

**RESOLUTION NO. 2018-37**

A RESOLUTION OF THE MAYOR AND TOWN COUNCIL OF FOUNTAIN HILLS, MARICOPA COUNTY, ARIZONA, ADOPTING A DRAINAGE EASEMENT AGREEMENT WITH RCS – PARK PLACE 1, LLC.

**WHEREAS**, the Mayor and Town Council of the Town of Fountain Hills (the “Town”) desire to adopt a drainage easement in the vicinity of the Park Place development pursuant to that certain Development Agreement between the Town and N-Shea Group and Park Place Properties, LLC, recorded in the Official Records of the Maricopa County Recorder at Instrument No. 2016-0478461.

**NOW, THEREFORE, BE IT RESOLVED** BY THE MAYOR AND TOWN COUNCIL OF THE TOWN OF FOUNTAIN HILLS as follows:

SECTION 1. A Drainage Easement Agreement is hereby adopted with RCS – Park Place 1, LLC located through, over, under and across certain real property more specifically described therein, 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 Drainage Easement Agreement and to take all steps necessary to carry out the purpose and intent of this Resolution.

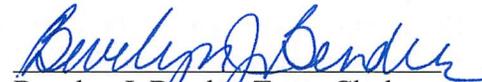
*[Signatures on following page]*

**PASSED AND ADOPTED** by the Mayor and Council of the Town of Fountain Hills, Maricopa County, Arizona, this 5<sup>th</sup> day of June, 2018.

**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

  
Mitesh V. Patel, Interim Town Attorney  
Dickinson Wright PLLC

EXHIBIT A  
TO  
RESOLUTION NO. 2018-37  
[DRAINAGE EASEMENT AGREEMENT]

See following pages.

**WHEN RECORDED RETURN TO:**

Town of Fountain Hills  
Attn: Town Clerk  
16705 East Avenue of the Fountains  
Fountain Hills, Arizona 85268

This Agreement is exempt from the real estate transfer fee and Affidavit of Property Value pursuant to A.R.S. §11-1134(A)(2)

**DRAINAGE EASEMENT AGREEMENT**

GRANTOR: RCS – PARK PLACE 1, LLC, a Colorado limited liability company

GRANTEE: TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation

THIS DRAINAGE EASEMENT AGREEMENT (this “**Easement Agreement**”) is entered into on June 5, 2018, by and between Grantor and Grantee for the purposes set forth below. Grantor and Grantee are sometimes referred to herein collectively as the “**Parties**,” or individually as a “**Party**.”

RECITALS

A. Grantor is the owner of that certain real property at the southwest corner of the intersection of Verde River Drive and the Avenue of the Fountains in the Town of Fountain Hills, Arizona (the “**Receiving Property**”) as described in Exhibit D-1 and depicted on Exhibit D3, attached hereto and incorporated herein by this reference.

B. Grantee is the owner of that certain real property at the southeast corner of the intersection of La Montana Drive and the Avenue of the Fountains in the Town of Fountain Hills, Arizona (the “**Town Property**”) as described depicted on in Exhibit D-2 and depicted on Exhibit D3, which property is adjacent to Grantor’s Receiving Property.

C. Pursuant to that certain Development Agreement between the Town of Fountain Hills, N-Shea Group (“**N-Shea**”), and Park Place Properties, LLC, dated June 17, 2016, recorded on July 7, 2016 in the Official Records of Maricopa County Recorder as Instrument No. 20160478461, as assigned by N-Shea to Grantor (with respect to the “Phase 1” rights and obligations only) pursuant to that certain Assignment and Assumption of Development Agreement (Phase 1), dated September 7, 2016, recorded on September 9, 2016 in the Official Records of Maricopa County Recorder as Instrument No. 20160655029 (as so assigned, the “**Development Agreement**”), Grantor will utilize the Town Property for parking, which parking will eliminate a retention basin necessary for drainage of the Town Property. Accordingly, Grantor has agreed to perpetually receive drainage from the Town Property.

## AGREEMENT

**NOW, THEREFORE**, in consideration of the foregoing introduction and recitals, which are incorporated herein by reference and the mutual covenants set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Grant of Easement. Grantor hereby grants to Grantee a limited, non-exclusive, perpetual blanket easement for drainage purposes, together with the necessary right of access, ingress and egress (the “**Easement**”) over the Receiving Property (excluding all building footprints) (the “**Easement Area**”). Grantor shall design, construct and maintain drainage facilities on the Receiving Property (the “**Drainage Facilities**”) in a manner that drains both the Receiving Property and the Town Property in a manner consistent with the design of the Drainage Facilities as approved by the Grantee.

2. Maintenance of Easement. Grantor hereby agrees that it is solely responsible for maintaining and repairing, as necessary, the Drainage Facilities in good working order and free and clear of any debris that might impede the flow of water through the Drainage Facilities. If Grantor fails to perform any obligations set forth herein, and fails to cure its nonperformance within three business days following written notice thereof from Grantee (unless, with respect to any such breach the nature of which cannot reasonably be cured within such three-day period, Grantee commences such cure within such three-day period and thereafter diligently prosecutes such cure to completion, which completion must occur not later than five days after the date of the notice), Grantee may cure Grantor’s nonperformance. In the event of such cure by Grantee, Grantor hereby agrees to pay Grantee an amount equal to 125% of the total of all costs reasonably incurred by Grantee in the completion of such cure, including reasonable labor and material costs related to Grantee’s employees. Notwithstanding the foregoing, the three-day notice required above shall not be required if Grantee must act to prevent imminent harm to the Town Property; in such instances, Grantee shall give such notice as is reasonable under the circumstances.

3. Indemnification. Grantor shall indemnify, defend and hold harmless Grantee and each council member, officer, employee, contractor or agent thereof (Grantor and any such person being herein called an “**Indemnified Party**”), for, from and against any and all losses, claims, damages, liabilities, costs and expenses (including, but not limited to, reasonable attorneys’ fees, court costs and the costs of appellate proceedings) to which any such Indemnified Party may become subject, under any theory of liability whatsoever (“**Claims**”), insofar as such Claims (or actions in respect thereof) relate to, arise out of, or are caused by or based upon (i) the negligent design and construction of the Drainage Facilities or (ii) failure to properly maintain the Easement Area by Grantee, its employees, agents or any tier of subcontractor acting on Grantor’s behalf. The provisions of this Section will survive for a period of one year following the termination of this Easement Agreement.

4. No Other Interest. Grantee acknowledges and agrees that except for the Easement, Grantee claims no right, title or interest in or to any portion of the Receiving Property.

5. Permits; Compliance with Laws. Grantor shall secure, maintain and comply with all required licenses, permits and certificates relating to, or otherwise necessary or appropriate for the purposes under this Easement Agreement. Grantor shall comply with all applicable federal, state and local laws, rules, regulations, statues, codes, orders and ordinances, including but not limited to, those governing the prevention, abatement and elimination of pollution or protection of the environment.

6. Assignment. Neither Grantor nor Grantee shall have the right or authority to assign, in whole or in part, any of its rights or obligations under this Easement Agreement, or any portion of this Easement Agreement to any third party without the prior, written consent of the other Party, which consent shall not be unreasonably delayed, conditioned or denied. Notwithstanding the foregoing, Grantor and Grantee acknowledge and agree that no such consent shall be required if the underlying property burdened or benefitted by this Easement Agreement is transferred or conveyed to a third party.

7. Running of Benefits and Burdens. All provisions of this Easement Agreement, including the benefits and burdens, run with the land and are binding upon and inure to Grantor, Grantee and their respective successors and assigns.

8. Additional Easements. Nothing contained in this Easement Agreement shall prohibit Grantor from conveying additional easements for access, drainage, utility or other purposes through, over, under, upon, in, across and along the Easement Area; provided, however, that no such additional rights or easements shall unreasonably impair the use of the Drainage Facilities.

9. Notices and Requests. Any notice or other communication required or permitted to be given under this Easement Agreement shall be in writing and shall be deemed to have been duly given if: (i) delivered to the Party at the addresses set forth below; (ii) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below; or (iii) given to a recognized and reputable overnight delivery service, to the address set forth below:

If to Grantee:                   Town of Fountain Hills  
16705 East Avenue of the Fountains.  
Fountain Hills, Arizona 85268  
Attn: Town Manager

With a copy to:               Town of Fountain Hills  
16705 East Avenue of the Fountains.  
Fountain Hills, Arizona 85268  
Attn: Town Attorney

If to Grantor:                 RCS – Park Place 1, LLC  
371 Centennial Parkway, Suite 200  
Louisville, CO 80027  
Attn: Bruce Hazzard

With a copy to: Real Capital Solutions, Inc.  
371 Centennial Parkway, Suite 200  
Louisville, CO 80027  
Attn: Senior Counsel

or at such other address, and to the attention of such other person or officer, as any Party may designate in writing by notice duly given pursuant to this Section. Notices shall be deemed received: (i) when delivered to the Party; (ii) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage; or (iii) the following business day after being given to a recognized overnight delivery service, with the person giving the notice paying all required charges and instructing the delivery service to deliver on the following business day. If a copy of a notice is also given to a Party's counsel or other recipient, the provisions above governing the date on which a notice is deemed to have been received by a Party shall mean and refer to the date on which the Party, and not its counsel or other recipient to which a copy of the notice may be sent, is deemed to have received the notice.

10. Headings. The headings herein are inserted only as a matter of convenience and for reference and in no way define, limit or describe the scope or intent of this document nor in any way affect the terms and provisions hereof.

11. Severability. Invalidation of any of the provisions contained in this Easement Agreement, or of the application thereof to any person by judgment or court order shall in no way affect any of the other provisions hereof or the application thereof to any person and the same shall remain in full force and effect.

12. Attorney's Fees. If either Party commences an action against the other to interpret or enforce any of the terms of this Easement Agreement or because of the breach by the other Party of any of the terms hereof, the losing Party shall pay to the prevailing Party reasonable attorney's fees, costs and expenses, including expert witness fees, incurred in connection with the prosecution or defense of such action. For the purpose of this Easement Agreement, the terms "**attorney's fees, costs and expenses**" shall mean the fees and expenses of counsel to the respective Parties, which may include printing, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. The term "**attorneys' fees, costs and expenses**" shall also include, without limitation, all such fees and expenses incurred with respect to appeals, arbitrations and bankruptcy proceedings.

13. Negation of Partnership. None of the terms or provisions of this Easement Agreement shall be deemed to create a partnership between or among the Parties in their respective businesses or otherwise, nor shall it cause them to be considered joint ventures or members of any joint enterprise. Each Party shall be considered a separate owner, and no Party shall have the right to act as an agent for another Party, unless expressly authorized to do so herein or by separate written instrument signed by the Party to be charged.

14. Applicable Law; Venue. This Easement Agreement shall be governed by the laws of the State of Arizona and suit pertaining to this Easement Agreement may be brought only in courts in Maricopa County, Arizona.

15. Counterparts. This Easement Agreement may be executed in counterparts, all of which are identical, each of which shall be deemed an original, and all of which counterparts, when executed, taken together shall constitute one and the same instrument.

16. Entire Agreement. This instrument contains the entire agreement between the Parties relating to the subject matter hereof. Any oral representations or modifications concerning this instrument shall be of no force or effect, excepting a subsequent recorded modification, signed by Grantor and Grantee or their respective successors or assigns.

[SIGNATURES ON FOLLOWING PAGES]



**"Grantor"**

RCS – PARK PLACE 1, LLC,  
a Colorado limited liability company

By: Sharon K Eshima  
Name: Sharon K Eshima

Title: Manager

(ACKNOWLEDGMENT)

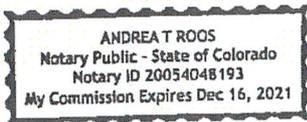
STATE OF COLORADO    )  
  ) ss.  
COUNTY OF BOULDER    )

On ~~June~~ <sup>May</sup> 30, 2018, before me personally appeared Sharon K. Eshima, as Manager of RCS – Park Place 1, LLC, a Colorado limited liability company, whose identity was proven to me on the basis of satisfactory evidence to be the person who he/she claims to be, and acknowledged that he/she signed the above document on behalf of RCS – Park Place 1, LLC, a Colorado limited liability company.

My Commission Expires: 12/16/2021

[Signature]  
Notary Public

(Affix notary seal here)



**Exhibit D-1**

**DRAINAGE EASEMENT AGREEMENT**

**PHASE 1 – RECEIVING PROPERTY – LEGAL DESCRIPTION**

Lot 1A, of the Final Replat of lot 1, of the Final Replat of Block 2, Plat No. 208, Fountain Hills, Arizona, Book 615 of Maps, Page 48, Maricopa County Records, Recorded June 28, 2016, Book 1278 of Maps, Page 31, Records of Maricopa County, Arizona, a portion of Section 15, Township 3 North, Range 6 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

This drainage easement contains an area of 2.58 acres, more or less.



*Expires 3/31/21*

**Exhibit D-2**

**DRAINAGE EASEMENT AGREEMENT**

**TOWN PROPERTY - LEGAL DESCRIPTION**

A portion of the west half of Section 15, Township 3 North, Range 6 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; being more particularly described in that certain Special Warranty Deed, recorded in Instrument Number 1997-0300068, records of Maricopa County, Arizona:

Beginning at the northeast corner of said described Special Warranty Deed, and the northwest corner of Lot 1A of Final Replat of Block 2, Plat No. 208, Book 1278, Page 31, Maricopa County Recorder, Maricopa County, Arizona, said corner being on the south right-of-way of Avenue of the Fountains as shown on said Final Replat No. 208, Block 2;

Thence south 20 degrees 38 minutes 08 seconds west, a distance of 280.36 feet;

Thence leaving said Replat 208, Block 2, north 39 degrees 40 minutes 03 seconds west, a distance of 170.38 feet;

Thence north 20 degrees 38 minutes 08 seconds east, a distance of 195.95 feet to a point on said southerly right-of-way of Avenue of the Fountains;

Thence south 69 degrees 21 minutes 52 seconds east along said southerly right-of-way of Avenue of the Fountains, a distance of 148.00 feet to the POINT OF BEGINNING;

This parking easement contains an area of 0.809 acres, more or less.

*Randy L. Hurd*



*LTP 3/31/21*

**EXHIBIT D-3**  
**DRAINAGE EASEMENT AGREEMENT**  
**BETWEEN THE TOWN OF FOUNTAIN HILLS AND RCS-PARK PLACE 1, LLC**

