension of the time for performance of any other obligation or act. No waiver shall be valid unless in writing, executed by the waiving Party, and delivered to the other Party.

10.4 **Binding Effect; Assignment**. Except as otherwise specified herein, this Agreement shall inure to the benefit of and be binding upon the Parties and their respective successors and permitted assigns. Neither Party may assign its rights, duties or obligations under this Agreement without the prior written consent of the other, which consent may not be unreasonably withheld.

10.5 **Entire Agreement; Severability**. This Agreement represents the entire agreement between the Parties relating to the specific subject matter hereof. The Parties have entered into various agreements in the past concerning land use, mining and water storage issues (the "*Prior Agreements*"). To the extent that any term or provision of the Prior Agreements is contrary to or inconsistent with a term or provision of this Agreement, this Agreement shall control; provided, however, that the Prior Agreements shall otherwise remain in full force and effect. The provisions of this Agreement are severable, and in the event that any provision is held to be invalid or unenforceable, the Parties intend that the remaining provisions will remain in full force and effect to the extent possible and in keeping with the intent of this Agreement.

10.6 **No Third Party Beneficiaries**. Nothing in this Agreement, express or implied, is intended to confer on any person, other than the Parties and their respective successors and assigns, any rights or remedies under this Agreement.

10.7 **Interpretation**. This Agreement shall be construed according to the fair meaning of its language. The rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not be employed in interpreting this Agreement.

10.8 **Governing Law**. This Agreement is entered into and shall be governed by, interpreted and construed in accordance with the laws of the State of Colorado.

10.9 **Dispute Resolution**. All disputes, differences and controversies arising under or in connection with this Agreement which the Parties fail to resolve between them within thirty (30) days following written notice of any such dispute, difference or controversy shall be settled by binding arbitration to be conducted in accordance with the Colorado Revised Uniform Arbitration Act, C.R.S. § 13-22-201, *et seq.*, in force at the time of such dispute, difference or controversy. In the event such binding arbitration becomes necessary, the arbitration shall be held in the City and County of Denver, Colorado. If the Parties are unable to agree within sixty (60) days following written notice of any such dispute, difference or controversy upon a single arbitrator to hear the case, each Party shall appoint an arbitrator of their choice, which two (2) arbitrators shall appoint a third arbitrator who will hear the case. The arbitration award may be enforced in any court of competent jurisdiction.

10.10 **Attorneys' Fees**. In the event of any controversy, claim or action between the Parties respecting this Agreement, the substantially prevailing Party shall be entitled to an award of its reasonable and necessary costs, attorneys' fees, and expenses that relate to or accrue as a result of such controversy, claim or action.

10.11 **Modification; Waiver; Delay**. This Agreement cannot be modified or amended, and no performance, term or condition may be waived in whole or in part, except in writing by the Parties. No delay or failure on the part of any Party in exercising any rights hereunder, and no partial or single exercise thereof, shall constitute a waiver of such rights or any other rights or benefits hereunder.

10.12 **Counterparts**. This Agreement and any exhibit, supplement, addendum, or modification thereof may be executed in two or more counterparts, each of which shall be deemed an original (including copies sent to a party by facsimile transmission) as against the Party signing such counterpart, but all of which together shall constitute one and the same instrument.

10.13 **Facsimile/Electronic Signatures**. Executed copies of this Agreement and any exhibits, addenda, supplements or modifications to them transmitted by facsimile or electronic mail shall be fully binding and effective upon receipt; *provided, however,* that each Party promptly shall deliver to the other an execution copy bearing an original signature.

10.14 **Section Headings**. The section headings in this Agreement are for convenience of reference only, shall not be considered a part of this Agreement, and shall not affect the validity or interpretation of this Agreement.

**IN WITNESS WHEREOF**, the Parties have, by their duly authorized representatives, entered into this Agreement upon the Effective Date.

| | |
|---|---|
| **THE CITY OF BRIGHTON, COLORADO,** a Colorado municipal corporation | **READY MIXED CONCRETE COMPANY**, a Colorado corporation |
| By:_____ | By:_____ |
| Title:_____ | Title:_____ |

[*Blank space left intentionally*]

STATE OF COLORADO )
) ss.
COUNTY OF ADAMS )

The foregoing instrument was acknowledged before me this ___ day of _____, 2015 by _____, as _____ of the City of Brighton, Colorado, a Colorado municipal corporation.

My Commission Expires:_____

Witness my hand and official seal.

_____
Notary Public

STATE OF COLORADO )
) ss.
CITY AND COUNTY OF DENVER )

The foregoing instrument was acknowledged before me this ___ day of _____, 2015 by _____ as _____ of Ready Mixed Concrete Company, a Colorado corporation.

My Commission Expires:_____

Witness my hand and official seal.

_____
Notary Public