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December 11, 2019

To: Mayor and Council, City of Ketchum
Delivered via 12/16/19 Council Packet

From: Matthew Johnson, City Attorney

Re: Trail Creek Fund, LLC, to Harriman Hotel, LLC, Assignment

Background:

The City Council held a special meeting on December 9, 2019, at which a determination was made upon whether Trail Creek Fund, LLC, had cured a noticed default of its Development Agreement by providing sufficient proof of financing. The Council determined in a 3-1 vote that such breach had been cured.

As part of the public comments and Council deliberation, a concern was raised about the submitted financing documents referencing Harriman Hotel, LLC, rather than Trail Creek Fund, LLC. It was represented to the Council that this was due to an assignment of all of Trail Creek Fund's interests in the Project to Harriman Hotel, LLC. This representation was made both verbally and by written letter dated December 7, 2019, from Ed Lawson, attorney for the Developer. During deliberations, there was assurance from Mr. Lawson that appropriate assignment documents would further be provided as "housekeeping" to further clarify and finalize this assignment.

Mr. Lawson has provided the attached Assignment Agreement. The Agreement has been reviewed by staff and legal counsel for the City. The Agreement clearly indicates the appropriate assignment and acceptance of all development interests from Trail Creek Fund to Harriman Hotel. While the Agreement is between Trail Creek Fund (Assignor) and Harriman Hotel (Assignee), the Agreement also does include a signatory spot at the end for the City to designate its review and consent to the assignment.

Recommended Motion: "I move that the City accept the Assignment Agreement 20441 as presented and authorize the Mayor to sign designating the City's consent to such after execution by Assignor and Assignee."

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

Lawson Laski Clark, PLLC
Post Office Box 3310
Ketchum, ID 83340
Attn: Edward A. Lawson

(SPACE ABOVE LINE FOR RECORDER'S USE)

ASSIGNMENT AGREEMENT 20441

THIS ASSIGNMENT AGREEMENT, (this "Agreement") is made and entered into effective as of December 5, 2019 (the "Effective Date"), by and between Harriman Hotel, LLC, an Idaho limited liability company ("Assignee"), and Trail Creek Fund, LLC, an Idaho limited liability company ("Assignor").

RECITALS

WHEREAS, Assignee and Assignor have entered into a Contribution Agreement with Jack E. Bariteau, Jr. as trustee of the Jack E. Bariteau, Jr. Separate Property Trust (the "Contribution Agreement"), providing for, among other things, the conveyance by Assignor to Assignee of the real property ("Property") described as 300 E. River Street, Lot 2, Block 87, Ketchum, Idaho.

WHEREAS, Assignor has acquired or may have used or acquired certain intangible rights ("Intangibles") in connection with the Property, including but not limited to rights related to trade names, easements, licenses, permits, air rights, certificates of occupancy, rights of way, agreements pertaining to utilities, water and mineral rights, express and implied warranties, rights relating to construction of improvements on the Property including but not limited to: (i) the Planned Unit Development Permit Conditional Use Permit ("CUP") to develop and operate a Hotel ("Project") on the Property; (ii) the building permits to construct the Project and related improvements ("Building Permit"); and that certain Amended and Restated Development Agreement between Assignor and the City of Ketchum, dated October 5, 2015 and recorded in the records of Blaine County, Idaho as Instrument No. 630816 and the 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, as amended by the First Amendment to Amended and Restated Development Agreement dated June 4, 2018 and recorded on June 5, 2018 as Instrument NO. 652281, records of Blaine County, Idaho ("Development Agreement") describing and defining the Project.

WHEREAS, Assignor desires to assign to Assignee all of his rights, titles, and interest in the Intangibles and Assignee is willing to accept such an assignment.

NOW, THEREFORE, in consideration of the mutual promises, representations, warranties and covenants set forth herein, the parties hereto hereby agree as follows:

1. Agreement of Intangibles. On the Effective Date, Assignor hereby conveys, transfers and assigns to the Assignee, its successors and assigns, all of Assignor's title, rights and interests in and to the following Intangibles, to the extent that same are assignable: Assignee hereby accepts the assignment and assumes all of the obligations associated with the Intangibles arising from and after the date hereof.

- (A) all plans, specifications, surveys, architectural renderings and drawings, soil test reports, other reports or examinations of the Property, architectural contracts, engineering contracts, construction contracts, subcontracts and contracts with material suppliers;
- (B) all service contracts, maintenance contracts, management agreements, warranties, guaranties and the right to use all names now or hereafter used by Assignor in connection with the Property;
- (C) the CUP, Building Permit and Development Agreement, and other all permits, certificates, licenses, approvals, contracts, agreements, entitlements and authorizations, however characterized, issued or in any way furnished for the acquisition, construction, development, operation, use and occupancy of the Property, including without limitation, certificates of occupancy;
- (D) all declarations of covenants or restrictions, regulatory agreements, redevelopment agreements, condominium declarations, homeowners' declarations or other documents including, without limitation, any articles of incorporation or bylaws of any association or corporation formed pursuant to a condominium or homeowners' declaration now or hereafter regulating or affecting the use of any portion of the Property ("Property Regulation Documents");
- (E) all soil borings and architectural, engineering, subdivision, access and other tests, studies or reports made or to be made with respect to the Property;
- (F) all market analyses, appraisals and development and economic feasibility studies made or to be made with respect to the Property;
- (G) all environmental reports, studies and letters related to the Property heretofore or hereafter received or obtained by or on behalf of Assignor; and
- (H) all claims, demands, judgments, insurance proceeds, rights of action, awards or damages, compensation and settlements resulting from the taking of all or any part of the Property under the power of eminent domain or for any damage (whether caused by such taking or casualty or otherwise) to all or any part of the Property.

which Assignor has, may have, or may subsequently directly or indirectly enter into, obtain or acquire in connection with the acquisition, improvement, ownership, operation, leasing or maintenance of the Property.

2. **Acceptance of Assignment.** Assignee agrees to and does hereby accept the assignment and conveyance of the Intangibles and agrees to perform all obligations of Assignor arising under or by virtue of the Intangibles, including but not limited to the obligations of Assignor under the City of Ketchum Security Agreement recorded on December 6, 2018 as Instrument No. 656999, records of Blaine County, Idaho.

3. **Successor Developer Status.** Assignor covenants and agrees that Assignee shall have the right to succeed to all of the right, title and interest of Assignor, as “*Declarant*” or “*Developer*” or under any other title, under any or all of the Property Regulation Documents by recording a certificate in the official records of the county in which the Property is located stating that Lender or such subsequent purchaser of the Property has so elected, and such certificate shall conclusively establish that Lender or such subsequent purchaser of the Property, and any person claiming by or through Lender, is the “*Declarant*” or “*Developer*” or such other title, as applicable. Such certificate shall not require the consent, approval or joinder of Assignor, but Assignor hereby agrees to join in, consent to and approve such certificate upon written request.

4. **Waiver and Indemnity.** Assignor hereby agrees that no liability shall be asserted or enforced by Assignor against Assignee in its exercise of the powers and rights herein granted, all such liability being hereby expressly waived and released by Assignor. Assignor hereby agrees to indemnify, defend and hold Assignee harmless from and against any and all liability, expense, cost or damage which Assignee may incur by reason of any act or omission of Assignor under any of the documents, instruments, or agreements constituting the Intangibles.

5. **Notices.** All notices and demands which are required or permitted to be given or served hereunder shall be deemed sufficiently served when delivered or mailed in the manner and to the persons described in the Development Agreement.

6. **Counterparts; Electronic Signatures.** This Agreement may be executed in any number of counterparts, all of which shall be taken to be one and the same instrument, for the same effect as if all parties hereto had signed the same signature page. Receipt of an executed signature page to this Agreement by electronic transmission shall constitute effective delivery thereof.

7. **Miscellaneous.** This Agreement and all rights and liabilities hereunder and in and to any and all Intangibles shall inure to the benefit of Assignee and its successors and assigns and shall be binding upon Assignor and its successors and permitted assigns. The validity, enforcement and interpretation of this Agreement shall for all purposes be governed by and construed in accordance with the laws of the State of Idaho. All provisions of this Agreement shall be deemed valid and enforceable to the extent permitted by law. Any provision or provisions of this Agreement which are held unenforceable, invalid or contrary to law by a court of competent jurisdiction, shall be of no force or effect, and in such event each and all of the remaining provisions of this Agreement shall subsist and remain and be fully effective according to the terms of this Agreement as though such invalid, unenforceable or unlawful provision or

provision had not been included in this Agreement. Time is of the essence of this Agreement, the headings of sections in this Agreement are for convenience only and shall not be construed in any way to limit or define the content, scope or intent of the provisions hereof.

IN WITNESS WHEREOF, the parties have each signed this Agreement as of the date first above written.

Assignor: Trail Creek Fund, LLC, an Idaho limited liability company

By: _____
Jack E. Bariteau, Jr. as Trustee of the Jack E. Bariteau, Jr. Separate Property Trust, as Managing Member

Assignee: Harriman Hotel, LLC, an Idaho limited liability company

By: Waypoint, LLC, an Idaho limited liability company, its Managing Member

By: _____
Jack E. Bariteau, Jr. its Managing Member

CONSENT OF CITY OF KETCHUM

The City of Ketchum, Idaho consents to the terms of the Agreement notwithstanding any contrary terms contained in the Development Agreement.

City of Ketchum, Idaho, a municipal corporation

By: _____
Neil Bradshaw, Mayor

Attest:

Robyn Crotty, City Clerk