

RESOLUTION 2018-12

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING A SECOND AMENDMENT TO THE AMENDED AND RESTATED FINAL SETTLEMENT AGREEMENT BETWEEN THE TOWN AND MCO PROPERTIES INC., ET AL.

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

SECTION 1. The Second Amendment to the Amended and Restated Final Settlement Agreement between the Town of Fountain Hills and MCO Properties Inc., et al., is hereby approved in substantially the form and substance attached hereto as Exhibit A and incorporated herein by reference.

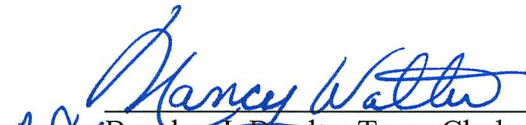
SECTION 2. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to execute all documents and take all steps necessary to carry out the purpose and intent of this Resolution.

SECTION 3. The Town Manager is hereby further authorized to approve and make such minor, non-material, administrative or clerical revisions to Exhibit A prior to its execution, as the Town Manager may reasonably determine to be required.

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Arizona, February 6, 2018.

FOR THE TOWN OF FOUNTAIN HILLS: **ATTESTED TO:**


Linda M. Kavanagh, Mayor


Nancy Watter, Town Clerk

REVIEWED BY:

APPROVED AS TO FORM:


Grady E. Miller, Town Manager


Fredda J. Bisman, Town Attorney

EXHIBIT A
TO
RESOLUTION 2018-12
[Second Amendment To The Amended And Restated Final Settlement Agreement]
See following pages.

SECOND AMENDMENT TO
"FINAL SETTLEMENT AGREEMENT
Amended and Restated May 1, 2014"

This Second Amendment to "Final Settlement Agreement (the "Amendment") is made to be effective as of February 6, 2018 (the "Effective Date"), between and among the Town of Fountain Hills, an Arizona municipal corporation (the "Town"), MCO Properties Inc., a Delaware corporation, successor-in-interest to MCO Properties L.P. d/b/a MCO Properties Limited Partnership, a Delaware limited partnership doing business in the State of Arizona ("MCO"), EN LLC d/b/a EN at Fountain Hills LLC, a Delaware limited liability company ("Eagles Nest"), Adero Canyon LLC, a Delaware limited liability company ("Adero") and Adero Canyon II LLC, a Delaware limited liability company ("Adero II"). The Town, MCO, Eagles Nest, Adero and Adero II are each referred to individually as a "Party," and collectively as the "Parties." MCO, Eagles Nest, Adero and Adero II may be referred to in this Amendment collectively as the "Developer Parties."

RECITALS

A. Town and Developer Parties are parties to a Final Settlement Agreement Amended and Restated on May 1, 2014, recorded at 2014-0314508 in the Official Records of the Maricopa County Recorder's Office ("Official Records"), that was amended by a First Amendment to Final Settlement Agreement dated September 15, 2016, and recorded at 2016-0644980 in the Official Records, which added Adero II as a party (collectively, the "Settlement Agreement") governing the development of property defined in the Settlement Agreement as the Eagles Nest Property and the Adero Canyon Property (collectively, "Property").

B. Adero II is the sole owner of a portion of the Property described in Exhibit A to this Amendment (the "Removed Property"). The Developer Parties now agree to cause the Removed Property to be removed from the Settlement Agreement. Accordingly, the purpose of this Amendment is to document the removal of the Removed Property from the Settlement Agreement, and to extinguish the Developer Parties' obligations with respect to the Removed Property.

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 Developer Parties hereby agree as follows:

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

2. Removal of Removed Property from Operation of the Settlement Agreement. As of the Effective Date, and subject to provisions of Section 5 of this Amendment, the Removed Property is removed from the Settlement Agreement, and all obligations of Developer Parties arising solely in connection with or with respect to the Removed Property are deemed

extinguished, including but not limited to, the obligation to complete the Emergency/Utility Access as defined in the Settlement Agreement.

3. Satisfaction of Certain Provisions of the Agreement. Upon execution of this Amendment, the Town shall issue a letter to the Developer Parties for the benefit of the Developer Parties acknowledging that certain requirements of the Settlement Agreement have been satisfied or complied with and accepted and approved by the Town, thus relieving the Developer Parties from any further obligations to satisfy those conditions and requirements.

4. Standards. In the event that Section 5.04 ("Hillside Disturbance") of the Town's current Subdivision Ordinance and Section 5.10 ("Canyon-side Lot Regulations") of the Town's current Zoning Ordinance (collectively, the "Current Ordinances") establish standards for the development of property within the Town that are less restrictive than the standards governing the development of the Property set forth in the Agreement, the less restrictive provisions of the Current Ordinances will govern the development of the Property.

5. Contingency. The effectiveness of this Amendment is contingent upon the execution by Adero II of a "Development Agreement" with the Town in a form satisfactory to the Town in its sole discretion ("Development Agreement") and concurrently with the execution by the Parties of this Amendment, by which Adero II assumes all development obligations with respect to the development of the Removed Property, as more fully set forth in the Development Agreement. Notwithstanding the forgoing, in the event that Adero II (i) fails to enter into a Development Agreement or (ii) in accordance with the express terms of the Development Agreement, elects to terminate the Development Agreement at its sole option upon giving written notice to the Town of such election (or is deemed to have terminated the Development Agreement), then this Amendment will be automatically withdrawn and of no force and effect, and the Removed Property (and the obligations of the applicable Developer Parties under the Settlement Agreement with respect to the Removed Property) will be fully restored and reinstated into the Settlement Agreement, as though this Amendment had never been executed.

6. No Boycott of Israel. Developer Parties certify pursuant to A.R.S. §35-393.01(A) that they are not currently engaged in, and for the Term of the Settlement Agreement will not engage in, a boycott of Israel.

7. Waiver of Claim under A.R.S. §12-1134. As an inducement to Town to approve and enter into this Amendment, Developer Parties agree to and do knowingly waive any and all rights to compensation for diminution in value of the Property pursuant to A.R.S. § 12-1134 that may now or in the future exist as a result of Town's entering into this Amendment, or the Town's approval or performance of, any condition, term and/or agreement contained in this Amendment, including (but not limited to) any acts undertaken by Town at the request of Buyer with respect to the Removed Property, any zoning (including but not limited to any approval of a PAD or amendment to such PAD), any amendment to Town's General Plan, and all similar actions of Town authorized or contemplated by or taken or performed in furtherance of this Amendment, or taken or performed in furtherance of this Agreement, or the restoration or reinstatement of the Removed Property into the Agreement following a failure of the contingency described in Section 3 of this Amendment (collectively, "Waiver"). This Waiver is effective from and after the Effective Date of this Amendment; supersedes any prior agreements

or understandings between Developer Parties and Town concerning the Property; and may not be modified or amended except by properly executed and recorded written agreement of Developer Parties and Town. This Waiver runs with the land and is binding upon all present and future owners of the Property. Developer Parties agree to indemnify, defend, pay and hold Town (including its employees and elected officials) harmless for, from and against any and all claims made, asserted or alleged by any other person or entity who has claims and interest in the Property as of this date.

8. Assignment. Developer Parties may not assign their rights under the Settlement Agreement apart from a conveyance of the Property (or applicable portion of the Property being conveyed), and Developer Parties must assign all of their right, title and interest in, and obligations under, the Settlement Agreement to a transferee in connection with a conveyance of the Property (or applicable portion of the Property being conveyed) to such transferee.

9. Full Force and Effect. Except as expressly modified by this Amendment, the Agreement remains in full force and effect.

[SIGNATURES ON FOLLOWING FOUR (4) 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



Grady Miller, Town Manager

ATTEST:

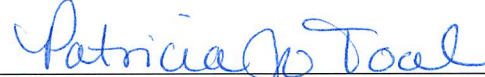


Bevelyn Bender, Town Clerk

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On February 7, 2018 before me, Patricia Jo Toal, a notary public in and for the State of Arizona, personally appeared GRADY MILLER, who proved to me on the basis of satisfactory evidence to be the person (s) whose names(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

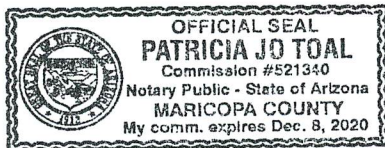
WITNESS my hand and official seal.



Notary Public

My Commission Expires:

December 8, 2020



"MCO"

MCO Properties Inc., a Delaware
corporation

By: M. Emily Madison
Name: M. Emily Madison
Its: Treasurer

STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)

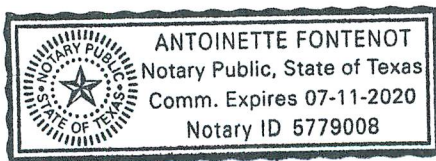
On January 22, 2018, before me, Antoinette Fontenot, a notary public
in and for the State of Texas, personally appeared M. Emily Madison who proved to
me on the basis of satisfactory evidence to be the person (s) whose names(s) is/are subscribed to
the within instrument and acknowledged to me that he/she/they executed the same in
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Antoinette Fontenot
Notary Public

My Commission Expires:

7-11-2020



"EAGLES NEST"

EN LLC, a Delaware
limited liability company

By: M. Emily Madison
Name: M. Emily Madison
Its: TREASURER

STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)

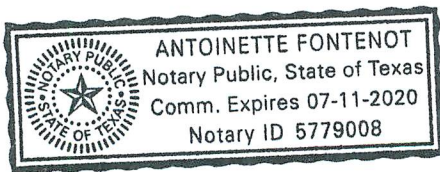
On January 22, 2018, before me, Antoinette Fontenot, a notary public in and for the State of TEXAS, personally appeared M. Emily Madison, who proved to me on the basis of satisfactory evidence to be the person (s) whose names(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Antoinette Fontenot
Notary Public

My Commission Expires:

7-11-2020



"ADERO"

Adero Canyon LLC, a Delaware
limited liability company

By: M. Emily Madison
Name: M. Emily Madison
Its: Treasurer

STATE OF Texas)
) ss.
COUNTY OF HARRIS)

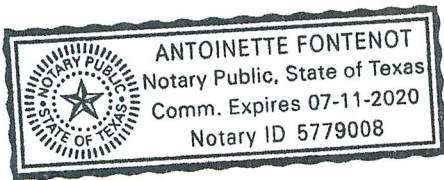
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his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Antoinette Fontenot
Notary Public

My Commission Expires:

7-11-2020



" ADERO II"

Adero Canyon II LLC, a Delaware
limited liability company

By: M. Emily Madison
Name: M. Emily Madison
Its: TREASURER

STATE OF TEXAS)
) ss.
COUNTY OF HARRIS)

On January 22, 2018, before me, Antoinette Fontenot, a notary public
in and for the State of TEXAS, personally appeared M. Emily Madison who proved to
me on the basis of satisfactory evidence to be the person (s) whose names(s) is/are subscribed to
the within instrument and acknowledged to me that he/she/they executed the same in
his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the
person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Antoinette Fontenot
Notary Public

My Commission Expires:

7-11-2020

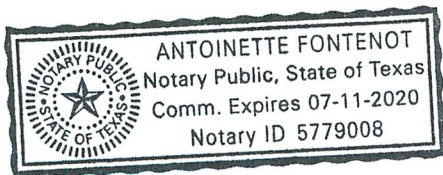


EXHIBIT A TO AMENDMENT
Legal Description of Removed Property

Exhibit "A"

PROPERTY DESCRIPTION

PARCELS 2, 3, 4, 5, 6, 9, 10 AND 10A OF ADERO CANYON, ACCORDING TO THE REPLAT OF RECORD IN THE OFFICE OF THE COUNTY RECORDER OF MARICOPA COUNTY, ARIZONA, IN BOOK 1220 OF MAPS, PAGE 28.

EXCEPT ALL OIL, GASES AND OTHER HYDROCARBON SUBSTANCES, COAL, STONE, METALS, MINERALS, FOSSILS AND FERTILIZERS OF EVERY NAME AND DESCRIPTION, TOGETHER WITH ALL URANIUM, THORIUM, OR ANY OTHER MATERIALS, WHETHER OR NOT OF COMMERCIAL VALUE, IN, OR UNDER THE PROPERTY, AS RESERVED ON DEED RECORDED DECEMBER 30, 1993 AS 93-0921340, OF OFFICIAL RECORDS.

EXCEPT ALL UNDERGROUND WATER IN, UNDER OR FLOWING THROUGH SAID PROPERTY AND WATER RIGHTS APPURTENANT THERETO, AS RESERVED ON DEED RECORDED DECEMBER 30, 1993 AS 93-0921340, OF OFFICIAL RECORDS.

[TO BE REVISED TO EXCEPT THE VERIZON PARCEL]