

## DEVELOPMENT AGREEMENT

### Wildhorse at Tuscany

**THIS AGREEMENT** is made and entered into this \_\_\_\_\_ day of April, 2020.

#### 1. Parties

The parties to this Agreement are the City of Evans, a Colorado home rule municipality (“the City”) and CPMF, LLC a Colorado limited liability company (“Developer”).

#### 2. Recitals

a. Developer is the owner of certain real property located in the City of Evans, Colorado, described on Exhibit "A" (Legal Description) attached hereto and incorporated herein (the “Property”).

b. Developer submitted to the City an application for a Site Plan to be known as Wildhorse at Tuscany and shown on the Site Plan, (“the Site Plan”) attached as Exhibit B;

c. The Development subject to this Agreement shall be titled Wildhorse at Tuscany. The Development is an approximately 7.55-acre site located in the area depicted on Exhibit B. The Developer contemplates the Development will be used for multi-family residential uses.

d. Developer acknowledges that approval of the Site Plan along with the subsequent use of the Property will directly impact existing infrastructure and generate the need for both on-site and off-site improvements.

e. The City administratively approved the Site Plan on October 14, 2019 with Conditions of Approval and included as Exhibit G. The City administratively approved the plat for the Property, Tuscany Fourth Filing, on March 18, 2018.

f. The Site Plan has been recorded with the Weld County Clerk and Recorder and a copy is included as Exhibit B;

g. Development of the Property will necessitate providing infrastructure improvements and public services and will contribute to the economic growth of the City, and will increase future tax revenues received by the City. Developer agrees and acknowledges that the exactions and requirements set forth in this Agreement are reasonably attributable to the special impacts that will be generated by the proposed development and use of the Property, and that the terms and conditions set forth in this Agreement are necessary, reasonable and appropriate and directly benefit or result from the impact of the Development.

NOW, THEREFORE, in consideration of the premises, mutual covenants and obligations contained herein, the sufficiency of which is acknowledged, the parties mutually agree as follows:

### **3. Definitions**

As used in this Agreement, unless specifically stated otherwise, the words and phrases used shall have the meaning as defined in the City Code. For the purpose of this Agreement the following words and phrases shall have the definitions provided for below:

a. The term “Agreement” refers to this Development Agreement.

b. The term “City Code” refers to the Municipal Code of the City of Evans, as adopted and as amended from time to time by the City Council.

c. The term “City Official” refers to and includes the City Manager, City Attorney, City Treasurer, Public Works Director, Community Development Director, and their designated representatives.

d. The term “Developer” initially refers to CPMF, LLC, as well as any entity that subsequently acquires a fee simple interest of record in any portion of

the Property as a transferee, grantee, assignee or successor of CPMF, LLC. “Developer” shall include, collectively, all of the foregoing persons or entities, all of whom shall be jointly and severally liable for the obligations and liabilities of the Developer to the extent such liability relates to the portion of the Property they purchase or otherwise obtain; provided, however, if the City approves an assignment of this Agreement to an assignee of CPMF, LLC, it shall be released from the obligations and liabilities of Developer under this Agreement. Notwithstanding the foregoing, the term “Developer” shall not include (1) purchasers of individual subdivided lots or individual residential lots or units or individual non-residential space in an approved Site Plan or Final Plat or (2) holders of a security interest in the Property or a portion thereof. The City approves a future assignment of this Agreement to Tuscany MF, LLC, so long Developer provides the City written notice that the Property has been transferred to Tuscany MF, LLC, within ten days of such transfer.

- e. The term “Development” refers to the overall plan of the Developer to develop the Property.
- f. The Term “Improvements” refers to the improvements more particularly described in Exhibit C, that the Developer is obligated to design, construct, and install at Developer’s sole cost in connection with the development of the Property.
- g. The term “Plans and Specifications” shall refer to the engineering and design documents that have been reviewed and approved by the City in connection with the Development and are denoted as Wildhorse at Tuscany, dated January 8, 2020 which includes Sheets C-1 through C-21, Landscaping/Irrigation Plans, dated February 1, 2020 & February 19, 2020 respectively, which includes Sheets L-1 through L-5 and IR-1 through IR-6.

#### **4. Effect of Agreement**

- a. Effective date. The effective date of this Agreement shall be April \_\_\_\_\_, 2020 (the “Effective Date”).
- b. This Agreement and the other provisions incorporated as part of the Site Plan are intended to prescribe a general plan for the use and development of the Property. However, except as expressly provided herein and in the Site Plan,

they do not supplant the City's land use regulations and other ordinances and regulations as they relate to the Property and shall not be construed to limit the authority of the City to adopt different ordinances, resolutions, regulations, rules, policies or codes so long as they apply throughout the City uniformly or to classes of individuals or properties uniformly; provided however, once this Development Agreement has been approved, Developer may develop the Property in accordance with the Site Plan and the Plans and Specifications, without any additional or different requirements regarding zoning or land use.

- c. The provisions of this Agreement, the Site Plan, and the Plans and Specifications reflect the requirements of the City's utilities as of the effective date of the Agreement. These provisions shall not be construed as a limitation upon the authority of the City to adopt different ordinances, rules, regulations, resolutions, policies or codes which change the charges or costs for any service or class of service or any other charges so long as they apply throughout the City uniformly or to the class of service uniformly or to all users of a particular utility system, such as a particular water system or sewer system, uniformly; provided however, once this Development Agreement has been approved, Developer may develop the Property in accordance with the Site Plan and the Plans and Specifications, without any additional or different requirements regarding zoning or land use.
  
- d. Except as otherwise expressly provided in this Agreement or the Site Plan, the establishment of vested property rights under this Agreement shall not preclude the application on a uniform and non-discriminatory basis of City regulations of general applicability (including, but not limited to, building, fire, plumbing, electrical and mechanical codes) as all of such regulations exist on the date of this Agreement or as they may be enacted or amended after the date of this Agreement. The Developer does not waive its right to oppose the enactment or amendment of any such ordinance, resolution or regulation on the same basis that any other member of the public could present such opposition; provided however, once this Development Agreement has been approved, Developer may develop the Property in accordance with the Site Plan and the Plans and Specifications, without any additional or different requirements regarding zoning or land use.

## **5. Term of Agreement**

The term of this Agreement shall be five (5) years from the Effective Date (the “Term”). After the expiration of the Term, this Agreement shall be deemed terminated and of no further force and effect; provided, however, such termination shall not affect (a) any vested rights obtained prior to such termination and contemplated to continue after such termination; or (b) any right arising from City permits, approvals or other entitlements for the Property which were granted or approved prior to, concurrently with, or subsequent to the approval of this Agreement and that were contemplated to continue after termination of this Agreement.

## **6. Vested Rights**

- a. Sections 24-68-101, et seq., C.R.S. (the “Vested Rights Statute”), provides for the establishment of vested property rights in order to ensure reasonable certainty, stability, and fairness in the land use planning process and in order to stimulate economic growth, secure the reasonable investment-backed expectations of landowners, and foster cooperation between the public and private sectors in the area of land use planning. The Vested Rights Statute has been implemented by the City through the procedures set forth in Sections 18.01.100, et seq., of the City Code.
- b. Pursuant to the provisions of the Vested Rights Statute and Sections 18.01.100, et seq., of the City Code, the parties find that the Site Plan is a site specific development plan for the purposes of developing the Property, vesting in the Developer the right to develop the Property in the manner depicted in the Site Plan.
- c. The vested rights associated with the Development, as set forth in this Section 6, shall run with the land and shall remain in effect throughout the term of this Agreement. No other vested rights are created or intended to be created by this Agreement, the Site Plan, or any of the other documents relating to the Property. Upon expiration or termination of this Agreement all vested rights shall expire, except as otherwise specifically provided by Section 5, above.
- d. Any provisions of this Agreement or the Site Plan to the contrary notwithstanding, the City reserves the right to declare a moratorium upon a

reasonable finding by the City Council that such moratorium is necessary to protect the public health, safety or welfare, but a moratorium cannot be declared with respect to the Development for planning purposes

- e. The City finds the five (5) year duration of such vested property rights to be warranted in light of all relevant circumstances, including, but not limited to, the substantial size of the Property, the scale and phasing of the Development, economic cycles and market conditions.

**7. Improvements.** The public improvements associated with the development of the Property are described in Exhibit C, Developer Improvements, (“the “Improvements”). Exhibit C includes but is not limited to (1) description of Improvements, (2) Engineer’s estimate of probable costs of Improvements, and (3) Schedule of completion of Improvements. Only those items set forth on Exhibit C are considered “Improvements” for purposes of this Agreement. From time to time and upon the City’s request, Developer agrees to keep the City informed of the progress of its work and provide a projection of when Improvements will be installed as well as the approximate cost of the remaining Improvements.

**8. Developer’s Obligations To Construct Improvements.** Developer shall design, construct and install at its own expense, the Improvements on or before the Estimated Completion Date set forth in Exhibit C, subject to extension as provided for delays due to Force Majeure. Construction of the Improvements shall be in substantial and material conformance with the Plans and Specifications, as reviewed and approved by the Public Works Director or a designated representative, and shall be in compliance with all policies, ordinances, standards and specifications adopted by the City relating thereto in effect at the time of such construction. The City’s review and approval of the Plans and Specifications shall not impose any liability on the City and shall not limit or affect Developer’s responsibility or liability for design, construction and installation of the Improvements. Developer agrees to save and hold the City harmless from any claims, fault or negligence attributable to such design, construction and installation.

Developer agrees to the following obligations to be completed at its own expense:

- a. Acquisition of rights-of-way and easements. Before commencing the construction of any Improvements the Developer shall acquire, at its own expense,

good and sufficient rights-of-way or easements, clear of any encumbrances except permitted encumbrances to which the City has consented in advance and in writing, on all lands and facilities, if any, traversed by the Improvements. Such rights-of-way shall include 47th Avenue to the Property right-of-way prior to commencement of construction activities. All construction traffic shall use the all-weather access road during construction. Arterial Road Improvements and Dedications: The developer is required to dedicate an additional five feet (5') of right-of-way for 47th Street as required by the City of Evans for future improvements to the existing road and associated improvements. The Site Plan approval includes required dedication of public right-of-way for Tuscan Way to the south of the proposed development. The costs associated the Arterial Road Improvements and Dedications are set forth on Exhibit C.

Access and Egress: There shall be a minimum of two means of all-weather or paved ingress and egress into the Wildhorse at Tuscany development at all times for emergency vehicle access or as may otherwise be approved by the City.

The developer is required to dedicate the north half of the Tuscan Way right-of-way. The developer will also be required to pay a fee-in-lieu of improvements to the Tuscan Way right-of-way, equal to a 1/2 local street, from the 47<sup>th</sup> Avenue right-of-way to the east edge of the entrance of the development in an amount of \$45,000 as set detailed on Exhibit C. This fee-in-lieu will include the cost of curb and gutter replacement, sidewalk installation and 1/2 local street paved section per City minimum standards. This fee shall include the cost of design and engineering in addition to the cost of construction. This fee shall be payable at the time of the first building permit issuance.

Mailbox Locations: Developer shall install any cluster mailboxes required by the United States Postal Service.

Overhead Utility Lines: The City has estimated that the cost to move the overhead utility lines underground along 47th Avenue from 37th Street to the City limits (2622 ft +/-) is approximately \$917,700 (\$350/LF) based on other similar projects. The frontage of Wildhorse is 1000 ft+/- or 38% of the overall length. Based on the

frontage percentage, the developer is responsible for two percent (2.0%) of the cost or \$18,354. This fee shall be payable at the time of the first building permit issuance.

Sidewalks: Interior sidewalks shall be a minimum of five (5) feet wide four (4) inches thick) and constructed of concrete.

Sidewalk: Developer shall contribute \$56,000 toward the City's installation of a sidewalk along 47<sup>th</sup> Avenue for the project frontage. The City shall construct the 10' wide concrete sidewalk in conjunction with improvements being made to 47<sup>th</sup> Avenue. This fee shall be payable at the time of the first building permit issuance.

Sewer Repair: The existing sewer downstream of the property was tested in June 2018 and a report prepared documenting the results of the test dated 08/01/2018 (Exhibit H1). The results of the test showed that eight (8) manholes failed the vacuum test and two of the sewer lines failed the pressure test. The limits of this testing extended from the existing manhole at the northeast corner of 37<sup>th</sup> Street and 47<sup>th</sup> Avenue east along 37<sup>th</sup> Street and north into the site south of Wildhorse. This sewer infrastructure was constructed circa 2004 as part of a project known as Tuscany Center that went bankrupt. The sewer was never accepted by the City as testing was not completed satisfactorily before the bankruptcy. This information only came to light when a new developer was performing their due diligence on the site and tested the sewer lines themselves.

The City requested quotes from three (3) contractors to make the repairs to the existing manholes and sewer line. The City received the following quotes;

- H & H Excavation                 \$7,610.00
- Mountain Constructor         Did not bid
- Naranjo                                 Did not bid

Based on the quotes received, the City is recommending that H & H Excavation ("Sewer Contractor") be awarded the contract to complete the repairs. The Developer shall contribute cash in lieu in the amount of \$7,700.00 for the repair of the existing sewer manholes (8) and sewer lines that did not pass the pressure test.



The City will contract with Sewer Contractor. The City will be responsible for cost of testing the repaired sewer manholes and sewer lines. Additionally, the City will be responsible for the testing of manholes and sewer lines running south from 37<sup>th</sup> Street to the City maintained sewer main in the Ashcroft Draw. The City will be responsible for any repairs needed on this southern sewer line.

Site Plan and As-Built Drawings: All site plan and as-built construction drawings of the Improvements shall be submitted in mylar, print, and digital form (which must conform to the City's format and content requirements).

Construction and Management of Storm Water Improvements: Developer shall construct stormwater detention facilities according to the approved Plans and Specs. Developer shall maintain and keep free of debris all of its stormwater management facilities leading to Tract O in perpetuity. The City shall have the right, but not the duty, to inspect stormwater improvements at any reasonable time to verify they are in proper working order and free of debris. Any damage or other defect in Developer's stormwater detention facilities shall be promptly corrected by Developer, at Developer's expense and to the satisfaction of the Public Works Director. The developer shall pay a surcharge fee, referenced in Section 9.q, to pay for the Tract O non-potable system.

Landscaping Improvements and maintenance: The Developer, the owners of the Property, their successors in interest and/or assigns, or property owners association are responsible for implementation and maintenance of landscaping and landscaped areas and sidewalks between the property line and public roadways. The parties specifically understand and agree that the city is not responsible for any maintenance or upkeep of the same.

The Developer shall comply with the provisions of Section 18.08.070 of the Evans City Code relating to landscaping, including but not limited to Section 18.08.070R.

Water lines: Developer will construct water lines serving the Property according to the approved Plans and Specs.

Sewer lines: Developer will construct sewer lines serving the Property according to the approved Plans and Specs or in accordance with Exhibit H, as applicable.

Non-potable Water lines: Developer will construct non-potable irrigation lines serving the Property according to the approved Plans and Specs.

b. Operation Standards during construction

1) Hours of operation of construction equipment. The operation of construction equipment outside an enclosed structure (i.e. grading, other surface improvements, underground utilities, either public or private) shall be prohibited between the hours of 8:00 p.m. and 7:00 a.m. on weekdays and 4:00 p.m. and 8:00 a.m. on legal holidays and weekends. In situations of need, and upon written request, the hours of operation may be altered by the Public Works Director.

2) Debris in public rights-of-way. The Developer shall, at all times, keep the public right-of-way free from accumulation of waste material or rubbish caused by its operation. Developer shall remove such rubbish no less than weekly and, at the completion of its work, shall remove all waste materials, rubbish, tools, construction equipment, machinery, and surplus materials from the public right-of-way caused by its operation.

3) Erosion control requirements. Developer shall install temporary and permanent erosion control in the Development to control erosion by both wind and water. Developer shall maintain said erosion controls on a routine basis. By way of explanation and without limitation, said control may consist of seeding of approved grasses, temporary dikes, gabions and/or other devices. In the event that the Developer fails to perform erosion control maintenance, Developer shall have 20 days upon receiving written notice to bring the Development into compliance.

4) Other nuisance mitigation. Developer shall mitigate any nuisance caused by construction activities in connection with development of the

Property, including but not limited to noxious odors, excessive dust, particularly on days with high winds, and artificial light intrusion.

5) Standards for subcontractors. Developer hereby agrees that it shall require its subcontractors to comply with the operations standards as set forth in this Section, including but not limited to cooperating with the City's construction inspectors, and ceasing operations when winds are of sufficient velocity to create blowing dust which, in the inspector's opinion, is hazardous to the public health and welfare.

6) Remedies for failure to comply with operation standards. Failure to comply with the Operation Standards set forth in this Section shall be sufficient cause for the City to withhold building permits and/or certificates of occupancy or other approvals or permits until corrected to the satisfaction of the Public Works Director or designee.

7 Temporary Construction Fencing Requirements: Fencing shall be constructed of standard materials, such chain-link, shall be uniform in design and shall be reviewed by the City to ensure placement upon property lines, not in City right-of-way. Perimeter fencing material shall be reviewed and approved by City Staff prior to installation. Only uniform fencing shall be permitted.

**9. Development Standards.** Developer shall comply with all applicable standards related to the following items as reflected in the Plans and Specifications:

- a. Arterial Road Improvements
- b. Right-of-way Improvements and Dedications
- c. Roadway extensions
- d. Fencing Requirements
- e. Access and Egress Requirements
- f. Mailbox Locations

- g. Utility Lines
- h. Bicycles and Pedestrian Trails/Sidewalks
- i. Site Plan and As-Built Drawings
- j. Construction and Management of Storm Water Improvements
- k. Landscaping Improvements
- l. Water lines
- m. Sewer lines
- n. Non-potable Water lines
- o. Ashcroft Draw Sewer Line Reimbursement: The Development will benefit from use of the Ashcroft Draw sanitary sewer line and thus is subject to the terms of the Ashcroft Draw Sanitary Sewer Joint Venture Reimbursement Agreement. The Agreement is included as Exhibit E. The Development is in Sub-basin 2C and will be subject to the 130% per acre Surcharge Rate of \$639.25 plus ten years of compounded interest at 3.9% for a total per acre Surcharge Rate of \$937.19.

Based on a site area of 7.23 acres and a per-acre cost of \$937.19, the reimbursement due is approximately **\$6,775.88**, payable at the time of the first building permit issuance. The City of Evans will remit these fees to the developer of the sewer line.

- p. Raw Water Dedication: The parties acknowledge that the Developer has dedicated 60.35 EQRs to the City for use on the Wildhorse project as outlined on Exhibit F (EQR Analysis), and notwithstanding anything herein to the contrary, the City agrees to provide potable water service to the Development for up 171 multi-family residential units and 1 Clubhouse/Leasing Center. The raw water requirements for outdoor irrigation are to be satisfied through the development's participation in the Tuscany Neighborhood Non-Potable Project as described in Section 9.q below.

- q. **Tuscany Neighborhood Non-Potable Project:** In 2020, the City of Evans will fund improvements to complete the non-potable system for the Tuscany neighborhood. The City has agreed to take over ownership and maintenance of the system long-term. An estimated \$1,168,880.00 of the total project cost will be recovered from Tuscany property owners, pro-rated based on square footage of the lot. Existing residents will pay their portion through a surcharge in their utility bill while undeveloped properties will pay the surcharge up-front at the time of building permit issuance. Property owners will be reimbursed the difference if actual costs are less than estimated costs and they will be held harmless if actual costs are more.

Based on a site area of 315,004 square feet, the Wildhorse Development is responsible for approximately 7% of the project or **\$78,291.00**, payable at the time of the first building permit issuance.

- r. **Sidewalk:** Developer shall contribute \$56,000 toward the City's installation of a sidewalk along 47<sup>th</sup> Avenue for the project frontage. The City shall construct the 10' wide concrete sidewalk in conjunction with improvements being made to 47<sup>th</sup> Avenue. This fee shall be payable at the time of the first building permit issuance.

**10. Security For Construction of Improvements.** The Developer's construction and completion of the Improvements shall be assured by Developer providing a performance guarantee in the amount of 115% of the estimated cost of the Improvements prior to the earlier of (1) issuance of the first permit associated with the Development or (2) commencement of work on the Property (the "Performance Guarantee"). The Performance Guarantee shall consist of a Letter of Credit or bond in a form deemed reasonably acceptable by the City Attorney, such acceptance not to be unreasonably, conditioned or delayed, and substantially as set forth on Exhibit D. The Developer shall have no direct or indirect ownership or managerial control over the entity issuing any Performance Guarantee. In the event that prior to the City's initial acceptance of the Improvements, the Performance Guarantee should expire or the entity issuing the Performance Guarantee becomes non-qualifying or the cost of the Improvements is reasonably determined by the City to be substantially greater than the amount of the security provided, then the City shall furnish the Developer with written notice of such condition, and within fifteen (15)

business days of receipt of such notice the Developer shall provide the City with a substituted qualifying Performance Guarantee or augment the deficient security to achieve 115% of the cost of the Improvements. If such Performance Guarantee is not timely furnished, then development activities including but not limited to the issuance of building permits and certificates of occupancy, may be suspended by the City pending compliance with the provisions of this Section.

Notwithstanding anything to the contrary, the City of Evans accepts the form of the letter of credit attached hereto as Exhibit D (the "Letter of Credit") as meeting the criteria for the Performance Guarantee (as defined in this Section 10) and Maintenance Guarantee (as defined in Section 14); provided however; that (i) the place of presentment of the Letter of Credit shown as Item 7 on Exhibit D is within the State of Colorado; (ii) the City is given at least thirty (30) days' written notice of expiration or termination of the Letter of Credit by the issuing bank; and (iii) the initial term of the Letter of Credit is twenty-four (24) months. Any additions to or deletions from the form attached as Exhibit D shall be subject to review and approval by the City Attorney, with such approval not to be unreasonably withheld.

#### **11. Testing and Inspection.**

Developer shall employ (at its own expense) a qualified independent testing company to be approved by the Public Works Director or a designated representative in its reasonable discretion, to perform all testing of materials or construction that may be reasonably required by the City. Developer shall furnish certified copies of test results to the Public Works Director and, upon request by the Public Works Director, release and authorize full access to the Public Works Director of all work-up materials, procedures and documents used in preparing the test results.

At all times during construction of the Improvements and until final acceptance by the City, the City shall have the right, but not the duty, in reasonable intervals of time, to inspect materials and workmanship utilized for the Improvements at Developer's cost, provided the City's inspector is accompanied by Developer or its designated representative. All materials and work must substantially conform to the approved Plans and Specifications and all applicable regulations. Any material or work not conforming to the Plans and Specifications or other applicable regulations shall be promptly removed, repaired or

replaced, at Developer's expense and to the reasonable satisfaction of the Public Works Director.

**12. Initial Acceptance of Improvements.** Developer shall make written application to the Public Works Director for initial acceptance of the Improvements ("Initial Acceptance") within 30 days of their completion. Such Improvements will be described on a "Developer's Contribution Worksheet" provided by the City Engineer. The Developer shall be responsible for the accuracy and completeness of all information provided. The affidavit, lien waivers and other materials may be reviewed by the City, but the City assumes no responsibility or liability to or for anyone regarding the veracity of the information so provided. Developer's application for initial acceptance shall be accompanied by the following information and materials:

- a. As Built Drawings: One (1) set of surveyed Mylar and one digital/CAD file of the "as built" drawings, certified as to accuracy by the Developer or its architect or Engineer;
- b. Engineer's Certification: Written certification by the Developer's Engineer that the Improvements have been fully constructed and installed in substantial conformance with the Plans and Specifications;
- c. Cost Affidavit: A final affidavit of the Improvements' construction cost including verification reasonably satisfactory to the City Public Works Director;
- d. Improvements Affidavit: Developer shall provide a signed affidavit that the Improvements have been paid for in full;
- e. Lien Waivers: Developer shall provide lien waivers from its general contractor and from all subcontractors, suppliers and materialmen who have furnished labor, material or services for the Improvements.

After the receipt of Developer's written application for initial acceptance, the Public Works Director (or a designated representative) will use reasonable efforts to promptly inspect the Improvements and prepare a detailed written description of all Improvements that are not in compliance with the requirements of the City or the Plans and Specifications and deliver that description to the Developer. After curing such defects as are noted on the written statement provided by the Public Works Director to the Developer, the Developer shall make written application to the City for re-inspection of the Improvements, and the Public Works Director will use reasonable efforts to promptly re-inspect such Improvements. No

Improvements shall be deemed to be initially accepted by the City until the Public Works Director has certified, in writing, that the Improvements appear to have been completed in accordance with the applicable Plans and Specifications. This shall then constitute Initial Acceptance.

**13. Warranty Period for Improvements Following Initial Acceptance.**

Developer shall remain fully responsible for maintenance, repairs, and replacement of the Improvements for a period of two (2) years after their Initial Acceptance by the City. If any of the Improvements fail or are in need of repair or replacement, such failed, repaired, or replaced portions shall be replaced with similar Improvements deemed satisfactory by the Public Works Director in the exercise of his reasonable discretion and the two-year warranty shall begin anew as to the repaired or replaced portions of the Improvement upon completion by the Developer, and inspection and approval by the Public Works Director, and the Maintenance Guarantee shall remain in place during such extended warranty period, solely to the extent of any portion of the Improvements that are replaced, and not the entire original amount. The provisions of this Section 13 and Section 14, below, shall not apply to the roadway along and immediately adjacent to the Southern border of the Property, known as Tuscan Way. With regard to Tuscan Way, Developer agrees to design and construct an all-weather access road that shall be used only for purposes of construction traffic and emergency access. Developer shall be responsible for maintenance and repair of Tuscan Way until Initial Acceptance of by the City. Upon review and Initial Acceptance of Tuscan Way, including the all-weather roadway, by the City, the City shall assume all responsibility for maintenance of Tuscan Way, which shall be maintained to the degree deemed appropriate by the City.

**14. Maintenance Guarantee During Warranty Period.** Developer's application for Initial Acceptance shall be accompanied by a Maintenance Guarantee in a form deemed acceptable to the City in the amount of fifteen percent (15%) of the total costs of the Improvements until Final Acceptance. The Maintenance Guarantee shall be subject to the same conditions as those set forth for the Performance Guarantee, except for the amount of such guarantee. Until Final Acceptance of the Improvements by a Certificate of Completion reviewed and approved by the Public Works Director Developer agrees that (a) the Maintenance Guarantee shall not be released; and (b) the Developer shall bear all risks and liability related to any loss, damage, or claims due to defects or failures of any of



the Improvements; and (c) the Developer shall perform all maintenance and make all repairs and replacements of all defects or failure of Improvements at Developer's expense which, in the reasonable opinion of the Public Works Director, may be necessary. If, within fifteen (15) days after the Developer's receipt of written notice from a City Official requesting such reasonably required maintenance, repairs, and/or replacements of the Improvements, the Developer shall not have undertaken with due diligence to make same, the City, after providing written notice to Developer, may make such maintenance, repairs, and/or replacements at the Developer's expense. The City shall be entitled to draw upon the Maintenance Guarantee, either before undertaking to make such repairs or at any time thereafter, or the City may charge the Developer for the costs thereof if such charges are not paid by the Maintenance Guarantee. In case of emergency, such written notice shall be waived and the City may proceed as it reasonably deems necessary, at the expense of the Developer or the issuers of the Maintenance Guarantee.

**15. Final Acceptance of Improvements.** The Developer shall make a written request to the Public Works Director (or a designated representative) for a final inspection of the Improvements no sooner than two (2) years after the City's Initial Acceptance of all of the Improvements for such Phase of Development. Upon receipt of such request the City shall conduct a final inspection of the Improvements within a reasonable time not to exceed sixty (60) days after such written request. If the City fails to conduct such final inspection within such sixty (60) day period then the Improvements shall be deemed to have Final Acceptance and the Public Works Director shall issue a Certificate of Completion within five (5) business days after Final Acceptance. If the Developer fails to have the Improvements finally accepted as provided in this Section within two years and six months after the City's Initial Acceptance, the City shall have the right, but not the obligation, at any time thereafter to conduct a Final Inspection of the Improvements. If, pursuant to a final inspection requested by the Developer or initiated by the City, any Improvement is found to not substantially conform to this Agreement, the Plans and Specifications, or other applicable regulation or requirement, then the City shall have the rights set forth in this Agreement to remedy such defects. Nothing herein shall be construed or deemed as requiring the City to finally accept and release from the Maintenance Guarantee any Improvement that is defective or damaged. After receipt of satisfactory evidence that the Improvements fully conform to this Agreement, the Plans and Specifications, all applicable regulations and requirements, and that all of the maintenance, repairs, and replacements

reasonably requested by City Officials pursuant to the terms of this Agreement have been completed to the reasonable satisfaction of the City, the Public Works Director shall issue a Certificate of Completion, evidencing completion and Final Acceptance of such Improvements. The Maintenance Guarantee provided by the Developer shall be released after the Final Acceptance of all of the Improvements has been granted (or deemed granted) and the Certificate of Completion has been issued by the City.

**16. Conveyance of Rights-of-way, Easements and Improvements to City.** All rights-of-way and easements associated with development of the Property, and the Improvements shall be conveyed to the City at the time of initial acceptance. The documents of conveyance shall be in a form acceptable to the City and shall be furnished to the Public Works Director or their designee for recording. Developer shall reimburse the City for all costs of recording. At the City's request, the Developer shall provide, at its expense, a policy of title insurance insuring title in the City, free and clear of all liens and encumbrances, for all land, property, and easements dedicated or conveyed (except those easements that do not affect the City's use of the property) to the City or for public use.

**17. Commitments to Serve From Service Providers.** Prior to commencement of construction, Developer shall provide will serve letters or other evidence deemed acceptable by the City's Director of Public Works, indicating the willingness and ability of service providers to supply their respective services to the Development in an amount reasonably needed for the Development, including but not limited to water, waste water, electrical, and natural gas service.

**18. Developer Dedications and Impact fees.** Developer shall comply with the City Code regarding dedication of impact fees, including but not limited to Section 3.20.010, et seq.

**19. Owners' Association** The proposed Wildhorse at Tuscany development is a multi-family rental development that does not involve a Homeowner's Association. Therefore, this section is not applicable to this agreement.

**20. Additional Developer Obligations.** In addition to its obligations related to the Improvements, Developer further agrees to fulfill its obligations with regard to the items and matters set forth in Exhibit E, attached.

## **21. Additional Developer Liabilities.**

a. Indemnification. To the extent permitted by law, Developer hereby agrees to indemnify and hold the City, City Officials, its employees, agents, representatives, and insurers (collectively, "City Parties") harmless from and against any and all suits, demands, actions, damages, liability, losses, claims, fees, and expenses (including reasonable attorney's fees) resulting or arising in any way from any breach or default of this Agreement or any acts or omissions of the Developer, its employees, agents, consultants, representatives, or subcontractors except to the extent caused by negligence, gross negligence or willful misconduct of the City or one or more City Parties. Developer shall promptly investigate, handle, respond to and provide defense for and defend against any such liability, claims, or demands at the sole expense of Developer. Developer also agrees to bear all reasonable costs, expenses, and attorney's fees related thereto whether or not such liability, claims or demands are groundless, false or fraudulent unless they are caused by negligence, gross negligence or willful misconduct of the City or one or more of its officers, agents or employees.

b. Insurance. Developer shall (for itself and for its contractors, subcontractors, representatives and agents engaged in the design, construction, or installation of Improvements) maintain such liability insurance including general liability, contractors liability, professional liability, comprehensive automobile liability, worker's compensation insurance and sufficient public liability insurance as will protect the City, City Officials, City's employees, agents and representatives against any and all potential liability, claims, damage, demands, losses and expenses, that may be incurred or asserted. Liability insurance shall be in the minimum amount of three hundred thirty thousand dollars (\$330,000.00) for injury to one person, or nine hundred ninety-thousand dollars (\$990,000.00) for injury to two or more persons in any single occurrence, or such greater amounts as may be established by the Colorado Governmental Immunity Act, Sections 24-10-101, et seq., C.R.S. as it may be amended. Whenever reasonably requested by City or City Officials, the Developer agrees to submit certificates of insurance evidencing sufficient amounts, types and duration of insurance and which show the City, City Officials, its employees, agents, and representatives as additional insureds. Developer shall not be relieved of any liability, claims, demands or other obligations assumed or set forth in this Agreement by reason of its failure to procure or maintain such insurance, or by

reason of its failure to procure or maintain insurance in sufficient amounts, durations, or types.

c. **Drainage Liability.** To the extent permitted by law, Developer shall indemnify and hold the City harmless from any liability the City may have on account of any change in the nature, direction, quantity or quality of drainage flow, resulting as a direct consequence from the Development. In addition, Developer shall reimburse the City for any and all costs, fees, and expenses, including reasonable attorney's fees, that the City incurs in acquiring any rights of way or easements that the City deems necessary or is required to acquire or condemn or that the City is held to have acquired or condemned for drainage or as a result of or relating in any manner to the Development.

d. **Tax Liability.** Developer shall pay any outstanding taxes, encumbrances or obligations on any property dedicated or conveyed to the City prior to or at the time of such dedication or conveyance, and shall indemnify and hold the City harmless from any and all encumbrances, obligations, or tax liability incurred prior to the dedication or conveyance to the City.

e. **Use Tax.** Any and all use tax due on construction and building materials for public facilities shall be paid as provided under Municipal Code including but not limited to Section 3.04.200.

f. **Cost Reimbursement to City.** Developer shall reimburse City for all reasonable costs incurred for professional consultants including but not limited to engineers, testing companies, contractors, and attorneys reasonably used by the City in connection with the preparation or implementation of this Agreement and in the review and processing of the Application, as well as the design, construction, review, testing, completion, repair, replacement, and approval of the Development.

## **22. Breach and Remedies**

a. **Breach of Agreement by Developer.** If at any time this Agreement (or any part hereof) has been materially breached by Developer or if satisfactory progress substantially in accordance with Exhibit C, Developer Improvements, has not been made on the design, construction, installation, repair, replacement or maintenance of the Improvements the City may, after 30 days' prior written notice to Developer or such additional period as may

reasonably be agreed to by the City in writing in light of the nature of the alleged breach, draw on the Performance Guarantee or Maintenance Guarantee and the City may withhold approval of any or all building permits, certificates of occupancy, water meters, or tap hook-ups for any area within the Development, or other approvals or permits, if Developer then fails to make reasonable progress as reasonably determined by the City, unless such failure is caused by Force Majeure. In the event Developer fails to remedy the alleged breach within 30 days or such additional period as may be necessary in light of the nature of the alleged breach, then the City's remedies are limited to (1) specific performance of this Agreement and (2) the other remedies, including monetary remedies specifically provided for in this Agreement, but shall not include any claim for additional damages. The City's remedies shall be cumulative.

b. Breach of Agreement by City. If at any time the Developer believes the City is in breach of this Agreement, the Developer shall provide the City with 20 days prior written notice. In the event the City fails to remedy the alleged breach within 20 days or such additional period as may be necessary in light of the nature of the alleged breach, then the Developer remedies are limited to specific performance of this Agreement and shall not include any claim for damages or other monetary relief.

### **23. Miscellaneous.**

a. No Waiver. Delays by the City or Developer in enforcement or the waiver of any one or more breaches of this Development Agreement shall not constitute a waiver of any of the remaining terms or obligations or any future breaches.

b. Severability. If any provisions or parts of this Agreement are judged to be unenforceable or invalid, to the extent practicable, such judgment shall not affect, impair, or invalidate the remaining parts of this Agreement, the intention being that the various parts and provisions hereof are severable.

c. Recording of Agreement and Encumbrance on the Property. This Agreement shall be recorded with the Weld County Clerk and Recorder at Developer's expense and shall be a covenant running with and against all the Property, property rights, and improvements contained within the Development in order to put prospective owners, purchasers, successors, assigns, and others acquiring any interest in the Property on notice as to the terms and obligations herein.

d. Binding Effect. Unless otherwise provided herein, this Development Agreement shall be binding upon Developer's heirs, successors, assigns, transferees, and any other person or entity acquiring or purchasing any interest in any part of the Property.

e. Transfer or assignment. In the event of a sale or transfer by Developer of any portion of the Property, the seller or transferor and the purchaser or transferee shall be jointly and severally liable for the performance of each of the obligations contained in this Agreement unless, prior to the transfer or the sale, a written Agreement delineating and allocating the various rights and obligations for the Improvements, has been approved and executed by the City Council. Notwithstanding anything herein to the contrary, Developer shall have the right to transfer and/or assign its rights and interests in this Agreement to any entity that controls, is controlled by, or is under common control with Developer without the approval of the City or City Council, provided the City is given written notice within 10 days of such transfer.

f. Title and Authority. Developer expressly warrants and represents to the City that it is the record owner of the Property and further represents and warrants that the undersigned has full power and authority to enter into this Development Agreement. Developer understands that the City is relying on the representations and warranties contained herein, in its consideration of the application and in entering into this Agreement.

g. Notices. Any notice to Developer or the City, which may be given under the terms of this Agreement, shall be in writing and shall be deemed sufficiently given on the third (3<sup>rd</sup>) business day following the date such notice is sent by certified or registered U.S. Mail, postage prepaid, return receipt requested, or as of the immediately following business day after deposit with Federal Express or a similar overnight courier service that provides evidence of receipt, addressed as follows:

TO CITY:

City Manager  
1100 37<sup>th</sup> Street  
Evans, CO 80620-2036

With a copy to

TO DEVELOPER:

Attention: Mike Hill  
CPMF, LLC  
461 Harbor Court  
Windsor, CO 80550

With a copy to:

Scotty P. Krob  
Krob Law Office LLC  
8400 E. Prentice Ave, Penthouse  
Greenwood Village, CO 80111

Brimah LLP  
1888 Sherman Street, Suite 200  
Denver, CO 80203

And

Perez & Associates LLC  
600 17<sup>th</sup> Street, Suite 2800-S  
Denver, CO 80202

Any party may change its notice address by providing the other party(ies) notice as set forth in this section.

h. Force Majeure. Whenever a period of time is herein prescribed for an action to be taken or performed by any Party, that Party will not be liable to so perform within such time period due to, and there will be excluded from the computation of such period of time, any delays due to, strikes, riots, acts of God, shortages of labor and materials, war, or any other cause which is beyond the reasonable control of the Party required to take or perform such action.

i. Cooperative drafting and Consultation with Attorney. This Agreement is the product of a cooperative drafting effort by the City and the Developer and shall not be construed or interpreted against either party solely on the basis that one party or its attorney drafted this Agreement or any portion of it. Both parties acknowledge that they understand this Agreement contains legal rights and obligations and further acknowledge that they have had the opportunity to and have consulted with an attorney to the extent they desire to do so.

j. Amendment. This Agreement cannot be modified or revoked except by an instrument approved by the City Council and signed by the Mayor and the Developer or the then owner of the Property or any portion thereof if there has been an assignment as it relates to the specific Property.

k. No third-party beneficiaries. Nothing expressed or implied in this Agreement is intended or shall be construed to confer upon, or to give to, any legal person other than the





COUNTY OF \_\_\_\_\_ )

Acknowledged before me this \_\_\_\_ day of \_\_\_\_\_, 2020 by Michael Hill, President of SWI Reality Inc., manager of CPMF, LLC, a Colorado limited liability company.

Witness my hand and official seal.

My commission expires: \_\_\_\_\_

(Seal)

\_\_\_\_\_  
Notary Public

## **Exhibits**

A – Legal Description

B – Site Plan

C – Developer Improvements

D – Letter of Credit

E – Ashcroft Draw Sanitary Sewer Reimbursement Agreement

F – Wildhorse Non-Potable Water – EQR Analysis

G – Staff Comments dated October 14, 2019

Exhibit A – Legal Description

Lot 1, Tuscany 4<sup>th</sup> Filing, City of Evans, County of Weld, State of Colorado.

Exhibit B – Site Plan (final approved)

## Exhibit C-Improvements

Engineers Opinion of Probable Cost					
Project Name:	WILDHORSE AT TUSCANY			Date:	1/10/2020
DESCRIPTION	UNITS OF MEASURE	ESTIMATED QUANTITY (PROVIDED BY THE PROJECT ENGINEER)	INFRASTRUCTURE CONSTRUCTION COST PER UNIT OF MEASURE	TOTAL ESTIMATED INFRASTRUCTURE COST	
<b>Sanitary Sewer System</b>					
Sanitary Sewer Main	L.F.	850	\$71.00	\$60,350.00	
Manhole	EACH	6	\$3,200.00	\$19,200.00	
Sewer Service Line Stub	EACH	7	\$2,800.00	\$19,600.00	
Sewer Connection to Ex MH	EACH	2	\$5,230.00	\$10,460.00	
<b>Water System</b>					
Water Main (8")	L.F.	1,010	\$50.00	\$50,500.00	
Waterline Fitting ( Bend, Tee, Cross )	EACH	11	\$684.00	\$7,524.00	
Fire Hydrant	EACH	3	\$4,410.00	\$13,230.00	
Valves (6" & 8")	EACH	15	\$1,300.00	\$19,500.00	
Meter Pit (1" ) & Service Line	EACH	1	\$3,000.00	\$3,000.00	
Meter Pit (1 1/2" ) & Service Line	EACH	3	\$7,830.00	\$23,490.00	
Meter Pit (2" ) & Service Line	EACH	2	\$6,950.00	\$13,900.00	
Water Main (Fire Line)	L.F.	630	\$53.00	\$33,390.00	
Fireline Fitting ( Bend, Tee, Cross )	EACH	6	\$331.00	\$1,986.00	
Water Connection	EACH	2	\$1,300.00	\$2,600.00	
<b>Public Storm Sewer System</b>					
(ALL PRIVATE)					
<b>Street System/ Trench</b>					
Grading	CY	342	\$4.50	\$1,539.00	
Pavement 5" Asph/6" ABC	SY	167	\$33.00	\$5,511.00	
Vertical Curb & Gutter (18")	L.F.	121	\$22.00	\$2,662.00	
Detached Sidewalk (6" Thick)	S.F.	305	\$5.55	\$1,692.75	
Drive Approach	S.F.	460	\$8.00	\$3,680.00	
<b>TOTAL PUBLIC INFRASTRUCTURE COST</b>				<b>\$293,814.75</b>	



SURROUNDINGS FOR

**ITEMIZED LANDSCAPE BUDGET FOR TUSCANY ROWs**

PROJECT WILDHORSE AT TUSCANY ROWs

DATE: 2/12/20

PHONE: (970) 493-3883

FAX: (970) 493-4943

**DESCRIPTION OF WORK:**

**47TH AVE. ROW LANDSCAPE BUDGET**

INCLUDES ONLY THE ITEMS PROVIDED PER THE PUBLIC ROW LANDSCAPE EXHIBIT. EXCLUDES ANY VALVES, WIRE, FITTINGS, BORES, ETC.

3995 SF SOIL PREP AND SOD	\$	3,236.00
870 LF 1" PVC CL 200 LATERAL PIP	\$	1,175.00
41 EA MAX8 NP-PRS40 HEADS	\$	1,640.00

**TUSCAN WAY ROW LANDSCAPE BUDGET**

INCLUDES ONLY THE ITEMS PROVIDED PER THE PUBLIC ROW LANDSCAPE EXHIBIT. EXCLUDES ANY VALVES, WIRE, FITTINGS, BORES, ETC.

1470 SF SOIL PREP AND SOD	\$	1,191.00
280 LF 1" PVC CL 200 LATERAL LINE	\$	378.00
26 EA MAX6-NP	\$	832.00
2 EA. MAX 6-NP-PRS40	\$	80.00
4 EA. 2" CALIPER TREES	\$	1,820.00

## D – Form of Letter of Credit/Bond Document

### **IRREVOCABLE UNCONDITIONAL LETTER OF CREDIT**

#### Instructions for Completing Forms

These instructions relate to the entry to be made in the corresponding numbered space in the form.

1. Identifies the beneficiary, i.e., the party entitled to draw on the letter of credit. For FHA Multifamily project loans, the beneficiary is the Ginnie Mae issuer.
2. A letter of credit number is assigned by the issuing bank. In order to draw on the letter of credit, the beneficiary must identify the letter by its assigned number.
3. An issuance date is assigned by the issuing bank. This is the date on which the letter of credit becomes effective.
4. Identifies the party in whose name the account is established.
5. Shows the amount of the letter of credit, as specified by the Account Party, in accordance with applicable Ginnie Mae regulations and Ginnie Mae MBS Guide requirements.
6. Expiration date of the letter of credit. The Account Party is responsible for renewing the letter of credit if it has obligations to the beneficiary to maintain collateral still outstanding as of the expiration date of the letter of credit.
7. The office at which drafts drawn under the letter of credit may be presented (including presentment by a mechanical or electronic method) and will be honored.
8. Type in the name of the issuing bank.
9. Signature of the authorized agent and/or officer of the issuing bank.
10. Typed name of the authorized agent and/or officer who signs the letter of credit.
11. Title of the authorized agent and/or officer who signs the letter of credit.
12. FHA Multifamily project loan situations only: enter the Ginnie Mae pool number associated with the subject securities issuance.
13. FHA Multifamily project loans situations only: enter the case number(s) assigned by FHA to the project(s) being financed by the securities issuance.
14. Date of transfer letter.
15. Name of transferee.

## Irrevocable Unconditional Letter of Credit

Beneficiary: \_\_\_\_\_ (1)                      Letter of Credit No. \_\_\_\_\_ (2)  
Ginnie Mae Pool No. \_\_\_\_\_ (12)  
FHA Project No. \_\_\_\_\_ (13)  
Date \_\_\_\_\_ (3)

Gentlemen:

For the account of \_\_\_\_\_ (4), we hereby authorize you or your transferee to draw on us at sight up to an aggregate amount of \_\_\_\_\_ (5) Dollars (\$\_\_\_\_\_).

This Credit is irrevocable, unconditional and transferable. This Credit may be transferred without charge one or more times upon receipt of your written instructions submitted in accordance with the attached transfer form.

Drafts drawn under this Credit must specify the number of this Credit and be presented at the office identified below not later than \_\_\_\_\_ (6). Any sight draft may be presented to us by electronic, reprographic, computerized or automated system, or by carbon copy, but in any event must visibly bear the word "original". If the document is signed, the signature may consist of (or may appear to us as) an original handwritten signature, a facsimile signature or any other mechanical or electronic method of authentication.

This Credit sets forth in full the terms of our obligation to you, and such undertaking shall not in any way be modified or amplified by any agreement in which this Credit is referred to or to which this Credit relates, and any such reference shall not be deemed to incorporate herein by reference any agreement.

We engage with you that drafts drawn under and in compliance with the terms of this credit will be duly



honored at \_\_\_\_\_ (7) \_\_\_\_\_.

Yours very truly,

(8) [Issuing Bank]

By \_\_\_\_\_ (9) \_\_\_\_\_

[ (10) ]

[ (11) ]

To: Name and Address of Issuing Bank

Bank Date: \_\_\_\_\_ (14)

Gentlemen:

We hereby transfer to \_\_\_\_\_ (15) all rights to your Letter of Credit Number (2) \_\_\_\_\_, subject to the terms of such Credit. Enclosed is the original Letter of Credit, which should be returned to us with the endorsement of this transfer thereon.

Yours very truly,

(Authorized  
Signature)  
(Beneficiary)

Enclosure

Exhibit E: Ashcroft Draw Sanitary Sewer Reimbursement Agreement  
(see attached)

Exhibit F: Wildhorse Non-Potable Water – EQR Analysis

(see attached)

Exhibit G: Staff Comments dated October 14, 2019

(see attached)