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2  
3 **MEMORANDUM OF UNDERSTANDING**

4 **AMONG**

5 **THE CITY OF CALISTOGA**

6 **AND**

7 **BOUNSALL**

8 **REGARDING INTENDED DEVELOPMENT OF**

9 **CERTAIN REAL PROPERTY LOCATED IN**

10 **THE CITY OF CALISTOGA**

11 **Authorizing Agreement No.**

12 **(2<sup>nd</sup> AMENDMENT AND RESTATEMENT)**

13  
14 This MEMORANDUM OF UNDERSTANDING (“MOU”) was made and entered into as of  
15 this 15<sup>th</sup> day of December, 2009 (“EFFECTIVE DATE”), by and among the CITY OF  
16 CALISTOGA, a municipal corporation (“CITY”) and Jeff M. Bounsall, William L. Bounsall,  
17 and Kathy Giammona Bowser (“BOUNSALL”), regarding BOUNSALLS’s desire to develop  
18 that certain real property consisting of approximately 7 acres located at 414 Foothill Boulevard,  
19 Assessor’s Parcel Numbers 011-260-045 through 011-260-076, in the City of Calistoga, County  
20 of Napa, State of California (the “PROPERTY”). An amendment to this MOU occurred on 3<sup>rd</sup>  
21 day of August 2010 (the “Amended Date”), and is amended again and restated as of the 2<sup>nd</sup> day  
22 of October 2012 (the “Second Amended Date”).  
23

24 **RECITALS**

25 A. WHEREAS, the PROPERTY is located at a key entrance to CITY in the Downvalley  
26 Foothill Boulevard Entry Corridor, where commercial uses, such as wineries and vineyard-  
27 related businesses and appropriate retail and commercial uses should complement CITY’s  
28 downtown core; and

29 B. WHEREAS, encouraging well conceived and designed developments, which broadens  
30 and diversifies the existing range of markets served by CITY’s businesses supports CITY’s  
31 continuing economic vitality, through diversification of its economy in a manner which supports  
32 its small-town character, unique history as a geothermal spa destination, rural identity, and  
33 regional identity as part of the world-renowned wine region of the Napa Valley; and

34 C. WHEREAS, BOUNSALL desires and intends to commit as a corporate resident to CITY  
35 and desires to develop the PROPERTY, by offering agriculturally focused retail, winery and  
36 recreation opportunities through a Mixed Use Development thereby providing BOUNSALL with  
37 the necessary diversification of uses and modern physical development and operational  
38 components to operate a sustainable, mixed use, project; and

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

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

46 F. WHEREAS, CITY’S Planning Commission considered a revised conceptual  
47 development proposal at its regularly scheduled meeting on April 14, 2010 wherein the CITY’s  
48 Planning Commission commented on the scale of the proposal and encouraged BOUNSALL to  
49 resubmit a subsequent conceptual plan addressing the comments and feedback; and

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

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

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

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

64 **AGREEMENT**

65 **SECTION 1 NONBINDING EFFECT.**

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

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73 (A) This MOU is not intended to set forth all of the material terms and conditions  
74 regarding BOUNSALL's intended development of the PROPERTY nor bind  
75 BOUNSALL to any particular development of the PROPERTY.

76 (B) This MOU is not intended to contractually bind CITY or BOUNSALL to any  
77 particular course of action. No legal obligation shall arise for CITY or  
78 BOUNSALL as a result of this MOU, except the obligation to negotiate and act in  
79 good faith in any future negotiations or other activities or discussions among the  
80 parties.

81 (C) CITY retains absolute discretion to consider any particular development proposal  
82 and related environmental analysis for development of the PROPERTY and to  
83 approve, deny or condition any discretionary permit or other approval of CITY in  
84 connection with development of the PROPERTY.

85 **SECTION 2 ACKNOWLEDGEMENTS**

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

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

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

95 **SECTION 3 TERM.**

96 The term of this MOU shall be effective from the EFFECTIVE DATE set forth hereinabove and  
97 shall continue until December 31, 2014 or until the development agreement and entitlement  
98 process are considered for final approval by the CITY, or until terminated as set forth in  
99 paragraph 16 of this MOU.

100 **SECTION 4 BOUNSALL PLANS.**

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

105 **SECTION 5 CITY SUPPORT.**

106 (A) CITY acknowledges its desire to broaden and diversify the existing range of  
107 markets served by CITY's business sector to include facilities providing support

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108 to the agricultural industry which is of great importance to the City of Calistoga  
109 and to the Napa Valley. CITY believes that developing lands such as the  
110 PROPERTY, which is located in the Downvalley Foothill Boulevard Entry  
111 Corridor and provides a unique opportunity for a mixed-use destination  
112 development similar to that reflected in the conceptual plans for the PROJECT  
113 integrated with the existing orchard and winery uses, is in the best interests of  
114 CITY.

115 (B) CITY acknowledges that BOUNSALL is intending to make very substantial  
116 financial investments in the PROPERTY and off-site infrastructure  
117 improvements, and would not set upon a path to do so without some preliminary  
118 indication from CITY that CITY is supportive of the development concepts  
119 proposed for the PROPERTY. Without in any way relinquishing or diminishing  
120 CITY's rights and responsibilities to exercise its reasonable discretion in  
121 evaluating and considering any development proposal related to the PROPERTY,  
122 and related environmental analysis, CITY desires to convey to BOUNSALL the  
123 CITY's good faith commitment to cooperate with BOUNSALL in connection  
124 with any development applications submitted by BOUNSALL to CITY for the  
125 PROPERTY, and to expedite the processing of those development applications  
126 where possible when those development proposals are consistent with the vision  
127 of development of the PROPERTY set forth in this MOU.

128 (C) City fully expects that BOUNSALL will cooperatively and constructively respond  
129 to the comments raised by City staff, the Planning Commission and public  
130 speakers during the February 11, 2009 Planning Commission meetings regarding  
131 the Pre-Application Conference and Conceptual Design Review Applications to  
132 address issues of: property boundary and ownership, design compatibility, scale  
133 and intensity of proposed uses, on-site circulation issues, and area-wide access  
134 and circulation needs and river trail development among other points of interest  
135 and concern.

136 (D) CITY shall cooperate with BOUNSALL in timely processing of the PROJECT  
137 and any required applications submitted by BOUNSALL in connection with the  
138 PROPERTY consistent with the vision for development of the PROPERTY set  
139 forth in this MOU, including a development agreement and related environmental  
140 documents, within a timeframe mutually agreed upon by CITY and BOUNSALL,  
141 as follows:

142 (1) CITY and BOUNSALL agree that the Department of Planning and  
143 Building shall, subject to land use and environmental review procedural  
144 requirements, bring the PROJECT, and any applications which may be  
145 necessary, forward for consideration by CITY's Planning Commission on  
146 an expeditious manner, subject to acts or events not within the parties'  
147 reasonable control, such as appeals or protests to environmental clearances  
148 issued in connection with the PROJECT which might arise after  
149 certification of environmental documents under CEQA and CITY's

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150 Municipal Code, litigation affecting the PROJECT, wars, floods,  
151 earthquakes, fires, acts of God and other similar events. To meet this  
152 timeline, BOUNSALL and its representatives agree to prepare all required  
153 documents and respond to CITY’s reasonable requests for further  
154 information in a timely manner that comports with and facilitates this  
155 schedule. CITY and BOUNSALL agree to work cooperatively to develop  
156 a schedule for carrying out the necessary environmental and planning  
157 review and analysis to promptly bring the PROJECT before CITY’s  
158 Planning Commission.

159 (2) CITY and BOUNSALL acknowledge that they desire to enter into a  
160 development agreement for the PROJECT pursuant to California  
161 Government Code Sections 65864 *et seq.* and Chapter 17.39 of CITY’s  
162 Municipal Code. CITY and BOUNSALL acknowledge that they both  
163 commit to negotiate in good faith to bring forward a development  
164 agreement for consideration by CITY’s Planning Commission and City  
165 Council that reflects development of the PROPERTY and certain benefits  
166 to CITY that are mutually agreed upon by CITY and BOUNSALL.

167 (3) BOUNSALL PROPERTY may transfer or assign its rights and/or benefits  
168 under this MOU along with its interest in the PROPERTY to any entity,  
169 including, but not limited to, a joint venture formed with an investment  
170 partner, provided that such successor entity demonstrate sufficient  
171 capabilities to fulfill the obligation of the PROJECT entitlements  
172 approved by the satisfaction of City, which satisfaction shall not be  
173 unreasonably withheld. In addition, City understands that this MOU may  
174 be pledged as collateral for any loan secured by the property.

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

176 During the term of this MOU, BOUNSALL and CITY shall negotiate in good faith the terms and  
177 conditions of a development agreement, subject to the nonbinding provisions described in  
178 Section 1 above. The development agreement resulting from negotiations hereunder shall  
179 become effective only after, and if, the development agreement has been considered and  
180 approved by CITY in accordance with Government Code Section 65864 *et seq.* and approved by  
181 BOUNSALL. If the development agreement is executed CITY and BOUNSALL, the  
182 development agreement shall thereafter govern the rights and obligations of the parties with  
183 respect to the PROJECT. The development agreement is contemplated by CITY and  
184 BOUNSALL to include, without limitation, the following:

185 (A) City Approvals. The PROJECT would require the following approvals:

- 186 1. Environmental review;
- 187 2. Rezoning actions;

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- 188           3.     A Development Agreement;
- 189           4.     A Subdivision Map, lot merger or other appropriate lot reconfiguration ;
- 190           5.     A Conditional Use Permit; and
- 191           6.     Design Review.
- 192        (B)   Project Public Improvement Requirements.   BOUNSALL would agree to  
193        construct and dedicate certain on- and off-site public improvements required as  
194        conditions of approval of the PROJECT.
- 195        (C)   Vested Development Rights.   CITY would grant BOUNSALL vested rights to  
196        develop the PROPERTY subject to the provisions of the development agreement  
197        and the entitlements for the PROJECT.
- 198        (D)   Reimbursement.   BOUNSALL would agree to pay CITY all costs related to the  
199        processing of the applications for the PROJECT and the negotiation and drafting  
200        of the development agreement, including all attorney fees, in addition to the  
201        standard application fees, building permit plan check and inspection costs.
- 202        (E)   Revenues.   BOUNSALL acknowledges that preservation and enhancement of  
203        CITY's general fund revenues is critical to CITY's desire to upgrade, diversify  
204        and intensify its existing business facilities and economy.
- 205        (F)   Cost-Sharing/Reimbursement Mechanisms.   CITY acknowledges that to the  
206        extent conditions of approval or environmental mitigations including, but not  
207        limited to, off-site infrastructure improvements, identified through required  
208        project or CEQA analysis provide more capacity than needed for the PROJECT,  
209        CITY will explore and examine potential cost-sharing mechanisms and/or  
210        reimbursement mechanisms in connection with the future development of other  
211        properties which may benefit from improvements financed and constructed by  
212        BOUNSALL.
- 213        (G)   Other Benefits.   BOUNSALL and CITY agree to negotiate in good faith to  
214        identify other public improvements, fees, and/or additional benefits which  
215        BOUNSALL would agree to provide to CITY beyond those imposed as part of  
216        the PROJECT-related conditions of approval or associated environmental  
217        mitigation measures. Such additional benefits may include but shall not be  
218        limited to: providing for affordable housing in addition to that typically required  
219        through existing affordable housing requirements; additional community-wide  
220        recreation needs in addition to that typically required through existing Quality of  
221        Life development impact fees including but not limited to: design and  
222        construction of a river trail along the PROPERTY's Napa River frontage with a  
223        bridge crossing the river and a trail connecting to the City's Washington Street  
224        pathway; off-setting improvements to the City's reclaimed spray field caused by

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225 River Trail improvements, development of a special events facility, and limited  
226 access to the special events facility for use by CITY or local non-profit entities;  
227 requirement for an alternate bottling fee applied to all bottles of wine produced at  
228 the PROPERTY.

229

230

231 **SECTION 7 APPLICABLE LAW**

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

238 **SECTION 8 PARTIAL INVALIDITY**

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

244 **SECTION 9 ENTIRE AGREEMENT**

245 This MOU constitutes the entire agreement between CITY and BOUNSALL and supersedes  
246 whatever oral or written understanding they may have had prior to the execution of this MOU.  
247 This MOU shall not be amended or modified except by a written agreement executed by each of  
248 the parties hereto.

249 **SECTION 10 BINDING ON SUCCESSORS**

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

255 **SECTION 11 COUNTERPARTS**

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

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259 **SECTION 12 AMBIGUITY**

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

263

264

265 **SECTION 13 WAIVER**

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

268 **SECTION 14 HEADINGS**

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

271 **SECTION 15 AUTHORITY**

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

274 **SECTION 16 TERMINATION.**

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

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

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	P.O. Box 65 Calistoga, CA 945145
With a copy to:	

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

280 WITNESSETH that this MOU is acknowledged by the parties hereto as of the EFFECTIVE  
281 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: _____ RICHARD D. SPITLER 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>

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	Date: _____
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