RESOLUTION 2015-51

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING A DEVELOPMENT AGREEMENT BETWEEN THE TOWN AND MS-RCS FOUNTAIN HILLS, LLC.

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

SECTION 1. The Development Agreement between the Town of Fountain Hills and MS-RCS Fountain Hills, LLC 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 execute all documents 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, October 1, 2015.

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 2015-51

[Development Agreement]

See following pages.
DEVELOPMENT AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
MS-RCS FOUNTAIN HILLS, LLC

THIS DEVELOPMENT AGREEMENT (this “Agreement”) dated October 1, 2015 (the “Effective Date”), is made and entered into by and between the Town of Fountain Hills, an Arizona municipal corporation (the “Town”), and MS-RCS Fountain Hills, LLC a Colorado limited liability company (the “Owner”). The Town and Owner are sometimes referred to herein as the “Parties” or individually as a “Party.”

RECITALS

A. Owner owns that certain real property located at the northeast corner of Verde River Drive and Paul Nordin Parkway, Fountain Hills, Arizona, more particularly described on Exhibit A attached hereto and incorporated herein by this reference (the “Property”).

B. It is the Owner’s intention to develop the Property as an assisted living and memory care facility (the “Project”).

C. The Town desires that the Property be developed as an integral part of the Town Center area of Fountain Hills. The Town has determined that encouraging the development of the Property pursuant to this Agreement will result in significant planning, economic and other public purpose benefits to the Town and its residents by, among other things (i) the development of the Property in a manner consistent with the Town’s General Plan, (ii) an increase in sales tax revenues to the Town arising from or relating to the development of the Property and (iii) the creation of new jobs and otherwise enhancing the economic welfare of the residents of the Town.

D. The Town requires open storm water drainage facilities on the Property to be designed in a manner that reflects the natural desert environment, including shallow slopes (not exceeding 3:1 horizontal to vertical) and natural vegetation. Owner has previously submitted, and the Town Council has approved, PAD zoning for the Property showing on-site storm water drainage via an underground system (the “PAD”). Owner has previously submitted, and the Town’s Planning and Zoning Commission has approved, a Concept Plan showing on-site storm water drainage via an underground system (the “Concept Plan”).
E. The Owner has requested certain modifications to the Town’s drainage requirements to allow for a detention basin with vertical walls instead of shallow slopes.

F. The Parties understand and acknowledge that this Agreement is a “Development Agreement” within the meaning of and entered into pursuant to the terms of ARIZ. REV. STAT. § 9-500.05, in order to facilitate the proper development of the Property by providing for, among other things modifications to conditions, terms, restrictions and requirements for the Property by the Town. The terms of this Agreement shall constitute covenants running with the Property, as more fully described in this Agreement.

AGREEMENT

NOW THEREFORE, in consideration of the foregoing recitals, which are incorporated herein by reference, the promises contained in this Agreement, and for other good and valuable consideration, the receipt and sufficiency of which the Parties hereby acknowledge, the Parties hereto agree as follows:

1. Incorporation of Recitals. The foregoing recitals are true and correct and incorporated by this reference as if fully set forth herein.

2. Term and Effective Date. The Owner, its successors and assigns, shall have the right to implement development on the Property in accordance with this Agreement for a period of one year from the date this Agreement is approved by the Town Council, at which time this Agreement shall automatically terminate as to the Property without the necessity of any notice, agreement or recording by or between the Parties (the “Term”); provided, however, that provisions of this Agreement that specifically survive the termination of this Agreement shall remain in full force and effect, subject only to the termination provisions herein specifically related thereto. This Agreement shall become effective only upon approval by the Town Council.

3. Modified Detention Basin. The Owner is hereby permitted to modify the underground storm water detention basins shown on the PAD and the Concept Plan to an aboveground facility as shown on the grading and drainage plans for the Project, dated September 3, 2015, and prepared by DNA, Inc., as shown on Exhibit B, attached hereto and incorporated herein by reference. The Town’s agreement to the modified detention facility is strictly conditioned upon a perpetual obligation to maintain the detention basin free from clutter, debris, overgrowth and any other condition that degrades the aesthetic or functional qualities of the detention basin by the current owner of the Property, including, as applicable, the Owner. At all times, the current owner of the Property shall ensure that hydraulic flows are maintained at the levels set forth in the Drainage Study for Morningstar, prepared by D.N.A, Inc., and date-stamped June 18, 2015 by William E. Collings. These maintenance obligations shall survive termination of this Agreement.

4. Use of Town Property. Prior to construction activities related to the modified detention basin described in Section 3 above, the Owner shall obtain the necessary permit from the Town to allow for use of the adjacent Town rights-of-way.
5. **Default.** If either Party fails to perform any obligation, and such Party fails to cure its nonperformance within 30 days after notice of nonperformance is given by the non-defaulting Party, such Party will be in default (the "Cure Period"). In the event of such default, the non-defaulting Party may terminate this Agreement and will have all remedies that are available to it at law or in equity including, without limitation, the remedy of specific performance. If the nature of the defaulting Party's nonperformance is such that it cannot reasonably be cured within 30 days, then the defaulting Party will have such additional periods of time as part of the Cure Period as may be reasonably necessary under the circumstances, provided the defaulting Party immediately commences to cure its nonperformance and thereafter diligently continues to completion the cure of its nonperformance. In no event shall any such Cure Period exceed 60 days.

6. **General.**

6.1 **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 addresses set forth below; (B) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below; or (C) given to a recognized and reputable overnight delivery service, to the address set forth below:

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

**With a copy to:**
Gust Rosenfeld, P.L.C.  
One East Washington, Suite 1600  
Phoenix, Arizona 85004-2553  
Attn: Andrew J. McGuire, Esq.

**If to Owner:**
MS-RCS Fountain Hills, LLC  
371 Centennial Pkwy., Suite 200  
Louisville, CO 80027  
Attn: Jarvie Worcester

**With a copy to:**
N-Shea Group, LLC  
14555 N. Scottsdale Road, Suite 240  
Scottsdale, Arizona 85254  
Attn: Bart M. Shea

**And a copy to:**
DKL Law, PLLC  
14555 N. Scottsdale Road, Suite 240  
Scottsdale, Arizona 85254  
Attn: David W. Lunn
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: (A) when delivered to the Party; (B) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage; or (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. 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.

6.2 Amendment. No amendment or waiver of any provision in this Agreement will be binding (A) on the Town unless and until it has been approved by the Town Council and has become effective or (B) on the current owner of the Property unless and until it has been executed by an authorized representative of such owner.

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

6.4 Time of the Essence. Time is of the essence with regard to performance under the terms and provisions of this Agreement, and any amendment, modification or revision thereof, with respect to the actions and obligations of each person bound by the terms hereof.

6.5 Recordation. This Agreement shall be recorded in its entirety in the Maricopa County Recorder’s Office not later than 10 days after it is fully executed by the Owner and the Town. This Agreement shall run with the title to the Property, and be binding upon all successor owners of the Property, and all other persons having any right, title or interest in or to the Property.

6.6 Choice of Law, Venue and Attorneys’ Fees. The laws of the State of Arizona shall govern any dispute, controversy, claim or cause of action arising out of or related to this Agreement. The venue for any such dispute shall be Maricopa County, Arizona, and each Party waives the right to object to venue in Maricopa County for any reason. Neither Party shall be entitled to recover any of its attorneys’ fees or other costs from the other Party incurred in any such dispute, controversy, claim, or cause of action, but each Party shall bear its own attorneys’ fees and costs, whether the same is resolved through arbitration, litigation in a court, or otherwise.

6.7 Good Standing; Authority. Owner represents and warrants that it is duly formed and validly existing under the laws of the State of Arizona with respect to Owner. The Town represents that it is a municipal corporation within Arizona. Both Parties represent and warrant that the individuals executing this Agreement on behalf of their respective Party are authorized and empowered to bind the Party on whose behalf each such individual is signing.
6.8 Notice Upon Transfer or Conveyance of the Property. On or before five business days after the transfer or conveyance of the Property to any person or entity, Owner shall, in compliance with Section 6.1 hereof, deliver written notice to the Town, which notice shall include (A) a reference to this Agreement, (B) the date of transfer, (C) the name of, and contact information for, the transferee, and (D) Owner’s representation that a file stamped copy of this Agreement was delivered to the transferee prior to such transfer or conveyance. Upon delivery of such notice to the Town, Owner shall be released from its obligations under this Agreement as of the date of such transfer or conveyance, and the Town shall look solely to the current owner of the Property for performance of the Owner’s obligations herein. This notice obligation shall bind each successive owner of the Property until such time, if ever, that the Town may waive or otherwise release this notice obligation by recordation of an instrument in the real property records of Maricopa County, Arizona.

6.9 Third Parties. No term or provision of this Agreement is intended to, or shall be for the benefit of any person or entity not a Party hereto (or such Party’s successor), and no such other person or entity shall have any right or cause of action hereunder.

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

6.11 Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver of any breach shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant, or condition of this Agreement. No waiver shall be effective unless it is in writing and is signed by the Party asserted to have granted such waiver.

6.12 Further Documentation. The Parties agree in good faith to execute such further or additional instruments and documents and to take such further acts as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.

6.13 Entire Agreement. This Agreement and the exhibits attached hereto contain the final and entire agreement between the Parties with respect to the subject matter hereof and are intended to be an integration of all prior negotiations and understandings.

6.14 Fair Interpretation. The Parties have been represented by counsel in the negotiation and drafting of this Agreement and this Agreement shall be construed according to the fair meaning of its language. The rule of construction that ambiguities shall be resolved against the Party who drafted a provision shall not be employed in interpreting this Agreement.

6.15 Counterparts. This Agreement may be executed in counterparts, each of which shall be an original but all of which shall constitute one and the same instrument.
6.16 **Computation of Time.** In computing any period of time under this Agreement, the date of the act or event from which the designated period of time begins to run shall not be included. The last date of the period so completed shall be included unless it is a Saturday, Sunday or legal holiday, in which event the period shall run until the end of the next day that is not a Saturday, Sunday or legal holiday. The time for performance of any obligation or taking any action under this Agreement shall be deemed to expire at 5:00 p.m. (local time, Phoenix, Arizona) on the last day of the applicable time period provided herein.

6.17 **Conflict of Interest.** Pursuant to ARIZ. REV. STAT. § 38-503 and § 38-511, no member, official or employee of the Town shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to cancellation pursuant to the terms of ARIZ. REV. STAT. § 38-511.

6.18 **Severability.** Every provision of this Agreement is and will be construed to be a separate and independent covenant. If any provision in this Agreement or the application of the same is, to any extent, found to be invalid or unenforceable, the remainder of this Agreement or the application of that provision to circumstances other than those to which it is invalid or unenforceable will not be affected by that invalidity or unenforceability. Each provision in this Agreement will be valid and will be enforced to the extent permitted by law and the Parties will negotiate in good faith for such amendments of this Agreement as may be necessary to achieve its intent, notwithstanding such invalidity or unenforceability.

6.19 **Covenant of Good Faith.** In exercising their rights and in performing their obligations pursuant to this Agreement, the Parties will cooperate with one another in good faith to ensure the intent of this Agreement can be attained.

6.20 **Estoppel Certificate.** Upon the Property owner's written request, the Town will execute, acknowledge and deliver to such owner and all parties identified by such owner, including without limitation assignees, transferees, tenants, purchasers, investors, lenders, and mortgagees, a written statement certifying (A) that this Agreement is unmodified and in full force and effect (or, if there have been modifications, that this Agreement is in full force and effect, as modified, and stating modifications) and (B) whether there are any existing breaches or defaults by the Property owner then known to the Town under this Agreement, and if so, specifying the same. The Town will deliver the statement to the Property owner or such requesting party within 15 days after request. The Town acknowledges that any such assignee, transferee, tenant, purchaser, investor, lender, or mortgagee may rely upon such statement as true and correct.

[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

Linda M. Kavanagh, Mayor

ATTEST:

Bevelyn J. Bender, Town Clerk

(ACKNOWLEDGMENT)

STATE OF ARIZONA )
) ss.
COUNTY OF MARICOPA )

On 05/16/2015, before me personally appeared Linda M. Kavanagh, the Mayor 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 she claims to be, and acknowledged that she signed the above document, on behalf of the Town of Fountain Hills.

(Affix notary seal here)

[SIGNATURES CONTINUE ON FOLLOWING PAGES]
"Owner"

MS-RCS Fountain Hills, LLC,
a Colorado limited liability company

By: __________________________
    Sharon Eshima, Manager

(ACKNOWLEDGMENT)

STATE OF COLORADO )
                 ) ss.
COUNTY OF BOULDER )

On September 22, 2015, before me personally appeared Sharon Eshima,
Manager of MS-RCS FOUNTAIN HILLS, LLC, a Colorado limited liability company, 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 on behalf of such limited liability
company.

__________________________
Notary Public

(Affix notary seal here)
EXHIBIT A
TO
DEVELOPMENT AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
MS-RCS FOUNTAIN HILLS, LLC

Legal Description of the Property

LOTS 1, 2, AND 3, OF A FINAL REPLAT OF BLOCK 7, PLAT NO. 208, FOUNTAIN HILLS, ARIZONA BOOK 144 OF MAPS, PAGE 4, ACCORDING TO THE PLAT OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF MARICOPA COUNTY, ARIZONA, RECORDED IN BOOK 615 OF MAPS, PAGE 49.
EXHIBIT B
TO
DEVELOPMENT AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
MS-RCS FOUNTAIN HILLS, LLC

Modified Detention Basin