

RESOLUTION NO. 2018-38

A RESOLUTION OF THE MAYOR AND TOWN COUNCIL OF FOUNTAIN HILLS, MARICOPA COUNTY, ARIZONA, ADOPTING A PARKING EASEMENT AGREEMENT WITH RCS – PARK PLACE 1, LLC.

WHEREAS, the Mayor and Town Council of the Town of Fountain Hills (the “Town”) desire to adopt a parking easement in the vicinity of the Park Place development pursuant to that certain Development Agreement between the Town and N-Shea Group and Park Place Properties, LLC, recorded in the Official Records of the Maricopa County Recorder at Instrument No. 2016-0478461.

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

SECTION 1. A Parking Easement Agreement is hereby adopted with RCS – Park Place 1, LLC located through, over, under and across certain real property more specifically described therein, 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 cause the execution of the Parking Easement Agreement and to take all steps necessary to carry out the purpose and intent of this Resolution.

[Signatures on following page]

PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Maricopa County, Arizona, this 5th day of June, 2018.

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


Mitesh V. Patel, Interim Town Attorney
Dickinson Wright PLLC

EXHIBIT A
TO
RESOLUTION NO. 2018-38
[PARKING EASEMENT AGREEMENT]

See following pages.

WHEN RECORDED RETURN TO:

Town of Fountain Hills
Attn: Town Clerk
16705 East Avenue of the Fountains
Fountain Hills, Arizona 85268

This Agreement is exempt from the real estate transfer fee and Affidavit of Property Value pursuant to A.R.S. §11-1134(A)(2)

PARKING EASEMENT AGREEMENT

THIS PARKING EASEMENT AGREEMENT (this “**Easement Agreement**”) is entered into on June 5, 2018, by and between the Town of Fountain Hills, an Arizona municipal corporation (“**Grantor**” or the “**Town**”), and RCS – Park Place 1, LLC, a Colorado limited liability company (“**Grantee**”). Grantor and Grantee are sometimes referred to herein collectively as the “**Parties**,” or individually as a “**Party**.”

RECITALS

A. Grantor owns that certain real property located east of the southeast corner of Avenue of the Fountains and La Montana Drive in Fountain Hills, Arizona, more particularly described in Exhibit P-1 and depicted in Exhibit P-3, attached hereto and incorporated herein by reference (the “**Town Parcel**”).

B. Grantee owns that certain real property located at the intersection of Verde River Drive and Avenue of the Fountains in the Town of Fountain Hills, Arizona, as more particularly described in Exhibit P-2 and as partially depicted in Exhibit P-3 (the “**Developer Property**”). Grantee intends to construct a multifamily and retail project, including but not limited to retail shopping areas, restaurants, offices, and related uses (the “**Project**”), on the Developer Property. Grantee requires use of the Town Parcel for parking related to the Project.

C. Grantor desires to grant to Grantee and its successors and assigns a permanent nonexclusive easement for ingress, egress, parking and pedestrian access on, over and across the Town Parcel (the “**Easement Area**”) for use in connection with the Project.

D. The Parties acknowledge and agree that Grantee must design and construct the AOTF Parking Lot (as defined in the Development Agreement (defined below)) on the Easement Area in accordance with the requirements of that certain Development Agreement by and among the Town of Fountain Hills, N-Shea Group, LLC (“**N-Shea**”), and Park Place Properties, LLC, dated June 17, 2016, recorded on July 7, 2016 in the Official Records of Maricopa County Recorder as Instrument No. 20160478461, as assigned by N-Shea to Grantee (with respect to the “Phase 1” rights and obligations only) pursuant to that certain Assignment and Assumption of Development Agreement (Phase 1), dated September 7, 2016, recorded on September 9, 2016 in the Official Records of Maricopa County Recorder as Instrument No. 20160655029 (as so assigned, the “**Development Agreement**”).

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing introduction and recitals, which are incorporated herein by reference and the mutual covenants set forth below, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby agree as follows:

1. Grant of Easement. Grantor hereby expressly grants to Grantee and to its successors and assigns, for the benefit of the Developer Property, the following easement through, on, over, under, upon, in, across and along the Easement Area, subject to termination as set forth in Section 2 below:

1.1 Parking and Maintenance Easement. Grantor hereby grants a non-exclusive and perpetual right and easement (the “**Easement**”) for the purpose of (i) ingress, egress, parking and pedestrian access, and on-going maintenance activities related to the AOTF Parking Lot, and (ii) ingress, egress, pedestrian access, and on-going maintenance activities related to the Pocket Park..

1.2 Reserved.

2. Termination of the Easement. The Easement granted herein shall terminate (i) immediately upon termination of the Development Agreement with respect to Phase 1 caused by a breach of such agreement by the Developer (as such term is defined in the Development Agreement) with respect to Phase 1, (ii) at such time as Phase 1 has been abandoned for a period in excess of 180 consecutive days, or (iii) after completion of the AOTF Parking Lot, the failure of Grantee to maintain the Easement Area as set forth in Section 3 below following the notice and cure process set forth in Section 7.2 below. Upon occurrence of any terminating event as set forth above, this Easement Agreement shall fully terminate and neither Party shall have any further rights or obligations herein.

3. Operation and Maintenance.

3.1 AOTF Parking Lot. Grantee shall be solely responsible for the (A) perpetual maintenance and repair of all pavement, markings, signage, dust control, landscaping, irrigation, electrical and lighting located within the Easement Area, and (B) payment of any electrical or water costs associated with the parking facilities located within the Easement Area. Such maintenance and repair shall be conducted at the same intervals and standards as Grantee’s parking areas.

3.2 Reserved.

4. Indemnification. Grantee shall indemnify, defend and hold harmless Grantor and each council member, officer, employee, contractor or agent thereof (Grantee 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 (i) the negligent design and construction of the Parking Lot and the Pocket Park on the Easement Area, or (ii) failure to properly maintain the Easement Area by Grantee, its employees, agents or any tier of subcontractor acting on Grantee’s behalf. The provisions of this Section will survive for a period of one year following the termination of this Easement Agreement.

5. Insurance. Each of the Parties shall, at its sole cost and expense, carry commercial general liability insurance, naming the other Party as additional insured, covering injury, death, disability or illness of any person, or damage to property, occurring in, on or about its real property, with liability limits not less than \$2,000,000. The policies of insurance provided herein shall be issued by insurance companies qualified to do business in the State of Arizona and reasonably acceptable to the Parties. Each such insurance company shall have a rating of at least A, Class IX in Best’s Key Rating Guide. Copies of certificates evidencing the insurance policies that each Party is required to carry hereunder, shall be delivered to the other Party within five days after the date on which this Easement Agreement is recorded. The policies of insurance must contain a provision or endorsement that the company writing said policy will give to the other Party 30 days’ notice in writing of any modification, cancellation or lapse of effective date or any reduction in the amount of insurance. Not more frequently than every five years, if, in the reasonable opinion of either Party the amount of the commercial general liability insurance coverage at that time is not adequate, the Parties shall meet and discuss additional insurance as may be reasonable for comparable facilities in the greater metropolitan Phoenix area.

6. Notices and Requests. Any notice or other communication required or permitted to be given under this Easement Agreement shall be in writing and shall be deemed to have been duly given if: (i) delivered to the Party at the addresses set forth below; (ii) deposited in the U.S. Mail, registered or certified, return receipt requested, to the address set forth below; or (iii) given to a recognized and reputable overnight delivery service, to the address set forth below:

If to Grantor:	Town of Fountain Hills 16705 East Avenue of the Fountains. Fountain Hills, Arizona 85268 Attn: Town Manager
With a copy to:	Town of Fountain Hills 16705 East Avenue of the Fountains. Fountain Hills, Arizona 85268 Attn: Town Attorney
If to Grantee:	RCS – Park Place 1, LLC 371 Centennial Parkway, Suite 200 Louisville, CO 80027 Attn: Bruce Hazzard

With a copy to: Real Capital Solutions, Inc.
371 Centennial Parkway, Suite 200
Louisville, CO 80027
Attn: Senior Counsel

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: (i) when delivered to the Party; (ii) three business days after being placed in the U.S. Mail, properly addressed, with sufficient postage; or (iii) 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.

7. Self-Help. In addition to all other remedies available at law or in equity, upon the failure of a defaulting Party to cure a breach of this Easement Agreement within 30 days following written notice thereof by the non-defaulting Party (unless, with respect to any such breach the nature of which cannot reasonably be cured within such 30-day period, the defaulting Party commences such cure within such 30 day period and thereafter diligently prosecutes such cure to completion, which completion must occur not later than 60 days after the date of the notice), the non-defaulting Party shall have the right to perform such obligation contained in this Easement Agreement on behalf of such defaulting Party and be reimbursed by such defaulting Party upon demand for the reasonable costs thereof together with interest at the prime rate charged from time to time by Bank of America (its successors or assigns), plus 2% (not to exceed the maximum rate of interest allowed by law). Notwithstanding the foregoing, in the event of (A) an emergency, (B) blockage or material impairment of the Easement rights, or (C) the unauthorized parking of vehicles on the Town parcel, the non-defaulting Party may immediately cure the same and be reimbursed by the defaulting Party upon demand for the reasonable cost thereof together with interest as above described.

8. Duration. Unless otherwise cancelled or terminated as set forth herein, the Easement granted in this Easement Agreement shall continue in perpetuity.

9. Document Execution, Modification and Cancellation. This Easement Agreement (including exhibits) may be modified or cancelled only by agreement between Grantor and Grantee.

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

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

12. Severability. Invalidation of any of the provisions contained in this Easement Agreement, or of the application thereof to any person by judgment or court order shall in no way affect any of the other provisions hereof or the application thereof to any person and the same shall remain in full force and effect.

13. Attorney's Fees. If either Party commences an action against the other to interpret or enforce any of the terms of this Easement Agreement or because of the breach by the other Party of any of the terms hereof, the losing Party shall pay to the prevailing Party reasonable attorney's fees, costs and expenses, including expert witness fees, incurred in connection with the prosecution or defense of such action. For the purpose of this Easement Agreement, the terms "**attorney's fees, costs and expenses**" shall mean the fees and expenses of counsel to the respective Parties, which may include printing, duplicating and other expenses, air freight charges, and fees billed for law clerks, paralegals, librarians and others not admitted to the bar but performing services under the supervision of an attorney. The term "**attorneys' fees, costs and expenses**" shall also include, without limitation, all such fees and expenses incurred with respect to appeals, arbitrations and bankruptcy proceedings.

14. Negation of Partnership. None of the terms or provisions of this Easement Agreement shall be deemed to create a partnership between or among the Parties 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.

15. No Other Interest. Grantee acknowledges and agrees that except for the Easement, Grantee claims no right, title or interest in or to any portion of the Town Parcel.

16. Assignment. Neither Grantor nor Grantee shall have the right or authority to assign, in whole or in part, any of its rights or obligations under this Agreement, or any portion of this Agreement to any third party without the prior, written consent of the other party, which consent shall not be unreasonably delayed, conditioned or denied. Notwithstanding the foregoing, the Parties acknowledge and agree that no such consent shall be required if the underlying property burdened or benefitted by this Easement Agreement is transferred or conveyed to a third party.

17. Running of Benefits and Burdens. All provisions of this Easement Agreement, including the benefits and burdens, run with the land and are binding upon and inure to Grantor, Grantee and their respective successors and assigns.

18. Additional Easements. Nothing contained in this Easement Agreement shall prohibit Grantor from conveying additional easements for access, drainage, utility or other purposes through, over, under, upon, in, across and along the Easement Area; provided, however, that no such additional rights or easements shall impair the use of the Easement. Notwithstanding the foregoing, if Grantor exercises its rights under this Section, Grantee shall not have any responsibility whatsoever for the repair or replacement of any damage or destruction to the Town Parcel, or for any damage or

destruction to any improvements installed on the Easement Area by Grantee, caused by any such activity, and Grantor shall be solely responsible for such repair or replacement.

19. Counterparts. This Easement Agreement may be executed in counterparts, all of which are identical, each of which shall be deemed an original, and all of which counterparts, when executed, taken together shall constitute one and the same instrument.

20. Entire Agreement. This instrument contains the entire agreement between the Parties relating to the subject matter hereof. Any oral representations or modifications concerning this instrument shall be of no force or effect, excepting a subsequent recorded modification, signed by Grantor and Grantee or their respective successors or assigns.

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

[SIGNATURES ON FOLLOWING PAGES]

"Grantee"

RCS – PARK PLACE 1, LLC,
a Colorado limited liability company

By: Sharon K Eshima

Name: Sharon K Eshima

Title: Manager

(ACKNOWLEDGMENT)

STATE OF COLORADO)
) ss.
COUNTY OF BOULDER)

On ^{May} ~~June~~ 30, 2018, before me personally appeared Sharon K. Eshima as Manager of RCS – Park Place 1, LLC, a Colorado limited liability company, whose identity was proven to me on the basis of satisfactory evidence to be the person who he/she claims to be, and acknowledged that he/she signed the above document on behalf of RCS - Park Place 1, LLC, a Colorado limited liability company.

My Commissions Expires: 12/16/2021 
Notary Public

(Affix notary seal here)

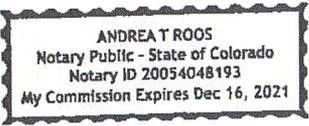


Exhibit P-1

PARKING EASEMENT AGREEMENT

PHASE 1 - TOWN PARCEL - LEGAL DESCRIPTION

A portion of the west half of Section 15, Township 3 North, Range 6 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona; being more particularly described in that certain Special Warranty Deed, recorded in Instrument Number 1997-0300068, records of Maricopa County, Arizona:

Beginning at the northeast corner of said described Special Warranty Deed, and the northwest corner of Lot 1A of Final Replat of Block 2, Plat No. 208, Book 1278, Page 31, Maricopa County Recorder, Maricopa County, Arizona, said corner being on the south right-of-way of Avenue of the Fountains as shown on said Final Replat No. 208, Block 2;

Thence south 20 degrees 38 minutes 08 seconds west, a distance of 280.36 feet;

Thence leaving said Replat 208, Block 2, north 39 degrees 40 minutes 03 seconds west, a distance of 170.38 feet;

Thence north 20 degrees 38 minutes 08 seconds east, a distance of 195.95 feet to a point on said southerly right-of-way of Avenue of the Fountains;

Thence south 69 degrees 21 minutes 52 seconds east along said southerly right-of-way of Avenue of the Fountains, a distance of 148.00 feet to the POINT OF BEGINNING;

This parking easement contains an area of 0.809 acres, more or less.

Randy Harrel



Exp 3/31/21

Exhibit P-2

PARKING EASEMENT AGREEMENT

PHASE 1 - DEVELOPER PROPERTY - LEGAL DESCRIPTION

Lot 1A, of the Final Replat of lot 1, of the Final Replat of Block 2, Plat No. 208, Fountain Hills, Arizona, Book 615 of Maps, Page 48, Maricopa County Records, Recorded June 28, 2016, Book 1278 of Maps, Page 31, Records of Maricopa County, Arizona, a portion of Section 15, Township 3 North, Range 6 East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona.

This parking easement contains an area of 2.58 acres, more or less.

Randy L. Harrel



Ltr. 3/31/21

EXHIBIT P-3
PARKING EASEMENT AGREEMENT
BETWEEN THE TOWN OF FOUNTAIN HILLS AND RCS-PARK PLACE 1, LLC

