

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:	
--------------------------------------------------------	--

(SPACE ABOVE LINE FOR RECORDER'S USE)

**SECOND AMENDMENT TO AMENDED AND RESTATED DEVELOPMENT AGREEMENT**

THIS SECOND AMENDMENT TO AMENDED AND RESTATED DEVELOPMENT AGREEMENT (“**Second Amendment**” ) is dated for reference purposes this \_\_\_\_ day of \_\_\_\_\_, 2022, by and between the CITY OF KETCHUM, IDAHO, a municipal corporation (“**Ketchum**” or “**City**”) and HARRIMAN KETCHUM HOTEL, LLC, an Idaho limited liability company (“**Owner**”, and together with the City, the “**Parties**”).

**RECITALS**

- A. Ketchum is a municipal corporation possessing all powers granted to municipalities under the applicable provisions of the Idaho Code, including the power to grant conditional use permits, approve planned unit developments, subdivide real property and the power to contract.
- B. Owner owns the real property situated in the State of Idaho, County of Blaine, commonly known as 300 River Street East, Ketchum, Idaho and more particularly described as Lot 2, Block 83 of the City of Ketchum, according to the plat thereof on file in the office of the County Recorder of Blaine County, Idaho under Instrument No. 210798 (“**Property**”).
- C. Owner’s predecessor in interest to the Property (“**Original Owner**”) entered into an Amended and Restated Development Agreement, dated October 5, 2015 (“**Development Agreement**”) and recorded in the records of Blaine County, Idaho as Instrument No. 630816, as corrected and amended by Instruments recorded as Nos. 635897 and 652281, respectively under and by virtue of which Ketchum issued a Planned Unit Development Conditional Use Permit (“**CUP**”) to develop and operate a Hotel on the Property (“**Project**”) and a building permit to construct certain Project improvements (“**Building Permit**” and together with the Development Agreement, CUP, Design Review, and Encroachment Agreement, the “**Entitlements**”).
- D. As an incident of the Project Original Owner and City entered into an agreement providing for reclamation of the Property in the event the Project did not proceed which agreement included a bond bearing number 2416447 issued in the amount of \$452,928 issued by Great American Insurance Company (“**Bond**”).

E. A dispute arose between Ketchum and the Original Owner regarding performance of obligations under the Development Agreement resulting in Ketchum declaring a breach of the Development Agreement, purporting to revoke all of the Entitlements and making a claim against the Bond. The Original Owner disputed Ketchum's claims and asserted breach of contract and tort claims against Ketchum.

F. Ketchum and the Original Owner entered into a Settlement Agreement dated June 24, 2022, and recorded in the records of Blaine County, Idaho as Instrument No. 694658 under and by virtue of which the parties settled their dispute and released all claims and Ketchum reinstated the Development Agreement and all the Entitlements, and released and terminated the Bond. The Settlement Agreement provides replacement alternatives to the Bond for securing restoration of the Property as may be required.

G. Owner has applied to change certain aspects of the Project including the square footage and layout of certain uses internal to the building, the number and size of the condominium units, addition of lock-offs to the condominium units, and adjustments to the proposed right-of-way improvements. The Project proposed, as shown in the project plans dated September 21, 2022, consists of 73 hotel rooms and 12 condominium units, 6 of which have lock-offs, and associated hotel uses as outlined in Table \_\_\_\_ of the Design Review Findings of Fact, Conclusions of Law, and Decision dated \_\_\_\_\_.

H. Ketchum received a Design Review application from Owner to amend Design Review application (File No. 08-007) reinstated per the terms of the Settlement Agreement. Said amendment was reviewed, considered, and approved by the Planning and Zoning Commission on \_\_\_\_\_.

I. Owner and Ketchum desire to amend and supplement the Development Agreement as provided in this Second Amendment to ensure the Project complies with all applicable conditions of approval contained in the Entitlements and that the Second Amendment reflects the Project as currently proposed. For absence of doubt, Owner and Ketchum acknowledge that this Second Amendment is not intended in any way to undermine, change or limit the reinstatement of the Entitlements that the Parties agreed to and approved in the Settlement Agreement.

## **AGREEMENT**

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

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

**2. Section 2 (Incorporation of Related Agreements, Approvals, Plans, Permits and other documents) is deleted and the following substituted therefore:**

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 stated 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 \_\_\_\_\_, or as amended from time to time.
- Site Plan No. \_\_\_\_\_, 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 after written notice and opportunity to cure, shall constitute a breach of this Agreement.

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

Except as provided otherwise in this Second Amendment, 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 the Development Agreement. Any amendments or additions made during the term of this Second Amendment 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 Second Amendment:

- i) plan review fees and inspection fees (to the extent not previously paid by Owner);
- 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 Second Amendment 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 in the form of an amendment to this Second Amendment.

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 showing compliance with all adopted codes referenced in Title 15 of the Ketchum Municipal Code and applicable fees (net of previously paid fees, as described below) shall be submitted to the City no later than six months after the city's final approval of the 2022 Design Review application and Development Agreement amendment application, A Certificate of Occupancy shall be issued for the Project no later than 41 months after the date of Building Permit issuance.

If a building permit application contains material deviations from the above-referenced applicable codes, agreements, approvals, plans, permits and other documents an amendment to this Second Amendment must be applied for by Owner and considered by the City Council. If such amendment is approved by City Council, one or more approvals referenced in Section 2 may be subject to amendment. A new or amended building permit may be required to reflect the changes made to the approvals in Section 2.

Ketchum acknowledges and agrees that Owner has paid the following fees and shall receive credit toward any additional fees or costs for the full amount of the fees paid.

- \$440,734 for impact fees
- \$1,072,940 for in-lieu housing fees for 27,370.91 net residential square feet
- \$ \_\_\_\_\_ for building permit fees paid for the permit issued July 6, 2016

**Section 3 (Hotel Uses and Restrictions) is deleted and the following substituted therefore:**

Owner may use the Property as a "Hotel" as defined in KMC 17.08.020 as that section existed at the time of the Development Agreement and for private residential uses. The following units and any residential owner storage, designated and assigned reserved parking spaces in the underground garage or limited common area associated with such units may be used as either private residential units by their owners, or as a "Hotel" rental unit if eligible for inclusion into the voluntary residential condominium rental program:

- 12 residential units, 6 of which have lock-offs rooms, located on the third and fourth floors of the Project as shown by the Design Review project plans filed with the City dated September 21, 2022.

Residential Condominium Rental Program: The operator and manager of the hotel contracted by the Owner of the Property ("**Hotel Operator**") shall implement and maintain a voluntary rental program for the purpose of managing, operating, and marketing of the rental of the 12 residential condominium units and 6 lock-offs rooms as shown in the project plans. Each residential unit owner may at his or her discretion place his or her residential unit in the voluntary Residential Condominium Rental Program the terms and conditions of which shall substantially conform to the provisions set forth in Exhibit B, attached hereto and incorporated herein by reference.

Prior to issuance of a Certificate of Occupancy for the Project, the Hotel Operator shall provide the City Planning Director with a redacted and confidential, to the extent reasonably necessary to protect trade secrets or proprietary information, copy of the Hotel Management Agreement between the Hotel Operator and Owner to substantiate the existence of the voluntary rental program consistent with Exhibit B and providing the Hotel Operator with the exclusive right to manage the voluntary Residential Condominium Rental program.

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 and banquet facilities, kitchen, restaurant and bar areas, outdoor seating and dining, swimming pool, fitness facilities, retail and spa/salon uses, bakery, back-of-house administrative offices and housekeeping uses, and an observatory and exterior deck on the fifth floor as further detailed in Table \_\_\_ of the Design Review Findings of Fact, Conclusions of Law, and Decision and shown on the design review project plans dated September 21, 2022. Owner agrees that this Second Amendment specifically allows only the uses set forth above and those incidental to the permitted and accessory uses and no others. Owner shall not be obligated to use the Property for all permitted or accessory uses. Owner may not substantially change or expand on the uses of the Property and improvements thereon specified in this Second Amendment without the prior written approval of City which approval shall not be unreasonably withheld, conditioned or delayed. Any substantial changes or expansions in the uses permitted by this Second Amendment without such prior written consent and formal modification of this Agreement as allowed by applicable law shall after written notice and opportunity to cure constitute a breach of this Agreement.

**Section 7 (Construction and Completion Schedule) is deleted and the following substituted therefore:**

Improvements shall be constructed and substantially completed pursuant to the following schedule:

- A Construction Mitigation Plan shall be provided with application for building permit within 6 months after final approvals of the 2022 Design Review application and Development Agreement amendment application.
- City will provide comments within 20 working days of the building permit being deemed complete and all applicable fees paid.
- Owner shall submit revised plans, addressing all comments from City, within 20 working days of receipt of comments.
- Subsequent City review comments and Owner responses/revisions will respectively occur within 10 days of the previous action.
- Prior to issuance of a building permit by City, Owner must secure an encroachment permit from ITD for any and all improvements within the Hwy 75 ITD right-of-way
- City will issue a building permit within 7 days of resolution of all City comments and payment of any remaining applicable fees.
- Construction shall commence upon the later of May 1, 2023 or 5 months after issuance of the building permit.

- A Certificate of Occupancy shall be issued for the Project no later than 41 months after the Building Permit is issued.

**Section 12 (Employee Housing) is deleted and the following substituted therefore:**

Owner agrees to provide 18 Employee Housing beds as provided by Ketchum Municipal Code and as set forth in the Revised Employee Housing Plan dated \_\_\_\_\_ approved by the City on \_\_\_\_\_ (Exhibit “C”). All required employee housing shall be available prior to any certificate of occupancy for the Property.

**Section 13 (Condominium Plat) is deleted and the following substituted therefore:**

City agrees to accept and process applications for condominium preliminary and final plat approval prior to issuance of a Certificate of Occupancy of the Project, pursuant to KMC 16.04.070, to allow for financing of the improvements and individual sale of private residential units. An application for preliminary plat approval for the Project, including a declaration of covenants, conditions and restrictions (“**Declaration**”) will be made by Owner within 60 calendar days after issuance of the building permit. An application for final plat approval will be submitted 60 or more days prior to the request for a Certificate of Occupancy for the Project. The condominium final plat must be approved by the City prior to recording. The individual Residential Condominium units and the Hotel commercial and/or common and/or limited common area units shall be use restricted through the Declaration.

**A new section to be designated as 21 (Off-site Improvements) is added as follows:**

Prior to issuance of the building permit, Owner will provide to the Planning Director a written agreement, with applicable diagrams illustrating proposed improvements, the owners of 220 S. Leadville and 400 E River Street, evidencing their acceptance of Owner’s proposal for resolving their landscaping and screening concerns as were noted and conditioned in the CUP. This submission will be timely reviewed and approved by the Planning Director for verification it resolves the CUP condition, which such approval will not be unreasonably withheld or delayed.

**A new section to be designated as 22 (Financial Capability) is added as follows:**

It is a condition of this Second Amendment that the proof of financing and financial capability to complete the project is a standing condition of the Development Agreement, and such condition will continue in force until substantial completion of construction.

**A new section to be designated as 23 (Default and Restoration) is added as follows:**

Provided Ketchum is not in default of its obligations hereunder, if Owner defaults in performance of any of its obligations hereunder prior to commencement of construction and the default continues for 60 days after receipt by Owner of Ketchum’s written notice of default, Owner agrees to reclaim the Property and restore it to the same or better condition as specified in the Reclamation Plan previously prepared, agreed to, and made a part of the Development Agreement. To secure Owner’s obligation hereunder, Owner shall obtain for Ketchum’s benefit an irrevocable stand-by letter of credit issued by a bank authorized to transact business in the state of Idaho in the amount of one hundred twenty-five percent of the estimated cost of

reclamation or shall provide some other form of security reasonably acceptable to Ketchum. The security, in whatever form, may be requested by Owner for release, partially or in full, with approval by City, not to be unreasonably withheld, if justified by substantial progress toward completion of construction in accordance with the following schedule: one half upon completion of the foundation stem walls and one half upon completion of framing.

**9. Miscellaneous Provisions.**

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

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

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

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

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

Notices to City shall be addressed as follows:

City of Ketchum  
Post Office Box 2315  
Ketchum, ID 83340  
Attn: Morgan Landers, Planning Director  
Telephone: 208.726.7801  
Email: [mlanders@ketchumidaho.org](mailto:mlanders@ketchumidaho.org)

Notices given to Owner shall be addressed as follows:

Jack E. Bariteau, Jr.  
Post Office Box 84  
Sun Valley, ID 83353  
Telephone: 650.906.5636  
Email: [jack@waypointsunvalley.com](mailto:jack@waypointsunvalley.com)

with copies to:

Harriman SV Properties, LLC  
Attn. Andy Blank, Manager  
3455 NW 54<sup>th</sup> Street  
Miami, FL 33142-33009

Alyse Blank  
745 N Alta Vista Blvd  
Los Angeles, CA 90046  
[avblank@archiveamerica.com](mailto:avblank@archiveamerica.com)

Justin C. Jones  
Justin C. Jones, LLM, P.C.  
Post Office Box 487  
182 Lopez Road, Suite C  
Lopez Island, WA 98261  
Telephone: 360. 378.4450

Lawson Laski Clark, PLLC  
675 Sun Valley Road, Suite A  
Post Office Box 3310  
Ketchum, Idaho 83340  
Attn.: Edward A. Lawson  
Telephone: 208.725.0055  
Email: [eal@lawsonlaski.com](mailto:eal@lawsonlaski.com)

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

f) Reliance by the Parties. This Second Amendment is intended by Owner to be considered by Ketchum as part of Owner's application for a modification of the existing design review approval and building permits for the Project. Owner acknowledges and intends the City to consider and rely upon this Second Amendment in its review and consideration of said applications.



g) Relationship of Parties. It is understood that the contractual relationship between Ketchum and Owner is such that neither party is the agent, partner, or joint venturer of the other party. The Parties agree at all times to cooperate with each other and exercise good faith to achieve the purposes of this Second Amendment. In the event any legal or equitable action or other proceeding is instituted by a third party or other governmental entity or official challenging the validity of any provision of Ketchum's approval and/or implementation of this Second Amendment or the Entitlements, the Parties agree to reasonably cooperate in and communicate regarding respective or joint plans defending such action or proceeding.

h) Successors and Assigns; Covenant Running With the Land. This Second Amendment shall inure to the benefit of City and Owner and their respective heirs, successors and assigns. This Second Amendment including all covenants, terms, and conditions set forth herein, shall be and is hereby declared a covenant running with the land with regard to the Property or any portion thereof, and is binding on both parties to this Agreement as well as their respective heirs, successors and assigns.

i) Recordation and Release. This Second Amendment shall be recorded with the Blaine County Recorder. City agrees to execute all appropriate documentation to cause the encumbrance of this Agreement to be terminated in the event of termination.

j) No Waiver. In the event that City or Owner, or its successors and assigns, do not strictly comply with any of the obligations and duties set forth herein, thereby causing a default under this Second Amendment, any forbearance of any kind that may be granted or allowed by Owner, City, or their successors and assigns, to the other party under this Second Amendment shall not in any manner be deemed or construed as waiving or surrendering any of the conditions or covenants of this Second Amendment with regard to any subsequent default or breach.

k) Partial Invalidity. In the event any portion of this Second Amendment, or part hereof, shall be determined by any court of competent jurisdiction to be invalid, void, or otherwise unenforceable, the remaining provisions of this Second Amendment, or parts hereof, shall remain in full force and effect and shall in no way be affected, impaired or invalidated, it being understood that such remaining provisions shall be construed in a manner most closely approximating the intention of the parties with respect to the invalid, void, or unenforceable provision or part hereof.

l) Entire Agreement. This Second Amendment and the Settlement Agreement constitute the full and complete agreement and understanding between the parties hereto. Excluding formal conditions placed upon the design review approval, subsequent plat approvals or other matters related to the public process, no representations or warranties made by either party shall be binding unless contained in this Agreement or subsequent written amendments hereto.

m) Exhibits. All exhibits referred to herein are incorporated in this Second Amendment by reference, whether or not actually attached.

n) Authority. Each of the persons executing this Second Amendment represents and warrants that he or she has the lawful authority and authorization to execute this Second

Amendment, as well as all deeds, easements, liens and other documents required hereunder, for and on behalf of the entity executing this Second Amendment.

o) Recitals. The Recitals are incorporated herein and made a part of this Second Amendment by this reference.

p) Choice of Law. This Second Amendment shall be governed by and construed in accordance with the laws of the state of Idaho, which shall be the sole jurisdiction and venue for any action which may be brought by either party with respect to this Second Amendment or the subject matter hereof.

[end of text – signatures appear on following page]

DRAFT

**SIGNATURE PAGE**

IN WITNESS WHEREOF, the parties hereto have executed this Second Amendment to the Agreement the day and year first above written.

Harriman Ketchum Hotel, LLC, an Idaho limited liability company

City of Ketchum, Idaho, a municipal corporation

By: \_\_\_\_\_  
Name:  
Title:

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

Attest: \_\_\_\_\_  
Trent Donat, City Clerk

DRAFT

**ACKNOWLEDGMENTS**

STATE OF IDAHO )  
 )ss.  
County of Blaine )

Subscribed and sworn before me on this \_\_\_\_ day of \_\_\_\_\_, 2022, before me a Notary Public in and for said State, personally appeared NEIL BRADSHAW, known to me to be the Mayor of the CITY OF KETCHUM, IDAHO and the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same on behalf of the City of Ketchum, Idaho.

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

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

STATE OF IDAHO )  
 )ss.  
County of Blaine )

Subscribed and sworn before me on this \_\_\_\_ day of \_\_\_\_\_, 2022, before me a Notary Public in and for said State, personally appeared \_\_\_\_\_ known or identified to me to be the Managing Member of HARRIMAN KETCHUM HOTEL, LLC, the limited liability company that executed the instrument or the person who executed the instrument on behalf of said limited liability company, and acknowledged to me that such limited liability company executed the same.

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

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