

RECORDING REQUESTED BY
AND WHEN RECORDED MAIL TO:

City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attn: Kathy Flamson, City Clerk

(Space Above This Line for Recorder's Use Only)
Exempt from recording fee per Gov. Code §27383

ON-SITE REMEDIATION AND REIMBURSEMENT AGREEMENT
FOR
CALISTOGA HILLS RESORT LLC

This Site Remediation and Reimbursement Agreement (this “**Agreement**”) is made and dated for convenience as of the ____ day of August, 2016 (the “**Effective Date**”), by and between the City of Calistoga, a municipal corporation in the County of Napa, State of California (the “**City**”), and Calistoga Hills Resort LLC, a Delaware limited liability company (as successor to Calistoga Hills Resort, Inc.) (“**Developer**”).

RECITALS

A. The property which is the subject of this Agreement is located in the City of Calistoga, Napa County, California at 411 Foothill Boulevard, Calistoga, CA (the “**Property**”)

B. On August 21, 2012, the City adopted (1) Resolution No. 2012-063 approving a vesting tentative map for the Property and (2) Resolution 2012-064 approving a Conditional Use Permit, Design Review, and Planned Development (PD2010-01) for the Property, subject to certain conditions of approval contained in Resolution 2012-064 (the “**Conditions**”).

C. On or about September 18, 2012, the City adopted Ordinance No. 687 approving a development agreement for the Property and authorized the City’s execution and delivery of such development agreement.

D. A Development Agreement was executed by the City and the Developer on April 9, 2013, and was recorded on April 18, 2013 in the Napa County Recorder’s Office as document number 2013-0011182 (the “**Development Agreement**”). The Development Agreement contemplates (1) the construction of (a) approximately 110 hotel rooms, and (b) 20 club homes (collectively, the “**Resort**”), and (2) the sale 13 single family home sites (together with the Resort, the “**Project**”).

E. Section 36 of the Conditions requires Developer to, among other things, enter into an On-Site Remediation and Reimbursement Agreement with the City prior to commencing construction of the onsite improvements, including grading, clearing and grubbing, tree removal,

storm water management improvements, erosion control, etc. related to the Project (the “**Project Improvements**”).

AGREEMENT

NOW, THEREFORE, in consideration of the faithful performance of the terms and conditions set forth in this Agreement, the parties hereto agree as follows:

1. Purpose. The purpose of this Agreement is to satisfy the requirement in Section 36 of the Conditions that requires the Developer and the City to enter into an agreement and provide security for any On-Site Remediation Costs (as defined below) incurred by the City in connection with this Agreement which are not paid by Developer. For purposes of this Agreement, “**On-Site Remediation Work**” shall include, but not be limited to, soil stabilization and compaction, planting of trees/vegetation, hydro-seeding, installation of storm water treatment systems, retaining walls and/or other related construction reasonably necessary to restore any aspect of the Property to its natural state in the event that (a) the Property is disturbed by Developer’s construction of the Project Improvements and other construction activities on the Property, and (b) the Developer stops or otherwise fails to complete construction of the Project Improvements. For purposes of this Agreement, “**On-Site Remediation Costs**” shall mean all reasonable costs incurred in connection with the performance of any On-Site Remediation Work.

2. Examination of On-Site Remediation Work by City Engineer. Any On-Site Remediation Work which is performed by the Developer shall be performed to the satisfaction of the City Engineer, in his reasonable discretion. The City and its authorized agents shall, at all times during the performance of any such On-Site Remediation Work, have free access to the On-Site Remediation Work and shall be allowed to examine the On-Site Remediation Work and all materials used and to be used in the On-Site Remediation Work.

3. On-Site Remediation Costs Incurred by the City. Developer and the City agree that in the event that (a) the City undertakes any On-Site Remediation Work, (b) the City incurs On-Site Remediation Costs, and (c) the Developer fails to pay any On-Site Remediation Costs incurred by the City, subject to the notice and cure provisions in section 9 of this Agreement, the City may draw upon that certain certificate of deposit issued by Bank of America (acct# 910-000-9862-1293) in the amount of approximately \$527,160 (the “**Certificate of Deposit**”) to pay for the On-Site Remediation Costs. Prior to payment to the City by the Developer, or a draw by the City on the Certificate of Deposit, Developer shall be provided itemized invoices or other reasonable evidence of the On-Site Remediation Costs incurred, and Developer shall have the right to audit the same at its own expense.

4. Developer Not Agent of City. Neither Developer nor Developer's contractors, subcontractors, agents, officers, or employees are agents or employees of City and the Developer's relationship to the City, if any, arising herefrom is strictly that of an independent contractor.

5. Indemnification. Except to the extent caused by the gross negligence or willful misconduct of City, its elective and appointed boards, commissions, officers, agents, employees

and consultants (the “**City Indemnified Parties**”), Developer agrees to indemnify, defend and hold the City Indemnified Parties harmless from and against any and all claims, liabilities, losses, damages or injuries of any kind (collectively, “**Claims**”) arising out of (1) Developer's, or Developer's contractors', subcontractors', agents' or employees', acts, omissions, or operations under this Agreement, including, but not limited to, the performance of the On-Site Remediation Work, whether such acts, omissions, or operations are by Developer or any of Developer's contractors, subcontractors, agents or employees. The aforementioned indemnity shall apply regardless of whether or not City has prepared, supplied or approved plans and/or specifications for the On-Site Remediation Work and regardless of whether any insurance required under this Agreement is applicable to any Claims. The City does not and shall not waive any of its rights under this indemnity provision because of its acceptance of the bonds or insurance required under the provisions of this Agreement.

6. Compliance with Laws. Developer shall fully comply with all federal, state and local laws, ordinances and regulations in the performance of this Agreement. Developer shall, at its own cost and expense, obtain all necessary permits and licenses for the On-Site Remediation Work, give all necessary notices, pay all fees and taxes required by law and make any and all deposits legally required by those public utilities that will serve the development on the Property. Copies and/or proof of payment of said permits, licenses, notices, fee and tax payments and deposits shall be furnished to the City Engineer upon request.

7. Encroachment Permits. Developer shall obtain, at its sole cost and expense, any encroachment permits required by the City or other agency in order to perform the On-Site Remediation Work.

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

with that governmental entity's reasonable standard practice and custom; or a Default of this Agreement by the other Party

9. Notice of Breach and Default. The occurrence of any of the following constitutes a breach and default of this Agreement:

A. Developer refuses or fails to complete the On-Site Remediation Work within the time set forth herein (other than based upon force majeure) or abandons the Work.

B. Developer assigns the Agreement without the prior written consent of City, which consent shall not unreasonably be withheld or delayed.

C. Developer is adjudged bankrupt or makes a general assignment for the benefit of creditors, or a receiver is appointed in the event of Developer's insolvency.

D. Developer or Developer's contractors, subcontractors, agents or employees, fail to comply with any terms or conditions of this Agreement within thirty (30) days after receipt of a written notice of default from the City.

E. Any delay in the construction of any portion of the Work or repairs, which in the reasonable opinion of the City Engineer, endangers public or private property.

10. Breach of Agreement; Performance by City. Subject to section 8 of this Agreement, in the event that Developer fails to cure or commence a cure within thirty (30) days after receipt written a written notice of default under this Agreement from the City, the City upon written notice to Developer may proceed to complete the On-Site Remediation Work by contract or other method the City considers advisable, at the sole expense of Developer. Developer, immediately upon demand, shall pay the costs and charges related to the On-Site Remediation Work and any subsequent repairs that have been undertaken by the City following such notice. City, without liability for doing so, may take possession of and utilize in completing the On-Site Remediation Work and repairs, if any, such materials and other property belonging to Developer as may be on or about the Property and necessary for completion of the Work.

11. Remedies. City and Developer may each bring legal action against each other to compel performance of this Agreement and recover the costs of completing the Work, and/or any Corrective Repairs, if any, including City's or Developer's administrative and legal costs. No failure on the part of City or Developer to exercise any right or remedy hereunder shall operate as a waiver of any other right or remedy that City or Developer may have hereunder.

12. Attorneys' Fees. Should any legal action or arbitration be brought by either party because of breach of this Agreement or to enforce any provision of this Agreement, the prevailing party shall be entitled to all costs of suit, reasonable attorneys' fees, arbitration costs and such other costs as may be determined by the court or arbitrator.

13. Notices. Formal written notices, demands, correspondence and communications between City and Developer shall be sufficiently given if: (a) personally delivered; or (b) dispatched by next day delivery by a reputable carrier such as Federal Express to the offices of City and Developer indicated below, provided that a receipt for delivery is provided. Such

written notices, demands, correspondence and communications may be sent in the same manner to such persons and addresses as either party may from time-to-time designate by next day delivery or by mail as provided in this section.

City: City of Calistoga
1232 Washington Street
Calistoga, CA 94515
Attn: Dylan Feik

with a copy to: Burke, Williams & Sorensen
1901 Harrison Street, Suite 900
Oakland, CA 94612
Attn: Michelle Marchetta Kenyon

Developer: Calistoga Hills Resort LLC
c/o CTF Development, Inc.
1800 Pembroke Drive, #230,
Orlando, FL 32810
Attn: Mike Kiggen

with a copy to: Calistoga Hills Resort LLC
c/o CTF Development, Inc.
2990 Ponce de Leon Blvd., Suite 401
Coral Gables, FL 33134
Attn: General Counsel

14. Transfers; Assignments. Developer may assign its obligations under this Agreement to successor owner(s) of the Site with the prior written approval of the City. Such consent shall not unreasonably be withheld, conditioned, or delayed by the City. In connection with any such assignment, Developer and its assignee shall execute and deliver to City a written assignment and assumption agreement in a form acceptable to the City Attorney.

15. Binding Upon Heirs, Successors and Assigns. The terms, covenants and conditions of this Agreement shall be binding upon all heirs, successors and assigns of the parties hereto; provided, however, that this Agreement shall not be binding upon a purchaser or transferee of any portion of the Property unless this Agreement has been assigned pursuant to Section 14, in which event this Agreement shall remain binding upon Developer.

16. Headings. 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 contained in this Agreement.

17. Severability. If any provision of this Agreement is held, to any extent, invalid, the remainder of this Agreement shall not be affected, except as necessarily required by the invalid provision, and shall remain in full force and effect.

18. Entire Agreement. The terms and conditions of this Agreement constitutes the entire agreement between City and Developer with respect to the matters addressed in this Agreement. This Agreement may not be altered, amended or modified without the written consent of both parties hereto.

19. Governing Law; Venue. This Agreement shall be construed and enforced in accordance with the laws of the State of California, without reference to choice of law provisions. Any legal actions under this Agreement shall be brought only in the Superior Court of the County of Napa, State of California.

20. Authority. Each party executing this Agreement on behalf of a party represents and warrants that such person is duly and validly authorized to do so on behalf of the entity it purports to bind and if such party is a partnership, corporation or trustee, that such partnership, corporation or trustee has full right and authority to enter into this Agreement and perform all of its obligations hereunder.

21. Time is of the Essence. Time is of the essence of this Agreement and of each and every term and condition hereof.

22. Runs With the Land; Recordation and Cancellation. This Agreement pertains to and shall run with the Property. Upon execution, this Agreement shall be recorded in the Official Records of Napa County. Upon the issuance of a certificate of occupancy for the Project, the City agrees to promptly execute and deliver such document(s) as maybe reasonably required by the Developer's title company to release and cancel this Agreement in the real property records of Napa County.

23. Counterparts. This Agreement may be executed in counterparts.

[Signatures Follow On Next Page]

IN WITNESS WHEREOF, City and Developer have hereunto set their hands to subscribe through their duly authorized officers: By the City this ____ day of _____, 2016 and by the Developer this _____, day of _____, 2016.

CITY OF CALISTOGA,
a municipal corporation

CALISTOGA HILLS RESORT LLC,
a Delaware limited liability company

By: _____
Dylan Feik, City Manager

By: _____
Name: _____
Its: _____

ATTEST:

Mailing Address:

Kathy Flamson, City Clerk

STATE OF _____)
) ss.
COUNTY OF _____)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

On _____, 2016, before me, _____, the undersigned, personally appeared _____,

- () personally known to me
- () proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) (is/are) subscribed to the within instrument and acknowledged to me that (he/she/they) executed the same in (his/her/their) authorized capacity(ies), and that by (his/her/their) signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary

Expiration date

Print Name

Commission number

Notary Public Phone Number: _____

(SEAL)

STATE OF CALIFORNIA _____)
) ss.
COUNTY OF _____)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

On _____, 20____, before me, _____, the undersigned, personally appeared _____,

- () personally known to me
- () proved to me on the basis of satisfactory evidence

to be the person(s) whose name(s) (is/are) subscribed to the within instrument and acknowledged to me that (he/she/they) executed the same in (his/her/their) authorized capacity(ies), and that by (his/her/their) signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature of Notary

Expiration date

Print Name

Commission number

Notary Public Phone Number: _____

(SEAL)