



## City of Ketchum

January 19, 2021

Mayor Bradshaw and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Bradshaw and City Councilors:

**Recommendation to Consider and Act on Development Agreement Amendment  
Application P20-122 to Extend Development Agreement 20427 for the Project Located at 1<sup>st</sup> and 4<sup>th</sup> Street,  
391 First Avenue, Jack Bariteau, Applicant**

### **Recommendation and Summary**

Staff is recommending the council consider and act on the proposed development agreement amendment and if in support, adopt the following motion:

**I move to approve Amendment #1 to Development Agreement 20427**

The reasons for the recommendation are as follows:

- On January 12, 2021, the Planning and Zoning Commission considered the proposed amendment and recommended Council approval of the amendment subject to additional changes;
- Without the amendment, the applicant will be unable to meet the performance dates in the Development Agreement.

### **Introduction and History**

In December 2020, the City Council approved Development Agreement 20427 for the 1<sup>st</sup> and 4<sup>th</sup> mixed use development (Attachment A). The Agreement contains specific performance dates. Due to issues outlined in the December 7, 2020 letter from the applicant's attorney and the December 22, 2020 email from Mr. Bariteau, (Attachment B), the applicant, Jack Bariteau is requesting an amendment to the Development Agreement 20427 to extend the performance dates for the project (Attachment C).

On January 12, 2020, the Planning and Zoning Commission reviewed the amendment request and on a vote of 3 in favor and 2 against, recommended the City Council approve the amendment subject to additional revisions. The Planning and Zoning Commission action is described later in this report.

Staff is recommending the Council review the requested amendments, consider the Planning and Zoning Commission recommendations, and act on the proposed amendment.

### **Existing Development Agreement 20427**

Development Agreement 20427 contains the following provisions:

**Section 3 Right to Develop:** "Pursuant to KMC §17.96.090, the design review approval on this Project shall be valid for twelve (12) months from the date of final decision on the associated Findings of Fact, Conclusions of

Law, and Decision. Application for a building permit must be done within this time as specified in KMC §17.96.090(A)(2). Any extension shall only be as allowed and specified in KMC §17.96.090.

Any application for a building permit submitted by Owner shall substantially comply with the requirements of applicable codes, agreements, approvals, plans, permits and other documents as such requirements exist on the day the building permit application is submitted. A building permit must be obtained within fourteen (14) months from the date of the final decision on the associated Findings of Fact, Conclusions of Law and Decision, and a certificate of occupancy must be obtained for the Project no later than 18 months after the building permit is issued unless the time for completion of the Project is extended by the City Council.”

Staff Comment: The design review application findings of fact were approved on June 10, 2019. The design review permit was valid until June 10, 2020. The development agreement required a building permit application to be submitted by June 10, 2020 and a building permit to be issued by August 10, 2020. A certificate of occupancy is required within 18 months of the date the building permit is issued. The applicant is requesting an extension of these performance dates.

**Section 13 Term.** “The term of this Agreement shall be two years and eight months (2 years 8 months) from the date of the final decision on the associated Findings of Fact, Conclusions of Law and Decision except such term will not be considered to supersede or amend the standard validity periods as specified in KMC, which may be shorter as to specific approvals and necessary steps (e.g. KMC §17.96.090 specifying that design review approval is only valid for twelve months without additional steps for extension).”

Staff Comment: The findings of fact were approved June 10, 2019 and the agreement would be in effect until February 10, 2022. Because the project has not yet started construction, the applicant is proposing to extend the effective date of the agreement.

**Section 16 q: Force Majeure.** “If either party hereto is delayed in the performance of any of its obligations hereunder because of abnormal and unforeseeable inclement weather, material shortages, labor shortages, dispute or strike, civil strife, acts beyond the reasonable control of the delayed party including acts of God, and actions by the United States of America, the State of Idaho, the City or any of their agencies, the time of performance hereunder, shall be reasonably extended for the same time as lost by the cause hereinabove set forth. Any claim of a force majeure event must be submitted to the other party within thirty days of such event.”

Staff Comment: The applicant is requesting to amend this section to include a Pandemic as a reason to extend the timelines in the Agreement.

### **Analysis**

Attachment C Contains the amendments proposed by the applicant, staff and the Planning and Zoning Commission.

Staff is in general agreement with extending the performance dates due to the challenges of COVID-19. Staff is recommending the following key changes to the applicant’s request:

**Section 2.1:** Staff is recommending adding a date when the building permit must be obtained by the applicant for the project. Because the date for the certificate of occupancy and the effective date of the Agreement are tied to issuance of building permit, there needs to be a date when the applicant must obtain the building permit. Otherwise, the possibility exists the applicant may delay obtaining a building permit and the agreement and completion of the project could be a significant period of time. The existing development agreement contains a deadline for obtaining a building permit and staff recommends the amendment also contain a deadline for obtaining a building permit.

Section 2.3: The applicant is proposing to add a Pandemic as a reason for invoking the Force Majeure clause of the Agreement. Staff does not support this addition. The addition of Pandemic is ambiguous and will lead to different interpretations as to the meaning and length of automatic extension for the project. Instead, if there are additional delays due to a future Pandemic, the applicant can return to the City for an amendment to the Agreement.

#### Planning and Zoning Commission Action

The Planning and Zoning Commission met on Tuesday January 12, 2021 to review and make a recommendation to the City Council on the proposed amendment. The Commission voted 3-2 to recommend approval of the amendment subject to additional changes in addition to those proposed by staff.

The Commission was in general support of design of the project as originally approved. Two Commissioners did not support the amendment and expressed concern about the applicant's ability to complete project, concern that development activity in Ketchum is robust and there is no need to continue granting exceptions to facilitate more development, and if this applicant wants to move ahead with the project, the project can go back through the permitting process.

The Commissioners in favor of the amendment were supportive of a modest extension but wanted shorter performance periods so the project does not stall. The Commission recommended two changes to the proposed amendment agreement:

- Modify Section 2.1, Obtain a Building Permit, within 60 days of approval of City Council approval of the Development Agreement Amendment. Staff recommended 90 days and the Commission is recommending 60 days in order to keep the city and the applicant moving forward on the project.
- Modify Section 2.1, Submit Evidence of a Construction Loan Recordation. The Commission recommended this section be modified to prohibit site excavation until the construction loan is recorded. There are two way to accomplish this recommendation. The first is to add language indicating site excavation may not occur until the loan is recoded. The other approach would be to require the recording to occur prior to issuance of a building permit.

#### Public Comment

Dave Wilson, property owner at the south end of the alley behind the project expressed concern about access to his property if the alley improvements were not completed before next winter. He asked that if the amendment is approved, the City add a condition requiring completion of the alley improvements before November 1, 2021.

Pat Cooley, with the Water Department, has requested a condition requiring the applicant to abandon the Ketchum Springs Water Line behind the project and install the associated connections before the trenching moratorium period begins in the downtown. This would require the work to be completed before July 2021.

Should Council agree with the request, language could be included in this amendment.

#### Financial Impact

There is no financial impact associated with the recommended action.

#### Attachments:

Attachment A: Development Agreement 20427

Attachment B: December 7, 2020 and December 22, Email from Applicant

Attachment C: Proposed Development Agreement Amendment

**Instrument # 665841**

HAILEY, BLAINE, IDAHO

12-29-2019 01:32:29 PM No. of Pages: 12

Recorded for : CITY OF KETCHUM

JOLYNN DRAGE

Fee: 0.00

Ex-Officio Recorder Deputy

Index to: AGREEMENT/CORRECTION



RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:	
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(SPACE ABOVE LINE FOR RECORDER'S USE)

**DEVELOPMENT AGREEMENT #20427**

THIS DEVELOPMENT AGREEMENT (“**Agreement**”) is dated for reference purposes this 16 h day of Decembe , 2019, by and between the CITY OF KETCHUM, IDAHO, a municipal corporation (“**Ketchum**” or “**City**”) and JACK E. BARITEAU, JR. as Trustee of the JACK E. BARITEAU, JR. SEPARATE PROPERTY TRUST, under agreement dated October 2, 1996 and MAIN DRIVE PROPERTIES, LLC, a Tennessee limited liability company (collectively “**Owner**”, and together with the City, the “**Parties**”).

**BACKGROUND AND CONTEXT**

A. Ketchum is a municipal corporation possessing all powers granted to municipalities under the applicable provisions of the Idaho Code, including the power to vacate rights-of-way, to grant variances to building height restrictions, to remove lot lines, grant rights to exceed building floor area ratio limitations, to grant licenses to encroach into the public right-of-way and the power to contract. A development agreement between the Parties is a collaboration that will provide mutual benefit for the Parties, businesses in the Commercial Core District and residents of the City.

B. Owner owns the real property situated in the State of Idaho, County of Blaine, commonly known as 391 N. 1<sup>st</sup> Avenue, Ketchum, Idaho and more particularly described as Lots 1 and 2 of Re-Division of Lots 1 and 2, Block 57, Original Ketchum Townsite, according to the plat thereof, recorded as Instrument No. 191607, records of Blaine County, Idaho (“**Property**”).

C. Owner has petitioned City to amend the current Property description to (a) vacate the common internal lot line between Lots 1 and 2 of the Property and (b) include the vacated fifteen-foot by one hundred and ten-foot (15’ x 110’) portion of alleyway adjacent the Property in Block 57, as more particularly described in paragraphs 5 and 6 above.

D. Owner has applied for design review approval for construction of improvements on the Property (“**Project**”) consisting of an approximately 34,729 gross square foot mixed use residential and commercial building to be constructed on and over a 15,225 square foot underground garage parking which will provide substantial public benefits, including a master lease of apartment units to Trail Creek Fund, LLC, successor Harriman Hotel, LLC, or other successor (“**Hotel Developer**”) to fulfill its obligation for hotel employee housing as set forth in the June 4, 2018 First Amendment to the Amended and Restated Development Agreement between the City and Trail Creek Fund, LLC. City acknowledges the square footages recited are

approximate and the actual square footages will not be known until construction documents are prepared and submitted to the City for a building permit following which submittal the actual square footages shall apply to the Project.

E. The Parties agree that the Property shall be developed in accordance with this Agreement; all applicable City ordinances; and any additional conditions and requirements imposed upon the Property by the Ketchum Planning and Zoning Commission (“**Commission**”) and/or City Council (“**Council**”) during the design review, vacation, development agreement, plat amendment, and 4<sup>th</sup> Street / 1<sup>st</sup> Avenue encroachment approval processes.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual covenants, promises, agreements, terms and conditions set forth herein, the Parties agree as hereinafter provided.

**1. Incorporation of Recitals.** The Recitals set forth above are hereby incorporated into and made an integral part of this Agreement.

**2. Incorporation of Related Findings, Agreements, Approvals, Permits and Plans.** The following findings of fact, approvals, permits, plans, and documents are hereby incorporated into and made an integral part of this Agreement by reference as if restated herein in full:

- a. Findings of Act, Conclusion of Law, and Order regarding the request for vacation;
- b. FAR Exceedance Agreement;
- c. Preliminary and final plat documents and approvals;
- d. Decision and orders related to the 1<sup>st</sup> & 4<sup>th</sup> Mixed Use Building Design Review;
- e. Decision and orders related to Owner’s application for encroachment;
- f. Design review drawings;
- g. Alley, 1<sup>st</sup> Avenue, and 4<sup>th</sup> Street sidewalk and landscaping plans;

Any material failure to comply with the terms and conditions of any of the above-referenced documents shall constitute a breach of this Agreement.

In the event of any inconsistency between the terms and conditions of this Agreement and the findings of fact, approvals, permits and plans listed above, the more restrictive terms and conditions shall govern. Development of the Project shall be vested and governed by policies, procedures, guidelines, ordinances, codes and regulations of the City governing land use in effect as of the date this Agreement is recorded and continue consistent with §17.96.090 of the Ketchum Municipal Code.

Owner may request to be bound by future amendments to the Ketchum Municipal Code (“**KMC**”), or other regulations, policies or guidelines affecting development, and such request

may be approved administratively, by the Commission, and/or by the Ketchum City Council consistent with the KMC.

**3. Right to Develop.** Subject to the requirements of this Agreement and KMC, the Owner and all future owners of some or all of the Property shall have the right to demolish all or any portion of the existing structures and redevelop, construct, improve and use the Property as a mixed use residential and commercial building as depicted and described in the approved plans incorporated into the Agreement as fully set forth in the recitals, including the Planning and Zoning Commission approved Pivot North Architecture plans approved on June 10, 2019 (“Plans”). The improvements on the Property shall be built exclusively as permitted under §17.96 of the KMC relating to design review approval. Any development of any portion of the Property substantially inconsistent with this Agreement or the design review approval for the Project shall constitute a breach of this Agreement by Owner.

Pursuant to KMC §17.96.090, the design review approval on this Project shall be valid for twelve (12) months from the date of final decision on the associated Findings of Fact, Conclusions of Law, and Decision. Application for a building permit must be done within this time as specified in KMC §17.96.090(A)(2). Any extension shall only be as allowed and specified in KMC §17.96.090.

Any application for a building permit submitted by Owner shall substantially comply with the requirements of applicable codes, agreements, approvals, plans, permits and other documents as such requirements exist on the day the building permit application is submitted. A building permit must be obtained within fourteen (14) months from the date of the final decision on the associated Findings of Fact, Conclusions of Law and Decision, and a certificate of occupancy must be obtained for the Project no later than 18 months after the building permit is issued unless the time for completion of the Project is extended by the City Council.

A building permit application that does not substantially comply with the requirements contained in applicable codes, agreements, approvals, plans, permits and other project documents may be rejected by the City within a reasonable time after completing review of the application by providing written notice to Owner describing the non-compliance in detail unless the non-compliance is cured by Owner within thirty (30) days. If a building permit application contains material changes to the above-referenced applicable codes, agreements, approvals, plans, permits and other documents an amendment to this Agreement must be applied for by Owner and considered by the City Council. If such amendment is approved by City Council, all inconsistent terms and conditions of the approvals referenced in Section 2 shall be deemed to have been amended to conform the amendment to this Agreement.

**4. FAR Exceedance Agreement.** The Parties agree Owner may exceed the gross floor area ratio limitations under KMC §17.124.040 and construct improvements on the Property having a floor area ratio up to and including 2.25, pursuant to that separate FAR Exceedance Agreement, and all conditions thereon, entered into by the Parties, and hereby incorporated by reference.

**5. Vacation of Alley.** Owner has made application to the City for vacation of the alley right-of-way pursuant to KMC §16.04.050. If approved via separate City vacation process,

such order or decision on vacation, including any and all conditions thereon, is hereby incorporated by reference and made a part of this Agreement. Owner shall assume and be responsible for maintenance of the entirety of the alley, including appropriate snow and snowmelt maintenance, to be further specified by a separate alley maintenance agreement. Any such alley vacation shall be deemed null and void in the event the Project is not commenced and completed within the time limits set forth in this Agreement.

**6. Removal of Lot Lines and Inclusion of Vacated Alley.** Owner has made application to the City for removal of the lot lines bisecting the Property, pursuant to Part L of KMC §16.04.030. As set forth in the April 2019 Preliminary Plat by Benchmark Associates, subject plat amendment will remove the lot line bisecting the Property and include the vacated portion of alley described in paragraph 5 above into a new Lot 1B, Block 57, Original Ketchum Townsite (“**Amended Property**”). Notwithstanding the City approval of the final plat map, the final plat map reflecting such changes shall not be recorded and become effective until after issuance of the Certificate of Occupancy for the Project.

**7. Sidewalk Improvements.** Owner has proposed and hereby commits for the Project to include ten-foot wide sidewalks along both 1<sup>st</sup> Avenue and 4<sup>th</sup> Street. All of the proposed sidewalk improvements along 4<sup>th</sup> Street are in the public Right of Way (“**ROW**”), while half of the sidewalk improvements (+/- 5’ wide) along 1<sup>st</sup> Avenue are in the public ROW. Subject sidewalk improvements include snowmelt, raised landscape planters, street trees with decorative tree grates, public art, bike racks, pedestrian walkway lighting, and street lighting. Final approval of subject improvements will be subject to review and approval through a separate encroachment agreement and to assure compliance with federal ADA and city standards. Such encroachment agreement shall be obtained prior to issuance of a building permit for the Project.

**8. Encroachment on Right of Way.** Owner has made application to the City for license for encroachments along the public Right of Way (“**ROW**”) for proposed sidewalk improvements along 4<sup>th</sup> Street, pursuant to KMC 12.08.040. If approved via separate City encroachment process, such order or decision on encroachment, including any and all conditions thereon, is hereby incorporated by reference and made a part of this Agreement.

**9. On-Site Employee Housing Units.** Owner commits to construction and provision of on-site employee housing units as specified in the Planning and Zoning approved design review documents, dated May 31, 2019. Three of such depicted units shall be deed-restricted community housing units, with such covenant to be managed by Blaine County Housing Authority. Twelve such depicted units shall be dedicated to on-site employee housing. In the event Owner determines not to use such for on-site employee housing, then such units shall be committed as deed-restricted community housing units, with such covenant to be managed by Blaine County Housing Authority.

**10. Master Lease of Employee Housing Units.** The Parties agree Owner may enter into a master lease with the Hotel Developer for apartment units containing at least eighteen (18) beds and thereby satisfy those certain related obligations of Trail Creek Fund, LLC under the Amended and Restated Development Agreement dated October 15, 2015 as amended by the Corrected Amendment to Amended and Restated Development Agreement dated June 21, 2016

and the First Amendment to Amended and Restated Development Agreement dated June 4, 2018 (“**Hotel Development Agreement**”). All apartment units leased to the Hotel Developer may be subleased, assigned or otherwise made available to employees of the Hotel Developer on terms and conditions determined by it in the exercise of its discretion. If the Hotel Development Agreement is terminated for any reason the apartment units shall cease to be governed by the master lease and all use restrictions of the Hotel Development Agreement. Any such units committed to Hotel Developer as satisfaction of Hotel Developer’s obligations may not also be counted as satisfaction of any required units necessary under the FAR Exceedance Agreement for the Project. Units satisfying the requirements of the FAR Exceedance Agreement may be included in the master lease with the Hotel Developer.

**11. Conditions to Owner’s Obligations.** Owner’s obligations hereunder are conditioned upon (1) receiving all the referenced approvals from the City and (2) securing financing for the Project. If either of those conditions (or part of one) is not satisfied, then this Agreement shall no longer be valid.

**12. Required Improvements by Owner.** Prior to issuance of a building permit, Owner agrees to provide the City an irrevocable letter of credit for completion of the improvements to both 4<sup>th</sup> Street and the vacated Block 57 alleyway consistent with the referenced approvals, plans and other documents. Subject security shall be approved as to both form and amount by the Ketchum City Council after receiving input from the City Attorney and City Engineer. The amount of security shall be at 150% of engineering estimates for the improvements.

**13. Term.** The term of this Agreement shall be two years and eight months (2 years 8 months) from the date of the final decision on the associated Findings of Fact, Conclusions of Law and Decision except such term will not be considered to supersede or amend the standard validity periods as specified in KMC, which may be shorter as to specific approvals and necessary steps (e.g. KMC §17.96.090 specifying that design review approval is only valid for twelve months without additional steps for extension).

**14. Financing.** Prior to the issuance of a building permit for the Project, Owner shall provide evidence to the reasonable satisfaction of the City Council of Owner’s receipt of one or more funding commitments for the cost of construction of the Project. Within sixty days after the issuance of a building permit for the Project, Owner shall provide evidence to the City of closure of the construction financing, such as a deed of trust to secure a construction loan, for completion of the Project. Owner shall not commence additional excavation or construction work on the Property except as may be required to maintain existing permits until receipt of City approval of such financing commitment

**15. Site Restoration.** Owner shall submit to City, prior to issuance of building permit, a Site Restoration Plan and a security instrument naming City as beneficiary sufficient to fund such restoration. The Restoration Plan shall:

- a. Identify a clear restoration plan sufficient to restore site to finished elevations compatible with neighboring streets and residences, including landscaping and other details, and subject to City review and approval;



- b. Be accompanied by a licensed engineer's estimate of one hundred and fifty percent (150%) of the estimated reclamation costs, with such estimate subject to verification and approval by the City not to be unreasonably withheld, delayed or conditioned;
- c. Be accompanied by a letter of credit or performance bond naming City as beneficiary, with the proposed method and form of such security subject to City review and approval not to be unreasonably withheld, delayed or conditioned, in the amount of the 150% reclamation cost estimate and provide for the City to immediately pursue reclamation and restoration on the site in the event of a material failure of condition, other material breach of the Development Agreement, or abandonment of the Project.

In the event Owner materially fails a condition or otherwise breaches this Amendment and/or the Agreement then City shall be entitled to immediately commence reclamation and restoration pursuant to such Restoration Plan and security instrument.

#### **16. Miscellaneous Provisions.**

a) Police Powers. Except as otherwise expressly provided herein, nothing contained herein is intended to limit the police powers of Ketchum or its discretion in review of subsequent applications regarding development of the Property. This Agreement shall not be construed to modify or waive any law, ordinance, rule, or regulation not expressly provided for herein, including, without limitation, applicable building codes, fire codes, Ketchum's Zoning Ordinance, Ketchum's Subdivision Ordinance, and Planned Unit Development requirements for the Property.

b) Amendment. This Agreement may be revised, amended, or canceled in whole or in part, only by means of a written instrument executed by both Parties and as evidenced by amended plats and development plans.

c) Specific Performance. In the event of a breach of this Agreement, in addition to all other remedies at law or in equity, this Agreement shall be enforceable by specific performance by either party hereto. All remedies shall be cumulative.

d) Attorney's Fees. In the event either party hereto is required to retain counsel to enforce a provision of this Agreement, or to recover damages resulting from a breach hereof, the prevailing party shall be entitled to recover from the other party all reasonable attorney's fees incurred, whether or not litigation is actually instituted or concluded.

e) Notices. All notices required or provided for under this Agreement shall be in writing and deemed delivered upon delivery in person or upon mailing by certified mail, return receipt requested, postage prepaid. However, the time period in which a response to such notice must be given shall commence to run from the date of receipt on the return receipt of the notice. Rejection or refusal to accept, or the inability to deliver because of a change of address of which no notice was given shall be deemed to be receipt of the notice.

Notices to City shall be addressed as follows:

City of Ketchum  
Post Office Box 2315  
Ketchum, ID 83340  
Attn: John Gaeddert, Planning Director  
Telephone: 208.726-7801  
Email: [jgaeddert@ketchumidaho.org](mailto:jgaeddert@ketchumidaho.org)

Notices given to Owner shall be addressed as follows:

Jack E. Bariteau, Jr.  
Post Office Box 84  
Sun Valley, ID 83353  
Telephone: 650.906-5636  
Email: [jack@waypointsunvalley.com](mailto:jack@waypointsunvalley.com)

with a copy to:

Lawson Laski Clark & Pogue, PLLC  
675 Sun Valley Road, Suite A  
Post Office Box 3310  
Ketchum, Idaho 83340  
Attn.: Edward A. Lawson  
Telephone: 208.725-0055  
Email: [eal@lawsonlaski.com](mailto:eal@lawsonlaski.com)

A party may change the address to which further notices are to be sent by notice in writing to the other party, and thereafter notices shall be addressed and transmitted to the new address.

f) Reliance by the Parties. This Agreement is intended by Owner to be considered by Ketchum as part of Owner's application for design review approval for the Project and the ancillary applications referenced. Owner acknowledges and intends the City to consider and rely upon this Agreement in its review and consideration of said applications.

g) Relationship of Parties. It is understood that the contractual relationship between City and Owner is such that neither party is the agent, partner, or joint venturer of the other party.

h) Successors and Assigns; Covenant Running With the Land. This Agreement shall inure to the benefit of City and Owner and their respective heirs, successors and assigns. This Agreement, including all covenants, terms, and conditions set forth herein, shall be and is hereby declared a covenant running with the land with regard to the Property or any portion thereof, and is binding on both parties to this Agreement as well as their respective heirs, successors and assigns. City acknowledges and agrees Owner may assign its rights hereunder to a new entity formed for the purpose of developing the Property or to a lender providing a construction or permanent loan, or both.

- i) Recordation and Release. This Agreement shall be recorded with the Blaine County Recorder. The Parties agree to execute all appropriate documentation to cause the encumbrance of this Agreement to be terminated in the event of termination.
- j) No Waiver. In the event that City or Owner, or its successors and assigns, do not strictly comply with any of the obligations and duties set forth herein, thereby causing a default under this Agreement, any forbearance of any kind that may be granted or allowed by Owner, City, or their successors and assigns, to the other party under this Agreement shall not in any manner be deemed or construed as waiving or surrendering any of the conditions or covenants of this Agreement with regard to any subsequent default or breach.
- k) Partial Invalidity. In the event any portion of this Agreement, or part hereof, shall be determined by any court of competent jurisdiction to be invalid, void, or otherwise unenforceable, the remaining provisions of this Agreement, or parts hereof, shall remain in full force and effect and shall in no way be affected, impaired or invalidated, it being understood that such remaining provisions shall be construed in a manner most closely approximating the intention of the parties with respect to the invalid, void, or unenforceable provision or part hereof.
- l) Entire Agreement. This Agreement constitutes the full and complete agreement and understanding between the parties hereto. Excluding formal conditions placed upon the design review approval, subsequent plat approvals or other matters related to the public process, no representations or warranties made by either party shall be binding unless contained in this Agreement or subsequent written amendments hereto.
- m) Exhibits. All exhibits referred to herein are incorporated in this Agreement by reference, whether or not actually attached.
- n) Authority. Each of the persons executing this Agreement represents and warrants that he or she has the lawful authority and authorization to execute this Agreement, as well as all deeds, easements, liens and other documents required hereunder, for and on behalf of the entity executing this Agreement.
- o) Recitals. The Recitals are incorporated herein and made a part of this Agreement by this reference.
- p) Choice of Law. This Agreement shall be governed by and construed in accordance with the laws of the state of Idaho, which shall be the sole jurisdiction and venue for any action which may be brought by either party with respect to this Agreement or the subject matter hereof. Venue shall be in Blaine County, Idaho.
- q) Force Majeure. If either party hereto is delayed in the performance of any of its obligations hereunder because of abnormal and unforeseeable inclement weather, material shortages, labor shortages, dispute or strike, civil strife, acts beyond the reasonable control of the delayed party including acts of God, and actions by the United States of America, the State of Idaho, the City or any of their agencies, the time of performance hereunder, shall be reasonably extended for the same time as lost by the cause hereinabove set forth. Any claim of a force majeure event must be submitted to the other party within thirty days of such event.



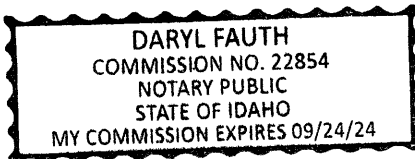
Subscribed and sworn before me on this \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me a Notary Public in and for said State, personally appeared WILLIAM ALLISON known or identified to me to be the Managing Member of MAIN DRIVE PROPERTIES, LLC, the limited liability company that executed the instrument or the person who executed the instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first written above.

\_\_\_\_\_  
Notary Public  
Residing at \_\_\_\_\_  
My Commission Expires \_\_\_\_\_

State of IDAHO        )  
                                  )ss.  
County of            )

On this 17<sup>th</sup> day of December, 2019, before me, a Notary Public in and for said State, personally appeared JACK E. BARITEAU, JR., known or identified to me to be the Trustee, or one of the Trustees of THE JACK E. BARITEAU, JR. SEPARATE PROPERTY TRUST under trust agreement dated October 2, 1996, and acknowledged to me that by said Trustee's signature on the foregoing instrument, the foregoing named Trust executed the same.



*[Handwritten Signature]*  
\_\_\_\_\_  
My Commission Expires 9/24/24  
Notary Public for Idaho  
Residing At Idaho, ID



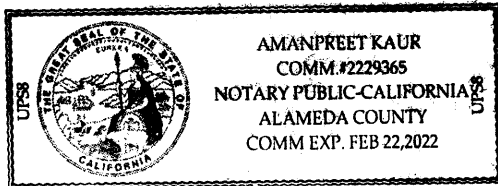
**A Notary Public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.**

Subscribed and sworn before me on this 17 day of Dec, 2019, before me a Notary Public in and for said State, personally appeared WILLIAM ALLISON known or identified to me to be the Managing Member of MAIN DRIVE PROPERTIES, LLC, the limited liability company that executed the instrument or the person who executed the instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year first written above.

*Amankaur*

Notary Public  
Residing at Emeryville, CA  
My Commission Expires Feb 22, 2022



State of IDAHO            )  
  )ss.  
County of                    )

On this \_\_\_\_\_ day of \_\_\_\_\_, 2019, before me, a Notary Public in and for said State, personally appeared JACK E. BARITEAU, JR., known or identified to me to be the Trustee, or one of the Trustees of THE JACK E. BARITEAU, JR. SEPARATE PROPERTY TRUST under trust agreement dated October 2, 19967, and acknowledged to me that by said Trustee's signature on the foregoing instrument, the foregoing named Trust executed the same.

My Commission Expires \_\_\_\_\_  
Notary Public for Idaho  
Residing At \_\_\_\_\_

December 7, 2020

Ms. Suzanne Frick, Administrator  
City of Ketchum  
480 East Avenue N.  
Post Office Box 2315  
Ketchum, ID 83340

Re: Jack E. Bariteau, Jr. and Main Drive Properties, LLC  
Mixed Use Project at 391 N. 1<sup>st</sup> Avenue  
Our File No. 70359-020

Dear Suzanne:

I and my firm represent Jack E. Bariteau, Jr. as trustee of the Jack E. Bariteau, Jr. Separate Property Trust and Main Drive Properties, LLC the owners ("Owners") of the property a 391 N. 1<sup>st</sup> Avenue ("Property") entitled for a 34,729 square foot mixed use residential and commercial project ("Mixed-Use Project"). In our representative capacity we have been asked to reply to your December 2, 2020 letter regarding the above-referenced matter.

For the reasons summarized below we request the City of Ketchum ("City") acknowledge and agree that the Owners' performance obligations referred to in your letter be extended pursuant to Section 16(q) of the December 16, 2020 Development Agreement #20427 between the City and the Owners ("Development Agreement").

Initially it must be observed, the Mixed-Use Project is inextricably related to and being pursued to fulfill obligations for employee housing associated with the Harriman Hotel Project. See, Recital paragraph D and Sections 9 and 10 of the Development Agreement. As such, the ability to fulfill the Owners' obligations under the Development Agreement are materially impacted by decisions the City has made in connection with the Hotel Project. In particular, the ability to prove the existence of financing under Section 14 of the Development Agreement is adversely affected by the City's decision to assert a breach of the Hotel Project development agreement. This is because as the City knows a master lease between the Owners and the Hotel for the employee housing and the payment of rent is contemplated as an element of the Mixed-Use Project. Therefore, the questions raised by the City's decisions challenging the viability of the Hotel Project affect the viability of the Mixed-Use Project.

Significant delays in the Mixed-Use Project occurred due to the City's determination that the proposed alley vacation required an amendment to its zoning ordinance to permit dead end alleys in the public right of way all after the Planning and Zoning Commission had approved the project in June of 2019. The decision resulted in months of delay in the Owners'



ability to move forward with the project design team to complete construction permit ready drawings, obtain bids and seriously explore construction financing of the Mixed-Use Project.

The virus and measures addressing it create uncertainty and make performance of obligations essential to development of the Mixed-Use Project simply impossible. During this period of uncertainty, the completion of design and pricing effort has been seriously interrupted. Design team consultants have been furloughed or key personnel are working from home part time. As a result, the final plans, construction drawings, off-site civil engineering and landscape design plans within the City right-of-way and general contractor requirements were significantly delayed.

Material supply chain problems also exist as supplier factories have been shuttered or are working with a minimal staff. Some vendors will not even quote pricing in key component areas. Insurance issues have arisen regarding how to effectively plan for social distancing to avoid infection among construction workers. Builder's Risk insurance, like other policies of this type, is not offering coverage for pandemic or viral infections that could be attributed to working on the site and within the building as it is erected. Conrad Brothers, the general contractor, is presently evaluating its overall building responsibilities and liabilities once commencing construction is deemed to be safe.

In the context of the foregoing, the City continued to process applications, work with the Owners and Benchmark Engineering and Rob King on the public improvements on Fourth Street and First Avenue North, the final alley design and satisfying neighboring property concerns regarding the balance of the public alley that will not be vacated by the City and otherwise perform its obligations under the Development Agreement. As an example, the Right-Of-Way Encroachment Agreement was finally approved in form and then executed on October 19, 2020, or four months after the purported expiration of design review approval of the Mixed-Use Project. These ongoing actions led the Owners' to reasonably believe the City was not intending to assert a breach of the Development Agreement. The Owners further proceeded to have the project consultant team restart the construction drawings once the project team could resume its work in office in Boise and submit to the City the required building permit set of drawings as prepared by Pivot North Architecture on September 30, 2020. The Owners paid the initial requisite Agency Review fees of \$126,221.00.

In view of the foregoing conditions Owners have been and will be hindered, delayed or prevented from the performance of their obligations under the Development Agreement. Owners believe their performance is excused by the common law doctrines of impossibility or impracticability of performance and under the Force Majeure provision of Section 16(q) of the Development Agreement which provides in part as follows:

"In the event either party hereto shall be delayed or hindered in or prevented from the performance of any act required under this Agreement because of acts beyond the

Ms. Suzanne Frick  
December 4, 2020  
Page 3

reasonable control of the delayed party, including acts of God and actions by . . . the City, then the time for performance hereunder shall be reasonably extended for the same time as lost by the cause hereinabove set forth."

Clearly the global pandemic caused by the coronavirus is an "act of God" beyond Owners' reasonable control. Similarly, the government regulations enacted in response to the virus and the decisions to amend the zoning ordinance and assert a breach of the Hotel Project development agreement are "actions by the City" which have "delayed or hindered or prevented" performance of the Owners' obligations under the Development Agreement. In any event, the risk of non-performance due to the virus and the decisions by the City were not expected or foreseeable and therefore it was assumed such an event and decisions would not occur and performance has been rendered impossible or impracticable.

The Owners are disappointed in the delays caused by all of the unprecedented and unforeseeable conditions and wish to assure the City they remain committed to beginning the improvements which are an integral part of the Mixed-Use Project as soon as reasonably possible. Toward that end, we would request that the City acknowledge the time delays that have resulted from the public alley issues that resulted in the Development Agreement not being fully approved and recorded until December of 2019 and recognize the impacts of the pandemic under the force majeure language cited above. If you feel it would be best to meet and confer with the City in person to allow the project to proceed with extended timelines reflective of the ongoing pandemic and prior delays, please let me know at your earliest convenience.

Sincerely,

LAWSON LASKI CLARK, PLLC



Edward A. Lawson

cc: Neil Bradshaw, Mayor  
Mathew Johnson  
Jack Bariteau  
Paul Conrad

**From:** [Jack Bariteau](#)  
**To:** [Suzanne Frick](#); [Jade Riley](#); [Matthew A. Johnson](#); [Neil Bradshaw](#); [Edward Lawson](#); [Jim Laski](#)  
**Subject:** Development Agreement #20427 - Extension Application -  
**Date:** Tuesday, December 22, 2020 12:30:17 PM

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Good afternoon: Per our meeting at City Hall on December 17, 2020 regarding the process for moving the development project along at 391 First Avenue North under Development Agreement #20427, I wanted to confirm with you that with the City's acceptance of the Development Agreement Extension Application and payment of the \$750.00 fee, that the project will be scheduled as we discussed for the Planning and Zoning Meeting on January 11, 2021 and the City Council Meeting on January 18, 2021.

You are in receipt of the letter from Edward Lawson dated December 7, 2020 notifying the City of the causes for the delay of the project while these are clearly listed in Mr. Lawson's letter,

I would again like to reiterate that the delays in our ownership proceeding per the timelines in the Development Agreement and submission of the building permit application were caused by matters outside of our control. First and most importantly, the issue related to the then in place City ordinance that prohibited dead end alleys in the City, only came to light after the Findings of Fact that were approved by the Planning and Zoning Commission on June 10, 2019. This discovery by John Gaeddert, in his position as Planning Director for the City at that time, caused a whole new public review process to begin so as to propose and adopt a new ordinance to allow for dead end alleys. Second, comments and requests by our adjoining property owners (Plttman, Wilson and Theilen) that our project be responsible for the maintenance of the remaining alley as part of our project also grew in scope as now evidenced by the ROW Encroachment Agreement between the City and our ownership. Third, the City continued to review the offsite improvement work to be performed by our project in the alley, on First Avenue North and Fourth Street and request changes in this overall final design in the public right of way that were finally resolved and that are now reflected and shown in the ROW Encroachment Agreement recorded on October 29, 2020. Lastly, we have been working expeditiously to secure the required construction loan commitment for the City Council's review. The letter from Suzanne has pushed back this process and it is imperative that we receive an extension of the Development Agreement by mid January to keep this effort on course.

The City Council then approved the Development Agreement and it was recorded on December 20, 2019. At this point, I turned to our project architect, Pivot North Architecture, and all related consultants to prepare building permit set drawings for submission to the City prior to the expiration of the Findings of Facts in mid June, 2020. In mid March this work effort was interrupted, as we are all aware by the outbreak of COVID-19, and resulted in the subsequent stoppage of work by many of our consultant team. Finally, we were able to get the team restarted and submitted for building permit on September 26, 2020 and paid \$126,121 in permit fees to the City. Not until I received a letter from Suzanne Frick on December 2, 2020, did it become readily apparent that the City indicated that the building permit would not be issued because the date of the Findings and Facts had been deemed to have expired.

Jade indicated during our meeting that our ownership should have requested an extension of the Findings and Facts while all of these additional processes were going on. Our view is that the pandemic and City's new ordinance process clearly interfered with our ability to proceed and therefore force majeure would definitely apply and extend our timelines accordingly. I

trust that the City recognizes the extenuating circumstances that caused us to not meet the timeline for submission of the building permit application exacerbated by the ongoing pandemic and grant our requested extension of the Development Agreement to allow us to construct this building and open the project by late Spring to early Summer 2022.

Please let me know if you have any questions at your earliest convenience.

Sincerely,

Jack Bariteau

RECORDING REQUESTED BY AND  
WHEN RECORDED RETURN TO:

OFFICE OF THE CITY CLERK  
CITY OF KETCHUM  
POST OFFICE BOX 2315  
KETCHUM, IDAHO 83340

(Space Above Line For Recorder's Use)

**FIRST AMENDMENT TO DEVELOPMENT AGREEMENT #20427**

This Amendment ("Amendment") is made as of January \_\_, 2021 by and between the City of Ketchum, Idaho ("Ketchum"), a municipal corporation, and Main Drive Properties, LLC, a Tennessee limited liability company and Jack E. Bariteau, Jr. as trustee of the Jack E. Bariteau Jr. Separate Property Trust, dated October 2, 1996 (collectively "Owner", and together with Ketchum, the "Parties").

1. Recitals. This Amendment is made in contemplation of the following facts and purposes:

1.1 Ketchum and Owner are parties to Development Agreement #20427 ("Agreement"), dated December 16, 2019, and recorded on December 20, 2019 in the records of Blaine County, Idaho as Instrument No. 665841, under and by virtue of which the Parties established certain rights and obligations with regard to the ~~development annexation~~ of the real property commonly known as 391 N. 1<sup>st</sup> Avenue, Ketchum, Idaho ("Property").

1.2 The parties desire to amend and supplement the Agreement as hereinafter provided pursuant to section 16. b) thereof.

1.2.1.3 ~~With the exception of the amendments in this Agreement, all terms of Agreement 20427 shall remain in effect.~~

2. Amendments. In view of the foregoing, the Parties agree to amend and supplement the Agreement including the extension of the design review approval to June 10, 2021, as follows:

2.1 The Parties have adopted the following schedule for the performance of the obligations of Owner under the Agreement and all related permits, approvals, and consents:

Performance Obligation

Completion Deadline

~~Subject to Section 3, S~~submit for Building Permit

Building Permit submitted 9/26/20

~~Receipt of Building Permit~~

~~In Review. Subject to City issuance~~

<u>Subject to Section 3, Obtain a Building Permit</u>	<u>Within <del>60</del> 90 days of approval of this Development Agreement Amendment</u>
<u>Subject to Section 8, Submit Right-Of-Way Encroachment Agreement</u>	Signed 10/19/20; Recorded 10/29/20
<u>Subject to Section 15, Submit Site Restoration Plan and Bond</u>	Prior to issuance of building permit
<u>Subject to Section 14, Submit Evidence of Construction Loan Commitment</u>	Prior to issuance of building permit
<u>Subject to Section 14, Submit Evidence of Construction Loan Recordation issuance.</u>	Within 60 days of building permit <u>No excavation may occur on the site until the construction loan is recorded and evidence is provided to the City.</u>
<u>Subject to Section 12, Submit Letter of Credit for Off Site Improvements</u>	Prior to issuance of building permit
<u>Subject to Section 3, Receipt of Certificate of Occupancy</u>	Within 18 months after issuance of building permit

2.2 Section 13 is amended to provide that the term of the Agreement shall be 2 years ~~and 8 months~~ from issuance of the building permit.

~~2.3 The terms “a pandemic” are added to the first sentence of Section 16 q after the word “including”.~~

3. Construction. This Amendment and the Agreement constitute one agreement between the Parties. In the event of any inconsistency between this Amendment and the Agreement the terms of this Amendment shall govern. All capitalized terms in the Agreement shall have the meaning in the Agreement when used in this Amendment, unless otherwise defined herein.

4. Ratification. The Agreement, as amended and supplemented by this Amendment, is hereby ratified and affirmed.

5. Counterparts. This Agreement may be executed in any number of counterparts.

This Amendment is executed by the Parties as of the date first above written.

Main Drive Properties, LLC, a Tennessee limited

City of Ketchum, Idaho, a municipal

liability company

corporation

By: \_\_\_\_\_  
William Allison, Managing Member

By: \_\_\_\_\_  
Neil Bradshaw, Mayor

By: \_\_\_\_\_  
Jack E. Bariteau, Jr. as Trustee of the Jack E. Bariteau,  
Jr. Separate Property Trust u/a/d October 2, 1996

STATE OF IDAHO )  
 )ss.  
County of Blaine )

On this \_\_\_\_ day of \_\_\_\_\_, 2021, before me, a Notary Public in and for said State, personally appeared JACK E. BARITEAU, JR., known or identified to me to be the Trustee, or one of the Trustees of the Jack E Bariteau, Jr. Separate Property Trust under trust agreement dated October 2, 1996, and acknowledged to me that by said Trustee's signature on the foregoing instrument, the foregoing named Trust executed the same.

\_\_\_\_\_  
My Commission Expires \_\_\_\_\_  
Notary Public for Idaho  
Residing at \_\_\_\_\_

STATE OF IDAHO )  
 ) ss.  
County of Blaine )

On this \_\_\_\_ day of \_\_\_\_\_, 2021, before me, a Notary Public in and for said State, personally appeared NEIL BRADSHAW, Mayor of the City of Ketchum, Idaho, known or identified to me to the person whose name is subscribed to the within instrument as the Mayor of the City of Ketchum, Idaho, and acknowledged to me that he executed the same as Mayor of the City of Ketchum, Idaho.

\_\_\_\_\_  
Notary Public for Idaho  
Residing at \_\_\_\_\_  
Commission expires \_\_\_\_\_

State of \_\_\_\_\_ )  
 ) ss.  
County of \_\_\_\_\_ )

On this \_\_\_\_ day of \_\_\_\_\_, 2021, before me, a Notary Public in and for said State, personally appeared WILLIAM ALLISON, known or identified to me to be the Manager of Main Drive Properties, LLC, a limited liability company and the member or one of the members who subscribed said limited liability company name to the foregoing instrument, and acknowledged to me that he executed the same in the name of said limited liability company.

\_\_\_\_\_  
Notary Public for \_\_\_\_\_  
Residing at \_\_\_\_\_  
My Commission expires \_\_\_\_\_