



City of Ketchum

December 9, 2019

Mayor Bradshaw and City Councilors
City of Ketchum
Ketchum, Idaho

Mayor Bradshaw and City Councilors:

Recommendation to Accept Public Comment and Review and Determine: (1) if Trail Creek LLC has cured the development agreement breach and (2) if not cured, direct staff to proceed to initiate communications and administrative work as necessary for site restoration.

Recommendation

Staff recommends the Council evaluate the information provided and make one of the following motions:

- Move to determine Trail Creek Fund LLC has sufficiently cured the breach identified in the October 9, 2019 Notice of Material Breach, or
- Move to determine Trail Creek Fund LLC has not cured the material breach and take the following actions:
 - a. Direct staff to prepare notice the material breach has not been cured
 - b. Direct staff to initiate communications and administrative work necessary to prepare for site restoration

Introduction and History

In June 2018 the City entered into a *First Amendment to Amended and Restated Development Agreement* with Trail Creek Fund, LLC ("*June 2018 Amendment*"). This amendment allowed for an extension on the Development Agreement timeline for the Auberge hotel project, subject to certain deadlines and conditions. A copy of the *June 2018 Amendment* is attached for reference.

Under Amendment 1-(2) of the *June 2018 Amendment*, Owner was to "provide and show sufficient evidence to the City of full financing and funding for completing the Hotel Project to the satisfaction of City by September 30, 2019 . . ."

On September 30, 2019 the City determined Trail Creek Fund LLC was in breach of the Development Agreement and directed staff to prepare a Notice of Material Breach. On October 9, 2019 notice was provided to Trail Creek Fund LLC (Attachment C) with the potential cure period ending December 9, 2019.

The Owner has provided the recorded Construction Deed of Trust, Security Agreement, Fixture Filing and Assignment of Leases and Rents and the Warranty Deed transferring title to Harriman Hotel LLC. (Attachments A and B). Based on the information provided, it appears the Owner has cured the default.

Provision 17 of the Amended and Restated Development Agreement dated October 5, 2015, states that in the event of a material breach of the Agreement, the parties agree that the City and Owner shall have sixty days after delivery of the notice of said breach to cure the breach.

The *June 2018 Amendment*, Provision 1-(3) does also provide that upon a failure of condition the City “shall be entitled to immediately commence reclamation and restoration [of the Site]” under a Site Restoration Plan and security instrument. Staff requests direction and approval from the Council to proceed with further communications both with the company backing Owner’s restoration security instrument and also with potential contractors to develop a plan for site restoration should Owner not satisfactorily cure the breach.

Attachments:

- A Construction Deed of Trust, Security Agreement, Fixture Filing and Assignment of Leases and Rents
- B Warranty Deed Transferring Title to the Harriman Hotel LLC
- C October 9, 2019 Notice of Default
- D October 2, 2019 Notice of Default
- E June 2018 Amendment
- F October 2015 Amended and Restated Development Agreement
- G Link to Public Comment Received: <https://ketchumidaho.org/citycouncil/page/trail-creek-fund-llc>

RECORDING REQUESTED BY:

MOSAIC KETCHUM RESORT, LLC,
a Delaware limited liability company

AND WHEN RECORDED MAIL TO:

Greenberg Traurig, LLP
1840 Century Park East, Suite 1900
Los Angeles, California 90067
Attention: Michael H. Davis, Esq.

Instrument # 665453

HAILEY, BLAINE, IDAHO
12-05-2019 3:51:11 PM No. of Pages: 43
Recorded for: BLAINE COUNTY TITLE
JOLYNN DRAGE Fee: \$84.00
Ex-Officio Recorder Deputy: JB
Electronically Recorded by Simplifile

**CONSTRUCTION DEED OF TRUST, SECURITY AGREEMENT, FIXTURE FILING
AND ASSIGNMENT OF LEASES AND RENTS**

**THIS CONSTRUCTION DEED OF TRUST SECURES A NOTE WHICH PROVIDES
FOR A VARIABLE INTEREST RATE**

**CONSTRUCTION DEED OF TRUST, SECURITY AGREEMENT, FIXTURE
FILING AND ASSIGNMENT OF LEASES AND RENTS**

THIS CONSTRUCTION DEED OF TRUST, SECURITY AGREEMENT, FIXTURE FILING AND ASSIGNMENT OF LEASES AND RENTS (this "Security Instrument") is made as of December 5, 2019, by HARRIMAN HOTEL, LLC, an Idaho limited liability company ("Trustor"), and having its address at 355 Spruce Avenue, Ketchum, Idaho 83340 to Blaine County Title, Inc., an Idaho corporation ("Trustee"), for the benefit of MOSAIC KETCHUM RESORT, LLC, a Delaware limited liability company, having its address at c/o Mosaic Real Estate Investors, LLC 23975 Park Sorrento, Suite 420, Calabasas, California 91302 attention: Vicky Schiff, together with its successors and assigns ("Beneficiary").

RECITALS

A. Loan Agreement and Loan Documents. Beneficiary is making a loan to Trustor (the "Loan") in an amount not to exceed Sixty Million One Hundred Thousand and 00/100 Dollars (\$60,100,000.00) pursuant to that certain Construction Loan Agreement of even date herewith by and between Trustor and Beneficiary, the provisions of which are incorporated herein by reference to the same extent as if fully set forth herein (said Construction Loan Agreement and any and all extensions and renewals thereof, amendments thereto and substitutions or replacements therefor is referred to herein as the "Loan Agreement"; any terms not defined herein shall have the meanings ascribed to such terms in the Loan Agreement). The Loan is evidenced by that certain Promissory Note of even date herewith in the principal amount of \$60,100,000.00 from Trustor to Beneficiary (together with all renewals, amendments, modifications, increases and extensions thereof, the "Note"). This Security Instrument encumbers certain real estate owned by Borrower located in Blaine County, Idaho, more fully described on Exhibit A attached hereto, and payment of the Note is secured by this Security Instrument, financing statements and other security documents (this Security Instrument, the Note, the Loan Agreement, the Rate Management Agreement (as defined below) and all other documents evidencing or securing the Loan (as amended, modified, replaced or restated from time to time) are individually hereinafter referred to as a "Loan Document" and collectively referred to as the "Loan Documents"). All initially capitalized terms used herein and not otherwise defined shall have the meaning ascribed to such terms in the Loan Agreement. As used herein, the term "Rate Management Agreements" means any agreement, device or arrangement providing for payments which are related to fluctuations of interest rates, exchange rates, forward rates, or equity prices, including, but not limited to, dollar-denominated or cross-currency interest rate exchange agreements, forward currency exchange agreements, interest rate cap or collar protection agreements, forward rate currency or interest rate options, puts and warrants, and any agreement pertaining to equity derivative transactions (e.g., equity or equity index swaps, options, caps, floors, collars and forwards), including without limitation any ISDA

Master Agreement between Trustor and Beneficiary, or any Affiliate of Beneficiary, and any schedules, confirmations and documents and other confirming evidence between the parties confirming transactions thereunder, all whether now existing or hereafter arising and in each case, as amended, modified or supplemented from time to time. The Loan bears interest at a variable rate of interest.

GRANT

NOW THEREFORE, to secure (i) the payment when and as due and payable of the principal of and interest on the Loan or so much thereof as may be advanced from time to time, and any and all late charges, and all other indebtedness, loans, advances and each and every obligation and liability evidenced by, owing, arising under or in connection with the Loan, the Note and any of the other Loan Documents (other than the obligations under each of the Environmental Indemnity Agreement and each Guaranty, which obligations are and shall remain, for as long as Beneficiary deems necessary, unsecured obligations), together with any extensions, modifications, renewals or refinancings of any of the foregoing, (ii) the payment of all other expenses, costs, advances and indebtedness which this Security Instrument by its terms secures, (iii) the performance and observance of the covenants and agreements contained in this Security Instrument, the Loan Agreement, the Note and each of the other Loan Documents (other than the obligations under each of the Environmental Indemnity Agreement and each Guaranty, which obligations are and shall remain, for as long as Beneficiary deems necessary, unsecured obligations), (iv) any and all obligations of Trustor to Beneficiary or any affiliate of Beneficiary, whether absolute, contingent or otherwise and howsoever and whensoever (whether now or hereafter) created, arising, evidenced or acquired (including renewals, extensions and modifications thereof and substitutions theretofore) , under or in connection with (I) any and all Rate Management Agreements, and (II) any and all cancellations, buy-backs, reversals, terminations or assignments of any Rate Management Agreement ("Rate Management Obligations"), except for Rate Management Obligations that constitute "Excluded Swap Obligations" (as defined in the Loan Agreement), (v) all obligations to perform or forbear from performing acts, and agreements, instruments and documents evidencing, guarantying, securing or otherwise executed in connection with any of the foregoing, together with any amendments, modifications and restatements thereof, and all expenses and attorneys' fees incurred by Beneficiary hereunder or any other document, instrument or agreement related to any of the foregoing, (vi) all obligations and liabilities of the Trustor to Beneficiary under any Letter of Credit Documents and (vii) all other loans, advances, indebtedness and each and every other obligation or liability of Trustor owed to Beneficiary or its successors, however created, of every kind and description whether now existing or hereafter arising and whether direct or indirect, primary or as guarantor or surety, absolute or contingent, liquidated or unliquidated, matured or unmatured, participated in whole or in part, created by trust agreement, lease overdraft, agreement or otherwise, whether or not secured by additional collateral, whether originated with Beneficiary or owed to others and acquired by Beneficiary by purchase, assignment or otherwise, and all obligations to perform or forbear from performing acts, and agreements, instruments and documents evidencing, guarantying, securing or otherwise executed in connection with any of

the foregoing, together with any amendments, modifications and restatements thereof, and all expenses and attorneys' fees incurred by Beneficiary hereunder or any other document, instrument or agreement related hereto or to any of the foregoing (all of such indebtedness, obligations and liabilities identified in (i), (ii), (iii), (iv), (v) and (vi) above being hereinafter referred to as the "Obligations"). For the purpose of securing payment and performance of the Obligations, Trustor hereby irrevocably and unconditionally grants, conveys, transfers and assigns to Trustee, its successors and assigns, IN TRUST, WITH POWER OF SALE TOGETHER WITH THE RIGHT OF ENTRY AND POSSESSION, for the benefit and security of Beneficiary, all present and future rights, titles, interests, estates, powers and privileges that Trustor now has or may hereafter acquire in and does hereby grant to Beneficiary, its successors and assigns a security interest in, all of Trustor's assets, wherever and howsoever located, and all products and proceeds thereof, including, without limitation, all and singular the properties, rights, interests and privileges described in Granting Clauses I, II, III, IV, V, VI, VII, VIII, IX, X and XI below, all of same being collectively referred to herein as the "Mortgaged Property":

GRANTING CLAUSE I:

THE LAND, all estate, right, title, interest, claim and demand whatsoever which Trustor now or hereafter acquires, either in law or in equity, in possession or expectancy, of, in and to the real property described on Exhibit A attached hereto and made a part hereof (the "Land"), and which is located at 300 River Street East, Block 83, Original Town of Ketchum, Blaine County, Idaho, together with any greater estate therein as hereafter may be acquired by Trustor; provided, however, neither the failure to designate an address nor any inaccuracy in the address designated shall affect the validity or priority of the lien of this Security Instrument on the Land;

GRANTING CLAUSE II:

TOGETHER WITH all buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land, including all extensions, additions, improvements, betterments, renewals, substitutions and replacements to or for any such buildings, structures and improvements and all of the right, title and interest of the Trustor now or hereafter acquired in and to any of the foregoing, including without limitation those certain improvements to be constructed on the Land in accordance with the Loan Agreement (collectively, the "Improvements");

GRANTING CLAUSE III:

TOGETHER WITH all easements, rights of way, strips and gores of land, streets, ways, alleys, sidewalks, vaults, passages, sewer rights, waters, water courses, water drainage and reservoir rights and powers (whether or not appurtenant), all estates, rights, titles, interests, privileges, liberties, tenements, hereditaments, easements, franchises, appendages, options to purchase all or any part of the Land or Improvements or any interest therein (and any greater estate in the Land or Improvements now owned or hereafter acquired by Trustor pursuant thereto), and appurtenances whatsoever, in any way belonging, benefitting, relating or

appertaining to the Land or the Improvements, whether now owned or hereafter acquired by the Trustor, including without limitation all existing and future mineral, oil and gas rights which are appurtenant to or which have been used in connection with the Land, all existing and future water stock relating to the Land or the Improvements, all existing and future share of stock respecting water and water rights pertaining to the Land or the Improvements or other evidence of ownership thereof, and the reversions and remainders thereof (the “Appurtenant Rights”);

GRANTING CLAUSE IV:

TOGETHER WITH all machinery, apparatus, equipment, fittings and fixtures of every kind and nature whatsoever, and all furniture, furnishings and other personal property now or hereafter owned by the Trustor and forming a part of, or used or obtained for use in connection with, the Land or the Improvements or any present or future operation, occupancy, maintenance or leasing thereof; including, but without limitation, any and all heating, ventilating and air conditioning equipment and systems, antennae, appliances, apparatus, awnings, basins, bathtubs, bidets, boilers, bookcases, cabinets, carpets, communication systems, coolers, curtains, dehumidifiers, dishwashers, disposals, doors, drapes, drapery rods, dryers, ducts, dynamos, elevators, engines, equipment, escalators, fans, fittings, floor coverings, furnaces, furnishings, furniture, hardware, heaters, humidifiers, incinerators, lighting, machinery, motors, ovens, pipes, plumbing and electric equipment, pool equipment, pumps, radiators, ranges, recreational facilities and equipment, refrigerators, screens, sprinklers, stokers, stoves, shades, shelving, sinks, security systems, toilets, ventilators, wall coverings, washers, windows, window covering, wiring, beds, bureaus, chiffoniers, chests, chairs, desks, mirrors, tables, screens, paintings, hangings, pictures, divans, couches, luggage carts, luggage racks, stools, sofas, chinaware, linens, pillows, blankets, glassware, food carts, cookware, dry cleaning facilities, dining room wagons, keys or other entry systems, bars, bar fixtures, liquor and other drink dispensers, icemakers, radios, television sets, intercom and paging equipment, electric and electronic equipment, dictating equipment, private telephone systems, facsimile machines, medical equipment, potted plants, lighting fixtures, fire prevention and extinguishing apparatus, fittings, plants, laundry machines, tools, machinery, engines, switchboards, conduits, compressors, vacuum cleaning systems, floor cleaning, waxing and polishing equipment, call systems, brackets, electrical signs, bulbs, bells, ash and fuel, conveyors, lockers, spotlighting equipment, garbage disposals, and other customary hotel equipment and all extensions, renewals or replacements thereof or substitutions therefor or additions thereto, whether or not the same are or shall be attached to the Land or the Improvements in any manner (collectively, the “Fixtures”); it being agreed that all of said property owned by the Trustor and placed on the Land or on or in the Improvements (whether affixed or annexed thereto or not) shall, so far as permitted by law, conclusively be deemed to be real property and conveyed hereby for purposes of this Security Instrument.

GRANTING CLAUSE V:

TOGETHER WITH the following (the “Personal Property”):

All personal property of every nature whatsoever now or hereafter owned by Trustor or used in connection with the Land or the improvements thereon, including all extensions, additions, improvements, betterments, renewals, substitutions and replacements thereof and all of the right, title and interest of Trustor in and to any such personal property together with the benefit of any deposits or payments now or hereafter made on such personal property by Trustor or on its behalf, including without limitation, any and all Goods, Investment Property, Instruments, Chattel Paper, Documents, Letter of Credit Rights, Accounts, Deposit Accounts, Commercial Tort Claims and General Intangibles, each as defined in the Uniform Commercial Code of the State of Idaho (as amended from time to time, the "ID UCC");

All proceeds of the foregoing, including, without limitation, all judgments, awards of damages and settlements hereafter made resulting from condemnation proceeds or the taking of the Land or improvements thereon or any portion thereof under the power of eminent domain, any proceeds of any policies of insurance, maintained with respect to the Land or the Improvements or proceeds of any sale, option or contract to sell the Land or the Improvements or any portion thereof;

Any and all additions and accessories to all of the foregoing and any and all proceeds (including proceeds of insurance, eminent domain or other governmental takings and tort claims), renewals, replacements and substitutions of all of the foregoing;

All of the books and records pertaining to the foregoing;

GRANTING CLAUSE VI:

TOGETHER WITH all right, title and interest which the Trustor hereafter may acquire in and to all leases and other agreements now or hereafter entered into for the occupancy or use of the Land, the Appurtenant Rights, the Improvements, the Fixtures and the Personal Property or any portion thereof, whether written or oral (herein collectively referred to as the "Leases"), and all rents, issues, incomes and profits in any manner arising thereunder (herein collectively referred to as the "Rents"), credit card receipts collected from guest rooms, restaurants, bars, meeting rooms, banquet rooms and recreational facilities and parking charges, the rendering of services by Trustor or any operator or manager of a hotel or the commercial space located in the Improvements or acquired from others (including, without limitation, from the rental of any office space, retail space, guest rooms or other space, halls, stores and offices, and deposits securing reservations of such space), license, lease, sublease and concession fees and rentals, health club membership fees, food and beverage wholesale and retail sales, service charges, vending machine sales and any other items of revenue, receipts and/or income as identified in the Uniform System of Accounts for the Lodging Industry, 10th Edition, published by the American Hotel and Lodging Association in conjunction with the HFTP, as from time to time amended) and all right, title and interest which the Trustor now has or hereafter may acquire in and to any bank accounts, security deposits, and any and all other amounts held as security under the Leases, reserving to the Trustor any statutory rights;

GRANTING CLAUSE VII:

TOGETHER WITH any and all awards and insurance proceeds, or proceeds of any sale, option or contract to sell the Mortgaged Property or any portion thereof (provided that no right, consent or authority to sell the Mortgaged Property or any portion thereof shall be inferred or deemed to exist by reason hereof); and the Trustor hereby authorizes, directs and empowers the Beneficiary, at its option, on the Trustor's behalf, or on behalf of the successors or assigns of the Trustor, to adjust, compromise, claim, collect and receive such proceeds; to give acquittances therefor; and, after deducting expenses of collection, including attorneys' fees, costs and disbursements, to apply the Insurance Proceeds to the extent not utilized for the restoration of the Mortgaged Property as provided in the Loan Agreement, to payment of the Obligations, notwithstanding the fact that the same may not then be due and payable or that the Obligations is otherwise adequately secured; and the Trustor agrees to execute and deliver from time to time such further instruments as may be requested by the Beneficiary to confirm such assignment to the Beneficiary of any such proceeds;

GRANTING CLAUSE VIII:

TOGETHER WITH all estate, right, title and interest, homestead or other claim or demand, as well in law as in equity, which the Trustor now has or hereafter may acquire of, in and to the Mortgaged Property, or any part thereof, and any and all other property of every kind and nature from time to time hereafter (by delivery or by writing of any kind) conveyed, pledged, assigned or transferred as and for additional security hereunder by the Trustor or by anyone on behalf of the Trustor to Beneficiary;

GRANTING CLAUSE IX:

TOGETHER WITH all of Trustor's right title, and interest in and to all contracts and agreements (including, without limitation, any development agreements, redevelopment agreements, construction, operation, reciprocal easement and use restriction agreements, parking rights agreements, and other similar agreements) now or hereafter entered into covering or relating to any part of the Mortgaged Property or the improvements thereon, including, without limitation, the Hotel Documents (collectively, the "Contracts") and all revenue, income and other benefits thereof, including, without limitation, management agreements, franchise agreements, service contracts, maintenance contracts, equipment leases, personal property leases and any contracts or documents relating to the construction on any part of the Mortgaged Property or the improvements (including plans, drawings, surveys, tests, reports, bonds and governmental approvals) or to the management or operation of any part of the Mortgaged Property or the improvements thereon and any and all warranties and guaranties relating to or in connection with the Contracts or any of the other foregoing items; all water taps, sewer taps, certificates of occupancy, permits, licenses, franchises, certificates, contracts, agreements consents, approvals and other rights and privileges now or hereafter obtained in connection with the Mortgaged Property or the improvements thereon and all present and future warranties and guaranties relating to the improvements or to any equipment, fixtures, furniture, furnishings, personal

property or components of any of the foregoing now or hereafter located or installed on the Mortgaged Property or the improvements; All building materials, supplies and equipment now or hereafter placed on the Mortgaged Property and/or the improvements and all architectural, engineering and other renderings, models, drawings, plans, specifications, studies and data now or hereafter relating to the Mortgaged Property and/or the improvements, including, without limitation, the plans and specifications;

GRANTING CLAUSE X:

TOGETHER WITH all of Trustor's right, title and interest in and to the Condominium Documents, specifically including any rights as developer, declarant or similar position thereunder;

GRANTING CLAUSE XI:

TOGETHER WITH All of Trustor's right, title and interest in all commitments for financing, including, without limitation, takeout financing, and all right, title and interest in all contracts to sell all or a portion of the Land and/or improvements, including, without limitation, all guaranties thereof and all earnest money and credit support thereof, including, without limitation, surety bonds and letters of credit;

TO HAVE AND TO HOLD the Mortgaged Property, unto the Trustee, its successors and substitutes in trust, IN FEE SIMPLE forever; subject, however, to those encumbrances which the Beneficiary has approved in the Loan Agreement or otherwise approved in writing (collectively, the "Permitted Encumbrances");

UPON CONDITION that, subject to the terms hereof and until the occurrence of an Event of Default hereunder, the Trustor shall be permitted to possess and use the Mortgaged Property;

SUBJECT to the covenants and conditions hereinafter set forth.

PROVIDED, NEVERTHELESS, that if (i) the Trustor shall pay and perform in full when due the Obligations and shall duly and timely perform and observe all of the covenants and conditions herein and in the other Loan Documents required to be performed and observed by the Trustor, and (ii) the Lender shall have no further obligation to make any further disbursements of the Loan to or for the benefit of Trustor under the provisions of the Loan Agreement, then the Lender shall execute and deliver to the Trustor such instruments as may be reasonably requested by the Trustor which are sufficient to release this Security Instrument.

THE TRUSTOR FURTHER COVENANTS AND AGREES AS FOLLOWS:

1. **Trustor's Covenants.**

- (a) The Recitals and Grant set forth above are true and correct and incorporated herein by reference.
- (b) Title. The Trustor hereby covenants with and warrants to Beneficiary and to the purchaser at any foreclosure sale: (i) that at the execution and delivery hereof it is well seized of the Mortgaged Property, and of a good, indefeasible estate therein, in fee simple, and that this Security Instrument is a first and prior lien on the Mortgaged Property; (ii) that the Mortgaged Property is free from all encumbrances whatsoever (and any claim of any other person thereto) other than (A) the security interest granted to Beneficiary herein and pursuant to the Loan Documents and (B) the Permitted Encumbrances, that it has good and lawful right to sell, mortgage, encumber and convey the Mortgaged Property; and (iii) that it and its successors and assigns will forever warrant and defend the Mortgaged Property against all claims and demands whatsoever with the exception of the Permitted Encumbrances.
- (c) Performance of Secured Obligations. Trustor shall, prior to the expiration of any grace or cure period: (i) pay the Obligations when due, and (ii) duly and punctually perform and observe all of the covenants and conditions to be performed or observed by the Trustor as provided in the Note, the Loan Agreement, this Security Instrument and the other Loan Documents.
- (d) Repair/Maintenance. Trustor shall (i) maintain, repair, restore, replace or rebuild any portion of the Mortgaged Property which may be damaged or destroyed in accordance with the requirements of the Loan Agreement; (ii) keep the Mortgaged Property in good condition and repair, free from waste; (iii) pay all operating costs and expenses of the Mortgaged Property when due; (iv) comply with all Applicable Laws, observe and comply with any conditions and requirements necessary to preserve and extend any and all rights, licenses, permits (including without limitation zoning variances, special exceptions and nonconforming uses), privileges, franchises and concessions that are applicable to all or any portion of the Mortgaged Property or the use and occupancy thereof; (v) refrain from any action, and correct any condition known to the Trustor, which would materially increase the risk of fire or other hazard to the Mortgaged Property or any portion thereof; and (vi) cause the Mortgaged Property to be managed in a competent and professional manner.
- (e) Alteration of Mortgaged Property. Without the prior written consent of Beneficiary, Trustor shall not cause, suffer or permit (i) any material alteration of the Mortgaged Property, except as required by any applicable legal requirement or as otherwise contemplated by the Loan Agreement; (ii) any change in the zoning classification or intended use or occupancy of the Mortgaged Property, including without limitation any change which would increase any fire or other hazard; (iii) any change in the identity of the Trustor or the person or entity responsible for

managing the Mortgaged Property; or (iv) any modification of the licenses, permits, privileges, franchises, covenants, conditions or declarations of use applicable to the Mortgaged Property. Further, Trustor shall not, without the consent of Beneficiary, not to be unreasonably withheld, delayed or conditioned, impose any restrictions, agreements or covenants which run with the land upon the Mortgaged Property or any part thereof, nor plat, re-plat, subdivide, re-subdivide or record condominium documents against the Mortgaged Property, except as required to develop and operate the Mortgaged Property in the manner required hereunder.

- (f) Organizational Documents of Trustor. The Borrower Entity Documents, or the organizational documents of any Material Constituent Entity shall not, without the prior written consent of the Beneficiary, be amended or modified, nor shall any direct or indirect Constituent Entity be released or discharged from its, his or her obligations under the Trustor's Certificate of Formation or Operating Agreement, nor shall any Material Constituent Entity transfer, pledge or encumber in any way any interest in the Trustor or the right to receive income or proceeds from the Trustor. Subject to Section 4(a)(ii), at all times prior to the repayment of the Loan, Jack E. Bariteau Jr. shall control Trustor.
- (g) Continuing Existence; Merger; Disposition of Assets. Trustor shall not (i) permit itself to be dissolved or its existence terminated, (ii) adversely change its capital structure, (iii) merge or consolidate with any entity, (iv) amend or change the Borrower Entity Documents or (v) sell, lease, transfer or otherwise dispose of, or grant any person an option to acquire, or sell and leaseback, all or any portion of its assets, whether now owned or hereafter acquired other than Obsolete Collateral (defined below), except for a bona fide sales of inventory in the ordinary course of business and dispositions of property which is obsolete and not used or useful in its business.
- (h) Compliance with Applicable Laws. The Trustor shall comply with, and shall cause Guarantors to comply with, all Applicable Laws. Trustor shall obtain and maintain any and all licenses, permits, franchises, governmental authorizations, patents, trademarks, copyrights or other rights necessary for the ownership of their respective properties and the advantageous conduct of its business and as may be required from time to time by Applicable Laws.
- (i) Insurance. The Trustor shall obtain and maintain or cause to be obtained and maintained, in full force and effect at all times insurance with respect to Trustor and the Mortgaged Property as required pursuant to the Loan Agreement.
- (j) Stamp and other Taxes. If the Federal, or any state, county, local, municipal or other government or any subdivision of any thereof having jurisdiction, shall levy, assess or charge any tax (excepting therefrom any income tax on the Beneficiary's

receipt of interest payments on the principal portion of the Obligations), assessment or imposition upon this Security Instrument, any of the other Obligations, or any of the other Loan Documents, the interest of the Beneficiary in the Mortgaged Property, or any of the foregoing, or upon the Beneficiary by reason of or as holder of any of the foregoing, or shall at any time or times require revenue stamps to be affixed to this Security Instrument or any of the other Loan Documents, the Trustor shall pay, or cause to be paid, all such taxes and stamps to or for the Beneficiary as they become due and payable. If any law or regulation is enacted or adopted permitting, authorizing or requiring any tax, assessment or imposition to be levied, assessed or charged, which law or regulation prohibits the Trustor from paying the tax, assessment, stamp, or imposition to or for the Beneficiary, then such event shall constitute an Event of Default hereunder and all sums hereby secured shall become immediately due and payable at the option of the Beneficiary.

- (k) Eminent Domain. In case the Mortgaged Property, or any part or interest in any thereof, is taken by condemnation or eminent domain, all condemnation awards are to be settled, assigned and applied in accordance with the terms of the Loan Agreement. Trustor has assigned to the Beneficiary all of its right, title and interest in, to and under all condemnation awards as provided in the Loan Agreement.
- (l) Delivery of Documents. Trustor will at all times deliver to Beneficiary either all of its executed originals (in the case of chattel paper or instruments) or (in all other cases), if requested by Beneficiary, certified copies of all Leases (as defined in the Loan Agreement), agreements creating or evidencing intangibles, Plans, Construction Contracts (as defined in the Loan Agreement), contracts for services, contracts for sale, all amendments and supplements thereto, and any other document which is, or which evidences, governs, or creates, the Mortgaged Property.
- (m) Changes in Use; Zoning. Unless required by Applicable Laws, or unless Beneficiary has otherwise first agreed in writing, the Trustor shall not make or allow any changes to be made in the nature of the occupancy or use of the Mortgaged Property or any portion thereof for which the Mortgaged Property or such portion was intended at the time this Security Instrument was delivered. The Trustor shall not initiate or acquiesce in any change in any zoning or other land use classification now or hereafter in effect and affecting the Mortgaged Property or any part thereof without in each case obtaining the Beneficiary's prior written consent thereto.
- (n) Acceptance of Trust; Powers and Duties of Trustee.

- (i) Trustee accepts this trust when this Security Instrument is recorded. Except as may be required by Applicable Laws, Trustee or Beneficiary may from time to time apply to any court of competent jurisdiction for aid and direction in the execution of the trust hereunder and the enforcement of the rights and remedies available hereunder, and may obtain orders or decrees directing or confirming or approving acts in the execution of said trust and the enforcement of said remedies.
- (ii) Trustee shall not be required to take any action toward the execution and enforcement of the trust hereby created or to institute, appear in, or defend any action, suit, or other proceeding in connection therewith where, in its opinion, such action would be likely to involve it in expense or liability, unless requested so to do by a written instrument signed by Beneficiary and, if Trustee so requests, unless Trustee is tendered security and indemnity satisfactory to Trustee against any and all cost, expense, and liability arising therefrom. Trustee shall not be responsible for the execution, acknowledgment, or validity of the Loan Documents, or for the proper authorization thereof, or for the sufficiency of the lien and security interest purported to be created hereby, and Trustee makes no representation in respect thereof or in respect of the rights, remedies, and recourses of Beneficiary.
- (iii) With the approval of Beneficiary, Trustee shall have the right to take any and all of the following actions: (i) to select, employ, and advise with counsel (who may be, but need not be, counsel for Beneficiary) upon any matters arising hereunder, including the preparation, execution, and interpretation of the Loan Documents, and shall be fully protected in relying as to legal matters on the advice of counsel, (ii) to execute any of the trusts and powers hereof and to perform any duty hereunder either directly or through its agents or attorneys, (iii) to select and employ, in and about the execution of its duties hereunder, suitable accountants, engineers and other experts, agents and attorneys in fact, either corporate or individual, not regularly in the employ of Trustee, and Trustee shall not be answerable for any act, default, negligence, or misconduct of any such accountant, engineer or other expert, agent or attorney in fact, if selected with reasonable care, or for any error of judgment or act done by Trustee in good faith, or be otherwise responsible or accountable under any circumstances whatsoever, except for Trustee's gross negligence or bad faith, and (iv) any and all other lawful action as Beneficiary may instruct Trustee to take to protect or enforce Beneficiary's rights hereunder. Trustee shall not be personally liable in case of entry by Trustee, or anyone entering by virtue of the powers herein granted to Trustee, upon the Mortgaged Property for debts contracted for or liability or damages

incurred in the management or operation of the Mortgaged Property. Trustee shall have the right to rely on any instrument, document, or signature authorizing or supporting any action taken or proposed to be taken by Trustee hereunder, believed by Trustee in good faith to be genuine. Trustee shall be entitled to reimbursement permitted under Applicable Law for expenses incurred by Trustee in the performance of Trustee's duties hereunder and to reasonable compensation for such of Trustee's services hereunder as shall be rendered. TRUSTOR WILL, FROM TIME TO TIME, PAY THE COMPENSATION DUE TO TRUSTEE HEREUNDER AND REIMBURSE TRUSTEE FOR, AND INDEMNIFY AND HOLD HARMLESS TRUSTEE AGAINST, ANY AND ALL LIABILITY AND REASONABLE EXPENSES WHICH MAY BE INCURRED BY TRUSTEE IN THE PERFORMANCE OF TRUSTEE'S DUTIES, IN ALL INSTANCES IN SUCH AMOUNTS PERMITTED UNDER APPLICABLE LAW.

- (iv) All moneys received by Trustee shall, until used or applied as herein provided, be held in trust for the purposes for which they were received, but need not be segregated in any manner from any other moneys (except to the extent required by Applicable Laws) and Trustee shall be under no liability for interest on any moneys received by Trustee hereunder.
- (v) Should any deed, conveyance, or instrument of any nature be required from Trustor by any Trustee or substitute Trustee to more fully and certainly vest in and confirm to the Trustee or substitute Trustee such estates, rights, powers, and duties, then, upon request by the Trustee or substitute Trustee, any and all such deeds, conveyances and instruments shall be made, executed, acknowledged, and delivered and shall be caused to be recorded and/or filed by Trustor.
- (vi) By accepting or approving anything required to be observed, performed, or fulfilled or to be given to Trustee pursuant to the Loan Documents, including without limitation, any deed, conveyance, instrument, officer's certificate, balance sheet, statement of profit and loss or other financial statement, survey, appraisal, or insurance policy, Trustee shall not be deemed to have warranted, consented to, or affirmed the sufficiency, legality, effectiveness, or legal effect of the same, or of any term, provision, or condition thereof, and such acceptance or approval thereof shall not be or constitute any warranty or affirmation with respect thereto by Trustee.
- (o) Trustee Compensation; Exculpation; Indemnification.

- (i) Trustor shall pay Trustee's fees to the fullest extent permitted under Applicable Law and reimburse Trustee for reasonable expenses in the administration of this trust, including attorneys' fees. Trustor shall pay to Beneficiary reasonable compensation for services rendered concerning this Security Instrument, including without limit any statement of amounts owing under any Obligations. Beneficiary shall not directly or indirectly be liable to Trustor or any other person as a consequence of (i) the exercise of the rights, remedies or powers granted to Beneficiary in this Security Instrument; (ii) the failure or refusal of Beneficiary to perform or discharge any obligation or liability of Trustor under any agreement related to the Mortgaged Property or under this Security Instrument; or (iii) any loss sustained by Trustor or any third party resulting from Beneficiary's failure (whether by malfeasance, nonfeasance or refusal to act) to lease the Improvements after an Event of Default (as defined below) or from any other act or omission (regardless of whether same constitutes negligence) of Beneficiary in managing the Improvements after an Event of Default (as defined below) unless the loss is caused by the gross negligence or willful misconduct of Beneficiary and no such liability shall be asserted against or imposed upon Beneficiary, and all such liability is hereby expressly waived and released by Trustor.
- (ii) TRUSTOR INDEMNIFIES TRUSTEE AND BENEFICIARY AGAINST, AND HOLDS TRUSTEE AND BENEFICIARY HARMLESS FROM, ALL LOSSES, DAMAGES, LIABILITIES, CLAIMS, CAUSES OF ACTION, JUDGMENTS, COURT COSTS, ATTORNEYS' FEES AND OTHER LEGAL EXPENSES, COST OF EVIDENCE OF TITLE, COST OF EVIDENCE OF VALUE, AND OTHER EXPENSES WHICH EITHER MAY SUFFER OR INCUR: (i) BY REASON OF THIS SECURITY INSTRUMENT; (ii) BY REASON OF THE EXECUTION OF THIS SECURITY INSTRUMENT OR IN PERFORMANCE OF ANY ACT REQUIRED OR PERMITTED HEREUNDER OR BY APPLICABLE LAWS; (iii) AS A RESULT OF ANY FAILURE OF TRUSTOR TO PERFORM TRUSTOR'S OBLIGATIONS SECURED BY THIS SECURITY INSTRUMENT; OR (iv) BY REASON OF ANY ALLEGED OBLIGATION OR UNDERTAKING ON BENEFICIARY'S PART TO PERFORM OR DISCHARGE ANY OF THE REPRESENTATIONS, WARRANTIES, CONDITIONS, COVENANTS OR OTHER OBLIGATIONS CONTAINED IN ANY OTHER DOCUMENT RELATED TO THE MORTGAGED PROPERTY, EXCEPT FOR THE GROSS NEGLIGENCE OR WILLFUL MISCONDUCT OF BENEFICIARY OR TRUSTEE. THE ABOVE OBLIGATION OF TRUSTOR TO INDEMNIFY AND HOLD HARMLESS TRUSTEE AND BENEFICIARY SHALL SURVIVE THE

RELEASE AND CANCELLATION OF THE OBLIGATIONS AND
THE RELEASE AND RECONVEYANCE OR PARTIAL RELEASE
AND RECONVEYANCE OF THIS SECURITY INSTRUMENT.

- (iii) Trustor shall pay all amounts and indebtedness arising under this Section 1(o) immediately upon demand by Trustee or Beneficiary together with interest thereon from the date the indebtedness arises at the rate of interest then applicable to the principal balance of the Loan as specified in the Loan Agreement.
- (p) Substitution of Trustee. From time to time, by a written instrument, signed and acknowledged by Beneficiary and recorded in the Office of the Recorder of the County in which the Mortgaged Property is situated, Beneficiary may appoint another trustee to act in the place and stead of Trustee or any successor. Such written instrument shall set forth any information required by Applicable Laws. The recordation of such instrument of substitution shall discharge Trustee herein named and shall appoint the new trustee as the trustee hereunder with the same effect as if originally named Trustee herein. A writing recorded pursuant to the provisions of this Section 1(p) shall be conclusive proof of the proper substitution of such new Trustee.

2. **Liens, Contest and Defense of Title.**

- (a) The Trustor shall not create or suffer or permit any lien, charge or encumbrance to attach to or be filed against the Mortgaged Property or any part thereof, or interest thereon, or any other rights and properties conveyed, mortgaged, transferred and granted hereunder (except for Permitted Encumbrances), whether such lien, charge or encumbrance is on a parity, inferior or superior to the lien of this Security Instrument, including liens for labor or materials with respect to the Mortgaged Property (collectively, "Mechanic's Liens").
- (b) Notwithstanding paragraph (a) of this Section 2, the Trustor may in good faith and with reasonable diligence contest the validity or amount of any Mechanic's Liens and defer payment and discharge thereof during the pendency of such contest, provided that: (i) such contest shall prevent the sale or forfeiture of the Mortgaged Property, or any part thereof or any interest therein, to satisfy such Mechanic's Liens and shall not result in a forfeiture or impairment of the lien of this Security Instrument; and (ii) within ten (10) days after the Trustor has been notified of the filing of any such Mechanic's Liens, Trustor shall have notified the Beneficiary in writing of the Trustor's intention to contest such Mechanic's Liens, or to cause such other party to contest such Mechanic's Liens, and shall have obtained a title insurance endorsement over such Mechanic's Liens in form and substance reasonably satisfactory to the Beneficiary, insuring the Beneficiary against loss or damage by reason of such Mechanic's Liens; provided that in lieu of such title

insurance endorsement the Trustor may deposit and keep on deposit with the Beneficiary (or such depository as may be designated by the Beneficiary) a sum of money sufficient, in the judgment of the Beneficiary, to pay in full such Mechanic's Liens and all interest thereon. Any such deposits are to be held without any allowance of interest and may be used by the Beneficiary, for itself, in its sole discretion to protect the priority of this Security Instrument. In case the Trustor shall fail to maintain such title insurance or deposit, or to prosecute or cause the prosecution of such contest with reasonable diligence, or to pay or cause to be paid the amount of the Mechanic's Lien, plus any interest finally determined to be due upon the conclusion of such contest; then the Beneficiary may, at its option, apply any money and liquidate any securities then on deposit with the Beneficiary (or other depository designated by the Beneficiary) in payment of or on account of such Mechanic's Liens, or that part thereof then unpaid, together with all interest thereon according to any written bill, notice or statement, without inquiring into the amount, validity or enforceability thereof. If the amount of money so deposited shall (in the Beneficiary's sole and absolute judgment) be insufficient for the payment in full of such Mechanic's Liens, together with all interest thereon, then Trustor shall forthwith, upon demand, deposit with the Beneficiary (or other depository designated by the Beneficiary) the sum which shall (in Beneficiary's sole and absolute judgment, when added to the funds then on deposit with Beneficiary) be necessary to make such payment in full (or such other security as shall be reasonably satisfactory to Beneficiary). If a Mechanic's Lien claim is ultimately resolved in the claimant's favor, then the monies so deposited shall be applied in full payment of such Mechanic's Lien or that part thereof then unpaid, together with all interest thereon (provided no Event of Default shall then exist) when the Beneficiary has been furnished with satisfactory evidence of the amount of payment to be made. Any excess monies remaining on deposit with the Beneficiary (or other depository) under this Section 2(b) shall be paid to the Trustor, provided that no Event of Default shall then exist.

- (c) If the lien and security interest of the Beneficiary in or to the Mortgaged Property, or any part thereof, shall be endangered or shall be attacked, directly or indirectly, the Trustor shall immediately notify the Beneficiary and shall appear in and defend any action or proceeding purporting to affect the Mortgaged Property, or any part thereof, and shall file and prosecute such proceedings and take all actions necessary to preserve and protect such title, lien and security interest in and to the Mortgaged Property.
- (d) Third Party Agreements.
 - (i) Performance of Obligations. The Trustor will, for the benefit of the Beneficiary, fully and promptly keep, observe, perform and satisfy each

obligation, condition, covenant, and restriction of the Trustor affecting the Mortgaged Property or imposed on it under any Third Party Agreements so that there will be no default thereunder and so that the persons (other than the Trustor) obligated thereon shall be and remain at all times obligated to perform for the benefit of the Beneficiary. The Trustor will not permit to exist any condition, event or fact which could allow or serve as a basis or justification for any such person to avoid such performance. The Trustor shall promptly deliver to Beneficiary copies of any demands or notices of default sent or received by the Trustor in connection with any Third Party Agreement and allow the Beneficiary the right but not the obligation, for itself, to cure any such default. For purposes hereof, "Third Party Agreements" shall mean all agreements between the Trustor (or its predecessor(s) in title) relating to the Mortgaged Property or the Obligations secured hereby, including, without limitation, all reciprocal easement agreements and covenants, conditions and restrictions affecting the Mortgaged Property, the Project Agreements, the Construction Contracts, the Hotel Documents, the Condominium Documents, contracts for sale, contracts for services, the intangibles and any other document imposing an obligation, covenant or restriction against the Mortgaged Property or Trustor.

- (ii) Enforceability. In addition, the Trustor will enforce, at its expense, each and every obligation of the parties (other than the Trustor) under the Third Party Agreements. Without the prior written consent of the Beneficiary, the Trustor shall not (i) collect the proceeds of any intangibles more than thirty (30) days before the same shall be due and payable; (ii) modify, amend, cancel or terminate any of the Third Party Agreements, or (iii) in any other manner impair Beneficiary's rights and interest with respect to the Third Party Agreements.

3. **Security Agreement and Fixture Filing.**

- (a) Grant of Security Interest. This Security Instrument shall constitute a security agreement as that term is used in the ID UCC and Trustor hereby grants and assigns to Beneficiary, for itself, as additional collateral for and to secure the Obligations, a security interest in all of the Personal Property. Beneficiary shall have all of the rights and remedies of a secured party under the ID UCC, as well as all other rights and remedies available at law or in equity.
- (b) Perfection. Trustor hereby consents to any instrument that may be requested by Beneficiary to publish notice or protect, perfect, preserve, continue, extend, or maintain the security interest and lien, and the priority thereof, of this Security Instrument or the interest of Beneficiary in the Personal Property, including, without limitation, deeds of trust, security agreements, financing statements,

continuation statements, and instruments of similar character, and Trustor shall pay or cause to be paid (i) all filing and recording taxes and fees incident to each such filing or recording, (ii) all expenses, including without limitation, actual attorneys' fees and costs (of both in house and outside counsel), incurred by Beneficiary in connection with the preparation and acknowledgement of all such instruments, and (iii) all federal, state, county and municipal stamp taxes and other taxes, duties, imposts, assessments, and charges arising out of or in connection with the delivery of such instruments. Trustor hereby consents to, and hereby ratifies, the filing of any financing statements relating to the Loan made prior to the date hereof. Trustor hereby irrevocably constitutes and appoints Beneficiary, for the benefit of itself, as the attorney-in-fact of Trustor, to file with the appropriate filing office any such instruments. In addition, Trustor hereby authorizes Beneficiary to cause any financing statement or fixture filing to be filed or recorded without the necessity of obtaining the consent of Trustor.

- (c) Rights of Beneficiary. In addition to Beneficiary's rights as a "Secured Party" under the ID UCC, Beneficiary may, but shall not be obligated to, at any time without notice and at the expense of Trustor: (a) give notice to any person of Beneficiary's rights hereunder and enforce such rights at law or in equity; (b) insure, protect, defend and preserve the Personal Property or any rights or interests of Beneficiary therein; (c) inspect the Personal Property; and (d) endorse, collect and receive any right to payment of money owing to Trustor under or from the Personal Property. Notwithstanding the above, in no event shall Beneficiary be deemed to have accepted any property other than cash in satisfaction of any obligation of Trustor to Beneficiary or to any Bank unless Beneficiary or such other Bank shall make an express written election of said remedy under ID UCC §28-9-621, or other applicable law.
- (d) Power of Attorney. Trustor hereby irrevocably appoints Beneficiary as Trustor's attorney-in-fact (such agency being coupled with an interest), and as such attorney-in-fact Beneficiary may, without the obligation to do so, in Beneficiary's name, or in the name of Trustor, prepare, execute and file or record financing statements, continuation statements, applications for registration and like papers necessary to create, perfect or preserve any of Beneficiary's' security interests and rights in or to any of the Personal Property, and, upon an Event of Default hereunder, take any other action required of Trustor; provided, however, that Beneficiary as such attorney-in-fact shall be accountable only for such funds as are actually received by Beneficiary.
- (e) Rights of Beneficiary upon Event of Default. Upon the occurrence of an Event of Default, then in addition to all of Beneficiary's rights as a "Secured Party" under the ID UCC or otherwise at law, and to the fullest extent not prohibited by Applicable Laws:

- (i) Beneficiary may (i) upon written notice, require Trustor to assemble any or all of the Personal Property and make it available to Beneficiary at a place designated by Beneficiary; (ii) without prior notice, enter upon the Land or other place where any of the Personal Property may be located and take possession of, collect, sell, lease, license and dispose of any or all of the Personal Property, and store the same at locations acceptable to Beneficiary at Trustor's expense; (iii) sell, assign and deliver at any place or in any lawful manner all or any part of the Personal Property and bid and become the purchaser at any such sales; and
- (ii) Beneficiary may, for the account of Trustor and at Trustor's expense: (i) operate, use, consume, sell, lease, license or dispose of the Personal Property as Beneficiary deems appropriate; (ii) enter into any agreement, compromise, or settlement, including insurance claims, which Beneficiary may deem desirable or proper with respect to any of the Personal Property; and (iii) endorse and deliver evidences of title for, and receive, enforce and collect by legal action or otherwise, all indebtedness and obligations now or hereafter owing to Trustor in connection with or on account of any or all of the Personal Property; and
- (iii) In disposing of Personal Property hereunder, Beneficiary may disclaim all warranties of title, possession, quiet enjoyment and the like. Any proceeds of any disposition of any Personal Property may be applied by Beneficiary to the payment of expenses incurred by Beneficiary in connection with the foregoing, including attorneys' fees, and the balance of such proceeds may be applied by Beneficiary, for itself, toward the payment of the Obligations in such order of application as Beneficiary may from time to time elect.

Notwithstanding any other provision hereof, Beneficiary shall not be deemed to have accepted any property other than cash in satisfaction of any obligation of Trustor to Beneficiary unless Trustor shall make an express written election of said remedy under ID UCC §28-9-621, or other Applicable Laws. Trustor agrees that Beneficiary shall have no obligation to process or prepare any Personal Property for sale or other disposition.

- (f) Place of Business. Trustor maintains its chief executive office as set forth as the address of Trustor in Section 20 below, and Trustor will notify Beneficiary in writing of any change in its place of business within five (5) days of such change.
- (g) Fixture Filing. This Security Instrument is intended to be a financing statement within the purview of Section 28-9-502 of the ID UCC and will be recorded as a "fixture filing" in accordance with the ID UCC.

- (h) **Representations and Warranties.** The Trustor represents and warrants that: (i) the Trustor is the record owner of the Mortgaged Property, including the Personal Property; (ii) the Trustor's chief executive office is located at 335 Spruce Avenue Ketchum, Idaho 83340; (iii) the Trustor's state of formation is the State of Idaho; (iv) the Trustor's exact legal name is as set forth on Page 1 of this Security Instrument; (v) the Trustor's organizational identification number is 373-3213, (vi) Trustor is the owner of the Personal Property subject to no liens, charges or encumbrances other than the lien hereof, (vii) the Personal Property will not be removed from the Mortgaged Property without the consent of the Beneficiary, and (viii) no financing statement covering any of the Personal Property or any proceeds thereof is on file in any public office except pursuant hereto.

4. **Restrictions on Transfer.**

- (a) The Trustor, without the prior written consent of the Beneficiary, which Beneficiary may withhold in its sole discretion, shall not effect, suffer or permit any Prohibited Transfer (as defined herein). Any merger or consolidation, change in capital structure, or any conveyance, sale, assignment, transfer, lien, pledge, mortgage, security interest or other encumbrance or alienation (or any agreement to do any of the foregoing) (a "Transfer") of any of the following properties or interests shall constitute a "Prohibited Transfer":
- (i) The Mortgaged Property or any part thereof or interest therein, excepting only sales of Residential Units (as defined in the Loan Agreement) or other dispositions of collateral ("Obsolete Collateral") no longer useful in connection with the operation of the Mortgaged Property, provided that prior to the sale or other disposition thereof, such Obsolete Collateral has been replaced by Collateral of at least equal value and utility which is subject to the lien hereof with the same priority as with respect to the Obsolete Collateral; or
- (ii) All or any part of the direct or indirect ownership interests in the Trustor, including, without limitation, any interests in any Constituent Entity; notwithstanding the foregoing, Beneficiary agrees that the following shall not constitute Prohibited Transfers hereunder: (a) with respect to each holder of an indirect interest in Trustor that is a natural person, the Transfer of such indirect interests for bona fide estate planning purposes to the spouse, child, parent, grandparent, grandchild, niece, nephew, aunt or uncle of such holder, or to a trust for the benefit of such holder or for the benefit of the spouse, child, parent, grandparent, grandchild, niece, nephew, aunt or uncle of such holder; (b) the Transfer of indirect interests in Trustor to one or more Affiliates of the transferor thereof, and (c) the sale of Class C Preferred Units incident to the initial capitalization of Trustor, (d) the sale or other transfer of interests in Waypoint, LLC or

Trail Creek Fund, LLC; provided that if any such Transfer results in any Person owning 20% or more of the direct or indirect ownership interests in Trustor, or in any other party Controlling Trustor, such Transfer shall not be permitted unless (x) the applicable transferee complies with Lender's "know-your-customer" and other general creditworthiness and other requirements, and (y) Jack E. Bariteau, Jr. remains in Control of Trustor and retains direct or indirect ownership of at least twenty-five percent (25%) of the direct or indirect beneficial interests in Trustor."

in each case whether any such Transfer is effected directly, indirectly, voluntarily or involuntarily, by operation of law or otherwise; provided, however, that the foregoing provisions of this section shall not apply (i) to liens securing the Obligations, (ii) to the lien of current Taxes not in default, (iii) to any Transfers of the beneficial interests, or shares of stock or partnership or joint venture interests, as the case may be of any Constituent Entity, by or on behalf of an owner thereof to another owner or by an owner who is deceased or declared judicially incompetent, to such owner's heirs, legatees, devisees, executors, administrators, estate or personal representatives, or (iv) to Leases or Sales contracts permitted by the terms of the Loan Documents, if any.

- (b) In determining whether or not to make the Loan, Beneficiary evaluated the background and experience of the Trustor, Sole Member, Trustor's manager, the Guarantors, and each Material Constituent Entity in owning and operating property such as the Mortgaged Property, found it acceptable and relied and continues to rely upon same as the means of maintaining the value of the Mortgaged Property which is the Beneficiary security for the Note. The Trustor, Sole Member, each Material Constituent Entity, and the Guarantors are well experienced in borrowing money and owning and operating property such as the Mortgaged Property, were ably represented by a licensed attorney at law in the negotiation and documentation of the Loan and bargained at arm's length and without duress of any kind for all of the terms and conditions of the Loan, including this provision. The Trustor recognizes that the Beneficiary is entitled to keep its loan portfolio at current interest rates by either making new loans at such rates or collecting assumption fees and/or increasing the interest rate on a loan, the security for which is purchased by a party other than the original Trustor. The Trustor further recognizes that any secondary junior financing placed upon the Mortgaged Property (i) may divert funds which would otherwise be used to pay the Note; (ii) could result in acceleration and foreclosure by any such junior encumbrancer which would force the Beneficiary to take measures and incur expenses to protect its security; (iii) would detract from the value of the Mortgaged Property should the Beneficiary come into possession thereof with the intention of selling same; and (iv) would impair the Beneficiary's right to accept a deed in lieu of foreclosure, as a foreclosure by the Beneficiary would be necessary

to clear the title to the Mortgaged Property. In accordance with the foregoing and for the purposes of (a) protecting the Beneficiary security, both of repayment and of value of the Mortgaged Property; (b) giving the Beneficiary the full benefit of their bargain and contract with the Trustor; (c) allowing the Beneficiary to raise the interest rate and collect assumption fees; and (d) keeping the Mortgaged Property free of subordinate financing liens, the Trustor agrees that if this section is deemed a restraint on alienation, that it is a reasonable one.

5. **Events of Default.** Any one or more of the following events shall constitute an “Event of Default” under this Security Instrument:

- (a) If the Trustor shall fail (i) to make any payment of principal or interest under the Note when due, or (ii) to make any other payment under the Loan Documents within three (3) days of the date when due or, if no date is stated, within three (3) days after demand (or such shorter period as may be expressly provided for herein or therein); or
- (b) If a Prohibited Transfer shall occur; or
- (c) Trustor fails to perform or cause to be performed any other obligation or observe any other condition, covenant, term, agreement or provision required to be performed or observed by Trustor contained in this Security Instrument and not specifically referred to elsewhere in this Section 5; provided, however, that if such failure by its nature can be cured, then so long as the continued operation and safety of the Mortgaged Property, and the priority, validity and enforceability of the liens created by this Security Instrument or any of the other Loan Documents and the value of the Mortgaged Property, are not impaired, threatened or jeopardized, then Trustor shall have a period (the “Cure Period”) of thirty (30) days after such failure to cure the same and an Event of Default shall not be deemed to exist during the Cure Period (provided, however, such period shall be limited to ten (10) days if such failure can be cured by the payment of money); provided further that if Trustor commences to cure such failure during the Cure Period and is diligently and in good faith attempting to effect such cure, the Cure Period shall be extended for thirty (30) additional days, but in no event shall the Cure Period be longer than sixty (60) days in the aggregate; or
- (d) If any Event of Default occurs under the Loan Agreement or any other Loan Document, including, without limitation, nonpayment by Trustor of any Rate Management Obligation when due or the breach by Trustor of any term, provision or condition contained in any Rate Management Agreement.

6. **Remedies.** Upon the occurrence of an Event of Default (regardless of the pendency of any proceeding which has or might have the effect of preventing Trustor from complying with the terms of this Security Instrument), and in addition to such other rights as

may be available under any other Loan Document or under Applicable Laws, but subject at all times to any mandatory legal requirements:

- (a) Acceleration. Beneficiary may declare the outstanding principal balance of the Note and all unpaid indebtedness of Trustor hereby secured, including interest then accrued thereon, to be forthwith due and payable, whereupon the same shall become and be forthwith due and payable, without other notice or demand of any kind (and upon the occurrence of any Event of Default described in Section 11.1(e) (i.e., bankruptcy of Trustor or any Guarantor) of the Loan Agreement, such indebtedness shall automatically become due and payable without any action by Beneficiary).
- (b) Uniform Commercial Code. Beneficiary shall, with respect to the Personal Property, have all the rights, options and remedies of a secured party under the ID UCC, including without limitation, the right to the possession of any such property or any part thereof, and the right to enter with legal process any premises where any such property may be found. Any requirement of the ID UCC for reasonable notification shall be met by mailing written notice to Trustor at its address set forth in Section 20 hereof at least ten (10) days prior to the sale or other event for which such notice is required. Any such sale may be held as part of and in conjunction with any foreclosure sale of the other properties and rights constituting the Mortgaged Property in order that the Mortgaged Property, including the Personal Property, may be sold as a single parcel if the Beneficiary elects. The Trustor hereby agrees that if the Beneficiary demands or attempts to take possession of the Personal Property or any portion thereof in exercise of its rights and remedies hereunder, the Trustor will promptly turn over and deliver possession thereof to the Beneficiary, and the Trustor authorizes, to the extent the Trustor may now or hereafter lawfully grant such authority, the Beneficiary, its employees and agents, and potential bidders or purchasers to enter upon the Mortgaged Property or any other office, building or property where the Personal Property or any portion thereof may at the time be located (or believed to be located) and the Beneficiary may (i) remove the same therefrom or render the same inoperable (with or without removal from such location); (ii) repair, operate, use or manage the Personal Property or any portion thereof; (iii) maintain, repair or store the Personal Property or any portion thereof; (iv) view, inspect and prepare the Personal Property or any portion thereof for sale, lease or disposition; (v) sell, lease, dispose of or consume the same or bid thereon; or (vi) incorporate the Personal Property or any portion thereof into the Land or the Improvements or Fixtures and sell, convey or transfer the same. The expenses of retaking, selling and otherwise disposing of the Personal Property, including reasonable attorneys' fees and legal expenses incurred in connection therewith, shall constitute so much additional Obligations and shall be payable upon demand with interest at the Default Rate until paid to Beneficiary.

- (c) Foreclosure. Beneficiary may proceed to protect and enforce the rights of Beneficiary for itself hereunder (i) by any action at law, suit in equity or other appropriate proceedings, whether for the specific performance of any agreement contained herein, or for an injunction against the violation of any of the terms hereof, or in aid of the exercise of any power granted hereby or by law, or (ii) by the foreclosure of this Security Instrument. In any suit to foreclose the lien hereof, there shall be allowed and included as additional Obligations in the decree of sale, all expenditures and expenses authorized by the foreclosure laws of the State of Idaho, as from time to time amended (the "Foreclosure Laws") and all other reasonable expenditures and expenses which may be paid or incurred by or on behalf of Beneficiary for attorneys' fees, appraiser's fees, outlays for documentary and expert evidence, stenographer's charges, publication costs, and costs (which may be reasonably estimated as to items to be expended after entry of the decree) of procuring all such abstracts of title, title searches and examinations, title insurance policies, and similar data and assurance with respect to title as Beneficiary may deem reasonably necessary either to prosecute such suit or to evidence to bidders at sales which may be had pursuant to such decree the true conditions of the title to or the value of the Mortgaged Property. All expenditures and expenses of the nature mentioned in this paragraph, and such other expenses and fees as may be incurred in the protection of the Mortgaged Property and rents and income therefrom and the maintenance of the lien of this Security Instrument, including the reasonable fees of any attorney employed by Beneficiary in any litigation or proceedings affecting this Security Instrument, the Note, any of the other Loan Documents or the Mortgaged Property, including bankruptcy proceedings, or in preparation of the commencement or defense of any proceedings or threatened suit or proceeding, or otherwise in dealing specifically therewith, shall be so much additional Obligations and shall be immediately due and payable by Trustor, with interest thereon at the Default Rate until paid to Beneficiary.
- (d) Appointment of Receiver. Beneficiary shall, as a matter of right, without notice and without giving bond to Trustor or anyone claiming by, under or through it, and without regard to the solvency or insolvency of Trustor or the then value of the Mortgaged Property, be entitled to have a receiver appointed pursuant to Applicable Law of all or any part of the Mortgaged Property and the rents, issues and profits thereof, with such power as the court making such appointment shall confer, and Trustor hereby consents to the appointment of such receiver and shall not oppose any such appointment. Any such receiver may, to the fullest extent permitted under Applicable Laws, without notice, enter upon and take possession of the Mortgaged Property or any part thereof by summary proceedings, ejectment or otherwise, and may remove Trustor or other persons and any and all property therefrom, and may hold, operate and manage the same and receive all earnings, income, rents, issues and proceeds accruing with respect thereto or any part

thereof, whether during the pendency of any foreclosure or until any right of redemption shall expire or otherwise.

- (e) Taking Possession, Collecting Rents, Etc. To the fullest extent not prohibited by Applicable Laws, upon demand by Beneficiary, Trustor shall surrender to Beneficiary and Beneficiary may enter and take possession of the Mortgaged Property or any part thereof personally, by its agent or attorneys or be placed in possession pursuant to court order as mortgagee in possession or receiver as provided in the Foreclosure Laws, and Beneficiary, in its discretion, personally, by its agents or attorneys or pursuant to court order as mortgagee in possession or receiver as provided in the Foreclosure Laws may enter upon and take and maintain possession of all or any part of the Mortgaged Property, together with all documents, books, records, papers, and accounts of Trustor relating thereto, and may exclude Trustor and any agents and servants thereof wholly therefrom and may, on behalf of Trustor, or in its own name as Beneficiary and under the powers herein granted:
- (i) hold, operate, manage and control all or any part of the Mortgaged Property and conduct the business, if any, thereof, either personally or by its agents, with full power to use such measures, legal or equitable, as in its discretion may be deemed proper or necessary to enforce the payment or security of the rents, issues, deposits, profits, and avails of the Mortgaged Property, including without limitation actions for recovery of rent, actions in forcible detainer, and actions in distress for rent, all without notice to Trustor;
 - (ii) cancel or terminate any lease or sublease of all or any part of the Mortgaged Property for any cause or on any ground that would entitle Trustor to cancel the same;
 - (iii) elect to disaffirm any lease or sublease of all or any part of the Mortgaged Property made subsequent to this Security Instrument without Beneficiary's prior written consent;
 - (iv) extend or modify any then existing Leases and make new Leases of all or any part of the Mortgaged Property, which extensions, modifications, and new Leases may provide for terms to expire, or for options to lessees to extend or renew terms to expire, beyond the Maturity Date of the Loan and the issuance of a deed or deeds to a purchaser or purchasers at a foreclosure sale, it being understood and agreed that any such Leases, and the options or other such provisions to be contained therein, shall be binding upon Trustor, all persons whose interests in the Mortgaged Property are subject to the lien hereof, and the purchaser or purchasers at any foreclosure sale, notwithstanding any redemption from sale, discharge

of the Obligations, satisfaction of any foreclosure decree, or issuance of any certificate of sale or deed to any such purchaser;

- (v) make all necessary or proper repairs, renewals, replacements, alterations, additions, betterments, and improvements in connection with the Mortgaged Property as may seem judicious to Beneficiary, to insure and reinsure the Mortgaged Property and all risks incidental to Beneficiary possession, operation and management thereof, and to receive all rents, issues, deposits, profits, and avails therefrom;
- (vi) apply the net income, after allowing a reasonable fee for the collection thereof and for the management of the Mortgaged Property, to the payment of Taxes, Premiums and other charges applicable to the Mortgaged Property, or in reduction of the Obligations in such order and manner as Beneficiary shall select, in its sole discretion; and
- (vii) receive and collect the rents, issues, profits and revenues of the Mortgaged Property personally or through a receiver so long as an Event of Default shall exist and during the pendency of any foreclosure proceedings and during any redemption period, and the Trustor agrees to consent to a receiver if it is believed necessary or desirable by the Beneficiary to enforce its rights under this subsection. The collection of rents, issues, profits or revenues of the Mortgaged Property by the Beneficiary shall in no way waive the right of the Beneficiary to foreclose this Security Instrument in the event of any said Event of Default.

Nothing herein contained shall be construed as constituting the Beneficiary a mortgagee in possession in the absence of the actual taking of possession of the Mortgaged Property. The right to enter and take possession of the Mortgaged Property and use any personal property therein, to manage, operate, conserve and improve the same, and to collect the rents, issues and profits thereof, shall be in addition to all other rights or remedies of the Beneficiary hereunder or afforded by law, and may be exercised concurrently therewith or independently thereof or under the other Loan Documents. The expenses (including any receiver's fees, reasonable counsel fees, costs and agent's compensation) incurred pursuant to the powers herein contained shall be secured hereby which expenses Trustor promises to pay upon demand together with interest thereon at the Default Rate until paid to the Beneficiary. The Beneficiary shall not be liable to account to Trustor for any action taken pursuant hereto other than to account for expenses incurred any rents or other income actually received by the Beneficiary. Without taking possession of the Mortgaged Property, the Beneficiary may, in the event the Mortgaged Property becomes vacant or is abandoned, take such steps as it deems appropriate or as required by any Applicable Laws to register, maintain, repair, protect and secure the Mortgaged Property (including hiring watchmen therefor) and all costs incurred in so doing shall constitute so much additional Obligations payable upon demand with interest thereon at the Default Rate.

- (f) **Indemnity.** The Trustor hereby agrees to indemnify, defend, protect and hold harmless Beneficiary, and their respective employees, officers and agents from and against any and all liabilities, claims and obligations which may be incurred, asserted or imposed upon them or any of them as a result of or in connection with any use, operation, or lease of any of the Mortgaged Property, or any part thereof, or as a result of Beneficiary seeking to obtain performance of any of the obligations due with respect to the Mortgaged Property; provided, however, that the foregoing indemnity shall not extend to such liabilities, claims or obligations as result from the gross negligence or intentional misconduct of Beneficiary, or their respective employees, officers or agents.

7. **Compliance with Foreclosure Laws.**

- (a) In the event that any provision in this Security Instrument shall be inconsistent with any provision of the Foreclosure Laws, the provisions of the Foreclosure Laws shall take precedence over the inconsistent provisions of this Security Instrument, but shall not invalidate or render unenforceable any other provision of this Security Instrument that can be construed in a manner consistent with the Foreclosure Laws.
- (b) If any provision of this Security Instrument shall grant to the Beneficiary any rights or remedies upon the occurrence of an Event of Default which are more limited than the rights that would otherwise be vested in the Beneficiary under the Foreclosure Laws in the absence of said provision, the Beneficiary shall be vested with the rights granted in the Foreclosure Laws to the full extent permitted by law.

8. **Waiver of Appraisal, Valuation, Etc.** Trustor shall not and will not apply for or avail itself of any appraisal, valuation, stay, extension or exemption laws, or any so-called "**Moratorium Laws**," now existing or hereafter enacted in order to prevent or hinder the enforcement or foreclosure of this Security Instrument, but hereby waives the benefit of such Moratorium Laws to the fullest extent not prohibited by Applicable Laws. Trustor for itself and all who may claim through or under it waives any and all right to have the property and estates comprising the Mortgaged Property marshalled upon any foreclosure of the lien hereof and agrees that any court having jurisdiction to foreclose such lien may order the Mortgaged Property sold as an entirety to the fullest extent not prohibited by Applicable Laws. In the event of any sale made under or by virtue of this instrument, the whole of the Mortgaged Property may be sold in one parcel as an entirety or in separate lots or parcels at the same or different times, all as the Beneficiary may determine in its sole discretion. The Beneficiary shall have the right to become the purchaser at any sale made under or by virtue of this instrument and the Beneficiary so purchasing at any such sale shall have the right to be credited upon the amount of the bid made therefor by the Beneficiary with the amount payable to the Beneficiary out of the net proceeds of such sale. In the event of any such sale, the outstanding principal amount of the

Loan and the other Obligations, if not previously due, shall be and become immediately due and payable without demand or notice of any kind.

9. **Costs and Expenses of Foreclosure.** In any suit to foreclose the lien hereof there shall be allowed and included as additional indebtedness in the decree for sale all reasonable expenditures and expenses which may be paid or incurred by or on behalf of the Beneficiary for appraiser's fees, outlays for documentary and expert evidence, stenographic charges, publication costs and costs (which may be estimated as to items to be expended after the entry of the decree) of procuring all such abstracts of title, title searches and examination, guarantee policies, and similar data and assurances with respect to title as the Beneficiary may deem to be reasonably necessary either to prosecute any foreclosure action or to evidence to the bidder at any sale pursuant thereto the true condition of the title to or the value of the Mortgaged Property, and reasonable attorneys' fees, all of which expenditures shall become so much additional Obligations which Trustor agrees to pay and all of such expenditures shall be immediately due and payable with interest thereon from the date of expenditure until paid to Beneficiary at the Default Rate.

10. **Protective Advances.**

- (a) Advances, disbursements and expenditures made by the Beneficiary for the following purposes, whether before and during a foreclosure, and at any time prior to sale, and, where applicable, after sale, and during the pendency of any related proceedings, for the following purposes, shall, in addition to those otherwise authorized by this Security Instrument, constitute "Protective Advances":
 - (i) all advances by Beneficiary in accordance with the terms of this Security Instrument to: (A) register, preserve or maintain, repair, restore or rebuild the Improvements upon the Mortgaged Property; (B) preserve the lien of this Security Instrument or the priority thereof; or (C) enforce this Security Instrument;
 - (ii) payments by the Beneficiary of: (A) when due, installments of principal, interest or other obligations in accordance with the terms of any prior lien or encumbrance; (B) when due, installments of Taxes and assessments, general and special and all other taxes and assessments of any kind or nature whatsoever which are assessed or imposed upon the Mortgaged Property or any part thereof; (C) other obligations authorized by this Security Instrument; or (D) with court approval, any other amounts in connection with other liens, encumbrances or interests reasonably necessary to preserve the status of title to the Mortgaged Property;
 - (iii) advances by Beneficiary in settlement or compromise of any claims asserted by claimants under any prior liens;

- (iv) reasonable attorneys' fees and other costs incurred: (A) in connection with the foreclosure of this Security Instrument; (B) in connection with any action, suit or proceeding brought by or against the Beneficiary for the enforcement of this Security Instrument or arising from the interest of the Beneficiary hereunder or under any of the other Loan Documents; or (C) in the preparation for the commencement or defense of any such foreclosure or other action;
 - (v) the Beneficiary's reasonable fees and costs, including attorneys' fees, arising between the entry of judgment of foreclosure and the confirmation hearing;
 - (vi) advances of any amount required to make up a deficiency in deposits for installments of Taxes and assessments and premiums as may be authorized by this Security Instrument;
 - (vii) expenses properly deductible from proceeds of sale; and
 - (viii) expenses incurred and expenditures made by the Beneficiary for any one or more of the following: (A) premiums for casualty and liability insurance paid by the Beneficiary whether or not the Beneficiary or a receiver is in possession, and all renewals thereof; (B) repair or restoration of damage or destruction in excess of available insurance proceeds or awards; (C) payments required or reasonably deemed by the Beneficiary to be for the benefit of the Mortgaged Property under any grant or declaration of easement, easement agreement, agreement with any adjoining land owners or instruments creating covenants or restrictions for the benefit of or affecting the Mortgaged Property; (D) shared or common expense assessments payable to any association or corporation in which the owner of the mortgaged real estate is a member in any way affecting the Mortgaged Property; or (E) pursuant to any Lease or other agreement for occupancy of the Mortgaged Property.
- (b) All Protective Advances shall be so much additional Obligations, and shall become immediately due and payable without notice and with interest thereon from the date of the advance until paid at the Default Rate.
 - (c) This Security Instrument shall be a lien for all Protective Advances as to subsequent purchasers and judgment creditors from the time this Security Instrument is recorded.
 - (d) All Protective Advances shall, except to the extent, if any, that any of the same is clearly contrary to or inconsistent with the provisions of the Foreclosure Laws, apply to and be included in the:

- (i) determination of the amount of Obligations at any time;
- (ii) indebtedness found due and owing to the Beneficiary in the judgment of foreclosure and any subsequent supplemental judgments, orders, adjudications or findings by the court of any additional indebtedness becoming due after such entry of judgment, it being agreed that in any foreclosure judgment, the court may reserve jurisdiction for such purpose;
- (iii) determination of amounts deductible from sale proceeds;
- (iv) application of income in the hands of any receiver or mortgagee in possession; and
- (v) computation of any deficiency judgment.

11. **Application of Proceeds.** The proceeds of any foreclosure sale of the Mortgaged Property or of any sale of property pursuant to Section 6(c) hereof shall be distributed in the following order of priority: First, on account of all costs and expenses incident to the foreclosure or other proceedings including all such items as are mentioned in Sections 6(c) and Section 9 hereof; second, to all items, other than principal and interest evidenced by the Note, which under the terms hereof constitute Obligations with interest thereon as herein provided; third, to all unpaid interest on the Note; fourth, to all unpaid principal on the Note; fifth, to whomsoever shall be lawfully entitled to the same.

12. **Rights Cumulative.**

- (a) Each right, power and remedy herein conferred upon the Beneficiary is cumulative and in addition to every other right, power or remedy, express or implied, now or hereafter provided by law or in equity, and each and every right, power, and remedy herein set forth or otherwise so existing may be exercised from time to time concurrently or independently and as often and in such order as may be deemed expedient by the Beneficiary.
- (b) By accepting payment of any sums secured by this Security Instrument after the due date thereof, by accepting performance of any of the Trustor's obligations hereunder after such performance is due, or by making any payment or performing any act on behalf of the Trustor which the Trustor was obligated but failed to perform or pay, the Beneficiary shall not waive, nor be deemed to have waived, their rights to require payment when due of all sums secured hereby and the due, punctual and complete performance of the Trustor's obligations under this Security Instrument, the Note, and all other Loan Documents. No waiver or modification of any of the terms of this Security Instrument shall be binding on the Beneficiary unless set forth in writing signed by the Beneficiary and any such waiver by the Beneficiary of any Event of Default by the Trustor under this

Security Instrument shall not constitute a waiver of any other Event of Default under the same or any other provision hereof. If the Beneficiary holds any additional security for any of the obligations secured hereby, it may pursue its rights or remedies with respect to such security at its option either before, contemporaneously with, or after a sale of the Mortgaged Property or any portion thereof.

- (c) No act or omission by the Beneficiary shall release, discharge, modify, change or otherwise affect the liability of Trustor under the Note, this Security Instrument, or any of the other Loan Documents, or any other obligation of the Trustor, or any subsequent purchaser of the Mortgaged Property or any part thereof, or any maker, co-signer, endorser, surety or guarantor, or preclude the Beneficiary from exercising any right, power or privilege herein granted or intended to be granted in the event of any Event of Default then made or of any subsequent Event of Default, or alter the security interest or lien of this Security Instrument or any of the other Loan Documents except as expressly provided in an instrument or instruments executed by the Beneficiary. The exercise of one right, power or remedy shall not be a waiver of the right to exercise at the same time or thereafter any other right, power or remedy; and no delay or omission of the Beneficiary in the exercise of any right, power or remedy accruing hereunder or under any of the other Loan Documents or arising otherwise shall impair any such right, power or remedy, or be construed to be a waiver of any Event of Default or acquiescence therein. Except as otherwise specifically required herein, notice of the exercise of any right, remedy or power granted to the Beneficiary by this Security Instrument is not required to be given.

13. **Successors and Assigns; Assignment.**

- (a) This Security Instrument and each and every provision hereof shall be binding upon the Trustor and its successors and assigns (including, without limitation, each and every record owner from time to time of the Mortgaged Property or any other person having an interest therein), and shall inure to the benefit of the Beneficiary, and their respective successors and assigns.
- (b) All of the covenants of this Security Instrument shall run with the Land and be binding on any successor owners of the Land. In the event that the ownership of the Mortgaged Property or any portion thereof becomes vested in a person or persons other than the Trustor, Beneficiary may, without notice to the Trustor, deal with such successor or successors in interest of the Trustor with reference to this Security Instrument and the Obligations in the same manner as with the Trustor without in any way releasing or discharging the Trustor from its obligations hereunder. The Trustor will give immediate written notice to the Beneficiary of any conveyance, transfer or change of ownership of the Mortgaged

Property, but nothing in this Section 13 shall vary or negate the provisions of Section 4 hereof.

- (c) The rights and obligations of Trustor under this Security Instrument may not be assigned and any purported assignment by Trustor shall be null and void. The Beneficiary (with Beneficiary's consent) shall have the right to sell, assign or transfer portions of their respective right, title and/or interest in and to this Security Instrument and the other Loan Documents (including the sale of participation interests therein), without the consent or approval of Trustor, and Trustor agrees to cooperate in all respects with the Beneficiary in connection therewith, including, without limitation, the execution of all documents and instruments reasonably requested by the Beneficiary or such transferee provided that such documents and instruments do not materially adversely affect any of Trustor's duties or obligations under this Security Instrument and the other Loan Documents.

14. Execution of Separate Security Agreements, Financing Statements, Etc.; Estoppel Letter; Corrective Documents.

- (a) The Trustor will do, execute, acknowledge and deliver or cause to be done, executed, acknowledged and delivered all such further acts, conveyances, Note, mortgages, security agreements, financing statements and assurances as the Beneficiary shall reasonably require for the better assuring, conveying, mortgaging, assigning and confirming unto the Beneficiary all property mortgaged hereby or property intended so to be, whether now owned by the Trustor or hereafter acquired. Without limitation of the foregoing, the Trustor will assign to the Beneficiary, upon request, as further security for the Obligations, its interest in all agreements, contracts, licenses and permits affecting the Mortgaged Property, such assignments to be made by instruments reasonably satisfactory to the Beneficiary, but no such assignment shall be construed as a consent by the Beneficiary to any agreement, contract, license or permit or to impose upon the Beneficiary any obligations with respect thereto.
- (b) From time to time, the Trustor will furnish, within ten (10) days after request from Beneficiary, a written and duly acknowledged statement of the amount due under the Note, this Security Instrument and the other Loan Documents and whether any alleged offsets or defenses exist against the Obligations.
- (c) Trustor and Beneficiary shall, at the request of the other, promptly correct any defect, error or omission which may be discovered in the contents of this Security Instrument or in the execution or acknowledgment hereof or in any other instrument executed in connection herewith or in the execution or acknowledgment of such instrument and will execute and deliver any and all

additional instruments as may be requested by Beneficiary or Trustor, as the case may be, to correct such defect, error or omission.

15. **Subrogation.** If any part of the Obligations is used directly or indirectly to pay off, discharge or satisfy, in whole or in part, any prior lien or encumbrance upon the Mortgaged Property or any part thereof, then by advancing the monies to make such payment, the Beneficiary shall be subrogated to the rights of the holder thereof in and to such other lien or encumbrance and any additional security held by such holder, and shall have the benefit of the priority of the same.

16. **Governing Law.** The validity, enforcement and interpretation of this Security Instrument shall for all purposes be governed by and construed in accordance with the laws of the State of Idaho, without reference to the conflicts of law principles of that State, and applicable United States federal law, and is intended to be performed in accordance with, and only to the extent permitted by, such laws.

17. **Business Loan.**

- (a) The Trustor declares, represents, certifies and agrees that the proceeds of the Note will be used solely for business purposes and that the Loan is exempt from interest limitations and is an exempted transaction under the Truth in Lending Act, 15 U.S.C. Section 1601 et seq.
- (b) All rights, remedies and powers provided by this Security Instrument may be exercised only to the extent that the exercise thereof does not violate any applicable provisions of law, and all the provisions of this Security Instrument are intended to be subject to all applicable mandatory provisions of law which may be controlling and to be limited to the extent necessary so that they will not render this Security Instrument invalid or unenforceable under the provisions of any Applicable Laws.

18. **Assignment of Leases and Other Agreements Affecting the Mortgaged Property.** In order to further secure payment of the Obligations and the observance, performance and discharge of the Trustor's obligations under the Loan Documents, the Trustor hereby irrevocably, absolutely and unconditionally assigns and transfers to the Beneficiary all of the Trustor's right, title, interest and estate in, to and under all of the Leases and in and to all of the "**Rents and Profits**" (defined as all rents, income, issues and profits arising from any Leases, or other agreements affecting the use, enjoyment or occupancy of the Mortgaged Property now or hereafter made affecting the Mortgaged Property or any portion thereof), as more particularly described in that certain Assignment of Leases and Rents dated as of even date herewith from Trustor to and for the benefit of Beneficiary. Unless and until an Event of Default occurs, the Trustor shall be entitled to collect the Rents and Profits (except as otherwise provided in this Security Instrument) as and when they become due and payable. Neither these assignments nor Beneficiary's enforcement of the provisions of these assignments (including the receipt of the

Rents) will operate to subordinate the lien of this Security Instrument to any of the rights of any tenant or other party to any other agreement affecting the use, enjoyment or occupancy of the Mortgaged Property of all or any part of the Mortgaged Property, or to subject Beneficiary to any liability to any such tenant for the performance of any obligations of Trustor under any such Lease or other agreement affecting the Mortgaged Property unless and until Beneficiary agrees to such subordination or assumes such liability by an appropriate written instrument.

19. **Environmental Matters.** Concurrently herewith, Trustor and Guarantors shall execute and deliver an Environmental Indemnity Agreement in form satisfactory to Beneficiary (the "**Environmental Indemnity Agreement**"). The performance of the covenants, undertakings and obligations of the indemnitors under the Environmental Indemnity Agreement shall not be secured by this Security Instrument.

20. **Notices.** All notices or other written communications hereunder shall be deemed to have been properly given (i) upon delivery, if delivered in person or by electronic mail, (ii) one (1) business day after having been deposited for overnight delivery with any reputable overnight courier service, or (iii) three (3) Business Days after having been deposited in any post office or mail depository regularly maintained by the U.S. Postal Service and sent by registered or certified mail, postage prepaid, return receipt requested, addressed to the addresses set forth below in this Section 20 or as such party may from time to time designate by written notice to the other parties. Either party by notice to the other in the manner provided herein may designate additional or different addresses for subsequent notices or communications:

To the Beneficiary:	MOSAIC KETCHUM RESORT, LLC c/o Mosaic Real Estate Investors, LLC 23975 Park Sorrento, Suite 420, Calabasas, California 91302 Attn: Vicky Schiff Email: vs@mosaicrei.com
With a copy to:	Greenberg Traurig LLP 1840 Century Park East Suite 1900 Los Angeles, CA 90067 Attn: Michael H. Davis, Esq. Telephone: (310) 586-7700 E-mail: davismh@gtlaw.com

To the Trustor:	HARRIMAN HOTEL, LLC 355 Spruce Avenue, Ketchum, Idaho 83340 Attn: Jack E. Bariteau, Managing Member Email: jack@waypointsunvalley.com
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With a copy to:

Lawson Laski Clark, PLLC
PO Box 3310
Ketchum, Idaho 3340
Attn: Edward A. Lawson
Email: eal@lawsonlaski.com

21. **Releases.**

- (a) Upon payment in full of all sums due under the Note and this Security Instrument and the other of the Loan Documents, the Beneficiary shall, upon the request of, and at the cost of, the Trustor, execute a proper reconveyance of this Security Instrument.
- (b) The Beneficiary may, regardless of consideration, cause the release of any part of the Mortgaged Property from the lien of this Security Instrument without in any manner affecting or impairing the lien or priority of this Security Instrument as to the remainder of the Mortgaged Property not so released.
- (c) Beneficiary will cause Partial Releases of Residential Units upon Trustor's satisfaction of all of the applicable conditions set forth in the Loan Documents.

22. **Indemnification by the Trustor.** The Trustor shall protect and indemnify the Beneficiary from and against all liabilities, obligations, claims, damages, penalties, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and disbursements), imposed upon or incurred by or asserted against the Beneficiary or the members, partners, shareholders, directors, officers, agents or employees of the Beneficiary or by reason of (a) ownership of the Mortgaged Property or any interest therein, or receipt of any Rents and Profits or other sum therefrom, (b) any accident to, injury to or death of persons or loss of or damage to Mortgaged Property occurring on or about the Mortgaged Property or the adjoining sidewalks, curbs, vaults or vault space, if any, streets or ways, (c) any failure on the part of the Trustor or any Guarantor to perform or comply with any of the terms, covenants, conditions and agreements set forth in this Security Instrument, the Note, any of the other Loan Documents, or any agreement, reimbursement agreement, guaranty, or any other agreements executed by the Trustor, or any Guarantor, or any other persons directly or indirectly liable for the payment of the Obligations, (d) any failure on the part of the Trustor to perform or comply with (i) any other agreement executed by the Trustor or any guarantor of the Note, or (ii) any requirement of law, (e) payment of sums for the protection of the lien and security interest of the Beneficiary in and to the Mortgaged Property, (f) performance of any labor or services or the furnishing of any materials or other property in respect of the Mortgaged Property or any part thereof for construction or maintenance or otherwise, or (g) any action brought against the Beneficiary attacking the validity, priority or enforceability of this Security Instrument, the Note, any other Loan Document, or any agreement, reimbursement agreement, guaranty, or any other agreements executed by the Trustor, any Guarantor, or any other persons directly or indirectly liable for the

payment of the Obligations. Any amounts payable to the Beneficiary under this paragraph shall bear interest at the Default Rate until paid to the Beneficiary and shall be secured by this Security Instrument. In the event any action, suit or proceeding is brought against the Beneficiary, or their respective members, partners, shareholders, directors, officers, agents or employees of the Beneficiary by reason of any such occurrence, the Trustor, upon the request of the Beneficiary and at Trustor's sole expense, shall resist and defend such action, suit or proceeding or cause the same to be resisted and defended by counsel designated by Trustor and approved by the Beneficiary. Such obligations under this paragraph shall survive the termination, satisfaction or release of this Security Instrument. Notwithstanding the contrary provisions of this paragraph, Trustor shall have no obligation to protect and indemnify the Beneficiary from any action, costs or expenses arising from its gross negligence or wilfull misconduct or that of its agents and representatives.

23. **Miscellaneous.**

- (a) **Time is of the Essence.** Time is of the essence of this Security Instrument.
- (b) **Captions and Pronouns.** The captions and headings of the various Sections of this Security Instrument are for convenience only, and are not to be construed as confining or limiting in any way the scope or intent of the provisions hereof. Whenever the context requires or permits, the singular shall include the plural, the plural shall include the singular, and the masculine, feminine and neuter shall be freely interchangeable.
- (c) **Intentionally omitted.**
- (d) **Beneficiary is not a Joint Venturer or Partner of Trustor.** The Trustor and the Beneficiary acknowledge and agree that in no event shall the Beneficiary be deemed to be a partner or joint venturer with the Trustor. Without limitation of the foregoing, the Beneficiary shall not be deemed to be such a partner or joint venturer on account of its becoming a mortgagee in possession or exercising any rights pursuant to this Security Instrument or pursuant to any other instrument or document evidencing or securing any of the Obligations, or otherwise.
- (e) **Replacement of the Note(s).** Upon notice to the Trustor of the loss, theft, destruction or mutilation of any Note, the Trustor will execute and deliver, in lieu thereof, a replacement note, identical in form and substance to such Note and dated as of the date of such Note and upon such execution and delivery all references in any of the Loan Documents to such Note shall be deemed to refer to the replacement note.
- (f) **Waiver of Consequential Damages.** To the fullest extent not prohibited by Applicable Laws, the Trustor covenants and agrees that in no event shall the Beneficiary be liable for consequential damages, whatever the nature of a failure

by the Beneficiary to perform their respective obligations, if any, under the Loan Documents, and the Trustor hereby expressly waives all claims that it now or may hereafter have against the Beneficiary for such consequential damages.

- (g) After Acquired Mortgaged Property. The lien hereof will automatically attach, without further act, to all after-acquired Mortgaged Property attached to and/or used in connection with or in the operation of the Mortgaged Property or any part thereof.
- (h) Severability. If any provision hereof should be held unenforceable or void, then such provision shall be deemed separable from the remaining provisions and shall in no way affect the validity of this Security Instrument except that if such provision relates to the payment of any monetary sum, then the Beneficiary may, at its option declare the Obligations immediately due and payable.
- (i) Interpretation of Agreement. Should any provision of this Security Instrument require interpretation or construction in any judicial, administrative, or other proceeding or circumstance, it is agreed that the parties hereto intend that the court, administrative body, or other entity interpreting or construing the same shall not apply a presumption that the provisions hereof shall be more strictly construed against one party by reason of the rule of construction that a document is to be construed more strictly against the party who itself or through its agent prepared the same, it being agreed that the agents of both parties hereto have fully participated in the preparation of all provisions of this Security Instrument, including, without limitation, all Exhibits attached to this Security Instrument.
- (j) Intentionally omitted.
- (k) Effect of Extensions and Amendments. If the payment of the Obligations, or any part thereof, be extended or varied, or if any part of the security or guaranties therefor be released, all persons now or at any time hereafter liable therefor, or interested in the Mortgaged Property shall be held to assent to such extension, variation or release, and their liability, and the lien, and all provisions hereof, shall continue in full force and effect; the right of recourse against all such persons being expressly reserved by the Beneficiary, notwithstanding any such extension, variation or release.
- (l) Mortgagee-in-Possession. Nothing herein contained shall be construed as constituting the Beneficiary a mortgagee-in-possession in the absence of the actual taking of possession of the Mortgaged Property by the Beneficiary pursuant to this Security Instrument.
- (m) No Merger. The parties hereto intend that the Security Instrument and the lien hereof shall not merge in fee simple title to the Mortgaged Property, and if the

Beneficiary acquires any additional or other interest in or to the Mortgaged Property or the ownership thereof, then, unless a contrary intent is manifested by the Beneficiary as evidenced by an express statement to that effect in an appropriate document duly recorded, this Security Instrument and the lien hereof shall not merge in the fee simple title and this Security Instrument may be foreclosed as if owned by a stranger to the fee simple title.

- (n) Complete Agreement. This Security Instrument, the Note and the other Loan Documents constitute the complete agreement between the parties with respect to the subject matter hereof and the Loan Documents may not be modified, altered or amended except by an agreement in writing signed by both the Trustor and the Beneficiary.
- (o) Further Assurances. Trustor shall execute, acknowledge and deliver, or cause to be executed, acknowledged or delivered, any and all such further assurances and other agreements or instruments, and take or cause to be taken all such other actions, as shall be reasonably necessary from time to time to give full effect to the Loan Documents and the transactions contemplated hereby and thereby.

24. **JURISDICTION AND VENUE.** TRUSTOR HEREBY AGREES THAT ALL ACTIONS OR PROCEEDINGS INITIATED BY TRUSTOR AND ARISING DIRECTLY OR INDIRECTLY OUT OF THIS SECURITY INSTRUMENT SHALL BE LITIGATED IN THE SUPERIOR COURT OF BLAINE COUNTY, IDAHO OR, IF BENEFICIARY INITIATES SUCH ACTION, ANY COURT IN WHICH BENEFICIARY SHALL INITIATE SUCH ACTION AND WHICH HAS JURISDICTION. TRUSTOR HEREBY EXPRESSLY SUBMITS AND CONSENTS IN ADVANCE TO SUCH JURISDICTION IN ANY ACTION OR PROCEEDING COMMENCED BY BENEFICIARY IN ANY OF SUCH COURTS, AND HEREBY WAIVES PERSONAL SERVICE OF THE SUMMONS AND COMPLAINT, OR OTHER PROCESS OR PAPERS ISSUED THEREIN, AND AGREES THAT SERVICE OF SUCH SUMMONS AND COMPLAINT OR OTHER PROCESS OR PAPERS MAY BE MADE BY REGISTERED OR CERTIFIED MAIL ADDRESSED TO TRUSTOR AT THE ADDRESS TO WHICH NOTICES ARE TO BE SENT PURSUANT TO THIS SECURITY INSTRUMENT. TRUSTOR WAIVES ANY CLAIM THAT BLAINE COUNTY, IDAHO IS AN INCONVENIENT FORUM OR AN IMPROPER FORUM BASED ON LACK OF VENUE. SHOULD TRUSTOR, AFTER BEING SO SERVED, FAIL TO APPEAR OR ANSWER TO ANY SUMMONS, COMPLAINT, PROCESS OR PAPERS SO SERVED WITHIN THE NUMBER OF DAYS PRESCRIBED BY LAW AFTER THE MAILING THEREOF, TRUSTOR SHALL BE DEEMED IN DEFAULT AND AN ORDER AND/OR JUDGMENT MAY BE ENTERED BY BENEFICIARY AGAINST TRUSTOR AS DEMANDED OR PRAYED FOR IN SUCH SUMMONS, COMPLAINT, PROCESS OR PAPERS. THE EXCLUSIVE CHOICE OF FORUM FOR TRUSTOR SET FORTH IN THIS SECTION SHALL NOT BE DEEMED TO PRECLUDE THE ENFORCEMENT BY BENEFICIARY OF ANY JUDGMENT OBTAINED IN ANY OTHER FORUM OR THE

TAKING BY BENEFICIARY OF ANY ACTION TO ENFORCE THE SAME IN ANY OTHER APPROPRIATE JURISDICTION, AND TRUSTOR HEREBY WAIVES THE RIGHT, IF ANY, TO COLLATERALLY ATTACK ANY SUCH JUDGMENT OR ACTION.

25. **Waiver of Jury Trial.** TO THE EXTENT NOT PROHIBITED BY APPLICABLE LAWS, BENEFICIARY AND TRUSTOR KNOWINGLY, IRREVOCABLY, VOLUNTARILY AND INTENTIONALLY WAIVE, TO THE FULLEST EXTENT NOT PROHIBITED BY LAW, ANY RIGHT EITHER MAY HAVE TO A TRIAL BY JURY IN RESPECT OF ANY ACTION, PROCEEDING OR COUNTERCLAIM BASED ON THIS SECURITY INSTRUMENT, OR ARISING OUT OF, UNDER OR IN CONNECTION WITH THIS SECURITY INSTRUMENT OR ANY LOAN DOCUMENT, OR ANY COURSE OF CONDUCT, COURSE OF DEALING, STATEMENT (WHETHER VERBAL OR WRITTEN) OR ACTIONS OF ANY PARTY HERETO OR TO ANY LOAN DOCUMENT.

26. **Additional Waivers.** TO THE FULLEST EXTENT NOT PROHIBITED BY APPLICABLE LAWS, TRUSTOR EXPRESSLY AND UNCONDITIONALLY WAIVES, IN CONNECTION WITH ANY SUIT, ACTION OR PROCEEDING BROUGHT BY THE BENEFICIARY ON THIS SECURITY INSTRUMENT, ANY AND EVERY RIGHT IT MAY HAVE TO (A) INTERPOSE ANY COUNTERCLAIM THEREIN UNLESS UNDER THE APPLICABLE RULES OF COURT SUCH COUNTERCLAIM MUST BE ASSERTED IN SUCH PROCEEDING, OR (B) HAVE THE SAME CONSOLIDATED WITH ANY OTHER OR SEPARATE SUIT, ACTION OR PROCEEDING UNLESS UNDER THE APPLICABLE RULES OF COURT SUCH SUIT, ACTION OR PROCEEDING MUST BE CONSOLIDATED WITH THE PROCEEDING BROUGHT BY THE BENEFICIARY.

27. **Compliance with Loan Agreement.** Trustor will abide by and comply with and be governed and restricted by all of the terms, covenants, provisions, restrictions and agreements contained in the Loan Agreement, and in each and every supplement thereto or amendment thereof which may at any time or from time to time be executed and delivered by the parties thereto or their successors and assigns.

28. **Provisions of Loan Agreement.** The proceeds of the Note are to be disbursed by the Beneficiary in accordance with the terms contained in the Loan Agreement, the provisions of which are incorporated herein by reference to the same extent as if fully set forth herein. Trustor covenants that any and all monetary disbursements made in accordance with the Loan Agreement shall constitute adequate consideration to Trustor for the enforceability of this Security Instrument, the Note and the other Loan Documents, and that all advances and indebtedness arising and accruing under the Loan Agreement from time to time, whether or not the total amount thereof may exceed the face amount of aggregate total of the Note, shall be secured by this Security Instrument.

29. **Construction Loan.** The Note evidences a debt created by one or more disbursements made by Beneficiary to Trustor to finance the cost of the construction of certain Improvements upon the Land in accordance with the provisions of the Loan Agreement, and this

Security Instrument is a construction mortgage as such term is defined in Section 9-334(h) of the ID UCC.

30. **State Specific Provisions.**

- (a) Area and Location of Land. The Land either (i) does not exceed forty (40) acres, regardless of use, (ii) is located within an incorporated city or village as of the date of this Deed of Trust, or (iii) does not exceed eighty (80) acres and are not principally used for the agricultural production of crops, livestock, dairy or aquatic goods.
- (b) Waiver of Statutes of Limitations and Statutes of Repose. The right to plead any and all statutes of limitations and statutes of repose, including but not limited to Idaho Code°§45-1512, as a defense to any action, suit or demand on, related to or arising from any obligation secured by this Deed of Trust is hereby waived to the full extent permitted by law. Trustor makes this waiver expressly, knowingly, voluntarily and intentionally.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK;
SIGNATURE PAGE FOLLOWS]**


IN WITNESS WHEREOF, the Trustor has caused this Security Instrument to be duly executed and delivered as of the day and year first above written.

TRUSTOR:

HARRIMAN HOTEL, LLC,
an Idaho limited liability company

By: Waypoint, LLC,
an Idaho limited liability company
Its: Manager

By:



Jack E. Bariteau, Jr.,
Managing Member

[Signature Page to Deed of Trust]

NOTARY ACKNOWLEDGMENT

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.

STATE OF Idaho)
COUNTY OF Blaine)ss.

On December 5, 2019, before me, Daryl Fauth
(Insert Name and Title of Officer; e.g. Jane Doe, Notary Public)
personally appeared Jack E. Bonifacio, Jr. who
proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
subscribed to the within instrument and acknowledged to me that he/she/they executed the same
in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of Idaho that the
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

[Signature]
Signature of Notary

[Notary Seal]

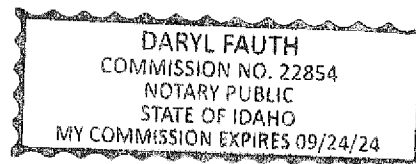


EXHIBIT "A"

LEGAL DESCRIPTION

Lot 2, Block 83 of a REPLAT OF BLOCK 83 ORIGINAL TOWN OF KETCHUM, according to the official plat thereof, recorded as Instrument No. 210798, records of Blaine County, Idaho.



WARRANTY DEED

FOR VALUE RECEIVED

Trail Creek Fund, LLC, a California limited liability company,

the Grantor, hereby grants, bargains, sells, conveys and warrants unto

Harriman Hotel, LLC, an Idaho limited liability company

the Grantee, whose current address is: PO Box 84, Sun Valley, ID 83353

the following described premises, to-wit:

Lot 2, Block 83 of a REPLAT OF BLOCK 83 ORIGINAL TOWN OF KETCHUM, according to the official plat thereof, recorded as Instrument No. 210798, records of Blaine County, Idaho.

TO HAVE AND TO HOLD the said premises, with their appurtenances unto the said Grantee, its heirs and assigns forever. And the said Grantor does hereby covenant to and with the said Grantee, that Grantor is the owner in fee simple of said premises; that they are free from all encumbrances except those to which this conveyance is expressly made subject to and those made, suffered or done by the Grantee; and subject to all existing patent reservations; restrictions in railroad deeds of record; easements and rights of way established and of record; protective covenants of record; zoning ordinances and applicable building codes, use restrictions, ordinances, laws and regulations of any governmental unit; general taxes and assessments, including irrigation and utility assessments (if any) for the current year, which are not due and payable; and that Grantor will warrant and defend the same from all lawful claims whatsoever. Whenever the context so requires, the singular number includes the plural.

Dated this 25th day of November, 2019.

Trail Creek Fund, LLC, a California limited liability company

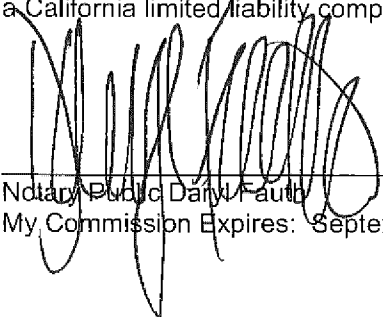
BY: The Jack E. Bariteau, Jr. Separate Property Trust, its Managing Member

A handwritten signature in black ink, appearing to read "Jack E. Bariteau, Jr.", written over a horizontal line.

BY: Jack E. Bariteau, Jr., Trustee of the Jack E. Bariteau, Jr. Separate Property Trust

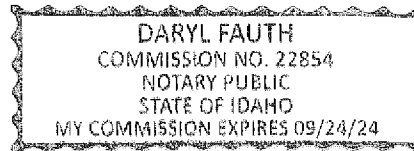
State of Idaho
County of Blaine

This record was acknowledged before me on 25th day of November, 2019, by Jack E. Bariteau, Jr., as Trustee of the Jack E. Bariteau, Jr. Separate Property Trust, Managing Member of Trail Creek Fund, LLC, a California limited liability company.



Notary Public Daryl Fauth
My Commission Expires: September 24, 2024

(STAMP)



WHITE PETERSON

ATTORNEYS AT LAW

WM. F. GIGRAY, III
KIRK J. HOUSTON
MATTHEW A. JOHNSON
JAY J. KIIHA **
WILLIAM F. NICHOLS *
BRIAN T. O'BANNON *

WHITE, PETERSON, GIGRAY & NICHOLS, P.A.
CANYON PARK AT THE IDAHO CENTER
5700 E. FRANKLIN RD., SUITE 200
NAMPA, IDAHO 83687-7901
TEL (208) 466-9272
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PHILIP A. PETERSON
WILLIAM L. PUNKONEY

TERRENCE R. WHITE **
OF COUNSEL
WILLIAM F. "BUD" YOST
OF COUNSEL

* Also admitted in OR
** Also admitted in WA

October 9, 2019

VIA US MAIL & EMAIL

Ed Lawson
LAWSON LASKI CLARK & POGUE, PLLC
As counsel for Trail Creek Fund, LLC
PO Box 3310
Ketchum, ID 83340
eal@lawsonlaski.com

VIA US MAIL

Copy sent to:
Jack E. Bariteau, Jr.
Trail Creek Fund, LLC
PO Box 84
Sun Valley, ID 83353

Re: Updated Notice of Material Breach – Trail Creek Fund Development Agreement

Dear Ed:

This notice letter is in follow-up to the October 2, 2019 Notice of Breach (October 2 Notice) from the City to Trail Creek Fund and the subsequent correspondence.

As detailed in the October 2 Notice, the City has determined Trail Creek Fund, LLC, to be in material breach of its Development Agreement with the City of Ketchum. This determination remains and continues to be undisputed as to the failure of condition.

As previously discussed with you, the City Council met on October 7, 2019 and received further legal advice in executive session with respect to a potential legal dispute over the alleged cure period. Certain commenting parties had previously argued to the City that the Amendment to the Development Agreement provided for immediate action superseding a cure period; whereas Trail Creek Fund's position was that the Development Agreement still provided for a cure period upon notice of breach for the conditions under the Amendment.

This revised October 9 Notice of Breach is for two purposes:

First, the City understands and accepts that the Development Agreement, Provision 17, provides for a cure period as part of the remedies process. The City looks forward to Trail Creek Fund providing, as represented, sufficient information to cure the current breach in a timely manner.

Second, the City will treat the date of notice of breach, and thus the commencement of the cure period, as being the date of this revised notice of breach. So the cure period is now running from the date of delivery (October 9, 2019) of this October 9 Notice of Breach.

Trail Creek Fund, LLC, is hereby reminded that it must cure or show cause otherwise in order to re-instate the terms of the Development Agreement.

Sincerely,



Matthew A. Johnson
City Attorney, City of Ketchum

WHITE PETERSON

ATTORNEYS AT LAW

WM. F. GIGRAY, III
KIRK J. HOUSTON
MATTHEW A. JOHNSON
JAY J. KIIHA **
WILLIAM F. NICHOLS *
BRIAN T. O'BANNON *

WHITE, PETERSON, GIGRAY & NICHOLS, P.A.
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NAMPA, IDAHO 83687-7901
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EMAIL: mjohnson@whitepeterson.com

PHILIP A. PETERSON
WILLIAM L. PUNKONEY

TERRENCE R. WHITE **
OF COUNSEL
WILLIAM F. "BUD" YOST
OF COUNSEL

* Also admitted in OR
** Also admitted in WA

October 2, 2019

VIA US MAIL & EMAIL

Ed Lawson
LAWSON LASKI CLARK & POGUE, PLLC
As counsel for Trail Creek, LLC
PO Box 3310
Ketchum, ID 83340
eal@lawsonlaski.com

VIA US MAIL

Copy sent to:
Jack E. Bariteau, Jr.
Trail Creek Fund, LLC
PO Box 84
Sun Valley, ID 83353

Re: Notice of Material Breach – Trail Creek Fund Development Agreement

Dear Ed:

Your client, Jack Bariteau representing Trail Creek Fund LLC, was present for a special Ketchum City Council meeting on the evening of September 30, 2019. At that meeting, the City Council took up the issue of Trail Creek Fund's failure to submit sufficient evidence, to the satisfaction of the City, of proof of financing as required under Provision 1(A)(2) of the *First Amendment to Amended and Restated Development Agreement*, June 4, 2018. The City Council received public comment, including from Mr. Bariteau, then deliberated and declared such material breach. Mr. Bariteau was present for and has notice of that determination of material breach.

This letter shall serve as additional notice to Trail Creek Fund that the City has found Trail Creek Fund, LLC, to be in material breach of the terms of its Development Agreement with the City. As called for in the *First Amendment* 1(A)(3) and per direction from the Council, City

staff is beginning on logistical arrangements for site restoration, including steps to call on the bond. This will include notice to the bonding company of this declaration of breach.

Mr. Bariteau did indicate at the September 30, 2019 Special Council meeting that he did not contest this breach and claimed he intended to cure such within sixty days under Provision 17 of the *Amended and Restated Development Agreement*. Please be advised that any such alleged cure opportunity period began running on October 1, 2019.

Trail Creek Fund, LLC, is hereby further noticed that it must cure or show cause otherwise in order to re-instate the terms of the Development Agreement.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Matthew A. Johnson', with a long horizontal flourish extending to the right.

Matthew A. Johnson
City Attorney

Agreement # 20196

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:	Instrument # 652281 HAILEY, BLAINE, IDAHO 06-05-2018 8:55:07 AM No. of Pages: 7 Recorded for: BLAINE COUNTY TITLE JOLYNN DRAGE Fee: \$28.00 Ex-Officio Recorder Deputy: JB Electronically Recorded by Simplifile
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(Space Above Line For Recorder's Use)

FIRST AMENDMENT TO AMENDED AND RESTATED DEVELOPMENT AGREEMENT

(City of Ketchum/Trail Creek Fund, LLC, *et al.*)

THIS FIRST AMENDMENT TO AMENDED AND RESTATED DEVELOPMENT AGREEMENT ("Amendment") is made and entered into as of the 4 day of June 2018, by and between the CITY OF KETCHUM, an Idaho municipal corporation ("City") and TRAIL CREEK FUND, LLC, a California limited liability company ("Owner").

RECITALS

WHEREAS, Owner owns that certain real property located at 300 River Street East (formerly 200 South Main Street), Ketchum, Idaho legally described as Lot 2 of Block 83, of the City of Ketchum, according to the official plat thereof, on file in the office of the County Recorder of Blaine County, Idaho (the "Property"); and

WHEREAS, Owner and City entered into an Amended and Restated Development Agreement, dated October 5, 2015 and recorded in the records of Blaine County, Idaho as Instrument No. 630816 and a Corrected Amendment To Amended and Restated Development Agreement, dated June 21, 2016 and recorded in the records of Blaine County, Idaho on June 22, 2016, as Instrument No. 635897 ("Agreement"); and

WHEREAS, pursuant to the Agreement the City issued Owner a Planned Unit Development Conditional Use Permit ("CUP") to develop and operate a Hotel ("Project") on the Property and a building permit to construct the Project related improvements ("Building Permit") and together with the CUP, the "Entitlements"; and

WHEREAS, a dispute exists between the Owner and the City regarding the date on which the Building Permit was issued and whether Owner's performance obligations were properly extended by a force majeure event. By this Amendment, the parties desire to settle and compromise their differences, release any claims they have ("Claims") and resolve the disputes between them without litigation.

WHEREAS, Owner has applied for and requested an extension and modification of certain deadlines and requirements in respect to the Entitlements and City is agreeable to certain amendments to address Owner's request and so as to update the Agreement.

Electronically Recorded - Do not
remove the county stamped first
page as it is now incorporated as
part of the original document

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:	
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(Space Above Line For Recorder's Use)

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WHEREAS, Owner has applied for and requested an extension and modification of certain deadlines and requirements in respect to the Entitlements and City is agreeable to certain amendments to address Owner's request and so as to update the Agreement.

Electronic recording of this document is required by the state of Idaho. This document is being recorded electronically by the County Recorder of Blaine County, Idaho. The recording fee for this document is \$15.00. The recording fee for this document is \$15.00. The recording fee for this document is \$15.00.

AGREEMENT

NOW THEREFORE, in consideration of the above recitals and the mutual covenants and agreements herein contained and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Amendments. The Agreement is amended and supplemented as follows:

A. *Schedule and Certificate of Occupancy.* All references to the requirement to issue a certificate of occupancy for the Project no later than 30 months after issuance of the Building Permit, including those in paragraphs 2, 7 and 14 are deleted and the following substituted therefore:

- (1) Owner, at no cost to the City, shall work with, provide for, and cause Idaho Power Company to initiate and undertake the work required to underground the electrical power poles and electrical and related utility lines along the east side of Highway 75 from Gem Street to River Street as shown on the Work Order documentation and Map as provided by Idaho Power and Owner dated March 27, 2018. Owner and the City agree to cooperate and provide requested reasonable assistance to Idaho Power and its contractors, vendors and employees. Said undergrounding work is to be completed on or before December 31, 2018.
- (2) Owner shall provide and show sufficient evidence to the City of full financing and funding for completing the Hotel Project to the satisfaction of City by September 30, 2019. Owner shall evidence such financing by recording on the Property a deed of trust to secure a construction loan on or before September 30, 2019 and by such other proof of financing reasonably necessary for the satisfaction of the City Council that this condition is met. Owner will not commence additional excavation work on the Property until acceptance and approval of such financing evidence by the City, unless the City Planning and Building Director otherwise grants such permission for good cause upon receipt of a written request from Owner.
- (3) *Site Restoration.* Owner shall submit to City by October 31, 2018 a Site Restoration Plan and security instrument naming City as beneficiary, such as a letter of credit, 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;

- c. Be accompanied by a security instrument naming City as beneficiary, with the proposed method and form of such security subject to City review and approval, sufficient to fund the 150% reclamation estimate and provide for the City to immediately pursue reclamation and restoration on the site in the event of a failure of condition, other breach of the Development Agreement, or abandonment of the Project.
- d. The Site Restoration Plan shall be recorded in the records of Blaine County, Idaho.

In the event Owner 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. Dates of breach could include, but are not limited to:

- i. November 1, 2018 in the event the Amended Employee Housing Plan is not complete;
 - ii. January 1, 2019 in the event the powerline undergrounding specified is not complete;
 - iii. In the event the Applicant's building permit lapses or is terminated by the City;
 - iv. October 1, 2019 in the event Project financing and funding is not secured to the satisfaction of the City Council by September 30, 2019;
 - v. Date of any other breach or failure of the Development Agreement requirements.
- (4) Owner shall complete the Project and City will issue a certificate of occupancy on or before December 31, 2021.
- (5) Owner shall provide its required Employee Housing and receive a certificate of occupancy for its Employee Housing on or before December 31, 2021.

B. *Construction and Completion Schedule.* The Revised Construction Mitigation Plan referenced in Provision 7 (Construction and Completion Schedule) is amended to conform to the schedule set forth in 1(A), above.

C. *Employee Housing.* Provision 12 of the Agreement regarding an Employee Housing Plan is hereby amended to allow Owner to submit an Amended Employee Housing Plan. The Amended Plan must be submitted to the City by October 31, 2018. The Amended Plan will be subject to review and approval by the City by December 31, 2018. The requirements for the Amended Plan are:

- a. Be generally consistent with the existing Employee Housing Plan and provide for 18 beds;
- b. Any alternate site location must be within the Community Core zoning district of the City;

- c. Provide a schedule and project deadlines, including design review, building permit, start of construction, and Certificate of Occupancy for the Amended Plan concurrent with issuance of a Certificate of Occupancy for the Hotel Project.
- d. The Amended Employee Housing Plan shall be recorded in the records of Blaine County, Idaho.
- e. To provide adequate security, approved as to form by and to the satisfaction of the City, to ensure completion and performance of the Amended Plan.

D. *Power Lines.* Provision 14 (Relocation of Overhead Distribution Power Lines) is deleted, as its purpose is replaced by amendment 1(A)(1) set forth above.

E. *Force Majeure.* Provision 20(b) is replaced as follows:

Force Majeure. In the event either party hereto shall be delayed or hindered in or prevented from the performance of any act required under this Agreement by reason of acts of God (fires, explosions, earthquakes, droughts and floods), strikes, lockouts, failure of power or other utility services, moratoria, riots, insurrection, war, terrorism or other reason of a like emergency nature, and specifically excluding economic conditions, which is beyond the reasonable control and not the fault of the party delayed in performing work or doing acts required under this Agreement, then performance of such act shall be excused for the period of the delay, and the period for performance of any such act will be reasonably extended for a period equivalent to the period of such delay. Any claim of a force majeure event must be submitted to the other party within thirty days of such event.

2. Release.

A. *Release by Owner.* Owner does hereby fully, finally and forever release and discharge the City and its officers, employees, directors, agents, attorneys, successors and assigns pursuant to the terms set forth in Section 2 C. below.

B. *Release by City.* The City does hereby fully, finally and forever release and discharge Owner, and its members, shareholders, officers, employees, directors, agents, attorneys, successors and assigns pursuant to the terms set forth in Section 2 C, below.

C. *Terms of Release.* This release includes all the Claims, manner of actions, causes of action, suits, debts, bonds, bills, moneys owed, accounts, covenants, agreements, promises, damages, judgments, claims and demands whatsoever, in law or equity, which are the subject of or arising from the time for performance of Owner's obligations under the Agreement or pursuant to the Entitlements, whether known or unknown, up to the date of this Agreement.

D. *Excluded Claims.* This Agreement does not apply to any separate continuing contractual and/or equitable obligations as may currently exist between or

among the Parties, including the obligations contained in the Agreement, this Amendment or pursuant to the Entitlements.

E. *Disputed Claims.* The facts and ultimate liability of any Party are unclear and disputed. Each of the Parties understands and agrees that this Amendment and the settlement provided for herein, are intended to compromise disputed claims and defenses, to avoid litigation and to buy peace, and that this Amendment and the settlement provided for herein shall not be construed or viewed as an admission by any Party of liability or wrongdoing, such liability being expressly denied. This Amendment, and the settlement provided for herein, shall not be admissible in any lawsuit, administrative action, or any judicial or administrative proceeding if offered to show, demonstrate, evidence or support a contention that any of the Parties acted illegally, improperly, or in breach of law, contract or proper conduct.

F. *Representations and Warranties.* Each of the Parties (i) represents, warrants, and covenants on behalf of himself, herself or itself, that he, she or it has not assigned to any other persons or entities any right to payment in connection with the matters herein settled and released and that he, she or it is fully entitled to enter into this Agreement, and (ii) agrees to the extent permitted by Idaho law to indemnify, defend and hold harmless each other Party from and against any claims based upon or arising in connection with any such prior assignment, transfer, lien, or right by him, her or it or as a result of any breach by him, her or it of his, her or its representatives, warranties or agreements set forth in this Agreement.

G. *Covenant Not to Sue.* The Parties agree not to cause claims to be made in any court or other forum against the other Parties for any matter within the scope of the releases contained herein.

3. General Provisions.

A. *Recitals and Construction.* The City and Owner incorporate the above recitals into this Amendment and affirm such recitals are true and correct. All capitalized terms used in this Amendment, unless specifically defined herein, have the same meanings attributed to them in the Agreement.

B. *Conflict with Agreement.* Except as amended by this Amendment, the Agreement remains unchanged and in full force and effect. If there is any conflict between the provisions of the Agreement and the provisions of this Amendment, the provisions of this Amendment shall control.

C. *Effective Date.* This Amendment is effective as of the date on which the last of the City and Owner execute this Amendment. Neither party shall have any rights with respect to this Amendment until both have executed this Amendment.

D. *Owner Representations.* Owner represents and warrants to City that (a) Owner holds fee simple title to the Property, (b) there is no mortgage or deed of trust lien encumbering any portion of the Property, except as previously disclosed to City, and (c) no joinder or approval of another person or entity is required with respect to Owner's

authority to make and execute this Amendment.

E. *Neutral Interpretation.* City and Owner acknowledge they and, if they so choose, their respective counsel have reviewed and revised this Amendment and the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be employed in the interpretation of the Agreement, this Amendment or any exhibits, attachments and addenda to the Agreement and/or this Amendment.

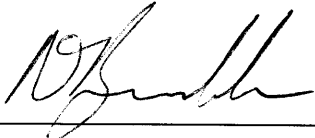
F. *Counterparts.* This Amendment may be executed in multiple counterparts, each of which taken together shall constitute one and the same agreement binding upon the parties. Signatures transmitted by facsimile or via e-mail in a "PDF" format shall have the same force and effect as original signatures on this Amendment. The Original of this Amendment shall be recorded with the Blaine County Recorder.

IN WITNESS WHEREOF, the parties, having been duly authorized, have hereunder caused this Amendment to be executed, the same being done after public hearing, notice and statutory requirements having been fulfilled.

"CITY":

CITY OF KETCHUM,
an Idaho municipal corporation

By: _____



Neil Bradshaw, Mayor

"OWNER":

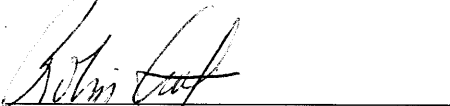
TRAIL CREEK FUND, LLC,
a California limited liability company

By: _____



Jack E. Bariteau, Jr. as Trustee of The
Jack E. Bariteau, Jr. Separate Property
Trust, as Managing Member of Trail
Creek Fund, LLC'

ATTEST:



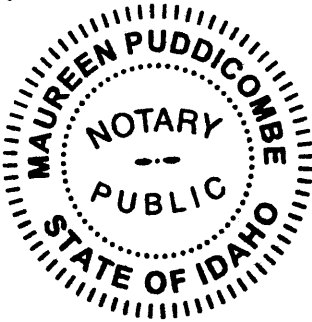
Robin Crotty, City Clerk

ACKNOWLEDGEMENT FOR CITY

STATE OF IDAHO)
) ss.
COUNTY OF BLAINE)

On this 5th day of June, 2018, before me, the undersigned Notary Public in and for said State, personally appeared NEIL BRADSHAW, known or identified by me to be the Mayor of the City of Ketchum, Idaho, and the person who executed the foregoing instrument and acknowledged to me that he executed the same on behalf of such city.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first written above.



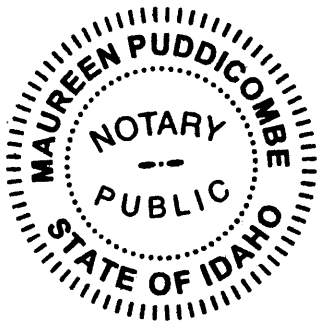
Maureen Puddicombe
Notary Public for the State of Idaho
Residing at 101 Emerald St
My Commission Expires 2-14-24

ACKNOWLEDGEMENT FOR OWNER

STATE OF Idaho)
) ss.
COUNTY OF Blaine)

On this 5th day of June, 2018, before me, a Notary Public in and for said State, personally appeared JACK E. BARITEAU, JR., known to me to be the trustee of the Jack E. Bariteau Separate Property Trust, the Managing Member of Trail Creek Fund, LLC, a California limited liability company, and known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same on behalf of said limited liability company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Maureen Puddicombe
Notary Public for the State of Idaho
Residing at 101 Emerald St
My Commission Expires 2-14-24



Bond No. 2416447

License Bond

KNOW ALL MEN BY THESE PRESENTS that we, Conrad Brothers of Idaho, Inc.

_____ as Principal,
and **GREAT AMERICAN INSURANCE COMPANY**, a corporation organized under the laws of the State of Ohio,
as Surety, are held and firmly bound unto City of Ketchum _____ as Obligees,
in the sum of Three Hundred Sixty Three Thousand and 00/100 _____
Dollars (\$ 363,000.00), lawful money of the United States of America, to be paid unto the said
Obligee or its successors; for which payment, well and truly to be made and done, we bind ourselves, our
successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated June 14, 2018

WHEREAS, the said Principal now has or will be granted a license or permit to engage in the business of Demolition and Site Improvements and backfilling to existing grades
in the City of Ketchum

NOW, THEREFORE, the condition of this obligation is such that if the said Principal shall faithfully comply with all laws, ordinances, rules and regulations pertaining to such License and Permit and shall indemnify and save harmless the Obligee from all loss or damage that the Obligee shall suffer by reason of the said Principal's failure to comply with said laws, ordinances, rules and regulations, then this obligation to be void; otherwise to remain in full force and effect.

PROVIDED, that the Surety may terminate its liability hereunder at any time by giving thirty (30) days written notice of such termination sent through the United States mail to the Obligee.

The term of this bond shall be from June 14, 2018 to June 14, 2019
but may be continued on a year to year basis by continuation certificate at the option of the Surety.

Conrad Brothers of Idaho, Inc.

Principal

GREAT AMERICAN INSURANCE COMPANY

By:

Paul Conrad
Conrad Brothers of Idaho, Inc.

By:

Terri Strawhand, Attorney-in-Fact



POWER OF ATTORNEY

Farmington Casualty Company
 Fidelity and Guaranty Insurance Company
 Fidelity and Guaranty Insurance Underwriters, Inc.
 St. Paul Fire and Marine Insurance Company
 St. Paul Guardian Insurance Company

St. Paul Mercury Insurance Company
 Travelers Casualty and Surety Company
 Travelers Casualty and Surety Company of America
 United States Fidelity and Guaranty Company

Attorney-In Fact No. 229789

Certificate No. 007090874

KNOW ALL MEN BY THESE PRESENTS: That Farmington Casualty Company, St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company are corporations duly organized under the laws of the State of Connecticut, that Fidelity and Guaranty Insurance Company is a corporation duly organized under the laws of the State of Iowa, and that Fidelity and Guaranty Insurance Underwriters, Inc., is a corporation duly organized under the laws of the State of Wisconsin (herein collectively called the "Companies"), and that the Companies do hereby make, constitute and appoint

Mark C. Bundy, Tammy A. Ward, Terri Strawhand, and Kathryn Snell

of the City of Virginia Beach, State of Virginia, their true and lawful Attorney(s)-in-Fact, each in their separate capacity if more than one is named above, to sign, execute, seal and acknowledge any and all bonds, recognizances, conditional undertakings and other writings obligatory in the nature thereof on behalf of the Companies in their business of guaranteeing the fidelity of persons, guaranteeing the performance of contracts and executing or guaranteeing bonds and undertakings required or permitted in any actions or proceedings allowed by law.

IN WITNESS WHEREOF, the Companies have caused this instrument to be signed and their corporate seals to be hereto affixed, this 5th day of January, 2017.

Farmington Casualty Company
 Fidelity and Guaranty Insurance Company
 Fidelity and Guaranty Insurance Underwriters, Inc.
 St. Paul Fire and Marine Insurance Company
 St. Paul Guardian Insurance Company

St. Paul Mercury Insurance Company
 Travelers Casualty and Surety Company
 Travelers Casualty and Surety Company of America
 United States Fidelity and Guaranty Company



State of Connecticut
 City of Hartford ss.

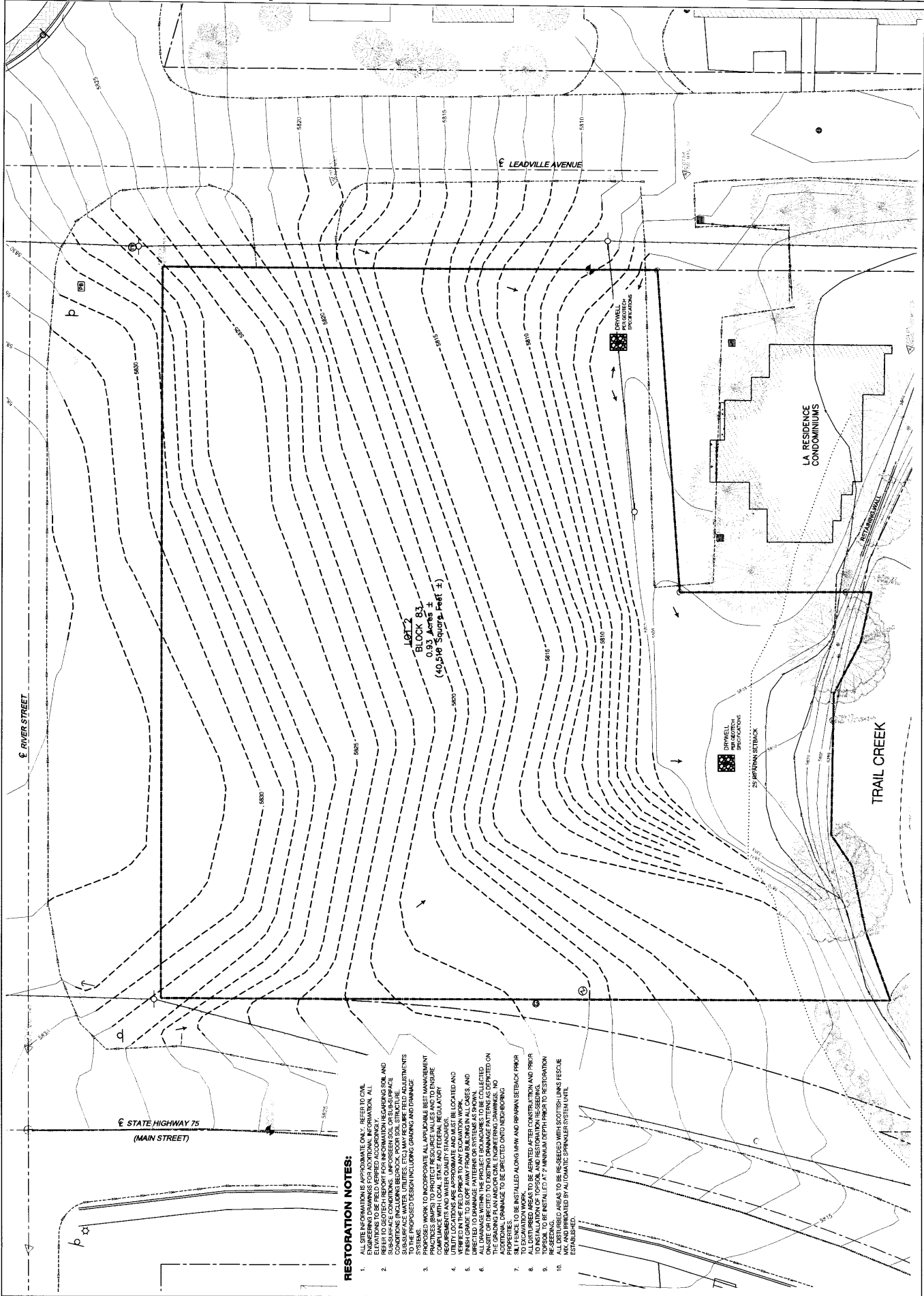
By: Robert L. Raney
 Robert L. Raney, Senior Vice President

On this the 5th day of January, 2017, before me personally appeared Robert L. Raney, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., St. Paul Fire and Marine Insurance Company, St. Paul Guardian Insurance Company, St. Paul Mercury Insurance Company, Travelers Casualty and Surety Company, Travelers Casualty and Surety Company of America, and United States Fidelity and Guaranty Company, and that he, as such, being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing on behalf of the corporations by himself as a duly authorized officer.

In Witness Whereof, I hereunto set my hand and official seal.
 My Commission expires the 30th day of June, 2021.



Marie C. Tetreault
 Marie C. Tetreault, Notary Public



RESTORATION NOTES:

1. ALL SITE INFORMATION IS APPROXIMATE ONLY. REFER TO CIVIL ENGINEERING DRAWINGS FOR ADDITIONAL INFORMATION. ALL INFORMATION IS BASED ON THE INFORMATION PROVIDED BY THE CLIENT.
2. REFER TO GEOTECH REPORT FOR INFORMATION REGARDING SOIL AND SUBSURFACE CONDITIONS. UNDESIRABLE SOILS OR SUBSURFACE CONDITIONS MAY REQUIRE FIELD ADJUSTMENTS TO THE PROPOSED DESIGN INCLUDING GRADING AND DRAINAGE SYSTEMS.
3. PROPOSED WORK TO INCORPORATE ALL APPLICABLE BEST MANAGEMENT PRACTICES (BMPs) TO PREVENT EROSION AND SEDIMENTATION. COMPLIANCE WITH LOCAL, STATE AND FEDERAL REGULATORY REQUIREMENTS AND WATER QUALITY STANDARDS.
4. FINISH GRADE TO BE SET AWAY FROM BUILDING FOOTINGS AND VERTICES IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
5. ALL EXCAVATION WORK TO BE COMPLETED PRIOR TO THE START OF THE RESTORATION WORK.
6. ALL DRAINAGE WITHIN THE PROJECT BOUNDARIES TO BE COLLECTED AND DISCHARGED TO THE APPROPRIATE DRAINAGE SYSTEM AS SHOWN ON THE SITE PLAN.
7. ADDITIONAL DRAINAGE TO BE DIRECTED ONTO NEIGHBORING PROPERTIES.
8. ALL FENCES TO BE INSTALLED ALONG UPR AND SPRINKLER SETBACK PRIOR TO EXCAVATION WORK.
9. ALL EXCAVATION WORK TO BE COMPLETED PRIOR TO THE START OF THE RESTORATION WORK.
10. ALL DISTURBED AREAS TO BE RE-SEED WITH SCOTT'S LINKS FESCUE MIX AND IRRIGATED BY AUTOMATIC SPRINKLER SYSTEM UNTIL ESTABLISHED.

RESTORATION PLAN

SCALE: 1" = 10' ±



Conrad Brothers
General Contractors and Builders
P.O. Box 3432 - Halley, Idaho 83333
208-726-3830 Fax 208-726-5788
www.conradbrothersconstruction.com

Job Name: TCF, LLC
Project Description: TCF Site Restoration
Date: 9.20.18

Qty.	Unit	Estimated Costs				Notes
		Material	Labor	Subs	Others	Total
Division 1- General Conditions						
01034 Permitting					\$ -	\$ -
01040 Project Manager			\$ 1,500.00		\$ -	\$ 1,500.00
01072 Legal					\$ -	\$ -
Total Division 1- General Conditions						\$ 1,500.00
Division 2- Sitework						
Backfill and Grading of Site				\$ 242,000.00		\$ 242,000.00
Remove Barricades				\$ 3,500.00		\$ 3,500.00
Top Soil				\$ 19,000.00		\$ 19,000.00
02025 Utilities- Service				\$ -		\$ -
02800 Landscaping				\$ -		\$ -
Clean Up, Seeding, Irrigation				\$ 34,452.00		\$ 34,452.00
Total Division 2- Sitework						\$ -
Subtotal						\$ 301,952.00
Fees						\$ -
Contingency						0%
Total Estimate						\$ 301,952.00
150% Valuation						\$ 452,928.00

GALENA ENGINEERING, INC.

CIVIL ENGINEERING & LAND SURVEYING

MEMO

DATE: June 4, 2018
TO: Trail Creek Fund, LLC
FROM: Samantha Stahlnecker, P.E.
Galena Engineering
RE: Site Embankment Opinion of Probable Construction Cost

Galena Engineering has prepared an opinion of probable cost to fill the existing foundation excavation at 200 S Main Street (Ketchum Replat Block 83, Lot 2). This estimate includes approximate construction costs to import, place, and compact fill material at a constant slope from River Street south to the southern property boundary.

Galena Engineering utilized LIDAR data collected by Quantum Spatial for Blaine County, Idaho in the fall of 2017 to approximate the existing conditions on site. Grading limits were defined at the approximate property boundary and an average ground slope of 15% was modeled over the site as the proposed embankment finish ground elevation. Galena Engineering approximates the in-place, compacted embankment quantity to be 11,000 CY.

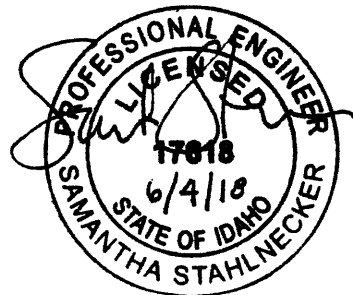
Based upon feedback from local contractors given the site's proximity to Ohio Gulch and the large quantity of material required, Galena Engineering estimates the unit cost per CY of embankment to be \$22.

It is Galena Engineering's opinion that the total estimated cost to fill the existing foundation excavation is approximately \$242,000.

Please contact me with any questions regarding the assumptions made to prepare this opinion of probable cost.

Sincerely,

Samantha Stahlnecker, P.E.



Webb Landscape, Inc.
162 Glendale Rd
Bellevue, ID 83313



Office: 208-726-4927
Fax: 208-726-4767
www.webbland.com

ESTIMATE

To: Rob King
Address:
Billing Info:

Date: September 13, 2018
Phone:
Email:

Re: Auberge Resort Restoration

108 MOBILIZATION/DELIVERY FEES:

8 Hours Labor, Supervisor

subtotal 492.00

500's

IRRIGATION INSTALLED:

*Assumes irrigation POC will be drawn from La Residence Condo's

*Assumes appropriate GPM and Pressure to accomodate needs

*Assumes Existing controller will be able to accommodate zone requirements

*Assumes irrigation to be above ground and temporary

*Includes time for removal of system after establishment

10 Hours Labor, Technician

320 Hours Labor

16 Hours Trackhoe

300 Linear Feet 18/6 Multi Wire

13 1-1/2" Automatic PGA Valve Assembly

300 Linear Feet Of 2" Poly Mainline

1400 Linear Feet Of 1.5" Poly Lateral Lines

1 Miscellaneous Fittings for Mainline & Lateral Assembly

58 Rainbird 5006 SAM/PRS Rotors Assembly

subtotal 22,620.00

607 HYDROSEED INSTALLED:

*Assumes excavtion contractor leaves area prepped for seed

40510 Square Feet Hydroseed, Roadside Mix

subtotal 10,533.00

113 SANITARY FACILITIES

Porta-Potty- Week

1 Porta-Potty- Month

subtotal 119.00

114 FINISH WORK & CLEAN UP

6 Hours Labor

2 Hours Loader/Trackhoe

1 Trash Haul- 12 cubic yards per haul

subtotal 688.00

Thank You,
Cooper Hayes
Project Manager

JOB TOTAL, ESTIMATED: \$ 34,452.00

To: Rob King

Date: September 13, 2018

Re: Auberge Resort Restoration

JOB TOTAL, ESTIMATED: \$ 34,452.00

WEBB LANDSCAPE CONTRACT:

OUR COMMITMENT:

- ▶ Webb maintains the integrity of our brand through accountability for our projects with an emphasis on quality, efficiency, industry best practices, and a mindful stewardship of environmental conservation.
- ▶ Webb is committed to our client relationships. We will not be party to dishonesty, distortion, or the misrepresentation of our brand. We stand behind our work and our dedication to customer satisfaction.
- ▶ Webb insures that our work is constructed of the highest quality materials and is completed in a professional and timely manner in accordance with the highest industry standard.
- ▶ Webb maintains a positive working relationships with every client by providing the highest level of comprehensive, year round service while sustaining the long term value for your property.

GUARANTEES & INCLUSIONS:

- ▶ 3 weeks of lawn mowing on new sod installations
- ▶ One turf fertilization for all new sod and hydroseed installations

GENERAL TERMS & POLICIES:

- ▶ Prices reflect the 2018 work season
- ▶ Winter weather conditions may increase costs.
- ▶ This is a cost estimate based on information and/or plans provided to Webb.
- ▶ Any engineering, permitting or subcontracted work not listed on this estimate is considered the responsibility of the contracting party
- ▶ Estimates are subject to change or cancellation after the end of the current growing season
- ▶ Final costs may vary according to on site changes and actual quantities installed.
- ▶ Final billing shall be imposed upon actual quantities used and labor to install.
- ▶ **Additional costs may be incurred to relieve soil compaction associated with construction traffic as needed.**
- ▶ **Change orders will be given as an estimate that must be agreed upon prior to change work commencing.**
- ▶ **A deposit of one-third the estimate total is due prior to the start of the project.**
- ▶ **Invoicing will be submitted, on a monthly basis as work progresses.**
- ▶ **A 1.5% monthly finance charge shall be imposed on any portion of account not paid within 30 days of each billing.**

ACCEPTANCE:

The pricing, specifications and conditions are satisfactory and accepted.
Webb Landscape, Inc. is hereby authorized to perform the work as specified.
Payments shall be made as outlined above.

Responsible Party

Date

GREAT AMERICAN INSURANCE COMPANY®

Administrative Office: 301 E 4TH STREET • CINCINNATI, OHIO 45202 • 513-369-5000 • FAX 513-723-2740

The number of persons authorized by
this power of attorney is not more than **THREE**

No. 0 20818

POWER OF ATTORNEY

KNOW ALL MEN BY THESE PRESENTS: That the GREAT AMERICAN INSURANCE COMPANY, a corporation organized and existing under and by virtue of the laws of the State of Ohio, does hereby nominate, constitute and appoint the person or persons named below, each individually if more than one is named, its true and lawful attorney-in-fact, for it and in its name, place and stead to execute on behalf of the said Company, as surety, any and all bonds, undertakings and contracts of suretyship, or other written obligations in the nature thereof; provided that the liability of the said Company on any such bond, undertaking or contract of suretyship executed under this authority shall not exceed the limit stated below.

Name	Address	Limit of Power
MARK C. BUNDY	ALL OF	ALL
TERRI STRAWHAND	VIRGINIA BEACH, VIRGINIA	\$100,000,000
TAMMY A. WARD		

This Power of Attorney revokes all previous powers issued on behalf of the attorney(s)-in-fact named above.

IN WITNESS WHEREOF the GREAT AMERICAN INSURANCE COMPANY has caused these presents to be signed and attested by its appropriate officers and its corporate seal hereunto affixed this **12TH** day of **SEPTEMBER**, 2016

Attest

GREAT AMERICAN INSURANCE COMPANY



Mark C. Bundy

Assistant Secretary

David C. Kitchen

Divisional Senior Vice President

STATE OF OHIO, COUNTY OF HAMILTON - ss:

On this **12TH** day of **SEPTEMBER**

2016, before me personally appeared **DAVID C. KITCHIN**, to me

known, being duly sworn, deposes and says that he resides in Cincinnati, Ohio, that he is a Divisional Senior Vice President of the Bond Division of Great American Insurance Company, the Company described in and which executed the above instrument; that he knows the seal of the said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the By-Laws of said Company, and that he signed his name thereto by like authority.

DAVID C. KITCHIN (877-377-2405)



Susan A. Kohorst
Notary Public, State of Ohio
My Commission Expires 06-18-2020

Susan A. Kohorst

This Power of Attorney is granted by authority of the following resolutions adopted by the Board of Directors of Great American Insurance Company by unanimous written consent dated June 9, 2008.

RESOLVED: That the Divisional President, the several Divisional Senior Vice Presidents, Divisional Vice Presidents and Divisional Assistant Vice Presidents, or any one of them, be and hereby is authorized, from time to time, to appoint one or more Attorneys-in-Fact to execute on behalf of the Company, as surety, any and all bonds, undertakings and contracts of suretyship, or other written obligations in the nature thereof; to prescribe their respective duties and the respective limits of their authority; and to revoke any such appointment at any time.

RESOLVED FURTHER: That the Company seal and the signature of any of the aforesaid officers and any Secretary or Assistant Secretary of the Company may be affixed by facsimile to any power of attorney or certificate of either given for the execution of any bond, undertaking, contract of suretyship, or other written obligation in the nature thereof, such signature and seal when so used being hereby adopted by the Company as the original signature of such officer and the original seal of the Company, to be valid and binding upon the Company with the same force and effect as though manually affixed.

CERTIFICATION

I, **STEPHEN C. BERAHA**, Assistant Secretary of Great American Insurance Company, do hereby certify that the foregoing Power of Attorney and the Resolutions of the Board of Directors of June 9, 2008 have not been revoked and are now in full force and effect.

Signed and sealed this

day of



Mark C. Bundy

Assistant Secretary



Bond No. 2416447

License Bond

KNOW ALL MEN BY THESE PRESENTS that we, Trail Creek Fund, LLC

as Principal,

and **GREAT AMERICAN INSURANCE COMPANY**, a corporation organized under the laws of the State of Ohio,

as Surety, are held and firmly bound unto City of Ketchum

as Obligee,

in the sum of Four Hundred Fifty Two Thousand Nine Hundred Twenty Eight Dollars and 00/100

Dollars (\$ 452,928.00), lawful money of the United States of America, to be paid unto the said Obligee or its successors; for which payment, well and truly to be made and done, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated June 14, 2019.

WHEREAS, the said Principal now has or will be granted a license or permit to engage in the business of Site Improvements and backfilling to existing grades in conjunction with restoration plan with seeding and irrigation in the City of Ketchum

NOW, THEREFORE, the condition of this obligation is such that if the said Principal shall faithfully comply with all laws, ordinances, rules and regulations pertaining to such License and Permit and shall indemnify and save harmless the Obligee from all loss or damage that the Obligee shall suffer by reason of the said Principal's failure to comply with said laws, ordinances, rules and regulations, then this obligation to be void; otherwise to remain in full force and effect.

PROVIDED, that the Surety may terminate its liability hereunder at any time by giving thirty (30) days written notice of such termination sent through the United States mail to the Obligee.

The term of this bond shall be from June 14, 2019 to June 14, 2020

but may be continued on a year to year basis by continuation certificate at the option of the Surety.

Trail Creek Fund, LLC

GREAT AMERICAN INSURANCE COMPANY

Principal

By: [Signature]
MANAGING MEMBER

By: [Signature]

Terri Strawhand, Attorney-in-Fact

AMENDED AND RESTATED DEVELOPMENT AGREEMENT
(City of Ketchum/Trail Creek Fund, LLC, *et al.*)

THIS AMENDED AND RESTATED DEVELOPMENT AGREEMENT ("Agreement") is made and entered into as of the 5th day of October, 2015, by and between the CITY OF KETCHUM, an Idaho municipal corporation ("City") and TRAIL CREEK FUND, LLC, a California limited liability company ("Owner").

RECITALS

WHEREAS, Owner owns that certain real property located at 200 South Main Street, Ketchum, Idaho legally described as Lot 2 of Block 83, of the City of Ketchum, according to the official plat thereof, on file in the office of the County Recorder of Blaine County, Idaho (the "Property"); and

WHEREAS, Owner has applied with the City to develop and operate a Hotel ("Project") currently referred to as the "Auberge Resort Hotel" on the Property pursuant to a Planned Unit Development Conditional Use Permit; and

WHEREAS, Ketchum Municipal Code ("KMC") Section 17.52.010.H.3.g requires that the developer of such a hotel enter into a Development Agreement with the City as part of the approval process and this Agreement satisfies such requirement; and

WHEREAS, KMC 16.08.070 requires the developer of a PUD to submit a Development Plan and this Agreement will ensure compliance with such Plan; and

WHEREAS, KMC 16.08.120.C.1 allows the City Council to require such written agreements executed by the developer to secure performance of any requirement or condition imposed as part of the PUD approval and this Agreement is such a written agreement; and

WHEREAS, City has identified the Property as a site which is suited for the proposed development; and

WHEREAS, the City's Planning and Zoning Commission and City Council have held properly noticed public hearings pursuant to applicable code with respect to the development of the Property and this Agreement; and

WHEREAS, the original agreement between the City of Ketchum and Trail Creek Fund LLC was first amended on April 15, 2010 for the purpose of extending the entitlement expiration dates; and

WHEREAS, the original agreement between the City of Ketchum and Trail Creek Fund LLC was amended for a second time on July 16, 2012 for the purpose of extending the entitlement expiration dates; and

WHEREAS, the original agreement between the City of Ketchum and Trail Creek Fund LLC was amended for a third time on November 5, 2013 for the purpose of extending the entitlement expiration dates; and

WHEREAS, Trail Creek Fund LLC requested a fourth amendment to the Development Agreement in July 2015 for the purpose of extending the entitlement expiration dates by seven (7) months; and

WHEREAS, on September 3, 2015 the Ketchum City Council approved the request from Trail Creek Fund LLC to extend the entitlement expiration dates by seven (7) months from October 6, 2015 to May 6, 2016; and

WHEREAS, the Ketchum City Council approved the fourth extension with the understanding that this would be the last and final amendment to the Development Agreement as to time extensions; and

WHEREAS, it is the intent and desire of the parties hereto that development and uses of the Property proceed as provided herein.

AGREEMENT

NOW THEREFORE, in consideration of the above recitals and the mutual covenants and agreements herein contained and other good and valuable consideration, the sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

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 Agreements, Approvals, Plans, Permits and other documents. The following agreements, approvals, plans, permits and other documents are hereby incorporated into and made an integral part of this Agreement by reference as if restated herein in full:
 - PUD CUP Findings of Fact, Conclusions of Law and Decision, including all conditions of approval, dated November 17, 2008, or as amended from time to time. Conditions of approval are excerpted in Exhibit A.
 - PUD CUP No. 08-007 dated November 17, 2008, or as amended from time to time.
 - PUD Development Plans referenced in the PUD CUP Findings of Fact, Conclusions of Law and Decision, or as amended from time to time.
 - Design Review Findings of Fact, Conclusions of Law and Decision, including all conditions of approval, dated September 8, 2008, or as amended from time to time.
 - Site Plan No. L-1 dated January 10, showing both on-site and off-site improvements, which off-site improvements may be amended to meet final right-of-way improvement design approvals, or as amended from time to time.

Any material failure to comply with the terms and conditions of any of the above-referenced agreements, approvals, plans, permits and other documents shall constitute a breach of this Agreement.

In the event of any inconsistency between the terms and conditions of this Agreement and the agreements, approvals, plans, permits and other documents listed above, the terms and conditions of this Agreement shall govern.

Except as provided otherwise in this Agreement, 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 Effective Date of this Agreement. Any amendments or additions made during the term of this Agreement to City policies, procedures, guidelines, ordinances, codes or regulations shall not apply to or affect the conditions of development of the Project; provided, however, the following are exempt from vesting under this Agreement:

- i) plan review fees and inspection fees;
- ii) amendments to building, plumbing, fire and other construction codes;
- iii) City enactments that are adopted pursuant to State or federal mandates that preempt the City's authority to vest regulations.

Owner may request to be bound by future amendments to the Ketchum Municipal Code, or other regulations, policies or guidelines affecting development, and such request may be approved administratively provided no new land use not allowed under this Agreement and no increase in total square footage of structures to be developed is proposed. In all other instances, the request to be bound by future amendment(s) shall be approved by the Council as an amendment to this Agreement.

Any application for a building permit submitted by Owner shall substantially comply with the requirements of the above-referenced applicable codes, agreements, approvals, plans, permits and other documents as such requirements exist on the day the building permit application is submitted. A complete Building Permit Application and applicable fees shall be submitted to the City no later than May 6, 2016. A Certificate of Occupancy shall be issued for the Project no later than 30 months after the Building Permit is issued.

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 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 approvals referenced in Section 2 may be subject to amendment. A new building permit may be required to reflect the changes made to the approvals in Section 2.

3. List of Uses to be Allowed (Hotel Uses and Restrictions). Owner may use the Property as a "Hotel" as defined in KMC 17.08.020 as that section existed at the time of PUD application and for private residential uses. The following units and any storage, parking or limited common area associated with such units may be used as either private residential units or as a "Hotel": Units 1 through 6, located on the fourth floor unless otherwise amended by the City of Ketchum. All other units and space on the Property and in the improvements constructed thereon shall be used exclusively as a "Hotel". The following are acknowledged as allowable accessory uses of the Property: conference facilities, restaurant and bar areas within the hotel, fitness facilities, retail and spa/salon uses, and an observatory on the fifth floor. Owner agrees that this Agreement specifically allows only the uses set forth above and no others. Owner may not change the uses of the Property and improvements thereon specified in this Agreement without the prior written approval of City which may be withheld for any reason permitted by law. Any substantial changes or expansions in the uses permitted by this Agreement without such prior written consent and formal modification of this Agreement as allowed by applicable law shall constitute a breach of this Agreement.
4. Permitted Square Footage and Building Location. Owner shall construct improvements on the Property in the locations depicted in the Design Review Approval. The gross square footage of the improvements shall not be greater than 149,325 square feet distributed as set forth in the Design Review Approval.
5. Identification of Development Standards & Right-of-Way Improvements. Owner shall develop the Property pursuant to the standards set forth in Title 15 of the Ketchum Municipal Code "Buildings and Construction" as such standards exist as of the date on which Owner applies for a building permit. Owner shall develop the public rights-of-way adjacent to the Property pursuant to the Site Plan and pursuant to the standards set forth in Title 12 of the Ketchum Municipal Code "Streets, Sidewalks, Public Utility Easements and Public Places" as such standards exist on the date on which Owner applies for a building permit. Improvements within the public rights-of-way that shall be dedicated to the public include:
- Pedestrian amenities such as bike racks, benches and other amenities provided within the Gateway Plaza area at the intersection of Main Street and River Street.
 - Public art.
 - Trees.
 - Street lights.
- Improvements within the public rights-of-way that shall remain in the ownership of the Owner and be subject to a revocable Right-of-Way Encroachment License include:
- Heated sidewalks within the Main Street, River Street and Leadville Avenue rights-of-way.
 - Heated asphalt or other paving within the River Street and Leadville Avenue rights-of-way.
 - Retaining walls.
 - Planter beds, screen and contents within Main Street, River Street and Leadville Avenue rights-of-way.

- Porte cochere and any other structural elements of the hotel building that project into or over the public right-of-way.
 - Curb and gutter and all ingress and egress improvements that are essential for access to the hotel entries and underground parking garage and loading dock areas of the Project.
6. Plaza Area. The size and location of the planned Gateway “plaza” area for the Property, shall be approved by the City Engineer and the City Council prior to issuance of a building permit and installed prior to the issuance of any Certificate of Occupancy.
7. Construction and Completion Schedule. Improvements shall be constructed and substantially completed pursuant to a schedule set forth in the Revised Construction Mitigation Plan, which shall be submitted by the Owner and approved by the City no later than March 6, 2016. A Certificate of Occupancy shall be issued for the Project no later than 30 months after the Building Permit is issued.
8. Infrastructure Improvements. Owner shall engineer, construct, and otherwise provide, at its sole expense, improvements, facilities and services (public and private) as provided in the PUD Conditional Use Permit and this Agreement:
- 8.1 Owner requests water and sewer service from Ketchum to the PUD Property and Ketchum hereby agrees to provide such water and sewer service at the same fees as charged to equivalent users of Ketchum.
- 8.2 All utilities, including water, sewer, gas, cable, phone and electric shall be installed underground within the street rights-of-way. Detailed engineered construction drawings and specifications for construction of such improvements shall be prepared by Owner and approved by the Ketchum Engineer prior to construction. Prior to acceptance of any such improvements to be dedicated to Ketchum, the Ketchum Engineer shall inspect and approve same and Owner shall provide Ketchum with "as built" drawings thereof. Owner hereby warrants that to the best of its knowledge the "as built drawings" are substantially correct and Owner shall, for a period of one year from Ketchum's receipt of said drawings, be liable and hold Ketchum harmless for any damage which may result from material errors in said drawings after acceptance by the Ketchum Engineer of said utilities unless such damage is caused directly or indirectly by the acts or omissions of Ketchum, or its agents or contractors.
9. Design Review. The improvements on the Property shall be built exclusively as permitted under the Design Review Approval unless otherwise amended by the City of Ketchum. Any development of any portion of the Property substantially inconsistent with this Agreement or the Design Review Approval, as determined by the Planning and Zoning Administrator, without modification of the Design Review Approval, shall constitute a breach of this Agreement by Owner.
10. Phasing. Owner shall not phase the development of the Property; therefore, no security agreement shall be required for any such phasing.

11. Public Access to the Observatory. The observatory has been accepted as a public amenity and as such shall be open to the public a reasonable number of hours. The applicant shall make a proposal to the City Council regarding the operation of the observatory, to be approved by the City Council prior to issuance of any Certificate of Occupancy. The operation of the observatory is subject to approval and adjustment periodically as determined by Owner and the City Council.
12. Employee Housing. The Owner agrees to provide Employee Housing as provided by Ketchum Municipal Code and as set forth in an Employee Housing Plan, which shall be submitted by the Owner and approved by the City Council no later than April 6, 2016. Such plan shall include items set forth in Exhibit A. The approved Employee Housing Plan shall be added to this Agreement by addendum and recorded prior to issuance of a building permit. All required employee housing shall be available no later than six months after the issuance of any certificate of occupancy for the PUD property. Security for the employee housing shall be provided in the form of either a letter of credit issued by a bank, a set-aside agreement with the lender, or a lien on the property in favor of the City sufficient to cover the Employee Housing requirement.
13. Condominium Plat. A condominium plat shall be submitted by the Owner and recorded, pursuant to KMC 16.04.060, to allow for financing of the improvements and individual sale of private residential units. The condominium plat and an operations management plan must be approved by the City prior to recording. The individual condominium units and the commercial and/or common area units shall be use restricted through a recorded declaration of covenants and restrictions.
14. Relocation of Overhead Distribution Power Lines. Owner shall contribute a pro rata share based on total linear feet to the underground relocation of overhead utility lines in the vicinity of the Project. The pro rata share shall be based on the frontage of the Property along Main Street, Leadville Avenue, and River Street. Said contribution shall be utilized by the City solely for the relocation of power lines from overhead to underground in the vicinity of the Property. Staff shall bring alternatives to the Council regarding the payment method within six (6) months of the Effective Date of this Agreement.
15. Conditions of Approval. Owner agrees to comply with all conditions incorporated into the PUD Conditional Use Permit. Any and all approvals as adopted or amended as listed in Section 2, shall be valid until May 6, 2016. These approvals may be retained by Owner and the validity date extended past May 6, 2016 by Owner submitting a building permit application by May 6, 2016, provided the requirements of Section 7 have been met.

In the event Owner has need to revise the approvals listed in Section 2, the following schedule shall be observed to provide Owner the best opportunity to submit a complete building permit by May 6, 2016:

- If necessary, a preliminary plat must be submitted to the City no later than December 15, 2015.

- Application for Conditional Use Permit (CUP) to amend the Planned Unit Development (PUD) approval of 2008 shall be submitted no later than January 15, 2016.
- Application to amend the Design Review approval of 2008 shall be submitted no later than January 15, 2016.
- Revised Construction Mitigation Plan shall be submitted to the City no later than March 6, 2016.
- Complete Building Permit Application and applicable fees shall be submitted to the City no later than May 6, 2016.
- A Certificate of Occupancy shall be issued for the Project no later than 30 months after the Building Permit is issued.

Owner acknowledges the public processes required to amend the approvals listed in Section 2 provide no guarantees of timelines for approval and even by observing the schedule above, Owner may not be in a position to submit a complete building permit application by May 6, 2016.

16. Amendment of Agreement. This Agreement shall be amended or cancelled, in whole or in part, only by the mutual consent of the parties, executed in writing.
17. Remedies. This Agreement shall be enforceable in any Court of competent jurisdiction by either City or Owner or by any successor or successors in title or interest or by the assigns of the parties hereto, unless otherwise expressly provided in paragraph 21, below. Enforcement may be sought by an appropriate action at law or in equity to secure the performance of the covenants, agreements, conditions, and obligations contained herein. In the event of a material breach of this Agreement, the parties agree that the City and Owner shall have sixty (60) days after delivery of notice of said breach to correct the same prior to the non-breaching party's seeking of any remedy provided for herein, provided, however, that in case of any such default which cannot with diligence be cured within such sixty (60) day period, if the defaulting party shall commence to cure the same within such sixty (60) day period and thereafter shall prosecute the curing of the same with diligence and continuity, then the time within which such failure may be cured shall be extended for such period as may be necessary to complete the curing of the same with diligence and continuity.
18. Mediation. Prior to either party filing suit, the parties shall participate in a minimum of one mediation session to determine if a resolution can be reached. The mediator shall be agreed to by both parties and the cost of mediation shall be split between the parties.
19. Default. In the event the Owner fails to comply with the terms and conditions hereof in any material respect, and such default is not cured after reasonable written notice to Owner, Ketchum may, without further notice to Owner, exercise any or all of the following remedies until the default is cured:
 - a. Withhold the issuance of a certificate of occupancy of any structure or unit located within the PUD;
 - b. Withhold the connection of water or sewer to any structure or unit located within the PUD;

- c. Refuse to accept public ownership and maintenance of public improvements within the PUD and record a notice of such action with the Blaine County Recorder's office;
- d. Issue a stop work order for any building or unit under construction within the PUD;
- e. Bring an action for damages, injunctive relief, specific performance or any other remedy available at law or in equity;

All of the above remedies are cumulative and to the extent not wholly inconsistent with each other, may be enforced simultaneously or separately, at the sole discretion of the Ketchum.

In the event that City fails to comply with the terms and conditions hereof in any material respect, and such default is not cured after reasonable written notice to City, Owner may, without further notice to City, exercise any and all remedies available under law or in equity.

20. Miscellaneous Provisions.

- a. Covenant Running with the Land/Successors and Assigns. Unless this Agreement is modified by mutual written agreement of the Parties or terminated by City, this Agreement and all conditions, terms, duties and obligations included in this Agreement shall be binding upon Owner, each subsequent owner of the Property and every person or entity acquiring any interest in the Property. This Agreement shall constitute a covenant running with the land burdening the Property in favor of City and shall be binding upon Owner, its successors in interest, personal representatives, heirs, vendees and assigns. Nothing herein shall in any way prevent sale or alienation of the Property, or portions thereof, except that any sale or alienation shall be subject to the provisions hereof, except as provided below, and any successor owner or Owner shall be both benefited and bound by the conditions and restrictions herein expressed. The words "successors" and "assigns" as used in this Agreement shall include all successors, assigns, personal representatives, administrators, trustees and holders of a security interest in the PUD Property or any portion thereof or interest therein except for purchasers of condominiums as designated in Section 13 (a) and 13 (b) of this Agreement. Nothing contained herein shall be deemed or construed to create any third party beneficiaries or third party rights. Upon conveyance of a condominium unit as designated in Section 13 (a) and 13 (b) of this Agreement to a third party, the lien and encumbrance of this Agreement shall be automatically released from said unit and a prospective third party purchaser, lender and all title insurers are entitled to rely upon said release.
- b. Force Majeure. In the event the performance of any covenant to be performed hereunder by either Owner or the City is delayed for causes which are beyond reasonable control of the party responsible for such performance, which shall include without limitation, acts of God (such as but not limited to fires, explosions, earthquakes, drought and floods); war, hostilities, invasion, act of foreign enemies; acts of civil disobedience, rebellion, revolution, insurrection or

civil war; contamination by radioactivity; riot, commotion, lock-outs or disorder, strikes; discontinuance of electrical supply; any litigation which directly or indirectly prevents or interrupts construction or would cause a reasonably prudent person to delay the commencement or continuation of construction pending the final resolution of such litigation; acts of terrorism; or similar causes, the time for such performance shall be extended by the amount of time of such delay.

- c. Waiver. Any waiver of any of the terms or conditions of this Agreement by City or Owner must be in writing to be effective and shall apply solely to the breach and breaches waived and shall not bar any other rights or remedies of City or Owner of applying to any subsequent breach of any such or other covenants and conditions.
- d. Notices. Any and all notices, demands, requests, and other communications required to be given hereunder by either of the parties hereto shall be in writing and be deemed properly served or delivered if delivered by hand to the party to whose attention it is directed, or when sent, seven (7) days after deposit in the U.S. Mail, postage pre-paid, or upon the sending of a facsimile, followed by a copy sent by U.S. Mail as provided herein, addressed as follows:

City: City of Ketchum
c/o Planning & Zoning Administrator
Post Office Box 2315
Ketchum, Idaho 83340
(208) 726-7801 Phone
(208) 726-7812 Fax

Owner: Jack E. Bariteau, Jr.
Trail Creek Fund, LLC
Post Office Box 84
Sun Valley, Idaho 83353
(650) 906-5636 Phone
(208) 727-1091 Fax

With a copy to: Lawson Laski Clark & Pogue, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340
(208) 725-0055 Phone
(208) 725-0076 Fax

Or at such other address, or facsimile number, or to such other party which any party entitled to receive notice hereunder designates to the other in writing as provided above.

- e. Attorney Fees. In the event either party to this Agreement is required to retain the services of an attorney to enforce its rights hereunder, the defaulting party shall

pay to the non-defaulting party reasonable attorney fees and costs incurred as a result of such default whether or not litigation is commenced and including reasonable attorney fees and costs on appeal.

- f. Time is of the Essence. The parties hereto acknowledge and agree that time is hereby made expressly of the essence with respect to each and every term, condition, and provision hereof, and that the failure to timely perform any of the obligations hereunder shall constitute a breach of and a default under this Agreement by the party so failing to perform.
- g. Effective Date of Agreement. This Agreement shall be effective as of the date approved by the City Council.
- h. Requirement for Recordation. Owner shall record this document, including all of the Exhibits, and submit proof of such recording to the City. Failure to comply with this section shall be deemed a default of this Agreement by Owner.
- i. No Precedent. The issuance of the PUD Conditional Use Permit shall not be considered a binding precedent for the issuance of other PUD conditional use permits. The permit is not transferable from one parcel of land to another.
- j. Police Powers. Nothing contained herein is intended to limit the police powers of the City. This Agreement shall not be construed to modify or waive any law, ordinance, rule, or regulation, including without limitation, applicable building codes, fire codes, zoning ordinances, subdivision ordinances, or comprehensive plan provisions, unless expressly provided herein.
- k. Final Agreement. This Agreement sets forth all promises, inducements, agreements, conditions, and understandings between Owner and the City relative to the subject matter hereof, and there are no promises, conditions, or understandings, either oral or written, express or implied, between Owner and the City, other than as stated herein. Except as herein otherwise provided, no subsequent alteration, amendment, change, or addition to this Agreement shall be binding upon the parties hereto unless reduced to writing and signed by them or their successors in interest or their assigns, and pursuant, with respect to the City, to a duly adopted ordinance or resolution of the City.
- l. No Presumptions. There shall be no presumptions for or against either party hereto as a result of the preparation of this Agreement.
- m. Invalid Provisions. If any provision of this Agreement is held not valid, such provision shall be deemed to be excised there from and the invalidity thereof shall not affect any of the other provisions contained herein.
- n. Choice of Law. This Agreement shall be governed by the laws and decisions of the state of Idaho.

IN WITNESS WHEREOF, the parties, having been duly authorized, have hereunder caused this Agreement to be executed on the day and year first-above written, the same being done after public hearing, notice and statutory requirements having been fulfilled.

“CITY”:

CITY OF KETCHUM,
an Idaho municipal corporation

“OWNER”:

TRAIL CREEK FUND, LLC,
a California limited liability company


By:


Nina Jonas, Mayor


By:


Jack E. Bariteau, Jr., Managing
Member

ATTEST:


Robin Crotty
Interim City Clerk

APPROVED AS TO FORM AND
CONTENT EXCLUSIVELY FOR
THE CITY OF KETCHUM:


Susan Buxton, City Attorney

ACKNOWLEDGEMENT FOR CITY

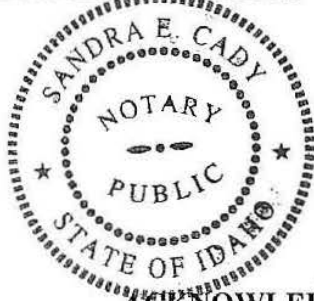
STATE OF IDAHO)
) ss.
COUNTY OF BLAINE)

On this 6th day of October, 2015, before me, the undersigned Notary Public in and for said State, personally appeared Nina Jonas, known or identified by me to be the Mayor of the City of Ketchum, Idaho, and the person who executed the foregoing instrument and acknowledged to me that he executed the same on behalf of such city.

SUZANNE FRICK

City Administrator

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first written above.



Sandra E. Cadley
Notary Public for the State of ID.
Residing at Blaine County
My Commission Expires 11-20-2019

ACKNOWLEDGEMENT FOR OWNER

STATE OF IDAHO)
) ss.
COUNTY OF BLAINE)

On this 28 day of OCTOBER, 2015, before me, a Notary Public in and for said State, personally appeared JACK E. BARITEAU, JR., known to me to be the Managing Member of Trail Creek Fund, LLC, a California limited liability company, and known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same on behalf of said limited liability company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.



Lilly Opple
Notary Public for the State of IDAHO
Residing at KETCHUM, ID
My Commission Expires 01/27/2018



Exhibit A

1. A construction staging and mitigation plan, including at a minimum provisions for off-site employee parking, off-site storage of bulk materials, and required right-of-way encroachments during construction, shall be submitted and approved by the City Engineer and the Director of Planning and Building, prior to issuance of a building permit.
2. Right-of-way encroachments including retaining walls and landscape beds, and curblane alignment, slope and drainage, and ADA design issues shall be resolved to the satisfaction of the City Engineer and ITD prior to the issuance of a building permit.
3. All water, sewer and other utility main lines, service lines, manholes and fire hydrants shall be maintained or improved as required by the Ketchum Water and Sewer Department.
4. The proposed development shall be completed as set forth in the design review and CUP approvals and the Planned Unit Development agreement. The PUD Development Agreement shall include, but not be limited to, provisions for the following:
 - Community/workforce housing- as required in condition #9, below.
 - Contribution to underground relocation of overhead utility lines.
 - Public pedestrian amenities to be included within adjacent street rights-of-way.
 - Development of a Construction Activity Standards Plan
 - Minimum access for the public to the observatory.
5. The applicant shall provide a detailed Employee Housing Plan, which provides for housing for 18 employees on a site acceptable to the Ketchum City Council, and within Ketchum City limits.

The following elements shall be required in the Employee Housing Plan:

- a) Provide salary/hourly wages for the various income categories of employees.
- b) The expected number of each level of employee that is intended to be served by the employee housing units.
- c) Which employee category will be served by which type/size of units.
- d) Provide information on anticipated rental rates or subsidized and/or free rent to employees; will utilities and homeowners dues (if any) be included in proposed rates.
- e) Establishment of maximum occupancy per unit type (i.e. 1 person per 1 bedroom unit; 2 persons per 2 bedroom units).
- f) Location of units to be within Ketchum City limits.

- g) Provide a matrix on breakdowns of the different types of units (1BD; square footage; total number of units; anticipated rent, etc.)
- h) Create a priority for occupancy program of these units; (i.e. first availability employees that are full-time, secondly to seasonal employees, and third to persons that are verified to be working in the City of Ketchum.
- i) What units will be available and how will the pool of units available be determined.
- j) What minimum standards will be used to determine employee eligibility to live in the employee housing; is full-time status required for employees to qualify for the employee housing and what constitutes full-time status.
- k) How will overflow of demand of units by employees be handled; will there be a priority system.
- l) Provide information on housing families (with children) and/or married couples.

The proposed Employee Housing shall meet minimum size thresholds and income categories established by BCHA.

The following information shall be provided to the City:

- o Wage/salary range and a breakdown the number of employees within the aforementioned classifications
- o Information on type of housing provided per employee classification
- o Costs incurred in rent (and utilities) and transportation/parking by employees
- o Details on anticipated lease terms/rental agreements for employees housed on-site
- o Anticipated transport and parking scenarios for both on-site and commuting employees.

The Employee Housing Plan shall be submitted and approved by the City Council prior to issuance of a building permit. This plan shall be an exhibit to an amendment to the PUD agreement and recorded prior to issuance of a building permit.

- 6. A privacy wall or landscaping buffer shall be developed as a buffer for the 200 South Leadville Townhomes.
- 7. Operational hours for the observatory shall be developed that provides for access for the public, schools and other interest groups.
- 8. This PUD CUP approval is contingent upon the approval of the Design Review/Waterways Design Review application.
- 9. The setback for the southernmost penthouse condominium unit adjacent to Leadville Avenue shall be increased to ten feet (10') either by reducing overhangs or other means.

10. Prior to issuance of any building permits, a plan shall be brought back to the City Council showing a third lane (through lane) instead of a dedicated right turn lane on Highway 75/Main Street, including consultation with the Idaho Transportation Department.
11. A PUD - Conditional Use Permit shall be issued in writing. The issuance thereof shall not be considered a binding precedent for the issuance of other conditional use permits. A conditional use permit is not transferable from one parcel of land to another.
12. Failure to comply with any condition or term of said permit shall cause said permit to be void ab initio. A PUD - Conditional Use Permit may be revoked at any time for violation of the permit or any condition thereof by motion of the City Council after a due process hearing upon ten (10) days written notice to the holder of the PUD - Conditional Use Permit.
13. All projects receiving a PUD - Conditional Use Permit, as a condition of said permit, shall be required to submit and receive design review approval for each structure to be constructed within the project prior to making application for a building permit irrespective of what zoning district or districts within which the project is located.

\$60,100,000.00

PROMISSORY NOTE

THIS PROMISSORY NOTE (this “Note”) is made as of December 5, 2019 (the “Effective Date”) in the principal amount of Sixty Million One Hundred Thousand and 00/100 Dollars (\$60,100,000.00).

RECITALS

A. This Note is made by **HARRIMAN HOTEL, LLC**, an Idaho limited liability company (“Borrower”), and is payable to the order of **MOSAIC KETCHUM RESORT, LLC**, a Delaware limited liability company, its successors and assigns (“Lender”) pursuant to the terms and conditions set forth in that certain Construction Loan Agreement dated as of even date herewith by and between Borrower and Lender (the “Loan Agreement”). The amount disbursed by Lender to Borrower, repayment of which is evidenced by this Note, is referred to as the “Loan”.

B. This Note is secured, among other items, by (i) a certain Construction Deed of Trust, Security Agreement, Fixture Filing and Assignment of Leases and Rents (the “Security Instrument”), dated of even date herewith, executed and delivered by Borrower for the benefit of Lender, encumbering certain interests in real and personal property as more particularly described as the Mortgaged Property in the Security Instrument (the “Property”), and (ii) certain other documents securing repayment of this Note, including, without limitation, Guaranty of Non-Recourse Carve-Outs, Completion, Interest and Carry, of even date herewith from Jack E. Bariteau, Jr., individually, and The Jack E. Bariteau, Jr. Separate Property Trust UTA dated October 2, 1996, as amended (“Guarantor”) for the benefit of Lender (the “Guaranty”) (the Security Instrument, the Loan Agreement, the Guaranty, and all other documents evidencing or securing the Loan are hereinafter collectively referred to herein as the “Loan Documents”). All of the agreements, conditions, covenants, provisions and stipulations contained in the Security Instrument and other Loan Documents are hereby made a part of this Note to the same extent and with the same force and effect as if they were fully set forth herein and Borrower covenants and agrees to keep and perform them, or cause them to be kept and performed, strictly in accordance with their terms.

1. **Agreement to Pay.** Borrower hereby promises to pay to the order of Lender the principal sum of Sixty Million One Hundred Thousand and 00/100 Dollars (\$60,100,000.00), or so much thereof as may be outstanding hereunder, in lawful money of the United States of America on or before the earlier of December 5, 2022 (the “Maturity Date”) or upon acceleration of the Note, subject to extension as provided in the Loan Agreement, together with interest thereon at the rate or rates hereinbelow set forth. After any such extension, the term “Maturity Date” as used in this Note shall mean the date to which the maturity of this Note has been extended.

2. **Defined Terms.** All capitalized terms used in this Note and not otherwise defined shall have the meanings ascribed thereto in the Loan Agreement.

3. **Non-Revolving Loan.** No amount repaid or prepaid on this Note may be borrowed again.

4. **Default and Remedies.**

A. An “Event of Default” shall occur under this Note upon the occurrence of (a) the failure of Borrower to make any principal or interest payment owing hereunder on the date when due pursuant to the Loan Agreement, (b) the failure by Borrower to pay any other amount payable to Lender under this Note after the date when any such payment is due in accordance with the terms hereof or thereof, (c) a breach by Borrower of any of the covenants, agreements, representations, warranties or other provisions hereof, which is not cured within the grace or cure period, if any, applicable thereto, or (d) the occurrence of any Event of Default under any of the other Loan Documents. An Event of Default under this Note shall also be deemed an Event of Default under the other Loan Documents.

B. If an Event of Default has occurred and is continuing, Lender shall have the option, without demand or notice, other than specified herein or in the other Loan Documents, to declare the unpaid principal of this Note, together with all accrued interest, prepayment premium, if any, and other sums secured by the Security Instrument or other Loan Documents, at once due and payable to the extent permitted by law, to foreclose the Security Instrument and the other liens or security interests securing the payment of this Note, and to exercise any and all other rights and remedies available at law or in equity under the Security Instrument or the other Loan Documents.

C. The remedies of Lender, as provided herein or in the Security Instrument or any of the other Loan Documents shall be cumulative and concurrent, and may be pursued singularly, successively or together, at the sole discretion of Lender, and may be exercised as often as occasion therefor shall arise. No act of omission or commission of Lender, including specifically any failure to exercise any right, remedy or recourse, shall be deemed to be a waiver or release of the same, such waiver or release to be effected only through a written document executed by Lender and then only to the extent specifically recited therein. A waiver or release with reference to any one event shall not be construed as continuing, as a bar to, or as a waiver or release of, any subsequent right, remedy or recourse as to a subsequent event.

5. **Costs and Attorneys’ Fees.** If any Event of Default under this Note shall occur, or if Lender incurs any expenses or costs in connection with the protection or realization of any collateral, whether or not suit is filed thereon or on any instrument granting a security interest in said collateral, Borrower promises to pay all reasonable costs of collection of every kind, including but not limited to all appraisal costs, reasonable attorneys’ fees, court costs, and expenses of every kind, incurred by Lender in connection with such collection or the protection or enforcement of any or all of the security for this Note, whether or not any lawsuit is filed with respect thereto.

6. **Waiver.** Borrower, and each guarantor and endorser hereon waives grace, notice, notice of intent to accelerate, notice of default, protest, demand, presentment for payment and diligence in the collection of this Note, and in the filing of suit hereon, and agrees that his or its liability and the liability of his or its heirs, beneficiaries, successors and assigns for the payment

hereof shall not be affected or impaired by any release or change in the security or by any increase, modification, renewal or extension of the indebtedness or its mode and time of payment. It is specifically agreed by the undersigned that the Lender shall have the right at all times to decline to make any such release or change in any security given to secure the payment hereof and to decline to make any such increase, modification, renewal or extension of the indebtedness or its mode and time of payment.

7. **Notices.** All notices or other communications required or permitted hereunder shall be delivered in the manner set forth in the Loan Agreement.

8. **Application of Payments.** All payments on account of the indebtedness evidencing the Note shall first be applied to late charges and reasonable costs and fees incurred by Lender in enforcing its rights hereunder or under the Security Instrument and the other Loan Documents, second to accrued interest on the unpaid principal balance, and third to reduce unpaid principal inverse chronological order of maturity. All payments shall be applied in the manner set forth in the Loan Agreement.

9. **Miscellaneous.**

A. The headings of the paragraphs of this Note are inserted for convenience only and shall not be deemed to constitute a part hereof.

B. All payments under this Note shall be payable in lawful money of the United States which shall be legal tender for public and private debts at the time of payment; provided that a check will be deemed sufficient payment so long as it clears when presented for payment. Each payment of principal, interest and/or other amount under this Note shall be credited on the date on which such payment is received so long as (i) funds received in respect of such payment are received by Lender not later than 12:00 P.M. Pacific Time on such date and (ii) such date is a Business Day. Funds received by Lender (a) after 12:00 P.M. Pacific Time on any day or (b) on any day other than a Business Day shall, in each case, be deemed to have been received by Lender on the following Business Day. If any payment of principal, interest or any other amount due under this Note shall become due on a day which is not a Business Day, the due date for such payment shall be automatically extended to the next succeeding Business Day, and, in the case of a principal payment, such extension of time shall be included in computing interest on such principal. Lender is hereby authorized to charge any account of Borrower maintained with Lender for each payment of principal, interest and other amounts due under this Note, when each such payment becomes due. All amounts payable under this Note and the other Loan Documents shall be paid by Borrower without offset or other reduction.

C. This Note has been made and delivered at New York, New York and all funds disbursed to or for the benefit of Borrower will be disbursed in New York, New York.

D. The obligations and liabilities under this Note of Borrower shall be binding upon and enforceable against Borrower and its heirs, legatees, legal representatives,

successors and assigns. This Note shall inure to the benefit of and may be enforced by Lender, its successors and assigns.

E. If any provision of this Note or any payments pursuant to the terms hereof shall be invalid or unenforceable to any extent, the remainder of this Note and any other payments hereunder shall not be affected thereby and shall be enforceable to the greatest extent permitted by law.

F. If this Note is executed by more than one party, the obligations and liabilities of each Borrower under this Note shall be joint and several and shall be binding upon and enforceable against each Borrower and their respective successors and assigns.

G. Lender may at any time assign its rights in this Note and the Loan Documents, or any part thereof and transfer its rights in any or all of the collateral, and Lender thereafter shall be relieved from all liability with respect to such collateral. In addition, the Lender may at any time sell one or more participations in the Note. Borrower may not assign its interest in this Note, or any other agreement with Lender or any portion thereof, either voluntarily or by operation of law, without the prior written consent of Lender.

H. Time is of the essence of this Note and of each and every provision hereof.

I. This Note, together with the other Loan Documents, sets forth all of the covenants, promises, agreements, conditions and understandings of the parties relating to the subject matter of this Note, and there are no covenants, promises, agreements, conditions or understandings, either oral or written between them relating to the subject matter of this Note or other than as are set forth herein and in the other Loan Documents. This Note and the other Loan Documents supersede all prior written and oral commitments and agreements relating to the Loan. Borrower acknowledges that it is executing this Note without relying on any statements, representations or warranties, either oral or written, that are not expressly set forth herein or in the other Loan Documents.

J. This Note and each provision hereof may be modified, amended, changed, altered, waived, terminated or discharged only by a written instrument signed by the party sought to be bound by such modification, amendment, change, alteration, waiver, termination or discharge.

K. Each party to this Note and the legal counsel to each party have participated in the drafting of this Note, and accordingly the general rule of construction to the effect that any ambiguities in a contract are to be resolved against the party drafting the contract shall not be employed in the construction and interpretation of this Note.

L. Borrower certifies that the proceeds of this Loan are to be used for business purposes.

10. **Choice of Laws.** This Note shall be governed by and construed in accordance with the laws of the State of New York.

11. **JURY WAIVER.** BORROWER AND LENDER, BY ITS ACCEPTANCE HEREOF, HEREBY VOLUNTARILY, KNOWINGLY, IRREVOCABLY AND UNCONDITIONALLY WAIVE ANY RIGHT TO HAVE A JURY PARTICIPATE IN RESOLVING ANY DISPUTE (WHETHER BASED UPON CONTRACT, TORT OR OTHERWISE) BETWEEN OR AMONG BORROWER AND LENDER ARISING OUT OF OR IN ANY WAY RELATED TO THIS NOTE, ANY OTHER LOAN DOCUMENT, OR ANY RELATIONSHIP BETWEEN BORROWER AND LENDER. THIS PROVISION IS A MATERIAL INDUCEMENT TO LENDER TO PROVIDE THE LOAN DESCRIBED HEREIN AND IN THE OTHER LOAN DOCUMENTS.

12. **JURISDICTION AND VENUE.** LENDER HAS SUBSTANTIAL BUSINESS OPERATIONS IN THE STATE OF NEW YORK, WHICH STATE THE PARTIES AGREE HAS A SUBSTANTIAL RELATIONSHIP TO THE PARTIES AND TO THE UNDERLYING TRANSACTION EMBODIED HEREBY, AND, EXCEPT AS OTHERWISE PROVIDED IN SECTIONS 9-301 OR 9-307 OF THE UCC OR OTHERWISE EXPRESSLY PROVIDED IN THE LOAN DOCUMENTS, IN ALL RESPECTS, INCLUDING, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE, THIS NOTE AND THE OBLIGATIONS ARISING HEREUNDER SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE LAWS OF THE STATE OF NEW YORK APPLICABLE TO CONTRACTS MADE AND PERFORMED IN SUCH STATE (WITHOUT REGARD TO PRINCIPLES OF CONFLICTS OF LAWS) AND ANY APPLICABLE LAW OF THE UNITED STATES OF AMERICA; PROVIDED, HOWEVER, THAT AT ALL TIMES THE PROVISIONS HEREIN FOR THE CREATION, PERFECTION, AND ENFORCEMENT OF THE LIENS AND SECURITY INTERESTS CREATED PURSUANT TO THE SECURITY INSTRUMENT SHALL BE GOVERNED BY AND CONSTRUED ACCORDING TO THE LAW OF THE STATE IN WHICH THE LAND (CONSTITUTING A PORTION OF THE PROPERTY) IS LOCATED. TO THE FULLEST EXTENT PERMITTED BY LAW, BORROWER HEREBY UNCONDITIONALLY AND IRREVOCABLY WAIVES ANY CLAIM TO ASSERT THAT THE LAW OF ANY OTHER JURISDICTION GOVERNS THIS NOTE, AND, EXCEPT TO THE EXTENT SET FORTH ABOVE, THIS NOTE SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF THE STATE OF NEW YORK PURSUANT TO SECTION 5-1401 OF THE NEW YORK GENERAL OBLIGATIONS LAW.

ANY LEGAL SUIT, ACTION OR PROCEEDING AGAINST BORROWER ARISING OUT OF OR RELATING TO THIS NOTE MAY, AT LENDER'S OPTION, BE INSTITUTED IN ANY FEDERAL OR STATE COURT IN THE CITY OF NEW YORK, COUNTY AND STATE OF NEW YORK, PURSUANT TO SECTION 5-1402 OF THE NEW YORK GENERAL OBLIGATIONS LAW AND BORROWER WAIVES ANY OBJECTIONS WHICH IT MAY NOW OR HEREAFTER HAVE BASED ON VENUE AND/OR FORUM NON CONVENIENS OF ANY SUCH SUIT, ACTION OR PROCEEDING, AND BORROWER HEREBY IRREVOCABLY SUBMITS TO THE JURISDICTION OF ANY SUCH COURT IN ANY SUIT, ACTION OR PROCEEDING. BORROWER HEREBY IRREVOCABLY DESIGNATES AND APPOINTS:

Registered Agent Solutions, Inc.
99 Washington Avenue, Suite 1008,
Albany, NY 12260

AS AUTHORIZED AGENT TO ACCEPT AND ACKNOWLEDGE ON BORROWER'S BEHALF SERVICE OF ANY AND ALL PROCESS WHICH MAY BE SERVED IN ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY FEDERAL OR STATE COURT IN NEW YORK, NEW YORK, AND BORROWER AGREES THAT SERVICE OF PROCESS UPON SAID AUTHORIZED AGENT AT SAID ADDRESS AND NOTICE OF SAID SERVICE MAILED OR DELIVERED TO BORROWER IN THE MANNER PROVIDED HEREIN SHALL BE DEEMED IN EVERY RESPECT EFFECTIVE SERVICE OF PROCESS UPON BORROWER IN ANY SUCH SUIT, ACTION OR PROCEEDING IN THE STATE OF NEW YORK. BORROWER (I) SHALL GIVE PROMPT WRITTEN NOTICE TO LENDER OF ANY CHANGED ADDRESS OF ITS AUTHORIZED AGENT HEREUNDER, (II) MAY AT ANY TIME AND FROM TIME TO TIME DESIGNATE A SUBSTITUTE AUTHORIZED AGENT WITH AN OFFICE IN NEW YORK, NEW YORK (WHICH SUBSTITUTE AGENT AND OFFICE SHALL BE DESIGNATED AS THE PERSON AND ADDRESS FOR SERVICE OF PROCESS), AND (III) SHALL PROMPTLY DESIGNATE SUCH A SUBSTITUTE IF ITS AUTHORIZED AGENT CEASES TO HAVE AN OFFICE IN NEW YORK, NEW YORK OR IS DISSOLVED WITHOUT LEAVING A SUCCESSOR. NOTHING CONTAINED HEREIN SHALL AFFECT THE RIGHT OF LENDER TO SERVE PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR TO COMMENCE LEGAL PROCEEDINGS OR OTHERWISE PROCEED AGAINST **BORROWER** IN ANY OTHER JURISDICTION.

13. **Patriot Act.** Lender (for itself and not on behalf of any other party) hereby notifies the Borrower that, pursuant to the requirements of the USA PATRIOT Act, Title III of Pub. L. 107-56, signed into law October 26, 2001 ("Act"), it is required to obtain, verify and record information that identifies the Borrower, which information includes the name and address of the Borrower and other information that will allow Lender to identify the Borrower in accordance with the Act.

**[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK;
SIGNATURE PAGE FOLLOWS]**

IN WITNESS WHEREOF, Borrower has executed, sealed and delivered this Note as of the date and year first above written.

BORROWER:

HARRIMAN HOTEL, LLC,
an Idaho limited liability company

By: Waypoint, LLC,
an Idaho limited liability company
Its: Manager

By: 

Jack E. Bariteau, Jr.,
Managing Member

[Signature Page to Promissory Note]