

This is a DRAFT document intended for the public to review prior to the June 23, 2022 City Council meeting in order to provide comments on the proposed agreement. (posted June 8, 2022)

SETTLEMENT AGREEMENT

THIS SETTLEMENT AGREEMENT (“**Agreement**”) is dated for reference purposes this _____ day of _____, 2022, by and between the CITY OF KETCHUM, IDAHO, a municipal corporation (“**Ketchum**” or “**City**”) and HARRIMAN HOTEL, LLC, an Idaho limited liability company (“**Owner**”, and together with the City, the “**Parties**”).

BACKGROUND AND CONTEXT

A. Ketchum is a municipal corporation possessing all powers granted to municipalities under the applicable provisions of the Idaho Code, including the power to grant conditional use permits, approve planned unit developments, subdivide real property and the power to contract. A development agreement between the Parties is a collaboration that will provide mutual benefit for the Parties and residents of the City.

B. Owner owns the real property situated in the State of Idaho, County of Blaine, commonly known as 300 River Street East, Ketchum, Idaho and more particularly described as Lot 2, Block 83 of the City of Ketchum, according to the plat thereof on file in the office of the County Recorder of Blaine County, Idaho (“**Property**”).

C. The Parties entered into an Amended and Restated Development Agreement, dated October 5, 2015 (the “**Development Agreement**”) and recorded in the records of Blaine County, Idaho as Instrument No. 630816, as corrected and amended by Instruments recorded as Nos. 635897 and 652281, respectively under and by virtue of which Ketchum issued a Planned Unit Development Conditional Use Permit CUP 08-007 (“**CUP**”), Right of Way Encroachment Agreement (“**Encroachment Agreement**”), and Design Review Permit and Waterways Design River Permit DR 08-007 (“**Design Review**”) with Owner to develop and operate a Hotel on the Property (“**Project**”) and a building permit to construct certain Project improvements (“**Building Permit**” and together with the Development Agreement, CUP, Design Review, and Encroachment Agreement, the “**Entitlements**”).

D. A dispute arose between the Parties regarding Owner’s performance of its obligations under the Development Agreement resulting in Ketchum declaring a breach of the Development Agreement and revoking the Development Agreement and CUP. Owner disputed Ketchum’s claims of breach, disputed Ketchum’s attempt to collect on a bond for site restoration and has asserted contract and tort claims against Ketchum.

E. Owner has secured an investor for the Project, Harriman SV Properties, LLC (“**Investor**”), with closing and Project funding by Investor (“**Investment**”) conditioned on Owner and Ketchum resolving their dispute and reinstating the Entitlements, as existed at time of the dispute. Such reinstatement to be considered for approval at a meeting of the City Council to be held on June 23, 2022.

F. Owner’s securing of the Investment addresses the primary basis of Ketchum’s alleged breach, and Ketchum finds it in the public interest to treat such as analogous to a delayed

cure in order for more timely recommencement of development on the Property without the need to engage in time-consuming and costly expenditures on litigation reasonably anticipated with respect to either site restoration or the threatened claims by Owner.

G. So that Owner can complete the Investment and move forward with the Project, the Parties agree that it is in their respective best interests to resolve and settle their dispute and enable the Project to proceed by reinstating the Development Agreement, Encroachment Agreement, Design Review, and the CUP as provided herein.

AGREEMENT

NOW, THEREFORE, in consideration of the mutual covenants, promises, agreements, terms and conditions set forth herein, the Parties agree as hereinafter provided.

1. Incorporation of Recitals. The Recitals set forth above are hereby incorporated into and made an integral part of this Agreement.

2. Reinstatement of Development Agreement and Entitlements. Ketchum covenants and agrees to and hereby does withdraw, cancel and rescind its notices of breach of the Development Agreement and cancellation of the Development Agreement, CUP, Design Review, and Encroachment Agreement and reinstates and reaffirms such for the Project are in effect and in good standing as if the notices of breach and cancellation were timely cured or had never been issued or asserted. The Parties understand and agree that the reinstatement herein does not constitute an amendment or modification of the Development Agreement, CUP, Design Review, or other Entitlements, with the sole exception of time limits being extended in a limited reasonable manner as if the intervening period of dispute were a force majeure type event. Owner understands that any revised plans will require applications to the City Planning & Zoning Commission for any proposed changes, anticipated primarily to be architectural elevation material and building form changes to the building as originally approved and permitted including the expansion of the roof top observatory deck to permit additional seating of hotel guests and the public where food and beverage services will be offered and which will be reasonably reviewed and considered in good faith in accord with City Code and Idaho Code, and that no such amendments or approvals of revisions are committed to in this Agreement. To the extent there is any inconsistency between this Agreement and the Development Agreement, this Agreement shall govern.

3. Right to Develop. Subject to the requirements of this Agreement, the Owner and all future owners of some or all of the Property shall have the right to redevelop, construct, improve and use the Property as a Hotel and for sale residences as described and defined in the CUP and Design Review, and in accord with the Development Agreement.

The performance timeline for the Project is as follows:

Item No.	Estimated Date	Action
1	By June 30, 2022	Closing of equity funding into escrow pending reinstatement of Development Agreement and Entitlements

2	June 23, 2022	City Council approves Settlement Agreement and reinstatements; Parties execute Settlement Agreement no later than June 30, 2022.
3	By July 1, 2022	Pre-application conference between Parties to discuss scope of any revised plans and need for subsequent applications, to be considered in process contemporaneously, including but not limited to any needed amendment of the Development Agreement CUP, and/or Design Review, amended or new building permits, design review modification, and/or subdivision.
4	By August 1, 2022	Owner submission of complete applications as determined needed from Item 3.
5	Within 60 days of submitted applications being deemed complete.	City will conduct a public hearing or hearings as necessary under City Code and/or Idaho Code, and then thereafter in a reasonably timely manner proceed to deliberation and decision.
6	Within 6 months after City final approvals on Item 4 applications	Owner applies for a building permit under the 2018 building and energy codes as adopted by the City.
7	Within 20 days of a deemed complete building permit application	City will provide comments.
8	Within 20 days of City comments provided to Owner	Owner will submit revised plans. Subsequent City review comments and Owner responses/revisions will respectively occur within 10 days of the previous action.
9	Prior to issuance of a building permit	Owner to secure ITD encroachment permit for any improvements within the Highway 75 ITD right-of-way.
10	Within 7 days of finalization of comments and review on building permit application(s).	Issuance of building permit.
11	Later of May 1, 2023 or 5 months after Item 10	Start of construction
12	Within 36 months after Item 11	Complete construction and issue certificate of occupancy

Time is of the essence. City shall be entitled to application but not impact fees based on current schedule but shall credit Owner with amounts of building impact and affordable in lieu housing fees paid to date of the reinstated application Development Agreement and Entitlements.

4. Condition to Obligations. The obligations of each of the Parties hereunder are expressly conditioned upon (i) Owner consummating the Investment in amounts and on substantially the terms and conditions set forth in that certain confidential Term Sheet, dated March 3, 2022, as modified and agreed by the parties thereto; (ii) Ketchum reinstating the

Development Agreement and Entitlements as provided in Paragraph 2 on or before the date set forth in Paragraph 3; and (iii) the Ketchum Urban Renewal Agency (KURA), at its sole discretion, entering into an Owner Participation Agreement with Owner for reimbursement of certain costs substantially similar to those approved in the OPA dated February 21, 2017. The Parties understand that Ketchum has no authority or control over the KURA and the KURA's review and decision on any OPA application contemplated under Condition (iii) above. City agrees to reasonably cooperate with Owner in its efforts to obtain the Owner Participation Agreement.

Owner agrees as a condition of this Agreement that the proof of financing and financial capability to complete the project is a standing condition of this Settlement Agreement and of the underlying Development Agreement, and such condition will continue in force until substantial completion of construction.

Understanding that this Property serves as a gateway into Ketchum, Owner and City will also enter into a discussion of aesthetic improvements for the construction screening associated with the Project, and reasonably cooperate to agree upon an improved aesthetic design for screening to be installed by Owner within sixty days of this Agreement.

5. Owner Default and Reclamation of Site. Provided Ketchum is not in default of its obligations hereunder, if Owner defaults in performance of any of its obligations hereunder prior to commencement of construction and the default continues for 60 days after receipt by Owner of Ketchum's written notice of default, Owner agrees to reclaim the Property and restore it to the same or better condition as specified in the Reclamation Plan previously prepared, agreed to, and made a part of the Development Agreement . To secure Owner's obligation hereunder, Owner shall obtain for Ketchum's benefit an irrevocable stand-by letter of credit issued by a bank authorized to transact business in the state of Idaho in the amount of one hundred twenty-five percent of the estimated cost of reclamation or shall provide some other form of security reasonably acceptable to Ketchum. The security, in whatever form, may be requested by Owner for release, partially or in full, with approval by City, not to be unreasonably withheld, if justified by substantial progress toward completion of construction in accordance with the following schedule: one half upon completion of the foundation stem walls and one half upon completion of framing.

6. Settlement of Dispute. Effective as of the date the conditions described in Paragraph 4 are fulfilled, for valuable consideration, the receipt and sufficiency of which Owner and City acknowledge, Owner and City, jointly and severally, agree to and each does hereby release the other and their respective directors, officers, managers, members, shareholders, agents, representatives, attorneys and employees from any and all claims, damages, costs, and causes of action either may have now or in the future arising directly or indirectly from the acts or omissions of the other through the date hereof, including the City declaring a breach of the Development Agreement and revoking the Development Agreement and CUP. The Parties acknowledge that the giving and receiving of the consideration called for herein and the execution of this Agreement are the result of compromise, that this Agreement is entered into in good faith, and that the execution of and performance of obligations under this Agreement shall not be considered or construed at any time for any purpose as, or evidence of, an admission of wrongdoing or liability by any Party.

7. Indemnification. Owner shall indemnify and hold City and its officers, members, agents, employees and representatives, harmless against and in respect of:

(i) all suits, actions, proceedings and investigations brought by any person (other than by, or at the behest of, City) which questions the validity or legality of this Agreement, the Development Agreement, or the Entitlements; and

(ii) any actions, judgments, costs and expenses (including without limitation reasonable attorneys' fees and costs and other expenses incurred in investigating, preparing or defending any litigation or proceeding, commenced or threatened) incident to any of the foregoing, or the enforcement of this Agreement.

City shall promptly notify Owner of the assertion by any third party of any claim with respect to which the indemnification set forth in this Agreement relates. Owner shall have the right at all times, upon notice to City, to undertake the defense of or, with the consent of City (which consent shall not be unreasonably withheld), to settle or compromise such claim, provided that Owner shall be responsible for all attorneys' fees and costs incurred before and after the decision to undertake such defense other than attorneys' fees and costs incurred by City

after such decision as provided below. The election by Owner to undertake the defense of a third-party claim shall not preclude City from participating or continuing to participate in the defense, so long as it bears its own legal fees and costs for so doing.

City shall have no rights, hereunder or otherwise, to indemnification or contribution from Owner with respect to any nonfulfillment of any covenant or obligation of City based upon the Development Agreement or the Entitlements pertaining to the Project except as otherwise expressly provided for herein.

8. Miscellaneous Provisions.

a) Police Powers. Except as otherwise expressly provided herein, nothing contained herein is intended to limit the police powers of Ketchum or its discretion in review of subsequent applications regarding development of the Property. This Agreement shall not be construed to modify or waive any law, ordinance, rule, or regulation not expressly provided for herein, including, without limitation, applicable building codes, fire codes, Ketchum's Zoning Ordinance, Ketchum's Subdivision Ordinance, and Planned Unit Development requirements for the Property.

b) Amendment. This Agreement may be revised, amended, or canceled in whole or in part, only by means of a written instrument executed by both Parties and as evidenced by amended plats and development plans.

c) Specific Performance. In the event of a breach of this Agreement, in addition to all other remedies at law or in equity, this Agreement shall be enforceable by specific performance by either party hereto. All remedies shall be cumulative.

d) Attorney's Fees. In the event either party hereto is required to retain counsel to enforce a provision of this Agreement, or to recover damages resulting from a breach hereof, the prevailing party shall be entitled to recover from the other party all reasonable attorney's fees incurred, whether or not litigation is actually instituted or concluded.

e) Notices. All notices required or provided for under this Agreement shall be in writing and deemed delivered upon delivery in person or upon mailing by certified mail, return receipt requested, postage prepaid. However, the time period in which a response to such notice must be given shall commence to run from the date of receipt on the return receipt of the notice. Rejection or refusal to accept, or the inability to deliver because of a change of address of which no notice was given shall be deemed to be receipt of the notice.

Notices to City shall be addressed as follows:

City of Ketchum
Post Office Box 2315
Ketchum, ID 83340
Attn: Jade Riley, City Administrator
Telephone: 208.727-5084
Email: jriley@ketchumidaho.org

Notices given to Owner shall be addressed as follows:

Harriman Hotel, LLC
c/o Waypoint, LLC
Jack E. Bariteau, Jr. Its Managing Member
Post Office Box 84
Sun Valley, ID 83353
Telephone: 650.906-5636
Email: jack@waypointsunvalley.com

with a copy to:

Lawson Laski Clark, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340
Attn.: Edward A. Lawson
Telephone: 208.725-0055
Email: eal@lawsonlaski.com

A party may change the address to which further notices are to be sent by notice in writing to the other party, and thereafter notices shall be addressed and transmitted to the new address.

f) Reliance by the Parties. This Agreement is intended by Owner to be considered by Ketchum as part of Owner's application for a modification of the existing design review approval and building permits for the Project, and such other applications as Owner may submit in connection with the Project. Owner acknowledges and intends the City to consider and rely upon this Agreement in its review and consideration of said applications.

g) Relationship of Parties. It is understood that the contractual relationship between Ketchum and Owner is such that neither party is the agent, partner, or joint venturer of the other party.

h) Successors and Assigns; Covenant Running With the Land. This Agreement shall inure to the benefit of City and Owner and their respective heirs, successors and assigns. This Agreement, including all covenants, terms, and conditions set forth herein, shall be and is hereby declared a covenant running with the land with regard to the Property or any portion thereof, and is binding on both Parties to this Agreement as well as their respective heirs, successors and assigns.

i) Recordation and Release. This Agreement shall be recorded with the Blaine County Recorder. City agrees to execute all appropriate documentation to cause the encumbrance of this Agreement to be terminated in the event of termination.

j) No Waiver. In the event that City or Owner, or its successors and assigns, do not strictly comply with any of the obligations and duties set forth herein, thereby causing a default

under this Agreement, any forbearance of any kind that may be granted or allowed by Owner, City, or their successors and assigns, to the other party under this Agreement shall not in any manner be deemed or construed as waiving or surrendering any of the conditions or covenants of this Agreement with regard to any subsequent default or breach.

k) Partial Invalidity. In the event any portion of this Agreement, or part hereof, shall be determined by any court of competent jurisdiction to be invalid, void, or otherwise unenforceable, the remaining provisions of this Agreement, or parts hereof, shall remain in full force and effect and shall in no way be affected, impaired or invalidated, it being understood that such remaining provisions shall be construed in a manner most closely approximating the intention of the parties with respect to the invalid, void, or unenforceable provision or part hereof.

l) Entire Agreement. This Agreement constitutes the full and complete agreement and understanding between the parties hereto. Excluding formal conditions placed upon the design review approval, subsequent plat approvals or other matters related to the public process, no representations or warranties made by either party shall be binding unless contained in this Agreement or subsequent written amendments hereto.

m) Exhibits. All exhibits referred to herein are incorporated in this Agreement by reference, whether or not actually attached.

n) Authority. Each of the persons executing this Agreement represents and warrants that he or she has the lawful authority and authorization to execute this Agreement, as well as all deeds, easements, liens and other documents required hereunder, for and on behalf of the entity executing this Agreement.

o) Recitals. The Recitals are incorporated herein and made a part of this Agreement by this reference.

p) Choice of Law. This Agreement shall be governed by and construed in accordance with the laws of the state of Idaho, which shall be the sole jurisdiction and venue for any action which may be brought by either party with respect to this Agreement or the subject matter hereof.

[end of text – signatures appear on following page]

SIGNATURE PAGE

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

Harriman Hotel, LLC, an Idaho
limited liability company

City of Ketchum, Idaho, a municipal
corporation

By: Waypoint, LLC, an Idaho limited
liability company, its Manager

By: _____
Jack E. Bariteau, Jr., Managing Member

By: _____
Neil Bradshaw, Mayor

