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REVIEWED
DM
LEGAL COUNSEL

For Recording Stamp Only

After Recording Return to:
Deschutes County
Community Development Department
117 NW Lafayette Avenue
Bend, OR 97703

**IMPROVEMENT AGREEMENT
Overnight Lodging**

This Improvement Agreement ("Agreement"), relating to the construction and installation of certain required improvements (the "Required Improvements," as defined below in Section 4) within the plat of Caldera Springs OLU, Phase A located in the Caldera Springs Destination Resort is by and between DESCHUTES COUNTY, OREGON, a political subdivision of the State of Oregon ("County") and Caldera Springs Real Estate, LLC ("Developer").

RECITALS:

- A. Developer filed an application for final subdivision plat approval for the tentative subdivision plan approved under File No. 247-22-000182-TP (the "Land Use Approval") prior to the completion of the Required Improvements.
- B. Deschutes County Code (DCC) Section 18.113.110 provides that a developer may, in lieu of completing the Required Improvements prior to filing a final subdivision plat, enter into an agreement with the County and provide a good and sufficient form of security to provide for the completion of such improvements.
- C. The Required Improvements under this Agreement do not constitute a Public Improvement as the term is defined in ORS 279A.010(1)(cc).
- D. County and Developer desire to enter into this Agreement in order to establish the obligation and to secure completion of the Required Improvements following recording of the final plat for the Land Use Approval.

NOW THEREFORE, IT IS HEREBY AGREED BY AND BETWEEN THE PARTIES above mentioned, for and in consideration of the mutual obligations hereinafter stated, as follows:

1. **Recitals.** The Recitals to this Agreement set forth above are hereby incorporated herein as if fully set out, shall constitute contractual provisions and are not mere recitals.

2. **Real Property Description.** The real property subject to this Agreement (the “Real Property”) is identified as a portion of Map and Tax Lots 201108DD01300 and 201108DD00900 and which are more particularly described on the attached Exhibit A. This Agreement shall be recorded against and shall encumber the Real Property and every developable unit of land lawfully created from the Real Property (each, a “Lot”) subject to Section 20 below.

3. **Exhibits.** The exhibits listed below and attached to the Agreement are hereby incorporated herein by reference:

4.1 Exhibit A -- Legal description of Real Property.

4.2 Exhibit B -- List of Required Improvements.

4.3 Exhibit C – Copy of Land Use Approval.

4.4 Exhibit D - Bond Instrument.

4. **Identification of Required Improvements.** Developer shall install and complete, or cause to be installed and completed, the improvements listed in Exhibit B on each Lot and required by the Tentative Plan set forth in Exhibit C to the extent that same remain to be completed (the “Required Improvements”).

5. **Construction of Required Improvements.**

5.1 Developer shall install and complete the Required Improvements in accordance with the plans and construction specifications related thereto and to any additional County and/or State of Oregon specifications or applicable regulations. Developer shall cause the Required Improvements to be completed in compliance with the applicable codes, regulations, and laws then in effect.

5.2 Developer shall promptly repair any damage to existing and new roads, water lines, stormwater facilities, and similar facilities within and without the Real Property, which are caused by the installation of the Required Improvements.

5.3 Under DCC 18.113.060(A)(1)(b)(3) overnight lodging units guaranteed through surety bonding or equivalent financial assurances must be constructed within four (4) years of the date of execution of the surety bond or other equivalent financial assurance (the “Completion Date”). Developer shall schedule final inspections and shall have the Required Improvements in a condition determined by County to be sufficient not later than the Completion Date. For purposes of calculating the warranty of improvements under Section 6.1 below, the “Completion Date” shall be the date upon which the County has performed all final inspections of and issued a certificate of occupancy for the Required Improvements.

6. License to Enter and Remain on Property.

- 6.1 During the term of this Agreement, Developer hereby grants County and County's employees, engineers, consultants, agents, contractors, subcontractors and suppliers license to come onto and remain on the Real Property as necessary to make inspections of the Required Improvements.
- 6.2 After the Default Grace Period specified in Section 7.2, and after providing notice to Developer, County or its employees, engineers, consultants, agents, contractors, subcontractors and suppliers may enter onto and remain on the Real Property and may cause the Required Improvements to be completed.

7. Right to Draw on Security.

- 7.1 Upon failure of the Developer to complete the Required Improvements as required under Section 5.3 above by the Completion Date, County shall notify Developer in writing of such failure (the "Default Notice").
- 7.2 Upon receipt of the Default Notice, Developer shall have thirty (30) days to complete the Required Improvements to the condition required under Section 5 (the "Default Grace Period").
- 7.3 Should Developer fail to complete the Required Improvements within the Default Grace Period, County may, at its sole discretion, cause incomplete or unsatisfactory Required Improvements to be completed.
- 7.4 If County causes the Required Improvements to be completed, County may draw upon the Security for any and all costs and expenses incurred by County including, but not limited to, attorneys and engineering fees, and costs and expenses reasonably anticipated or projected by the County to be incurred by the County, in construction and/or completion of the Required Improvements.
- 7.5 If County affirmatively elects (with written documentation of same signed by the Chair of the Board of County Commissioners) not to cause the Required Improvements to be completed, County shall within 180 days cause the Security to be released to Developer.
- 7.6 For the purposes of this Agreement and access to any security offered and accepted to secure Developer's performance, Developer's failure to complete the Required Improvements shall include failure to install or have installed any portion of the Required Improvements to the standards required under Section 5 above.

8. No County Guarantee. County does not warrant or guarantee that any of the Required Improvements referred to in this Agreement will be constructed, maintained or operated.

9. License to Use Permits, Specifications and Plans.

- 9.1** If County determines that any portion of the Required Improvements have not been completed as required by Section 5 above, Developer shall, upon request of the County, license and assign to County all of Developer's, applicable permits, plans, specifications, shop drawings, instruments, permits and approvals, and other documents necessary or useful in the completion or repair of or related in any manner to the applicable Required Improvements.
- 9.2** Developer shall ensure that any contracts for supply of labor and materials used in connection with constructing Required Improvements are assignable to the County.
- 9.3** Upon such request, Developer shall deliver or shall cause to be delivered, physical possession of such permits, plans, specifications, shop drawings, instruments, permits, approvals, and other documents to the County.
- 9.4** County may sub-assign or license the rights referred to in this Section 9 for any purpose without further approval from Developer.

10. No Third-Party Beneficiaries.

- 10.1** County and Developer are the only parties to this Agreement and are the only parties entitled to enforce its terms.
- 10.2** Nothing in this Agreement gives or provides any benefit or right, whether directly, indirectly, or otherwise, to third persons.

11. Restoration of Monuments. Developer shall restore any monument erected or used for the purpose of designating a survey marker or boundary of any town, tract, plat or parcel of land that is broken, damaged, removed or destroyed, during the course of work provided for or anticipated by this Agreement, whether intentional or otherwise, by the Developer or Developer's agents, employees, independent contractors, or persons or entities other than County.

12. Costs of Inspection. Developer shall pay to County the actual costs incurred by County in the inspection of the completed Required Improvements plus any fees, such as legal review fees, plan review fees and structural, electrical, plumbing and other specialty codes inspection fees normally associated with the review and inspection of any improvements on the Real Property.

13. Security for Required Improvements.

- 13.1** Attached as Exhibit D is a copy of a performance bond in the amount of One Million Sixty-Nine Thousand One Hundred Fifty-Nine and 25/100 Dollars (\$1,069,159.25) (the "Security"). The Security represents the costs of the Required Improvements

to be constructed on each of the two Lots subject to this Agreement, together with the required twenty percent (20%) added Security.

13.2 As used herein, the issuer of the Security is referred to as “Surety.”

13.4 Cost Notice Update

13.4.1 County, in reasonable intervals, may require the Developer to provide an updated construction cost estimate for the then remaining Required Improvements (the “Cost Update Notice”).

13.4.2 Upon receipt of the Cost Update Notice, the Developer shall have thirty (30) days to provide the updated construction cost estimate (the “Developer’s Response”).

13.4.3 Upon receipt of the Developer’s Response, or if no Response is received within the thirty (30) day period, if the County reasonably determines that the Developer’s obligations under this Agreement together with the Security do not provide adequate financial assurance for completion of the Required Improvements, the County shall have the option to require Developer to increase the amount of the Security and to memorialize such increase in an amendment to this Agreement (the “Security Amendment”).

13.4.4 If the County requires Developer to increase the amount of the Security, Developer shall also file the application fees and materials to amend this Agreement to memorialize the Security Amendment within thirty (30) days of receipt of the County’s notice to increase the Security.

13.4.5 If Developer fails or refuses to increase the amount of Security as directed by the County, such failure or refusal shall be considered failure of the Developer to complete the Required Improvements as required under Section 5 and the County may draw upon the Security pursuant to Section 8.

14. Developer’s Obligation for Costs.

14.1 Developer expressly acknowledges, understands, and agrees that this Agreement shall not relieve Developer from the obligation to complete and fully pay for the Required Improvements, to warranty those Required Improvements, and other costs and fees set forth in this Agreement.

14.2 Should Developer default in its obligation to complete the Required Improvements as required by Section 5 or warranty those Required Improvements as required by Section 6, Developer agrees to compensate County for all costs, fees, charges and incurred expenses related to Developer’s default.

15. Release of Security or Obligation.

- 15.1** County shall release the Security less any Warranty Security within thirty (30) calendar days of Developer requesting in writing that the Security be released following the final inspection and approval of the Required Improvements. County shall release the Warranty Security within thirty (30) calendar days of the Developer requesting in writing that the Warranty Security be released following the Warranty Period.
- 15.2** County may, at the County's discretion and consistent with applicable law, release Developer from any of Developer's obligations under the terms and conditions of this Agreement.
- 15.3** County's release of any of Developer's obligations shall not be construed as a waiver of County's right to require full compliance with the remainder of this Agreement and Developer's obligation to satisfy any costs, fees, charges and expenses incurred in completion or repair of the Required Improvements.

16. Shortfall in Security.

- 16.1** If the amount available to be drawn from the Security or Warranty Security is less than the costs and expenses anticipated to be incurred, or actually incurred, by County, including, but not limited to, attorneys and engineering fees, County may apply the proceeds of the Security or Warranty Security to the anticipated or actual costs and expenses of completion or repair of the Required Improvements.
- 16.2** Developer shall be responsible and liable for any shortfall between the actual costs and expenses of completion or repair of the Required Improvements, including, but not limited to, attorneys and engineering fees, and the amount of the Security or Warranty Security available to fund such costs and expenses.

- 17. Incidental Costs.** Without limiting the generality of Section 17, if the proceeds of the Security or Warranty Security are not remitted to County within the timeframe set forth in the Security or Warranty Security after County provides written notice to Surety in the form prescribed by the Surety, or the Required Improvements are not installed within a reasonable time period determined and specifically identified by County after County provides notice to Developer and/or Surety, then County's costs of completing and/or repairing the Required Improvements, the costs of obtaining the proceeds of the Security, Warranty Security, or other security, all incidental costs to the extent not covered by the Security, Warranty Security, or other security, and liquidated damages calculated at the rate of \$500 per day shall be added to the amount due to County from Developer, and shall be paid to County by Developer, in addition to and with all other amounts due hereunder.

18. Successors in Interest.

- 18.1 The original of this Agreement shall be recorded with the Deschutes County Clerk and shall be a condition and covenant that shall run with the Real Property including any lots created from the Real Property (each a "Lot").
- 18.2 It is the intent of the parties that the provisions of this Agreement shall be binding upon the parties to this Agreement, and subject to the terms contained in Section 20, their respective successors, heirs, executors, administrators, and assigns, and any other party deriving any right, title or interest in or to the Real Property or any Lot, including any person who holds such interest as security for the payment of any obligation, including a mortgagee or other secured party in actual possession of said Real Property by foreclosure or otherwise or any person taking title from such security holder.

19. Lot Purchasers.

- 19.1 Notwithstanding the terms of Section 19, the terms of this Section 19 shall apply to each Lot lawfully created from the Real Property in accordance with the Land Use Approval.
- 19.2 Each Lot shall be conveyed free of any obligation to pay money or complete any obligation arising from or related to this Agreement.
- 19.3 The owner of a Lot, other than Developer, is under no obligation or burden to complete the terms and conditions of this Agreement.
- 19.4 The purpose for the recordation of this Agreement is to place owners and prospective purchasers on notice of the Agreement's terms, that the County has no obligation to construct the Required Improvements or any portion of the Required Improvements, and the Agreement does not in any way guarantee that any of the Required Improvements will be constructed.
- 19.5 The Agreement conveys no right or right of action by a Lot owner, other than Developer, against the County for any act or omission of the County including, but not limited to, County decisions or acts that required or authorized the Required Improvements, or any part of the Required Improvements, not being constructed.

20. Binding Authorization. By signing this Agreement, each signatory signing in a representative capacity, certifies that the signer is authorized to sign the Agreement on behalf of and bind the signer's principal.

21. Expiration.

- 21.1 This Agreement shall expire after the conclusion of the Warranty Period, or by the County's express written release of Developer from this Agreement.

- 21.2 Upon expiration, County shall provide Developer with a document in recordable form, formally evidencing such expiration within thirty (30) days of such a request from Developer.
22. **Survival.** County's rights under this Agreement, including County's right to draw upon the Security or Warranty Security in whole or in part, and Developer's obligation to pay the full costs and expenses of completing the Required Improvements and repairs or replacements required herein along with any licenses granted in this Agreement and any costs of enforcement of this Agreement, shall survive the expiration of this Agreement.
23. **No Agency.**
- 23.1 It is agreed by and between the parties that Developer is not carrying out a function on behalf of County, and County does not have the right of direction or control of the manner in which Developer completes performance under this Agreement nor does County have a right to exercise any control over Developer's activities.
- 23.2 Developer is not an officer, employee or agent of County as those terms are used in ORS 30.265.
24. **No Joint Venture or Partnership.** County is not, by virtue of this Agreement, a partner or joint venturer with Developer in connection with the Site Plan, the Required Improvements, the Real Property, or any Lot and shall have no obligation with respect to Developer's debts, obligations or other liabilities of each and every nature.
25. **Liens.**
- 25.1 Developer shall pay as due all claims for work done on and for services rendered or materials furnished to the Real Property and shall keep the Real Property free from liens.
- 25.2 If Developer fails to pay any such claims or to discharge any lien, County may do so and collect the cost plus ten percent (10%) from the Developer or Surety; provided, however, County may not pay such claims or discharge any lien while Developer is timely disputing the validity of such claims or liens.
- 25.3 Such action by County shall not constitute a waiver of any right or remedy that County may have on account of Developer's failure to complete the Required Improvements or failure to observe the terms of this Agreement.
26. **Indemnification.** The County shall not be responsible for any injury to any and all persons or damage to property caused directly or indirectly by reason of any and all activities (including inaction) of Developer under this Agreement and on the Real Property; Developer further agrees to defend, indemnify and save harmless County, its officers, agents and employees from and against all claims, suits, actions, damages, costs, losses

and expenses in any manner resulting from, arising out of, or connected with any such injury or damage.

27. **Limitation of Liability.** County's liability, if any, pursuant to this Agreement is subject to the Oregon Tort Claims Act, ORS 30.260 to 30.300.

28. **Attorney Fees and Costs.** In the event an action or suit or proceeding, including appeal therefrom, is brought by any party arising directly and/or indirectly out of the provisions of this Agreement or the interpretation thereof, for Developer's failure to complete the Required Improvements or to observe any of the terms of this Agreement or the interpretation thereof, County shall be entitled to recover, in addition to other sums or performances due under this Agreement, reasonable attorney's fees and costs as the court may adjudge in said action, suit, proceeding or appeal.

29. **Waiver.**

29.1 Waiver of the strict performance of any provision of this Agreement shall not constitute the waiver of any other provision or of the Agreement.

29.2 No waiver may be enforced against the County unless such waiver is in writing and signed by the County.

30. **Compliance with provisions, requirements of Federal and State laws, statutes, rules, regulations, executive orders and policies. Debt Limitation.**

30.1 This Agreement is expressly subject to the debt limitation of Oregon counties set forth in Article XI, Section 10, of the Oregon Constitution.

30.2 Any provisions herein that conflict with applicable law, including but not limited to DCC 17.24.120 and 17.24.130, are deemed inoperative to that extent.

30.3 Additionally, Developer shall comply with any requirements, conditions or limitations arising under any Federal or State law, statute, rule, regulation, executive order and policy applicable to the Required Improvements.

30.4 If this Agreement is in any manner construed to constitute the lending of the County's credit or constitute a debt of County in violation of Article XI, Section 10, of the Oregon Constitution, this Agreement shall be void.

31. **No Inducement.** No representations, statements, or warranties have induced the making and execution of this Agreement other than those herein expressed.

32. **Governing Law.**

32.1 This Agreement shall be governed by and construed in accordance with the laws of the State of Oregon without regard to principles of conflicts of law.

- 32.2** Any claim, action, suit or proceeding (each a “Claim”) between County and Developer that arises from or relates to this Agreement shall be brought and conducted solely and exclusively within the Circuit Court of Deschutes County for the State of Oregon; provided, however, if a Claim shall be brought in a federal forum, then it shall be brought and conducted solely and exclusively within the United States District Court for the District of Oregon in Eugene, Oregon.
- 32.3** By signing below, Developer hereby consents to the *in personam* jurisdiction of the courts identified in Section 33.2.
- 32.4** The parties agree that the UN Convention on International Sales of Goods shall not apply.
- 33. Severability.** If any term or provision of this Agreement is declared by a court of competent jurisdiction to be void, invalid or unenforceable in one respect, the validity of the term or provision in any other respect and that of the remaining terms and provisions shall not be affected, and the rights and obligations of the parties shall be construed and enforced to the extent possible.
- 34. Counterparts.**
- 34.1** This Agreement may be executed in several counterparts, all of which when taken together shall constitute one Agreement binding on all parties, notwithstanding that all parties are not signatories to the same counterpart.
- 34.2** Each copy of this Agreement so executed shall constitute an original.
- 34.3.** If this Agreement is signed in counterpart, each counterpart shall be recorded as provided herein for the recording of this Agreement.
- 35. Notice.**
- 35.1** Except as otherwise expressly provided in this Agreement, any communications between the parties hereto or notices to be given hereunder shall be given in writing to Developer or County at the address or fax number set forth below or to such other addresses or fax numbers as either party may hereafter indicate in writing.
- 35.2** Delivery may be by personal delivery, facsimile, or mailing the same, postage prepaid.
- 35.2.1** Communication or notice by personal delivery shall be deemed delivered when actually given to the designated person or representative.
- 35.2.2** Any communication or notice sent by facsimile shall be deemed delivered when the transmitting machine generates receipt of the transmission.

35.2.3 To be effective against County, such facsimile transmission shall be confirmed by telephone notice to County's Director of Administrative Services.

35.2.4 Any communication or notice mailed shall be deemed delivered five (5) days after mailing. Any notice under this Agreement shall be mailed by first class mail or delivered as follows:

To Developer:

Caldera Springs Real Estate LLC
PO Box 3609
Sunriver, Oregon 97707
Attn: Thomas Samwel

To County:

Deschutes County Administration
County Administration
1300 NW Wall Street, Ste 200
Bend, Oregon 97703
Fax No. 541-388-4752

36. Time is of the Essence. Time is of the essence of each and every provision of this Agreement.

37. Captions.

37.1 The captions contained in this Agreement were inserted for the convenience of reference only.

37.2 Captions do not, in any manner, define, limit, or describe the provisions of this Agreement or the intentions of the parties.

38. Amendment.

38.1 The Agreement may only be amended by written instrument signed by both parties and recorded, except that an amendment shall not be recorded against any Lot other than Lots then owned by Developer.

38.2 For purposes of Section 39.1, the signatures of the County shall be the signatures of the Board of Commissioners, Board Chair, or County Administrator.

38.3 Developer shall make application and pay the applicable fee to bring a proposed amendment before the County.

39. Merger Clause. This Agreement and the attached exhibits constitute the entire agreement between the parties and supersedes any and all prior or contemporaneous negotiations and/or agreements among the parties, whether written or oral.

40. **Effective Date.** Notwithstanding mutual execution of this Agreement, this Agreement shall not become effective until recorded.

Signatures on Following Pages

Dated this 21st of Dec., 2022

BOARD OF COUNTY COMMISSIONERS
OF DESCHUTES COUNTY, OREGON

Patti Adair

PATTI ADAIR, Chair

Anthony DeBona

ANTHONY DEBONE, Vice-Chair

Phil Chang

PHIL CHANG, Commissioner

ATTEST:

Brenda Fitzgerald

Recording Secretary

STATE OF OREGON, County of Deschutes) ss.

Before me, a Notary Public, personally appeared ANTHONY DEBONE, PHIL CHANG, PATTI ADAIR, the above-named Board of County Commissioners of Deschutes County, Oregon and acknowledged the foregoing instrument on behalf of Deschutes County, Oregon.

DATED this 21st day of December, 2022

Angie Marie Powers
Notary Public, State of Oregon



DATED this 20th day of Dec, 2022

DEVELOPER:

Caldera Springs Real Estate, LLC

By: Sunriver Resort Limited Partnership

Its: Member

By: Lowe Sunriver, Inc.

Its: General Partner

By: Tom O'Shea
Tom O'Shea, Managing Director

STATE OF OREGON, County of Deschutes) ss.

Before me, a Notary Public, personally appeared Tom O'Shea, and acknowledged the foregoing instrument as the Managing Director of Lowe Sunriver, Inc. as General Partner of Sunriver Resort Limited Partnership, as Member of Caldera Springs Real Estate, LLC on behalf of Caldera Springs Real Estate, LLC.

DATED this 20 day of December, 2022

Tammy Lynette Wickizer
Notary Public, State of Oregon

