

**INFRASTRUCTURE IMPROVEMENT AGREEMENT
FOR
MOUNTAIN SHADOWS RESORT**

THIS INFRASTRUCTURE IMPROVEMENT AGREEMENT FOR MOUNTAIN SHADOWS RESORT (“**Infrastructure Agreement**”) is entered into as of _____, 2020, between: (i) the TOWN OF PARADISE VALLEY, an Arizona municipal corporation (“**Town**”); and (ii) MS RESORT OWNER, LLC, a Delaware limited liability company (“**MS Owner**”) (each individually a “**Party**,” and collectively “**Parties**.”).

RECITALS

A. MS Owner owns a resort known as Mountain Shadows, located at 5445 East Lincoln Drive, Paradise Valley, Arizona (APN 169-30-101 and legally described in **Exhibit A**) (“**MS Resort Property**”).

B. The Town previously granted a special use permit for the MS Resort Property (as amended, the “**MS SUP**”).

C. MS Owner applied to the Town for a minor amendment to the MS SUP, Minor Special Use Permit Application SUP No. 20-01 (“**Application**”) which sought approval of left turn access into the Mountain Shadows western-most entrance for westbound traffic on Lincoln Drive. The Application was approved by the Town.

D. The Town currently intends to undertake a construction project to improve Lincoln Drive between Mockingbird Lane and the western boundary of the Town, as part of a capital improvement project referred to as the Lincoln Drive Median Improvements Project (“**Project**”). The Project will include, among other things, changes to existing medians and the construction of new medians and left turn lanes along Lincoln Drive (“**Median and Turn Lane Improvements**”).

E. In connection with the Project, MS Owner has requested that plans for the Median and Turn Lane Improvements include the new left turn access approved by the Town Planning Commission on May 19, 2020, pursuant to the Application for a Minor Amendment to the MS SUP No. 20-01, and MS has agreed to pay for the design and construction costs for this left turn access. The general configuration of the left-turn access is shown in **Exhibit B** and incorporated herein (“**MS Left Turn Plan**”).

F. The Town is willing to include the MS Left Turn Plan in the Project, provided that MS Owner pays for the design and construction costs attributable to the MS Left Turn Plan.

G. The Town and MS Owner now desire to:

- (i) design Project plans that will include the MS Left Turn Lane;
- (ii) provide an opportunity for MS Owner to comment on the design of the MS Left Turn Plan and suggest reasonable changes to the MS Left Turn Plan;
- (iii) provide for the deposit of funds by MS Owner with the Town in an amount sufficient to pay for the estimated design and construction costs for the MS Left Turn Plan and for the Town to draw on the deposited funds to pay for the costs of the design and construction as such costs are incurred by the Town;
- (iv) make provision for MS Owner, at its option, to construct the Final MS Left Turn Plan or other Town-approved left turn access for westbound Lincoln traffic into the western-most entrance at MS Resort in the event the Town does not construct such access by October 31, 2021.

In consideration of the Recitals set forth above, MS Owner and the Town agree as follows:

AGREEMENTS AND COVENANTS

ARTICLE 1. DEFINITIONS.

The following terms shall have the meanings set forth below when used in this Infrastructure Agreement:

1.1 “Affiliate” as applied to any person, means any person directly or indirectly controlling, controlled by, or under common control with, that person or spouse or children of such person, if such person is a natural person. For the purposes of this definition, (i) “control” (including with correlative meaning, the terms “controlling,” “controlled by” and “under common control”), as applied to any person, means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of that person, whether through the beneficial ownership of voting securities, by contract or otherwise, and (ii) “person” means and includes natural persons, corporations, limited partnerships, general partnerships, joint stock companies, joint ventures, associations, limited liability companies, limited liability partnerships, limited liability limited partnerships, trusts, land trusts, business trusts or other organizations, whether or not legal entities.

1.2 “Effective Date” means the date on which this Infrastructure Agreement is (i) approved (*i.e.*, voted on) by the majority of the Town Council of the Town of Paradise Valley, Arizona; and (ii) is executed by both Parties.

1.3 “Third Party” means, with respect to a good faith transaction, any individual or entity other than a Party, an Affiliate of any Party, a principal of a Party or an Affiliate of a principal of any Party, and a spouse, parent, child of a principal of a Party or of an Affiliate of any Party.

1.4 “Town Engineer” means the Paradise Valley Town Engineer or designee. The individual acting in this position shall be a certified civil engineer in the State of Arizona.

1.5 “Town Manager” means the Paradise Valley Town Manager or designee.

ARTICLE 2. RESPONSIBILITIES OF THE PARTIES RELATED FOR THE DESIGN AND CONSTRUCTION OF THE MS LEFT TURN PLAN AS PART OF THE TOWN PROJECT.

2.1 In the event the Town appropriates funds for construction of the Project or otherwise appropriates funds for construction of the Final Left Turn Plan, then on the terms and subject to the conditions contained in this Infrastructure Agreement:

(a) The Town shall design a median and deceleration lane on Lincoln Drive to allow left turn access into the MS Resort Property at its western-most entrance for westbound traffic on Lincoln drive in general conformance with the MS Left Turn Plan;

(b) The MS Left Turn Plan shall be further refined and defined through a set of construction plans that the Town will prepare, with input and advice from MS Owner; provided, however, that if the Town and MS Owner are unable to resolve any differences after good faith efforts, the Town shall have and retain ultimate and controlling authority as to the final form of the MS Left Turn Plans (“**Final Left Turn Plan**”);

(c) Prior to preparation of the final construction drawings for the Final Left Turn Plan, the Town shall provide MS Owner with an estimate of the costs to design the MS Left Turn Plan and to prepare the construction drawings for the Final Left Turn Plan (“collectively “**Plan Cost Estimates**”);

(d) MS Owner shall provide to the Town Engineer its written approval or objection with specific comments within five (5) business days of receipt of the Plan Cost Estimates. MS Owner’s failure to respond within the foregoing five (5)-day period shall be deemed approval of, and agreement to pay the Town the Plan Cost Estimates under the terms set forth in paragraph 2.1(g) below. MS Owner acknowledges that the actual costs

to prepare the plans may vary from the estimates, and MS Owner agrees to pay the Town's actual costs to prepare the MS Left turn Plan and the Final Left Turn Plan under the terms set forth in paragraph 2.1(g) below. In the event of an objection, the Town and MS Owner will work in good faith to resolve the objection(s), but if a mutually-agreeable resolution is not achieved, the Town shall not be obligated to construct the Final Left Turn Plan as part of the Project and MS Owner shall have the option to construct the Final Left Turn Plan or other Town-approved access in accordance with the terms and requirements set forth in Article III, below;

(e) Prior to the start of construction on the Project, the Town shall provide MS Owner with an estimate of the cost to construct the Final Left Turn Plan ("**Construction Cost Estimate**");

(f) MS Owner shall provide to the Town Engineer its written approval or objection with specific comments within five (5) business days of receipt of the Construction Cost Estimate. MS Owner's failure to respond within the foregoing five (5)-day period shall be deemed approval of, and agreement to pay the Town the Construction Cost Estimate under the terms set forth in paragraph 2.1(g) below. MS Owner acknowledges that the actual costs to construct the Final Left Turn Plan may vary from the Construction Cost Estimate, and MS Owner agrees to pay the Town's actual costs to construct the Final Left Turn Plan. In the event of an objection, the Town and MS Owner will work in good faith to resolve the objection(s), but if a mutually-agreeable resolution is not achieved, the Town shall not be obligated to construct the Final Left Turn Plan as part of the Project or otherwise, and MS Owner shall reimburse the Town's actual costs to design and prepare final construction plans for the Final Left Turn Plan. After reimbursement of the Town's Costs, MS Owner shall have the option to construct the Final Left Turn Plan or other Town-approved access in accordance with the terms and requirements set forth in Article III, below;

(g) Within twenty (20) days after receipt of the Construction Cost Estimate, MS Owner shall make a cash payment to the Town in an amount equal to the sum of the Plan Cost Estimates and Construction Cost Estimate (collectively "MS Payment"), which shall be used by the Town to pay its costs incurred or to be incurred in the future for: 1) preparation of the Left Turn Plan; 2) preparation of construction drawings for the Final Left Turn Plan; and 3) construction of the Final Left Turn Plan;

(h) Upon payment of the MS Payment by MS Owner to the Town, the Town shall be obligated, as part of the Project, to construct the improvements on the Final Left Turn Plan to allow left-turn access into the MS Resort Property for westbound traffic on Lincoln drive at the western-most driveway unless the Town, in its sole discretion, cancels, terminates or otherwise does not proceed with the Project or construction of the Final Left Turn Plan. In the event the Town, in its sole discretion, delays or postpones the Project, the Town agrees to construct the approved Final Left Turn Plan as part of the Project when

it proceeds, and MS Owner agrees to pay the Town's Actual Cost for the Final Left Turn Plan on the terms and subject to the conditions contained in this Infrastructure Agreement;

(i) In the event that, upon completion of construction of the Final Left Turn Plan, the Town's actual cost to prepare the Left Turn Plan and the Final Left Turn Plan and to construct the Final Left Turn Plan (all three collectively "**Town's Actual Cost**") exceeds the MS Payment to the Town by MS Owner, MS Owner agrees to pay to the Town the additional amounts necessary to equal the Town's Actual Cost (the "Additional Payment"). The Additional Payment, if any, shall be paid by MS Owner to the Town within thirty (30) days of its receipt of an invoice from the Town. In the event the Town's Actual Cost is less than the MS Payment paid to the Town by MS Owner, the Town shall refund to MS Owner the difference between the Town's Actual Cost and the amount of the MS Payment paid by MS Owner (the "Refund Payment"). The Refund Payment, if any, shall be paid by the Town to MS Owner within thirty (30) days of the Town's final payment to the contractor for the Project. Any amount due from either Party that is not paid within the thirty (30)-day time period shall accrue interest at the rate of 12% per annum from the date such payment is due until paid in full;

(j) In the event the Town determines, in its sole discretion, that it will not proceed with the Project, in whole or part, for any reason, or that the Town will not otherwise construct the Final Left Turn Plan by October 31, 2021, the Town shall notify MS Owner and MS Owner may, in its sole discretion, construct the Final Left Turn Plan (or other Town-approved left turn access for westbound Lincoln Traffic into the western-most entrance to the MS Resort) pursuant to the terms and conditions set forth in Article II, below. In the event the Parties determine that the Town will not construct the Final Left Turn Plan, the Town shall refund to MS Owner the sum remaining from the MS Payment, if any, after the Town pays any of the Town's Actual Cost incurred for the design of the Left Turn Plan and/or Final Left Turn Plan.;

(k) MS Owner shall, at no cost to the Town, grant the Town any and all temporary construction easements reasonably needed or required to construct the Final Left Turn Plan.

ARTICLE 3. RESPONSIBILITIES OF THE PARTIES RELATED TO THE DESIGN AND CONSTRUCTION OF THE MS LEFT TURN PLAN INDEPENDENT OF THE TOWN PROJECT.

3.1 In the event the Town does not construct the Final Left Turn Plan by February 1, 2021, then on the terms and subject to the conditions contained in this Infrastructure Agreement:

(a) MS Owner, in its sole discretion and at its sole cost, may construct improvements consistent with the Minor Amendment to Special Use Permit, SUP No. 20-01, which approved left turn access into the Mountain Shadows western-most entrance for westbound traffic on

Lincoln Drive. Such construction shall not be permitted if Lincoln Drive has been resurfaced by mill and overlay or any other process within five (5) years prior to the time MS Owner seeks to start construction;

(b) In the event the Town has prepared the Final Left Turn Plan (or other final construction plan for the left turn), MS Owner shall construct improvements in Lincoln Drive consistent with such plan, unless the Town Engineer approves in writing a modification, which must be consistent with SUP 20-01, and MS Owner shall reimburse the Town for its actual costs to prepare such the Final Left Turn Plan or other plan. If MS Owner requests modifications to the Final Left Turn Plan (or other final construction plan) that require redesign and/or construction modifications, and the Town, in its sole discretion, agrees to such redesign and/or construction modifications, any additional costs shall be borne by MS Owner;

(c) Construction of any and all improvements in Lincoln Drive by MS Owner are required to meet all requirements for work in the Town right-of-way, including but not limited to, Town plan review and approval, obtaining a permit authorizing work in the right-of-way, posting of a performance bond, and providing proof of required insurance.

ARTICLE 4. MISCELLANEOUS PROVISIONS

4.1 **Successors and Assigns.** This Infrastructure Agreement will be binding upon the Parties, their successors and assigns, including any individual, or other entity with or into which MS Owner may merge, consolidate, or be liquidated, or any individual or other entity to which MS Owner may sell or assign its assets.

4.2 **Notices.** All notices or demands required by this Contract must be given to the other Party in writing, delivered by hand or by registered or certified mail at the addresses stated below, or to any other person(s) or address a Party may substitute by giving written notice at least five (5) business days before the date on which the change is to become effective as required by this section.

If hand delivered, Notices are received on the date delivered. If delivered by certified or registered mail, Notices are received on the date indicated on the receipt. **Notice by facsimile or electronic mail is not adequate notice.**

<u>If to MS Owner:</u>	Mountain Shadows Resort
	Attn: Andrew Chippindall
	5445 East Lincoln Drive
	Paradise Valley, Arizona 85253

With a copy to: Kristopher Harman
Woodbine Development Corporation
[Insert Address]

If to the Town: Town Manager
Town of Paradise Valley
6401 East Lincoln Drive
Paradise Valley, Arizona 85253-4399

With a copy to: Town Attorney
Town of Paradise Valley
6401 East Lincoln Drive
Paradise Valley, Arizona 85253-4399

4.3 **Waiver.** No delay in exercising any right or remedy shall constitute a waiver and no waiver by the Parties of the breach of any provision of this Infrastructure Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or of any other provision of this Infrastructure Agreement.

4.4 **Headings.** The descriptive headings of the paragraphs of this Infrastructure Agreement are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions of the Infrastructure Agreement.

4.5 **Authority.** The undersigned represents to each other that they have full power and authority to enter into this Infrastructure Agreement, and that all necessary actions have been taken to give full force and effect to this Infrastructure Agreement. MS Owner represents and warrants that it is formed and validly existing under the laws of the State of Arizona and is duly qualified to do business in the State of Arizona and in good standing under applicable state laws.

4.6 **Entire Agreement.** This Infrastructure Agreement, including the exhibits referenced herein, constitutes the entire agreement between the Parties.

4.7 **Severability.** If any provision of the Infrastructure Agreement is held to be illegal, invalid or unenforceable, in whole or in part, under present or future laws effective during the Term, such provision shall be fully severable and this Infrastructure Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision had never comprised a part of this Infrastructure Agreement and the remaining provisions of this Infrastructure Agreement shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by the severance of such provision from this Infrastructure Agreement. Furthermore, in lieu of such illegal, invalid or unenforceable provision, there shall be added automatically as part of this Infrastructure Agreement, a provision as similar in terms to such illegal, invalid, or unenforceable provisions as may be possible and

still be legal, valid and enforceable and this Infrastructure Agreement shall be deemed reformed accordingly.

4.8 **Governing Law.** The laws of the State of Arizona shall govern the interpretation and enforcement of this Infrastructure Agreement. The Parties agree that venue for any action commenced in connection with this Infrastructure Agreement shall be proper only in a court of competent jurisdiction located in Maricopa County, Arizona, and the Parties hereby waive any right to object to such venue.

4.9 **Attorneys' Fees and Costs.** If either Party brings a legal action either because of a breach of this Infrastructure Agreement or to enforce a provision of this Infrastructure Agreement, the prevailing party will be entitled to reasonable attorneys' fees and court costs.

4.10 **No Third-Party Beneficiaries.** There are no third-party beneficiaries to this Infrastructure Agreement, and no other person or entity not a party to this Infrastructure Agreement shall have any right or cause of action hereunder.

4.11 **No Agency Created.** Nothing contained in this Infrastructure Agreement shall create any partnership, joint venture, or agency relationship between the Parties.

4.12 **Conflict of Interest.** This Infrastructure Agreement is subject to ARIZ. REV. STAT. § 38-511.

4.13 **Counterparts.** This Infrastructure Agreement may be executed in one or more counterparts, and each executed duplicate counterpart will possess the full force and effect of the original.

4.14 **Force Majeure.** Neither Party will be responsible for delays or failures in performance resulting from acts beyond their control. These acts will include, but not be limited to, acts of God, riots, acts of war, epidemics, governmental regulations imposed after the fact, fire, communication line failures, or power failures.

(Signatures on Following Page)

THE TOWN OF PARADISE VALLEY,
an Arizona municipal corporation

MS RESORT OWNER, LLC, a
Delaware limited liability company

By: _____
Jill Keimach
Town Manager

By: _____

Name: _____

Title: _____

ATTEST:

By: _____
Duncan Miller, Town Clerk

APPROVED AS TO FORM:

Andrew Miller, Town Attorney

LIST OF EXHIBITS

Exhibit A – MS Resort Property Legal Description

Exhibit B – MS Left Turn Plan

Exhibit A

Legal Description

Exhibit B

MS Left Turn Plan