



City of Ketchum

November 1, 2021

Mayor Bradshaw and City Councilors
City of Ketchum
Ketchum, Idaho

Mayor Bradshaw and City Councilors:

Provide Feedback Regarding DRAFT Ground Lease for Bluebird Community Housing Project

Recommendation and Summary

Staff has been working with representatives from both GMD Development and the Ketchum Community Development Corporation (KCDC) regarding a long-term ground lease for the recently approved Bluebird Community Housing Project. Staff is not requesting formal action on the lease at this time, instead, staff would like to highlight the following policy questions for Council feedback:

1. Article 2: Length of lease
2. Article 3: Subsidized lease rate and nexus with period of affordability of units
3. Article 5.6 Ketchum local preference policy
4. Article 5.9: Treatment of commercial space
5. Article 6.1/2 Notification versus approval on sublease and refinancing
6. Article 12 Insurance coverage
7. Article 19.10 Legal proceedings

Staff would anticipate potential action during the November 18th City Council meeting.

Introduction and History

During the October 4th meeting, City Council approved the design and associated fourth floor for the Bluebird Community Housing project. Findings of Fact and Conclusions of Law were later adopted by the council. The development team is now working with the city regarding their building permit. The city will need to execute a long-term lease. The city has already formally surplus-ed old city hall and has issued an RFP to select a contractor to complete asbestos remediation, recycle building materials where possible, and then demolish the structure.

Sustainability Impact

The availability of community housing in the city limits reduces trip generation associated with local workers.

Financial Impact

The current DRAFT lease contemplates a \$10 a year annual lease payment. The reduced rent structure was a key component of local funding match and a major factor in the successful award of federal tax credits by Idaho Housing Finance Association.

Attachments:

1. DRAFT lease

GROUND LEASE

by and between

CITY OF KETCHUM
an Idaho municipal corporation
("Owner")

and

KETCHUM COMMUNITY DEVELOPMENT CORPORATION
an Idaho nonprofit corporation
("Tenant")

FOR

BLUEBIRD VILLAGE

480 East Avenue
Ketchum, Idaho 83340

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EXHIBITS

Exhibit A Legal Description of the Land

**GROUND LEASE
FOR
BLUEBIRD VILLAGE
480 EAST AVENUE
KETCHUM, IDAHO 83340**

This Ground Lease for Bluebird Village (this “**Lease**”) is made effective as of the date this Agreement is recorded in the real property records of Blaine County, Idaho (“**Effective Date**”) by and between City of Ketchum, an Idaho municipal corporation (“**Owner**”) and Ketchum Community Development Corporation, an Idaho nonprofit corporation (“**Tenant**”).

RECITALS

- A. Owner owns the parcel of land located at 480 East Avenue, Ketchum, Idaho 83353, that is legally described on Exhibit A (the “**Land**”).
- B. Tenant desires to lease the Land for redevelopment into a mixed-use project with street-level retail, parking, and affordable rental housing units in an energy-efficient building designed to blend into Ketchum’s downtown core, as graphically depicted on Exhibit B (the “**Project**” or “**Bluebird Village**”).
- C. Owner has authority, pursuant to Idaho Code § 50-1407, to manage city property and authorize the lease of any real property not otherwise needed for city purposes, upon any terms as the City Council determines may be just and equitable.
- D. Owner, by approval of this Lease, hereby finds that the Land is not otherwise needed for city purposes, that affordable community housing is an important community need, that it is in the best interest of the public to lease the Land to Tenant, and that the terms of this Lease are just and equitable.

NOW, THEREFORE, in consideration of the mutual covenants and promises of the parties, the receipt and sufficiency of which are hereby acknowledged, Owner and Tenant agree that the foregoing recitals are true and correct and incorporated herein by this reference, and further agree as follows:

ARTICLE 1 LEASE OF LAND

- 1.1 **Land Restoration.** Owner agrees to restore the Land to a vacant “bare ground” state that is ready for development of the Project thereon, including (a) abatement and removal of any Hazardous Materials (as defined in Section 16.1) thereon, if any; (b) removal of any existing structures and other improvements on the Land, including any below-grade elements thereof (such as foundations, footings and utilities; (c) restoration of the surface of the Land to a clear, level and rough graded condition (collectively, the “**Land Restoration**”). Owner agrees to use commercially reasonable efforts to complete the Land Restoration on or before _____. Owner will provide Tenant with a completion notice once the Land Restoration is fully complete and the Land is ready for development of the Project (the “**Completion Notice**”).
- 1.2 **Lease.** This Lease will be fully effective as of the Effective Date. From the Commencement Date (defined in Article 2), Owner hereby leases the Land to Tenant on the terms hereof. Tenant hereby accepts the lease of the Land from Owner on the terms hereof. Tenant warrants to Owner that Tenant accepts the Land in its as-is condition without representation or warranty from Owner,

except as expressly provided in this Lease. The term “**Leasehold Interest**” refers to Tenant’s interest in this Lease and the leasehold estate and all attendant and appurtenant rights, including without limitation, Tenant’s rights to all improvements to the Land.

ARTICLE 2 LEASE TERM

The “**Term**” of the Lease will commence on the date that Owner provides the Completion Notice to Tenant (the “**Commencement Date**”) and will expire sixty-five (65) years after the Commencement Date (the “**Expiration Date**”).

ARTICLE 3 RENT

For the entire Term, the rent due under this Lease is Ten Dollars (\$10), which Owner acknowledges to be paid by Tenant in full as of the Effective Date.

ARTICLE 4 THE PROJECT

Tenant will cause the Project to be constructed on the Land in accordance with this Lease and applicable law. Once the Project is constructed on the Land, Tenant will keep the Project in a state of good condition, maintenance and repair, with ordinary wear and tear excepted. Tenant may alter the Project in any lawful manner, provided that the Project (as altered) complies with the terms of this Lease.

ARTICLE 5 USE OF PREMISES

- 5.1 **Permitted Uses.** Owner and Tenant agree that the principal purpose of this Lease is (a) to provide Covered Units (as defined below) for lease to Qualified Tenants (as defined below) for a rent that does not exceed the rent limit (as defined in Section 5.5 below) (collectively, the “**Affordability Requirement**”); and (b) provide ground floor commercial space for retail, restaurant, office, service and similar users for the benefit of the general public. Accordingly, the Land and the Project will be used primarily for the foregoing principal purpose and other uses that may be incidental thereto or in support thereof, and for no other purposes, except as otherwise approved by Owner.
- 5.2 **Covered Units.** A “**Covered Unit**” is each residential dwelling unit in the Project that is designated as being subject to the Affordability Requirement, which will be all residential dwelling units in the Project except Employee Housing units (if any). Tenant agrees to market, lease and operate the Covered Units on the terms set forth in this Lease. Tenant may designate up to two (2) dwelling units as “**Employee Housing**” provided that the dwelling units are occupied by (or are reserved for occupancy by) a residential tenant family where at least one person of that family is a full time employee (30+ hours per week) primarily providing services with respect to and for the Project.
- 5.3 **Qualified Tenants.** As used herein, the term “residential tenant” for a Covered Unit means all persons that lease or occupy the Covered Unit as a dwelling, whether or not the persons are related. A “**Qualified Tenant**” is any residential tenant family that meets Tenant’s then-current tenant selection criteria for the Project with a family income that does exceed the applicable family income limit of the Applicable Affordable Housing Program (if any is then in effect) or, if no such Applicable Affordable Housing Program is then in effect, then in accordance with the then current applicable family income limits of the Low Income Housing Tax Credit (LIHTC) program. Nothing in this Lease will require Tenant to lease any Covered Unit to a residential tenant that does not meet Tenant’s then-current tenant selection criteria for the Project (other than limited income as permitted herein). Nothing in this Lease limits Tenant’s right to enforce the terms of any lease or other agreement with a residential tenant (or any the occupant) in the Project.

- 5.4 **Income Qualification.** Each Covered Unit must be occupied (or, if unoccupied, made available for occupancy) by a Qualified Tenant. Tenant will verify that each residential tenant meets the income qualification to be a Qualified Tenant, which verification may be by any reasonable method, including the residential tenant's production of reasonable evidence of residential tenant's income and residential tenant's self-certification that income statements are true and correct in all material respects. Once a residential tenant is verified to be a Qualifying Tenant and leases a Covered Unit, then the residential tenant will remain a Qualifying Tenant for as long as the residential tenant remains a tenant in the Project.
- 5.5 **Rent Limit.** To maintain the Covered Units as affordable, Tenant will charge monthly rent for each Covered Unit that does not exceed the applicable rent limit of the Applicable Affordable Housing Program (if any is then in effect) or, if no such Applicable Affordable Housing Program is then in effect, then in accordance with the then current applicable rent limits of Low Income Housing Tax Credit (LIHTC) program (the "**Rent Limit**"). If at any time during the Term, Tenant is permitted by the Applicable Affordable Housing Program to exceed the Rent Limit for any residential tenant, then the portion of the rent that exceeds the Rent Limit will be paid to Owner. The Commercial space in the Project is excluded from this provision for the Term of the Lease.
- 5.6 **Ketchum Preference Policy.** Except to the extent prohibited by any Applicable Affordable Housing Program (defined in Section 5.8) or other applicable law, all Covered Units must be leased in accordance with the then current preference policy or ordinance adopted by the City of Ketchum, if any (a "**Ketchum Preference Policy**").
- 5.7 **Annual Reports.** After occupancy of the Project, Tenant will provide Owner with a written report (in any form reasonably requested by Owner) by March 1 of each year that provides reasonable evidence that the Covered Units have been leased (or made available for lease) in compliance with the Affordability Requirement (as applicable) during the prior calendar year.
- 5.8 **Federal or State Affordability Programs.** Owner and Tenant intend the Affordability Requirement and this Lease to be adjusted as necessary to allow for the Project to fully take advantage of any then available federal, state or local programs for affordable housing. Affordable housing programs include, by way of example and not limitation, the Low Income Housing Tax Credit (LIHTC) program, HOME investment partnership program (HOME), Community Development Block Grants (CDBG) funding, and the HUD Housing Trust Fund (HTF) program. To the extent that any program requires an amendment or rider to this Lease, Owner agrees to promptly execute any amendment or rider that is reasonably required for the Project to fully participate in the Program. To the extent any element of the Affordability Requirement or this Lease is inconsistent with any federal, state or local state affordable housing program that applies to the Project (or any residential dwelling units therein) (an "**Applicable Affordable Housing Program**"), then the terms of the Applicable Affordable Housing Program will govern over the inconsistent terms of the Affordability Covenant or the Lease.
- 5.9 **Commercial Tenants.** Tenant may lease the Commercial Space to any party for the occupancy and use thereof (a "**Commercial Tenant**") provided that (a) the lease is subject to the terms of this Lease; (b) the term of the lease will expire prior to the Term; and (c) the uses allowed in the Commercial Space are limited to office, retail, restaurant, service and similar uses that are open to the general public. Except as restricted by this Lease, Tenant may lease the commercial space in any lawful manner and on any financial terms as Tenant deems appropriate.
- 5.10 **Prohibited Uses.** Tenant agrees that it will not permit the Land or the Project for (a) any use that constitutes a public or private nuisance in or around the Land; (b) use that violates applicable law;

(c) any industrial use; (d) any use related to the service of automobiles or other self-powered machines; (e) any dry-cleaner (or other cleaning service that uses solvents similar to dry-cleaning); (f) any 'head' shop or similar operation that sells any paraphernalia related to the use of marijuana, cannabis, tetrahydrocannabinol or other illegal substances; or (g) any use relates to the use, sale, cultivation, manufacture, distribution or marketing of any substance containing any amount of marijuana, cannabis or tetrahydrocannabinol (whether for commercial, medical, or personal purpose) if such activities are prohibited by applicable federal, state or local law (and if the any such activities become lawful under some federal, state or local applicable law, but prohibited by other federal, state or local law, then the such activities will remain prohibited).

ARTICLE 6 SUBLEASE AND ENCUMBRANCE OF LEASEHOLD ESTATE

- 6.1 **Tenant's Right to Sublease.** Tenant may, at any time, sublease all or any portion of the Leasehold Interest (each, a "**Sublease**") without Owner's consent, and in that event, the subtenant of the Sublease (each, a "**Subtenant**") will perform all of Tenant's obligations under this Lease with respect to the Leasehold Interest subleased under the Sublease (said Leasehold Interest subleased by the Sublease is hereafter called the "**Subleased Property**"). By way of example, if Tenant enters into a Sublease for portion of the Project that has Covered Units (or that will be developed into Covered Units), then the Subtenant of the Sublease will be the "Tenant" under this Lease with respect to the Sublease, and any reference herein to Tenant with respect to the Subleased Property will also mean the Subtenant. For clarity, the following leases are not Subleases under this Lease: (a) the lease of a Covered Unit to a residential tenant thereof; (b) the lease of Employee Housing to an residential tenant that is an employee; and (c) the lease of Commercial Space to a Commercial Tenant. The Sublease must specify that the Sublease is limited to the Leasehold Interest, and must have a stated expiration date which is prior to expiration of the Term. Tenant will cause a true, complete and correct copy of the original of each Sublease, together with written notice containing the name and address of the holder Subtenant, to be delivered to Owner within ten (10) days of Tenant's execution and delivery of the Sublease or Leasehold Mortgage. Subject to the terms of this Lease, a Subtenant may enforce its rights under its Sublease and take possession of the Leasehold Interest subleased under the Sublease (said Leasehold Interest subleased by the Sublease is hereafter called the "**Subleased Property**"), in any lawful way.
- 6.2 **Tenant's Right to Encumber.** Tenant may, at any time, encumber all or any portion of the Leasehold by deed of trust, mortgage or other security instrument (collectively, "**Leasehold Mortgage**"). Any Leasehold Mortgage of any part of the Leasehold Interest must be expressly subject and subordinate to the terms of this Lease. Tenant covenants to pay the indebtedness secured by any Leasehold Mortgage when the same will become due and payable, and to perform, when the performance is required, all obligations of the mortgagor thereunder. Tenant further agrees not to suffer or permit any default to occur and continue under any Leasehold Mortgage beyond any applicable cure period. The Leasehold Mortgage will specify that the indebtedness is that of Tenant only and is not the indebtedness of Owner and that the lien of the Leasehold Mortgage is limited to the Leasehold Interest. Each Leasehold Mortgage must, by its own terms, have a stated maturity date which is prior to expiration of the Term, and Tenant covenants that it will be so paid and that the Leasehold Interest will be released from the lien prior to the expiration of the Term. Tenant will cause a true, complete and correct copy of the original of each Leasehold Mortgage, together with written notice containing the name and address of the holder thereunder (the "**Mortgagee**"), to be delivered to Owner within ten (10) days of Tenant's execution and delivery of the Mortgage to the Mortgagee. Subject to the terms of this Lease, a Mortgagee may enforce its rights under its Leasehold Mortgage and succeed to the Leasehold Interest encumbered by the Leasehold Mortgage (said Leasehold Interest encumbered by the Leasehold Mortgage is hereafter called the "**Leasehold Mortgage Property**"), in any lawful way, including possession through foreclosure, assignment

and/or deed or assignment in lieu of foreclosure, and upon foreclosure of the Leasehold Mortgage or acceptance of an assignment and/or deed in lieu of foreclosure to the leasehold estate, take possession of the Leasehold Mortgage Property subject to the interests of the Project tenants.

- 6.3 **Owner's Rights.** Owner will not be required (a) to pledge its fee interest in the Land to secure any Sublease or Leasehold Mortgage; (b) to subordinate the fee interest to the rights of any Subtenant or Mortgagee; or (c) to assume in any manner any liability of Tenant under any Sublease or Leasehold Mortgage. The Sublease must specify that the Sublease is limited to the Leasehold Interest. The Sublease must, by its own terms, have a stated expiration date which is prior to expiration of the Term. Tenant will cause a true, complete and correct copy of the original of each Sublease or Leasehold Mortgage, together with written notice containing the name and post office address of the holder thereunder, to be delivered to Owner within ten (10) days of Tenant's execution and delivery of the Sublease or Leasehold Mortgage.
- 6.4 **Notices to Recognized Interest Holder.** Any Subtenant or Mortgagee may give notice to Owner of its name and address (who is sometimes referred to herein as a "**Recognized Interest Holder**") in the manner provided in this Lease, and if the notice is given, Owner will give to the Recognized Interest Holder a copy of each notice of default given pursuant to Section 14.1 by Owner to Tenant (the "**Owner Notice**") at the same time as and whenever any Owner Notice will thereafter be given by Owner to Tenant, addressed to the Recognized Interest Holder at its address last furnished to Owner (the "**Holder Notice**"). No notice by Owner to Tenant hereunder will be deemed to have been duly given unless and until a copy thereof has been served on the Recognized Interest Holder in the manner provided in this Lease.
- 6.5 **Recognized Interest Holder Provisions.** Owner agrees that it will not accept the surrender of the Land by Tenant prior to the termination of this Lease, or consent to the modification of any term of the Lease which materially alters the rights and obligations of the parties hereunder, or consent to the termination thereof by Tenant, without the prior written approval of each Recognized Interest Holder, in each instance, which approval will not be unreasonably withheld, conditioned or delayed. Owner further agrees that it will not seek to terminate the Lease or Tenant's right of possession thereunder by reason of any act or omission of Tenant until:
- (1) Owner has given to each Recognized Interest Holder a copy of the Owner Notice with respect to the Event of Default, as defined hereafter in Section 14.1, upon which the proposed termination is based;
 - (2) after the expiration of all applicable notice and grace periods set forth under the Lease with respect to the Event of Default (a "**Lease Default**"), Owner will have given written notice to each Recognized Interest Holder of the failure of Tenant to cure the lease Default. The Holder Notice will be sent by certified mail, return receipt requested or by a nationally recognized commercial overnight delivery service to the address designated in writing to Owner by each Recognized Interest Holder (or any other address as may hereinafter be designated in writing to Owner by each Recognized Interest Holder); and
 - (3) a reasonable period of time will have elapsed following the receipt of the Holder Notice, during which period any Recognized Interest Holder will have the right, but will not be obligated, to remedy the lease Default, Owner agreeing to accept any remedy by any Recognized Interest Holder as if the same had been performed by Tenant.

As used herein, a reasonable period of time will be 60 days if the lease Default can be remedied during the 60 day period; provided, however, if the lease Default cannot be remedied during the 60

day period, then the period of time as is necessary to remedy the lease Default (not to exceed one-hundred twenty (120) days), provided any Recognized Interest Holder has commenced to cure the lease Default within the 60 day period and continues to diligently prosecute the same. Any default that, by its nature, is not capable of being cured by Recognized Interest Holder will be deemed cured whether or not the default is cured, but as to Recognized Interest Holder only and not as to Tenant. Further:

- (a) Owner will accept performance by any Recognized Interest Holder of any covenant, condition or agreement on Tenant's part to be performed hereunder with the same force and effect as though performed by Tenant.
- (b) If the Recognized Interest Holder is a Mortgagee, then the time for the Recognized Interest Holder to cure any Lease Default by Tenant which reasonably requires that the Recognized Interest Holder be in possession of the Leasehold Mortgage Property to do so, will be deemed extended to include the period of time required by the Recognized Interest Holder to obtain the possession or obtain Tenant's interest in the Leasehold Mortgage Property (by foreclosure or otherwise) with due diligence; provided, however, that the Recognized Interest Holder will have delivered to Owner its written commitment to cure outstanding Lease Defaults reasonably requiring possession of the Leasehold Mortgage Property and which are capable of being cured by the Recognized Interest Holder (which commitment may be revoked by Recognized Interest Holder by written notice to Owner); and further provided, however, that during the period all other obligations of Tenant under this Lease are being duly performed to the extent that the other obligations are capable of being performed by the Recognized Interest Holder, including but not limited the payment of rent and other monetary obligations due Owner.
- (c) The provisions of this Section 6.5 are for the benefit of each Recognized Interest Holder and may be relied upon and will be enforceable by each Recognized Interest Holder and their respective successors and assigns. Neither a Recognized Interest Holder nor any other holder or owner of the indebtedness secured by a Leasehold Mortgage or otherwise will be liable upon the covenants, agreements or obligations of Tenant contained in this Lease, unless and until the Recognized Interest Holder or that holder or owner acquires the interest of Tenant, and then only to the extent set forth in this Section 6.5. Owner and Tenant agree to execute the documentation reasonably requested by a Recognized Interest Holder consistent with the terms and provisions of this Article 6.
- (d) Anything herein contained to the contrary notwithstanding, the provisions of this Section 6.5 will inure only to the benefit of all Recognized Interest Holders and their respective successors and assigns. If more than one the Mortgagee (one the Mortgagee being intended to include multiple mortgagees holding a single mortgage or deed of trust) will make written requests upon Owner for a new ground lease in accordance with the provisions of this Section, the new ground lease will be entered into pursuant to the request of the Recognized Interest Holder whose Leasehold Mortgage will be prior in lien thereto according to the records of Blaine County and thereupon the written requests for a new ground lease of each person junior in priority will be deemed to be void and of no force and effect.

6.6 Other Miscellaneous Provisions Concerning Leasehold Mortgages

- (a) At Tenant's request, Owner will execute a written agreement with a Recognized Interest Holder in which Owner agrees that it consents to the granting of the Sublease or Leasehold

Mortgage and that Owner will not disturb the tenancy or rights of the Recognized Interest Holder (its successors or assigns and any subsequent purchaser) so long as the Recognized Interest Holder (its successors or assigns and subsequent purchaser) cures any existing defaults as required herein and commits no default beyond the applicable notice and curative periods hereunder and is otherwise in full compliance with the terms of this Lease. Additionally, Owner will execute the other documentation reasonably requested to confirm the rights of a Recognized Interest Holder hereunder; provided, under no circumstances will Owner be responsible for the payment of the debt secured by the Leasehold Mortgage, and in no event will Owner's fee simple estate in the Land, including Owner's reversionary interest in the Project be subject or subordinate to any Sublease or the lien of the Leasehold Mortgage.

- (b) Owner agrees that it will promptly make the reasonable amendments or modifications of the Lease as are requested by any Recognized Interest Holder, provided that there will be no adverse change in any of the substantive rights, duties or obligations of Owner under this Lease. The preceding sentence is effective regardless of the fact that the Recognized Interest Holder may make the request prior to the execution of the applicable Sublease or Leasehold Mortgage; in that event, said amendments or modifications to the Lease will become effective as of the execution of the Sublease or Leasehold Mortgage.

ARTICLE 7 TAXES

From and after the Commencement Date and continuing thereafter during the Term, Tenant will pay or cause to be paid all real and personal property taxes, general and special assessments, and all other charges, assessments and taxes of every description, levied on or assessed against the Land, the Project and other improvements located on the Land. Tenant will make all payments directly to the appropriate charging or taxing authority before delinquency. If, however, the law expressly permits the payment of any or all of the above items in installments (whether or not interest accrues on the unpaid balance), Tenant may, at Tenant's election, utilize the permitted installment method, but will pay each installment before delinquency. All payments of taxes or assessments will be prorated for the year in which this Lease commences and for the year in which the Lease terminates. Tenant will have the right to contest or review by legal proceedings, as permitted under applicable law, any assessed valuation, real estate tax, or assessment; provided that, unless Tenant has paid the tax or assessment under protest, Tenant will furnish to Owner (i) proof reasonably satisfactory to Owner that the protest or contest may be maintained without payment under protest, and (ii) a surety bond or other security reasonably satisfactory to Owner securing the payment of the contested item or items and all interest, penalty and cost in connection therewith upon the final determination of the contest or review. Any amount already paid by Tenant and subsequently recovered by Owner or Tenant as the result of the contest or review will be for the account of Tenant.

ARTICLE 8 MAINTENANCE AND REPAIR

Tenant agrees that it will, at its own expense, maintain or cause to be maintained the entire Land, the Project and any other improvements and appurtenances thereto and every part thereof, in good order, condition and repair and in accordance with applicable law. In the event any repairs required to be made under the provisions of this Lease are not made within thirty (30) days after written notice from Owner to do so, then Owner may, at its option, enter upon the Land and repair the same, and the cost and expense of the repairs, with interest at the applicable legal rate will be due and paid by Tenant to Owner upon demand.

ARTICLE 9 MECHANICS' LIENS

Tenant will not suffer, create or permit any mechanic's liens or other liens to be filed against the fee interest of Owner in the Land or Project by reason of any work, labor, services or materials supplied or claimed to have been supplied to Tenant or anyone holding the Land or any part thereof through or under Tenant. If any mechanic's or laborer's liens or materialman's lien will be recorded against the Land or the Project, then within sixty (60) days after notice of the filing thereof, or fifteen (15) days after Tenant is served with a complaint to foreclose said lien or Owner advises Tenant in writing that Owner has been served with the complaint, whichever is earlier, Tenant will use commercially reasonable efforts cause the lien to be removed, or will transfer the lien to bond for the benefit of Owner pursuant to applicable law. If Tenant in good faith desires to contest the lien, Tenant will be privileged to do so, but in that case Tenant agrees to indemnify and save Owner harmless from all liability for damages, including attorneys' fees and costs, occasioned thereby and will, in the event of a judgment of foreclosure upon any mechanic's, laborer's or materialman's lien, cause the same to be discharged and removed prior to the execution of the judgment.

ARTICLE 10 CONDEMNATION

10.1 **Interests of Parties on Condemnation.** If the Land or any part thereof will be taken for public purpose by condemnation as a result of any action or proceeding in eminent domain, or will be transferred in lieu of condemnation to any authority entitled to exercise the power of eminent domain, the interests of Owner, Tenant and any Recognized Interest Holder in the award or consideration for the transfer, and the allocation of the award and the other effect of the taking or transfer upon this Lease, will be as provided by this Article 10.

10.2 **Total Taking.** If the entire Land is taken, then (a) the right of Tenant and each Subtenant to possess the Land under this Lease will terminate on the date title to the Land vests in the condemning authority; and (b) this Lease will terminate after Tenant and each Recognized Interest Holder has received all amounts that it may be entitled to receive with respect to the taking.

10.3 **Partial Taking.**

(a) In the event of taking or transfer of only a part of the Land, leaving the remainder of the Land in a location, form, shape or reduced size as to be not effectively and practicably usable in the good faith opinion of Tenant (and each Subtenant, if any) for the operation thereon of the Project, taking into consideration the effect, if any, of the taking on the availability of parking proximately located to the Project, and if Owner agrees with the determination of the Tenant (and each Subtenant, if any), which consent will not be unreasonably withheld, this Lease and all right, title and interest thereunder may be terminated by Tenant (and each Subtenant, if any) giving, within sixty (60) days of the occurrence of the event, thirty (30) days' notice to Owner of Tenant's (and each Subtenant's, if any) election to terminate.

(b) In the event of a taking of only a part of the Land leaving the remainder of the Land in a location, form, shape or reduced size as to be used effectively and practicably in the good faith opinion of Tenant (and each Subtenant, if any) for the purpose of operation of the Project therein, this Lease will terminate only as to the portion of the Land so taken or transferred as of the date title to the portion vests in the condemning authority, and will continue in full force and effect as to the portion of the Land not so taken or transferred. If title and possession of a portion of the Land is taken under the power of eminent domain, and the Lease continues as to the portion remaining, all compensation and damages ("**Compensation**") payable to Tenant (or the applicable Subtenant, if any) by reason of

any improvements so taken will be available to be used, to the extent reasonably needed, by Tenant (or the applicable Subtenant, if any) in replacing any improvements so taken with improvements of the same type as the remaining portion of the Land.

- 10.4 **Allocation of Award.** Any Compensation awarded or payable because of the taking of all or any portion of the Land by eminent domain will be awarded in accordance with the values of the respective interests in the Land and all improvements thereon immediately prior to the taking. The value of Owner's interest in the Land immediately prior to a taking will include the then value of its interest in the Land prior to the Expiration Date of this Lease, together with the value of its reversionary interest in the Land and Project after the Expiration Date. The value of Tenant's interest in the Land immediately prior to a taking will include the then value of its interest in the Land and Project for the remainder of the Term. The values will be those determined in the proceeding relating to the taking or, if no separate determination of the values is made in the proceeding, those determined by agreement between Owner, Tenant and any affected Recognized Interest Holders. If the agreement cannot be reached, the values will be determined by an appraiser or appraisers appointed in the manner by agreement of the parties to the dispute, or if no agreement is reached within a reasonable period of time, then an appraiser or appraisers appointed by an arbitrator appointed under Idaho Uniform Arbitration Act. In the event of separate awards, then each party may retain the separate awards made to each and any of them. To the extent any outstanding amount under any Leasehold Mortgagee exists, then the outstanding balance of the Leasehold Mortgage will be satisfied first from Tenant's award or share of the award, and if the share is insufficient, then Tenant will pay the balance from its own resources.
- 10.5 **Voluntary Conveyance.** Any voluntary conveyance by Owner under threat of a taking under the power of eminent domain in lieu of formal proceedings will be deemed a taking within the meaning of this Article 10.

ARTICLE 11 ASSIGNMENT

Tenant may not assign, sublease, convey or transfer this Lease or the Leasehold Estate, other than as expressly permitted in Article 5 and Article 6 of this Lease, without the prior written consent of Owner, which Owner will not unreasonably withhold. No assignment, sublease, conveyance or transfer of this Lease or the Leasehold Estate will release Tenant from this Lease, and Tenant will remain fully liable for all obligations binding upon Tenant under this Lease. In the event of an approved sale or transfer of Tenant's interest in this Lease, any approved assignee will be required to assume in writing the "Tenant" obligations under this Lease.

ARTICLE 12 INSURANCE AND INDEMNIFICATION

- 12.1 **Comprehensive Liability Insurance.** Tenant will, at its cost and expense, at all times during the Term, maintain in force, for the joint benefit of Owner and Tenant, a commercial general liability insurance policy or its equivalent issued by a carrier licensed to do business the State of Idaho with a Best's Insurance Guide Rating of A+, by the terms of which Owner and Tenant, are named as insureds or additional insureds, as the case may be, and are indemnified against liability for damage or injury to the Land or person (including death) of any person entering upon or using the Land or the Project. The insurance policy or policies will be maintained on the minimum basis of \$1,000,000.00 for damage to property and for bodily injury or death as to any person, and \$1,000,000.00 as to any one accident. Owner reserves the right to require reasonable increases in the limits of coverage from time to time during the Term; and the requested increase will be deemed reasonable if consistent with commercially reasonable practices for similar projects in the same geographic area. The insurance policy or policies will be stated to be primary and noncontributing

with any insurance which may be carried by Owner. Evidence of said insurance will be delivered to Owner on the Commencement Date, and evidence of renewal will be delivered to Owner not less than fifteen (15) days prior to the renewal date of any insurance policies during the Term. In the event Tenant fails to timely pay any premium when due, Owner will be authorized, but not obligated, to do so, and may charge all costs and expenses thereof, including the premium and interest at the maximum rate allowed by law, to Tenant, to be paid by Tenant.

- 12.2 **Fire and Extended Coverage Property Insurance.** Tenant will, at its cost and expense and at all times during the Term, maintain in force, for the joint benefit of Owner, Tenant and all Recognized Interest Holders, a policy of insurance against loss or damage to the Project by fire and lightning, and the other perils as are covered under a “Cause of Loss-Special Form” policy or equivalent together with the broadest form of the “extended coverage” or “all risk” endorsements, or equivalent, available in Idaho including damage by wind storm, hurricane, explosion, smoke, sprinkler leakage, vandalism, malicious mischief and any other risks as are normally covered by the endorsements. Owner will be named as an additional insured on the policy of insurance, and any Recognized Interest Holder will be named as required by the Sublease or Leasehold Mortgage, and subject to terms of the Sublease or Leasehold Mortgage any insurance proceeds will be applied in the manner as set forth in this Lease. The insurance will be carried and maintained to the extent of full (actual) replacement cost of the Project; provided however, that during the period of construction, Tenant will provide or cause to be provided in lieu thereof builders’ risk or similar type of insurance to the full replacement costs thereof. The insurance policy or policies will be stated to be primary and noncontributing with any insurance which may be carried by Owner. Evidence of said insurance will be delivered to Owner on the Commencement Date. Evidence of renewal will be delivered to Owner not less than fifteen (15) days prior to the renewal date of any insurance policies during the Term. In the event Tenant fails to timely pay any premium when due, Owner will be authorized, but not obligated, to do so, and may charge all costs and expenses thereof, including the premium and interest at Owner’s Interest Rate, to Tenant, to be paid by Tenant as additional rent hereunder. Owner will have no obligation to obtain insurance for the benefit of Tenant.
- 12.3 **Evidence of Insurance.** Evidence of the required liability insurance will be delivered to Owner on the Commencement Date. Evidence of the required property insurance will be delivered to Owner prior to construction of the Project. Evidence of renewal will be delivered to Owner not less than fifteen (15) days prior to the renewal date of any insurance policies during the Term. In the event Tenant fails to timely pay any premium when due, Owner will be authorized, but not obligated, to do so, and may charge all costs and expenses thereof, including the premium and interest at Owner’s Interest Rate, to Tenant, to be paid by Tenant as additional rent hereunder. Owner will have no obligation to obtain insurance for the benefit of Tenant.
- 12.4 **Waiver of Subrogation.** Owner and Tenant and all parties claiming under them mutually release and discharge each other from all claims and liabilities arising from or caused by any casualty or hazard covered or required hereunder to be covered in whole or in part by the casualty and liability insurance to be carried on the Project, the Land or in connection with any improvements on or activities conducted on the Land and the Project, and waive any right of subrogation which might otherwise exist in or accrue to any person on account thereof, and evidence the waiver by endorsement to the required insurance policies, provided that the release will not operate in any case where the effect is to invalidate or substantially increase the cost of the insurance coverage (provided that in the case of increased cost, the other party will have the right, within thirty (30) days following written notice, to pay the increased cost, thereby keeping the release and waiver in full force and effect).

- 12.5 **Indemnification.** Tenant (and each Subtenant, but only with respect to the Subleased Property) hereby agrees to indemnify, defend and save Owner harmless from and against any third-party claims, losses, damages and expense (including attorneys' fees and costs through litigation and all appeals) in connection with the loss of life, personal injury and damage to property caused by (a) any occurrence in, upon, at or about the Land or Project; (b) the occupancy, use, construction upon and maintenance of the Land and Project by Tenant (or the applicable Subtenant), and its guests and invitees, and any party acting by, through or under any of them; and (c) any wrongful or negligent act or failure to act by Tenant (or the applicable Subtenant) or its employees, agents or contractors. Nothing contained herein will be construed to make Tenant or any Subtenant liable for any injury or loss caused by the negligence, gross negligence or willful misconduct of Owner or any agent or employee of Owner.

ARTICLE 13 DAMAGE AND DESTRUCTION

- 13.1 **Tenant's Duty to Restore Property.** If any buildings or improvements now or hereafter on the Land are damaged and/or destroyed in whole or in part by fire, theft, the elements, or any other cause, this Lease will continue in full force and effect, and Tenant, at its sole cost and expense, will have the right to repair and restore the damaged or destroyed Project in any matter permitted by this Lease. The work of repair and restoration will be commenced by Tenant as soon as reasonably possible, with due consideration given to, among other things, clearing of damaged portions of the Land and site preparation, adjustment of insurance claims, redesign, rebidding and repermitting, obtaining a new loan or loans for construction or repair. Tenant will proceed diligently to commence repairs and restoration. Once construction has commenced, Tenant will proceed diligently thereafter to complete the construction or repair, subject to reasonable delays due to force majeure events or events beyond the reasonable control of Tenant. Tenant will not be responsible for delays caused by force majeure events or for reasons beyond the reasonable control of Tenant.
- 13.2 **Option to Terminate Lease for Destruction.** Notwithstanding Section 13.1 above, if the Project is damaged or destroyed by fire, theft or any other casualty, then Tenant will have the option of terminating this Lease by at least sixty (60) days' prior written notice of Tenant's intent to do so. If Tenant elects to terminate this Lease, then Tenant will also be required to remove, at Tenant's own expense, all debris and remains of the damaged improvements from the Land.

ARTICLE 14 DEFAULTS AND REMEDIES

- 14.1 **Defaults.** Each of the following events will constitute an "Event of Default":
- 14.1.1 Tenant's abandonment of the Land, or the improvements now or hereafter constructed thereon, where the abandonment continues for a period of sixty (60) days after notice thereof by Owner to Tenant;
- 14.1.2 Any violation of the Affordability Requirements or use restrictions set forth in this Lease; provided, however, as to any violations of the use restrictions by any Subtenant, tenant or occupant of the Project, then Tenant's only obligation is to take reasonable action to stop the violation by the Subtenant, tenant or occupant promptly after receipt of written notice from Owner specifying the violation of the use restriction. The reasonable action may include legal or equitable actions to enforce the use restrictions against the Subtenant, tenant or occupant; provided, however, Tenant will not be obligated to pursue the termination of any Sublease or the eviction of the Qualified Tenant.

- 14.1.3 Tenant's failure to pay any monetary obligations of any nature whatsoever required to be paid by Tenant under this Lease when due and payable;
- 14.1.4 Tenant's failure to observe or perform any other material covenants, conditions or agreements under this Lease.
- 14.2 **Notice and Right to Cure.** As to any Event of Default occurring under this Lease, Tenant will have thirty (30) days after written notice is given by Owner specifying the nature of the default to cure the default; provided, however, that if after exercise of due diligence and its best efforts to cure the non-monetary default Tenant is unable to do so within the thirty (30) day period, then the curing period will be extended for the reasonable time as may be reasonably approved by Owner for curing the default, so long as Tenant continues to diligently prosecute to completion the curing of the default.
- 14.3 **Remedies.** If any default by Tenant will continue uncured upon expiration of the applicable curing period, then subject to the rights of any Mortgagee or Subtenant under this Lease, Owner may, at Owner's election, terminate this Lease by notice to Tenant. All Tenant's rights in the Land, the Project and in all improvements will terminate upon termination of this Lease. Promptly after any termination, Tenant will surrender and vacate the Land and the Project, and Owner may re-enter and take possession of the Land and the Project, subject to (a) any Subleases where the Subtenant is not in default beyond any applicable cure period; (b) any leases authorized pursuant to Article 5, all of which will remain in full force and effect; and (c) any federal or state affordability programs to which the Project (or individual residential units therein) may be bound. Termination under this paragraph will not relieve Tenant from the payment of any sum then due to Owner, or from any claim for damages previously accrued, or then accruing, against Tenant. Owner will utilize commercially reasonable efforts to mitigate damages in case an Event of Default will occur.

ARTICLE 15 SURRENDER AND REMOVAL

Upon any termination of the Term, Tenant will surrender possession of the Land and all improvements constructed and installed thereon. Tenant may remove, or cause to be removed, all personal property, trade fixtures and equipment of Tenant, other than permanent fixtures, from the Land within thirty (30) days after the date of any termination of this Lease; thereafter all personal property, trade fixtures and equipment not removed will belong to Owner without the payment of any consideration.

ARTICLE 16 HAZARDOUS MATERIALS

- 16.1 **Definition. "Hazardous Materials"** means any material, substance or waste that is or has the characteristic of being hazardous, toxic, ignitable, reactive or corrosive, including, without limitation, petroleum, PCBs, asbestos, materials known to cause cancer or reproductive problems and those materials, substances and/or wastes, including infectious waste, medical waste, and potentially infectious biomedical waste, which are or later become regulated by any local governmental authority, the State of Idaho or the United States Government, including substances defined as "hazardous substances," "hazardous materials," "toxic substances" or "hazardous wastes" in the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601, et seq.; the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, et seq.; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, et seq.; all corresponding and related State of Idaho and local statutes, ordinances and regulations, including without limitation any dealing with underground storage tanks; and in any other environmental law,

regulation or ordinance now existing or hereinafter enacted (collectively, “**Hazardous Materials Laws**”).

- 16.2 **Use of Property by Tenant.** Tenant (and each Subtenant, but only with respect to the Subleased Property) hereby agrees that it and its employees, representatives, agents, contractors, subcontractors, tenants, subtenants and any other occupants of the Land (for purpose of this Section 16.2, referred to collectively herein as “**Occupants**”) will not use, generate, manufacture, process, store or dispose of, on, under or about the Land except in compliance with applicable Hazardous Materials Laws.
- 16.3 **Indemnification by Tenant.** Tenant (and each Subtenant, but only with respect to its Subleased Property) will indemnify, defend and hold Owner harmless from any claims, damages, losses or expenses (including reasonable attorneys’ fees and costs through litigation and all appeals) resulting from death of or injury to any person, or damage to any property, or government mandated remediation plans, arising from by (a) Tenant’s (or Subtenant’s, as applicable) failure to comply with any Hazardous Materials Laws with respect to the Land, or (b) a breach of any covenant, warranty or representation of Tenant (or Subtenant, as applicable) under this Article 16. The foregoing indemnification by Tenant and each Subtenant will not extend to Hazardous Materials on, in or about the Land prior to prior to the Commencement Date.

ARTICLE 17 REPRESENTATIONS AND WARRANTIES

- 17.1 **By Owner.** Owner makes the following representations and warranties to Tenant: (a) Owner is duly organized and existing under the laws of its state of origin and has all requisite legal power and authority to execute, deliver and perform this Lease; (b) the execution, delivery and performance by Owner of this Lease have been duly authorized by all requisite entity action of Owner and there is no provision in its charter documents requiring further consent by any other person or entity; (c) this Lease constitutes the legal, valid and binding obligation of Owner, enforceable against Owner in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, reorganization, moratorium or similar laws affecting or limiting creditors’ rights generally or by equitable principles relating to enforceability; (d) Owner has fee title to the Land and there are no liens or encumbrances against the Land except as permitted under this Lease; and (e) Owner will not during the Term of the Lease cause or suffer any lien, claim or encumbrances to exist against the Land by or through Owner, except as permitted by this Lease; (f) as long as Tenant is not in material default of this Lease (beyond any applicable cure period), Tenant will quietly hold, occupy and enjoy the Land during the Term without hindrance of Owner or any person claiming by, through or under Owner; and (g) Owner will cooperate with Tenant as reasonably necessary for Tenant to enjoy the benefits of this Lease, including executing any applications, consents or other instruments that are required (by applicable law or otherwise) to be executed by the fee simple owner of the Land, including any entitlement, subdivision or development applications.
- 17.2 **By Tenant.** Tenant makes the following representations and warranties to Owner: (a) Tenant is duly organized and existing under the laws of its state of origin and has all requisite legal power and authority to execute, deliver and perform this Lease; (b) the execution, delivery and performance by Tenant of this Lease have been duly authorized by all requisite entity action of Tenant and there is no provision in its charter documents requiring further consent by any other person or entity; (c) this Lease constitutes the legal, valid and binding obligation of Tenant, enforceable against Tenant in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, reorganization, moratorium or similar laws affecting or limiting creditors’ rights generally or by equitable principles relating to enforceability; (d) Tenant has

inspected the Land and accepts the Land in its as-is condition, except for Owner's representations, warranties and covenants under this Lease; and (e) Tenant will not during the Term of the Lease cause or suffer any lien, claim or encumbrances to exist against the Land by or through Tenant, except as permitted by this Lease.

ARTICLE 18 NOTICES

Unless otherwise specifically required by this Lease or applicable law, any notices, approvals, consents or other communications required or permitted by this Lease or by applicable law to be served on, given to, or delivered to any party to this Lease must be in writing and will be deemed duly served, given, delivered and received only when actually received by the receiving party (or delivery is refused by the receiving party). Delivery may be by any reasonable method. Each party agrees to give notice to the other parties of its address and any change of its address for the purpose of this section by giving written notice of the change to the other party in the manner herein provided. If any party fails to provide a current address for notices, then the other parties may serve notices to the then current address for the other party (or its registered agent) in the records of the Idaho Secretary of State or the records of the Blaine County Assessor. For so long as the City of Ketchum remains the Owner, then City of Ketchum may update its notice address by public notice.

ARTICLE 19 GENERAL PROVISIONS

- 19.1 **Survival of Indemnities.** All representations, warranties and indemnities of Owner, Tenant and each Subtenant under this Lease will survive the expiration or sooner termination of this Lease.
- 19.2 **Unavoidable Delay; Force Majeure.** If either party will be delayed or prevented from the performance of any act required by this Lease by reason of acts of God, strikes, lockouts, labor troubles, pandemics, epidemics, inability to procure materials, restrictive governmental laws, or regulations or other cause, without fault and beyond the reasonable control of the party obligated, performance of the act will be excused for the period of the delay; and the period for the performance of any act will be extended for a period equivalent to the period of the delay.
- 19.3 **Interpretation.** Time is of the essence of any obligation where time is a factor. The use herein of any gender includes all other genders, and the use of the singular number includes the plural and vice-versa, whenever the context so requires. Captions in this Lease are inserted for convenience of reference only and do not define, describe or limit the scope or the intent of this Lease or any of the terms hereof. The word "including" will be construed without limitation, as if the words "but not limited to" appear immediately after. The words shall, will and must have the same meaning, which is mandatory. This Lease will not be construed in favor of any party hereto, but to be construed fairly and broadly toward effectuating the purposes hereof. If any term, provision, covenant or condition of this Lease is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of the provisions will remain in full force and effect and will in no way be affected, impaired or invalidated. For purposes of this Lease, the parties to this Lease includes Owner and Tenant, and if applicable, any Subtenant in possession of a Subleased Property, but only with respect to the Subleased Property.
- 19.4 **Entire Agreement.** This Lease contains the entire agreement between the parties regarding the subject matter hereof. Any other oral or written representations, agreements, understandings and/or statements will be of no force and effect.
- 19.5 **Waiver; Amendment.** No modification, waiver, amendment, discharge or change of this Lease will be valid unless the same is in writing and signed by the party against which the enforcement

of the modification, waiver, amendment, discharge or change is or may be sought. Owner and Tenant agree that they will not amend this Lease with respect to any Subleased Property without the prior written consent of the Subtenant thereof.

- 19.6 **Attorney's Fees.** If either party retains an attorney to enforce or interpret this Lease, the prevailing party will be entitled to recover reasonable attorneys' fees and litigation costs incurred through litigation, bankruptcy proceedings and all appeals.
- 19.7 **Governing Law.** This Lease will be construed and enforced in accordance with the laws of the State of Idaho.
- 19.8 **Binding Effect.** This Lease will bind, and inure to the benefit of, the parties and their respective successors and permitted assigns.
- 19.9 **Estoppel Certificates.** Either party will execute, acknowledge and deliver to the other party, within twenty (20) days after the request by the other party, a statement in writing certifying, if it is the case, that this Lease is unmodified and in full force and effect (or if there have been modifications that the same is in full force and effect as modified); the date of commencement of this Lease; the dates for which the rent and other charges have been paid; any alleged defaults and claims against the other party; and providing any other information as may be reasonably requested.
- 19.10 **Waiver of Trial by Jury.** EXCEPT AS OTHERWISE PROVIDED BY LAW, OWNER AND TENANT MUTUALLY, EXPRESSLY, IRREVOCABLY AND UNCONDITIONALLY WAIVE TRIAL BY JURY FOR ANY PROCEEDINGS ARISING OUT OF OR IN CONNECTION WITH THIS LEASE, OR ANY CONDUCT OR COURSE OF DEALING OF THE PARTIES, STATEMENTS (WHETHER ORAL OR WRITTEN) OR ACTIONS OF ANY PERSONS. THIS WAIVER IS A MATERIAL INDUCEMENT TO OWNER TO ACCEPT DELIVERY OF THIS LEASE.

[end of text; counterpart signature pages follows]

COUNTERPART SIGNATURE PAGE

DATED effective as of the Effective Date.

Owner: CITY OF KETCHUM, an Idaho municipal corporation

By: _____
Neil Bradshaw, Mayor

Attest:

Tara Fenwick, Ketchum City Clerk

STATE OF IDAHO)
) ss.
County of Blaine)

This record was signed before me on _____ by Neil Bradshaw as Mayor,
and by Tara Fenwick as City Clerk of the City of Ketchum.

Notary Signature

DATED effective as of the Effective Date.

By: _____
Name: _____
Title: _____

Notary Signature

EXHIBIT A
LEGAL DESCRIPTION OF THE LAND

EXHIBIT B

CONCEPT PLANS FOR PROJECT