



## City of Ketchum

December 2, 2019

Mayor Bradshaw and City Councilors  
City of Ketchum  
Ketchum, Idaho

Mayor Bradshaw and City Councilors:

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

### Recommendation

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

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

### Introduction and History

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

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

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

The Owner has informed the City that the loan will be recorded and the default will be cured by noon on December 2, 2019. Staff will be prepared to report to the Council on the status at the December 2, 2019 City Council meeting. At that time the Council will determine what action to take.

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

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

Attachments:

- A October 9, 2019 Notice of Default
- B October 2, 2019 Notice of Default
- C June 2018 Amendment
- D October 2015 Amended and Restated Development Agreement
- E Link to Public Comment Received: <https://ketchumidaho.org/citycouncil/page/trail-creek-fund-llc>

# WHITE PETERSON

## ATTORNEYS AT LAW

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

WHITE, PETERSON, GIGRAY & NICHOLS, P.A.  
CANYON PARK AT THE IDAHO CENTER  
5700 E. FRANKLIN RD., SUITE 200  
NAMPA, IDAHO 83687-7901

TEL (208) 466-9272  
FAX (208) 466-4405

EMAIL: [mjohnson@whitepeterson.com](mailto:mjohnson@whitepeterson.com)

PHILIP A. PETERSON  
WILLIAM L. PUNKONEY

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

\* Also admitted in OR  
\*\* Also admitted in WA

October 9, 2019

VIA US MAIL & EMAIL

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

VIA US MAIL

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

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

Dear Ed:

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

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

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

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

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

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

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

Sincerely,



Matthew A. Johnson  
City Attorney, City of Ketchum

# WHITE PETERSON

## ATTORNEYS AT LAW

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

WHITE, PETERSON, GIGRAY & NICHOLS, P.A.  
CANYON PARK AT THE IDAHO CENTER  
5700 E. FRANKLIN RD., SUITE 200  
NAMPA, IDAHO 83687-7901

TEL (208) 466-9272  
FAX (208) 466-4405

EMAIL: [mjohnson@whitepeterson.com](mailto:mjohnson@whitepeterson.com)

PHILIP A. PETERSON  
WILLIAM L. PUNKONEY

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

\* Also admitted in OR  
\*\* Also admitted in WA

October 2, 2019

VIA US MAIL & EMAIL

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

VIA US MAIL

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

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

Dear Ed:

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

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

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

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

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

Sincerely,



Matthew A. Johnson  
City Attorney

<b>RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:</b>	<b>Instrument # 652281</b> HAILEY, BLAINE, IDAHO 06-05-2018 8:55:07 AM No. of Pages: 7 Recorded for: BLAINE COUNTY TITLE JOLYNN DRAGE Fee: \$28.00 Ex-Officio Recorder Deputy: JB Electronically Recorded by Simplifile
--	---

(Space Above Line For Recorder's Use)

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

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

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

**RECITALS**

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

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

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

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

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

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

<b>RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:</b>	
--	--

(Space Above Line For Recorder's Use)

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

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

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

**RECITALS**

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

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

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

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

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

Electronic recording of this document is required by the State of Idaho. This document is being recorded electronically. The recording fee is \$15.00 per page. The recording fee is \$15.00 per page. The recording fee is \$15.00 per page.



## AGREEMENT

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

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

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

- (1) Owner, at no cost to the City, shall work with, provide for, and cause Idaho Power Company to initiate and undertake the work required to underground the electrical power poles and electrical and related utility lines along the east side of Highway 75 from Gem Street to River Street as shown on the Work Order documentation and Map as provided by Idaho Power and Owner dated March 27, 2018. Owner and the City agree to cooperate and provide requested reasonable assistance to Idaho Power and its contractors, vendors and employees. Said undergrounding work is to be completed on or before December 31, 2018.
- (2) Owner shall provide and show sufficient evidence to the City of full financing and funding for completing the Hotel Project to the satisfaction of City by September 30, 2019. Owner shall evidence such financing by recording on the Property a deed of trust to secure a construction loan on or before September 30, 2019 and by such other proof of financing reasonably necessary for the satisfaction of the City Council that this condition is met. Owner will not commence additional excavation work on the Property until acceptance and approval of such financing evidence by the City, unless the City Planning and Building Director otherwise grants such permission for good cause upon receipt of a written request from Owner.
- (3) *Site Restoration*. Owner shall submit to City by October 31, 2018 a Site Restoration Plan and security instrument naming City as beneficiary, such as a letter of credit, sufficient to fund such restoration. The Restoration Plan shall:
  - a. Identify a clear restoration plan sufficient to restore site to finished elevations compatible with neighboring streets and residences, including landscaping and other details, and subject to City review and approval;
  - b. Be accompanied by a licensed engineer's estimate of one hundred and fifty percent (150%) of the estimated reclamation costs, with such estimate subject to verification and approval by the City;

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

In the event Owner fails a condition or otherwise breaches this Amendment and/or the Agreement then City shall be entitled to immediately commence reclamation and restoration pursuant to such Restoration Plan and security instrument. Dates of breach could include, but are not limited to:

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

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

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

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

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

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

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

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

2. Release.

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

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

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

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

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

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

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

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

### 3. General Provisions.

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

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

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

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

authority to make and execute this Amendment.

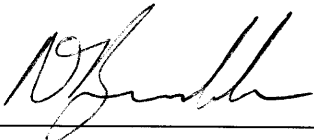
E. *Neutral Interpretation.* City and Owner acknowledge they and, if they so choose, their respective counsel have reviewed and revised this Amendment and the normal rule of construction to the effect that any ambiguities are to be resolved against the drafting party will not be employed in the interpretation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

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

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


"CITY":

CITY OF KETCHUM,  
an Idaho municipal corporation

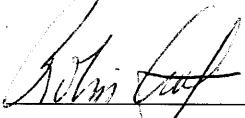
By:   
Neil Bradshaw, Mayor

"OWNER":

TRAIL CREEK FUND, LLC,  
a California limited liability company

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

ATTEST:

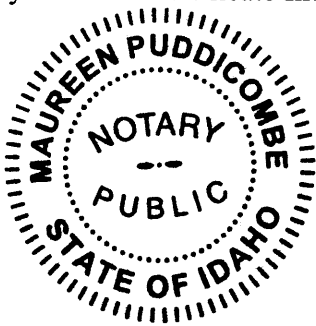
  
Robin Crotty, City Clerk

**ACKNOWLEDGEMENT FOR CITY**

STATE OF IDAHO )  
 ) ss.  
COUNTY OF BLAINE )

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

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



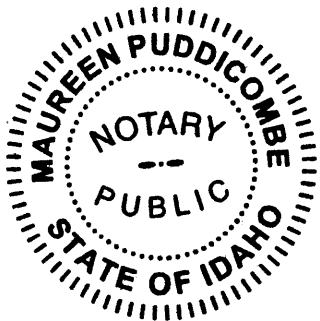
Maureen Puddicombe  
Notary Public for the State of Idaho  
Residing at 101 Emerald St  
My Commission Expires 2-14-24

**ACKNOWLEDGEMENT FOR OWNER**

STATE OF Idaho )  
 ) ss.  
COUNTY OF Blaine )

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

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



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



Bond No. 2416447

### License Bond

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

Signed, sealed and dated June 14 \_\_\_\_\_, 2018 .

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

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

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

The term of this bond shall be from June 14, 2018 \_\_\_\_\_ to June 14, 2019  
 \_\_\_\_\_

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

Conrad Brothers of Idaho, Inc.

\_\_\_\_\_  
 Principal

**GREAT AMERICAN INSURANCE COMPANY**

By: Paul Conrad  
 Conrad Brothers of Idaho, Inc.

By: Terri Strawhand  
 Terri Strawhand, Attorney-in-Fact



POWER OF ATTORNEY

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

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

Attorney-In Fact No. 229789

Certificate No. 007090874

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

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

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

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

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

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



State of Connecticut
City of Hartford ss.

By: [Signature]
Robert L. Raney, Senior Vice President

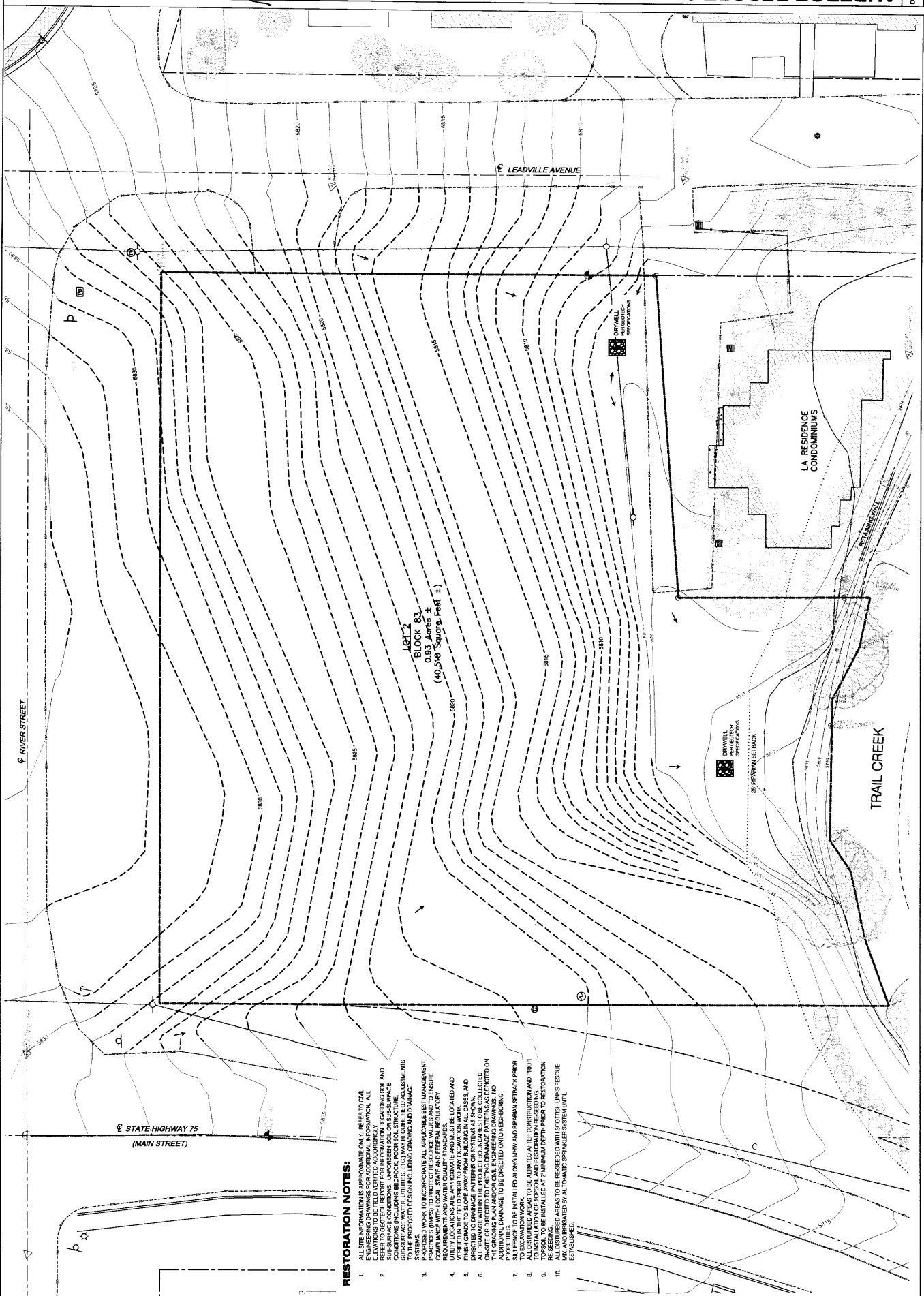
On this the 5th day of January, 2017, before me personally appeared Robert L. Raney, who acknowledged himself to be the Senior Vice President of Farmington Casualty Company, Fidelity and Guaranty Insurance Company, Fidelity and Guaranty Insurance Underwriters, Inc., St. Paul Fire and Marine Insurance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

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



[Signature]
Marie C. Tetreault, Notary Public

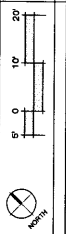


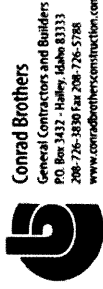


**LOT 2**  
**BLOCK 83**  
 0.93 Acres ±  
 (40,518 Square Feet ±)

**RESTORATION NOTES:**

1. ALL SITE INFORMATION IS APPROXIMATE ONLY. REFER TO CIVIL ENGINEERING DRAWINGS FOR ADDITIONAL INFORMATION. ALL REFER TO GEOTECH REPORT FOR INFORMATION REGARDING SOIL AND SUBSURFACE CONDITIONS. UNDESIRABLE SOILS, SUBSURFACE SURFACE WATER, UTILITIES, ETC.) MAY REQUIRE FIELD ADJUSTMENTS TO PROPOSED DESIGN INCLUDING GRADING AND DRAINAGE SYSTEMS.
2. PROPOSED WORK TO INCORPORATE ALL APPLICABLE BEST MANAGEMENT REQUIREMENTS AND WATER QUALITY STANDARDS. ALL RESTORATION WORK SHALL BE DESIGNED TO MEET OR EXCEED COMPLIANCE WITH LOCAL, STATE AND FEDERAL REGULATION.
3. ALL EXCAVATION WORK SHALL BE INSTALLED AND LOCATED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
4. FINISH GRADE TO SOFFIT AWAY FROM BUILDING ALLOWANCES AND ALL DRAINAGE WITHIN THE PROJECT BOUNDARIES TO BE COLLECTED AND DISPOSED OF AT AN APPROPRIATE LOCATION. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
5. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
6. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
7. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
8. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
9. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.
10. ALL DRAINAGE TO BE INSTALLED AND VERIFIED IN THE FIELD PRIOR TO ANY EXCAVATION WORK.





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

	Qty.	Unit	Estimated Costs				Notes
			Material	Labor	Subs	Others	
Division 1 - General Conditions							
01034 Permitting							N/A
01040 Project Manager			\$ 1,500.00				By Owner
01072 Legal							
<b>Total Division 1 - General Conditions</b>						\$ 1,500.00	
Division 2 - Sitework							
Backfill and Grading of Site					\$ 242,000.00		Per Plan and Galena Elevations Document
Remove Barricades					\$ 3,500.00		
Top Soil					\$ 19,000.00		500 Tons
02025 Utilities- Service					\$ -		N/A
02800 Landscaping					\$ -		
Clean Up, Seeding, Irrigation					\$ 34,452.00		Temp Irrigation
<b>Total Division 2 - Sitework</b>						\$ 34,452.00	
Subtotal						\$ 301,952.00	
Fees						\$ -	0%
Contingency						\$ -	3%
<b>Total Estimate</b>						\$ 301,952.00	
150% Valuation						\$ 452,928.00	

# GALENA ENGINEERING, INC.

CIVIL ENGINEERING & LAND SURVEYING

## MEMO

---

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

---

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

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

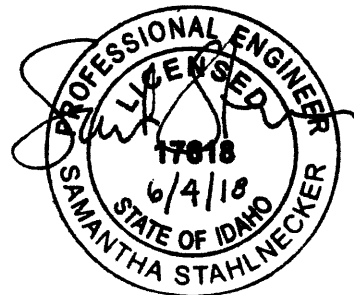
Based upon feedback from local contractors given the site's proximity to Ohio Gulch and the large quantity of material required, Galena Engineering estimates the unit cost per CY of embankment to be \$22.

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

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

Sincerely,

Samantha Stahlnecker, P.E.



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



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

**ESTIMATE**

To: Rob King  
Address:  
Billing Info:

Date: September 13, 2018  
Phone:  
Email:

Re: Auberge Resort Restoration

**108 MOBILIZATION/DELIVERY FEES:**

8 Hours Labor, Supervisor

subtotal 492.00

500's

**IRRIGATION INSTALLED:**

\*Assumes irrigation POC will be drawn from La Residence Condo's  
\*Assumes appropriate GPM and Pressure to accomadate needs  
\*Assumes Existing controller will be able to accommodate zone requirements  
\*Assumes irrigation to be above ground and temporary  
\*Includes time for removal of system after establishment

10 Hours Labor, Technician  
320 Hours Labor  
16 Hours Trackhoe  
300 Linear Feet 18/6 Multi Wire  
13 1-1/2" Automatic PGA Valve Assembly  
300 Linear Feet Of 2" Poly Mainline  
1400 Linear Feet Of 1.5" Poly Lateral Lines  
1 Miscellaneous Fittings for Mainline & Lateral Assembly  
58 Rainbird 5006 SAM/PRS Rotors Assembly

subtotal 22,620.00

**607 HYDROSEED INSTALLED:**

\*Assumes excavation contractor leaves area prepped for seed

40510 Square Feet Hydroseed, Roadside Mix

subtotal 10,533.00

**113 SANITARY FACILITIES**

Porta-Potty- Week  
1 Porta-Potty- Month

subtotal 119.00

**114 FINISH WORK & CLEAN UP**

6 Hours Labor  
2 Hours Loader/Trackhoe  
1 Trash Haul- 12 cubic yards per haul

subtotal 688.00

Thank You,  
Cooper Hayes  
Project Manager

**JOB TOTAL, ESTIMATED: \$ 34,452.00**

To: Rob King

Date: September 13, 2018

Re: Auberge Resort Restoration

**JOB TOTAL, ESTIMATED: \$ 34,452.00**

**WEBB LANDSCAPE CONTRACT:**

**OUR COMMITMENT:**

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

**GUARANTEES & INCLUSIONS:**

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

**GENERAL TERMS & POLICIES:**

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

**ACCEPTANCE:**

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

\_\_\_\_\_  
Responsible Party

\_\_\_\_\_  
Date

**GREAT AMERICAN INSURANCE COMPANY®**

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

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

No. 0 20818

**POWER OF ATTORNEY**

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

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

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

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



*Mark C. Bundy*  
Assistant Secretary

*David C. Kitchin*  
Divisional Senior Vice President

STATE OF OHIO, COUNTY OF HAMILTON - ss:

On this **12TH** day of **SEPTEMBER**, 2016, before me personally appeared **DAVID C. KITCHIN**, to me known, being duly sworn, deposes and says that he resides in Cincinnati, Ohio, that he is a Divisional Senior Vice President of the Bond Division of Great American Insurance Company, the Company described in and which executed the above instrument; that he knows the seal of the said Company; that the seal affixed to the said instrument is such corporate seal; that it was so affixed by authority of his office under the By-Laws of said Company, and that he signed his name thereto by like authority.

DAVID C. KITCHIN (877-377-2405)



**Susan A. Kohorst**  
Notary Public, State of Ohio  
My Commission Expires 05-18-2020

*Susan A. Kohorst*

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

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

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

**CERTIFICATION**

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

Signed and sealed this \_\_\_\_\_ day of \_\_\_\_\_



*Mark C. Bundy*  
Assistant Secretary



Bond No. 2416447

### License Bond

KNOW ALL MEN BY THESE PRESENTS that we, Trail Creek Fund, LLC  
 \_\_\_\_\_ as Principal,  
 and **GREAT AMERICAN INSURANCE COMPANY**, a corporation organized under the laws of the State of Ohio,  
 as Surety, are held and firmly bound unto City of Ketchum \_\_\_\_\_ as Obligee,  
 in the sum of Four Hundred Fifty Two Thousand Nine Hundred Twenty Eight Dollars and 00/100  
Dollars (\$ 452,928.00 ), lawful money of the United States of America, to be paid unto the said  
 Obligee or its successors; for which payment, well and truly to be made and done, we bind ourselves, our  
 successors and assigns, jointly and severally, firmly by these presents.

Signed, sealed and dated June 14 \_\_\_\_\_, 2019 .

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

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

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

The term of this bond shall be from June 14, 2019 \_\_\_\_\_ to June 14, 2020 \_\_\_\_\_  
 but may be continued on a year to year basis by continuation certificate at the option of the Surety.

Trail Creek Fund, LLC

**GREAT AMERICAN INSURANCE COMPANY**

Principal  
 \_\_\_\_\_  
 By: [Signature]  
MANAGING MEMBER

By: [Signature]  
 Terri Strawhand, Attorney-in-Fact

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

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

**RECITALS**

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

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

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

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

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

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

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

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

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



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

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

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

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

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

### **AGREEMENT**

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

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

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

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

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

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

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

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

A building permit application that does not substantially comply with the requirements contained in applicable codes, agreements, approvals, plans, permits and other project documents may be rejected by the City within a reasonable time after completing review of the application by providing written notice to Owner describing the non-compliance in detail unless the non-compliance is cured by Owner within thirty days. If a building permit application contains material changes to the above-referenced applicable codes, agreements, approvals, plans, permits and other documents an amendment to this agreement must be applied for by Owner and considered by the City Council. If such amendment is approved by City Council, all approvals referenced in Section 2 may be subject to amendment. A new building permit may be required to reflect the changes made to the approvals in Section 2.

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

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

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

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

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

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

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

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

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

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

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

## 20. Miscellaneous Provisions.

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

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

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

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

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

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

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

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



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

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

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

“CITY”:

CITY OF KETCHUM,  
an Idaho municipal corporation

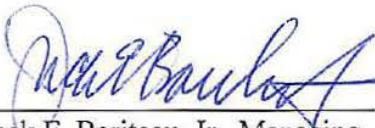
By:

  
\_\_\_\_\_  
Nina Jonas, Mayor

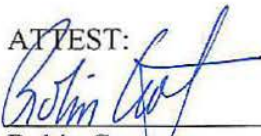
“OWNER”:

TRAIL CREEK FUND, LLC,  
a California limited liability company

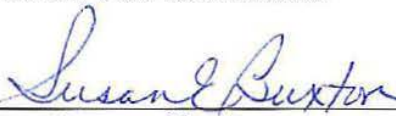
By:

  
\_\_\_\_\_  
Jack E. Bariteau, Jr., Managing  
Member

ATTEST:

  
\_\_\_\_\_  
Robin Crotty  
Interim City Clerk

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

  
\_\_\_\_\_  
Susan Buxton, City Attorney

ACKNOWLEDGEMENT FOR CITY

STATE OF IDAHO )  
 ) ss.  
COUNTY OF BLAINE )

SUZANNE FRICK

City Administrator

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

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



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

ACKNOWLEDGEMENT FOR OWNER

STATE OF IDAHO )  
 ) ss.  
COUNTY OF BLAINE )

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

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



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



## **Exhibit A**

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

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

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

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

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

The following information shall be provided to the City:

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

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

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

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