ORDINANCE NO. 687

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA, STATE OF CALIFORNIA ADOPTING A DEVELOPMENT AGREEMENT (DA 2010-02) FOR THE ENCHANTED RESORTS PROJECT LOCATED AT 515 FOOTHILL BOULEVARD (011-310-031 THROUGH 011-310-041 AND 011-310-044; 011-320-007; 011-320-039 THROUGH 011-320-069; 011-310-024) WITHIN THE "PD 2010-01", ENCHANTED RESORT AND SPA PLANNED DEVELOPMENT DISTRICT

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1 **WHEREAS,** on March 31, 2010, an application was submitted by the Enchanted
2 Resorts, Inc., requesting a Development Agreement associated with the approval of a
3 Conditional Use Permit, Design Review, and a Preliminary/Final Planned Development
4 Plan for the development of the Enchanted Resorts Project featuring 110 resort hotel
5 units (grouped among 36 cottages), 20 residence club units, 13 custom residences,
6 public restaurant and bar, event facilities, spa and swimming pools, and parking and
7 support facilities. Offsite sewer and recycled water improvements would be installed.
8 The property is located at 515 Foothill Boulevard (011-310-031 through 011-310-041 and
9 011-310-044; 011-320-007; 011-320-039 through 011-320-069; and 011-310-024); and
10
11 **WHEREAS**, Enchanted Resorts, Inc. and the City of Calistoga have negotiated
12 and drafted a development agreement for the Project ("Development Agreement"); and
13
14 **WHEREAS,** the City Council authorizes the City Manager (or any successor City
15 officer designated by law) to enter into or approve any additions, amendments, or other
16 modifications to the Development Agreement agreed to by Enchanted Resorts, Inc. or its
17 successors and assigns, that he or she determines, in consultation with the City
18 Attorney, are in the best interests of the City, provided that any such additions,
19 amendments, or modifications (i) do not materially increase the liabilities or obligations of
20 the City or materially decrease the benefits to City, in either case arising under the
21 Development Agreement and (ii) are necessary or advisable to effectuate the
22 implementation of the Project, such determination to be conclusively evidenced by the
23 execution and delivery by the City Manager of the Development Agreement as so added
24 to, amended or otherwise modified; and
25
26 **WHEREAS,** the Planning Commission considered this Development Agreement
27 at its regular meetings on June 20, 2012, June 27, 2012 and July 18, 2012, and prior to
28 taking action on the Development Agreement, the Commission received written and oral
29 reports by the Staff, and received public testimony; and
30
31 **WHEREAS,** the Planning Commission pursuant to Resolution PC 2012-19 found
32 that the Environmental Impact Report SCH #2010082028 adequately assesses the
33 impacts of this Project; and
34
35 **WHEREAS**, the Planning Commission has not provided a recommendation on
36 the Development Agreement since the motion to support the General Plan Amendment
37 failed to meet the minimum number of votes required for an affirmative recommendation on
38 a legislative act; (AYES: Vice Chair Coates, Commissioner Bush; NOES: Commissioner
39 Kusener; ABSENT: None; ABSTAIN: Chairman Manfredi, Commissioner Kite); and
40

41 **WHEREAS,** the City Council has reviewed and considered the application for the
42 Project at meetings of August 14, 2012, August 21, 2012 and September 18, 2012 as
43 considered one of its items of business, this Ordinance to be adopted in accordance with
44 Government Code Section 65090, this Ordinance to be adopted in accordance with
45 Government Code Section 65850, to include the written and oral staff report, proposed
46 findings and comments received from the general public and interested agencies and
47 parties; and
48
49 **WHEREAS,** the City Council pursuant to Resolution 2012-061 found that the
50 Environmental Impact Report SCH #2010082028 adequately assesses the impacts of
51 this Development Agreement; and
52
53 **WHEREAS,** the City Council pursuant to Resolution 2012-062 approved an
54 amendment to the General Plan establishing a General Plan Planned Development
55 Overlay designation on the subject properties and associated Planned Development
56 goals; and
57
58 **WHEREAS,** adoption of this Development Agreement will not result in conflicts
59 with any other appropriate ordinance and to the extent such conflict exists, this
60 resolution is hereby repealed; and
61
62 **WHEREAS,** the City Council adopted the following findings with the introduction
63 of an Ordinance:
64
65 1. The City Council duly adopted Ordinance No. 547 enacting procedures
66 for entering into development agreements.
67
68 2. That this Development Agreement is a contract negotiated and entered
69 into voluntarily between the City of Calistoga, and property owner and
70 developer (Enchanted Resorts, Inc.) of the Enchanted Resorts Project.
71
72 3. That this Development Agreement contains those conditions and
73 obligations relating to the Project stated in the resolution(s) approving the
74 Project.
75
76 4. That the Project is a project of significance to the community and upon
77 the community of Calistoga and for that reason a development agreement
78 is a proper use of the City's authority to secure the project benefits for the
79 community.
80
81 **<u>SECTION TWO</u>:**
82
83 The City Council hereby approves, adopts a Development Agreement for the
84 Enchanted Resorts Project as provided in Exhibit 1, attached hereto and incorporated
85 herein by reference, and authorizes the Mayor to execute the Development Agreement
86 upon the effective date of this Ordinance. Upon execution of the Development
87 Agreement by all parties, the City Clerk is hereby directed to record the Development
88 Agreement with the Napa County Recorder's Office.
89

90 **SECTION THREE:**
91
92 If any section or portion of this ordinance is for any reason held to be invalid
93 and/or unconstitutional by a court or competent jurisdiction, such decision shall not affect
94 the validity of the remaining portions of this ordinance.
95
96 **SECTION FOUR:**
97
98 **THIS ORDINANCE** shall take effect thirty (30) days after its passage provided
99 that Resolution 2012-062 has become effective at that time. If Resolution 2012-062 has
100 not become effective by that time, then this Ordinance shall not become effective unless
101 and until Resolution 2012-062 becomes effective and shall become immediately
102 effective upon the effectiveness of Resolution 2012-062. Before expiration of fifteen (15)
103 days after its passage, THIS ORDINANCE shall be published in accordance with law in
104 a newspaper of general circulation published and circulated in the City of Calistoga.
105
106 **THIS ORDINANCE** was introduced with the first reading waived at the City of
107 Calistoga City Council meeting on the 21st day of August 2012, and was passed and
108 adopted contingent on the effectiveness of Resolution 2012-62 at a regular meeting of
109 the Calistoga City Council on the 18th day of September 2012, by the following vote:
110
111 **AYES:**
112
113 **NOES:**
114
115 **ABSENT:**
116
117 **ABSTAIN:**
118
119 ____________________________
120 **JACK GINGLES, Mayor**
121
122
123 **ATTEST:**
124
125
126 ____________________________
127 **AMANDA DAVIS, Deputy City Clerk**
128

This document is exempt from payment of a recording fee pursuant to California Government Code Section 27383

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:

City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attention: City Clerk

Recorder's Stamp

DEVELOPMENT AGREEMENT

BY AND BETWEEN

THE CITY OF CALISTOGA,
A CALIFORNIA MUNICIPAL CORPORATION

AND

ENCHANTED RESORTS, INC.,
A DELAWARE CORPORATION

DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT (this "**Agreement**") is entered into as of the ______ day of ______________ 2012, by and between ENCHANTED RESORTS, INC., a Delaware corporation ("**Developer**"), and the CITY OF CALISTOGA, a California municipal corporation ("**City**"). City and Developer are sometimes referred to herein as a "**Party**" and collectively as the "**Parties**".

RECITALS

A. To strengthen the public planning process, encourage private participation in comprehensive planning and reduce the economic risk of development, the Legislature of the State of California enacted California Government Code § 65864 *et seq*. ("**Development Agreement Statute**"), which authorizes City to enter into an agreement with any person having a legal or equitable interest in real property regarding the development of such property.

B. Pursuant to California Government Code §65865, City has adopted procedures and requirements for the consideration of development agreements (City Municipal Code Chapter 17.39). This Agreement has been processed, considered and executed in accordance with such procedures and requirements.

C. Developer owns that certain real property consisting of approximately eighty eight (88) acres within City, located west of Foothill Boulevard (SR-29/128), depicted on the "**Site Map**" attached as Exhibit A, and legally described in Exhibit B (the "**Property**").

D. Developer proposes to develop on the Property a boutique hotel consisting of up to one hundred ten (110) keys, up to twenty (20) residence club homes, up to thirteen (13) custom homes, and other public amenities and infrastructure, including on-site improvements and the Off-Site Improvements (as defined below) (collectively, and as more particularly described herein, the "**Project**"), all in the manner described in City's 2000 General Plan, as amended pursuant to the General Plan Resolution to effectuate the Project (the "**General Plan**").

E. Developer seeks to comply with the Project conditions of approval and develop the Property in accordance with the land use policies and goals set forth in the General Plan and in accordance with this Agreement.

F. The application for this Agreement was considered by City at one or more duly noticed public hearings in accordance with the Development Agreement Statute.

G. On or about __________________, 20___ (the "**Approval Date**"), the City Council, at a duly noticed public hearing, took the following actions in connection with the development of the Project on the Property:

1. By Resolution No. ______, certified the EIR and adopted the Mitigation Monitoring Plan;

2. By Resolution No. ________ (the "**General Plan Resolution**"), amended the General Plan Overlay Districts Map;

3. By Ordinance No. _____, rezoned the Property;

4. By Resolution No. ____, approved and adopted a vesting tentative subdivision map (the "**Vesting Tentative Map**");

5. By Resolution No. ____, approved a Conditional Use Permit for the Resort Hotel (as defined below), Design Review and Preliminary/Final Planned Development Plan; and

6. By Ordinance No. _____, approved this Agreement and authorized City's execution and delivery of this Agreement.

The approvals and development policies described in subsections 1 through 5 of this Recital G are collectively referred to herein as the "**Existing Project Approvals**".

H. Subsequent to approval of this Agreement, City anticipates that applications for additional approvals, entitlements, and permits related to the development and operation of the Project will be submitted to implement and operate the Project (the "**Subsequent Project Approvals**").

I. This Agreement furthers the public health, safety and general welfare in that the provisions of this Agreement are consistent with the General Plan. City and Developer have further determined that the Project is a development for which this Agreement is appropriate. This Agreement will reduce uncertainty, thereby encouraging planning for, investment in and commitment to use and development of the Property, all in accordance with this Agreement. Continued use and development of the Property in accordance with this Agreement are anticipated, in turn, to provide substantial benefits to City and contribute to the provision of needed infrastructure for area growth, assure progressive installation of necessary improvements, provide public services appropriate to each phase of development of the Project, ensure attainment of the maximum effective utilization of resources within City at the least economic cost to its citizens and otherwise achieve the goals and purposes for which the Development Agreement Statute was enacted.

J. The Parties intend through this Agreement to (i) allow Developer to develop and operate the Project in accordance with the Existing Project Approvals and the Applicable City Laws (as defined below), and (ii) require that any Subsequent Project Approvals and Fees and Exactions with respect to the Project be governed by this Agreement.

K. The City Council has found that this Agreement is consistent with the General Plan and has conducted all necessary proceedings in accordance with City's rules and regulations for the approval of this Agreement.

L. In exchange for the benefits to City contained herein, City has taken or will take all actions required so that Developer may begin and consummate development of the Project, including the future approval of building plans and issuance of final maps and building permits, and other necessary or desired approvals and entitlements that are consistent with development of the Project.

M. In exchange for the benefits to City, Developer desires to receive the assurance that it may proceed with the Project in accordance with the Existing Project Approvals, subject to the terms and conditions contained in this Agreement, and to secure the benefits afforded to Developer by the Development Agreement Statute.

N. It is the intent of the Parties that all acts referred to in this Agreement shall be accomplished in such a way as to fully comply with CEQA and the Development Agreement Statute.

O. The terms of this Agreement support the vital and best interests of City by ensuring that development of the Project will provide tax revenue for City.

P. The Parties acknowledge that, in reliance on the agreements, representations and warranties contained in this Agreement, Developer will take certain actions, including making substantial investments and expenditures of monies, relative to the Property and the development of the Project.

AGREEMENT

NOW, THEREFORE, in consideration of the promises, covenants and provisions set forth herein, the receipt and adequacy of which are hereby acknowledged, and the authority contained in the Development Agreement Statute, the Parties agree as follows:

ARTICLE 1. DEFINITIONS

Section 1.01 Definitions.

"**Actual Water Demand**" shall have the meaning set forth in Section 4.03.

"**Administrative Action**" shall have the meaning set forth in Section 10.07.

"**Adobe Report**" shall have the meaning set forth in Section 3.11.D.

"**Affiliate**" shall mean any Person that directly or indirectly Controls, is Controlled by or is under Common Control with, a Party (or a partner or managing or other member of a Party, as the case may be).

"**Agreement**" shall have the meaning set forth in the introductory paragraph preceding the Recitals and shall include any amendment or modification hereto entered into by the Parties in accordance with Section 10.07.

"**Alleging Party**" shall have the meaning set forth in Section 9.01.

"**Annual Review Date**" shall mean the second January 1 occurring after the Fee Payment Date and each January 1 thereafter during the Term.

"**Applicable City Laws**" shall have the meaning set forth in Section 3.02.

“**Approval Date**” shall have the meaning set forth in Recital Q.

“**Assignee**” shall have the meaning set forth in Section 8.02.A.

“**Assignment**” shall have the meaning set forth in Section 8.02.A.

“**Breach**” shall have the meaning set forth in Section 9.01.

“**Breach Notice**” shall have the meaning set forth in Section 9.01.

“**Breaching Party**” shall have the meaning set forth in Section 9.01.

“**Business Day**” shall mean a day other than a Saturday, Sunday or holiday recognized by City.

“**CEQA**” shall mean the California Environmental Quality Act, Division 13 of the California Public Resources Code, Sections 21000 and following.

“**CEQA Guidelines**” shall mean the Guidelines for the California Environmental Quality Act, Title 14 of the California Code of Regulations, Chapter 3, Sections 15000 and following.

“**Changes in the Law**” shall have the meaning set forth in Section 3.10

“**City**” shall have the meaning set forth in the introductory paragraph preceding the Recitals or the territorial jurisdiction thereof, as applicable.

“**City Council**” shall mean the Council of City.

“**City Manager**” shall mean the City Manager of City.

“**Consultant Fees**” shall have the meaning set forth in Section 5.02.A(2).

“**Control**” shall mean the possession (direct or indirect) by one Person (and/or such Person and its Affiliates) of day-to-day control of the activities of a Person. “**Common Control**” shall mean that two Persons are both Controlled by the same other Person or Persons. “**Controlled**”, “**Controlling Interest**” and “**Controlling**” have correlative meanings.

“**Cure Period**” shall have the meaning set forth in Section 9.01.

“**Custom Home**” shall have the meaning set forth in Section 2.05.

“**Default**” shall have the meaning set forth in Section 9.01.

“**Developer**” shall have the meaning set forth in the introductory paragraph preceding the Recitals and shall include its permitted successors and assigns.

“**Development Agreement Statute**” shall have the meaning set forth in Recital A.

“**Effective Date**” shall have the meaning set forth in Section 2.01.

"**EIR**" shall mean the Final Environmental Impact Report for the Project approved by City on the Approval Date.

"**Existing Project Approvals**" shall have the meaning set forth in Recital G.

"**Federal/State Compliance Fees**" shall have the meaning set forth in Section 5.02.B.

"**Fee Deposit Date**" shall mean the date that is one hundred twenty (120) days following the Effective Date, which date shall be extended as set forth in Section 9.06 where delays are due to Force Majeure.

"**Fee Payment Date**" shall mean the date that is ninety-one (91) days following the Fee Deposit Date, which date shall be extended as set forth in Section 9.06 where delays are due to Force Majeure.

"**Fees and Exactions**" shall mean a monetary or other exaction including in-kind contributions, other than a tax or special assessment, that is charged by City in connection with the Property, the Project, any Project Approval or this Agreement.

"**Force Majeure**" shall mean the period required to extend the performance of a Party under this Agreement due to: war; acts of terrorism; insurrection; strikes or lock-outs not caused by, or outside the reasonable control of, Developer; riots; floods; earthquakes; fires; casualties; acts of nature; acts of the public enemy; epidemics; quarantine restrictions; freight embargoes; previously unknown environmental conditions discovered on or affecting the Property, the Project or any portion of either, including any delay caused or resulting from the investigation or remediation of such conditions; litigation or a referendum that enjoins construction or other work on the Property, the Project or any portion of either; litigation or a referendum that challenges this Agreement or the Existing Project Approvals; unusually severe weather; a development moratorium, as defined in section 66452.6(f) of the California Government Code, extending the expiration date of a tentative subdivision map; failure of City to file a Notice of Determination with respect to the Project EIR in accordance with all applicable laws and regulations and in any event within five (5) days of the Approval Date; litigation regarding the EIR or any other environmental review of the Project; any governmental entity's failure to act in accordance with federal, state or local regulations or, where there is no time-frame legally required, in accordance with that governmental entity's reasonable standard practice and custom; or a Default of this Agreement by the other Party.

"**General Plan**" shall have the meaning set forth in Recital D.

"**General Plan Resolution**" shall have the meaning set forth in Recital D.

"**Initial Fees**" shall mean, collectively, the Traffic Impact Fee, the Quality of Life Fee, the Public Safety Fees, the Initial In-Lieu Housing Fee and the Water Service Connection Fee, in each case to the extent payable as of the Fee Payment Date.

"**Initial In-Lieu Housing Fee**" shall have the meaning set forth in Section 5.02.D(1).

"**Initial Term**" shall have the meaning set forth in Section 2.03.

“**Mortgage**” shall have the meaning set forth in Section 6.01.

“**Mortgagee**” shall have the meaning set forth in Section 6.01.

“**Mortgagor**” shall have the meaning set forth in Section 6.01.

“**New City Law**” shall mean City’s laws, rules, regulations, official policies, standards and specifications, including those enacted or imposed by a citizen-sponsored initiative or referendum or by the City Council directly or indirectly in connection with any proposed initiative or referendum, in each case to the extent amended or otherwise imposed following the Approval Date.

“**Off-Site Improvements**” shall mean, individually or collectively as the context requires, the Off-Site Wastewater Improvements and the Off-Site Water Improvements.

“**Off-Site Improvements Maximum Projected Cost**” shall mean (i) with respect to the Off-Site Wastewater Improvements, four million nine hundred ninety three thousand one hundred ninety four dollars ($4,993,194) and (ii) with respect to the Off-Site Water Improvements, one hundred fifty eight thousand seven hundred thirty dollars ($158,730).

“**Off-Site Improvements Outside Date**” shall mean the date that is three (3) years following the Fee Payment Date.

“**Off-Site Wastewater Improvements**” shall have the meaning set forth in Section 3.11.B.

“**Off-Site Water Improvements**” shall have the meaning set forth in Section 3.11.C.

“**Party**” and “**Parties**” shall have the meaning set forth in the introductory paragraph preceding the Recitals.

“**Person**” shall mean any natural person or a corporation, partnership, trust, limited liability company, limited liability partnership or other entity.

“**Pine Street Lift Station Upgrades**” shall have the meaning set forth in Section 3.11.B.

“**Processing Fees**” shall have the meaning set forth in Section 5.02.A(1).

“**Project**” shall have the meaning set forth in Recital D.

“**Project Approvals**” shall mean, individually or collectively as the context requires, the Existing Project Approvals and the Subsequent Project Approvals.

“**Projected Water Demand**” shall have the meaning set forth in Section 4.03.

“**Property**” shall have the meaning set forth in Recital C.

“**Public Safety Fees**” shall have the meaning set forth in Section 5.02.C(1).

"**Public Safety Water Line Improvements**" shall have the meaning set forth in Section 3.11.C.

"**Quality of Life Fee**" shall have the meaning set forth in Section 5.02.C(2).

"**Residence Club**" shall have the meaning set forth in Section 2.05.

"**Resort Hotel**" shall have the meaning set forth in Section 2.05.

"**Resort Occupancy Date**" shall mean the date on which a certificate of occupancy is issued by City with respect to the Resort Hotel.

"**Site Map**" shall have the meaning set forth in Recital C.

"**Subdivision Map Act**" shall have the meaning set forth in Section 3.07.

"**Subsequent Discretionary Approvals**" shall have the meaning set forth in Section 7.01.B.

"**Subsequent Ministerial Approvals**" shall have the meaning set forth in Section 7.01.A.

"**Subsequent Project Approvals**" shall have the meaning set forth in Recital H, and include (and are limited to) Subsequent Discretionary Approvals and Subsequent Ministerial Approvals.

"**Supplemental In-Lieu Housing Fee**" shall have the meaning set forth in Section 5.02.D(2).

"**Term**" shall have the meaning set forth in Section 2.02.

"**Term Extension**" shall have the meaning set forth in Section 2.04.

"**TOT**" shall have the meaning set forth in Section 2.04.

"**Traffic Impact Fee**" shall have the meaning set forth in Section 5.02.C(3).

"**Transient Lodging Use**" shall have the meaning set forth in Section 2.03.

"**Vesting Tentative Map**" shall have the meaning set forth in Recital G.

"**Washington Street Main Wastewater Trunk Line**" shall have the meaning set forth in Section 3.11.B.

"**Water Check-In Date**" shall mean the date that is three (3) years from the Resort Occupancy Date.

"**Water Service Agreement**" shall have the meaning set forth in Section 4.05.

"**Water Service Connection Fee**" shall have the meaning set forth in Section 4.03.

ARTICLE 2. EFFECTIVE DATE AND TERM

Section 2.01 Effective Date. This Agreement shall become effective upon the date that the ordinance approving this Agreement becomes effective (the "**Effective Date**").

Section 2.02 Term. The "**Term**" of this Agreement shall be the Initial Term together with any Term Extension(s). In no event shall the Term exceed ten (10) years.

Section 2.03 Initial Term. The Term of this Agreement shall commence upon the Effective Date and shall extend for a period of five (5) years thereafter (such period, the "**Initial Term**").

Section 2.04 Term Extensions. City and Developer agree that it may be desirable for the Initial Term to be extended. Accordingly, Developer may request in writing that City extend the Initial Term for up to five (5) additional one (1) year periods (each such period, a "**Term Extension**"). Such written request may be delivered to City not earlier than two hundred seventy (270) days nor later than sixty (60) days prior to the expiration of the then-current Term. Any such request shall be subject to the consent of City acting through the City Manager, which approval City agrees it shall not unreasonably withhold, condition or delay. City shall provide such consent within thirty (30) days of City's receipt of any such request if as of the date of such receipt, Developer is (i) not in Breach (for the avoidance of doubt, City shall have delivered a Breach Notice with respect to any such Breach and Developer shall have not cured any such Breach as of the date of such receipt), or (ii) in Breach (for the avoidance of doubt, City shall have delivered a Breach Notice with respect to any such Breach as of the date of such receipt), but Developer cures such Breach prior to the end of such thirty (30) day period. If the Initial Term of this Agreement is extended in accordance with this Section 2.04, City shall promptly record in the Official Records of Napa County, California an instrument giving notice of the Term Extension.

Section 2.05 Project Integration and Description. The Parties intend that the Property be developed as a single, integrated Project. Accordingly, this Agreement and the Existing Project Approvals shall permit the development and use of a mixed use luxury resort expected to include: (a) a boutique hotel (the "**Resort Hotel**") consisting of up to one hundred ten (110) keys, intended to be primarily (but not exclusively) for transient occupancy use, and expected to include lobbies, common areas, restaurants and other food and beverage concessions, various retail facilities, one or more pools and various other recreational areas and facilities, a spa, a fitness center, meeting spaces, back of house areas and facilities, private roadways and walkways, open and landscaped areas, utilities facilities and general infrastructure; (b) up to twenty (20) residence club homes (the "**Residence Club**") that may be owned or used as whole ownership, fractional interest ownership (which, for purposes of this Agreement, is defined as the right to occupy a Residence Club home coupled with a fractional fee ownership interest in the Residence Club or in a specific Residence Club home together with an undivided ownership interest in the common areas appurtenant to the Residence Club), equity club, non-equity club and any other type of residence club, fee interest and/or any shared ownership real estate product recognized by the California Department of Real Estate except that time-share ownership (which, for purposes of this Agreement, is defined as the right to use and occupy a Residence Club home on a recurring basis but which is not coupled with a fractional fee ownership interest

in the Residence Club or a specific Residence Club home) is expressly disallowed (and regardless of the ownership type, Developer may rent any unsold interests (the fraction size and type of shared ownership to be determined by Developer in its sole discretion, provided that time-share ownership is expressly disallowed) and including related amenities (including dedicated owner areas such as check-in areas, common areas, pool and other recreational areas and facilities, clubhouse and/or other owner-dedicated areas and facilities (which may include food services, retail, recreation and other related facilities)); and (c) up to thirteen (13) custom homes lots on which it is intended that purchasers would construct custom designed luxury homes ("**Custom Homes**") in accordance with design guidelines established by Developer or, in Developer's discretion, Developer may construct and sell completed homes on such lots, but, in any event, such homes may be owned as whole ownership, or fee interest and including related amenities including dedicated owner areas such as check-in areas, common areas, pool and other recreational areas and facilities, clubhouse and/or other owner-dedicated areas and facilities (which may include food services, retail, recreation and other related facilities).

Section 2.06 Developer Representations and Warranties. Developer represents and warrants to City that, as of the Approval Date:

A. Developer is the sole fee owner of the Property, and to the knowledge of Developer no other Person holds any legal or equitable interests in the Property other than those recorded against the Property as reflected in the Official Records of Napa County, California;

B. Developer: (i) is organized and validly existing under the laws of the State of Delaware; (ii) to the extent required, has qualified and been authorized to do business in the State of California and has complied with all requirements pertaining thereto; (iii) to the extent required, is in good standing and has all necessary powers under the laws of the State of California to own property and enter into and perform the undertakings and obligations of Developer under this Agreement; and (iv) is not in default with respect to payment of any general or special property taxes or assessments or other property based fees allocable to the Property;

C. No approvals or consents of any persons are necessary for the execution, delivery or performance of this Agreement by Developer, except as have been obtained;

D. The execution and delivery of this Agreement have been duly authorized by all necessary corporate action; and

E. This Agreement is a valid obligation of Developer and is enforceable in accordance with its terms.

ARTICLE 3. DEVELOPMENT OF PROPERTY AND OPERATION OF RESORT HOTEL

Section 3.01 Vested Rights. The Property is hereby made subject to the provisions of this Agreement. Developer shall have the vested right to develop the Property and the Project in accordance with and subject to the Existing Project Approvals, the Subsequent Project Approvals, Applicable City Law and this Agreement, which shall control the permitted uses,

density and intensity of use of the Property and the maximum height and size of buildings on the Property.

Section 3.02 Applicable City Law. The Parties acknowledge and agree that City is restricted in its authority to limit its police power by contract and that the limitations, reservations and exceptions contained in this Agreement are intended to reserve to City all of its police power that cannot be so limited. This Agreement shall be construed to reserve to City all such power and authority that cannot be restricted by contract. Notwithstanding the foregoing reservation of City, it is the intent of City and Developer that this Agreement be construed to provide Developer with the maximum rights afforded by law, including but not limited to, the Development Agreement Statute. Therefore, regardless of any future action by City, whether by ordinance, resolution, initiative or otherwise, the only laws, rules, regulations, official policies, standards and specifications of City applicable to the development of the Property and/or the Project shall be (collectively, "**Applicable City Laws**"):

(1) Those rules, regulations, official policies, standards and specifications of City set forth in the Project Approvals and this Agreement;

(2) With respect to matters not addressed by and not otherwise inconsistent with the Project Approvals and this Agreement, those laws, rules, regulations, official policies, standards and specifications (including City ordinances and resolutions) governing permitted uses, building locations, timing and manner of construction, densities, intensities of uses, design, heights and sizes, requirements for on- and off-site infrastructure and public improvements, fees and exactions; in each case to the extent in full force and effect on the Approval Date;

(3) New City Laws that relate to hearing bodies, petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals and any other matter of procedure imposed at any time, provided such New City Laws are uniformly applied on a city-wide basis to all substantially similar types of development projects and properties;

(4) New City Laws that revise City's uniform construction codes, including City's building code, plumbing code, mechanical code, electrical code, fire code, grading code and other uniform construction codes, as of the date of permit issuance, provided, that such New City Laws are uniformly applied on a city-wide basis to all substantially similar types of development projects and properties;

(5) New City Laws that are necessary to protect physical health and safety of the public; provided, that such New City Laws are uniformly applied on a city-wide basis to all substantially similar types of development projects and properties;

(6) New City Laws that do not conflict with this Agreement or the Project Approvals, provided such new City Laws are uniformly applied on a city-wide basis to all substantially similar types of development projects and properties. Without limiting the generality of the foregoing, New City Laws will be deemed to conflict with the Agreement under this Section 3.02(6) if they: limit or reduce the density or intensity of development; limit or

reduce the height or bulk of development on the Property, or any part thereof, or of individual proposed buildings or other improvements thereon; materially change, restrict, or condition any land uses, including permitted or conditional uses, of development within the Property; materially limit or control the rate, timing, phasing, or sequencing of approval, development, or construction (including demolition); conflict with the Project Approvals; materially limit or control the availability of public utilities, services or facilities or any privileges or rights to public utilities, services or facilities for the Property, including to water rights, water connections, sewage capacity rights and sewer connections; control or limit commercial or residential rents or purchase prices; materially increase the cost of construction or maintenance of all or any development permitted or contemplated on the Property or of compliance with any provision of this Agreement or any Project Approval; or impose any new Fees and Exactions or expand or increase Fees and Exactions; and

(7) New City Laws that do not apply to the Property and/or the Project due to the limitations set forth above, but only to the extent that such New City Laws are accepted in writing by Developer in its sole discretion.

Section 3.03 Preparation of Project Approvals and Applicable City Laws. Promptly following the Approval Date, the Parties, at Developer's sole cost and expense, shall use their respective good faith efforts to prepare two (2) sets of the Project Approvals and Applicable City Laws in full force and effect on the Approval Date, one (1) set for City and one (1) set for Developer, to which the Parties shall endeavor in good faith to add from time to time, Subsequent Project Approvals, so that if it becomes necessary in the future to refer to any of the Project Approvals or Applicable City Law, there will be a common set available to the Parties. Failure to include (or to agree on what to include) in the sets of Project Approvals and Applicable City Law any Subsequent Project Approvals or New City Laws that constitute Applicable City Law shall not affect the applicability of any such Subsequent Project Approvals or New City Laws.

Section 3.04 Development Timing. The Parties acknowledge that Developer cannot at this time predict what portions of the Project will be included within any phase of the Project, when or the rate at which the phases will be developed or the order in which each phase will be developed. Such decisions depend upon numerous factors that are not within the control of Developer, such as market orientation and demand, interest rates, absorption, completion, availability of financing and other similar factors. In particular, and not in any limitation of any of the foregoing, since the California Supreme Court held in *Pardee Construction Co. v. The City of Camarillo*, 37 Cal.3d 465 (1984), that the failure of the parties therein to consider and expressly provide for the timing of development resulted in a later-adopted initiative restricting the timing of development prevailing over such parties' agreement, it is the Parties' desire to avoid that result by acknowledging that, unless otherwise provided for in this Agreement, Developer's vested rights under this Agreement include the right to develop the Property and the Project in such order and at such rate and at such times as Developer deems appropriate in the exercise of its discretion, subject to the terms, requirements and conditions of the Existing Project Approvals and this Agreement.

Section 3.05 Regulation by Other Public Agencies. City and Developer acknowledge and agree that other governmental or quasi-governmental entities not within the control of City

possess authority to regulate aspects of the development of the Property and the Project and that this Agreement does not limit the authority of such other public agencies. City shall cooperate with Developer in Developer's effort to obtain such permits and approvals as may be required by other governmental or quasi-governmental entities in connection with the development of, or the provision of services to, the Property and/or the Project; provided, however, City shall have no obligation to incur any costs, without compensation or reimbursement, or to amend any City policy, regulation or ordinance in connection therewith.

Section 3.06 Life of Project Approvals. The term of any and all Project Approvals shall automatically be extended for the longer of the Term or the term otherwise applicable to such Project Approvals. Without limiting the generality of the foregoing, pursuant to the Subdivision Map Act, any vesting or tentative maps heretofore or hereafter approved in connection with development of the Project or the Property, shall be extended for the Term (and may be subject to other extensions provided under the Subdivision Map Act).

Section 3.07 Vesting Tentative Maps. If the Vesting Tentative Map or any tentative map hereafter approved in connection with development of the Property is a vesting map under the Subdivision Map Act, Government Code §§ 66410 *et seq.* ("**Subdivision Map Act**"), and if this Agreement is determined by a final judgment to be invalid or unenforceable insofar as it grants a vested right to Developer for development of the Project, then and to that extent all rights and protections afforded Developer under the laws and ordinances applicable to vesting maps shall survive.

Section 3.08 Developer's Right to Rebuild. City agrees that Developer may renovate or rebuild portions of the Project at any time within the Term should it become necessary due to any casualty, including natural disaster or changes in seismic requirements. Such renovations or reconstruction shall be processed as a Subsequent Project Approval consistent with all prior Project Approvals and Applicable City Law. Any such renovation or rebuilding shall be subject to all design, density and other limitations and requirements imposed by this Agreement, and shall comply with the Project Approvals, Applicable City Law, and the requirements of CEQA.

Section 3.09 Environmental Mitigation. The Parties understand that the EIR is intended to be used not only in connection with the Existing Project Approvals, but also in connection with the Subsequent Project Approvals needed for the Project. Consistent with the CEQA streamlining policies applicable to specific plans, including but not limited to California Code of Regulations Title 14, Section 15182, City agrees to use the EIR in connection with the processing of any Subsequent Project Approval to the maximum extent allowed by law and consistent with the requirements of CEQA. Further, City shall rely on the exemption referenced in CEQA Guideline 15182 to the fullest extent permitted by law. To the extent supplemental or additional environmental review is required in connection with Subsequent Project Approvals, Developer acknowledges that City may require additional mitigation measures that were not foreseen as of the Approval Date.

Section 3.10 State and Federal Law. As provided in Section 65869.5 of the Development Agreement Statute, this Agreement shall not preclude the applicability to the Project of changes in laws, regulations, plans or policies, to the extent that such changes are specifically mandated and required by changes in State or Federal laws or by changes in laws,

regulations, plans or policies of special districts or other governmental entities, other than City, created or operating pursuant to the laws of the State of California ("**Changes in the Law**"). In the event Changes in the Law prevent or preclude, or render substantially more expensive or time consuming, compliance with one (1) or more provisions of this Agreement, the Parties shall meet and confer in good faith in order to determine whether such provisions of this Agreement shall be modified or suspended, or performance thereof delayed, as may be necessary to comply with Changes in the Law. Nothing in this Agreement shall preclude City or Developer from contesting by any available means (including administrative or judicial proceedings) the applicability to the Project any such Changes in the Law. If Changes in the Law preclude or substantially prevent or preclude, or render substantially more expensive or time consuming, performance of this Agreement in a manner that makes the Project economically infeasible, Developer, in its sole and absolute discretion, may terminate this Agreement by providing written notice thereof to City.

Section 3.11 Public Improvements.

A. General. Developer shall reserve and dedicate land for and shall construct all public improvements required by the Project Approvals and this Agreement.

B. Off-Site Wastewater Improvements. Prior to the Off-Site Improvements Outside Date, Developer shall install the "**Washington Street Main Wastewater Trunk Line**" and "**Pine Street Lift Station Upgrades**" (each as generally described in the Adobe Report) (collectively, the "**Off-Site Wastewater Improvements**").

C. Off-Site Water Improvements. Prior to the Off-Site Improvements Outside Date, Developer shall install the "**Public Safety Water Line Improvements**" (as generally described in the Adobe Report) (the "**Off-Site Water Improvements**").

D. Cost Sharing for Off-Site Improvements. If City installs (or causes another project to install) all or any portion of the Off-Site Improvements in connection with another project(s) approved by City, then Developer's obligations under Sections 3.11.B and C shall terminate with respect to such portion. Developer shall instead pay to City a pro rata share of the construction costs thereof, determined by the reasonably projected use of such Off-Site Improvements by Developer and such other project(s), respectively, of the three (3) separate sections thereof as shown on the Adobe Technical Memo Key Map attached hereto as Exhibit D (the "**Adobe Report**") and as follows:

(1) Section #1 = 20% of Off-Site Improvements: Off-Site Improvements from Pine Street lift station to the corner of Anna Street and the old railroad gravel access road;

(2) Section #2 = 40% of Off-Site Improvements: Off-Site Improvements from corner of Anna Street along old access road to crossing over to Washington Street to the sanitary sewer man hole (SSMH) adjacent to the Palisades lift station; and

(3) Section #4 = 40% of of Off-Site Improvements: Off-Site Improvements from sanitary sewer man hole (SSMH) adjacent to the Palisades lift station to connection at the wastewater treatment plant.

E. Subdivision Improvement Agreement. Prior to commencing the Off-Site Water Improvements and the Off-Site Wastewater Improvements, Developer and City shall enter into a Subdivision Improvement Agreement to address, among other things, security, warranty and acceptance. Such Subdivision Improvement Agreement shall be on City's standard form, subject to such revisions thereto as may be approved by City and Developer. Such agreement shall provide that: all Off-Site Improvements, once inspected and approved by City in accordance therewith, shall become the property of City and will be maintained by City; any security provided therefor shall be limited to that required by state law and the Applicable City Laws; City shall provide Developer with any rights of access to property City controls that is required in order for Developer to install the Off-Site Improvements at no cost to Developer; and Developer may acquire any additional easement or property interests that would facilitate the construction of the Off-Site Improvements, provided that failure to acquire such interests shall not modify the obligation to complete the Off-Site Improvements or the timeframe for completion thereof, unless approved in writing by the City Manager.

F. Increased Costs for Off-Site Improvements. If the projected or actual cost to Developer of installing the Off-Site Water Improvements or the Off-Site Wastewater Improvements is at any time in excess of the Off-Site Improvements Maximum Projected Costs therefor, then City and Developer may agree, in their respective sole and absolute discretion, to appropriate revisions to the Off-Site Improvements or identify alternative funding sources. This Section 3.11.F shall not revise Developer's obligations with respect to the Off-Site Improvements unless and until City and Developer expressly agree to any such revisions.

Section 3.12 Operational Requirements. Prior to issuance of a building permit for the Resort Hotel, Developer and City shall enter into an Operational Agreement with a term of thirty (30) years from the Approval Date to be recorded against the portion of the Property containing the Resort Hotel, in the form attached hereto as Exhibit E, together with such changes as may be reasonably approved by the City Manager (on behalf of City) and Developer.

ARTICLE 4. WATER ALLOCATIONS AND USE

Section 4.01 Allocation of Water and Wastewater Services. City hereby agrees that the Project shall be and hereby is deemed to be exempt from the City Growth Management System pursuant to Section 19.020.050(F) of City's Municipal Code and that the water and sewer service allocations set forth herein are hereby made to and for the benefit of the Project. City agrees that unless prohibited by a moratorium lawfully adopted by another governmental agency not controlled by City, or by action taken by City in accordance with this Agreement, no change in Applicable City Law shall reduce or eliminate these allocations.

Section 4.02 Will-Serve Obligation. The allocations of water and wastewater capacity set forth herein shall constitute the "will serve" obligation of City with respect to the Project. This "will serve" obligation of City is vested by this Agreement. The water and wastewater allocations set forth herein shall constitute the Baseline (as defined in Municipal Code Section

13.16.060) for the Project and any additional allocations shall be determined as set forth in Sections 4.03 and 4.05. This provision shall supersede any conflicting City codes or regulations in effect as of the Approval Date.

Section 4.03 Domestic and Emergency Potable Water. City agrees to provide the Project an annual allocation of thirty (30) acre feet of domestic and emergency potable water as defined under the Resource Management Services Code to service all Project uses. Developer may place a reservation in its discretion in the form of a surety bond for up to an additional twenty (20) acre feet annually that may be provided under City's Resource Management System, as provided herein (and may thereafter increase or decrease such reservation, up to twenty (20) acre feet, at its discretion). The surety bond will be released or proportionally reduced by City if Developer waives in writing its right to the reservation (or a portion thereof). On or prior to the Fee Deposit Date, Developer shall pay (in accordance with Section 5.02.E), a connection fee of one million six thousand three hundred eighty dollars ($1,006,380) for the annual allocation of thirty (30) acre feet of water ("**Water Service Connection Fee**").

A. Promptly following the Water Check-In Date, City and Developer shall review the Project's average actual annual demand on water supplies (the "**Actual Water Demand**") against the projected demand of thirty (30) acre feet annually (the "**Projected Water Demand**") and adjust as follows:

(1) If the Actual Water Demand over the period between the Resort Occupancy Date and the Water Check-In Date *exceeds* the Projected Water Demand, then within ninety (90) days after such determination is finally made, Developer shall pay to City the differential connection fees due at the generally applicable fee schedule in effect at the time and City shall increase the Project's allocation of water supply and the Baseline to the level of the Actual Water Demand (but not above thirty (30) acre feet of water annually plus any amount reserved under Section 4.03). For example, if the Actual Water Demand over the period between the Resort Occupancy Date and the Water Check-In Date is forty (40) acre feet of water under Section 4.03, Developer has reserved at least an additional ten (10) acre feet of water, and the fee schedule in effect at the time provides for a fee of thirty eight thousand four hundred sixty three dollars ($38,463) per additional acre foot of water annually, then Developer shall pay to City an amount equal to three hundred eighty four thousand six hundred thirty dollars ($384,630) (40-30=10; 10 * $38,463 = $384,630).

(2) If the Actual Water Demand over the period between the Resort Occupancy Date and the Water Check-In Date *is less than* the Projected Water Demand, then City shall give Developer a rebate in an amount equal to thirty three thousand five hundred forty six dollars ($33,546) multiplied by the difference between the Projected Water Demand and the Actual Water Demand and City shall decrease the Baseline accordingly. For example, if the Actual Water Demand over the period between the Resort Occupancy Date and the Water Check-In Date is twenty five (25) acre feet of water, then City shall pay to Developer an amount equal to one hundred sixty seven thousand seven hundred thirty dollars ($167,730) (30-25=5; 5 * $33,546 = $167,730).

B. Prior to the review described in Section 4.03.A, Developer may not purchase domestic and emergency potable water allocation for the Project above fifty (50) acre

feet of water annually. After the Water Check-In Date, Developer may apply from time to time for additional domestic and emergency potable water allocation above fifty (50) acre feet of water annually and such application may be approved as provided under the terms of City's Growth Management System.

C. Subject to compliance with State law, Developer shall have the right to be a purveyor of water to users within the Property, including through the utilization of meters serving all or any portion of the Property or the Project.

D. As part of its development of the Project, Developer shall install two (2) separate metered water pumps at City connection point (i) one (1) that is solely dedicated to day-to-day water services for the Property and the Project and refill of any on-site reservoir and (ii) one (1) that is dedicated to emergency services as outlined the Adobe Report prepared in connection with the approval of this Agreement.

Section 4.04 Wastewater.

A. Charges. City agrees to charge the Project the Transient General Rate for monthly treatment services as incorporated in City's wastewater service rate matrix. The Project will not be subject of any present or future connection fees for wastewater service up to sixty (60) acre feet of discharge annually. Developer may apply from time to time for additional wastewater allocation beyond the sixty (60) acre feet annually and such applications may be approved as provided under the terms of City's Growth Management System.

B. Greywater Systems; Meters.

(1) Subject to Applicable City Law, Developer may, but shall not be required to, install "greywater systems" for use within the Property, potentially including for landscape uses to, among other things, reduce the amount of wastewater discharged to City. City encourages such uses.

(2) Developer may, at its expense, place meters at appropriate discharge points within the Property to monitor and measure the amount of wastewater effluent discharged to City.

Section 4.05 Separate Water Agreement. If the Water Check-In Date and the above procedures related thereto have not occurred prior to any expiration of the Term, upon the request of either Party, City and Developer shall work together in good faith to prepare and execute a separate agreement ensuring their respective ability to exercise their respective rights and perform their respective obligations under this Article 4 notwithstanding any such expiration (a "**Water Service Agreement**").

ARTICLE 5. TAXES AND ASSESSMENTS; FEES AND EXACTIONS; FINANCING MECHANISMS

Section 5.01 Taxes and Assessments.

A. Generally. Subject to this Agreement, City may impose and Developer agrees to pay any new, increased or modified taxes and assessments imposed in accordance with the laws then in effect, but only if such taxes and assessments are equally applied on a city-wide basis and have a uniform and proportionate effect on a broadly based class of land, projects or taxpayers, as applicable, within City.

B. Transient Occupancy Taxes. Notwithstanding Section 5.01.A, TOT shall be paid with respect to the Resort Hotel, the Residence Club, and the Custom Home uses only for short term transit uses (i.e., with respect to short term transient rental to third-party renters); provided however, with respect to the Residence Club and the Custom Homes, TOT shall not apply to use by owners or their guests, exchange users (i.e., users who exchange use time in another residence or unit for use time in a Residence Club unit), or leases having a continuous term of greater than thirty (30) days.

Section 5.02 Fees and Exactions. Notwithstanding Section 5.01.A, the following are the only Fees and Exactions applicable to the Property and the Project, which shall be applied without duplication.

A. Processing Fees and Consultant Fees.

(1) City may charge, and Developer agrees to pay, all reasonable processing fees imposed from time to time by City to cover the actual costs to City of processing applications for Project Approvals ("**Processing Fees**"), as such fees are uniformly applied on a city-wide basis to all substantially similar types of development projects. City shall use reasonable efforts to minimize Processing Fees.

(2) City may charge, and Developer agrees to pay, all reasonable, out-of-pocket costs (without an administration or carrying charge) to City of engaging such third-party consultants (including architects) as City may reasonably deem necessary to assist City in processing applications for Project Approvals ("**Consultant Fees**"). City shall cooperate with Developer in establishing a scope of work and budget(s) for any third-party consultants prior to engaging such consultants, however the final scope and budget shall be at City's reasonable discretion in light of the size, type and complexity of the Project and the subject Project Approval. City shall use reasonable efforts to minimize Consultant Fees.

(3) All Processing Fees and Consultant Fees shall be billed by City in a prompt and efficient manner, and in reasonable detail, including a general description of the services performed. Any bills for Processing Fees and Consultant Fees shall be paid within thirty (30) days of Developer's receipt thereof, subject to Article 9.

B. Federal/State Compliance Fees. City may charge and Developer agrees to pay any new, increased or modified Fees and Exactions that are uniformly applied on a city-wide basis to all substantially similar types of development projects and are reasonably necessary to comply with the requirements of any Federal or State statute or regulation that is enacted or adopted after the Effective Date ("**Federal/State Compliance Fees**").

C. Impact Fees. Developer shall pay the development impact fees in the amount and at the time set forth below in addition to those fees and charges set forth in Section 3.11.D (if any) and Article 4. No other development impact fees of City shall apply to the Project, except as provided by New City Laws permitted under Section 3.02.

(1) *Public Safety Fees*. First, on or prior to the Fee Payment Date, Developer shall pay (in accordance with Section 5.02.E), one hundred two thousand nine hundred twenty five dollars ($102,925) and second, within thirty (30) days following City's issuance of the first grading permit for the Off-Site Improvements, Developer shall pay or cause to be paid to City an additional one hundred two thousand nine hundred twenty five dollars ($102,925), collectively as the "**Public Safety Fees**".

(2) *Quality of Life Fees*. On or prior to the Fee Payment Date, Developer shall pay (in accordance with Section 5.02.E) two hundred sixty four thousand dollars ($264,000) as the "**Quality of Life Fee**".

(3) *Traffic Impact Fees*. On or prior to the Fee Payment Date, Developer shall pay (in accordance with Section 5.02.E), two hundred sixty seven thousand seven hundred ninety five dollars ($267,795) as the "**Traffic Impact Fee**", as contemplated by Mitigation Measures Trans-1 and Trans-2 in the Mitigation Measures adopted for the Project in connection with the approval of the EIR.

The Parties agree that as of the Approval Date, Developer has paid seven hundred eighty thousand five hundred dollars ($780,500) for the "Diamond Hill Estates" subdivision, which amount shall be deducted from amounts otherwise due on or prior to the Fee Payment Date. For the convenience of the Parties, a table reflecting the above fees is attached hereto as Exhibit C. In the event of a conflict between the body of this Agreement and Exhibit C, the body shall prevail.

D. In-Lieu Housing Fee.

(1) On or prior to the Fee Payment Date, Developer shall pay or cause to be paid to City three hundred forty three thousand twenty five dollars ($343,025) as an in-lieu affordable housing fee (the "**Initial In-Lieu Housing Fee**").

(2) On or prior to the date that is thirty (30) days after issuance of the initial residential building permit for each Custom Home, Developer shall pay eighteen thousand dollars ($18,000) as an additional in-lieu affordable housing fee (each, a "**Supplemental In-Lieu Housing Fee**"); provided, that (i) Developer's obligations under this Section 5.02.D shall be Developer's exclusive affordable housing obligation and shall be deemed to satisfy Developer's obligations under City's inclusionary zoning ordinance (City Municipal Code Chapter 17.08), and (ii) Developer's aggregate Supplemental In-Lieu Housing Fees shall not exceed two hundred two hundred thirty four thousand dollars ($234,000). Subject to the consent of City and Developer in their respective sole and absolute discretion, this fee shall be waived if Developer provides funds to a third-party at a comparable or higher value for off-site construction of and/or land acquisition for one or more off-site affordable housing projects.

E. Payment of Initial Fees. The Initial Fees shall be deposited in an escrow with a title company approved by Developer and City on or prior to the Fee Deposit Date, with instructions signed by the Parties providing that the Initial Fees (and interest earned thereon, if any) shall be paid to the City on the earlier of: (a) the Fee Payment Date; or (b) the date that Developer pulls any permits for the grading or construction of the Project; and further providing that the Initial Fees (and interest earned thereon, if any) shall be returned to Developer upon any termination of this Agreement in accordance with Section 9.03. All costs of such escrow shall be paid by Developer.

Section 5.03 Financing Mechanisms for Public/Private Improvements. Developer agrees and understands that is shall not be eligible to establish a local benefit district for reimbursement for the cost of Off-Site Improvements.

ARTICLE 6. MORTGAGEE PROTECTION

Section 6.01 Mortgagee Protection. Developer and any Assignee (collectively and individually, as the case may be, a "**Mortgagor**") shall have the right, at any time and from time to time during the Term, to grant a mortgage, deed of trust or other security instrument (each a "**Mortgage**") encumbering all or any portion of Mortgagor's ownership interest in the Property for the benefit of any Person, including any deed of trust beneficiary or mortgagee (together with its successors in interest, a "**Mortgagee**"), as security for one or more loans related to the Property and/or the Project, or any portion of either. Notwithstanding the foregoing, this Agreement shall be superior and senior to any lien placed upon the Property or any portion thereof after the date of recording the Agreement, including the lien of any Mortgage. No breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any Mortgage made in good faith and for value, but all of the terms and conditions contained in this Agreement shall be binding upon and effective against and shall run to the benefit of any Mortgagee who acquires title or possession to the Property, or any portion thereof, by foreclosure, trustee's sale, deed in lieu of foreclosure, lease termination, eviction or similar means of foreclosure. City shall cooperate reasonably with any Mortgagors or prospective Mortgagors in confirming or verifying the rights and obligations of a Mortgagee or Mortgagor under this Agreement.

Section 6.02 Mortgagee Not Obligated. No Mortgagee shall have any obligation or duty under this Agreement to construct or complete the construction of improvements, or to guarantee such construction or completion. Upon acquisition of the Property or any portion thereof pursuant to the terms of a Mortgage, the Mortgagee may elect to terminate this Agreement by providing written notice thereof to City or may develop and operate the Property and the Project under, and subject to, this Agreement. If Mortgagee, or any Person that acquires the Property or any portion thereof from Mortgagee, elects to develop and operate the Property and the Project under, and subject to, this Agreement, City and such Mortgagee or Person shall work together in good faith to make such amendments as may be reasonably necessary for the Parties to effectuate the terms and obligations of this Agreement.

Section 6.03 Notice of Default to Mortgagee. If City receives a notice from a Mortgagee requesting a copy of any Breach Notice or other notice of default given to Developer under this Agreement and such notice specifies the address for service thereof to Mortgagee, then City agrees to deliver to such Mortgagee, concurrently with service thereon to Developer,

any such Breach Notice or other notice of default given to Developer under this Agreement. Each Mortgagee shall have the right during the same period available to Developer to cure or remedy, or to commence to cure or remedy, the Breach or other default claimed. If a Mortgagee shall be required to obtain possession in order to cure any default, then vis-à-vis the Mortgagee, the time to cure shall be tolled so long as the Mortgagee is attempting to obtain possession, including by appointment of a receiver or foreclosure but in no event may this period exceed one hundred twenty (120) days from City's notice.

ARTICLE 7. SUBSEQUENT PROJECT APPROVALS; AMENDMENTS; COOPERATION

Section 7.01 Subsequent Project Approvals. Developer and City acknowledge and agree that Developer intends to submit applications for Subsequent Project Approvals, including both Subsequent Ministerial Approvals and Subsequent Discretionary Approvals. In connection with any Subsequent Project Approval, City shall exercise its discretion in accordance with Applicable City Law, the Project Approvals and this Agreement. Notwithstanding the foregoing, City shall not deny or unreasonably delay any Subsequent Project Approval that is necessary or desirable to the exercise of the rights vested in Developer by this Agreement, including construction, occupancy and use of the vested development. Any conditions, terms, restrictions and requirements for subsequent discretionary actions imposed or required by City, including those provided for herein, shall not prevent development of the Property for the uses and to the density or intensity of development set forth in this Agreement. City agrees that it will act on all applications for Subsequent Project Approvals as expeditiously as is reasonably feasible, consistent with Applicable City Law and the City's standard custom and practice.

A. Subsequent Ministerial Approvals ("**Subsequent Ministerial Approvals**") are permits or approvals that are required by Applicable City Law and that are to be issued upon compliance with uniform, objective standards and regulations. They include applications for road construction permits or authorizations; grading and excavation permits; building permits, including electrical, plumbing, mechanical, Title 24 Electrical, and Title 24 Handicap permits or approvals; certificates of occupancy; encroachment permits; water connection permits; and any other similar permits required for the development and operation of the Project.

B. All other Subsequent Project Approvals, including amendments of the Project Approvals, site development plan approvals, improvement agreements, architectural review permits, use permits, lot line adjustments, subdivision maps, preliminary and final development plans, rezonings, development agreements, permits, resubdivisions, and any amendments to, or repealing of, any of the foregoing, are "**Subsequent Discretionary Approvals**".

C. In addition, certain other approvals or reviews, such as Covenants, Conditions and Restrictions (CC&Rs), Storm Water Pollution Prevention Plans (SWPPPs), Timber Harvest Plan, Wildland Fire Protection Plan, Photometric Plan, Hydrology Plan Update, Geotechnical Plan Update, Architectural and Building Plans, Landscape Plan, and Grading / Improvement Plans are required by the conditions of approval for the Project Approvals and the mitigation measures imposed on the Project and will be processed as required by the conditions

or mitigation measures, as applicable, and federal, state or laws or regulations and the Applicable City Laws.

Section 7.02 Changes and Amendments to Project Approvals and this Agreement. Given the long term build-out of the Project, the Parties acknowledge that modifications or amendments to the Project Approvals and/or this Agreement may be appropriate and mutually desirable, including in order to ensure the economic viability of the Project. In addition, Developer may after the Approval Date acquire additional real property within City for use in connection with the Project. Accordingly, subject to Applicable City Law and Section 10.07, the Parties shall work together in good faith to consider any modifications or amendments to any Project Approval and/or this Agreement proposed by a Party from time to time, including with respect to any modifications or amendments to include additional real property acquired by Developer.

Section 7.03 Approval Indemnity; Cooperation in the Event of Legal Challenge. Developer shall indemnify, defend with counsel reasonably acceptable to City, and hold harmless City and its officials and employees from and against any and all litigation, claims, costs, damages, losses, or liabilities challenging the validity of this Agreement or the underlying CEQA action. In addition, Developer shall reimburse City, within thirty (30) days following City's written demand therefor, which may be made from time to time during the course of such litigation, all reasonable costs incurred by City in connection with the litigation challenge, including City's administrative, legal and court costs, in the event that City shall either: (a) elect to joint representation by Developer's counsel; or (b) retain an experienced litigation attorney. In addition, City and Developer, at Developer's sole cost and expense, shall cooperate in the event of any court action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, any Existing Project Approvals or any Subsequent Project Approvals and City shall, upon request of Developer, appear in the action and defend its approval of this Agreement and any Project Approval, except that City shall not be required to be an advocate for Developer. Nothing herein shall authorize Developer to settle such legal challenge on terms that would constitute an amendment or modification of this Agreement, any Existing Project Approvals or any Subsequent Project Approvals, unless such amendment or modification is approved by City in accordance with the Applicable City Laws.

ARTICLE 8. ASSIGNMENTS

Section 8.01 No Amendment Required. No sale, transfer, ground lease, assignment or other conveyance of all or a portion of the Property, nor any Assignment in accordance with Section 8.02, shall require the amendment of this Agreement.

Section 8.02 Assignment.

A. Requirements. Developer shall not sell, transfer, assign or otherwise convey, in whole or in part (each, an "**Assignment**"), its rights or obligations under this Agreement to any Person (each, an "**Assignee**") without the consent of City, which City agrees it shall not unreasonably withhold, condition or delay; provided, that, no such consent shall be required for any Assignment of Developer's right or obligations under this Agreement to an Affiliate of Developer, although City shall be provided with a copy of the assignment and

assumption or similar agreement effectuating such Assignment. Within fifteen (15) days of City's receipt of notice of any Assignment for which City's consent is required, City shall provide such consent if:

(1) City receives (i) a form of assignment and assumption or similar agreement effectuating such Assignment that clearly outlines the rights and obligations of Developer that are being Assigned and (ii) contact information for Assignee;

(2) for any such Assignment that occurs prior to the Fee Payment Date, (i) the Initial Fees have been paid in full (or deposited in escrow in accordance with Section 5.02.E) or (ii) City receives evidence that demonstrates to City's reasonable satisfaction that the Assignee or the Persons Controlling the Assignee have the financial resources necessary to pay any unpaid Initial Fees when due under this Agreement;

(3) Developer is not in Default under this Agreement or the Assignee agrees to cure any Default;

(4) for any such Assignment that includes the Resort Hotel portion of the Project and/or the Property, the Assignee assumes the rights and obligations of Developer under the Operational Agreement relating to such portion; and

(5) for any such Assignment that occurs prior to the completion of the Off-Site Improvements, the Assignee assumes the rights and obligations of Developer with respect thereto, including those contained in any Subdivision Improvement Agreement.

B. Assignment of Agreement in Connection with Property Transfer. Developer's rights and obligations under this Agreement shall run with the portions of the Property to which such rights and obligations relate. Accordingly, (i) Developer shall not sell, transfer, assign or otherwise convey any portion of the Property without making an Assignment of the rights and obligations under this Agreement that correspond to the portion being sold, transferred, assigned or otherwise conveyed and (ii) any Assignment of this Agreement in accordance with this Section 8.02 shall be coupled with a sale, transfer, assignment or other conveyance of the corresponding portion of the Property. Any sale, transfer, assignment or other conveyance of a portion of the Property shall be made in compliance with the Subdivision Map Act.

C. Effect of Assignment. Following any Assignment in accordance with this Section 8.02, the Assignee shall succeed to the rights and obligations of Developer with respect to the portion of this Agreement that were subject to such Assignment, and Developer shall continue to be obligated under this Agreement with respect to any other portions of this Agreement retained by Developer.

D. Release of Assigning Developer. Following any Assignment in accordance with this Section 8.02, Developer shall, automatically and without the need for further documentation, be released from its obligations under this Agreement with respect to the portion of this Agreement so Assigned and, upon Developer's request therefor, City shall confirm any such release in writing in a form reasonably approved by City and Developer.

E. Residence Club and Custom Home Purchasers. The burdens, obligations and duties of Developer under this Agreement shall not apply to any Person that acquires any interest in the completed Residence Club or the completed Custom Homes and no consent of City shall be required in connection with any such acquisition.

ARTICLE 9. DEFAULT; REMEDIES; TERMINATION; INDEMNITY

Section 9.01 Breach. The failure or delay by either Party to perform any term or provision of this Agreement shall constitute a breach of this Agreement. In the event of alleged breach of any term or provision of this Agreement (each, a "**Breach**"), the Party alleging such Breach (the "**Alleging Party**") shall give the other Party (the "**Breaching Party**") notice thereof specifying the nature of the Breach and the manner in which such Breach may be cured (the "**Breach Notice**"). The Breaching Party shall have thirty (30) days following receipt of the Breach Notice to cure such Breach; provided, that if such Breach may not be reasonably cured within thirty (30) days and within such thirty (30) days the Breaching Party commences to cure such Breach then such cure period shall be extended for so long as the Breaching Party diligently prosecutes such cure to completion, but, subject to Section 9.06, not to exceed one hundred twenty (120) days following receipt of the Breach Notice (any such period, the "**Cure Period**"). During the Cure Period, the Breaching Party shall not be in default under this Agreement. The failure of any Party to give notice of any Breach shall not be deemed to be a waiver of such Party's right to allege any such Breach or other Breach at any other time. If the Breaching Party has not cured a Breach for which it has received a Breach Notice within the Cure Period therefor, the Breaching Party shall be in default and a default shall be deemed to have occurred ("**Default**").

Section 9.02 Remedies.

A. During the pendency, and prior to cure, of a material Default by Developer as determined by City Council, City shall have the right to refuse to issue any permits or other approvals to which Developer would otherwise have been entitled pursuant to this Agreement. This provision is in addition to and shall not limit any actions that City may take to enforce the conditions of the Project Approvals.

B. In the event of a Default by City or Developer, the Alleging Party shall have the right to terminate this Agreement upon giving notice of intent to terminate pursuant to Government Code Section 65868 and regulations of City implementing such section. Following notice of intent to terminate, the matter shall be scheduled for consideration and review in the manner set forth in Government Code Section 65867 and City regulations implementing such section. Following consideration of the evidence presented in such review before the City Council, the Alleging Party may give written notice of termination of this Agreement to the other Party.

C. In the event of a Default by City or Developer, the Parties intend that the primary remedy for the Alleging Party shall be specific performance of this Agreement. A claim for actual monetary damages against the Breaching Party may only be considered if specific performance is not granted by the court. In no event shall Developer or City be entitled to any consequential, punitive or special damages.

D. In addition to any other rights or remedies, either Party may institute legal action to cure, correct or remedy any Default, to enforce any covenants or agreements herein, to enjoin any threatened or attempted violation hereof, or to obtain any other remedies consistent with the purpose of this Agreement except as limited by Section 9.02.C.

Section 9.03 Termination Prior to Fee Payment Date. In addition to the right to terminate set forth in Section 9.02, Developer may terminate this Agreement on or prior to the Fee Payment Date. If Developer terminates this Agreement as set forth above, City may, in its discretion, rescind any Project Approvals and Developer agrees to waive any and all claims of any kind or nature related to such rescission.

Section 9.04 Enforceability of Agreement. City and Developer agree that unless this Agreement is amended or terminated in accordance with this Agreement, this Agreement shall be enforceable by any Party notwithstanding any change(s) in any applicable general plan, specific plan, zoning ordinance, subdivision ordinance or any other land use ordinances or building ordinances, resolutions or ordinances or other regulations adopted by City which changes, alters or amends the general plan, specific plan, zoning ordinance, subdivision ordinance or any other land use ordinances or building ordinances, resolutions or ordinances or other regulations applicable to the development of the Property at the time of the approval of this Agreement as provided by Government Code Sections 65866 and 65867.5.

Section 9.05 Periodic Review. Within sixty (60) days prior to each Annual Review Date, Developer shall submit a written request to City to undertake a review of Developer's good faith compliance with this Agreement. Such request shall be accompanied by evidence reasonably necessary to demonstrate Developer's good faith compliance with the provisions of this Agreement. Developer shall work with City in good faith in connection with any such review, including by providing such additional information as City may reasonably request in connection therewith. Failure of City to conduct the review shall be deemed a finding of good faith compliance. City shall undertake any such review in accordance with City's duly adopted procedures therefor.

Section 9.06 Delay Due to Force Majeure; Extension of Time of Performance. No Party shall be deemed to have breached any term or provision of this Agreement or be in default hereunder, and all performance and other dates specified in this Agreement shall be extended, where a Party fails to perform a term or provision of this Agreement due to Force Majeure. The occurrence of Force Majeure shall cause the date for performance of such terms or provisions to be extended for the period of the Force Majeure, which shall be deemed to commence and terminate as of the time of the commencement and termination, respectively, of the cause.

Section 9.07 Resolution of Disputes. With regard to any dispute involving the Project, the resolution of which is not provided for by this Agreement or Applicable City Law, the Parties shall meet at the request of any Party at which meeting they shall attempt in good faith to resolve any such disputes. Nothing in this Section 9.07 shall in any way be interpreted as requiring that Developer and City reach agreement with regard to any such dispute, nor shall the outcome of these meetings be binding in any way on City or Developer unless expressly agreed to by City and Developer in writing.

Section 9.08 Surviving Provisions. In the event this Agreement expires or is earlier terminated, neither Party shall have any further rights or obligations hereunder, except for: Section 9.09, which shall survive with respect to any Claims arising on or prior to the date of any such expiration or earlier termination; and, if the Water Check-In Date has not occurred prior to any expiration of the Term, Sections 4.03 and 4.05, which shall survive until the execution and delivery of the Water Service Agreement.

Section 9.09 Indemnity and Hold Harmless. Developer shall indemnify and hold City and its elected and appointed officers, agents, employees, and representatives harmless from and against any and all claims, costs, liabilities and damages (including reasonable, out-of-pocket attorneys fees and costs) (collectively, "**Claims**") for bodily injury, death, or property damage resulting directly or indirectly from the development and construction of the Project by or on behalf of Developer (including Developer's contractors, subcontractors, agents or employees) under this Agreement, except to the extent such Claims are caused by the active negligence or willful misconduct of City, its elected and appointed officers, agents, employees, representatives, contactors or subcontractors.

ARTICLE 10. MISCELLANEOUS PROVISIONS

Section 10.01 Findings. City hereby finds and determines that execution of this Agreement furthers public health, safety and general welfare and that the provisions of this Agreement are consistent with the General Plan.

Section 10.02 Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the Parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, the Party adversely affected may (in its sole and absolute discretion) terminate this Agreement by providing written notice of such termination to the other Party.

Section 10.03 Construction. Each reference in this Agreement to this Agreement or any of the Existing Project Approvals or Subsequent Project Approvals shall be deemed to refer to this Agreement, the Existing Project Approval or the Subsequent Project Approvals as they may be amended from time to time, whether or not the particular reference refers to such possible amendment, except as specifically provided otherwise. Section headings in this Agreement are for convenience only and are not intended to be used in interpreting or construing the terms, covenants or conditions of this Agreement. This Agreement has been reviewed and revised by legal counsel for both City and Developer, and no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement. Unless the context clearly requires otherwise, in this Agreement, including its Exhibits, (i) the plural and singular shall each be deemed to include the other; (ii) the masculine, feminine, and neuter genders shall each be deemed to include the others; (iii) "shall", "will", or "agrees" are mandatory, and "may" is permissive; (iv) "or" is not exclusive; (v) "include", "includes" and "including" are not limiting and shall be construed as if followed by the words

"without limitation"; (vi) "days" shall mean calendar days; (vii) reference to any Recital, Article, Section, Exhibit, or any defined term shall be deemed to refer to the Recital, Article, Section, Exhibit or defined term of this Agreement and (viii) if the last day of any period to give notice, reply to a notice, meet a deadline or to undertake any other action occurs on a day that is not a Business Day, then the last day for undertaking the action or giving or replying to the notice shall be the next succeeding Business Day.

Section 10.04 Covenants Running with the Land. All of the provisions contained in this Agreement shall be binding upon the Parties and their respective heirs, successors and assigns, and all other persons acquiring all or a portion of the Property or the Project, whether by operation of law or in any other manner whatsoever. All of the provisions contained in this Agreement shall be enforceable as equitable servitudes and shall constitute covenants running with the land pursuant to California law including California Civil Code Section 1468. Each covenant herein to act or refrain from acting is for the benefit of or a burden upon the Project, as appropriate, runs with the Property and is binding upon Developer of all or a portion of the Property and each successive Developer during its development of such Property or portion thereof.

Section 10.05 Notices. Any notice, communication, consent or approval required or permitted hereunder by or between City or Developer must be in writing, and may be given either personally, by facsimile (with original forwarded by regular U.S. Mail), by registered or certified mail (return receipt requested), or by Federal Express or other similar courier promising overnight delivery. If personally delivered, a notice shall be deemed to have been given when delivered to the Party to whom it is addressed. If given by facsimile transmission, a notice or communication shall be deemed to have been given and received upon actual physical receipt of the entire document by the receiving Party's facsimile machine. Notices transmitted by facsimile after 5:00 p.m. on a Business Day shall be deemed to have been given and received on the next Business Day. If given by registered or certified mail, such notice or communication shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addressees designated below as the Party to whom notices are to be sent, or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If given by Federal Express or similar courier, a notice or communication shall be deemed to have been given and received on the date delivered as shown on a receipt issued by the courier. Any Party may at any time, by giving ten (10) days written notice to the other Party, designate any other address in substitution of the address to which such notice or communication shall be given. Any notices or communications shall be given to the Parties at their addresses set forth below (as the same may be revised in accordance with the preceding sentence):

If to City:	City of Calistoga 1232 Washington Street Calistoga, California 94515 Attention: City Manager
If to Developer:	Enchanted Resorts, Inc. 660 N Rush Street Chicago, Illinois 60611

Attention: Aaron Harkin

With a copy to: Paul Hastings LLP
55 Second Street, 24th Floor
San Francisco, California 94105
Attention: David A. Hamsher

Section 10.06 Counterparts; Entire Agreement; Exhibits. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original. This Agreement, together with the attached Exhibits, constitutes the final and exclusive understanding and agreement of the Parties and supersedes all negotiations or previous agreements of the Parties with respect to all or any part of the subject matter hereof. The Exhibits attached to this Agreement are incorporated herein for all purposes.

Section 10.07 Amendments; Administrative Actions. This Agreement may be amended from time to time, in whole or in part, by mutual written consent of the Parties. The City Manager or his or her designee, in consultation with the City Attorney, is authorized (but not required) to enter into any amendments to this Agreement, grant any consent or waiver, enter into the Operation Agreement and negotiate and enter into any Water Service Agreement, in each case on behalf of City (each, an "**Administrative Action**") so long as such Administrative Actions do not materially modify (i) the Term or time for Developer's performance, (ii) permitted uses of the Property, (iii) provisions for the reservation or dedication of land, (iv) the density or intensity of use of the Property or the maximum height or size of proposed buildings, (v) vested rights of Developer, (vi) monetary payments by Developer, (vii) the construction of Off-Site Improvements, (viii) water or wastewater allocations, or (ix) the Operational Agreement. Nothing in this Section 10.07 shall be deemed to prevent the City Manager from bringing any Administrative Action to the City Council and/or the Planning Commission, as applicable, for their consideration, in his/her sole discretion. Administrative Action shall, except to the extent otherwise required by federal law, state law or Applicable City Law, become effective in accordance with their terms and without notice or public hearing.

Section 10.08 Recordation of Development Agreement. Pursuant to California Government Code § 65868.5, no later than ten (10) days after the later to occur of the full execution and delivery of this Agreement or the Effective Date, the City Clerk shall record an executed copy of this Agreement in the Official Records of Napa County, California.

Section 10.09 No Joint Venture or Partnership. It is specifically understood and agreed to by and between the Parties that: (i) the subject development is a private development; (ii) City has no interest or responsibilities for, or duty to, third parties concerning any improvements until such time, and only until such time, that City accepts the same pursuant to the provisions of this Agreement or in connection with the various Existing Project Approvals or Subsequent Project Approvals; (iii) Developer shall have full power over and exclusive control of the Project herein described, subject only to the limitations and obligations of Developer under this Agreement, the Existing Project Approvals, Subsequent Project Approvals, and Applicable City

Law; and (iv) City and Developer hereby renounce the existence of any form of agency relationship, joint venture or partnership between City and Developer and agree that nothing contained herein or in any document executed in connection herewith shall be construed as creating any such relationship between City and Developer.

Section 10.10 Waivers. No Party shall be deemed to have waived any provision of this Agreement unless it does so in writing, and no "course of conduct" shall be considered to be such a waiver, absent such a writing.

Section 10.11 California Law. This Agreement shall be construed and enforced in accordance with the laws of the State of California, without reference to choice of law provisions. All references in this Agreement to City's laws, rules, regulations, official policies, standards and specifications, including those enacted or imposed by a citizen-sponsored initiative or referendum or by the City Council directly or indirectly in connection with any proposed initiative or referendum, shall be to the Applicable City Laws.

Section 10.12 Estoppel Certificate. Within thirty (30) days of a written request of either Party to the other Party, the other Party shall provide written certification stating: (a) whether or not this Agreement is in full force and effect and a binding obligation of the Parties; (b) whether or not this Agreement has not been amended or modified, and if so amended or modified, identifying the amendments and/or modifications; and (c) to the knowledge of the certifying Party, whether or not the requesting Party is in default in the performance of its obligations under this Agreement and, if so, describing the same in detail.

Section 10.13 No Third-Party Beneficiaries. The Parties expressly agree and acknowledge that there are no third-party beneficiaries to this Agreement, nor do the Parties intend for there to be any third-party beneficiaries to this Agreement.

Section 10.14 Time of Essence. Time is of the essence of each and every provision of this Agreement.

Section 10.15 Venue. Any dispute arising out of or related to this Agreement shall be brought and tried in the Napa County Superior Court.

Section 10.16 Subsequent Applications. Nothing in this Agreement shall be construed as preventing Developer from submitting a new or modified application for any land use entitlements or approvals for the Property not contemplated by this Agreement. Any approvals or entitlements with respect to such applications shall supersede this Agreement.

Section 10.17 Referendum on Agreement. The Parties acknowledge that City's approval of this Agreement is a legislative action subject to referendum.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this Agreement has been entered into by and between Developer and City as of the Effective Date.

CITY:

CITY OF CALISTOGA,
a municipal corporation

By: ___________________
Name: Richard Spitler
Title: City Manager

Approved as to Form:
City Attorney

By: ___________________
Name: ___________________
Title: ___________________

DEVELOPER:

ENCHANTED RESORTS, INC.,
a Delaware corporation

By: ___________________
Name: ___________________
Title: ___________________

EXHIBIT A

Site Map

LOT 10
LOT 11
FOREST RESERVE
LOT 9
FOREST RESERVE
LOT 12
LOT 13
LOT 8
LOT 1
LOT 3
LOT 2
FOREST RESERVE
FOREST RESERVE
PONDEROSA ROAD
LOT 7
LOT 6
LOT 5
LOT 4
FOREST RESERVE
FOREST RESERVE
MADRONE DRIVE
FIRE ACCESS ROAD
Project Entry
HWY 29
0 20 60 100 Ft.

Enchanted Resorts

CALISTOGA
CALIFORNIA

Development Agreement Submittal March 2010

A1.0 Resort Master Plan

SB ARCHITECTS

EXHIBIT B

Legal Description of Property

The land referred to in this report is situated in the City of Calistoga, County of Napa, State of California, and is described as follows:

TRACT ONE:
PARCEL ONE:
Lots 1 through 35 as shown on the map entitled, "Final Map of Diamond Hill Estates" filed April 21, 2005 in Book 25 of Maps at pages 12-20 in the office of the County Recorder of said Napa County.

APN 011-310-031 thru -042; 011-320-041 thru -044; -046 thru -049; -051; -052; -054 and -056 thru -067

PARCEL TWO:
Parcels "A" through "G", and the private streets labeled "Manzanita Road", "Madrone Drive" and "Ponderosa Road", as shown on the map entitled, "Final Map of Diamond Hill Estates" filed April 21, 2005 in Book 25 of Maps at pages 12-20 in the office of the County Recorder of said Napa County.

APNs 011-320-039; -040; -045; -053; -068; -069; -055 and 050

PARCEL THREE:
A non-exclusive easement 20 feet wide for utility purposes and incidents thereto as contained in Easement Deed recorded March 14, 2002 as Series Number 2002-0010887 of Official Records of Napa County.

PARCEL FOUR:
A non-exclusive easement 20 feet wide for underground utilities and incidents thereto as contained in Easement Deed recorded May 1, 2002 as Series Number 2002-0018265 of Official Records of Napa County.

PARCEL FIVE:
A non-exclusive Easement, for a right-of-way fire lane and all other emergency purposes as described in the "Easement for Fire and Emergency Access Agreement" recorded August 2, 2004 as Series Number 2004 0032490 of Official Records of Napa County.

TRACT TWO:
PARCEL ONE:
Commencing at the southwest corner of Parcel One described in the deed to Roland DeGuarda, recorded March 27, 1998 under Series No. 1998-007784 of Official Records, Napa County Records; thence northeasterly along the western line of said Lands of DeGuarda 915 feet more or less to a point which bears southwesterly 179.00 feet from an angle point in said western line of

DeGuarda; thence at right angles southeasterly 1503 feet more or less to the eastern line of said Lands of DeGuarda, said point also being on the western line of Parcel B as shown on the map of Diamond Hill Estates, recorded April 21, 2005 in Book 25 of Record Maps at pages 12 through 20, said Napa County Records, and from said point, the most westerly corner of said Parcel B bears South 24°04'52" West 469.39 feet; thence along said western line of Parcel B South 24°04'52" West 469.39 feet to the most western corner thereof; thence along the exterior boundary of said map of Diamond Hill Estates North 30°56'57" West 455.47 feet, South 77°35'22" West 240.20 feet, North 78°24'59" West 282.42 feet, South 33°09'50" West 294.72 feet, North 43°43'12" West 108.30 feet, North 48°39'00" West 107.04 feet and South 55°52'07" West 6.16 feet to the most northern corner of Lot 29, said map of Diamond Hill Estates; thence following along the lines of Lot 29, as shown on said map southeasterly along a non-tangent curve to the left, the center of which bears North 83°35'07" East, having a radius of 240.00 feet through a central angle of 53°52'34" an arc length of 225.68 feet and South 68°42'16" West 214.91 feet to the most southern corner of said Lot 29 on the southwestern line of Calistoga City Limits; thence along said city limits line North 66°13'20" West 445.51 feet to the point of commencement.

APN(S) 011-310-044

PARCEL TWO:
A non-exclusive Easement for a right of-way-fire land and all other emergency purposes as described in the "Easement for Fire and Emergency Access Agreement" recorded August 2, 2004 as Series Number 2004 0032490 of Official Records of Napa County.

PARCEL THREE:
A non-exclusive easement for private utilities and private access over Manzanita Road, Ponderosa Road and Madrone Drive as shown on the map entitled "Final Map of Diamond Hill Estates" filed April 21, 2005 in Book 25 R.M. at pages 12 – 20.

EXHIBIT C

Schedule of Fees

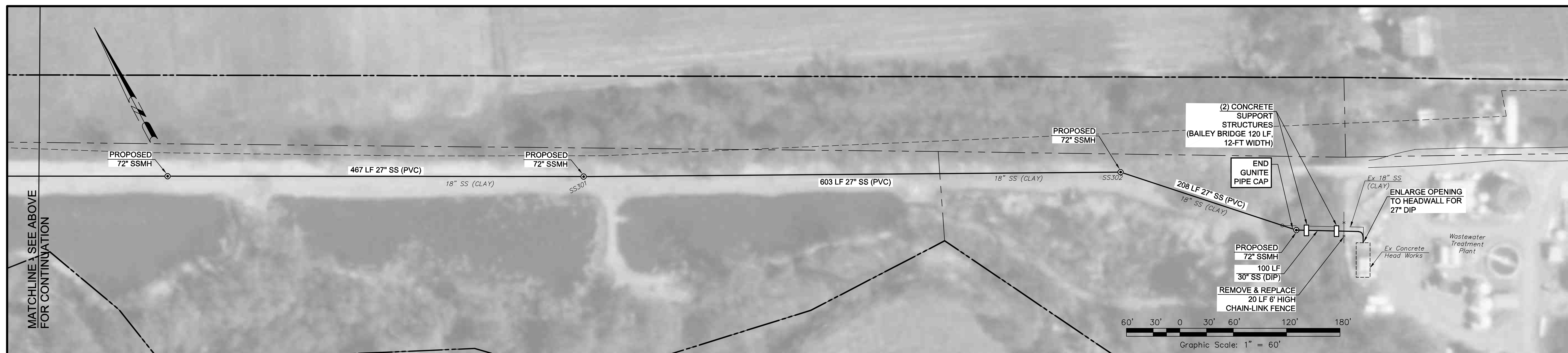
Contribution	Value	Due Date
Water Service Connection Fee	**$1,006,380**	On or prior to Fee Payment Date
In Lieu Housing Fee	**$343,025**	On or prior to Fee Payment Date
In Lieu Supplemental Housing Fee	**$234,000**	Custom Home Building Permit (calculated at $18,000 per Custom Home)
Quality of Life Fee	**$264,000**	On or prior to Fee Payment Date
Traffic Impact Fee	**$267,795**	On or prior to Fee Payment Date
Public Safety Fee Part 1	**$102,925**	On or prior to Fee Payment Date
Public Safety Fee Part 2	**$102,925**	Grading Permit Issuance
Less Cash Paid to Date for Diamond Hill Estates subdivision	**($780,500)**	
Total Contribution	**$1,540,550**	
Cash Due on or prior to Fee Payment Date	**$1,203,625**	

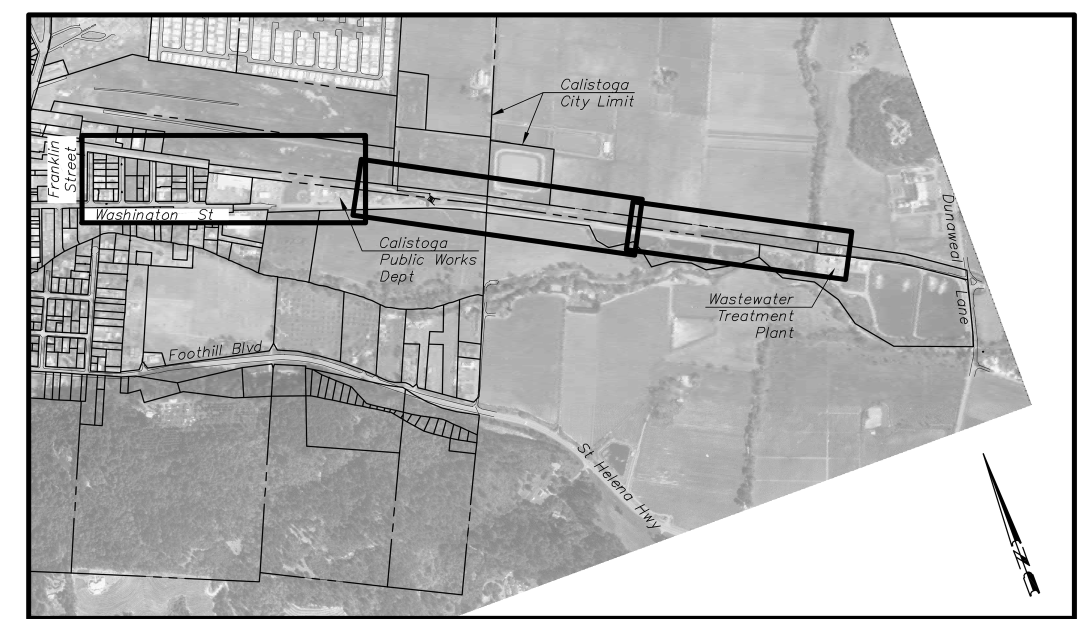
EXHIBIT D

Adobe Engineers Technical Memo Key Map Dated September 2011

[ATTACHED]

PROPOSED 60" SSMH
240 LF 12' W x 6" D GRAVEL ACCESS ROAD
500 LF 24" SS (PVC)
PROPOSED 60" SSMH
50 LF 24" SS (PVC)
PROPOSED 60" SSMH
Ex Day School Bldgs to Remain
REMOVE & REPLACE 810 S.F. AC SURFACE (3" AC OVER 10" AB)
REMOVE & REPLACE 120 LF OF 6' HIGH CHAIN-LINK FENCE
PROPOSED 60" SSMH
364 LF 24" SS (PVC)
780 LF 12' W x 6" D GRAVEL ACCESS ROAD
364 LF 24" SS (PVC)
PROPOSED 60" SSMH
SAWCUT LINE (TYP)
REMOVE & REPLACE 6,960 S.F. CONC
600 LF 12" SS FORCE MAIN (DIP)
FRANKLIN ST
ANNA ST
EDDY ST
EARL ST
Calistoga Public Works Dept
250 LF 24" SS (PVC)
Ex 10" W (DIP)
PROPOSED 72" SSMH
380 LF 30" SS (DIP)
PROPOSED 72" SSMH
380 LF 30" SS (DIP)
WASHINGTON ST
WASHINGTON ST
WASHINGTON ST
230 LF 12" SS (DIP) FORCE MAIN REMOVE AND REPLACE AC DRIVEWAY (4,500 SFs)
UPGRADE PINE STREET LIFT STATION. REPLACE EX PUMPS WITH 3-10 HP PUMPS PLUS ONE-10 HP SPARE PUMP. UPGRADE ELECTRIC SERVICE PANEL WITH POSSIBLE GENERATOR UPGRADE
60' 30' 0 30' 60' 120' 180'
Graphic Scale: 1" = 60'
MATCHLINE - SEE BELOW FOR CONTINUATION





KEY SHEET

Scale: 1" =1,000'

July 7, 2010

WASHINGTON STREET SEWER REPLACEMENT

ENCHANTED RESORTS
1019 Myrtle Street, Calistoga CA
APN 011-320-038, 008, 037 & 011-310-029

Adobe Associates, Inc.
Civil Engineering, Land Surveying & Land Development Services
1220 N. Dutton Ave
Santa Rosa, CA 95401
707 541-2300
Fax: 707 541-2301

<u>EXHIBIT E</u>

Form of Operational Agreement

This document is exempt from payment of a recording fee pursuant to California Government Code Section 27383

RECORDING REQUESTED BY AND WHEN RECORDED RETURN TO:

City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attention: City Clerk

Recorder's Stamp

OPERATIONAL AGREEMENT

BY AND BETWEEN

THE CITY OF CALISTOGA,
A CALIFORNIA MUNICIPAL CORPORATION

AND

ENCHANTED RESORTS, INC.,
A DELAWARE CORPORATION

OPERATIONAL AGREEMENT

This OPERATIONAL AGREEMENT (as amended from time to time, this "**Agreement**") is entered into as of the ______ day of ______________ 201_ (the "**Effective Date**"), by and between ENCHANTED RESORTS, INC., a Delaware corporation ("**Developer**"), and the CITY OF CALISTOGA, a California municipal corporation ("**City**"). City and Developer are sometimes referred to herein as a "**Party**" and collectively as the "**Parties**".

RECITALS

A. The Parties have entered into that certain Development Agreement dated as of ____________ 2012 and recorded on ____________ 2012 as instrument number _____________ in the Official Records of Napa County, California (as amended from time to time, the "**Development Agreement**").

B. All capitalized terms used but not defined herein shall have the meanings given to such terms in the Development Agreement.

C. Section 3.12 of the Development Agreement requires that, prior to the issuance of a building permit for the Resort Hotel, Developer and City enter into this Operational Agreement.

D. Developer is the owner of the real property on which the Resort Hotel is located, which property is described in Attachment 1, attached hereto and incorporated herein by this reference (the "**Property**").

AGREEMENT

NOW, THEREFORE, in consideration of the promises, covenants and provisions set forth herein, the receipt and adequacy of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1. TERM

Section 1.01 Term. This Agreement shall commence as of the Effective Date and shall expire and terminate at 12:01 A.M. on the thirty (30) year anniversary of the Approval Date (the "**Term**").

ARTICLE 2. OPERATIONAL REQUIREMENTS

Section 2.01 Managing Entity Experience. The operator of the Resort Hotel (the "**Managing Entity**") must (including by or through its Affiliates) have at least three (3) years' experience operating a resort or hotel that meets the highest luxury and/or quality standards recognized by Smith Travel Research, AAA Travel Guide, Forbes Travel Guide (formerly Mobil Travel Guide) or JD Power and Associates (or any generally recognized equivalent to the foregoing) and shall manage and operate the Resort Hotel to meet such luxury and/or quality standards.

Section 2.02 Formula Visitor Accommodations. The Managing Entity shall not operate the Resort Hotel as "Formula Visitor Accommodations" (as defined in Section 17.04.639 of the City Municipal Code) unless otherwise approved by City or in accordance with and permitted under Applicable City Law.

Section 2.03 Management of Transient Lodging Use. Transient Lodging Use (as defined below) of the Residence Club and Custom Homes shall, to the extent allowable under applicable law, be managed by: (a) the Managing Entity, (b) any Homeowners Association ("**HOA**") governing the single family dwellings (including a master HOA), or (c) a Person hired and approved by the HOA. The name and contact information of the manager shall be provided to City upon request by City. For purposes of this Agreement the term "**Transient Lodging Use**" shall mean occupancy of a room or unit in the Resort Hotel, the Residence Club and/or or a Custom Home, as the context requires, for a period of thirty (30) consecutive calendar days or less, counting portions of calendar days as full days.

Section 2.04 Payment of Transient Occupancy Tax. Transient occupancy tax payable to City pursuant to City Municipal Code Chapter 3.16 ("**TOT**") shall be paid by the Managing Entity with respect to the Resort Hotel, the Residence Club and Custom Homes, but only for rent charged for Transient Lodging Use to non-owner third party renters. Moreover, with respect to the Residence Club and Custom Homes, TOT shall not apply to use by owners or their guests, exchange users (i.e., users who exchange use time in another residence or unit for use time in a Residence Club unit), or leases having a continuous term of greater than thirty (30) days.

Section 2.05 Use by Recognized Service Clubs. For a period of fifteen (15) years from date of issuance of the initial certificate of occupancy for the Resort Hotel, Developer agrees to provide to City and non-profit organizations located in the City a fifty percent (50%) discount (the "**Discount**") on the rental of meeting facilities located within the Resort Hotel (the "**Meeting Facilities**"), subject to the following conditions: (a) the rental rate for the Meeting Facilities, before applying the Discount, shall be the then-standard rental fees for the Meeting Rooms at the time the reservation is booked, (b) the Discount shall only apply to rental rate of the Meeting Facilities and shall exclude and not be applied to the cost of any services provided to or at the Meeting Facilities, such as food and beverage, audio/visual or special decorating, services, furniture, fixtures or equipment; (c) the Discount shall be provided a maximum of three (3) times per year in the aggregate on a first-come-first-served basis; (d) reservations for Meeting Facilities shall be subject to availability, shall be made no more than sixty (60) days in advance, and shall not be made during peak rental or use periods as determined by Developer in its reasonable discretion; (e) use of the Meeting Facilities shall be subject to the standard terms of usage applicable to such Meeting Facilities; (f) use of the Meeting Facilities shall be for civic and public purposes; and (g) only so much space shall be reserved as is needed for the purpose for which the reservation is being made (e.g. partitions shall be utilized to divide large spaces into appropriate smaller spaces).

ARTICLE 3. ASSIGNMENTS

Section 3.01 No Amendment Required. No sale, transfer, ground lease, assignment or other conveyance of all or a portion of the Property, nor any Assignment in accordance herewith, shall require the amendment of this Agreement.

Section 3.02 Assignment.

A. Requirements. Developer shall not sell, transfer, assign or otherwise convey, in whole or in part (each, an "**Assignment**"), its rights or obligations under this Agreement to any Person (each, an "**Assignee**") without the consent of City, which City agrees it shall not unreasonably withhold, condition or delay; provided, that, no such consent shall be required for any Assignment of Developer's right or obligations under this Agreement in connection with an assignment of the Development Agreement to the extent permitted thereunder.

B. Assignment of Agreement in Connection with Property Transfer. Developer's rights and obligations under this Agreement shall run with the portions of the Property to which such rights and obligations relate. Accordingly, (i) Developer shall not sell, transfer, assign or otherwise convey all or any portion of the Property without making an Assignment of the rights and obligations under this Agreement that correspond to the portion being sold, transferred, assigned or otherwise conveyed and (ii) any Assignment of this Agreement in accordance with this Section 3.02 shall be coupled with a sale, transfer, assignment or other conveyance of the corresponding portion of the Property.

C. Effect of Assignment. Following any Assignment in accordance with this Section 3.02, the Assignee shall succeed to the rights and obligations of Developer under this Agreement.

D. Release of Assigning Developer. Following any Assignment in accordance with this Section 3.02, Developer shall, automatically and without the need for further documentation, be released from its obligations under this Agreement with respect to the portion of this Agreement so Assigned and, upon Developer's request therefor, City shall confirm any such release in writing in a form reasonably approved by City and Developer.

ARTICLE 4. MISCELLANEOUS PROVISIONS

Section 4.01 Findings. City hereby finds and determines that execution of this Agreement furthers public health, safety and general welfare and that the provisions of this Agreement are consistent with the General Plan.

Section 4.02 Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual consent of the Parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable, the Party adversely affected may (in its sole and absolute discretion) terminate this Agreement by providing written notice of such termination to the other Party.

Section 4.03 Construction. Section headings in this Agreement are for convenience only and are not intended to be used in interpreting or construing the terms, covenants or

conditions of this Agreement. This Agreement has been reviewed and revised by legal counsel for both City and Developer, and no presumption or rule that ambiguities shall be construed against the drafting Party shall apply to the interpretation or enforcement of this Agreement. Unless the context clearly requires otherwise, in this Agreement, (i) the plural and singular shall each be deemed to include the other; (ii) the masculine, feminine, and neuter genders shall each be deemed to include the others; (iii) "shall", "will", or "agrees" are mandatory, and "may" is permissive; (iv) "or" is not exclusive; (v) "include", "includes" and "including" are not limiting and shall be construed as if followed by the words "without limitation"; (vi) "days" shall mean calendar days; and (vii) reference to any Recital, Article, Section, Exhibit, or any defined term shall be deemed to refer to the Recital, Article, Section, Exhibit or defined term of this Agreement.

Section 4.04 Notices. Any notice, communication, consent or approval required or permitted hereunder by or between City or Developer must be in writing, and may be given either personally, by facsimile (with original forwarded by regular U.S. Mail), by registered or certified mail (return receipt requested), or by Federal Express or other similar courier promising overnight delivery. If personally delivered, a notice shall be deemed to have been given when delivered to the Party to whom it is addressed. If given by facsimile transmission, a notice or communication shall be deemed to have been given and received upon actual physical receipt of the entire document by the receiving Party's facsimile machine. Notices transmitted by facsimile after 5:00 p.m. on a Business Day shall be deemed to have been given and received on the next Business Day. If given by registered or certified mail, such notice or communication shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addressees designated below as the Party to whom notices are to be sent, or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If given by Federal Express or similar courier, a notice or communication shall be deemed to have been given and received on the date delivered as shown on a receipt issued by the courier. Any Party may at any time, by giving ten (10) days written notice to the other Party, designate any other address in substitution of the address to which such notice or communication shall be given. Any notices or communications shall be given to the Parties at their addresses set forth below (as the same may be revised in accordance with the preceding sentence):

If to City:	City of Calistoga 1232 Washington Street Calistoga, California 94515 Attention: City Manager
If to Developer:	Enchanted Resorts, Inc. 660 N Rush Street Chicago, Illinois 60611 Attention: Aaron Harkin
With a copy to:	Paul Hastings LLP 55 Second Street, 24th Floor San Francisco, California 94105 Attention: David A. Hamsher

Section 4.05 Counterparts; Entire Agreement. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original. This Agreement constitutes the final and exclusive understanding and agreement of the Parties and supersedes all negotiations or previous agreements of the Parties with respect to all or any part of the subject matter hereof.

Section 4.06 Amendments. This Agreement may be amended from time to time, in whole or in part, by mutual written consent of the Parties. The City Manager or his or her designee, in consultation with the City Attorney, is authorized (but not required) to enter into any amendments to this Agreement on behalf of City (each, an "**Administrative Amendment**") that do not materially amend the Term, Developer's performance obligations, or monetary payments by Developer. Administrative Amendments shall, except to the extent otherwise required by federal law, state law or Applicable City Law, become effective in accordance with their terms and without notice or public hearing.

Section 4.07 Recordation of Agreement; Runs with Land. The City Clerk shall record an executed copy of this Agreement in the Official Records of Napa County, California, which Agreement shall be recorded against and run with the Property.

Section 4.08 Waivers. No Party hereto shall be deemed to have waived any provision of this Agreement unless it does so in writing, and no "course of conduct" shall be considered to be such a waiver, absent such a writing.

Section 4.09 California Law. This Agreement shall be construed and enforced in accordance with the laws of the State of California, without reference to choice of law provisions. All references in this Agreement to City's laws, rules, regulations, official policies, standards and specifications, including those enacted or imposed by a citizen-sponsored initiative or referendum or by the City Council directly or indirectly in connection with any proposed initiative or referendum, shall be to the Applicable City Laws.

Section 4.10 Estoppel Certificate. Within thirty (30) days of a written request of either Party to the other Party, the other Party shall provide written certification stating: (a) whether or not this Agreement is in full force and effect and a binding obligation of the Parties; (b) whether or not this Agreement has not been amended or modified, and if so amended or modified, identifying the amendments and/or modifications; and (c) to the knowledge of the certifying Party, whether or not the requesting Party is in default in the performance of its obligations under this Agreement and, if so, describing the same in detail.

Section 4.11 No Third-Party Beneficiaries. The Parties expressly agree and acknowledge that there are no third-party beneficiaries to this Agreement, nor do the Parties intend for there to be any third-party beneficiaries to this Agreement.

Section 4.12 Time of Essence. Time is of the essence of each and every provision of this Agreement.

Section 4.13 Venue. Any dispute arising out of or related to this Agreement shall be brought and tried in the Napa County Superior Court.

Section 4.14 Damages. No Party would have entered into or become a Party to this Agreement if it were to be liable in damages under this Agreement. Without limiting the generality of the foregoing, each of the Parties expressly waives any right to recover consequential, incidental, punitive, special, lost profits or revenues, exemplary or other damages.

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, this Agreement has been entered into by and between Developer and City as of the Effective Date.

CITY:

CITY OF CALISTOGA,
a municipal corporation

By: ____________________
Name: Richard Spitler
Title: City Manager

Approved as to Form:
City Attorney

By: ____________________
Name: ____________________
Title: ____________________

DEVELOPER:

ENCHANTED RESORTS, INC.,
a Delaware corporation

By: ____________________
Name: ____________________
Title: ____________________

Attachment 1

Legal Description of the Property

[INSERT DESCRIPTION OF PORTION OF PROJECT CONTAINING RESORT HOTEL ONLY]