CONSTRUCTION SERVICES AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
DAVID RAU
d/b/a
SAGE LANDSCAPE CONTRACTORS

THIS CONSTRUCTION SERVICES AGREEMENT (this "Agreement") is made as of November 29, 2011 (the "Effective Date"), between the Town of Fountain Hills, an Arizona municipal corporation (the "Town") and David Rau, an Arizona sole proprietorship d/b/a Sage Landscape Contractors (the "Contractor").

RECITALS

A. Pursuant to Town Code Section 3-3-5(C), the Town contacted contractors seeking quotations (the "Quotation Request") for tree planting and irrigation installation services for the Town on the southeast side of Fountain Park (the "Services").

B. The Contractor responded to the Quotation Request, a copy of which is attached at Exhibit B, and incorporated herein by reference, and the Town desires to enter into an Agreement with the Contractor for the Contractor to perform the Services.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing 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 Contractor hereby agree as follows:

1. Project Description. Contractor shall do and perform, or cause to be done and performed in accordance with this Agreement, the Services necessary for the project entitled "Greening of Downtown" (the "Project") in accordance with and as more fully described in the Scope of Work and the "Greening of Downtown Fountain Hills" Plans as prepared by Swaback Partners, PLLC, dated June 2010, including, EX-1 Existing Condition Plan, L-1.0 Site Preparation and Demolition Plan, L-2.1 Planting Plan, L-2.2 Planting Details, L-3.1 Irrigation Plan, L-3.2 Irrigation Details, and L-3.3 Irrigation Notes/Specifications (collectively the "Scope") all of which are included as Exhibit A and incorporated herein by reference. Performance of the Services according to the Scope is referred to herein as the "Work." The Work must be performed and completed in accordance with all requirements of law and no Work shall be undertaken until Contractor has been issued all required permits.

2. Contract Time. The Work shall be completed by the later to occur of (i) 30 days from the date the Town issues a Notice to Proceed, or (ii) December 2, 2011 (the "Contract Time"). It is expressly understood that should Contractor fail to complete the Work covered hereby within the Contract Time, the Contractor agrees to pay and shall pay to the Town upon request therefore for each calendar day of delay beyond Contract Time, as liquidated damages, and

not as a penalty, the amount per day as set forth in MAG Specifications for each calendar day of delay.

3. Compensation; Payment. The Town shall pay Contractor a price not to exceed $12,768.00 for the Work, in accordance with the Contractor's Response to the Quotation Request (the "Contract Price"), attached hereto as Exhibit B and incorporated herein by reference. No adjustment will be made to the Contract Price except by approved Change Order. Upon receipt of written notice that the Work is ready for final inspection and acceptance, the Town's representative shall promptly make a final inspection and, upon the Town's acceptance of the Work, the Town's representative shall promptly approve a certificate for payment stating that upon knowledge, information and belief and on the basis of observations and inspections, the Work has been completed in accordance with the terms and conditions of the Agreement and that the entire balance found to be due to the Contractor is due and payable.

4. Reference Standards. To the extent applicable, the Contractor shall perform the Work required in conformance with the "Uniform Standard Specifications for Public Works Construction, 1998 Edition with revisions through 2011" and, except where specifically modified by the Town of Fountain Hills Standard Details, the "Uniform Standard Details for Public Works Construction, 1998 Edition with revisions through 2011" which are sponsored and distributed by the Maricopa Association of Governments ("MAG"), together with any amendments or supplements adopted by the Town (collectively the "MAG Specifications"). The MAG Specifications are incorporated herein by reference. In the event traffic control is affected by the Work pursuant to this Agreement, traffic control shall be regulated in accordance with the then-current version of the *City of Phoenix-Traffic Barricade Manual* (the "Barricade Manual") which is incorporated herein by reference. This Agreement shall govern in a conflict with the terms of the Barricade Manual or the MAG Specifications.

5. Inspection, Safety and Compliance. Each Contractor must inform itself fully of the conditions relating to the construction of the Project and the employment of labor thereon. Failure to do so will not relieve the Contractor of its obligation to furnish all material and labor necessary to carry out the provisions of this Agreement. Insofar as possible the Contractor, in carrying out its work, must employ such methods or means as will not cause any interruption of or interference with the work of any other contractor. Contractor affirms that it has inspected the jobsite and has thoroughly reviewed this Agreement including, without limitation, the Scope documents listed on Exhibit A, as the same may be revised by the Town, and is not relying on any opinions or representations of Town. Contractor agrees to perform and complete such Work in strict accordance with this Agreement and under the general direction of the Town. Contractor agrees that any exclusions of any Work must be approved in writing by the Town prior to acceptance of this Agreement or same shall not be excluded hereunder. Contractor is responsible for all safety precautions and programs and shall provide all protection and necessary supervision to implement said precautions and programs. Contractor shall take all reasonable precautions for the safety of and provide reasonable protection to prevent damage, injury or loss to: (i) employees or others on the Project, (ii) the Work and materials and (iii) other property at the Project or adjacent thereto. Contractor shall designate a responsible person on the Project whose duty shall be prevention of accidents. Contractor shall provide all competent supervision necessary to execute all Work and any Work incidental thereto in a thorough, first-class, workmanlike manner. It is Contractor's responsibility that all of the Work and any work incidental thereto conforms to, and is performed in accordance with, all applicable federal, state, county and city laws, codes, ordinances, regulations

(including NPDES and air pollution) and orders of public authorities bearing on performance of the Work.

6. Changes in the Work. The Town may, without invalidating this Agreement, order changes in the Work consisting of additions, deletions or other revisions to the Agreement and the Contract Price and the Contract Time shall be adjusted as provided below. The Contract Price and/or the Contract Time may only be changed by the Town's written directive or approval authorizing said change, and said changes shall be performed under the applicable conditions of the Contract. The Contract Price shall be adjusted as a result of a change in the Work as follows:

6.1 Additions. When the Town increases the scope of the Work, Contractor will perform the increased work pursuant to Contractor's unit prices set forth in Exhibit B.

6.2 Deletions. When the Town decreases the Work resulting in a decrease in Contractor's quantity of the Work, the Town shall be allowed a decrease in the Contract Price amounting to the quantity of the deleted Work multiplied by the Contractor's unit prices as set forth in Exhibit B.

6.3 Estimating. Whenever the Town is considering a change to the Work, Contractor shall promptly, and in any event within five business days, estimate the price of the contemplated additional or deleted Work in good faith and as accurately as is then feasible. The estimate shall show quantities of labor, material and equipment and shall be pursuant to the rates set forth in the Contractor's Response to the Quotation Request, set forth in Exhibit B.

7. Documents. All documents prepared and submitted to the Town pursuant to this Agreement shall be the property of the Town.

8. Contractor Personnel.

8.1 Project Manager. Contractor shall employ a competent Project Manager and necessary assistants who shall be in attendance at the Project site during the progress of the Work. The Project Manager shall represent and be the agent of the Contractor and communications given to the Project Manager shall be as binding as if given to the Contractor.

8.2 Staffing. Contractor shall provide adequate, experienced personnel, capable of and devoted to the successful completion of the Work to be performed under this Agreement. Contractor agrees to assign specific individuals to key positions. Contractor agrees that, upon commencement of the Work to be performed pursuant to this Agreement, key personnel shall not be removed or replaced without prior written notice to the Town. If key personnel are not available to perform the Work for a continuous period exceeding 30 calendar days, or are expected to devote substantially less effort to the Work than initially anticipated, Contractor shall immediately notify the Town of same and shall, subject to the concurrence of the Town, replace such personnel with personnel of substantially equal ability and qualifications.

9. Progress Schedule. Contractor, immediately after entering into this Agreement, shall provide the Town with any requested scheduling information and a proposed progress schedule for performance of the Work in a form acceptable to the Town providing for

commencement and completion of the Work within the Contract Time. Contractor shall prosecute the Work in a prompt and diligent manner and without hindering or delaying the Work of other contractors of subcontractors on the Project. The progress schedule shall be supplemented thereafter upon request. Work shall not commence upon this Project until a written Notice to Proceed has been issued to the Contractor by the Town. The Notice to Proceed will be considered issued on the date it is sent to the Contractor by certified mail, facsimile or delivered to the Contractor in person.

10. Drawings and Samples. Contractor shall furnish, within three working days following request therefore by the Town, detailed drawings of the Work and samples of materials required for the performance or coordination of the Work. Drawings and samples shall comply with the Scope or shall be rejected.

11. Errors in the Plans. The details and specifications are presumed to be correct, but Contractor shall be required to check carefully all dimensions and verify all vertical and horizontal controls using the nearest benchmark before beginning the Work. If any errors or omissions are discovered, the Town's representative shall be so notified in writing. The Town's representative shall immediately notify the Town's Engineer, who will then make such corrections, and interpretations as may be deemed necessary for fulfilling the intent of the plans and specifications and shall issue appropriate corrections. Any adjustments made by Contractor without prior review and acceptance shall be at its own risk. The settlement of any complication or disputed expenses arising from an adjustment made by Contractor shall be paid by Contractor at its own expense.

12. Inspection; Acceptance. All Work shall be subject to inspection and acceptance by the Town at reasonable times during Contractor's performance. The Contractor shall provide and maintain a self-inspection system that is acceptable to the Town.

13. Licenses, Permits; Fees. Contractor shall secure and pay for all permits, governmental fees, licenses and inspections necessary for the proper execution and completion of Work which are customarily secured after execution of the Agreement and which are legally required. Contractor shall maintain in current status all federal, state and local licenses and permits required for the operation of the business conducted by the Contractor. The Town has no obligation to provide Contractor, its employees or subcontractors any business registrations or licenses required to perform the specific services set forth in this Agreement.

14. Labor; Materials. The Town has no obligation to provide tools, equipment or material to Contractor. Contractor shall provide and pay and shall insure under the requisite laws and regulations all labor, materials, equipment, tools, construction equipment, machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether incorporated or to be incorporated in the Work.

15. Warranty. Contractor warrants to the Town that all materials and equipment furnished under this Contract will be new, and that all Work will be of good quality, free from faults and defects. Contractor further guarantees all Work and materials for a period of one year from the date of acceptance of the Project. Should any portion of the Work need replacement or repair within one year from the date of completion due to construction methods or material failure, the Contractor shall replace such Work at no cost to the Town. If Contractor fails within

reasonable time to replace or repair any portion of the Work deemed to be needed, the Town may cause such Work to be done and Contractor agrees to pay all costs incurred therein. All Work not conforming to the Scope documents, including substitutions not properly approved and authorized, may be considered defective. If required by the Town, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment.

16. Performance Warranty. Contractor warrants that the services rendered in performance of the Work will conform to the requirements of this Agreement and to the highest professional standards in the field.

17. Taxes. Contractor shall pay all licenses, sales, consumer, use and other similar taxes for the Work or portions thereof provided by the Contractor which are legally enacted at the time on the Effective Date of this Agreement, whether effective or subsequently applicable due to acts of jurisdictions or bodies other than the Town.

18. Indemnification. To the fullest extent permitted by law, the Contractor shall indemnify, defend and hold harmless the Town and each council member, officer, employee or agent thereof (the Town 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 the negligent acts, intentional misconduct, errors, mistakes or omissions, in connection with the work or services of the Contractor, its officers, employees, agents, or any tier of subcontractor in the performance of this Agreement. The amount and type of insurance coverage requirements set forth below will in no way be construed as limiting the scope of the indemnity in this Section.

19. Insurance.

19.1 General.

A. Insurer Qualifications. Without limiting any obligations or liabilities of Contractor, Contractor shall purchase and maintain, at its own expense, hereinafter stipulated minimum insurance with insurance companies authorized to do business in the State of Arizona pursuant to ARIZ. REV. STAT. § 20-206, as amended, with an AM Best, Inc. rating of A- or above with policies and forms satisfactory to the Town. Failure to maintain insurance as specified herein may result in termination of this Agreement at the Town's option.

B. No Representation of Coverage Adequacy. By requiring insurance herein, the Town does not represent that coverage and limits will be adequate to protect Contractor. The Town reserves the right to review any and all of the insurance policies and/or endorsements cited in this Agreement but has no obligation to do so. Failure to demand such evidence of full compliance with the insurance requirements set forth in this Agreement or failure to identify any insurance deficiency shall not relieve Contractor from, nor be construed or deemed a waiver of, its obligation to maintain the required insurance at all times during the performance of this Agreement.

C. Additional Insured. All insurance coverage and self-insured retention or deductible portions, except Workers' Compensation insurance and Professional Liability insurance, if applicable, shall name, to the fullest extent permitted by law for claims arising out of the performance of this Agreement, the Town, its agents, representatives, officers, directors, officials and employees as Additional Insured as specified under the respective coverage sections of this Agreement.

D. Coverage Term. All insurance required herein shall be maintained in full force and effect until all work or services required to be performed under the terms of this Agreement are satisfactorily performed, completed and formally accepted by the Town, unless specified otherwise in this Agreement.

E. Primary Insurance. Contractor's insurance shall be primary insurance with respect to performance of this Agreement and in the protection of the Town as an Additional Insured.

F. Waiver. All policies, except for Professional Liability, including Workers' Compensation insurance, shall contain a waiver of rights of recovery (subrogation) against the Town, its agents, representatives, officials, officers and employees for any claims arising out of the work or services of Contractor. Contractor shall arrange to have such subrogation waivers incorporated into each policy via formal written endorsement thereto.

G. Policy Deductibles and/or Self-Insured Retentions. The policies set forth in these requirements may provide coverage that contains deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to the Town. Contractor shall be solely responsible for any such deductible or self-insured retention amount.

H. Use of Subcontractors. If any work under this Agreement is subcontracted in any way, Contractor shall execute written agreements with its subcontractors containing the indemnification provisions set forth in this Section and insurance requirements set forth herein protecting the Town and Contractor. Contractor shall be responsible for executing any agreements with its subcontractors and obtaining certificates of insurance verifying the insurance requirements.

I. Evidence of Insurance. Prior to commencing any work or services under this Agreement, Contractor will provide the Town with suitable evidence of insurance in the form of certificates of insurance and a copy of the declaration page(s) of the insurance policies as required by this Agreement, issued by Contractor's insurance insurer(s) as evidence that policies are placed with acceptable insurers as specified herein and provide the required coverages, conditions and limits of coverage specified in this Agreement and that such coverage and provisions are in full force and effect. Confidential information such as the policy premium may be redacted from the declaration page(s) of each insurance policy, provided that such redactions do not alter any of the information required by this Agreement. The Town shall reasonably rely upon the certificates of insurance and declaration page(s) of the insurance policies as evidence of coverage but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. In the event any insurance policy required by this Agreement is written on a "claims made" basis, coverage shall extend for two years past

completion of the Work and the Town's acceptance of the Contractor's Work or services and as evidenced by annual certificates of insurance. If any of the policies required by this Agreement expire during the life of this Agreement, it shall be Contractor's responsibility to forward renewal certificates and declaration page(s) to the Town 30 days prior to the expiration date. All certificates of insurance and declarations required by this Agreement shall be identified by referencing this Agreement. A $25.00 administrative fee shall be assessed for all certificates or declarations received without a reference to this Agreement. Additionally, certificates of insurance and declaration page(s) of the insurance policies submitted without referencing this Agreement will be subject to rejection and may be returned or discarded. Certificates of insurance and declaration page(s) shall specifically include the following provisions:

(1) The Town, its agents, representatives, officers, directors, officials and employees are Additional Insureds as follows:

(a) Commercial General Liability - Under Insurance Services Office, Inc., ("ISO") Form CG 20 10 03 97 or equivalent.

(b) Auto Liability - Under ISO Form CA 20 48 or equivalent.

(c) Excess Liability - Follow Form to underlying insurance.

(2) Contractor's insurance shall be primary insurance as respects performance of the Agreement.

(3) All policies, except for Professional Liability, including Workers' Compensation, waive rights of recovery (subrogation) against Town, its agents, representatives, officers, officials and employees for any claims arising out of work or services performed by Contractor under this Agreement.

(4) A 30-day advance notice cancellation provision. If ACORD certificate of insurance form is used, the phrases in the cancellation provision "endeavor to" and "but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives" shall be deleted. Certificate forms other than ACORD form shall have similar restrictive language deleted.

19.2 Required Insurance Coverage.

A. Commercial General Liability. Contractor shall maintain "occurrence" form Commercial General Liability insurance with an unimpaired limit of not less than $1,000,000 for each occurrence, $2,000,000 Products and Completed Operations Annual Aggregate and a $2,000,000 General Aggregate Limit. The policy shall cover liability arising from premises, operations, independent contractors, products-completed operations, personal injury and advertising injury. Coverage under the policy will be at least as broad as ISO policy form CG 00 010 93 or equivalent thereof, including but not limited to, separation of insured's clause. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the Town, its agents, representatives, officers, officials and employees shall be cited as an Additional

Insured under ISO, Commercial General Liability Additional Insured Endorsement form CG 20 10 03 97, or equivalent, which shall read "Who is an Insured (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of "your work" for that insured by or for you." If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

B. Vehicle Liability. Contractor shall maintain Business Automobile Liability insurance with a limit of $1,000,000 each occurrence on Contractor's owned, hired and non-owned vehicles assigned to or used in the performance of the Contractor's work or services under this Agreement. Coverage will be at least as broad as ISO coverage code "1" "any auto" policy form CA 00 01 12 93 or equivalent thereof. To the fullest extent allowed by law, for claims arising out of the performance of this Agreement, the Town, its agents, representatives, officers, directors, officials and employees shall be cited as an Additional Insured under ISO Business Auto policy Designated Insured Endorsement form CA 20 48 or equivalent. If any Excess insurance is utilized to fulfill the requirements of this subsection, such Excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.

C. Professional Liability. If this Agreement is the subject of any professional services or work, or if the Contractor engages in any professional services or work adjunct or residual to performing the work under this Agreement, the Contractor shall maintain Professional Liability insurance covering negligent errors and omissions arising out of the Work performed by the Contractor, or anyone employed by the Contractor, or anyone for whose negligent acts, mistakes, errors and omissions the Contractor is legally liable, with an unimpaired liability insurance limit of $2,000,000 each claim and $2,000,000 annual aggregate. In the event the Professional Liability insurance policy is written on a "claims made" basis, coverage shall extend for two years past completion and acceptance of the Work, and the Contractor shall be required to submit certificates of insurance and a copy of the declaration page(s) of the insurance policies evidencing proper coverage is in effect as required above.

D. Workers' Compensation Insurance. Contractor shall maintain Workers' Compensation insurance to cover obligations imposed by federal and state statutes having jurisdiction over Contractor's employees engaged in the performance of work or services under this Agreement and shall also maintain Employers Liability Insurance of not less than $500,000 for each accident, $500,000 disease for each employee and $1,000,000 disease policy limit.

19.3 Cancellation and Expiration Notice. Insurance required herein shall not expire, be canceled, or materially changed without 30 days' prior written notice to the Town.

20. Termination; Cancellation.

20.1 Termination by the Town for Cause.

A. Default; Cure. If the Contractor refuses or fails to supply sufficient properly skilled staff or proper materials, or disregards laws, ordinances, rules, regulations, or orders of any public authority jurisdiction, or otherwise substantially violates or materially breaches any term or provision of this Agreement, and such nonperformance or violation continues

without cure for 15 days after the Contractor receives written notice of such nonperformance or violation from the Town, then the Town may, without prejudice to any right or remedy otherwise available to the Town, terminate this Agreement.

B. Substitute Performance. Upon termination of this Agreement by the Town, the Town shall be entitled to furnish or have furnished the Work to be performed hereunder by the Contractor by whatever method the Town may deem expedient. Such substitute performance shall not constitute or be construed as a waiver by the Town of any action, claim or demand the Town may have against Contractor by reason of injury or damage resulting to the Town because of Contractor's failure of performance hereunder. Contractor shall pay to the Town a sum equal to the Town's total cost of completing such Work, and a sum for reasonable attorneys' fees and litigation expenses for procuring substitute performance for the Work. In no event shall any delay in performance hereunder by Contractor be excused unless, and then to the extent only, such delay is excused by the Town in writing.

C. Contractor Insolvency. Upon the appointment of a receiver for the Contractor, or if the Contractor makes a general assignment for the benefit of creditors, the Town may terminate this Contract, without prejudice to any right or remedy otherwise available to the Town, upon giving three working days' written notice to the Contractor. If an order for relief is entered under the Bankruptcy Code with respect to the Contractor, the Town may terminate this Agreement by giving three working days' written notice to the Contractor unless the Contractor or the trustee completes all of the following:

(1) Promptly cures all breaches within such three-day period.

(2) Provides adequate assurances of future performance.

(3) Compensates the Town for actual pecuniary loss resulting from such breaches.

(4) Assumes the obligations of the Contractor within the established time limits.

20.2 Termination by the Town for Convenience. The Town may, upon 30 days' written notice to the Contractor, terminate this Contract, in whole or in part, for the convenience of the Town without prejudice to any right or remedy otherwise available to the Town. Upon receipt of such notice, the Contractor shall immediately discontinue all services affected unless such notice directs otherwise. In the event of a termination for convenience of the Town, the Contractor's sole and exclusive right and remedy shall be payment for all work performed through the date of termination. The Contractor shall not be entitled to be paid any amount as profit for unperformed services or consideration for the termination of convenience by the Town.

20.3 Conflict of Interest. This Agreement is subject to the provisions of ARIZ. REV. STAT. § 38-511. The Town may cancel this Agreement without penalty or further obligations by the Town or any of its departments or agencies if any person significantly involved in initiating, negotiating, securing, drafting or creating this Agreement on behalf of the Town or any of its departments or agencies is, at any time while the Agreement or any extension of the Agreement is

in effect, an employee of any other party to the Agreement in any capacity or a consultant to any other party of the Agreement with respect to the subject matter of the Agreement.

20.4 Gratuities. The Town may, by written notice to the Contractor, cancel this Agreement if it is found by the Town that gratuities, in the form of economic opportunity, future employment, entertainment, gifts or otherwise, were offered or given by the Contractor or any agent or representative of the Contractor to any officer, agent or employee of the Town for the purpose of securing this Agreement. In the event this Agreement is cancelled by the Town pursuant to this provision, the Town shall be entitled, in addition to any other rights and remedies, to recover or withhold from the Contractor an amount equal to 150% of the gratuity.

21. Agreement Subject to Appropriation. This Agreement is subject to the provisions of ARIZ. CONST. ART. IX, § 5 and ARIZ. REV. STAT. § 42-17106. The provisions of this Agreement for payment of funds by the Town shall be effective when funds are appropriated for purposes of this Agreement and are actually available for payment. The Town shall be the sole judge and authority in determining the availability of funds under this Agreement and the Town shall keep the Contractor fully informed as to the availability of funds for the Agreement. The obligation of the Town to make any payment pursuant to this Agreement is a current expense of the Town, payable exclusively from such annual appropriations, and is not a general obligation or indebtedness of the Town. If the Town Council fails to appropriate money sufficient to pay the amounts as set forth in this Agreement during any immediately succeeding fiscal year, this Agreement shall terminate at the end of then-current fiscal year and the Town and the Contractor shall be relieved of any subsequent obligation under this Agreement.

22. Miscellaneous.

22.1 Independent Contractor. The Contractor acknowledges and agrees that the Work provided under this Agreement is being provided as an independent contractor, not as an employee or agent of the Town. Contractor, its employees and subcontractors are not entitled to workers' compensation benefits from the Town. The Town does not have the authority to supervise or control the actual work of Contractor, its employees or subcontractors. The Contractor, and not the Town, shall determine the time of its performance of the Work provided under this Agreement so long as Contractor meets the requirements of its agreed Scope as set forth in Section 1 above. Contractor is neither prohibited from entering into other contracts nor prohibited from practicing its profession elsewhere. Town and Contractor do not intend to nor will they combine business operations under this Agreement.

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

22.3 Laws and Regulations. Contractor shall keep fully informed and shall at all times during the performance of its duties under this Agreement ensure that it and any person for whom the Contractor is responsible abides by, and remains in compliance with, all rules, regulations, ordinances, statutes or laws affecting the services, including, but not limited to, the following: (A) existing and future City and County ordinances and regulations, (B) existing and future State and Federal laws and (C) existing and future Occupational Safety and Health Administration standards.

22.4 Amendments. This Agreement may be modified only by a written amendment signed by persons duly authorized to enter into contracts on behalf of the Town and the Contractor.

22.5 Provisions Required by Law. Each and every provision of law and any clause required by law to be in the Agreement will be read and enforced as though it were included herein and, if through mistake or otherwise any such provision is not inserted, or is not correctly inserted, then upon the application of either party, the Agreement will promptly be physically amended to make such insertion or correction.

22.6 Severability. The provisions of this Agreement are severable to the extent that any provision or application held to be invalid by a Court of competent jurisdiction shall not affect any other provision or application of the Agreement which may remain in effect without the invalid provision or application.

22.7 Entire Agreement; Interpretation; Parol Evidence. This Agreement represents the entire agreement of the parties with respect to its subject matter, and all previous agreements, whether oral or written, entered into prior to this Agreement are hereby revoked and superseded by this Agreement. No representations, warranties, inducements or oral agreements have been made by any of the parties except as expressly set forth herein, or in any other contemporaneous written agreement executed for the purposes of carrying out the provisions of this Agreement. This Agreement shall be construed and interpreted according to its plain meaning, and no presumption shall be deemed to apply in favor of, or against the party drafting the Agreement. The parties acknowledge and agree that each has had the opportunity to seek and utilize legal counsel in the drafting of, review of, and entry into this Agreement.

22.8 Assignment. No right or interest in this Agreement shall be assigned by Contractor without prior, written permission of the Town signed by the Town Manager and no delegation of any duty of Contractor shall be made without prior, written permission of the Town signed by the Town Manager. Any attempted assignment or delegation by Contractor in violation of this provision shall be a breach of this Agreement by Contractor.

22.9 Subcontracts. No subcontract shall be entered into by the Contractor with any other party to furnish any of the material or services specified herein without the prior written approval of the Town. The Contractor is responsible for performance under this Agreement whether or not subcontractors are used. The names of subcontractors submitted at the time of the submission of this Agreement to the Town shall be assumed to be the subcontractors which the Contractor shall use for Work required to be done under the Contract Documents. The Contractor shall make no substitution for any subcontractor, person, or entity previously selected if the Town makes a reasonable objection to such substitution. Contractor shall not contract with any subcontractor to whom the Town has made a reasonable objection. Contractor shall not be required to contract with anyone to whom it has made a reasonable objection.

22.10 Rights and Remedies. No provision in this Agreement shall be construed, expressly or by implication, as waiver by the Town of any existing or future right and/or remedy available by law in the event of any claim of default or breach of this Agreement. The failure of the Town to insist upon the strict performance of any term or condition of this Agreement or to

exercise or delay the exercise of any right or remedy provided in this Agreement, or by law, or the Town's acceptance of and payment for services, shall not release the Contractor from any responsibilities or obligations imposed by this Agreement or by law, and shall not be deemed a waiver of any right of the Town to insist upon the strict performance of this Agreement.

22.11 Attorneys' Fees. In the event either party brings any action for any relief, declaratory or otherwise, arising out of this Agreement or on account of any breach or default hereof, the prevailing party shall be entitled to receive from the other party reasonable attorneys' fees and reasonable costs and expenses, determined by the court sitting without a jury, which shall be deemed to have accrued on the commencement of such action and shall be enforced whether or not such action is prosecuted through judgment.

22.12 Liens. All materials or services shall be free of all liens and, if the Town requests, a formal release of all liens shall be delivered to the Town.

22.13 Offset.

A. Offset for Damages. In addition to all other remedies at law or equity, the Town may offset from any money due to the Contractor any amounts Contractor owes to the Town for damages resulting from breach or deficiencies in performance or breach of any obligation under this Agreement.

B. Offset for Delinquent Fees or Taxes. The Town may offset from any money due to the Contractor any amounts Contractor owes to the Town for delinquent fees, transaction privilege taxes and property taxes, including any interest or penalties.

22.14 Notices and Requests. Any notice or other communication required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if (A) delivered to the party at the address set forth below, (B) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below, (C) given to a recognized and reputable overnight delivery service, to the address set forth below or (D) delivered by facsimile transmission to the number set forth below:

If to the Town: Town of Fountain Hills
16705 East Avenue of the Fountains
Fountain Hills, Arizona 85268
Facsimile: 480-837-3145
Attn: Julie Ghetti, Interim Town Manager

With copy to: GUST ROSENFELD, P.L.C.
One East Washington Street, Suite 1600
Phoenix, Arizona 85004-2553
Facsimile: (602) 254-4878
Attn: Andrew J. McGuire, Esq.

If to Contractor: David Rau
PO Box 17164
Fountain Hills, Arizona 85269
Facsimile:_____
Attn: David Rau

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 subsection. Notices shall be deemed received (A) when delivered to the party, (B) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage, (C) 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, or (D) when received by facsimile transmission during the normal business hours of the recipient. 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.

22.15 Confidentiality of Records. The Contractor shall establish and maintain procedures and controls that are acceptable to the Town for the purpose of ensuring that information contained in its records or obtained from the Town or from others in carrying out its obligations under this Agreement shall not be used or disclosed by it, its agents, officers, or employees, except as required to perform Contractor's duties under this Agreement. Persons requesting such information should be referred to the Town. Contractor also agrees that any information pertaining to individual persons shall not be divulged other than to employees or officers of Contractor as needed for the performance of duties under this Agreement.

22.16 Records and Audit Rights. To ensure that the Contractor and its subcontractors are complying with the warranty under subsection 13.18 below, Contractor's and its subcontractor's books, records, correspondence, accounting procedures and practices, and any other supporting evidence relating to this Agreement, including the papers of any Contractor and its subcontractors' employees who perform any work or services pursuant to this Agreement (all of the foregoing hereinafter referred to as "Records"), shall be open to inspection and subject to audit and/or reproduction during normal working hours by the Town, to the extent necessary to adequately permit (A) evaluation and verification of any invoices, payments or claims based on Contractor's and its subcontractors' actual costs (including direct and indirect costs and overhead allocations) incurred, or units expended directly in the performance of work under this Agreement and (B) evaluation of the Contractor's and its subcontractors' compliance with the Arizona employer sanctions laws referenced in subsection 13.18 below. To the extent necessary for the Town to audit Records as set forth in this subsection, Contractor and its subcontractors hereby waive any rights to keep such Records confidential. For the purpose of evaluating or verifying such actual or claimed costs or units expended, the Town shall have access to said Records, even if located at its subcontractors' facilities, from the effective date of this Agreement for the duration of the work and until three years after the date of final payment by the Town to Contractor pursuant to this Agreement. Contractor and its subcontractors shall provide the Town with adequate and appropriate workspace so that the Town can conduct audits in compliance with the provisions of this subsection. The Town shall give Contractor or its subcontractors reasonable advance notice of

intended audits. Contractor shall require its subcontractors to comply with the provisions of this subsection by insertion of the requirements hereof in any subcontract pursuant to this Agreement.

22.17 E-verify Requirements. To the extent applicable under ARIZ. REV. STAT. § 41-4401, the Contractor and its subcontractors warrant compliance with all federal immigration laws and regulations that relate to their employees and their compliance with the E-verify requirements under ARIZ. REV. STAT. § 23-214(A). Contractor's or its subcontractor's failure to comply with such warranty shall be deemed a material breach of this Agreement and may result in the termination of this Agreement by the Town.

22.18 Scrutinized Business Operations. Pursuant to ARIZ. REV. STAT. §§ 35-391.06 and 35-393.06, the Contractor certifies that it does not have scrutinized business operations in Sudan or Iran. For the purpose of this subsection the term "scrutinized business operations" shall have the meanings set forth in ARIZ. REV. STAT. §§ 35-391 or 35-393, as applicable. If the Town determines that the Contractor submitted a false certification, the Town may impose remedies as provided by law including terminating this Agreement.

22.19 Conflicting Terms. In the event of any inconsistency, conflict or ambiguity among the Agreement, the Scope of Work, the Quotation Request and the Contractor's Response to the Quotation Request, the documents shall govern in the order listed herein.

22.20 Non-Exclusive Contract. This Agreement is entered into with the understanding and agreement that it is for the sole convenience of the Town. The Town reserves the right to obtain like goods and services from another source when necessary.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first set forth above.

"Town"

TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation

Julie Ghetti, Interim Town Manager

ATTEST:

Bevelyn J. Bender, Town Clerk

(ACKNOWLEDGMENT)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

This instrument was acknowledged before me on November 30, 2011, by Julie Ghetti, the Interim Town Manager of the TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation, on behalf of the Town of Fountain Hills.

JANICE E. BAXTER
NOTARY PUBLIC - ARIZONA
MARICOPA COUNTY
My Comm. Exp. December 6, 2012

Notary Public in and for the State of Arizona

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

"Contractor"

DAVID RAU, an Arizona sole
proprietorship d/b/a Sage Landscape Contractors

By: D d ER

Name: DAVID E. RAU

Title: PRESIDENT

(ACKNOWLEDGMENT)

STATE OF Arizona)
) ss.
COUNTY OF Maricopa)

This instrument was acknowledged before me on David E Rau, 2011, by DAVID RAU, in his individual capacity.

Bevelyn J Bender
Notary Public in and for the State of AZ

(affix notary seal here)

BEVELYN J. BENDER
Notary Public - State of Arizona
MARICOPA COUNTY
My Commission Expires August 27, 2015

1630690.1

EXHIBIT A
TO
CONSTRUCTION SERVICES AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
DAVID RAU
d/b/a
SAGE LANDSCAPE CONTRACTORS

[Scope]

See following page(s).

SCOPE

Contractor shall provide the Work required for this project including, but not limited to, furnishing and planting 40 trees in the Town's, Fountain Park, and installation of a drip irrigation system specified in the plans as prepared by Swaback Partners, PLLC, dated June 2010 (the "Specifications"). There are two existing 1" drip valves available for Phase 4 and approximately 1,650 linear feet of dripline (purple pipe) required to supply effluent water to trees.

1. Selection of Trees. Trees shall conform to the minimum guidelines established for nursery stock published by the American Association of Nurserymen, Inc. and from a nursery stock approved by the Town. All trees for the project shall be specimen quality. The Town of Fountain Hills' Supervisor of Parks, or another person to be designated shall approve each tree at the nursery prior to digging or delivery to the site. Each tree selected shall be tagged.

2. Transporting Trees. Trees shall be covered during transport to minimize stress and harm. All stock shall be boxed and arrive as originally tagged at the nursery. Trees substituted between the time of selection and jobsite delivery may be rejected.

3. Layout of Trees. Contractor shall have all existing utilities located and then mark the location of each tree to verify planned tree positions do not conflict with known underground utilities. Should conflicts exist, the Contractor shall notify the Supervisor of Parks to determine how to resolve the conflict.

4. Planting Trees. Trees shall be set three inches above the surrounding grade, root flare visible, add vitamin B root stimulator, add a 3" top layer of compost, and shall be planted in accordance with the tree planting details on the Specifications.

5. Drip Irrigation System. Contractor shall install drip irrigation for each tree in accordance with the Specifications.

6. Plans/Specifications. Contractor shall fully adhere to the Specifications.

EXHIBIT B
TO
CONSTRUCTION SERVICES AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
DAVID RAU
d/b/a
SAGE LANDSCAPE CONTRACTORS

[Contractor's Response to Quotation Request]

See following page.

BID AMOUNT
SAGE LANDSCAPE CONTRACTORS

QUOTATION

GREENING OF DOWNTOWN FOUNTAIN HILLS

	Description	Unit	Bid Quantity	Unit Price	Extended Price
	GDC Phase 4				
1.	36" Box Tree Nursery Price	Ea.	8	$ 275.00	$ 2,200.00
2.	24" Box Tree Nursery Price	Ea.	32	$ 88.00	$ 2,816.00
3.	36" Box Tree Delivered and Planted	Ea.	8	242.00	1,936.00
4.	24" Box Tree Delivered and Planted	Ea.	32	88.00	2,816.00
5.	Drip Irrigation System	Ea.	40	$ 75.00	$ 3,000.00
	Subtotal				12,768.00
	Taxes (as applicable)				
	TOTAL QUOTE AMOUNT				

Signature of Authorized Agent: [signature]

Typed or Printed Name: DAVID E RAU Title: PRESIDENT

Telephone No. 480-585-4446 602-702-2800

Date: OCT 16, 2011

1595745.2