When Recorded Return to:
Kanab City
26 North 100 East
Kanab, UT 84741

Tax ID#s: K-15-1-ANNEX
K-14-15-ANNEX

HIDDEN CANYON DEVELOPMENT AGREEMENT
AND
SYSTEM IMPROVEMENTS REIMBURSEMENT AGREEMENT

THIS HIDDEN CANYON DEVELOPMENT AGREEMENT AND SYSTEM IMPROVEMENTS REIMBURSEMENT AGREEMENT (herein "**Agreement**") is entered into this _____ day of _____, 2024, by and between Jim Guthrie and his assigns, (herein "**Guthrie**"), owner of record for parcels K-15-1-ANNEX and K-14-15-ANNEX (the "Property"), and JJJ Development, Inc., a Utah corporation (herein "**JJJ Development**") (Mr. Guthrie and JJJ Development, Inc. herein collectively referred to as the "**Developer**"), and the City of Kanab, a municipal corporation and political subdivision of the State of Utah (herein "**City**"). This Agreement is intended, in part, to replace a previously approved but not fully executed development agreement between Developer and City. Developer and City are collectively referred to herein as "**Parties**," and each may be referred to individually as "**Party**."

RECITALS

WHEREAS, City is a political subdivision of the State of Utah**.**

WHEREAS, Guthrie owns approximately 257.37 acres of real property located within City limits, with parcel/tax ID numbers of K-15-1-ANNEX and K-14-15-ANNEX, which is more fully described in Exhibit "A," identified as the "Hidden Canyon Subdivision" and portions of which may be hereafter interchangeably referenced as "Property", "Development Property," "Planned Community," and "Hidden Canyon".

WHEREAS, the Property is zoned with a Planned Development Overlay ("PD") established by City.

WHEREAS, The Developer is proposing to develop the Property into a commercial (hotel, storage units), multi-family residential , and single-family residential units; the single-family residential portion of the development will be a gated retirement community designed for ownership by individuals over 55 years of age while the remainder of the commercial and residential development shall be open to all ages ("Development").

WHEREAS, development of the property shall occur over a several year period, with marketing during development as well as thereafter, by applying to the City for development approvals, the issuance of required permits, and other items as more fully described hereafter.

Commented [KB1]: 6/27: Initial explanation of the changes in this version of the development agreement: This agreement started out as just a reimbursement agreement but has been morphed into a full development agreement due to the developer and City not having signed nor recorded the prior development agreement (considered years earlier). I have worked on this present agreement for almost two years, the first version being drafted by the City and sent to the developer/developer's attorney in August 2022. The next time I received a version of the development agreement from the developer was a year later (8/3/24). That version had a lot of changes. Many versions of this agreement have been exchanged since that time.
More recently, after receiving input from the Planning Commission (on 3/19/24) and the City Council (on 3/26/24) about this development agreement, some changes were made, specifically to address concerns discussed at their respective meetings. Then quite a few other substantive changes were made by the developer/developer's attorney or as a result of discussions with the developer/developer's attorney. Some substantive terms of this agreement have been changed, ***some of which are concerning***. From a legal perspective, I do not advise a positive recommendation or adoption of this agreement "as is." My opinion is based on Utah law governing impact fees and relevant and controlling case law. The proposal related to impact fee credits in this version is not legal, or at a minimum puts the City at a higher risk of legal action being taken related thereto. Furthermore, my opinion is based on the input received from multiple City staff members, in which provisions of the agreement have been changed that are objectionable.
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Commented [KB2]: Recently the Developer has stated that the apartments and possibly some other aspects of the development will not be limited to 55+. Need to clarif ... [2]

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Commented [KB5]: Recently the Developer has stated that the apartments and possibly some other aspects of the development will not be limited to 55+. Need to clarif ... [3]

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WHEREAS, proposed development of the Property will including approximately Seven Hundred and Five (705) residential units (constituting 356 Single Family Units, 269 Multifamily Units, 80 Unit commercial hotel and 7.07 acres of commercial Storage Units requiring additional infrastructure and public services.

WHEREAS, the City is willing to enter into this Agreement because the proposed development contains an upscale residential senior community, high-scale residential apartments, provides various commercial services, improves or develops City roads, contributes to the overall infrastructure and improvements of the City for future growth, and promotes economic development, all of which will be advanced by Developer through the formation of a PID and/or other private financial resources.

WHEREAS, Developer will install all utilities, provide paved hard surface roads from the public street to the Development, provide the Development with all public utility facilities including but not limited to curb, gutter and sidewalk, streets, power, water, and public sewer systems, in accordance with the applicable law and design standards, which infrastructure may be funded in whole or in part by the Developer, a Public Infrastructure District ("PID"), and/or other statutorily permitted infrastructure district, if one is approved and created. [Where "Public Infrastructure District" or "PID" is referenced herein, any statutorily permitted infrastructure district is also intended.]

WHEREAS, upon completion, dedication, and acceptance of the infrastructure, the City is willing to provide the necessary public services to the Development Property, upon certain conditions as outlined in City ordinances and in accordance with the terms included herein.

WHEREAS, as a condition of development approval, Developer is required to construct and install certain "Public Improvements" and "System Improvements," including future public facilities identified in and included as part of the City's Capital Facilities Plan(s), each as defined by Section 7-801 of the Kanab City General Ordinances and in Utah Code, Title 11, collectively referred to as "System Improvements;" however, System Improvements do not include "Development Property Improvements" or "Project Improvements" as that term is used in State Code and the City's ordinances. [The term "Capital Facilities Plan(s)" as used throughout this Agreement, includes those plans for future capital facility improvements anticipated and included in the various Impact Fee Facilities Plan & Analysis, adopted by Kanab City in 2018, revised and re-adopted in April 2024.]

WHEREAS, the proposed Planned Community will require approximately (1) an 810,150 gallon water storage tank, (2) require at least an 8-inch water line to connect the existing water infrastructure to the water storage tank (with the possibility of a 12-inch line being required), and (3) require at least an 8-inch water line to serve the needs of the Planned Community.

WHEREAS, Developer has certain obligations to install infrastructure and System Improvements to specified standards sufficient to meet the Development Property's needs.

WHEREAS, as part of the development activities, the City desires to have Developer upsize or oversize certain infrastructure as required by the City, beyond the infrastructure described previously.

WHEREAS, specific oversized System Improvements covered by this Agreement are outlined in Exhibit B, attached hereto and incorporated by reference, and are included in the City's Capital Facilities

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Commented [KB7]: JC comment 6/26: Delete "I am good with these changes".

Commented [KB8]: 6/27: Needs to be "2024," since new plans have been adopted.

Commented [JW9]: This would be moot if adopted??

Commented [JW10R9]: I believe this is resolved.

Plan(s). Specifically, the Developer is required to have engineered, constructed, and dedicated to the City a water storage tank and related infrastructure, based on specific criteria.

WHEREAS, the Parties have acknowledged that (a) a one (1) million-gallon water storage reservoir ("water tank"), in lieu of a 810,150 gallon water tank, (b) a 12-inch transmission and distribution pipeline, in lieu of an 8-inch pipeline, specifically extending from the water tank to the road identified as "Road A" in the Master Plan attached hereto as Exhibit C, running the length of "Road A" south to Highway 89 (the other distribution lines to service the Development Property remaining as 8-inch lines, as required by the development), and (c) other water-related infrastructure specifically related to the oversizing aspect of (a) and (b), described in Exhibit B (collectively, "Eligible Public Improvements"), are necessary for future development of the Development Property and future developments adjacent thereto, which currently do not exist.

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WHEREAS, the Parties agree that the oversizing/upsizing of the System Improvements that are the subject of this Agreement are reasonably anticipated to serve future development, both within and without the Hidden Canyon Subdivision.

WHEREAS, Utah Code § 11-36a-101, et seq., the Impact Fee Act, allows for municipalities to either reimburse or credit developers for Public Improvements and System Improvements, through their impact fee enactment;

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WHEREAS, General Ordinances of Kanab City establish the parameters for the construction of Public Improvements, for reimbursement for oversizing Public Improvements, and for collecting and calculating impact fees, and state, in part:

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> Where public improvements are installed which are intended to extend, expand or improve the City's public improvements beyond the public improvements required to service or benefit the subdivision or development activity proposed by the developer, the City in its discretion may enter into a written reimbursement agreement with the developer who installs the public improvement.
> *Kanab City General Ordinances* § 7-803.
>
> Any developer seeking to commence development activity prior to the City's commitment to participate in a Development Property or to provide the required system improvements may construct all of the Development Property and system improvements and may, with the approval and at the discretion of the City Council, enter into a written system improvements reimbursement agreement with the City for the repayment of the actual, reasonable cost of the system improvements installed by receiving credits toward development impact fees or reimbursement from current or future impact fees as determined by the City Council.
> *Kanab City General Ordinances* § 7-804
>
> In consideration for the construction and installation by the developer of system improvements which are required by the City as a condition of approving the development activity, the City Council may in its sole discretion grant developer a credit against applicable impact fees assessed on development within developer's Development Property as determined by the City after receiving the recommendations of the City Engineer. No credits will be granted for Development Property improvements.
> *Kanab City General Ordinances* §7-806.

No interest shall be paid on any reimbursement amounts. The City will not have any obligation to make reimbursements to the developer for systems improvements until the designated impact fees are actually received by the City.
Kanab City General Ordinances §7-807.

WHEREAS, Kanab City's Water Impact Fee Facilities Plan & Analysis (Capital Facilities Plan for Water, adopted in 2024), outlines: "It is projected that the first new 1 Mgal tank should be constructed in 2026 near the east City boundary with a 12 inch pipeline connected to the nearest 12 inch water main." *See* page 13 (Appendix A, Maps 4 & 5, identify the approximate and adjacent area of the Hidden Canyon Subdivision for the location of a future 1-million-gallon water tank).

WHEREAS, Developer and the City agree that Developer will connect the Public Infrastructure to the waterline currently servicing the Quality Inn property. The Developer will not use the existing 8-inch waterline extending east from the Quality Inn property. The Developer will install a new 12-inch waterline adjacent to the existing 8-inch waterline and extending the full distance to the 1-million gallon storage tank. Developer shall be entitled to applicable impact fee credits for the difference in the cost of install a 12-inch waterline as compared to the cost of installing an 8-inch waterline from the point of connection to the Development Property line.

WHEREAS, Developer will also construct and install a return 12-inch waterline from the water storage tank to the road identified as "Road A" in the Master Plan, attached hereto as Exhibit C, and thence along Road A to the areas of the Development Property, from which 8-inch waterlines may be utilized if sufficient to service the Development Activity, for which approved designs and standards require it for the Planned Development itself, and the 12-inch waterline continuing and extending along Road A back to the Highway 89, as further explained in Exhibit B. If it can be shown that the Development Property infrastructure only requires an 8" line from the water storage tank to the road identified as "Road A" in the Master Plan, attached hereto as Exhibit C, and thence along Road A to the areas of the Development Property, Developer shall be entitled to applicable impact fee credits for the difference in the cost of installing a 12-inch waterline as compared to the cost of installing an 8-inch waterline.

WHEREAS, Developer or a subsequently formed PID, if approved, will be reimbursed by way of a credit towards applicable impact fees for the portion of the actual, reasonable costs for materials and installation of said Public Improvements attributable to the upsizing/oversizing, and the extension of Public Improvements beyond what is necessary for the Hidden Canyon Planned Development, dependent upon whether the Developer or PID has incurred the expense for installation of the oversized/upsized improvements, as set forth hereafter.

WHEREAS, Developer or a subsequently formed PID, if approved, will front costs for extending and upsizing portions of Public Infrastructure, as outlined in Exhibit B, including the return water line and the water tank, from which the actual, reasonable costs shall be reimbursed (1) by City, through impact fee credits, or (2) by any private party or entity of an adjacent development which connects to the oversized return water line (i.e., from the water tank to US-89; the cost of reimbursement to be determined and paid in accordance with their pro-rata share of the actual, reasonable costs of the oversized portion of the water infrastructure, (including the water storage tank), to which the third-party connects. Notwithstanding, upon payment by a private party or the City, Developer shall only be reimbursed up to the full actual, reasonable costs of the oversized portion of the infrastructure paid by Developer.

Commented [KB11]: 6/26: Need to update this reference and paragraph, including the quoted text, to the latest Water IFFP, adopted in 2024.

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Deleted: Otherwise, due to the lack of compatibility, capacity, or capability of the existing or a possible replacement 8-inch waterline, the City and Developer agree that Developer will be required to install replace the existing 8-inch waterline with a 12-inch waterline, from the connection point near or at the Quality Inn running the full distance to the booster pump and Property boundary, and thereafter extending the 12-inch waterline to the water tank.

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Commented [KB18]: 6/27: Justin, your response in your recent comment (below) about this recital, regarding locking in impact fee rates, is not acceptable. It is illegal, or would put the City at a higher risk of litigation than is acceptable (based on potential accusations of illegality), which I believe you learned when you spoke with three other land use professionals this month (notwithstanding the fact that I have been informing you of this not being permitted for many months).

The developer can push forward to have the City Council consider the agreement in any form desired, so I don't want him to feel I am delaying their consideration. However, a favorable recommendation will not be provided to the City Council if the agreement provides for illegal terms, puts the City at unreasonable increased risk/liability, and/or if the proposed agreement includes impact fee provisions that are not allowed by law, or that put the City at increased risk of being sued due to the proposed novel application of impact fees/credits.

… [4]

WHEREAS the City will provide Developer with an impact fee credit for an equivalent amount of funds paid by Developer for the actual upsizing costs expended by Developer for expanding the Water Storage Tank to one (1) million-gallon water storage reservoir ("water tank"), in lieu of a 810,150 gallon water tank, and for upsizing a mandatory 8" line to a 12-inch transmission and distribution pipeline. The number of connections awarded to Developer will be determined at the time of completion of installation of the tank and upsized pipeline, and the number of connections shall be based upon the amount expended by Developer to upsize the infrastructure.

WHEREAS, the Parties have had the opportunity and have utilized the help and advice of legal counsel in the negotiating, drafting, and reviewing of this Agreement.

WHEREAS, on March 19, 2024, the Kanab City Planning Commission held a duly noticed public hearing to consider this Agreement, and thereafter made a recommendation to the Kanab City Council pertaining thereto.

WHEREAS, on March 26, 2024, having received the Planning Commission's recommendation, the Kanab City Council met during its duly noticed regular meeting, considered this Agreement with any modifications, and considered the input of City staff, the public (if any), and the Planning Commission, and discussed the Agreement. The City Council then tabled the issue, with the Agreement of the Developer, to be brought forth for further consideration at a later date.

WHEREAS, on _____, 2024, the Kanab City Council again discussed and reviewed this Agreement, with the changes and additions made by City staff and Developer, pursuant to the input from the prior meetings.

WHEREAS, the City, acting pursuant to its authority under Utah Code § 10-9a-101, *et seq*. and its ordinances, resolutions, and regulations and in furtherance of its land use policies and goals, has made certain determinations with respect to the proposed Planned Community, and, in the exercise of its legislative discretion, has elected to approve this Agreement because it promotes the orderly and appropriate development of property, and will provide public facilities, amenities, and other benefits for the better welfare of the community and in connection with a proposed development.

NOW THEREFORE, in consideration of the goals and policies of City, which include the appropriate and coordinated development of property within City, and after consideration by the various services which Developer will provide, and in accordance with provisions, terms or conditions of City, and the Developer as more fully set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties now agree to the following terms and conditions:

AGREEMENT

1. Recitals. The Recitals above are hereby incorporated by reference and expressly made a part of this Agreement. Capitalized terms used herein shall have the meaning given them in this Agreement and if not otherwise defined herein, or within State Code or the City's ordinances, shall have the plain and

Commented [KB19]: This is not allowed under the Impact Fee Act. This would be asking the City to enter into an Agreement that violates State law.

Commented [JW20R19]: Please review 11-36a-402. I believe this is not illegal and is often used in various forms to repay for upsizing of infrastructure. Often, Districts and Municipalities waive impact fees, offset with connections, reimburse and contribute to expansion or otherwise make arrangements in unusual circumstances. In this case, the request because Developer is investing millions of dollars which will benefit the City, that the impact fees for this development only remain locked in for this Development only, until reimbursed while this Agreement is in place. In return the City has excess capacity. However, later this month I am meeting with the leading expert in the state of Utah on impact fees and will posit this question to him for clarification and discussion. I will report back.

Deleted: WHEREAS, the city reserves the right to increase its impact fees in the future, but not withstanding the same, stipulates and agrees that during the term of this Aagreement and any extension thereof, Ccity will not increase its water impact fees currently assessed as to any part of this Development, until Developer has been fullywe are reimbursed for all oversizing

Commented [KB21]: JC comment:
a. It has not been determined by the City Engineer that the 8" line meets the city standards and required fire flow at this time it is unknown whether the waterline will be eligible for impact fee credits.
b.Impact fees are not awarded "connections", they are reimbursed through the determined costs for the upgrade. As building permits are issued the current impact fee amount is subtracted from the balance (credit for the upgrade) until paid in full.

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ordinary meaning within the context they appear.

2. Definitions.

"**Agreement**" means and refers to this "Hidden Canyon Development Agreement and System Improvements Reimbursement Agreement" between Developer and City with respect to the Planned Community.

"**Developer**" means and refers to JJJ Development, Inc. and Jim Guthrie, the initial owner of the Planned Community, who is anticipated to create the Planning Areas and reserves the right to convey the same, through sale or otherwise, to the Secondary Developers. This definition extends to successors and assigns of Developer, provided such successors and assigns acquire all of the rights to the master development of the Planned Community which are currently held by Developer and agree to become subject to the obligations of this Agreement.

"**Development Property**" or "**Property**" means and refers to the parcels of real property located in Kanab City, Kane County, State of Utah, upon which any development to be constructed on the Property pursuant to the Hidden Canyon Development Property Plan, as depicted in Exhibit C, and this Agreement, with the associated intended uses and all the other aspects approved as part of this Agreement, as also contained in the Exhibit B attached hereto, and identified as parcel/tax ID numbers K-15-1-ANNEX and K-14-15-ANNEX, which is more particularly described in Exhibit "A".

"**Hidden Canyon Development Property Plan**" ("Plans") are those Plans presented by Developer in Exhibit C ("Description and Plans") and once approved by City, setting forth some of the specifications required for development of the Property and System Improvements, as generally outlined in Exhibits B and C. The Plans referenced, mean, or include the specific description and Master Plans attached as Exhibit C and do not include items not yet submitted. The Master Plans in Exhibit C are not yet approved development plans or applications, notwithstanding their reference or inclusion herein.

"**Impact Fee Credits**" means and refers to credits for applicable impact fees granted by City pursuant to this Agreement.

"**Master Association**" means and refers to an association that shall be created by Developer consisting of Developer and/or some or all of the private owners of lots and parcels, including those privately retained open spaces, in the Planned Community which will have the responsibility of enforcing the Master Declaration. "Sub-associations" or "neighborhood associations" may also be created with respect to the distinct Planning Areas and/or Secondary Phases of the Planned Community and shall be subject to the Master Association. A Master Association, sub-association, or neighborhood association may commonly and legally be referred to as a "homeowners association."

"**Master Declaration**" means and refers to a declaration of covenants, conditions and restrictions for the residential and commercial portions of the Planned Community which shall be created by Developer and recorded in the Kane County Recorder's Office with respect to the entire Planned Community. The Master Declaration shall set forth the rights and obligations of Developer, the Secondary Developers, the Master Association, and the individual owners in the Planned Community with respect to one another, and may establish a lien for the collection of assessments and serve other purposes common to declarations in similar development properties/homeowners associations. Other "sub-declarations" may also be recorded with respect to the distinct Planning Areas and/or Secondary Phases of the Planned Community, but all shall be

Commented [KB22]: There is no active LLC in the State of Utah. If LLC is actually intended, then Jim needs to bring the status of the LLC back to Active status with the state. We need to make sure this is uniform throughout the Agreement.

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subject to the Master Declaration.

"**Planned Community"** or "Planned Development" means and refers to the Development Property known as "Hidden Canyon," anticipated to be developed upon the Development Property.

"**Public Infrastructure**" or "**Public Improvements"** (or at times referenced as "Infrastructure") means and refers to interchangeably the installation of standard utilities necessarily required to service the Property, as used and defined in Utah Code and Kanab City ordinances, including water and sewer (which shall be installed within a Public Utility Easement) as well as roads, sidewalks, curbs and gutters and such other improvements to develop the Property as set forth, in part, in the Plans, indicated as intended to be dedicated to the City, or otherwise noted and included in Exhibit B.

"**Public Infrastructure District**" or "**PID**" shall have the same meaning as defined in Utah Code, Title 17D, Chapter 4, *et seq*. [Where "Public Infrastructure District" or "PID" is referenced herein, any statutorily permitted infrastructure district is also intended.]

3. Property to be Bound - Development Property. The legal description of the Property to be bound by this Agreement, i.e., the Development Property, is set forth in Exhibit "A" hereto and incorporated with this reference. No additional property may be added to the Development Property for the purposes of this Agreement except by written amendment to this Agreement executed and approved by Developer and City.

4. Acknowledgments.

a. The City acknowledges the Developer is relying on the execution and continuing validity of this Agreement, and the City's performance of its obligations herein.

b. The City further acknowledges that development of the Development Property may be contingent upon Developer obtaining approval of a PID which is subject to further legislative action.

c. Developer acknowledges that the City will be making a decision regarding the formation of a PID at a later date, upon submission of a complete application, requisite documents, and corresponding fee.

d. Developer acknowledges that this Agreement will not bind the City to the approval and formation of a PID and that if the formation of a PID is denied, Developer may need to take additional steps not contemplated under this Agreement to facilitate the development of the Property, which decisions may or may not be legislative in nature (e.g., application to amend this Agreement; application to re-zone a portion or all of the Property).

e. Developer will directly (or through a PID) expend substantial funds in the development of the Property and, in reliance upon this Agreement, will continue to expend additional funds. Notwithstanding this acknowledgment, the Developer foregoes any right or remedy, both in law and equity, to seek damages for the same.

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f. Developer acknowledges that the City is relying on the Hidden Canyons Development Property Plan, as included in Exhibit C, and the execution and continuing validity of this Agreement, and Developer's performance of its obligations under this Agreement, in continuing to perform the obligations of Developer herein.

g. The City has expended substantial time, resources, and funds in connection with the proposed development of the Property and, in reliance of this Agreement, will continue to expend additional time, resources and funds. Notwithstanding this acknowledgment, the City foregoes any right or remedy, both in law and equity, to seek damages for the same.

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h. The Parties desire that the City has reasonable certainty concerning the manner in which the Property will be developed, and that Developer will have reasonable certainty in proceeding with development of the Property. Developer shall comply with the terms and conditions of the Plans in Exhibit C and of this Agreement, and the City authorizes Developer to develop the Property as set forth in the Plan, included in Exhibit C, and this Agreement.

i. Notwithstanding the foregoing, the Parties jointly acknowledge that nothing herein will bind the City to any future legislative action, decision, or appropriation, and that any future administrative decision (i.e., approval or denial) shall be made in accordance with the terms of this Agreement, local ordinance, and state law.

j. The Developer (i.e., Guthrie and JJJ Development, Inc., individually and collectively) acknowledge and affirm that they have been advised by the City and Guthrie's and JJJ Development's legal counsel, orally and in writing (including as outlined through this Agreement), of any and all rights "under clearly established state law" to which they are entitled but are conceding and giving up by entering into this Agreement, as demonstrated/repeated more explicitly hereafter, and will therefore be estopped from a future related claim, including claims brought under Utah Code §10-9a-532(2)(c) (i.e., claim of undisclosed or unknown right forfeited through this Agreement). [If a term of this written agreement could be interpreted or constructed to abridge the rights of the Developer, or seen in a light less favorable to the Developer, it should be considered as notice of a possible if not an outright concession or abridgment of the Developer's "clearly established" statutory right(s).]

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k. The Developer (i.e., Guthrie and JJJ Development, Inc., individually and collectively) acknowledge that this Agreement is not a condition for development of the Property; however, a development agreement is a requirement for planned developments under Kanab City's ordinances. Developer acknowledges there are other avenues for developing the Property without entering into this Agreement.

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5. Prior Development Agreement. The Developer having presented, and the City Council having previously considered and approved a version of a Development Agreement related to the Hidden Canyon Planned Development (in September of 2021), but the document having failed to be fully executed and recorded; the Parties now agree to the following terms included, as previously considered:

a. City Facilities and Landscape Improvements. City will permit and cooperate in Developer's efforts to improve existing City facilities including water, drainage, and sewer systems. In addition, City will permit and cooperate in Developer's efforts to enhance and improve landscaping features on any City owned property within the Planned Community. To the extent reserved by Developer, Developer will dedicate to City when appropriate such easements in locations acceptable to Developer as shall be reasonably necessary to accommodate City's utility system to service these areas. More specifically, a public utility easement shall be granted to City for water and sewer, as well as to Garkane Power for electrical utilities.

b. Model Homes and Sales Center. Developer and/or Secondary Developers may construct model home complexes and sales centers in one or more Planning Areas. Construction Plans for model home complexes and sales centers shall be reviewed and approved by the City and Master Association for code compliance upon requesting a building permit to assure that all structures comply with building code requirements.

c. Exceptions to City Ordinance. In accordance with Section 23-7 of the Kanab City Land Use Ordinance, City agrees to allow the Development Property to deviate from the City Standards and Ordinances in the following ways:

i. allow for lots to be as small as 5,000 sq. ft.;
ii. allow for frontage of lots to be as short as 52 feet wide;
iii. allow for front setbacks to be as short as 20 feet, side setbacks to be as short as 5 feet, and rear setbacks to be as short as 10 feet; and
iv. allow for private roads, including back of sidewalk and curb, to be as narrow as 40 feet wide. (26' pavement, 2.5' gutter on each side, 4' sidewalk on each side and 6" between sidewalk and right-of-way line on each side of back of sidewalk for a total of 40') Private roads are all roads located within the Master Plan (i.e., Exhibit C) servicing single family residential lots within the privacy gates, identified as Road A from north of Road B on, Road C, Road D, and Road E north of the turnaround to be constructed, north of the multi-family housing. All roads servicing the commercial storage, hotel, and multi-family residential are intended to be public roads as depicted in Exhibit "C", identified as Road A from Highway 89 to Road B, Road B, and Road E from Road B to the turnaround, just north of the multi-family residential housing; these roads shall be built in accordance with City design standards, except where modification is allowed herein, and dedicated as public roads, upon which the City will inspect and then accept the roads if they are constructed as required. No parking will be permitted on any private roads which shall be posted with signage restricting parking and enforced by the Master Association.

6. Developer's Responsibility. Developer agrees to complete all of the onsite and offsite improvements as required under this Agreement and to develop the Property, which may be done by Developer or through the creation of a Public Infrastructure District, in accordance with the Public Infrastructure District Act, Title 17D, Chapter 4 ("PID"), if creation is approved (after due consideration by the City upon receipt of a completed application, fee(s), and required documents), which will create a public entity in order to assist in the financing of public infrastructure for the purpose of creating and developing the Property.

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Commented [KB24]: JC comment 6/26/24: Model Homes and Sales Center; Building code does not specify the occupancy classification or use of a model home/sales center, in situations where it is not specified such structures shall be classified in the occupancy it most nearly resembles based on fire safety and relative hazard (IBC 302.1). Regardless of whether it is commercial or residential use, the building codes and permitting process still apply. With all building permits a plan review of the construction drawings takes place to review for code compliance (both building code and land use code). The city is not looking at designing the building, architectural or structural. A registered design professional should prepare the construction drawings and submit them with the building permit, the city will review the submittal documents during the building permit process. The development can require an architectural review as a separate process from the city's review.
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Commented [KB25]: This sentence was dropped from the prior version and should remain.
Commented [JW26R25]: I don't believe that a city has the ability to review construction drawings for a home. I have no problem with requiring that the Master Assoc ... [6]
Commented [KB27R25]: This is considered to be a ... [7]
Commented [JW28R25]: I disagree. This is not a ... [8]
Commented [JW29R25]: Construction standards sl ... [9]
Commented [KB30]: 6/27: ... [10]
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Commented [KB31]: JC comment 6/26: ... [11]
Commented [KB32]: Need to run this change/moc ... [12]
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Commented [KB33]: Clarify if this is intended as a ... [13]
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7. Development Pursuant to Plan and Design Guidelines.

a. Developer shall submit plans that will promote a sophisticated development, technology wise, with various amenities as well as certain commercial services. The single-family residential gated community shall be restricted to senior housing 55 and older. The plans submitted shall generally depict the intended uses, lot lines, water and sewer system, various other utilities, drainage control facilities, major roads, and facilities that will be installed and constructed upon the Property, subject to minor modifications as necessary to facilitate construction. The City shall be notified of all minor modifications in advance of their implementation, upon receipt of which the City will determine if the minor modification(s) can proceed without further review, or if the minor modification(s) will require some form of administrative application, review, and approval.

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b. Developer may submit an application for City's approval of minor modifications to the extent generally consistent with the Development Property, in accordance with the City's ordinances and standard procedure. Examples of such minor modifications shall include moving or adjusting lot lines or lot sizing, minor street realignments, adjusting open areas, so far as those modifications still meet with the substantive terms of this Agreement. Minor modifications shall be approved by the City's Land Use Coordinator/Building Official (acting, under the circumstances, as the City's Land Use Authority), in consultation with the Public Works Director and City Engineer, as deemed appropriate.

c. No material modifications to the Plans, as included in Exhibit C, shall be made after approval by City without City's written approval of such modification. Developer may submit an application for approval of material modifications to the Development Plans, included and incorporated into this Agreement (Exhibit C), from time to time as Developer may determine necessary or appropriate. For purposes of this Agreement, a material modification shall mean any modification beyond that considered minor, including, for example, modifications which (i) increases the total perimeter size (footprint) of building area to be constructed on the Property by more than ten (10) percent, (ii) substantially changes the exterior appearance of the Project, (iii) changes the functional design of the Project in such a way that materially affects traffic, drainage, or other design characteristics, or (iv) increasing or decreasing housing density. Material modifications that still generally fall within the terms and parameters outlined in this Agreement shall be approved by the City's Land Use Authority.

d. In the event of a dispute between Developer and City as to the meaning of "minor modification" or "material modification," no modification shall be made without express written approval by the City (i.e., may require amendment to this Agreement). Modifications shall be approved by City if such proposed modifications are consistent with City's then applicable rules and regulations for projects in the zone where the Property is located, and are otherwise consistent with the standard for approval set forth herein. Modifications that do not meet with the then applicable rules and regulations or the terms laid out in this Agreement, may require an amendment to this Agreement, subject to the City Council's approval (legislative).

e. Developer shall not commence site preparation or construction of any infrastructure or improvement on the Property until such time as the required submitted plans have been approved by the City in accordance with the terms and conditions of this Agreement and the applicable City ordinances.

f. It is anticipated that the following general planning and construction of the development will occur through a series of steps or procedures described hereafter in three general phases. In addition, actual development of lots and construction of homes will be completed through a phased development plan resulting in lots and homes being developed and constructed by Developer in multiple phases as determined in the discretion of Developer and approved by the City:

General Phase 1: The Parties, according to their respective obligations herein, will perform or work together to satisfy the following requirements:

i. Prepare preliminary planning.
ii. Take necessary measures for consideration of a PID or other financing opportunities.
iii. Complete applications for prospective tax relief for the PID which will be provided and distributed through the PID, subject to consideration and approval by the City.
iv. Complete engineering for development. Developer shall prepare detailed construction plans, drawings, and specifications as part of the plans for the Developer's Public Improvements for each phase of the Development Property prior to each phase of development, (each phase may be completed in no particular order of development), which Plans shall be subject to the City's reasonable approval. Developer shall diligently pursue and obtain any and all necessary governmental approvals, permits and the like as necessary and required for development of each phase of the Development Property. Developer agrees to provide City with a copy of any and all relevant records and documents relating to the Developer's Public Improvements, as requested by City.
v. Obtain soils testing.
vi. Prepare subdivision layout and apply to City for subdivision approval for each phase including submitting a final site plan, preliminary and final plat, site plan review and engineered construction drawings as required by the City for review for approval for each phase by the City. .
vii. Complete Landscaping Designs for infrastructure for each phase.
viii. Complete Sign Design and construction of signage, subject to the requisite review(s) and approval(s) for each phase.
ix. Subject to the requisite application(s), review(s), and approvals/permitting, and completion of required public infrastructure improvements (or posting with the City an improvement completion assurance as required under Utah Code § 10-9a-604.5 and Kanab City Subdivision Ord., Chapter 4), the water storage tank being excepted, permit Developer to proceed with Phase 1 at Developer's election, as per the map included as Exhibit "C", including construction of storage facilities prior to construction of the water tank, provided Developer is able to meet minimum fire flow standards. Developer may install a fire flow pump in a new 12" line from the Quality Inn to the Development Property or construct the storage tank, but in either event must meet minimum fire flow standards. Other than the storage facilities

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Commented [KB37]: JC comment 6/26:
Per Land Use ordinances (and State Code in some situations), a final site plan, preliminary and final plat, Site Plan Reviews (commercial and multi-family), and engineered construction drawings (aka "subdivision improvement plan" per State Code) are required to go through a review and approval process for each phase of the development with City staff and in some cases Planning Commission.

Commented [JW38]: I believe we have an overall view of the development and engineering, but then more specific engineering (as builts) will be applied for each phase. I am concerned about the"detailed construction plans , drawings and specifications" language and will speak with Jim's engineer.

Commented [KB39]: JC Comment 6/26:
a. In the past the city approved an unrecorded/unsigned development agreement, preliminary site plan and preliminary plat the prelim site plan and prelim plat have expired per the time requirements in city code and are no longer valid.
b. Kanab has not received any site plan reviews for commercial or multi-family developments (per Land Use Ordinance - Chapter 9).
c. Currently the city has only received the application for the development Agreement and a Preliminary site plan.

Commented [KB40]: 6/27: *** "PHASE 1" still needs to be labeled on Exhibit "C". It's not in the latest version provided. If it is not identified, then this term is not definitive. Someone unfamiliar with the project, such a future secondary developer or replaced City employee, would have no idea what this references geographically, without it being labeled.
Further addressing your comment (above): It doesn't matter that a Phase I and Phase II have been identifie ... [15]

Commented [KB41]: 6/27: The City Engineer is evaluating this provision and determining what other infrastructure is likely going to be necessary/required to meet 1,500 gpm (fire flow), in order to build the storage units without constructing the water tank first. At a ... [16]

Commented [KB42]: City staff has concerns about this provision.

Commented [KB43R42]: Phase 1 is not identified on the maps included as Exhibit C.
The acceptability of this was not fully discussed by the City Council. It may or may not be acceptable.

Commented [JW44R42]: I believe that Phase I and Phase II preliminary and site plans have already been submitted to the City. Construction Drawings have been submitted previously but the final version has been held out the final submission because it is our understanding that the (... [17]

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anticipated to be constructed, all other building permits shall be withheld until the water storage tank is constructed and accepted by the City unless Developer has posted satisfactory improvement completion assurance (i.e., guarantee of improvement; bonding), which is still valid, to cover completion of the water storage tank.

General Phase 2: Perform the following requirements:

i. Apply for and Complete Construction of all necessary Infrastructure for each phase which may include developed infrastructure outside of a particular phase being developed.

ii. The City shall cooperate reasonably in promptly processing all ***complete*** construction and development applications as Developer develops the Development Property in multiple phases, in accordance with the City's normal procedure and practices.

iii. If an application is considered incomplete, the City will communicate the same to the Developer, detailing the deficiency.

iv. If the City denies any complete application submitted by the Developer, the City shall provide notice to the Developer and, upon request of the Developer, a written record or recording related to the denial, if created.

v. Upon issuance of a denial, the City and Developer shall meet within fifteen (15) business days (in-person, by phone, text, email, or virtually), or as soon thereafter as possible, of a denial of any application to attempt to resolve the issues specified in a denial of the application. This requirement to meet shall be considered waived, if the meeting is not requested by the Developer, or the time limit for meeting shall be tolled if the request is not timely.

vi. The Parties will work together in good faith to resolve any denials of applications submitted by Developer.

vii. Unresolved issues resulting from the City's denial of an application after a reasonable good faith attempt to resolve the denial, shall be subject to the administrative appeals process outlined in the City's Land Use Ordinance. The time frame for an appeal shall commence upon the date the denial is provided to the Developer. However, if Developer requests the meeting outlined herein within fifteen (15) business days, then the commencement for the time limit for submitting an appeal will be tolled until the date upon which the meeting is scheduled, or thirty (30) calendar days after the denial, whichever date is earlier.

viii. Upon receiving approval of an application, Developer shall work diligently towards completion of the Infrastructure within the time frame required under local ordinance (including any permitted extensions granted under the parameters allowed for in City ordinance).

ix. The improvements depicted in the Hidden Canyon Development Property Plan, as included in Exhibit B, and set forth in this section or elsewhere in this Agreement or attached exhibits, represent some but not all of the Public Infrastructure improvements to be completed by Developer, or through a PID, if approved and created, on the Development Property, that are intended to service the Development Property. Developer or the PID shall bring the major infrastructure from the perimeter of the Property internally to the boundary of each individual parcel. Developer will address, install, construct, and dedicate any requisite offsite

Commented [KB45]: With this added wording, it should be recognized that some infrastructure necessary for one phase may require the construction of infrastructure that serves multiple phases (i.e., the infrastructure necessary may include infrastructure to be completed outside the specific phase being developed).

Public Infrastructure (i.e., infrastructure necessary to bring required Public Infrastructure to the perimeter of the Property).

x. Subject to the performance by the City of its obligations herein, Developer or the PID, as applicable, shall cause improvements to be installed, constructed, and completed, in conformance with applicable governmental and City standards, policies and guidelines and the Plans, included as Exhibit B, as amended. Developer will coordinate with City staff, including the Building Inspector, Land Use Coordinator, City Engineer, and Public Works Director, in constructing and installing Public Infrastructure, both within the Property boundaries and outside the Property boundaries/offsite.

xi. The Infrastructure may be installed and constructed in stages or phases as necessary to support the development of each parcel, subject to any applicable requirement to provide an improvement completion assurance (i.e., guarantee/bonding for the improvement). Developer or the PID, if approved and created, shall be responsible for the costs to install, construct, and complete the Infrastructure. Some but not all of the required Public Infrastructure to be constructed is set forth in Exhibit "B" (specifically outlining portions of the water infrastructure required to be oversized).

xii. Ground prep lots including general sheet grade where Developer determines necessary, and with issuance of any necessary permit upon application, and landscaping of surrounding street, and entrances.

xiii. At the time that City receives the improvement completion assurances from the Developer, or a PID, if approved and created, and a subdivision plat is recorded, Developer may request issuance of building permits according to City's ordinances and customary permitting process applicable to developers or builders.

xiv. Developer may request certificates of occupancy for those structures issued building permits as long as Developer is in compliance with this Agreement and City Ordinances, i.e., on the same grounds as applicable and granted to similarly situated developers/builders.

xv. Notwithstanding the foregoing, as outlined more fully subsequently herein, breach of this Agreement, including incomplete necessary Public Infrastructure, or failure of an aspect of constructed/installed Public Infrastructure, without a required completion or repair assurance bond, shall be grounds for the City to withhold issuance of a building permit(s) or certificate(s) of occupancy, until the breach/deficiency is cured—i.e., a sufficient bond for the Public Infrastructure or repair is submitted, or the necessary Public Infrastructure is constructed, repaired, and accepted/approved by the City.

General Phase 3: Perform the following requirements:

i. Market and sell lots with completed building infrastructure (a final plat having been approved and recorded); and

ii. City shall duly consider complete applications submitted for conditional use permits for buildings being constructed for commercial purposes, if required.

g. Developer agrees to proceed with each phase as it obtains sufficient funding through the PID, if approved and created, other financial resources, reimbursement by the City, and market demand as it determines appropriate to assure completion of the improvements by

Developer as set forth in this Agreement. All infrastructure shall be developed pursuant to the terms of this Agreement and the Development will conform with all of the designs and engineering standards, and improvements necessary or required in the City ordinances. Approval of this Agreement does not exempt Developer from the other timelines outlined in City ordinances, unless specifically exempted or modified in this Agreement.

8. Additional Developer Responsibilities. As a condition of development, Developer shall install specified System Improvements on the Development Property, the oversized portion of which is summarized herein and in Exhibit "B", including the following:

a. A properly engineered oversized one (1) million-gallon water storage tank, upsized from a 810,150 gallon water storage tank;
b. An oversized water main line, from the 1-million-gallon water storage tank, extending to and then along "Road A" as identified in Exhibit C (Master Plan), to serve the Hidden Canyon Planned Development, upsized from 8-inch to 12-inch, with the lateral waterlines being 8-inch lines, as required by the development activity; and,
c. Then extending the 12-inch water main line coming from the 1-million-gallon water storage tank beyond the distance and locations required to service the Hidden Canyon Planned Development, extending it to a location specified by the City near or approximate to US-89.
d. An An upsized 12-inch waterline connecting from the existing water infrastructure on or adjacent to the Quality Inn property, running parallel to and not replacing the existing 8-inch waterline, extending to the requisite booster pump(s) and then to the Development Property line.

Developer, through a PID, if approved and created, and private funding at the discretion of Developer, shall bear the costs for design, construction, and installation and provide for the real property and easements required. All infrastructure shall be engineered, constructed, and then dedicated to the City, subject to review, approval, and acceptance by the City Engineer and Public Works Director (formal acceptance shall be in writing). Dedication of any Public Infrastructure to the City shall be free and clear of all liens and encumbrances by executing and delivering to the City such conveyance or dedication of documents as the City may reasonably require (e.g., recordable deed or easement), subject however to any restrictions required through a PID, if approved and created.

City will then reimburse (reimbursement further defined hereafter) a PID, if approved and created, or Developer, as applicable, for all proportional actual, reasonable costs directly associated with extending the 12-inch waterline described in Exhibit B and/or upsizing (1) the water tank and (2) upsizing the water main line from the water storage tank to the Hidden Canyon Planned Development itself, or the proportional actual, reasonable cost of upsizing of any other public infrastructure, if required by the City. This reimbursement shall include actual, reasonable costs associated directly with additional materials, construction and labor costs expended and directly attributable to the upsized portion of the systems as more fully set forth hereafter in Sections that follow and in Exhibit B. The oversizing related reimbursement will only cover the difference between the actual, reasonable cost of the Public Infrastructure improvements with the oversizing as compared to the cost of the Public Infrastructure improvements without the oversizing. Developer, or a PID if approved and created, will submit to the City the costs attributable to the required oversizing, which will be subject to the review and approval of the City Engineer, which approval will not be unreasonably withheld.

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Deleted: and the existing Quality Inn water line

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Commented [KB46]: Rejected part of the deletions and additions. It is not a foregone conclusion that his pipe will actually be considered upsized.

Commented [JW47R46]: I believe we are good with this. Jim has stated that he will comply with the law.

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Additionally

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Deleted: <#>water storage tank, shall be required.

Deleted: <#>This 12-inch waterline shall only be considered as an upsizing/oversizing from an 8-inch waterline, and therefore entitled to reimbursement through impact fee credits, if Developer sufficiently demonstrates that an 8-inch waterline would reasonably and sufficiently meet the regular and emergency demands of the Development Property at full buildout.

9. Public Infrastructure Improvements. The improvements set forth in the Developer's Plans, as shown in Exhibit "B," generally represent an overview of a portion of the Public Infrastructure water improvements required to be constructed, installed, and oversized by Developer or a PID, if approved and created. This section is intended to obligate Developer, or a subsequently approved and created PID, to bring other major and needed infrastructure to the perimeter of the Property and from the perimeter of the Property internally to the boundary of each individual parcel. Subject to the performance by the City of its obligations herein, Developer or a PID, if approved and created, as applicable, shall cause improvements to be installed, constructed, and completed, in conformance with applicable governmental and City standards, policies and guidelines, (the "**Developer's Public Improvements**"). The Developer's Public Improvements will be installed and constructed in stages or phases, which sequence of construction phases shall be at the discretion of the Developer, but shall be constructed as necessary to support the development of each phased Parcel, except or as otherwise required herein. Developer or a PID, if approved and created, shall be responsible for the costs to install, construct, and complete the Developer's Public Improvements. The Developer's Public Improvements to be constructed within a dedicated public utility easements include:

A. Culinary Water and Culinary Distribution Systems. All pipes, valves, fittings, pressure reducing valve stations, air release valves, booster pump(s), and other distribution facilities within the Development Property for the purpose of distributing water to parcels in the Development Property from existing City sources, water tanks and distribution lines. Upon dedication of the water public improvements to the City, with the required dedication of the public utility easement, the City shall inspect the improvements and if they meet the required design standards, as approved by the Public Works Director, in consultation with the City Engineer, then the City shall accept the improvements in writing. After written acceptance by the City, the City shall be responsible to repair and maintain the same, subject to the use or applicability of any required warranty bond or other assurance in place.

B. Sewer Collection System. All pipes, manholes, clean-outs, some non-submersible lift stations, and other collection facilities within the Development Property for the purpose of collecting and transporting sanitary sewer from and within the parcels to the existing sanitary sewer connection points. Upon dedication of the sewer public improvements to the City, with the required dedication of the public utility easement, the City shall inspect the improvements and if they meet the required design standards, as approved by the Public Works Director, in consultation with the City Engineer, then the City shall accept the improvements in writing. After written acceptance by the City, the City shall be responsible to repair and maintain the same, other than lift stations as more fully set forth hereafter, subject to the use or applicability of any required warranty bond or other assurance in place.

C. Electrical Distribution System. Developer agrees to provide and install all required electrical materials and equipment for installation from the point of the existing distribution system in order to provide electrical service to all parcels, lots, units, and amenity facilities within the Development Property. This shall include, but is not limited to, Developer's obligation to provide conduit, cable (primary and secondary), switchgear, sectionalizers, switch basements, secondary boxes, services, and all other material and equipment required for construction of a complete electrical system. City will cooperate with Developer, if and when necessary. Developer shall coordinate with the City and Garkane Energy Cooperative, Inc. (the electric

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Commented [KB52]: 6/27: This language added (after my prior deletion) is still misleading, if not outright incorrect. While the order of phases developed is left open, once the Developer has decided on a phase, the Public Improvements that must be installed **is not a discretionary decision** of the Developer.

Commented [JW54R53]: We are stating the same thing. The order of phase development is at the discretion of the Developer no the infrastructure necessary to provide all of the services..

Commented [JW55R53]: I have tried to clarify that.

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Commented [KB56]: 6/27: As we've discussed, it should be recognized that merely putting infrastructure within a dedicated public utility easement does not indicate the City's acceptance of the infrastructure. Acceptance is a decision independent of dedication of a public utility easement. Not all infrastructure put in a public utility easement will be accepted by the City (e.g., infrastructure that is not built to City standards or which the Public Works Director was not notified and allowed to inspect prior to being buried or concealed).

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Commented [KB57]: JC Comment 6/26:
All lift stations were not to be dedicated to the city. The Public Works Director indicated in a pre-development meeting that the lift stations within the gated development area would not be accepted or maintained by the city and would need to remain with the master association.

utility provider in Kanab) in relation to the layout for the required public improvements. Developer shall provide and install the required electrical system per Garkane requirements and standards and in compliance with City standards and ordinances (including the requirement for new lines to be installed underground). (Developer will provide easements and all associated documentation for the required transmission and distribution lines within the Development Property for electrical public improvements to connect to Garkane's existing distribution system.) Upon dedication of the electrical public improvements, Garkane Power shall be responsible to repair and maintain the same.

D.

E. Street Lighting. Street lighting may be installed by the Developer and in such event, Developer will follow the City's Outdoor Lighting Ordinance and coordinate the same with Garkane and Chapter 22 of Kanab's Land Use Ordinances. The Master or Owner Association shall be responsible for the funding of the upkeep, maintenance, repair, and utility costs of street lighting, unless the Developer establishes another method for funding these costs. The City shall not be responsible for ongoing upkeep, maintenance, repair, or utility costs associated with street lighting.

F. Roadways. All roadways contained within the Property as shown on the Master Plan in Exhibit "C" will be constructed by Developer, unless otherwise stipulated by City or mutually constructed by Developer and City. Except as specifically noted in the the Master Plan, all roadways accessing the Development Property are intended to be public roadways, shall be constructed to City standards, and upon completion of construction shall be dedicated to the City, subject to approval and acceptance by the City. The roads intended to be constructed and then dedicated as public streets are identified in Exhibit C as: (1) Road A from Highway 89 to Road B; (2) Road B; and (3) Road E from Road B to the turnaround, just north of the multi-family residential housing. These roads are intended to access the commercial storage, hotel, and multi-family residential housing. rRoads intended to be dedicated as public streets shall be constructed to City standards, including width requirements. Upon dedication and acceptance, the City shall be responsible for the maintenance, repair, and replacement of all such roadways. Internal roads within the Development Property shall be private roads, specifically identified in Exhibit C as: (1) Road A from north of Road B on; (2) Road C; (3) Road D; and (4) Road E north of the turnaround to be constructed, north of the multi-family housing. The Master Association Declaration or a sub-association declaration/agreement shall address maintenance, repair, and replacement of all private roads. As roads are constructed in a phased approach, be they private or public roads, Developer shall create a temporary paved cul-de-sac or hammer-head at the end of any dead end roads for emergency turnaround and access. The temporary cul-de-sac or hammer-head must meet the requirements of this Agreement, State law, and local ordinance, subject to approval of the Fire Chief.

A secondary emergency access shall be required and constructed by Developer, (unless another adjacent property owner constructs a secondary access first which services the Development Property), to a standard acceptable to the City's Fire Official and UDOT, upon completion of construction of the 200th dwelling unit, (accounting for any single-family homes, multi-family residential units, and hotel rooms). No further building permits will be issued for any additional dwelling units until the secondary access is approved and constructed.

Commented [KB58]: Recognize, Garkane is not a party to this agreement—Garkane will not be bound to the provisions referencing that entity.

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Commented [JW60R59]: I believe we are in agreement with this.

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Commented [KB61]: Public roads and Private roads need to be more clearly identified on the Master Plan (Exhibit C). In recent days, Developer has stated certain roads are intended to be dedicated as Public roads that were not previously identified. As a result, the road widths on the site plan may need to be widened or otherwise adjusted.

Commented [JW62R61]: I believe this has all been completed.

Commented [KB63]: 6/27: ***The secondary access should be indicated on Exhibit C (as noted in JC's comment below). This was one of the main issues that led to the developer requesting the City Council to delay the decision at the City Council meeting last time. If an agreement has been reached with an adjacent property owner or an ingress/egress public easement granted, then please submit a copy.

Commented [KB64]: JC comment 6/26:
Exhibit - Master Plan: Add the proposed secondary emergency access location. This will help with future planning and may need to align with the Master Transportation plan.

Commented [KB65]: [Deleted phrase]
We cannot bind adjacent property owners through this Agreement. Developer may coordinate with adjacent property owners to meet this obligation, but it will still be Developer's obligation.

Commented [JW66R65]: This is not stating that we are binding another property owner. If another property owner develops and provides the necessary secondary access, then Developer will construct. I fixed the confusion.

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G. Stormwater Drainage/Detention Basins. Stormwater flows generated by development of the Property will be controlled and contained within onsite detention basins and stormwater infrastructure shall be constructed to address flows of a 100-year storm event, as established and agreed upon by the Developer and the City Public Works Director, in consultation with the City Engineer. All improvements including pipe, inlet and outlet structures, manholes, and detention basins will be constructed by Developer. Upon completion, inspection, approval, and written acceptance of these facilities, Developer will convey and/or dedicate these facilities, including the necessary property or public utility easements—*excluding* the detention basins—to the City, at which time the City will assume ownership and maintenance of these facilities *excluding* the detention basins. Upon completion and City-approval of the detention basins, Developer, the Lot Owners and the Master Owners Association shall retain or otherwise be responsible for the detention basins and any Low Impact Development features. The Master Association Declaration or a sub-association agreement shall address maintenance, repair, and related issues for all such privately retained improvements (e.g., the detention basins). The detention basins shall be subject to inspections by the City Public Works staff and City Engineer from time to time, for which access shall be granted. If the City provides written notice to the Maser Owners Association, or a subsequent applicable subordinate association, of the need to repair, maintain, or otherwise take necessary action in relation to the detention basins, and the Master Owners Association, or applicable subordinate association, does not take the necessary action within a reasonable time, then the City shall have the right to enter the area of the detention basins and perform the necessary work, thereafter billing the Master Owners Association/subordinate association. The billed amounts, if not paid within a reasonable time, shall act as a lien against the properties within the Master Owners Association or subordinate association, if applicable.

H. Financial Assurance. To the extent permissible under applicable State and City's vested laws, the City's Future Laws, or if applicable pursuant to this Agreement, the City agrees that this Agreement constitutes the written undertaking of Developer to cause the improvements which Developer is required to make under this Agreement to be installed, constructed and completed, subject however to privately available funding to Developer or the approval and establishment of a PID to provide the funding.

An improvement completion assurance, also referred to as an improvement guarantee or bonding, required under the normal City subdivision process shall be required of Developer or a subsequently created PID for each phase of development prior to or at the time each phase is commenced. However, when the construction of certain infrastructure is necessary for more than one phase (e.g., the water tank, sewer, or stormwater infrastructure upstream), then the improvement completion assurance shall be provided for the complete infrastructure required, in accordance with the City's ordinances—i.e., some required and necessary infrastructure may have to be constructed outside a specific phase to support the development of that phase, thereby requiring an improvement completion assurance for infrastructure outside the specific phase being developed.

Notwithstanding the foregoing, a subsequently created PID that undertakes the construction and installation of some or all of the Public Infrastructure pertaining to the Hidden Canyon Planned Development may work through any issues related to providing an improvement completion assurance with the City (however, this provision does not constitute a waiver of the

Deleted: No additional storm drain infrastructure will be required. ...However, However,

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Commented [KB69]: You can't assure flows do not exceed a 100-year flood event; you can build stormwater infrastructure to handle a 100-year flood event. Re-worded accordingly.

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Commented [KB70]: 6/27: An improvement completion assurance/infrastructure bond is related to infrastructure, which may or may not be directly associated with a phase of development, particularly if a phase requires infrastructure beyond its borders. This added phrase is misleading and should, therefore, be removed. [Based on your comment (below), I'm not sure why you added this phrase.

Commented [JW71]: I have spoke with Jim. That is correct. All infrastructure being constructed will be covered by a financial assurance even when outside a current phase of development.

requirements established and not waived or exempted for public entities under state law and local ordinance). In furtherance of the foregoing, Developer or a subsequently approved and created PID may provide one or more surety bonds or agreements, as permitted by State law and the City's Subdivision Ordinance, to satisfy the undertakings set forth herein and any bonding (including without limitation any improvement guarantee bond(s), warranty bond(s), or restoration bond(s)) as may be required to complete the Public Infrastructure pertaining to the Development Property.

Developer shall not be required to proceed with development of the Development Property until a PID has been formed, approved and fully funded, unless Developer decides to proceed without a PID. [Developer may elect to proceed without a PID, in which case the Developer must comply with this Agreement, apply to have it amended, or apply for a zone change for the purpose of removing the Planned Development Overlay designation.] Approval of this provision does not exempt Developer from the other timelines outlined in City ordinances, including those applicable to previously or subsequently approved site plans, permits, etc.

Deleted: once development is commenced on a phase

I. Dedication of Developer's Public Improvements. Developer intends to dedicate, and the City intends to accept the dedication of certain approved and acceptable Developer's Public Improvements as summarized above. Developer shall retain ownership of Developer's Public Improvements constructed for respective portions of the Development Property and shall remain solely responsible for all necessary maintenance, repairs, and replacements of Developer's Public Improvements prior to final acceptance thereof by the City. Developer shall satisfy the obligation to dedicate the Public Improvements by causing: (i) the filing of a dedication plat; or (ii) the filing of a final subdivision plat including dedication.

Public Infrastructure/Developer's Public Improvements shall be constructed as required by State law, City ordinances, and City design standards. City acceptance of Public Infrastructure shall be subject to the written acceptance by the City's Public Works Director, after necessary inspections. Public Infrastructure/Developer's Public Improvements must be formally accepted in writing, which acceptance may be given in phases or at completion of some or all of the improvements are completed, after a final inspection. Developer shall call for and receive an inspection of all Public Infrastructure/Developer's Public Improvements before burying or otherwise concealing any portion of the Public Infrastructure and before final connection to existing City infrastructure. Such inspections shall not necessarily constitute a final inspection. If pursuant to a final inspection, the City's Public Works Director requires repairs, corrections, or further measures to be taken in order for the Public Infrastructure to meet State law, local ordinance, City standards, and/or the terms of this Agreement, then Developer shall call for another final inspection once Developer believes the necessary measures are completed.

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The City shall approve and accept dedication of any Developer's Public Improvements, in whole or in part, as necessary to support the phase of development as long as the Developer's Public Improvements meet the requirements of State law, local ordinance, City's design standards, and this Agreement, and are inspected and formally accepted in writing by the City's Public Works Director. Thereafter, the City shall own, operate, and maintain the dedicated, approved, and accepted Developer's Public Improvements without further charge or cost to

Developer; provided, however, Developer shall provide the requisite warranty, in a form and content required by the City's subdivision ordinance. To the extent not prohibited by law or contract, Developer shall assign to the City any contractual warranty rights existing for such Developer's Public Improvements. This provision shall not apply to sewer lifts/pump stations within the boundaries of the Development Property, which shall not be dedicated to the City, nor accepted or maintained by the City. The Master Association Declaration shall address the upkeep, maintenance, repair, and replacement of sewer lifts/pump stations which are located within the private gated portion of the Development Property. The City shall maintain the sewer lifts/pump stations located on the public dedicated areas and shall be designed to meet the City Standards.

10. Guarantee of Performance; Warranty. Developer acknowledges and agrees that an improvement completion assurance is required for all of Developer's Public Improvements within the Development Property. If Developer desires to record any plat prior to Developer's non-PID-funded Public Improvements being completed, Developer will furnish to City an improvement completion assurance in accordance with City Code in an amount required by City, but not to exceed one hundred ten percent (110%) of the Developer's engineer's estimate price, subject to review and approval of the City Engineer, for faithful completion of the Developer's Public Improvements necessary or required for said plat. Developer shall also provide improvement completion assurances and improvement warranties for public landscaping improvements as authorized under Utah Code, Title 10, Chapter 9a, and as outlined and required in Kanab City ordinances.

11. System Improvements, Extensions and Oversizing. City shall reimburse Developer for the difference in the actual, reasonable costs of material, labor, and installation directly associated with that portion paid by Developer for oversizing System Improvements, as summarized infra and as outlined in Exhibit B, in the which the City requests oversizing of a water transmission lines and water storage tank over that which is required to meet the requirements of the development of the Property, and consistent with the policy of upsizing, after receiving the recommendations of the City Engineer. As required by Kanab City General Ordinance §§ 7-803 and 7-807, the amount for the oversized portion of the public improvements shall not exceed the actual, reasonable costs directly attributable to the oversizing portion of the infrastructure, as incurred in purchasing materials and installing the oversized portion of the public improvements, and shall not include interest.

Upon being engineered and a sufficient cost analysis being performed, the City Engineer will determine and recommend to the City the actual, reasonable cost of oversizing the System Improvements (i.e., determine the difference between all costs of the System Improvements as necessary for the proposed Hidden Canyon Development and the overall cost including oversizing the System Improvements), for which Developer will be eligible for reimbursement. Developer may submit to the City Engineer documentation of actual costs/expenditures related to oversized System Improvements for consideration and/or subsequent revision of the City Engineer's calculation of the eligible reimbursement. If Developer disagrees with the reimbursable amount calculated and recommended by the City Engineer, and ultimately decided upon by the City Manager, then Developer may appeal the City Manager's decision through the administrative appeal process outlined in the Kanab City's Land Use Ordinance Developer may, at any time before the City Manager has made a final decision, submit an additional opinion of actual, reasonable costs and reimbursable amount from a third-party engineer to be considered by the City Manager. If the Developer needs additional time to acquire an additional opinion from a third-party engineer, then Developer may request the City Manager withhold his/her final decision. The information and materials

Commented [KB73]: JC comment 6/26:
"which are located with the Development Property, unless stationed in a public utility easement corridor". The Public Works Director indicated in a pre-development meeting that the lift stations within the gated development area would not be accepted or maintained by the city and would need to remain with the master association.

Commented [KB74]: 6/27: Justin, the last phrase, "unless stationed in a public utility easement corridor," is incorrected and needs to be deleted. Constructing and installing infrastructure in a public utility easement does not make it the City's infrastructure, nor, by itself, does it place a responsibility to maintain, repair, or replace it. Your comment (above) is not a justification for this language. See JC's comment (above). The agreement should be corrected before being approved—the lift stations within the development will not be accepted by the City, even though a public utility easement will be required for the City to maintain the lines connected thereto. The Public Works Director has said that the lift station anticipated outside the development area will be accepted by the City, through the normal process of accepting public infrastructure (i.e., following inspection(s) and confirmation that it meets the required standards). **However, any lift station outside the development area will require a dedicated public utility easement before it is accepted.

Commented [KB75]: [Rejected deletion of these 2 sentences.]
Why are these phrases being deleted?

Commented [JW76R75]: Because a lift station is part of the sewer lines and is located off premises. Once dedicated to the City, it is the City's sewer line and the City is responsible to fix it, especially when it is in a City PUE. However if the lift station is in the development and not located in a public utility easement, then certainly it is the Mater Association or Developer's responsibility maintain it.

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submitted to the City Manager may then be submitted by the Developer on appeal, if appealing the City Manager's final decision. The final written decision of the appeal authority is subject to judicial review.

12. Impact Fee Credit as the Means for Payment/Reimbursements. City shall reimburse either the Developer and/or a subsequently approved and created PID, as applicable, for the oversizing of System Improvements, based on the private or public entity that actually bears the oversizing costs (i.e., the entity that pays the difference in actual costs for oversizing System Improvements as set forth herein). Developer or the PID will be responsible for the cost of the System Improvements upfront, including the cost of oversizing.

a. The form of the reimbursement, if Developer bears the cost of oversizing the System Improvements, shall be a credit against subsequent applicable impact fees becoming due and payable at the time a completed building application(s) is submitted.

b. The form of the reimbursement, if a subsequently approved and created PID bears the cost of oversizing the System Improvements shall be through reimbursement from applicable impact fees due, actually collected by the City, and related to the development of the Property.

c. "Applicable impact fees" as used herein, from which a credit or reimbursement may be received, means those impact fees related to the Water Impact Fee Facilities Plan & Analysis, for oversizing water System Improvements; and those impact fees related to the Wastewater Impact Fee Facilities Plan & Analysis, if oversizing the sewer lines is subsequently required by the City (though not contemplated currently). Applicable impact fees, as used herein, does not include those fees related to Public Safety, Transportation, Recreation, or Stormwater.

d. The credit against impact fees for the Developer, or the reimbursement paid from collected impact fees for a subsequently approved and created PID, shall be applied/calculated at the time of dedication and acceptance of the oversized infrastructure by the City. City shall then credit Developer with the equivalent amount of applicable impact fees credits as necessary to reimburse Developer for upsizing of any system improvements, but only for that number of impact fees due/accrue to the Developer, or in the amount of applicable impact fees actually due and collected in regards to a PID reimbursement which will be credited upon approval of a building permit application by the City. Impact fee credits will be based on the effective impact fees adopted at the time of dedication of the infrastructure to the City for a purchase credit of the upsizing of the infrastructure.

e. The City will only approve impact fee credit/reimbursements for the actual, reasonable costs of any City-requested upsizing/oversizing or additional capacities or additional System Improvements not required for the Planned Development (i.e., required in anticipation of adjacent future growth outside the Hidden Canyon Planned Development), as outlined in this Agreement and summarized in Exhibit B. In addition to the required plans, Developer shall submit the budget and actual costs for the System Improvements, with a detailed breakdown, for purpose of calculating reimbursement and credit against impact fees for requested oversizing.

12. Combining Reimbursement Methods; Reimbursement Through Future Adjacent Developments (i.e., for Pioneering). Contemporaneous with potential impact fee credits, or reimbursement from collected impact fees in relation to a subsequently created PID, if applicable, outlined in the preceding section, the

Commented [KB78]: 6/27: This timing is what was expected.

Commented [KB79]: 6/27: This is what was expected (calculating the dollar value of the impact fee credits at the time of "dedication and acceptance"). However, to be clear, this is a dollar amount for which impact fees are credited (a running balance, like a bank account balance eligible for use).

Commented [JW81R80]: Not so. The impact fee credit will be based upon the impact fee amount at the time this Agreement is executed rather than impact fees which are raised at a later date thus diluting Developer's ROI from installing the oversized lines.

Commented [JW82R80]: This is the alternative to capping impact fees which I now agree is not appropriate unless it were a closed system which this system is not. So I appreciate your insight on that issue and want to reassure that Jim has explained that he desires to comply with the law but also desires to be treated as fairly as possible by the City. What is being proposed, (however worded and you are welcome to clarify as you feel necessary, is that at the time of dedication of the improvements which are upsized), the City can then purchase the upsized portion of the system through giving the Developer an equivalent number of impact fee credits which the City would have paid if it had the impact fees and were upsizing the lines at the time of dedication. Clearly we have the nexus and rough proportionality because the impact fee credits paid for upsizing the waterline would be equivalent in value received by the City.

This matches up with both Sheetz v. City of El Darado and the Dolan test which asks whether the imposition or ... [18]

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Commented [KB83]: JC Comment 6/26: ... [19]

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Commented [KB84]: [Deleted phrase and rejected deletion of "application/collection".] ... [20]

Deleted: application/collection

Commented [KB85]: 6/27: The way in which you (Justin) have modified this paragraph is not acceptable—***The*** ... [21]

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Commented [KB88]: 6/27: This phrase was still deleted in the latest version of the development agreement e ... [23]

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City shall reimburse the Developer, or a subsequently approved and created PID, for the difference in actual, reasonable costs borne for requested oversizing of System Improvements with corresponding/applicable impact fees paid, or through outright collection of a pro-rata share of the actual, reasonable costs of the oversized portion of the System Improvements from or as a result of entering into a reimbursement agreement with adjacent property owner(s)/developer(s) (subsequently entered into at the City's sole discretion--it being a legislative decision), which payments are actually received by the City from adjacent development(s)/developer(s) reasonably anticipated to connect to and utilize the oversized System Improvements. This method for reimbursement shall be subject to any limitations imposed by Utah Law and local ordinance. *See* Utah Code, Title 11, Chapter 36a, *Impact Fee Act*. State law may impose a maximum term for eligible reimbursement under this provision; however, if not specified, this form of reimbursement shall be limited to ten (10) years from the date the oversizing costs accrue and are approved by the City, pursuant to the limitation imposed under Kanab City's General Ordinance.

13. No Duplicative Recoupment of Oversizing Costs. Notwithstanding the foregoing, the Developer nor any Secondary Developer, nor a PID, if subsequently approved and created, shall be entitled to recoup more than the total actual, reasonable costs attributable to the oversizing portion of the System Improvements—i.e., no impact fee credits and no reimbursement through adjacent developments (i.e., pioneering reimbursement) shall be granted once the actual costs attributable to the oversizing of the System Improvements have been realized through one or both methods for reimbursement. Any form of reimbursement provided for herein shall comply with the applicable provisions of State law. Developer and Secondary Developer(s), and/or a PID, if subsequently approved and created, shall not be entitled to duplicative reimbursement. Initial Developer must clearly convey right to reimbursement/future credit against applicable impact fee(s) to a Secondary Developer, clearly identifying the oversized infrastructure to which the reimbursement or credit apply and the specific category of impact fees applicable, and provide written notice of the same to the City for Secondary Developer(s) or assignee(s) to receive reimbursement as outlined herein. Initial Developer may convey all or portion of the right to be reimbursed to a Secondary Developer or assignee. The transferred right to reimbursement through impact fee credits or otherwise, may only be utilized in relation to the Hidden Canyon Planned Development or an adjacent developer that actual connects to the oversized infrastructure for which reimbursement is contemplated herein. City shall notify Developer within a reasonable time of receipt of payment of applicable impact fees paid by an adjacent property owner/developer connecting to and planned utilization/benefit of the oversized System Improvements.

14. Public Infrastructure District. The City and Developer specifically agree and acknowledge that Developer shall be entitled but not required to seek the creation of a PID permitted by Utah law, particularly Title 17D, Chapter 4, titled the Public Infrastructure District Act, (the "PID Act"), as determined by Developer, in order to implement and facilitate the financing, construction and operation of public infrastructure for the Planned Community. Subject to the provisions of the PID Act, and the City Council's legislative decision-making authority, the City and Developer agree to continue cooperation in connection with the application, consideration of the formation, and operation of a PID in order to accommodate development circumstances, to fund, construct and/or provide public facilities and services set forth in this Agreement or otherwise required in connection with the development of the Planned Community, including but not limited to streets, water, sewer, and drainage, within or otherwise serving all or a portion of the Planned Community. The City agrees that it will exercise any rights reserved to the City under the PID Act in connection with the establishment or operation of a PID for the Planned Community in accordance with the requirements of the PID Act, or any portion thereof. The City agrees that any obligation set forth in this Agreement for the financing and construction of public improvements which are required to serve the

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Planned Community, which are anticipated to be dedicated to the City by the Developer, a PID, if approved and created, or other limited purpose governmental entity may be undertaken, performed and completed by a PID, subject to the requirements of the PID Act and the approval of the City consistent therewith. Any PID created for the Planned Community, or any portion thereof, shall not create any financial liabilities for the City. This provision shall not be interpreted as binding the City to any future legislative decision, particularly in regards to whether a PID is created.

15. Approval Process for Development and Applications.

    a. Phasing of Development and Applications. The City acknowledges that Developer and its assigns may submit multiple applications from time-to-time to develop a portion of the Development Property. Approval processes for each development application shall be as provided in the City's vested laws at the time that a complete application(s) and required fee(s) is submitted, except as otherwise provided or modified in this Agreement. The Parties shall cooperate reasonably and promptly in proceeding with each development application, subject to review and proper public notification of any matters which must be brought before the City's Planning Commission, City Council, or another board or individual, whichever or whomever is the applicable and formally designated land use authority.

    b. If City denies any Development Application, it shall provide notice to the Developer and, upon Developer's request, provide any written decision, record, or recording related to the decision. Upon request of the Developer, the City and Developer shall meet within fifteen (15) business days (in-person, by phone, text, email, or virtually) or as soon thereafter as possible, to review the denial and attempt to resolve the issues specified in the denial. If a dispute remains, related to the denial, the Developer may appeal the decision in accordance with administrative appeal process as outlined in Kanab City's Land Use Ordinance. The time period for submitting an appeal will start at the time the land use decision was made, but may be tolled, if Developer requests a meeting with the City, through the date in which the meeting occurs. However, if no meeting occurs, there shall be no tolling of the time period for submitting an appeal.

    c. Non-City Agency Reviews. If any aspect or a portion of a Development Application is governed exclusively by a Non-City Agency, requires any form of certification, or necessitates an independent technical analysis (such as a threatened species evaluation) for approval of any application, then Developer shall timely notify the City of any such submittals and promptly provide the City with a copy of the requested submissions. The City may only grant final approval for any Development Application subject to compliance by Developer with any conditions required for such Non-City Agency's approval, certification, or independent technical analysis, and shall not be responsible for any delays caused by a Non-City Agency. Under such circumstances, Developer may apply/request a reasonable extension of time from the City, which request shall not be unreasonable withheld if such extension is allowed for and meets the requirements of the City's applicable ordinance.

16. Coordination with City Public Works Director and City Engineer. Pursuant to Kanab City Ordinance, all System Improvements, including those being oversized, shall be coordinated with and approved by the City Public Works Director and City Engineer throughout the design and development phase. Developer shall pay for the cost of the City Engineer to design certain elements of the System Improvements being oversized (i.e., the water tank). Developer acknowledges that the City Engineer is not Developer's engineer. Accordingly, Developer will be required to employ and pay for its own engineer for matters not addressed by the City Engineer.

17. Assignment. This Agreement grants and vests in Developer all rights, consistent with the Hidden Canyon Development Property Plan, as shown in Exhibit C, to develop the Development Property according to the Plans as provided in this Agreement, including incorporating all exhibits attached hereto, without alterations. The Parties intend that the rights granted to Developer and the entitlements for the Development Property under this Agreement are agreed to with recognition of the application of the requirements of *Utah Code Ann*. § 10-9a-509 (2023). It is expressly understood by the City that Developer may assign all or portion of its rights under this Agreement, provided such assignment conforms to the requirements of, and any and all assignees agree to be bound by the terms of this Agreement. However, Developer must provide written notice of any and all such assignments.

18. Applicability of Federal and State Law and Kanab City Ordinances.

a. This Agreement shall be governed by the laws in the State of Utah and the Kanab City ordinances, except where modified herein.

b. All provisions of State Law and the City ordinances shall be applicable to the development of the Property, except to the extent this Agreement is more restrictive.

c. This Agreement does not exempt nor override any procedure, process, necessary approvals, design standards, provision of applicable State law, building code, fire code, or Kanab City ordinance (e.g., General, Land Use, and Subdivision) except where specifically outlined in this Agreement, and as permitted by law.

d. Developer shall be entitled to application of the relevant local ordinances, laws, and fees in effect at the time a complete application is submitted (i.e., the point at which the principle of vested laws is applicable), except as outlined or restricted herein.

e. Developer shall cause to be submitted the necessary application(s) with requisite supporting documentation and plans, preliminary and final if required, for administrative consideration and approval. For administrative applications, the City shall approve such application(s), site plan(s), plat(s), etc., if such items meet the standards and requirements outlined in applicable State Law and local ordinances, except where local ordinance is modified by this Agreement.

f. The Parties agree, intend, and understand that the obligations imposed by this Agreement are only such as are consistent with state and federal law. The Parties further agree that if any provision of this Agreement becomes, in its performance, inconsistent with state or federal law or is declared invalid, this Agreement shall be deemed amended to the extent necessary to make it consistent with state or federal law, as the case may be, and the balance

of the Agreement shall remain in full force and effect. If the City's approval of the development of the Property is held invalid by a court of competent jurisdiction, this Agreement shall be null and void.

19. Temporary Land Use Regulation/Moratorium. The Development Property and the rights and obligations of Developer under this Agreement shall not be subject to any temporary land use regulation or moratorium enacted by the City, except upon a finding by the legislative body of a compelling, countervailing public interest, or if the area is unregulated, pursuant to *Utah Code Ann*. § 10-9a-504 (2022).

20. City Legislative Authority/Police Powers. Nothing in this Agreement shall limit the future exercise of the police powers of City in enacting zoning, subdivision, development, growth management, platting, environmental, open space, transportation and other land use plans, policies, ordinances, and regulations after the date of this Agreement. This Agreement is not intended to bind a future governing body of the City to a specific legislative decision.

Notwithstanding the retained power of City to enact such legislation under its police power, such legislation shall not modify Developer's rights as set forth herein, unless facts and circumstances are present which meet the compelling, countervailing public interest exception to the vested rights doctrine as set forth in Western Land Equities, Inc., v. City of Logan, 617 P.2d 388 (Utah, 1988), or successor case law or statute. Any such proposed change affecting Developer's rights shall be of general application to all development activity in City. Unless City declares an emergency, Developer shall be entitled to prior written notice and an opportunity to be heard with respect to the proposed change and its applicability to development of the Property.

21. Default.

a. Failure by a Party to perform any of the Party's obligations under this Agreement within a thirty (30) day period (the "Cure Period") after written notice thereof from the other Party shall constitute a default ("Default") by such failing Party under this Agreement; provided, however, that if the failure cannot reasonably be cured within thirty (30) days, the Cure Period shall be extended for the time period reasonably required to cure such failure so long as the failing Party commences its efforts to cure within the initial thirty (30) day period and thereafter diligently proceeds to complete the cure. Said notice shall specify the nature of the alleged Default and the manner in which said Default may be satisfactorily cured, if possible. Upon the occurrence of an uncured Default under this Agreement, the non-defaulting Party may seek a remedy as outlined in the Remedies provision of this Agreement.

b. The City shall have the additional following remedies in the case of default by the Developer:

i. Enforcement of Security. The right to draw on any security posted or provided in connection with the Planned Community and System Improvements, relating to remedying the particular default.

ii. Claim Reimbursement – Public Infrastructure. The right to demand repair or replacement of failed Public Infrastructure/System Improvements or for reimbursement from the Developer for costs of remedying a particular failure or

default relating to the Public Infrastructure/System Improvements, in excess of any security posted or provided during the warranty period, or prior thereto.

iii. Withholding Further Development Approvals. After meeting with Developer without resolution of any default, the right to withhold all further reviews, approvals, licenses, building permits, certificates of occupancy, and/or other permits for the Developer, Secondary Developer, or for the development of the Property owned by the defaulting party.

c. During any period of default by Developer or Secondary Developer, Developer or Secondary Developer shall not receive reimbursement for oversized System Improvements until such default has been cured. If the Default is cured, then no Default shall exist and the noticing Party shall take no further action.

d. Any Default or inability to cure a Default caused by strikes, lockouts, labor disputes, acts of God, inability to obtain labor or materials or reasonable substitutes therefor, governmental restrictions, governmental regulations, governmental controls, enemy or hostile governmental action, civil commotion, fire or other casualty, and other similar causes beyond the reasonable control of the party obligated to perform, shall excuse the performance by such party for a period equal to the period during which any such event prevented, delayed or stopped any required performance or effort to cure a Default.

e. These Default provisions shall not be interpreted as applying to administrative decisions made by the City in relation to submitted Development applications; which remedy must be sought through the administrative appeal process.

22. Remedies. Notwithstanding the foregoing provisions related to default, the following remedies shall apply:

a. The Parties to this Agreement recognize that City has the right to enforce its rules, policies, regulations, ordinances, and the terms of this Agreement by seeking an injunction to compel compliance. In the event Developer violates the rules, policies, regulations or ordinances of City or violates the terms of this Agreement, City may, without declaring a Default hereunder or electing to seek an injunction, and after thirty (30) days written notice to correct the violation (or such longer period as may be established in the discretion of City or a court of competent jurisdiction if Developer has used its reasonable best efforts to cure such violation within such thirty (30) days and is continuing to use its reasonable best efforts to cure such violation), take such actions as shall be deemed appropriate under law until such conditions have been rectified by Developer. City shall be free from any liability arising out of the exercise of its rights under this paragraph.

b. Any assertions of breach or default asserted by Developer against the City shall be handled as a Land Use Appeal and addressed in accordance with the administrative appeal process outlined in Utah Code, Title 10, Part 7, and the Kanab City Land Use Ordinance, Chapter 3, and other applicable provisions of the Kanab City ordinances. All administrative process and remedies must be exhausted, prior to seeking judicial review of an appeal authority's final decision.

c. No Monetary Damages. The Parties acknowledge that City would not have entered into this Agreement had it been exposed to monetary damage claims from Developer for any breach thereof except as set forth herein. As such, and except as otherwise noted within the Agreement, the Parties agree that specific performance, as may be determined through the Kanab City administrative appeals process (the final decision of which is subject to review by a court of competent jurisdiction) is the only intended remedy for any breach of this Agreement by the City. Accordingly, the Parties waive all other remedies in law or equity, including monetary damages (e.g., actual, future, and speculative damages, including economic, special, consequential, punitive, or other monetary damages), except where otherwise noted in this Agreement.

d. Nothing in this Agreement shall be construed as eliminating nor intended to circumvent the requirement and applicability of the City's administrative appeal process, with the option for judicial review of any final decision resulting from an administrative appeal.

23. Governmental Immunity. The City is a governmental entity under the Governmental Immunity Act of Utah, Utah Code §§ 63G-7-101 et seq. (the "Immunity Act"). The City does not waive any defenses or limits of liability available under the Immunity Act and other applicable law. The City maintains all privileges, immunities, and other rights granted by the Immunity Act and all other applicable law. Nothing in this Agreement should be interpreted as a waiver of the City's privileges, immunities, and other rights granted by the Immunity Act and all other applicable law. [Were it so, the City would not be sufficiently induced to enter into this Agreement.]

24. Hold Harmless.

a. Developer agrees to and shall hold City, its officers, agents, employees, consultants, special counsel, and representatives harmless from liability for damages, just compensation restitution, or judicial or equitable relief which may arise from or are related to any activity connected with the development of the Property, including approval of the development and this Agreement; the direct or indirect operations of Developer or its contractors, subcontractors, agents, employees or other persons acting on its behalf which relate to the development of the Property; or which arises out of claims for personal injury, including health, and claims for property damage.

b. This hold harmless provision shall not be applicable to any claim arising by reason of the negligence or intentional tort actions of City.

c. City shall give written notice of any claim, demand, action or proceeding which is the subject of Developer's hold harmless agreement as soon as practicable but not later than thirty (30) days after the assertion or commencement of the claim, demand, action or proceeding. If any such notice is given, Developer shall be entitled to participate in the defense of such claim. Each party agrees to cooperate with the other in the defense of any claim and to minimize duplicative costs and expenses.

25. Successors and Assigns.

a. Agreement to Run with the Land. This Agreement shall be recorded in the Office of the Kane County Recorder, shall be deemed to run with the Development Property, shall

encumber the same, and shall be binding on and inure to the benefit of all successors and assigns of Developer in the ownership or development of any portion of the Development Property. When a phase of development is complete or ownership rights are transferred, the Master Owners Association, and/or an applicable subordinate association, and the individual property owners shall be bound to the terms of this Agreement, notwithstanding the expiration or termination of this Agreement. However, an amendment to this Agreement may be presented to the City for consideration by those associations or property owners bound hereunder.

b. Transfer. If the Property is transferred ("Transfer") to a third party ("Transferee"), Developer and the Transferee shall be jointly and severally liable for the performance of each of the obligations contained in this Agreement unless prior to such Transfer (i) Developer provides to City a letter from Transferee acknowledging the existence of this Agreement and agreeing to be bound thereby. Said letter shall be signed by the Transferee, notarized, and delivered to City prior to the Transfer. Upon execution of the letter described above, the Transferee shall be substituted as Developer under this Agreement and the persons and/or entities executing this Agreement as Developer shall be released from any further obligations under this Agreement as to the transferred Property.

c. Individual Lot or Unit Sales. Notwithstanding the provisions of this section, a transfer by Developer of a lot or condominium dwelling unit or commercial building located on the Property within a City approved and recorded plat shall not be deemed a Transfer as set forth above so long as Developer's obligations with respect to such lot or dwelling unit have been completed, including the infrastructure necessary or required to service the lot or dwelling unit. In such event, Developer shall be released from any further obligations under this Agreement pertaining to such lot or dwelling unit.

26. Term and Early Termination.

a. The "Effective Date" of this Agreement shall be the date upon which the Agreement is approved by the Kanab City Council.

b. Pursuant to Kanab City General Order § 7-808, the City's obligation to make reimbursements under the reimbursement provisions related to development by adjacent property owners/developers that connect to the oversized Public Infrastructure of Hidden Canyon (i.e., the "pioneering" provision) shall terminate after ten (10) years. The termination of the pioneering provision shall not affect the term for the remaining applicable provisions of this Agreement.

c. This Agreement shall expire twenty (20) years from the Effective Date of this Agreement ("Termination Date"), unless it is terminated earlier by (i) mutual consent, (ii) buildout, (iii) the Term is modified by written and recorded amendment to this Agreement, or (iv) upon termination as otherwise specified herein.

d. If as of that Termination Date (i) Developer has not been declared to be in default as provided in this Agreement, or if any such declared default has been or is being cured as provided therein, and (ii) Developer has continued to make meaningful substantial progress

Commented [KB89]: Added this sentence in an effort to address one of the City Council's concerns, which I could not find addressed elsewhere. This point could be further elaborated upon, if deemed appropriate.

Commented [JW90R89]: I am good with this.

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each year in developing the Property, then this Agreement shall be automatically extended until December 31, 2044.

e. If Developer has failed to make meaningful substantial progress in developing the Property for any given 2-year period, the City shall give written notice to the Developer of its intent to terminate the Agreement for non-performance. If an additional year passes thereafter without Developer making any meaningful substantial progress in developing the Property (i.e., totaling a 3-year period of no meaningful substantial progress), then the City shall give written notice of the termination of this Agreement, upon which this Agreement will be considered null and void.

f. If the City has not taken/does not take the required affirmative steps to terminate this Agreement, outlined herein, then the mere passage of time and/or lack of meaningful substantial progress by the Developer shall not be sufficient for terminating the Agreement and the obligations of the Parties established by this Agreement shall remain—i.e., there is no automatic termination for non-performance.

g. "Meaningful substantial progress" as used herein shall include (i) submission and approval of one or more Development applications (e.g., building or grading permit, conditional use application/permit, or preliminary or final site plan or plat approval or amendment), (ii) completion and passage of three or more onsite inspections (e.g., relating to construction/installation of Public Infrastructure, inspection related to construction of commercial or residential units).

h. The provisions related to the term of this Agreement shall not be interpreted as modifying the City's ordinances in respect to other deadlines, timelines/time frames and expiration of any permit or approval issued by the City (e.g., a building permit shall terminate/expire as outlined in the City's ordinance; Developer must commence construction under an approved site plan within 1-year, as determined by the City's ordinance, unless an extension is granted).

i. Upon termination of this Agreement, or if the Agreement becomes null and void, the Parties agree that the City or the Developer may record a declaration of the same against the Development Property, after giving notice to the other party of the intent to record the declaration and allowing ninety (90) days for the non-recording party to object, at which point the City may consider taking any other lawful action in relation to some or all of the Development Property not fully built out, including removing the Planned Development Overlay through a zone change.

j. .

27. Notices. Any notices, requests, or demands required or desired to be given hereunder shall be in writing and shall be given using one of the following methods of delivery: personal delivery, registered or certified mail (in each case, return receipt requested and postage prepaid), nationally recognized overnight courier (with all fees prepaid), facsimile, or email. Notices shall be effective upon receipt. Any party giving a notice shall address the notice to the receiving party at the following addresses:

Commented [KB91]: JC comment 6/26:
per land Use Ordinance, Chapter 23 – Planned Development Overlay (PDO): A prepared and approved development agreement is required for a PDO, if the agreement is terminated the planned development overlay zone would need to be removed, this would be done through the re-zoning process.

Commented [KB92]: Added this proposed provision to address the concerns of the City Council, since I did not see it addressed elsewhere.

Commented [KB93]: JC comment 6/26:
per land Use Ordinance, Chapter 23 – Planned Development Overlay (PDO): A prepared and approved development agreement is required for a PDO, if the agreement is terminated the planned development overlay zone would need to be removed, this would be done through the re-zoning process.

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Commented [KB94]: [Rejected deletion.]
This is a correct statement of the law. If the development agreement is terminated (as opposed to expiring) or becomes null and void, then the City should consider rezoning the undeveloped portion of the property. Planned Developments require a development agreement; hence, no development agreement = need to rezone as non-PD zone.

Commented [JW95R94]: I simply do not agree and find nothing in the law to support your position. Why would the City go back in and rezone a property? That makes no sense to me. Are you talking about the overlay or the underlying zone or both?

Commented [JW96R94]: I am glad to talk about this, but it is simply perplexing to me why this would be added or what the City is trying to achieve.

Commented [KB97]: [Rejected deletion.]
This is a correct statement of the law. If the development agreement is terminated (as opposed to expiring) or becomes null and void, then the City should consider rezoning the undeveloped portion of the property. Planned Developments require a development agreement; hence, no development agreement = need to rezone as non-PD zone.

Commented [JW98R97]: I simply do not agree and find nothing in the law to support your position. Why would the City go back in and rezone a property? That makes n ... [24]

Commented [JW99R97]: I am glad to talk about this, but it is simply perplexing to me why this would be added or what the City is trying to achieve.

Commented [KB100R97]: 6/27: See JC's comment. You cannot have a Planned Development Overlay without a valid development agreement, thus requiring a re-zoning legislative decision to remove it if there is no valid ... [25]

City:	Developer:
Kanab City 26 North 100 East Kanab, UT 84741 ATTN: City Manager (435) 644-2534	JJJ Development, Inc. 575 West Upper Alton Road Alton, UT 84710 ATTN: Jim Guthrie (951) 334-9003 jim@guthriecompanies.com

28. No Third-Party Beneficiary. This Agreement is made for the sole protection and benefit of the City and the Developer and their assigns. No other person shall have any right of action based upon any provision of this Agreement whether as third-party beneficiary or otherwise. The relationship between City and Developer arising out of this Agreement is one of independent contractor and not agency. It is specifically understood by the parties that: (i) all rights of action and enforcement of the terms and conditions of this Agreement shall be reserved to City and Developer; (ii) developing the Property is a private development; (iii) City has no interest in or responsibilities for or duty to third parties concerning any improvements to the Property; and (iv) Developer shall have the full power and exclusive control of the Property subject to the obligations of Developer set forth in this Agreement.

29. Successors and Assigns. This Agreement shall bind and inure to the benefit of the parties hereto and their respective successors and assigns.

30. Severability. If any part or provision of this Agreement shall be adjudged unconstitutional, invalid or unenforceable by a court of competent jurisdiction such determination shall not affect any other part or provision of this Agreement except that part or provision so adjudged to be unconstitutional, invalid or unenforceable. If any condition, covenant, or other provision of this Agreement shall be deemed invalid, due to its scope or breadth such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

31. Waiver. No waiver of any of the provisions of this Agreement shall operate as a waiver of any other provision regardless of any similarity that may exist between such provisions nor shall a waiver in one instance operate as a waiver in any future event. No waiver shall be binding on the City or the Developer, unless executed in writing by the waiving party.

32. Reasonableness. Except as otherwise stated to the contrary in this Agreement, when the consent, approval, or agreement of the City and/or the Developer is required or contemplated under this Agreement, such consent, approval, or agreement shall not be unreasonably withheld, conditioned, or delayed; provided, this provision shall not bind the City with respect to its legislative actions.

33. Time of the Essence. Time shall be of the essence with respect to the duties imposed on the Parties under this Agreement. Unless a time limit is specified for the performance of such duties each party shall commence and perform its duties in a diligent manner in order to complete the same as soon as reasonably practicable.

34. Annual Review. City may review progress pursuant to this Agreement at least once every twelve (12) months to determine if Developer has complied with the terms of this Agreement. If City finds, on the basis of substantial evidence, that Developer has failed to comply with the terms hereof, City may declare

Developer to be in Default as provided herein. City's failure to review at least annually Developer's compliance with the terms and conditions of this Agreement shall not constitute or be asserted by any party as a Default under this Agreement by Developer or City.

35. Non-Liability of City Officials, Employees, Members, or Managers. No officer, representative, agent, or employee of the City shall be personally liable to the Developer or any of its successors or assigns in the event of any default or breach by the City or for any amount which may become due to the Developer or its successors or assigns for any obligation arising out of the terms of this Agreement. Similarly, no officer, member, manager, or representative, agent, or employee of the Developer shall be personally liable to the City or any of its successors or assigns in the event of any default or breach by the Developer or for any amount which may become due to the City or its successors or assigns for any obligation arising out of the terms of this Agreement.

36. Costs. In the event of any litigation between the parties arising out of or related to this Agreement, or planned development and the application of the City's ordinances or state law, the prevailing party shall not be entitled to an award of reasonable court costs, including reasonable attorney fees. In the event that a dispute over or relating to the terms of this Agreement is resolved short of a final contested decision by a court of competent jurisdiction, the Parties shall cover their or its own costs, including reasonable attorney fees, whether incurred in litigation or otherwise. The Parties agree that an advisory opinion rendered by a representative of the Utah Property Rights Ombudsman, while potentially helpful in reaching a resolution to a dispute between the Parties, shall not be considered grounds for awarding attorney fees, civil fines or penalties, nor consequential damages.

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37. Authority to Execute Agreement. Each party hereto expressly warrants that it has the necessary authority to execute this Agreement on behalf of its governing board or board of directors that each signatory hereto has authority to execute this Agreement on behalf of the respective named party. The Parties agree to undertake such other acts and execute such other documents as may be reasonably necessary to affect the purpose and intent of this Agreement.

38. Counterparts. This Agreement may be executed in any number of duplicate originals or counterparts, each of which when so executed shall constitute in the aggregate but one and the same document.

39. Headings and Interpretation. Paragraph headings contained herein are only for the convenience of the Parties. The substance and provisions hereof control without regard to the headings. This Agreement shall be construed so as to effectuate its public purpose of ensuring the Property is developed as set forth herein to protect health, safety, and welfare of the citizens of City. The Parties acknowledge that this Agreement has been negotiated and prepared in an arms-length transaction and that all Parties have been deemed to have drafted this Agreement and this Agreement shall not be interpreted against any Party as the draftsman.

40. The Parties each warrant and acknowledge that (i) they have read and understood the terms of this Agreement; (ii) they have had the opportunity to retain legal counsel of their choice throughout the negotiations which preceded the signing of this Agreement; and (iii) they have entered into this Agreement for reasons of their own and not based upon representations of any other party hereto.

Deleted: ¶

41. Recordation. Within ten (10) business days of the Effective Date of this Agreement, it shall be recorded in its entirety at Developer's expense in the Office of the Kane County Recorder. Each commitment and restriction on development set forth herein shall be a burden on the Development Property, shall be appurtenant to and for the benefit of the City and Developer and shall run with the land. A recorded copy of the Agreement shall be provided by the Developer to the City, in physical or digital format.

42. Entire Agreement. This Agreement represents the entire agreement between the parties related to the subject matter herein. All other agreements are merged into this Agreement, which cannot be modified except by the written consent of all parties. Any modification to this Agreement shall require the same notice(s) and public hearing required for the modification of a land use regulation.

43. Formation of PID or Other Infrastructure District. Prior to development of the Development Property, Developer may apply to form and fund a PID, or another statutorily applicable infrastructure district, for purposes of funding some or all of the Public Improvements. If a PID or other infrastructure district is not approved or formed within a reasonable time, then it will be presumed that Developer will proceed without a PID/infrastructure district in accordance with the Terms of this Agreement. However, Developer or a subsequent owner of the development property may apply to the City for an amendment to or termination of this Agreement and/or for a rezoning of some or all of the development property. Upon application, the City Council, in accordance with the procedures in the City's ordinances, as applicable, will consider the application as a legislative land use decision.

IN WITNESS WHEREOF, the parties hereunder have executed this Agreement on the date first written above.

[*Signatures on the following page(s).***]**

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Deleted: If a PID is not approved and created within one (1) year of the Effective Date, then by the end of the one-year period Developer shall affirmatively communicate in writing to the City its intent to continue to proceed with forming a PID or to proceed with the Hidden Canyon Development as otherwise outlined in this Agreement without a PID.

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Commented [KB101]: Added language, per request of Developer's attorney.

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Commented [KB102]: Amended this paragraph to address the City Council's concerns, which were not addressed by any of the other recent changes.
The City Council does not want the Developer to just terminate or not move forward unilaterally. An amendment or notice of termination will need to be considered by the Parties and recorded, and the development property will need to be rezoned to something other than PD, because a PD zoning desigation requires a valid recorded development agreement.

KANAB CITY

Attest:

_____
Colten Johnson, Mayor

_____
City Recorder

Approved as to form:

_____
City Attorney

STATE OF UTAH)
ss:
COUNTY OF KANE)

On the _____ day of _____, 20 ___, personally appeared before me Colten Johnson, Kanab City Mayor, whose identity is personally known to or proved to me based on satisfactory evidence, and who, being by me duly sworn (or affirmed), did say that he did duly acknowledge to me that he executed the foregoing document.

_____
Notary Public

[*Additional signatures on following page.*]

JJJ DEVELOPMENT, INC.

_____
Jim Guthrie, President

STATE OF UTAH)
ss:
COUNTY OF KANE)

On the _____ day of _____, 20 ___ personally appeared before me Jim Guthrie, who being duly sworn and authorized did say that he is the President of JJJ Development, Inc. and Jim Guthrie indicated to me that said company executed the same.

_____
Notary Public

PROPERTY OWNER

_____
Jim Guthrie

STATE OF UTAH)
ss:
COUNTY OF KANE)

On the _____ day of _____, 20 ___ personally appeared before me Jim Guthrie, who being sufficiently identified and duly sworn did executed the same.

_____
Notary Public

EXHIBIT A

LEGAL DESCRIPTION FOR

HIDDEN CANYON SUBDIVISION

PARCEL K-15-1-ANNEX:

PARCEL 1: THAT PORTION OF THE E ½ OF THE W ½ OF THE NE ¼ OF SECTION 35, TOWNSHIP 43 SOUTH, RANGE 6 WEST, SALT LAKE BASE & MERIDIAN LYING NORTHERLY OF US HIGHWAY 89 (CONTAINING 36.0 ACRES, MORE OR LESS).

PARCEL 2: THAT PORTION OF THE E 400 FEET OF THE W ½ OF THE W ½ OF THE NORTHEAST ¼ OF SECTION 35, TOWNSHIP 43 SOUTH, RANGE 6 WEST, SALT LAKE BASE & MERIDIAN LYING NORTHERLY OF US HIGHWAY 89 (CONTAINING 21.0 ACRES, MORE OR LESS).

PARCEL K-14-15-ANNEX:

ALL OF SECTIONAL LOTS 7 & 8; AND THE S ½ OF THE SE ¼ OF THE NORTHEAST ¼; AND THE E ½ OF THE SE ¼ OF SECTION 26, TOWNSHIP 43 SOUTH, RANGE 6 WEST, SALT LAKE BASE & MERIDIAN (CONTAINING 180.37 ACRES, MORE OR LESS).

ALSO: BEGINNING AT THE SW CORNER OF SECTIONAL LOT 6, SECTION 26, TOWNSHIP 43 SOUTH, RANGE 6 WEST, SALT LAKE BASE & MERIDIAN AND RUNNING THENCE E 1320.0 FEET MORE OR LESS ALONG THE LOT LINE TO THE SE CORNER OF SAID LOT 6; THENCE N 1320.0 FEET MORE OR LESS ALONG THE LOT LINE TO THE NE CORNER OF SAID LOT 6; THENCE SOUTHWESTERLY 1866.76 FEET MORE OF LESS TO THE POINT OF BEGINNING (CONTAINING 20 ACRES, MORE OR LESS).

EXHIBIT B

Oversizing of System Improvements Required

Kanab City is working with the Developer to establish infrastructure to support the new Planned Development ("Hidden Canyon") on the north-east side of Kanab. To meet the culinary water demands, a new water storage tank must be built near the Planned Development. In accordance with Kanab City's Water Impact Fee Facilities Plan and Analysis (2024), the water storage tank will have a capacity of 1 million gallons and will be constructed from reinforced concrete. The Developer will provide all Civil Engineering at the tank site including site grading, piping, and drainage. The Developer will pay for and utilize the services of the City Engineer (currently Civil Science), or another engineering firm approved by the City Engineer, to provide a design for the concrete water tank. A conceptual Engineer's Opinion of Cost indicates that the overall construction costs (not the difference for oversizing the infrastructure) associated with the tank will be approximately $1,340,000.00 (estimate as of April 11, 2022).

Based on the anticipated development of the Development Property, as outlined above, Developer will pay for the City Engineer or an approved engineering firm to provide the services detailed by the City Engineer in its Work Task Order 2022-3, dated April 11, 2022, incorporated herein by reference. The cost for such services may be modified, as necessary or agreed upon by the Developer and the City Engineer.

Oversized/Upsized Infrastructure Required and Eligible for Reimbursement:
The following infrastructure is required to be oversized as a condition of development and in accordance with Kanab City's Water Impact Fee Facilities Plan & Analysis (2024), making the actual, reasonable costs for the oversized aspect of the infrastructure eligible for reimbursement:

1. The size of the water storage tank necessary to support the Hidden Canyon Planned Development must provide for the storage of approximately 810,150 gallons. This water storage tank must be increased and oversized to a 1-million-gallon water storage tank for the purpose of serving future adjacent development. The difference in actual, reasonable cost between installing a water storage tank for 810,150 gallons and a 1-million gallons shall be reimbursable by the City by the methods outlined below.
2. The existing pump station vault must be increased to accommodate the required booster pump(s) and equipment service clearances. The vault dimensions and any equipment service clearances shall be subject to inspection, approval, and written acceptance by the Kanab City Public Works Director, after coordination with the Developer and City Engineer.
3. The main distribution waterline connecting to the existing water infrastructure on or adjacent to the Quality Inn property, running parallel to the existing 8-inch line toward the Development Property and on to the 1-million-gallon water storage tank, then extending out from the 1-million-gallon water storage tank to the Hidden Canyon Planned Development (initially to "Road A" as identified on Exhibit C, and then along Road A) and extended beyond the Development Property, shall be eligible for reimbursement for actual, reasonable costs for three different aspects considered oversizing:
    a. The portion of the 12-inch main tank fill waterline beginning from the proposed booster pump station and proceeding parallel to the existing 8-inch waterline, extending to the Development Property Line, requires an 8-inch waterline, using C-900 pipe, to meet the needs of the Planned Development itself and to allow for maintenance and servicing by the City, once dedicated and accepted. This main distribution water line shall be increased from an 8-inch to a 12-inch line, using C-900 pipe, in order for emergency pumping

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scenarios to be able to pump the required fire flow. The difference between the actual, reasonable costs of the construction and installation of an 8-inch water line and the 12-inch waterline shall only be eligible for reimbursement by the City by the methods outlined below.

b. The portion of the 12-inch main distribution water line beginning from the 1-million-gallon water storage tank and proceeding to the necessary parts of the Hidden Canyon Planned Development requires an 8-inch water line, using C-900 pipe, to meet the needs of the Planned Development itself and to allow for maintenance and servicing by the City, once dedicated and accepted. The portion of this main distribution waterline shall be increased and oversized from 8-inch to a 12-inch, using C-900 pipe, from the water storage tank to "Road A" as identified in the Master Plan (Exhibit C) and then along Road A until it reaches Highway 89, in order for the 1-million-gallon water storage tank to support future adjacent development beyond the Hidden Canyon Planned Development. The difference between the actual, reasonable costs of the construction and installation of an 8-inch water line and the oversized 12-inch water line shall be eligible for reimbursement the City by the methods outlined below. All other waterlines servicing the Development Property shall be sized according to the specifications required by the development activities and shall not be eligible for reimbursement.

c. This 12-inch main distribution water line shall be extended beyond the distance and locations necessary for the Hidden Canyon Planned Development, to a connection point designated and approved by the City, located at or near US-89 and the proposed Hidden Canyon entrance, for the purpose of allowing the 1-million-gallon water storage tank to serve additional adjacent future growth. The actual, reasonable costs for constructing and installing this portion of the 12-inch main distribution line, extending beyond what is necessary for the Hidden Canyon Planned Development itself, constituting an oversized and extended portion of the water line in its entirety, shall be eligible for reimbursement from the City by the methods outlined below.

4. The Developer, or a subsequently formed PID, if applicable, shall submit its total costs for constructing and installing the infrastructure outlined herein, and its calculation for the portion of those costs it has determined are attributable to the oversizing of the infrastructure. The City will then review the submittals and make a determination of the amount of reimbursable actual, reasonable costs, as permitted by ordinance.
5. If a disagreement arises relating to a formal decision made by City staff relating to the oversizing requirements and specifications, including the determination of the actual, reasonable cost thereof, then the decision of City staff may be appealed, pursuant to the land use appeal requirements, process, and procedure outlined in the Kanab City Land Use Ordinance. Only a formal decision of City staff may be appealed, unless City staff fails to issue a formal decision when reasonable or required to do so. In the circumstances in which the appeal authority finds that City staff has failed to issue a reasonable or required decision, the appeal authority, if deemed appropriate, shall require the City staff to issue a decision as a precursor to going forward with the appeal. The final written decision of the appeal authority is subject to judicial review.
6. No additional oversized infrastructure is required by the City. In reviewing all other designs and planned infrastructure anticipated, approval of such designs shall be based on City standards based on what is required and necessary for the Hidden Canyon Planned Development. Any subsequent and additional oversizing requirements, if subsequently required and agreed upon by the Parties, shall require a new separate reimbursement agreement, or an agreed upon amendment to this Agreement.

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Commented [KB104]: JC comment 6/26: **Page 36 & 37**, regarding size of waterline – same comments as above.

Commented [KB105]: [Deleted "engineers."] While the City is going to consult and rely upon the opinion of the City's Engineer, the City Engineer does not make the decision of what is agreeable. [Like the City Attorney, the City Engineer advises the City on such matters, rather than deciding them. I would assume that is the same for the Developer (Jim). Jim will decide if he agrees after hearing from his engineer.]

Commented [KB113]: 6/27: This paragraph needs to be updated. The City Engineer (Kelvin) and developer's engineer (Steve) discussed this just this week. They determined the development itself requires an 8" line from the booster bump to the property line, but then requires a 12" line the rest of the way to the water tank. So, the portion of the line from the booster pump to the property line would need to be oversized to 12". That portion of the line would be the only part eligible for impact fee credit, based on the actual, reasonable costs of the oversizing (difference between the cost of installing an 8" line versus a 12" line).
This clause and any other clause referencing this portion of the line should be corrected. The agreement should not be approved without these corrections.

Deleted: , if it is determined that an 8-inch waterline would be sufficient to meet the regular and emergency requirements of the Development Property at full buildout. If that determination cannot be made and agreed to by the Parties then no portion of this portion of the main tank fill waterline shall be eligible for reimbursement.

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Commented [KS114]: Seems like you are requiring them to bring the 12" back into town. That is not something I have required in previous reviews. I do like the idea of getting it to the south side of US-89, opposite of their entrance. But this does follow the 2018 Water IFFPA. However, there are assumptions with that system that are not stated.

Deleted: existing Quality Inn

Commented [KB115]: 6/27: This phrasing ("actual, reasonable costs"), used throughout the agreement, is from the City's Ordinance. It indicates that a determination of what impact fee credits are granted takes place after the infrastructure is installed/after actual costs are determined (effectively at the point of dedication and consideration for acceptance).

Form of Reimbursement:

The form and timing of reimbursement shall depend upon whether the Developer or the PID pays the actual, reasonable costs for oversizing the infrastructure. The following criteria shall apply to the reimbursement of actual, reasonable costs of the oversized infrastructure:

1. If Developer pays for the actual, reasonable cost of oversizing all or part of the infrastructure outlined herein, then reimbursement will come in the form of impact fee credits, which credits may be applied at the time that the water impact fee becomes due (i.e., upon submission of a complete building permit application).
2. If a subsequently formed PID pays the actual, reasonable cost for oversizing all or a part of the infrastructure outlined herein, then the PID will be reimbursed as follows:
    a. When the Developer, or a third-party, submit a complete building permit application(s) to build a structure(s) within the Hidden Canyon Planned Development, the applicant will be required to pay the applicable water impact fee;
    b. Within a reasonable time thereafter, the City will distribute the water impact fee collected to the PID, in accordance with this Agreement and state and local law.
3. The right to reimbursement for the actual, reasonable oversizing costs will also be permitted by the Developer, or a subsequently formed PID, if applicable, through recoupment of the pro-rata share of the actual, reasonable oversizing costs attributable to a third-party property owner(s) or developer(s), whose property and proposed development is adjacent to the Hidden Canyon Planned Development, when that adjacent third-party's development intends to connect the adjacent land or development to the 12-inch main distribution line extending from the 1-million gallon water storage tank. The City shall calculate and collect the pro-rata share from the third-party at the time an application is made which involves the applicable connection, or subsequently, if the connection to the 12-inch main distribution line is not determined as necessary until later. Developer or PID, if applicable, shall only be entitled to this form of reimbursement upon the City receiving the pro-rata portion from the third-party property owner or developer (i.e., the City is under no obligation to pay Developer or PID unless and until the designated payment is received; and the City is not liable for non-payment of a third-party developer). This form of reimbursement shall be limited to ten (10) years, as outlined in the Agreement.
4. Impact fee credits and the right to reimbursement may only be applied within the Hidden Canyon Planned Development. Any transfer of impact fee credits and the right to reimbursement must be in writing and shall incorporate the relevant terms of this Agreement to be valid. A fully executed copy of the written transfer agreement shall be provided to the City.
5. The Developer, or a subsequently formed PID, if applicable, will only be eligible for reimbursement of the total actual, reasonable costs paid for the oversized portion of the infrastructure, and may not recover more than that what the entity paid through one or a combination of both methods for reimbursement outlined.
6. The City shall maintain records accounting for the balance remaining for impact fee credits/the remaining reimbursable amount.
7. If a disagreement arises relating to the form, timing, or method of reimbursement, based on a formal decision of City staff, then the decision of City staff may be appealed, pursuant to the land use appeal requirements, process, and procedure outlined in the Kanab City Land Use Ordinance. Only a formal decision of City staff may be appealed, unless City staff fails to issue a formal decision when reasonable or required to do so. In the circumstances in which the appeal authority finds that City staff has failed to issue a reasonable or required decision, the appeal authority, if deemed

appropriate, shall require the City staff to issue a decision as a precursor to going forward with the appeal. The final written decision of the appeal authority is subject to judicial review.

Until fully designed and engineered, the full details and costs of the oversized Public Infrastructure and System Improvements are not entirely known. The Parties shall work together in good faith in determining and agreeing upon the specifications and further details of the water storage tank and related water infrastructure.

EXHIBIT "C"

Hidden Canyon Development Property Plan

Page 1: [1] Commented [KB1] Kent Burggraaf 6/28/2024 8:11:00 AM

6/27: Initial explanation of the changes in this version of the development agreement:

This agreement started out as just a reimbursement agreement but has been morphed into a full development agreement due to the developer and City not having signed nor recorded the prior development agreement (considered years earlier). I have worked on this present agreement for almost two years, the first version being drafted by the City and sent to the developer/developer's attorney in August 2022. The next time I received a version of the development agreement from the developer was a year later (8/3/24). That version had a lot of changes. Many versions of this agreement have been exchanged since that time.

More recently, after receiving input from the Planning Commission (on 3/19/24) and the City Council (on 3/26/24) about this development agreement, some changes were made, specifically to address concerns discussed at their respective meetings. Then quite a few other substantive changes were made by the developer/developer's attorney or as a result of discussions with the developer/developer's attorney. Some substantive terms of this agreement have been changed, ***some of which are concerning***. From a legal perspective, I do not advise a positive recommendation or adoption of this agreement "as is." My opinion is based on Utah law governing impact fees and relevant and controlling case law. The proposal related to impact fee credits in this version is not legal, or at a minimum puts the City at a higher risk of legal action being taken related thereto. Furthermore, my opinion is based on the input received from multiple City staff members, in which provisions of the agreement have been changed that are objectionable.

Some changes in this version are highlighted as follows:

YELLOW—Changes made at or just before the Planning Commission meeting.

BLUE—Changes made at the developer's or Planning Commission's request.

GREEN—Changes made during the City Council's meeting (3/26/24).

*Some highlighting may be overlapped with comments that have highlighted the text. You may have to look at a no markup version to see certain of the highlighting noted above.

*Some text may appear highlighted, different than the highlighting noted above (e.g., lighter shading), if the person reviewing entered a comment to the righthand side, after selecting certain text in the body of the agreement.

NOT highlighted, but changes *Tracked*:

On 3/27/24, I provided developer's attorney a list of additional concerns the City Council wanted addressed. On 5/30/24, about 2 months after sending the latest version and list of additional concerns to developer's attorney, developer's attorney provided another draft of the agreement with more revisions to the agreement (not highlighted, but tracked using *Track Changes*). These changes went beyond those matters discussed in the City Council and Planning Commission meetings. Some issues we thought had been resolved or were non-issues were brought up by the revisions made by the developer/developer's attorney.

On 5/31/24, one day after receiving the developer's revised version, I provided feedback and commentary on the changes that were being proposed. Those comments are included throughout this version of the agreement. I further included draft changes (*Tracked Changes*) addressing the City Council's concerns not addressed in the latest version received by developer's attorney.

On 6/7/24, developer's attorney sent another version of the development agreement more changes and comments. Developer then communicated that he wanted the latest version provided to City staff to be

considered by the Planning Commission and City Council. Accordingly, while the latest version was reviewed and input prepared, no further revision to the agreement was made by City staff.

The developer's attorney and I continued to communicate through many emails and multiple phone calls about the issues in the latest version (i.e., they were on notice of the objectionable provisions that had recently been included or changed).

On 6/25/24, I received another updated version of the development agreement from the developer's attorney with more changes. This was an effort by developer's attorney to fix one of the objectionable issues, related to impact fee credits, but in actuality just used different reasoning to reach the same result (i.e., locking in impact fee rates), which is not allowed by law.

Notwithstanding receiving another version of the agreement (this version), City staff made no further changes to the agreement, letting the developer present whatever version of the agreement desired, having already voiced the concerns of City staff.

In this latest version of the agreement, City staff has only provided comments on what has been changed in the last two version provided by the developer/developer's attorney.

Page 1: [2] Commented [KB2] **Kent Burggraaf** **3/19/2024 11:20:00 AM**

Recently the Developer has stated that the apartments and possibly some other aspects of the development will not be limited to 55+. Need to clarify this point within the Agreement; otherwise the Agreement would dictate it is all 55+.

Page 1: [3] Commented [KB5] **Kent Burggraaf** **3/19/2024 11:20:00 AM**

Recently the Developer has stated that the apartments and possibly some other aspects of the development will not be limited to 55+. Need to clarify this point within the Agreement; otherwise the Agreement would dictate it is all 55+.

Page 4: [4] Commented [KB18] **Kent Burggraaf** **6/27/2024 12:04:00 PM**

6/27: Justin, your response in your recent comment (below) about this recital, regarding locking in impact fee rates, is not acceptable. It is illegal, or would put the City at a higher risk of litigation than is acceptable (based on potential accusations of illegality), which I believe you learned when you spoke with three other land use professionals this month (notwithstanding the fact that I have been informing you of this not being permitted for many months).

The developer can push forward to have the City Council consider the agreement in any form desired, so I don't want him to feel I am delaying their consideration. However, a favorable recommendation will not be provided to the City Council if the agreement provides for illegal terms, puts the City at unreasonable increased risk/liability, and/or if the proposed agreement includes impact fee provisions that are not allowed by law, or that put the City at increased risk of being sued due to the proposed novel application of impact fees/credits.

Additionally, your comment (below) cites to Utah Code 11-36a-402. As you and I discussed during our phone call, that is not an applicable statute for this issue--I think you realized that after we reviewed it. That code section does not support the developer's position.

Your comment (below) overstates the ability for the City to waive impact fees; this is a common misinterpretation of the Impact Fee Act. State law and the controlling case law specifically address issues of waiver and impact fee credits; they are specific and limited. As I explained to you, Utah Code 11-36a-403 demonstrates how the ability to grant a waiver or exemption of impact fees is very limited/restricted. There is not a lot of discretion granted to the City for this. I cannot account for what other cities do; some may follow the law, and others may not be fully informed about what the law requires. However, I have invited you to share with me any case law, statutes, and/or the legal analysis (staff report) from another city that has done what is being proposed here.

Page 9: [5] Deleted **Kent Burggraaf** **5/31/2024 2:41:00 AM**

a.

Page 9: [6] Commented [JW26R25] **Justin Wayment** **4/29/2024 11:43:00 AM**

I don't believe that a city has the ability to review construction drawings for a home. I have no problem with requiring that the Master Association approve the plans through an architectural control committee.

Page 9: [7] Commented [KB27R25] **Kent Burggraaf** **5/31/2024 2:40:00 AM**

This is considered to be a commercial building, at least during its use as a model home and sales office, notwithstanding architecture and design being patterned after a home. That is why it had to be noted/added to the development agreement as an exception to the City's ordinances.

If this sentence is dropped, as it was in prior versions, it would not change the legal obligation for review, approval, and inspections, as a commercial building.

Page 9: [8] Commented [JW28R25] **Justin Wayment** **6/6/2024 5:57:00 PM**

I disagree. This is not a commercial building. It is a model home which will ultimately be sold as a residence and is located in a residential and not a commercial community. Furthermore, unless Kanab is different than most in the region, not even commercial buildings are designed by the City. Finally, I believe that this provision contradicts or at least potentially (inferably) contradicts 10-9a-534.

Page 9: [9] Commented [JW29R25] **Justin Wayment** **6/6/2024 6:01:00 PM**

Construction standards should certainly comply, and the model home should meet all building standards, but a model home architectural design should remain within the privity of the developer provided it complies with the Code as its design and architecture is utilized to model how the subdivision will look and to sell homes that meet the designs of the Development.

Page 9: [10] Commented [KB30] **Kent Burggraaf** **6/27/2024 12:15:00 PM**

6/27:

Reply to your recent comments (below) about model homes and sales center:

I think you misunderstand the applicability of the sentence at issue--it does not imply that the City would design the model home or dictate the architecture. The construction of a model home will still require a building permit with corresponding required inspections. For a building permit to issue, the application and the plans will have to be reviewed to confirm they meet the requirements of state law, the building code, and the City's land use and design standards, except where exceptions are provided in the development agreement itself.

You may disagree about this being a commercial building. However, if it is intended to be used as a model home and sales office, then it will be a form of business that is not permitted to be conducted within a single-family home, at least not without meeting some additional requirements under local ordinances.

You cite to Utah Code 10-9a-534--I am not clear why. Utah Code 10-9a-534(3)(d) and (h) would actually allow the City to impose a building design element under these circumstances; however, that is not what the provision in the development agreement is even addressing.

If the provision is adopted as it currently is (i.e., the deleted portion as is, and the undeleted portion as is), then it is good. My prior comment was stating that the entire sentence was previously removed, which gives the misimpression that the developer would not have to follow the normal process for constructing the model home. It needs to state that the plans for the model home shall be reviewed and approved by the City; that is referring to the City's normal process when a home/building is proposed to be constructed and not stating that there is a building design element that will be required.

The concession to local ordinance being considered in this provision is to allow for a model home/sales office to be constructed in a location not normally permitted (not allowed in a residential zone, because it is of a commercial nature). It grants no further exception to the City's ordinances. If you want to review the City's ordinances and have something more considered, feel free to do so.

Page 9: [11] Commented [KB31] **Kent Burggraaf** **6/27/2024 9:51:00 AM**

JC comment 6/26:

Spoke with both the Public Works director and Fire Chief who agree with the allowable for private roads. At buildout the roads loop and intersect so the fire apparatus can get around fairly easily. During the buildout any dead-end road(s) over 150 feet will be required to have an approved fire apparatus turnaround per IFC (503.2.5)

Page 9: [12] Commented [KB32] **Kent Burggraaf** **5/31/2024 2:46:00 AM**

Need to run this change/modifying clause by City Public Works and the Fire Chief. I don't know if this changes their understanding of the road width or not.

Page 9: [13] Commented [KB33] **Kent Burggraaf** **3/19/2024 2:17:00 PM**

Clarify if this is intended as a 40-foot paved surface or 40-foot right-of-way/easement for ingress/egress. The Fire Chief may need to weigh in on the sufficiency of the width—even though they are intended as private roads, they still are considered fire apparatus roads. Need to also consider turn arounds/hammer heads at the end of temporary dead end roads, as a result of phased buildout, or loop roads beyond phase of construction.

Page 9: [14] Commented [KB34] **Kent Burggraaf** **3/19/2024 2:13:00 PM**

The Development Agreement and Master Plan will not always be printed/looked at in color, and therefore, these color descriptions may not be perceivable on Exhibit C. Consider labeling roads as either "Intended Private Road" or "Intended for Public Dedication" and rewording this clause.

Page 11: [15] Commented [KB40] **Kent Burggraaf** **6/27/2024 12:24:00 PM**

6/27: *** "PHASE 1" still needs to be labeled on Exhibit "C". It's not in the latest version provided. If it is not identified, then this term is not definitive. Someone unfamiliar with the project, such a future secondary developer or replaced City employee, would have no idea what this references geographically, without it being labeled.

Further addressing your comment (above): It doesn't matter that a Phase I and Phase II have been identified in other not yet approved or not still valid land use applications. Those other documents are not incorporated into this agreement by reference. Phase 1 needs to be identified on Exhibit C, because that is what will be attached hereto, as it is incorporated by reference, and will be recorded with the agreement, when approved.***

Page 11: [16] Commented [KB41] **Kent Burggraaf** **6/27/2024 12:31:00 PM**

6/27: The City Engineer is evaluating this provision and determining what other infrastructure is likely going to be necessary/required to meet 1,500 gpm (fire flow), in order to build the storage units without constructing the water tank first. At a minimum (from what has been discussed with the City Engineer), a booster pump may be needed and the water line will have to be looped, which will add some expenses to contructing the storage units, but be less than constructing the water tank. These additional requirements should be spelled out in the agreement, in order to have this exception apply. However, the additional requirements of the City Engineer may not be all-inclusive of what may be required to meet fire flow standards (i.e., because the City Engineer is not the one designing the system).

Page 11: [17] Commented [JW44R42] **Justin Wayment** **6/6/2024 6:19:00 PM**

I believe that Phase I and Phase II preliminary and site plans have already been submitted to the City. Construction Drawings have been submitted previously but the final version has been held out the final submission because it is our understanding that the City won't take them until the Site Plan is approved which is being held up by this agreement. That has been my general experience that the actual phases of construction plans come concurrently or after the development agreement is signed.

Page 20: [18] Commented [JW82R80] **Justin Wayment** **6/25/2024 3:38:00 PM**

This is the alternative to capping impact fees which I now agree is not appropriate unless it were a closed system which this system is not. So I appreciate your insight on that issue and want to reassure that Jim has explained that he desires to comply with the law but also desires to be treated as fairly as possible by the City. What is being proposed, (however worded and you are welcome to clarify as you feel necessary, is that at the time of dedication of the improvements which are upsized), the City can then purchase the upsized portion of the system through giving the Developer an equivalent number of impact fee credits which the City would have paid if it had the impact fees and were upsizing the lines at the time of dedication. Clearly we have the nexus and rough proportionality because the impact fee credits paid for upsizing the waterline would be equivalent in value received by the City.

This matches up with both Sheetz v. City of El Darado and the Dolan test which asks whether the imposition on the community of a proposed development is roughly equal to the cost being extracted to offset it.

As per our discussion earlier regarding Fred Philpot, and his experience with implementing impact fees, after reviewing applicable cases, the statutes, and after discussing this matter with both Craig Call and Brent Bateman, both former Utah State Ombudsmans, (it is my understanding that Brent Batemen wrote the impact fee statutes

for the state of Utah), it would appear that there is nothing which prohibits the City from purchasing the upsized system through granting impact fee credits at the time of dedication.

This also would address your concern that impact fees are only assessed at the time a building permit is applied for and granted because I would point out that the fees being credited are being utilized to pay for the upsizing of the system at the time of development. While, the City is paying for the upsized system, it is doing so by giving Developer a credit proportional to the cost.

I am interested in your take on this and would am available to discuss tomorrow.

Page 20: [19] Commented [KB83] **Kent Burggraaf** **6/27/2024 10:09:00 AM**

JC Comment 6/26:

"Impact fee credits will be based on the effective impact fees adopted at the time of dedication of the infrastructure to the city" this is still locking in impact fee amount. Impact fees are assessed with the building permits and/or at the time the development will impact the system. As noted above, impact fees are not awarded "connections", they are reimbursed through the determined costs for the upgrade. As building permits are issued the current impact fee amount is subtracted from the balance (credit for the upgrade) until paid in full.

Page 20: [20] Commented [KB84] **Kent Burggraaf** **5/31/2024 4:12:00 AM**

[Deleted phrase and rejected deletion of "application/collection".]

As explained multiple times previously, this would require the City to agree to something that violates State law (the Impact Fee Act). Impact fees are applicable and assessed/imposed at the time that a complete building permit application is submitted. The analysis that supports the impact fees assessable in the future could be completely different, which would, by law, require the City to adjust the impact fees imposed. Without doing so, the impact fees would not have the required nexus and proportionality. [**Please review the Impact Fee Act and the relevant case law on this point, so we can stop having to go over this issue every time.**] A Developer can't lock in impact fees for an entire development upfront. If that is a dealbreaker for Jim, then let's stop wasting our time with this.

Page 20: [21] Commented [KB85] **Kent Burggraaf** **6/28/2024 6:01:00 AM**

6/27: The way in which you (Justin) have modified this paragraph is not acceptable—***The development agreement should not be adopted with this language***.

These modifications merely change the timing for "locking in" of impact fees, which was previously rejected as illegal—*this was not in the prior version of the development agreement presented to the Planning Commission and City Council.*

<u>Allowed process for determining and utilizing impact fee credits</u>:

Here's how impact fee credits can legally be determined and applied. Developer will submit his costs for the infrastructure being dedicated (i.e., at the time of dedication), with the estimated cost for the oversizing. The "actual, reasonable costs of the oversized portion" of the infrastructure being dedicated will then be credited to developer as impact fee credits, following the review and approval by the City Engineer. Once approved, the Developer will have an impact fee credit balance--a dollar figure, like a running balance on a bank account--established for the type of infrastructure dedicated (i.e., water for water). [We discussed this previously.]

When the developer subsequently applies for a building permit(s), the impact fees applicable at that time will be assessed (impact fees established through the Impact Fee Facilities Plan & Analysis adopted at that time—establishing the timely nexus and proportionality required by controlling case law). The developer can then use from his impact fee credit balance a dollar-for-dollar credit towards the applicable impact fee assessed (e.g., water), thereby reducing his impact fee credit balance by the dollar amount used.

What is impermissible that you are proposing:

The City does not handle impact fee credits by crediting a certain number of "hookups." The fee for water hookups is actually a separate fee and application. Impact fees are assessed separately from that. [Utah law distinguishes between hookup fees and impact fees. They are different. *See* Utah Code 11-36-102.]

The impact fee credits cannot be used before the fees are assessed, just as the City does not, and should not, allow an individual or developer to pay for impact fees well in advance of submitting a building permit application. The fees applicable are not calculated until the time of application.

Were impact fee credits to be calculated based upon a number of hookups credited, then when the impact fees are updated or changed, developer would potentially be benefited or suffer a detriment, as compared to other home builders/developers at that time. That would violate Utah Code 11-36a-402, which requires that impact fees be imposed fairly. Finally, if later in the development the City's impact fees have increased from what they are at the time of the infrastructure being dedicated, then a hookup-based credit would also violate that code section, which codifies the requirement for proportionality.

Unacceptable Increase in Risk of Litigation: Giving an impact fee credit based on a number of hookups would NOT conform to the Impact Fee Act, because at some future date when the impact fees were actually assessed, the City could not be assured that (1) the credit being applied was equal, (2) the nexus between time of assessment and time of impact would not be there, and (3) it would not be certain to be based on proportionality, as required. It would subject the City to an ***increased risk of litigation*** from this developer, if the fees go down (just as the water portion of the impact fees did in Aug. of 2022, decreasing from $3,512.70 to $2,552.80, and as they potentially will in the future), or a secondary developer of Hidden Canyon will have an argument to then claim that the City is not meeting the nexus and proportionality requirements at the time of impact (their hookup-based impact fee credit will have diminished in value and they would get more value by a dollar value based impact fee credit). Possibly more likely is the ***increased litigation risk*** from one or more other developers, if impact fees go up, providing them with a statutory claim of unfairness under the Impact Fee Act, and a possible constitutional claim of unequal treatment under the law. If a per-hookup-based credit is used, and impact fees go up from the time of the dedication of the infrastructure to the time at which a building permit is applied for and granted, then this model of credits will also arguably constitute an illegal waiver/exemption from the difference in the amount assessed previously versus the amount assessable at the time of the building permit (the closest point in time to the impact of development).

Page 20: [22] Deleted **Kent Burggraaf** **5/31/2024 4:14:00 AM**

Page 20: [23] Commented [KB88] **Kent Burggraaf** **6/28/2024 6:30:00 AM**

6/27: This phrase was still deleted in the latest version of the development agreement emailed to the City as the version developer wants considered by the Planning Commission and City Council—the deletion was not rejected (i.e., developer added this clause after the last time this agreement was considered by the City Council; I proposed it's deletion, which was not rejected, so it will not appear in the version proposed for adoption). This deletion was probably not objected to because the significant changes were made to paragraph 12(d) in your latest version. Developer has told you (Justin) that he wants to follow the law and you found out that what I had been telling you (locking in impact fees) was not legal. And yet we now have the same efforts to lock in impact fees in paragraph 12(d), just at the time of dedication rather than when the agreement is executed. This is still the same or similar

illegal proposal, just re-worded, making it a hook-up-based impact fee credit (locking in the impact fees at time of dedication and providing a specific number of hookups). See my prior comments regarding paragraph 12(d).

Page 28: [24] Commented [JW98R97] Justin Wayment 6/6/2024 6:41:00 PM

I simply do not agree and find nothing in the law to support your position. Why would the City go back in and rezone a property? That makes no sense to me. Are you talking about the overlay or the underlying zone or both?

Page 28: [25] Commented [KB100R97] Kent Burggraaf 6/28/2024 6:42:00 AM

6/27: See JC's comment. You cannot have a Planned Development Overlay without a valid development agreement, thus requiring a re-zoning legislative decision to remove it if there is no valid development agreement. [In reality, a proposed and approved development agreement should be put in place at the time the PDO decision is made. It was not here, which is why the developer can't legally move forward with the development process until it is corrected.]

When it comes to the underlying zone, through a proper legislative decision, with notice and a public hearing, the City Council can decide to remove an overlay designation and leave the underlying zone as is (currently R-1-8, I believe) or they can change that—it's the legislative authority they have over any lot or parcel. However, a valid recorded development agreement would lock in the developer's rights to develop the property under the terms of the agreement unless that agreement were terminated.

Of note, in the latest version provided to the City, the prior deletion was not re-deleted. With the request to submit the latest version for consideration by the Planning Commission, the clause remains as drafted.