

RESOLUTION 2016-16

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING THE FIRST AMENDMENT TO AMENDED AND RESTATED FINAL SETTLEMENT AGREEMENT BETWEEN THE TOWN AND MCO PROPERTIES INC., EN LLC, ADERO CANYON LLC AND ADERO CANYON II LLC.

BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS as follows:

SECTION 1. The First Amendment to Amended and Restated Final Settlement Agreement between the Town of Fountain Hills and MCO Properties Inc., EN LLC, Adero Canyon LLC and Adero Canyon II LLC (the "First Amendment"), is hereby approved in substantially the form and substance attached hereto as Exhibit A and incorporated herein by reference.

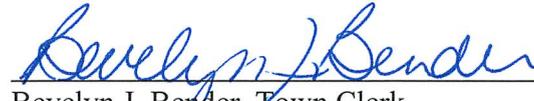
SECTION 2. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to cause the execution of the First Amendment and take all steps necessary to carry out the purpose and intent of this Resolution.

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Arizona, September 1, 2016.

FOR THE TOWN OF FOUNTAIN HILLS:

ATTESTED TO:


Linda M. Kavanagh, Mayor


Bevelyn J. Bender, Town Clerk

REVIEWED BY:

APPROVED AS TO FORM:


Grady E. Miller, Town Manager


Andrew J. McGuire, Town Attorney

EXHIBIT A
TO
RESOLUTION 2016-16

[First Amendment]

See following pages.

When Recorded Return To:
Town Clerk
Town of Fountain Hills
16705 East Avenue of the Fountains
Fountain Hills, Arizona 85268

**FIRST AMENDMENT
TO
AMENDED AND RESTATED FINAL SETTLEMENT AGREEMENT**

THIS FIRST AMENDMENT TO FINAL SETTLEMENT AGREEMENT (this “First Amendment”) is entered into September 15, 2016, between the Town of Fountain Hills, an Arizona municipal corporation (the “Town”), MCO Properties Inc., a Delaware corporation, successor-in-interest to MCO Properties L.P. d/b/a MCO Properties Limited Partnership, a Delaware limited partnership doing business in the State of Arizona (“MCO”), EN LLC d/b/a EN at Fountain Hills LLC, a Delaware limited liability company (“Eagles Nest”), Adero Canyon LLC, a Delaware limited liability company (“Adero”) and Adero Canyon II LLC, a Delaware limited liability company (“Adero II”). The Town, MCO, Eagles Nest, Adero and Adero II are each referred to individually as a “Party” and collectively as the “Parties.” MCO, Eagles Nest, Adero and Adero II are collectively referred to as the “Developer Parties.”

RECITALS

A. The Town and the Developer Parties (other than Adero II) entered into that certain Final Settlement Agreement (Amended and Restated May 1, 2014), recorded at Document Number 2014-0314508 in the Official Records of the Maricopa County Recorder’s Office (the “Restated Agreement”), relating to development of approximately 431.20 acres of real property commonly referred to as “Adero Canyon.” Subsequently a portion of the the Adero Canyon Property was conveyed to and is now owned by Adero II. Unless otherwise defined herein, all capitalized terms used in this First Amendment shall have the meanings set forth in the Restated Agreement.

B. The Restated Agreement required, among other things, that Adero provide for certain Temporary Utilities at the Town’s to-be-constructed Trailhead.

C. As part of its construction on the Adero Canyon Property, Adero excavated soils that the Town desires to use as construction fill material. The Town anticipates beginning construction on the Trailhead in 2017, at which time fill material will be required.

D. Adero and Adero II have agreed that the Town may utilize the approximately 12,000 cubic yards of excavated fill material (the “Fill Material”) that is currently located on the Storage Property (defined below) in the Trailhead construction by the Town, which the Town has determined will result in (i) an estimated cost savings of \$90,000 to the Town for fill material it would have otherwise purchased for the Trailhead construction and (ii) a

reduction in the number of truck trips through the Town that would have been necessary to dispose of the fill material at the alternative location.

E. In exchange for the use of the Fill Material, including Adero II's storage of the Fill Material on the property adjacent to the Town's Eagle Ridge Drive right-of-way shown on Exhibit A to this First Amendment (the "Storage Property") until such time as it is needed by the Town (subject to the limitation below), Adero and Adero II and the Town have agreed to eliminate Adero's and/or Adero II's obligation to provide the Temporary Utilities.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing introduction and recitals, which are incorporated herein by reference, the following mutual covenants and conditions, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Town and the Developer Parties hereby agree as follows:

1. Temporary Utilities Deleted. The Restated Agreement is hereby amended by deleting subsection 4.4.1 thereof in its entirety.

2. Fill Material. The Fill Material currently located on the Storage Property shall be stored thereon until the sooner to occur of the date the Town requires its use as part of the Trailhead construction or September 15, 2019. The Fill Material shall be stored and made accessible for use by the Town at no cost, and the Town, or its agents, employees or designees, shall be permitted to have cost-free access over and across the Storage Property to access and remove the Fill Material. After the Fill Material is removed, the Town shall not be responsible for restoring the Storage Property to its pre-storage condition, but shall be responsible for any damages it may cause to the Storage Property beyond the normal wear and tear associated with removing the Fill Material, if any.

3. Consistency; Modification. Except as modified by this First Amendment, all of the terms and conditions of the Restated Agreement shall remain in full force and effect. This First Amendment and the Restated Agreement shall not be further modified in any manner other than by a written amendment executed by the Town and the Developer Parties or their successors or assigns. If any clause, sentence or other portion of this First Amendment becomes illegal, null or void for any reason, or is held by any court of competent jurisdiction to be so, the remaining portions thereof shall remain in full force and effect.

4. Non-Default by Town. By executing this First Amendment, Developer Parties each affirmatively assert that (i) the Town is not currently in default, nor has it been in default at any time prior to this First Amendment, under any of the terms or conditions of the Restated Agreement and (ii) any and all claims, known and unknown, relating to a default by the Town under the Restated Agreement existing on or before the date of this First Amendment are forever waived.

5. Non-Default by Developer Parties. By executing this First Amendment, the Town affirmatively asserts that (i) the Developer Parties are not currently in default, nor have they been in default at any time prior to this First Amendment, under any of the terms or

conditions of the Restated Agreement and (ii) any and all claims, known and unknown, relating to a default by the Developer Parties under the Restated Agreement existing on or before the date of this First Amendment are forever waived.

6. Successors and Assigns. This First Amendment shall be binding upon and inure to the benefit of the successors and assigns of the respective Parties.

7. Conflict of Interest. This First Amendment is subject to the provisions of ARIZ. REV. STAT. § 38-511.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties have executed this First Amendment as of the date first set forth above.

“Town”

TOWN OF FOUNTAIN HILLS,
an Arizona municipal corporation

Grady E. Miller, Town Manager

ATTEST:

Bevelyn J. Bender, Town Clerk

(ACKNOWLEDGMENT)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On September 6, 2016, before me personally appeared Grady E. Miller, the Town Manager of the TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation, whose identity was proven to me on the basis of satisfactory evidence to be the person who he claims to be, and acknowledged that he signed the above document.

Notary Public

(Affix notary seal here)



[SIGNATURES CONTINUE ON FOLLOWING PAGE]

EXHIBIT A
TO
FIRST AMENDMENT
TO AMENDED AND RESTATED FINAL SETTLEMENT AGREEMENT
BETWEEN THE
TOWN OF FOUNTAIN HILLS
AND
MCO PROPERTIES INC.,
EN LLC,
ADERO CANYON LLC AND
ADERO CANYON II LLC

[Storage Property]

See following page.

ADERO CANYON

