

**MEMORANDUM OF UNDERSTANDING**  
**AMONG**  
**THE CITY OF CALISTOGA**  
**AND**  
**BOUNSALL**  
**REGARDING INTENDED DEVELOPMENT OF**  
**CERTAIN REAL PROPERTY LOCATED IN**  
**THE CITY OF CALISTOGA**  
**Authorizing Agreement No. 0392**  
**(AMENDED AND RESTATED)**

This MEMORANDUM OF UNDERSTANDING (“MOU”) was made and entered into as of this 15<sup>th</sup> day of December, 2009 (“EFFECTIVE DATE”), by and among the CITY OF CALISTOGA, a municipal corporation (“CITY”) and Jeff M. Bounsall, William L. Bounsall, and Kathy Giammona Bowser (“BOUNSALL”), regarding BOUNSALLS’s desire to develop that certain real property consisting of approximately 7 acres located at 414 Foothill Boulevard, Assessor’s Parcel Numbers 011-260-045 through 011-260-076, in the City of Calistoga, County of Napa, State of California (the “PROPERTY”), and is amended and restated as of the 3<sup>rd</sup> day of August 2010 (the “Amended Date”).

**RECITALS**

- A. WHEREAS, the PROPERTY is located at a key entrance to CITY in the Downvalley Foothill Boulevard Entry Corridor, where commercial uses, such as wineries and vineyard-related businesses and appropriate retail and commercial uses should complement CITY’s downtown core; and
- B. WHEREAS, encouraging well conceived and designed developments, which broadens and diversifies the existing range of markets served by CITY’s businesses supports CITY’s continuing economic vitality, through diversification of its economy in a manner which supports its small-town character, unique history as a geothermal spa destination, rural identity, and regional identity as part of the world-renowned wine region of the Napa Valley; and
- C. WHEREAS, BOUNSALL desires and intends to commit as a corporate resident to CITY and desires to develop the PROPERTY, by offering agriculturally focused retail, winery and recreation opportunities through a Mixed Use Development thereby providing BOUNSALL with

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the necessary diversification of uses and modern physical development and operational components to operate a sustainable, mixed use, project; and

D. WHEREAS, BOUNSALL has determined that development of the PROPERTY will require substantial forward financial commitments by BOUNSALL, including substantial investments in improvements to off-site infrastructure; and

E. WHEREAS, BOUNSALL submitted for preliminary application and conceptual design review to CITY on August 13, 2008, and CITY's Planning Commission considered at its regularly scheduled meeting on February 11, 2009, a conceptual proposal to allow for the development on the PROPERTY; and

F. WHEREAS, CITY desires to promote and sustain the City of Calistoga as a continued, viable location for destination geothermal spas and resorts integrated with the vineyards and wineries for which the Napa Valley region is renowned throughout the world, making further contributions to the local and regional economies; and

G. WHEREAS, CITY supports development of the PROPERTY, which is currently underutilized, to increase its density and diversify its uses in a way that enhances the physical and economic conditions of the PROPERTY, the Downvalley Foothill Boulevard Entry Corridor and the City of Calistoga; and

H. WHEREAS, in furtherance of development of the PROPERTY, BOUNSALL and CITY desire to memorialize their understandings in a development agreement. Prior to finalizing the development agreement, BOUNSALL and CITY intend to set forth in this non-binding MOU the parties' understanding of some of the terms that will be negotiated.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

**AGREEMENT**

**SECTION 1 NONBINDING EFFECT.**

By execution of this MOU, CITY is not committing itself to or agreeing to undertake any acts or activities requiring the subsequent independent exercise or discretion of CITY or any agency or department thereof. Execution of this MOU by CITY and BOUNSALL is merely an agreement to enter into a period of good faith negotiations according to the terms hereof, reserving final discretion and approval by CITY and BOUNSALL to any development agreement and all proceedings and decisions in connection therewith. In addition to the above, CITY and BOUNSALL understand and acknowledge the following:

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- (A) This MOU is not intended to set forth all of the material terms and conditions regarding BOUNSALL's intended development of the PROPERTY nor bind BOUNSALL to any particular development of the PROPERTY.
- (B) This MOU is not intended to contractually bind CITY or BOUNSALL to any particular course of action. No legal obligation shall arise for CITY or BOUNSALL as a result of this MOU, except the obligation to negotiate and act in good faith in any future negotiations or other activities or discussions among the parties.
- (C) CITY retains absolute discretion to consider any particular development proposal and related environmental analysis for development of the PROPERTY and to approve, deny or condition any discretionary permit or other approval of CITY in connection with development of the PROPERTY.

**SECTION 2 ACKNOWLEDGEMENTS**

CITY and BOUNSALL acknowledge the following statutory requirements with which the CITY must comply. These include, but are not limited to:

(A) The provisions of the California Environmental Quality Act, California Public Resources Code Section 2100 *et seq.* ("CEQA"), including the provisions of Section 15004 of the CEQA Guidelines; and

(B) The provisions of Government Code Section 65864 *et seq.* governing the approval of development agreements, including the requirement that a public hearing on an application for a development agreement is held by the planning agency and by the legislative body and that certain findings are made.

**SECTION 3 TERM.**

The term of this MOU shall be effective from the EFFECTIVE DATE set forth hereinabove and shall continue until December 31, 2012 or until the development agreement and entitlement process are considered for final approval by the CITY, or until terminated as set forth in paragraph 16 of this MOU.

**SECTION 4 BOUNSALL PLANS.**

BOUNSALL intends to seek entitlements for the PROPERTY generally consistent with the proposed mix of uses and development phasing reflected on the conceptual architectural design submitted to the CITY's Planning Commission on February 11, 2009, as set forth in Section 6 (B) (1) through (7) of this MOU, referred to collectively hereinafter as the "PROJECT."

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**SECTION 5 CITY SUPPORT.**

- (A) CITY acknowledges its desire to broaden and diversify the existing range of markets served by CITY's business sector to include facilities providing support to the agricultural industry which is of great importance to the City of Calistoga and to the Napa Valley. CITY believes that developing lands such as the PROPERTY, which is located in the Downvalley Foothill Boulevard Entry Corridor and provides a unique opportunity for a mixed-use destination development similar to that reflected in the conceptual plans for the PROJECT integrated with the existing orchard and winery uses, is in the best interests of CITY.
- (B) CITY acknowledges that BOUNSALL is intending to make very substantial financial investments in the PROPERTY and off-site infrastructure improvements, and would not set upon a path to do so without some preliminary indication from CITY that CITY is supportive of the development concepts proposed for the PROPERTY. Without in any way relinquishing or diminishing CITY's rights and responsibilities to exercise its reasonable discretion in evaluating and considering any development proposal related to the PROPERTY, and related environmental analysis, CITY desires to convey to BOUNSALL the CITY's good faith commitment to cooperate with BOUNSALL in connection with any development applications submitted by BOUNSALL to CITY for the PROPERTY, and to expedite the processing of those development applications where possible when those development proposals are consistent with the vision of development of the PROPERTY set forth in this MOU.
- (C) City fully expects that BOUNSALL will cooperatively and constructively respond to the comments raised by City staff, the Planning Commission and public speakers during the February 11, 2009 Planning Commission meetings regarding the Pre-Application Conference and Conceptual Design Review Applications to address issues of: property boundary and ownership, design compatibility, scale and intensity of proposed uses, on-site circulation issues, and area-wide access and circulation needs and river trail development among other points of interest and concern.
- (D) CITY shall cooperate with BOUNSALL in timely processing of the PROJECT and any required applications submitted by BOUNSALL in connection with the PROPERTY consistent with the vision for development of the PROPERTY set forth in this MOU, including a development agreement and related environmental documents, within a timeframe mutually agreed upon by CITY and BOUNSALL, as follows:

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- (1) CITY and BOUNSALL agree that the Department of Planning and Building shall, subject to land use and environmental review procedural requirements, bring the PROJECT, and any applications which may be necessary, forward for consideration by CITY's Planning Commission on an expeditious manner, subject to acts or events not within the parties' reasonable control, such as appeals or protests to environmental clearances issued in connection with the PROJECT which might arise after certification of environmental documents under CEQA and CITY's Municipal Code, litigation affecting the PROJECT, wars, floods, earthquakes, fires, acts of God and other similar events. To meet this timeline, BOUNSALL and its representatives agree to prepare all required documents and respond to CITY's reasonable requests for further information in a timely manner that comports with and facilitates this schedule. CITY and BOUNSALL agree to work cooperatively to develop a schedule for carrying out the necessary environmental and planning review and analysis to promptly bring the PROJECT before CITY's Planning Commission.
- (2) CITY and BOUNSALL acknowledge that they desire to enter into a development agreement for the PROJECT pursuant to California Government Code Sections 65864 *et seq.* and Chapter 17.39 of CITY's Municipal Code. CITY and BOUNSALL acknowledge that they both commit to negotiate in good faith to bring forward a development agreement for consideration by CITY's Planning Commission and City Council that reflects development of the PROPERTY and certain benefits to CITY that are mutually agreed upon by CITY and BOUNSALL.
- (3) BOUNSALL PROPERTY may transfer or assign its rights and/or benefits under this MOU along with its interest in the PROPERTY to any entity, including, but not limited to, a joint venture formed with an investment partner, provided that such successor entity demonstrate sufficient capabilities to fulfill the obligation of the PROJECT entitlements approved by the satisfaction of City, which satisfaction shall not be unreasonably withheld. In addition, City understands that this MOU may be pledged as collateral for any loan secured by the property.

**SECTION 6 GOOD FAITH NEGOTIATION OF DEVELOPMENT AGREEMENT**

During the term of this MOU, BOUNSALL and CITY shall negotiate in good faith the terms and conditions of a development agreement, subject to the nonbinding provisions described in Section 1 above. The development agreement resulting from negotiations hereunder shall become effective only after, and if, the development agreement has been considered and

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approved by CITY in accordance with Government Code Section 65864 *et seq.* and approved by BOUNSALL. If the development agreement is executed CITY and BOUNSALL, the development agreement shall thereafter govern the rights and obligations of the parties with respect to the PROJECT. The development agreement is contemplated by CITY and BOUNSALL to include, without limitation, the following:

- (A) City Approvals. The PROJECT would require the following approvals:
  - 1. Environmental review;
  - 2. General Plan Amendments;
  - 3. Rezoning actions;
  - 4. A Development Agreement;
  - 5. A Subdivision Map, lot merger or other appropriate lot reconfiguration ;
  - 6. A Conditional Use Permit; and
  - 7. Design Review.
- (B) Project Public Improvement Requirements. BOUNSALL would agree to construct and dedicate certain on- and off-site public improvements required as conditions of approval of the PROJECT.
- (C) Vested Development Rights. CITY would grant BOUNSALL vested rights to develop the PROPERTY subject to the provisions of the development agreement and the entitlements for the PROJECT.
- (D) Reimbursement. BOUNSALL would agree to pay CITY all costs related to the processing of the applications for the PROJECT and the negotiation and drafting of the development agreement, including all attorney fees, in addition to the standard application fees, building permit plan check and inspection costs.
- (E) Revenues. BOUNSALL acknowledges that preservation and enhancement of CITY's general fund revenues is critical to CITY's desire to upgrade, diversify and intensify its existing business facilities and economy.
- (F) Cost-Sharing/Reimbursement Mechanisms. CITY acknowledges that to the extent conditions of approval or environmental mitigations including, but not limited to, off-site infrastructure improvements, identified through required project or CEQA analysis provide more capacity than needed for the PROJECT,

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CITY will explore and examine potential cost-sharing mechanisms and/or reimbursement mechanisms in connection with the future development of other properties which may benefit from improvements financed and constructed by BOUNSALL.

- (G) Other Benefits. BOUNSALL and CITY agree to negotiate in good faith to identify other public improvements, fees, and/or additional benefits which BOUNSALL would agree to provide to CITY beyond those imposed as part of the PROJECT-related conditions of approval or associated environmental mitigation measures. Such additional benefits may include but shall not be limited to: providing for affordable housing in addition to that typically required through existing affordable housing requirements; additional community-wide recreation needs in addition to that typically required through existing Quality of Life development impact fees including but not limited to: design and construction of a river trail along the PROPERTY's Napa River frontage with a bridge crossing the river and a trail connecting to the City's Washington Street pathway; off-setting improvements to the City's reclaimed spray field caused by River Trail improvements, development of a special events facility, and limited access to the special events facility for use by CITY or local non-profit entities; requirement for an alternate bottling fee applied to all bottles of wine produced at the PROPERTY.

**SECTION 7 APPLICABLE LAW**

This MOU shall be governed by and construed in accordance with the laws of the State of California without reference to choice of laws principles. Litigation arising out of or connected with this MOU shall be instituted and maintained in the courts of Napa County in the State of California, and CITY and BOUNSALL consent to jurisdiction over their person and over the subject matter of any such litigation in such courts, and consent to service of process issued by such courts.

**SECTION 8 PARTIAL INVALIDITY**

If any provision of this MOU is held by a court of competent jurisdiction to be invalid or unenforceable, the remainder of the MOU shall continue in full force and effect and shall in no way be impaired or invalidated, and CITY and BOUNSALL agree to substitute for the invalid or unenforceable provision a valid and enforceable provision that most closely approximates the intent and economic effect of the invalid or unenforceable provision.

**SECTION 9 ENTIRE AGREEMENT**

This MOU constitutes the entire agreement between CITY and BOUNSALL and supersedes whatever oral or written understanding they may have had prior to the execution of this MOU.

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This MOU shall not be amended or modified except by a written agreement executed by each of the parties hereto.

**SECTION 10 BINDING ON SUCCESSORS**

Neither party shall be entitled to assign its rights or obligations under this MOU, in whole or in part, except as set forth in Section 5 (D) (3) above, without the prior written consent of the other, which consent may be granted in such party's sole and absolute discretion. Subject to the foregoing, the terms and conditions herein contained shall be binding upon and inure to the benefit of the successors and assignees of the parties hereto.

**SECTION 11 COUNTERPARTS**

This MOU may be executed in one or more counterparts, including facsimile counterparts, each of which shall, for all purposes, be deemed an original and all such counterparts, taken together, shall constitute one and the same instrument.

**SECTION 12 AMBIGUITY**

BOUNSALL, the CITY and their respective counsel have each carefully reviewed this MOU, and each has agreed to each term of the MOU. No ambiguity shall be presumed to be construed against either party.

**SECTION 13 WAIVER**

Waiver by either party of any default, breach or condition precedent shall not be construed as a waiver of any other default, breach or condition precedent or any other right hereunder.

**SECTION 14 HEADINGS**

The section headings contained in this MOU are inserted for convenience only and shall not affect in any way the meaning or interpretation of this MOU.

**SECTION 15 AUTHORITY**

The signatories to this MOU hereby represent and warrant that they are fully authorized to sign this MOU on behalf of the party that they represent.

**SECTION 16 TERMINATION.**

- (A) Any party to this MOU may terminate this MOU with or without cause with at least sixty (60) day's prior written notice to the other party provided via first class United States mail or hand delivery at the following address:



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City:	Planning and Building Director City of Calistoga 1232 Washington Street Calistoga, CA 94515
With a copy to:	City Manager City of Calistoga 1232 Washington Street Calistoga, CA 94515
And to:	Michelle Kenyon, Esq. McDonough, Holland & Allen, PC 1901 Harrison Street, 9th Floor Oakland, CA 94612-3501
Bounsall:	William Bounsall & Jeff Bounsall P.O. Box 65 Calistoga, CA 945145

- (B) The City Manager is and shall be authorized to terminate this MOU and send the termination notice on behalf of CITY in accordance with the terms hereof.

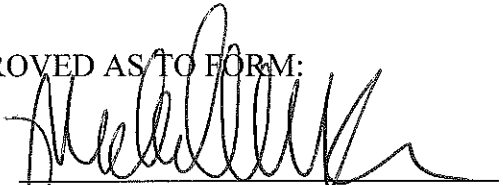
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WITNESSETH that this MOU is acknowledged by the parties hereto as of the EFFECTIVE DATE set forth above:

<p>APPROVED AS TO FORM:</p> <p>By: _____ MICHELLE MARCHETTA KENYON City Attorney</p> <p>Date: _____</p>	<p>“CITY”</p> <p>CITY OF CALISTOGA, a municipal corporation</p> <p>By: <u>William C Norton</u> WILLIAM C. NORTON Its: Interim City Manager</p> <p>Date: <u>8-19-10</u></p>
	<p>“BOUNSALL”</p> <p>By: <u>Jeff M. Bounsall</u> Jeff M. Bounsall Its: <u>OWNER</u></p> <p>Date: <u>8-17-2010</u></p> <p>By: <u>W L Bounsall</u> William L. Bounsall Its: <u>Owner</u></p> <p>Date: <u>8-17-2010</u></p> <p>By: <u>Kathy Giammona Bowser</u> Kathy Giammona Bowser Its: <u>8-17-2010</u></p> <p>Date: <u>Owner Ltr.</u></p>

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WITNESSETH that this MOU is acknowledged by the parties hereto as of the EFFECTIVE DATE set forth above:

<p>APPROVED AS TO FORM:</p> <p>By:   MICHELLE MARCHETTA KENYON  City Attorney</p> <p>Date: _____</p>	<p>“CITY”</p> <p>CITY OF CALISTOGA, a municipal corporation</p> <p>By: _____  WILLIAM C. NORTON  Its: Interim City Manager</p> <p>Date: _____</p>
	<p>“BOUNSALL”</p> <p>By: _____  Jeff M. Bounsall</p> <p>Its: _____</p> <p>Date: _____</p> <p>By: _____  William L. Bounsall</p> <p>Its: _____</p> <p>Date: _____</p> <p>By: _____  Kathy Giammona Bowser</p> <p>Its: _____</p> <p>Date: _____</p>