ORDINANCE NO. 688

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF CALISTOGA, COUNTY OF NAPA, STATE OF CALIFORNIA, ADOPTING A DEVELOPMENT AGREEMENT (DA 2011-01) FOR THE RESORT AT INDIAN SPRINGS EXPANSION PROJECT LOCATED AT 1712 LINCOLN AVENUE (APN 011-340-019) WITHIN THE "CC-DD", COMMUNITY COMMERCIAL – DESIGN DISTRICT.

The City Council of the City of Calistoga does hereby ordain as follows:

SECTION ONE:

WHEREAS, on July 15, 2011, an application was submitted by Paul Coates, on behalf of Resort at Indian Springs, LLC, requesting a Development Agreement associated with the approval of a Conditional Use Permit and Design Review for the expansion of the Resort at Indian Springs by adding 75 guest rooms (i.e. 9 8-unit bungalows and 3 cottage units), a restaurant, conference facility (i.e. event building), gym & yoga studio and hotel registration building. Landscaping, new parking areas, driveways and pedestrian pathways will also be developed. On and off site water, sewer, recycled water and storm drainage improvements will be installed to serve the project. The off site improvements will include the construction of new sewer and storm drain lines across the adjoining Gliderport property using a subgrade "jack and bore" method. The existing tennis court, several out buildings, trees, and mud ponds will be demolished and/or removed from the property to accommodate the expansion. The property is located at 1712 Lincoln Avenue (APN 011-340-019); and

WHEREAS, Resort at Indian Springs, LLC and the City of Calistoga have negotiated and drafted a development agreement for the Project ("Development Agreement"); and

WHEREAS, an Initial Study/Mitigation Negative Declaration (IS/MND) was completed in accordance with applicable CEQA Guidelines, and on October 12, 2012, the IS/MND was circulated for public and agency review and comment. Copies of the IS/MND were made available to the public at the Department of Planning and Building on October 12, 2012, and the IS/MND was distributed to interested parties and agencies. On October 12, 2012 and October 29, 2012, a notice of the Planning Commission public hearing of November 14, 2012, to review the IS/MND was published in the local newspaper; and

WHEREAS, the Planning Commission has recommended adoption of a Mitigated Negative Declaration (Resolution PC 2012-25) based upon the initial study prepared for this project finding that the proposed project, as amended by mitigation measures agreed to by the applicant, would not have a significant adverse impact on the environment; and

WHEREAS, the City Council adopted Resolution 2012-081 adopting a Mitigated Negative Declaration based upon the initial study prepared for this project finding that the proposed project, as amended by mitigation measures agreed to by the applicant, would not have a significant adverse impact on the environment; and

WHEREAS, the Planning Commission has reviewed and considered this application at its regular meeting of November 14, 2012 and prior to taking action on the application, the Commission received written and oral reports by the Staff, and received public testimony. After considering the project, the Commission adopted Resolution 2012-27 recommending approval of a Development Agreement based upon findings presented in the Staff Report and subject to conditions of approval; and

WHEREAS, a public notice of the City Council public hearing of December 18, 2012 for the Draft Initial Study/Mitigated Negative Declaration, Conditional Use Permit, Design Review and Development Agreement was published in the local newspaper on December 7, 2012 and made available on the City's website; and

WHEREAS, the City Council has reviewed and considered the application for the Project at a regular meeting on December 18, 2012, considered as one of its items of business, this Ordinance to be adopted in accordance with Government Code Section 65090, this Ordinance to be adopted in accordance with Government Code Section 65850, to include the written and oral staff report, proposed findings and comments received from the general public and interested agencies and parties; and

WHEREAS, the City Council adopted the following findings with the introduction of an Ordinance:

1. The City Council duly adopted Ordinance No. 547 enacting procedures for entering into development agreements.

2. That this Development Agreement is a contract negotiated and entered into voluntarily between the City of Calistoga, and property owner and developer (Resort at Indian Springs, LLC) of the Resort at Indian Springs.

3. That this Development Agreement contains those conditions and obligations relating to the Project stated in the resolution(s) approving the Project.

4. That the Project is a project of significance to the community and upon the community of Calistoga and for that reason a

development agreement is a proper use of the City's authority to secure the project benefits for the community.

WHEREAS, adoption of this Development Agreement will not result in conflicts with any other appropriate ordinance and to the extent such conflict exists, this resolution is hereby repealed; and

SECTION TWO:

The City Council hereby approves, adopts a Development Agreement for the Resort at Indian Springs Expansion Project as provided in Exhibit A, attached hereto and incorporated herein by reference, and authorizes the City Manager to execute the Development Agreement upon the effective date of this Ordinance. Upon execution of the Development Agreement by all parties, the City Clerk is hereby directed to record the Development Agreement with the Napa County Recorder's Office.

SECTION THREE:

If any section or portion of this ordinance is for any reason held to be invalid and/or unconstitutional by a court or competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance.

SECTION FOUR:

THIS ORDINANCE shall take effect thirty (30) days after its passage and before expiration of fifteen (15) days after its passage, shall be published in accordance with law in a newspaper of general circulation published and circulated in the City of Calistoga.

THIS ORDINANCE was introduced with the first reading waived at the City of Calistoga City Council meeting of the 18th day of December 2012, and was passed and adopted at a regular meeting of the Calistoga City Council on the 15th day of January, 2013, by the following vote:

AYES:
NOES:
ABSENT:
ABSTAIN:

_____
CHRIS CANNING, Mayor

ATTEST:

_____

Amanda Davis, Deputy City Clerk

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

RESORT AT INDIAN SPRINGS,
A LIMITED LIABILITY COMPANY

DEVELOPMENT AGREEMENT

This DEVELOPMENT AGREEMENT (this "Agreement") is entered into as of the _____ day of _____ 20_____, by and between RESORT AT INDIAN SPRINGS, LLC, a _____ _____ limited liability company ("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 16.6 acres within City, located at 1712 Lincoln Avenue, Calistoga, California, depicted on the "**Site Map**" attached as Exhibit A, and legally described in Exhibit B (the "**Property**").

D. Developer, along with other Calistoga spas, entered into an agreement entitled "Agreement Between The City of Calistoga and The Calistoga Spas" dated March 1, 2001 attached as Exhibit C which provided methods for establishing water and wastewater baseline for the spas; and, specifically requires the Developer and the City to meet and confer in an effort to find a solution in case it becomes necessary for the Developer to discharge groundwater into the City's wastewater treatment facility.

E. Developer and the City entered into an agreement entitled "Agreement between the City of Calistoga and the Resort at Indian Springs, LLC dated February 16, 2010" attached as Exhibit D which established water and wastewater baselines for the Lodge (as defined therein), which is a portion of the Property, and allowed for the combining of established baselines with the remainder of the Property.

F. Developer proposes to develop on the Property a resort expansion including adding 75 guest rooms, a restaurant, conference facility, gym and yoga studio and hotel registration building, 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 2003 General Plan, as amended (the "**General Plan**").

G. 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.

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

I. 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. _____, adopted [insert environmental approval];

2. By Resolution No. ____, approved a Conditional Use Permit and Design Review Permit.; and

3. 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 3 of this Recital I are collectively referred to herein as the "**Existing Project Approvals**".

J. 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**").

K. 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.

L. 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.

M. 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.

N. 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.

O. 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.

P. 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.

Q. 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.

R. 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(A).

"**Actual Wastewater Demand**" shall have the meaning set forth in Section 4.04(A).

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

"**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 Effective 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 G.

"**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, Section 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, Section 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 the City of Calistoga.

"**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.

"**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.

"**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 Payment Date**" shall mean the date that the first building permit is issued for the Project.

"**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; or 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.

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

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

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

"**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.

"**Occupancy Date**" shall mean the date a certificate of occupancy is issued for the Project.

"**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.

"**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.

"**Projected Wastewater Demand**" shall have the meaning set forth in Section 4.04.

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

"**Public Safety Fee**" shall have the meaning set forth in Section 5.02.C(1).

"**Occupancy**" shall mean the date the first certificate of occupancy is issued for the Project.

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

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

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

"**Term Extension**" 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).

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

"**Wastewater Service Connection Fee**" shall have the meaning set forth in Section 4.04.

"**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 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 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 additional one-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 its City Manager, which approval City agrees it shall not unreasonably withhold, condition or delay. 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 resort expansion including adding 75 guest rooms, a restaurant, conference facility, gym and yoga studio and hotel registration building, and other public amenities and infrastructure, including on-site improvements and the Off-Site Improvements.

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 that no other Person holds any legal or equitable interests in the Property;

B. Developer: (i) is organized and validly existing under the laws of the State of _____; (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 GEOTHERMAL OPERATIONS, MAINTENANCE, AND MONITORING

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; conflict with the Project Approvals; 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.

Section 3.07 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 3.08 Environmental Mitigation. The Parties understand that the Mitigated Negative Declaration 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. City agrees to use the Mitigated Negative Declaration in connection with the processing of any Subsequent Project Approval to the maximum extent allowed by law and consistent with the requirements of CEQA. 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 3.09 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 of 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 3.10 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 Emergency Vehicle Access for Mobile Home Parks. Prior to Occupancy, the Developer shall grant a 20-foot wide emergency vehicle access easement from the Property to the Calistoga Springs and Chateau Calistoga mobile home parks to the City over Developer Property, which location and language shall be approved by the City Public Works Director in his reasonable discretion. Prior to Occupancy, Developer shall install an all weather surface and gate(s) to the satisfaction of the Fire Chief, contingent on written approval by the mobile home park owners and applicable state and federal resource agencies

Section 3.11 Removal of Dirt Pile. Prior to Occupancy, the dirt pile located on 1522 and 1546 Lincoln Avenue, also known as the "Airport Property") shall be entirely removed.

Section 3.12 Geothermal Operations, Maintenance and Monitoring.

A. All body-contact geothermal discharge shall be directed to a separate sewer line on the Property that does not initially combine with other non-geothermal wastewater discharge. A meter shall be installed to the City's satisfaction to enable monitoring and metering of this geothermal wastewater discharge prior to combining with other on-site wastewater discharge, which meter shall be provided with telemetry to the City's SCADA system for monitoring and shall be conveyed to the City to own, operate and maintain. An easement, in a form approved by City, shall be granted to the City to allow for access to this metering device. These requirements shall be completed prior to Occupancy.

B. Prior to issuance of any building permit for the Project, the Developer shall develop and submit an Operations, Maintenance, and Monitoring Plan (OMMP) to the City. The OMMP shall include a detailed description of the methods and procedures for monitoring, measuring, and reporting geothermal use on the Property, in order to ensure that such use is consistent with the project description, conditions of approval, and the annual maximum discharge limitation of body-contact geothermal resources to the City's sewer system.

ARTICLE 4. WATER AND 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 and as set forth in the "Agreement between the City of Calistoga and the Resort at Indian Springs, LLC dated February 16, 2010") for the Project, and any additional allocations shall be determined as set forth in Sections 4.03 and 4.04. 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. The total existing baseline is 16.4 acre feet per year. City agrees to provide the Project an additional baseline annual allocation of seven and seven- tenths (7.7) 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 five (5) 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 five (5) acre feet, at its discretion). The surety bond will be released or proportionally reduced by City if the Developer waives in writing its right to the reservation (or a portion thereof). On or prior to the issuance of a building permit, Developer shall pay a connection fee of Two- hundred fifty-eight thousand and three hundred and four dollars and four cents ($258,304.20) for the annual allocation of 7.7 acre feet of water ("**Water Service Connection Fee**") if paid during the calendar year 2012. If the Water Service Connection Fee is paid at a later time due to timing of development, the applicable fee rate shall be paid.

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 seven and seven-tenths (7.7) acre feet annually (the "**Projected Water Demand**") and adjust as follows:

(1) If the Actual Water Demand over the period between the 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 seven and seven-tenths (7.7) 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 Occupancy Date and the Water Check-In Date is ten (10) acre feet of water under Section 4.03, Developer has reserved at least an additional five (5) acre feet of water, and the fee schedule in effect at the time provides for a fee of thirty- three thousand and five- hundred forty six dollars ($33,546) per additional acre foot of water annually, then Developer shall pay to City an amount equal to seventy-seven thousand, one- hundred fifty -five dollars and eighty cents ($77,155.80).

(2) If the Actual Water Demand over the period between the 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 and 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 Occupancy Date and the Water Check-In Date is five acre feet of water, then City shall pay to Developer an amount equal to seventy-three thousand eight hundred and one dollars and twenty cents ($73,801.20).

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 twelve and one-half (12.5) 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 twelve and one-half (12.5) 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.

Section 4.04 Wastewater. City agrees to provide the Project an annual allocation of thirty- five and one- tenth (35.1) acre feet of wastewater as defined under the Resource Management Services Code and in accordance with the baseline as set forth in the "Agreement between the City of Calistoga and the Resort at Indian Springs, LLC dated February 16, 2010" 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 4.5 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 4.5 acre feet, at its discretion). The surety bond will be released or proportionally reduced by City if the Developer waives in writing its right to the reservation (or a portion thereof).

A. Promptly following the Water Check-In Date, City and Developer shall review the Project's average actual annual demand on wastewater, to include the combined non-geothermal wastewater and body-contact geothermal wastewater discharge(the "**Actual Wastewater Demand**") against the baseline credit of 35.1 acre feet, projected demand of 7.7 acre feet annually (the "**Projected Water Demand**") plus the measured body-contact geothermal discharge and adjust as follows:

(1) If the Actual Wastewater Demand over the period between the Occupancy Date and the Water Check-In Date *exceeds* the Projected Wastewater 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 wastewater supply and the Baseline to the level of the Actual Wastewater Demand (but not above 4.5 acre feet of wastewater annually plus any amount reserved under Section 4.03). For example, if the Actual Wastewater Demand over the period between the Occupancy Date and the Water Check-In Date is 39.6 acre feet of wastewater under Section 4.03, Developer has reserved at least an additional 4.5 acre feet of wastewater, and

the fee schedule in effect at the time provides for a fee of ninety- two thousand dollars ($97,942) per additional acre foot of wastewater annually, then Developer shall pay to City an amount equal to four hundred fourteen thousand dollars ($440,739)

B. Prior to the review described in Section 4.04.A, Developer may not purchase wastewater allocation for the Project above 4.5 acre feet annually. After the Water Check-In Date, Developer may apply from time to time for additional wastewater allocation above 4.5 acre feet of water annually and such application may be approved as provided under the terms of City's Growth Management System.

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, Transient Occupancy Taxes shall be paid with respect to the Project in accordance with the provisions of the City's Municipal Code.

Section 5.02 Fees and Exactions. 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), $109,336.02, as the "**Public Safety Fee**".

(2) *Quality of Life Fees*. On or prior to the Fee Payment Date, Developer shall pay (in accordance with Section 5.02.E) $112,500 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), $60,882.60 as the "**Traffic Impact Fee.**".

(4) *Solage Local Benefit Reimbursement.* On or prior to the Fee Payment Date Developer shall pay the following in accordance with that certain Reimbursement Agreement between the City and Palisades-Calistoga Resort, L.P., dated April 3, 2012: Storm Drainage: $20,248.25 plus accrued interest of 3% from April 3, 2012; Sanitary Sewer: $263,059.84 plus accrued interest of 3% from April 3, 2012.

For the convenience of the Parties, a table reflecting the above fees is attached hereto as Exhibit "E". In the event of a conflict between the body of this Agreement and Exhibit E, the body shall prevail.

D. In-Lieu Housing Fee. On or prior to the Fee Payment Date, Developer shall pay or cause to be paid to City $88,088 as an in-lieu affordable housing fee (the "**In-Lieu Housing Fee**").

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. In connection with any Subsequent Project Approval, City shall exercise its discretion in accordance with Applicable City Law, the Project Approvals, this Agreement and 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.

Section 7.02 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, 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 Fees when due under this Agreement; and

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

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.

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 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 9.04 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 9.05 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 9.06 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 9.06 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 9.07 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 9.08, which shall survive with respect to any Claims arising on or prior to the date of any such expiration or earlier termination.

Section 9.08 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 sole 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:	Resort at Indian Springs, LLC 1712 Lincoln Avenue Calistoga, California 94515 Attention: Pat and John Merchant

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 or grant any consent or waiver (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 provision of improvements, or (viii) water or wastewater allocations. 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. An 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:

_____,
a _____

By: _____
Name: _____
Title: _____

EXHIBIT A

Site Map

EXHIBIT B

Legal Description of Property

EXHIBIT C

"Agreement Between The City of Calistoga and The Calistoga Spas" dated March 1, 2001

EXHIBIT D

"Agreement between the City of Calistoga and the Resort at Indian Springs, LLC dated February 16, 2010"

EXHIBIT E

Schedule of Fees

Contribution	Value	Due Date
Water Service Connection Fee (7.7 af x $33,546)	**$258,304**	Prior to Issuance of Building Permit
Wastewater Service Connection Fee (provided the Actual Wastewater Demand does not exceed the initial credit of 35.1 af)	**$0**	Prior to Issuance of Building Permit
In Lieu Housing Fee $1.40 x 62,920 sf = $88,088	**$88,088**	Prior to Issuance of Building Permit
Quality of Life Fee	**$112,500**	Prior to Issuance of Building Permit
Traffic Impact Fee	**$60,882.60**	Prior to Issuance of Building Permit
Public Safety Fee	**$109,336.02**	Prior to Issuance of Building Permit
Solage Local Benefit District- Drainage	**$20,248.25**	Prior to Issuance of Building Permit
Solage Local Benefit District- Sewer	**$263,059.84**	Prior to Issuance of Building Permit
Total Contribution	**$912,418.71**	Prior to Issuance of Building Permit