

Midway City Council
7 June 2022
Regular Meeting

Resolution 2022-22 /
The Village, Phase 2
Development Agreement



RESOLUTION 2022-22

A RESOLUTION OF THE MIDWAY CITY COUNCIL APPROVING A DEVELOPMENT AGREEMENT FOR THE VILLAGE, PHASE TWO

WHEREAS, the Midway City Council is granted authority under Utah law to make agreements in the public interest and to further the business of Midway City; and

WHEREAS, the City Council deems it appropriate to adopt a development agreement for The Village, Phase 2.

NOW THEREFORE, be it hereby **RESOLVED** by the City Council of Midway City, Utah, as follows:

Section 1: The attached The Village, Phase 2 Development Agreement is hereby approved and adopted.

Section 2: The Mayor is authorized to sign the document on behalf of Midway City.

PASSED AND ADOPTED by the Midway City Council on the day of 2022.

MIDWAY CITY

Celeste Johnson, Mayor

ATTEST:

Brad Wilson, Recorder

(SEAL)

DRAFT

Exhibit A

DRAFT

THE VILLAGE - PHASE 2 DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (the “Agreement”) is entered into as of this ____ day of _____, 2022, by and between MIDWAY HERITAGE DEVELOPMENT, LLC (hereinafter called the “Developer”) and MIDWAY CITY, UTAH, a political subdivision of the State of Utah (hereinafter called the “City”). Developer and the City are, from time to time, hereinafter referred to individually as a “Party” and collectively as the “Parties.” Unless otherwise noted herein, this Agreement supersedes and replaces any previous development agreements entered into by and between Developer and the City involving the same Property and is the entire, complete Agreement between the Parties.

RECITALS

- A. The City, acting pursuant to its authority under Utah Code Ann. §10-9a-101, *et. seq.*, in compliance with the Midway City Land Use Ordinance, and in furtherance of its land use policies, goals, objectives, ordinances and regulations, has made certain determinations with respect to the proposed The Village - Phase 2, located at 541 East Main Street in Midway, Utah (hereinafter referred to as the “Project”), and therefore has elected to approve and enter into this Agreement in order to advance the policies, goals and objectives of the City, and to promote the health, safety and general welfare of the public.
- B. The Developer has a legal interest in certain real property located in the City, as described in Exhibit “A”, (hereinafter referred to as the “Property”) attached hereto and incorporated herein by this reference. Developer warrants and represents that it has the legal authority to sign this Agreement and bind the Property as set forth herein.
- C. The Developer intends to develop the Property as part of The Village, a mixed-use development containing both commercial and residential uses. This Phase 2 proposal is for thirty-five (35) units, including three (3) commercial buildings, located on 5.7 acres designated for the units and internal roads with 1.11 acres of total open space. The Project is in the C-2 zone. There are five (5) total phases in the development. Preliminary approval was granted for Phases 1-3 on March 1, 2022.
- D. Phases 1 and 2 will contain forty-five (45) dwellings and seven (7) commercial structures on 9.4 acres. The Property is located at 541 East Main Street and encompasses 27.47 acres and contains 8.81 acres of open space. The proposal includes at least 44,128 square feet of commercial space in multiple buildings, 143 townhomes, park, trails, pool, and sports club.

- E. The Property has historically and is currently in agricultural production except the land occupied by the automotive shop, storage units, and dwelling. Sensitive land areas located on the Property will be left undisturbed as required by the land use ordinance. These sensitive lands include the sloped areas at the base of Memorial Hill.
- F. The C-2 zone allows for mixed-use development. The proposal is to create a mixed-use development that will include commercial uses along Main Street and residential uses on the remainder of the Property. Because mixed-use projects are a conditional use, the City Council may require reasonable conditions to mitigate negative impacts to the neighbors and the area.
- G. Each Party acknowledges that it is entering into this Agreement voluntarily. The Developer consents to all the terms and conditions of this Agreement and acknowledges that they are valid for development of the Project. Unless otherwise specifically agreed to herein, the terms and conditions contained herein are in addition to any conditions or requirements of any other legally adopted ordinances, rules, or regulations governing the development of real property in Midway City.

NOW, THEREFORE, in consideration of the promises, covenants and provisions set forth herein, the receipt and sufficiency of which consideration is hereby acknowledged, the Parties agree as follows:

AGREEMENT

Section 1. Effective Date and Term. The term of this Agreement shall commence upon the signing of this Agreement (the “Effective Date”) by both Parties and shall continue for a period of ten (10) years. Unless otherwise agreed between the City and the Developer, the Developer’s vested interests and rights contained in this Agreement expire at the end of the Term, or upon termination of this Agreement. Upon termination of this Agreement, the obligations of the Parties to each other hereunder shall terminate, but none of the dedications, easements, deed restrictions, licenses, building permits, or certificates of occupancy granted prior to the expiration of the term or termination of this Agreement shall be rescinded or limited in any manner.

Section 2. Definitions. Unless the context requires a different meaning, any term or phrase used in this Agreement that has its first letter capitalized shall have that meaning given to it by this Agreement. Certain terms and phrases are referenced below; others are defined where they appear in the text of this Agreement, including the Exhibits.

“Applicable Law” shall have the definition set forth in Section 4A of this Agreement.

“Governing Body” shall mean the Midway City Council.

“City” shall mean the Midway City, and shall include, unless otherwise provide, any and all of the City’s agencies, departments, officials, employees or agents.

Section 3. Obligations of the Developer and the City.

A. Obligations of the Developer:

- i. **General Obligations:** The Parties acknowledge and agree that the City’s agreement to perform and abide by the covenants and obligations of the City set forth herein is conditioned upon and in material consideration of the Developer’s agreement to perform and abide by the covenants and obligations of the Developer set forth herein.
- ii. **Construction and/or Dedication of Project Improvements:** The Developer agrees to construct and/or dedicate Project improvements as set forth below as directed by the City, including but not limited to, driveways, landscaping, water, sewer, and other utilities as shown on the approved final plans and in accordance with current City standards. The Developer shall satisfactorily complete construction of all Project improvements no later than ten (10) years after the recording of the plat for the Project. All costs associated with the Project improvements shall be borne by the Developer. The Developer also agrees to comply with the terms of the Midway City Staff Report, as approved and adopted by the Midway City Planning Commission and as accepted by the Midway City Council, attached hereto and incorporated herein by this reference.
- ii. **Conditions for Current Approvals:** The Developer shall comply with all of the following conditions:
 - a) **Payment of Fees:** Developer agrees to pay all applicable Midway City fees as a condition of developing the Project on the Property, including all engineering and attorney fees and other outside consultant fees incurred by the City in relation to the Project. All fees shall be paid current prior to the recording of any plat or the issuance of any building permit for the Project or any portion thereof.
 - b) **Water Rights and Water Service:** The Developer has submitted the required water rights to the City and they are now being held in escrow. The required water rights for each phase will be dedicated to the City before the recording of each plat. The Water Advisory Board has approved an estimated 181.42 acre-feet for the five phases of the project. For Phase 2, 38.57 acre-feet must be dedicated. The water rights dedicated for Phase 2 must be cited on the plat with specific water rights requirements noted for each commercial building. If a use is proposed in a commercial building and the proposed use requires more water rights than has been dedicated, the Developer must dedicate the needed water rights before the use is approved. Any municipal and industrial water must be reserved to meet the needs of Phases 3-5.

- c) Roads and Traffic Circulation: Each phase of the development must meet access requirements. Phase 2 complies with all access requirements.
- d) Traffic Study: A traffic study has been submitted to the City for review. The study has determined the impact of traffic generated from the proposal on the surrounding UDOT and City streets. One significant finding is a third access is required for better traffic distribution and to lower the impact on the intersection of River Road and Main Street. The third access will be from River Road. The Fire District has also reviewed the application and has recommended that a third access is needed. A third access is a requirement for the conditional approval of the zone map amendment.
- e) Alley Access: The proposed plan has street access to each unit, but there is also additional alley access proposed for parking access. The alley access areas will be private and will be owned by the HOA or POA. The Developer shall prepare a snow removal and storage plan for review and approval by Midway City Staff. The Developer has provided an area on the site plan where snow will be stored in the central open space area. The Developer has provided a will-serve letter from Wasatch County Solid Waste for the current plan. The City and the Developer have met with the Fire District to review all fire related issues, including alley access, and have addressed any and all concerns.
- f) Main Street Improvements: The Developer will be required to improve Main Street to UDOT requirements and provide the City with documentation of UDOT approval. A final approval from UDOT will be required before approval is granted.
- g) Density: The maximum number of residential units is 143 as per the condition of the conditionally approved re-zone of the Property. The residential density per phase is as follows:
 - a. Phase 1 – 10 units
 - b. Phase 2 – 35 units
 - c. Phase 3 – 43 units
 - d. Phase 4 – 40 units
 - e. Phase 5 – 15 units
- h) Trails: The Master Plan requires the Developer to pursue approval of a trail connection from the development to Memorial Hill. Wasatch County, the owner of Memorial Hill, must approve the trail. If a trail is built, it will be a backcountry soft surface trail to minimize the impact on Memorial Hill and to limit visual impact when looking at Memorial Hill. There are trails and sidewalks throughout the proposal and all will have a public access easement, including the trail through the central open space area.

- i) Architectural Theme: The Developer is required to receive architectural approval of all structures in the mixed-use development, including all commercial and residential buildings and any other features requiring architectural approval. Specific review of each building is required through the building permit approval process.
- j) Parking: The Developer is providing 184 commercial stalls and 90 residential stalls, totaling 274 parking stalls in Phases 1 and 2. Of the residential stalls, two (2) stalls per unit will be provided in the unit's garage. Code requires another 23 stalls to be provided that have not been identified on the plans. To meet this requirement, the Developer may need to install some temporary stalls until future phases are developed containing additional required parking. The parking assigned to each commercial building will be noted on the plat for each commercial building. If a use is proposed in a commercial building and the proposed use requires more parking than has been provided, the applicant proposing the use must provide the required parking before the use is approved.
- k) Required Commercial Square Footage: The mixed-use code requires twenty percent (20%) of the gross square footage of all structures within a mixed-use development (except residential garages) to be deed restricted as commercial. At build out, the Developer is proposing 44,128 square feet of commercial space and 81,401 square feet of residential space based on building pad area and one-story buildings above grade. Likely, most structures will be two stories above grade and the commercial building area will be 83,184 square feet and the residential space will be 242,731 square feet. The eighty percent (80%) to twenty percent (20%) ratios must be met and will be monitored through the building permit approval process.
- l) Open Space: The project is required to provide 8.32 acres of total open space. The Developer is providing 8.44 acres of total open space to comply with the requirement. Phase 2 will include 1.11 acres of open space.
- m) Setbacks: The development is required to meet the setback requirements for the mixed-use code and the conditions placed on the project through the rezoning approval. All commercial buildings are required to have an eight-foot (8') setback and all residential structures are required to have a ten-foot (10') setback. Residential setbacks along the western boundary are a minimum of thirty-six feet (36'), and residential setbacks along the eastern boundary are a minimum of one hundred feet (100').
- n) Height of Structures: Structures cannot exceed thirty-five feet (35') in height, measured from natural grade to roof. Architectural elements may exceed the limit as per code.

- o) Transient Rental Overlay District: The transient rental overlay district (TROD) covers the roughly six hundred foot (600') area of the project north of Main Street. Per the conditional approval of the rezone of some of the project area, only units that fall entirely in the rezone area may be rented as short-term nightly rentals, and such units must comply with all short-term rental requirements.
- p) One Property Owner's Association: All residential phases of the development are required to be part of one property owner's association. The commercial areas will all be required to be part of one property owner's association. This is required to maintain all private areas, including private roads, alleys, roads, and common areas. The City has received a draft of the Declaration of Covenants, Conditions and Restrictions, which is being reviewed by the City Attorney.
- q) Geotechnical Report: The Developer will be required to install piezometers in multiple areas of the development to monitor water levels over the next few years, especially in the areas of Phases 2-5. The piezometers will provide information regarding the water table over multiple years and the development of future phases.
- r) Commercial Area Landscaping: The proposed development has a significant amount of frontage along Main Street. The view of Midway along Main Street is highly important to the City. It is required that the commercial areas of the development either be kept in agricultural production until constructed, or once such areas are developed, that the commercial pads and surrounding area be landscaped until the structures are built. Such landscaping may be minimal, with grass and an irrigation system, but such areas must be kept orderly and maintained.
- s) Residential Area Landscaping: The Developer has submitted a final landscaping plan for the residential areas of the development. As part of the conditional use permit, landscaping must be used to help mitigate nuisances. Berms, landscaping, and walls will help mitigate light and noise from trespassing on to neighboring properties. The Developer has committed to constructing a masonry wall around the Wilde property that borders the southwest corner of the property. A wall should also be constructed next to the southwest parking lot north of the Wilde property to mitigate light trespass from vehicles. A berm with landscaping will be installed along the western boundary of Phase 2. A berm and landscaping are also required in the northeast corner of the Property to mitigate light trespass on the neighboring property.
- t) Temporary Connector Access: There is a planned temporary connector access in Phase 2 to provide emergency access and traffic circulation between Phases

1 and 2. The access will be made of pavers that have been approved by the Fire District and by the City Engineer. Once Phase 3 is built, the temporary access will be removed, unless the City and the Developer agree that the access is both aesthetically pleasing and beneficial to the community. If Phase 3 is not approved within one (1) year of the temporary connector installation, the temporary connector will be paved to a City standard and will not be removed until Phase 3 is complete.

- u) Mailbox Location: The mailbox location shall be in the commercial building located east of Unit 141.
- v) Lighting Plan: The City has required the Developer to provide a lighting plan for street lighting, dwelling lights, and parking areas lighting. The purpose of the plan is to assure the proposed lights comply with current code regarding light cut-off and to assure no light trespasses will occur onto neighboring properties. The Developer has provided a plan that appears to comply with code requirements. All commercial and dwelling permits must also comply with code requirements for full cut off.
- w) Private Street Profile: The City, the Developer, and utility company representatives are working together to create a street profile for the mixed-use development that will be functional, aesthetically pleasing, and safe for the community. Several ideas have been discussed to help accomplish this, which include narrowing the road, creating bulb-outs with trees, creating parallel parking areas between the bulb-outs, installing landscaping planter islands at the three entry points to The Village, and creating safer and pedestrian crossings throughout the neighborhood. Some of the proposed ideas have been included in the site plan and include the narrowing of the road, bulb-outs, defined parallel parking, and landscaping planter islands at the three entry points to The Village.
- x) Automotive Shop: A requirement of the conditional approval to rezone part of the property is that the automotive shop and storage unit property must be purchased and left as open space in The Village development. The Developer has purchased the property and has submitted the deed to the City.
- y) Sewer Connection: The development will connect to existing Midway Sanitation District sewer lines located in the area.
- z) Weed Control: Developer and its successors and assigns shall eradicate, mow or trim weeds and vegetation at all times in all areas of the Project.
- aa) Construction Traffic: All construction traffic for all Project improvements will meet the requirements imposed by the Midway City Planning and Engineering Departments.
- bb) Duration of Final Approval: The duration of final approval shall be for one (1) year from the date of final approval of the development by the City

Council. Should a final plat not be recorded by the County Recorder within this one-year period, the development's approval shall be voided, and both preliminary and final approvals must be re-obtained, unless, on a showing of extenuating circumstances, the City Council extends the time limit for plat recording, with or without conditions. The granting or denying of an extension, with or without conditions, is within the sole discretion of the City Council, and an applicant has not right to receive such an extension. Such conditions may include, but are not limited to, provisions requiring that:

- a. Construction must be conducted according to any new City standards in effect at the time the plat is ultimately recorded;
 - b. The property must be maintained in a clean, dust-free, and weed-free condition at all times;
 - c. Each extension will be for a one-year period only, after which time an annual review must be presented before the City Council; and/or
 - d. No more than three one-year extensions will be allowed.
- cc) Warranty: Consistent with City standards, the Developer will provide a one-year warranty for the operation of all improvements.
- dd) Bonding: Developer agrees to post performance and other bonds in amounts and types established by the City related to the performance of the Developer's construction obligations for the Project, pursuant to current City Ordinances and Regulations.
- ee) City's Right to Draw From Construction Bond: If the Developer is required to perform any work within the public right-of-way, and the work is not completed by the City's established deadlines, the City shall have the right to draw funds from the Developer's performance and other bonds.

B. Obligations of the City:

- i. General Obligations: The Parties acknowledge and agree that Developer's agreement to perform and abide by the covenants and obligations of Developer set forth herein is conditioned upon and in material consideration of the City's agreement to perform and abide by the covenants and obligations of the City set forth herein.
- ii. Conditions of Approval: The City shall not impose any further Conditions on Current Approvals other than those detailed in this Agreement, and on the Project Plats, unless agreed to in writing by the Parties. Developer shall remain bound by all legally adopted ordinances, resolutions and policies of the City unless specifically agreed to otherwise herein.
- iii. Acceptance of Improvements: The City agrees to accept all Project improvements constructed by Developer, or Developer's contractors, subcontractors, agents or employees, provided that 1) the Midway City Planning

and Engineering Departments review and approve the plans for any Project improvements prior to construction; 2) Developer permits Midway City Planning and Engineering representatives to inspect upon request any and all of said Project improvements during the course of construction; 3) the Project improvements are inspected by a licensed engineer who certifies that the Project improvements have been constructed in accordance with the approved plans and specifications; 4) Developer has warranted the Project improvements as required by the Midway City Planning and Engineering Departments; and 5) the Project improvements pass a final inspection by the Midway City Planning and Engineering Departments.

Section 4. Vested Rights and Applicable Law.

- A. Applicable Law. The rules, regulations, official policies, standards and specifications applicable to the development of the Property (the “Applicable Law”) shall be in accordance with those set forth in this Agreement, and those rules, regulations, official policies, standards and specifications, including City Ordinances and Resolutions, in force and effect on the date the City Council granted preliminary approval to Developer for the Project. Developer expressly acknowledges and agrees that nothing in this Agreement shall be deemed to relieve Developer from the obligation to comply with all applicable requirements of the City necessary for approval and recordation of the plat, including the payment of fees and compliance with all other applicable ordinances, resolutions, regulations, policies and procedures of the City.
- B. State and Federal Law. Notwithstanding any other provision of this Agreement, this Agreement shall not preclude the application of changes in laws, regulations, plans or policies, to the extent that such changes are specifically mandated and required by changes in State or Federal laws or regulations (“Changes in the Law”) applicable to the Property. In the event the Changes in the Law prevent or preclude compliance with one or more of the provisions of this Agreement, such provisions of the Agreement shall be modified or suspended, or performance thereof delayed, as may be necessary, to comply with the Changes in the Law.

Section 5. Amendment. Unless otherwise stated in this Agreement, the Parties may amend this Agreement from time to time, in whole or in part, by mutual written consent. No amendment or modification to this Agreement shall require the consent or approval of any person or entity having any interest in the specific lot, or other portion of the Project. Each person or entity (other than the City and Developer) that holds any beneficial, equitable, or other interests or encumbrances in all or any portion of the Project at any time hereby automatically, and without the need for any further documentation or consent, subjects and subordinates such interests and encumbrances to this Agreement and all amendments thereof that otherwise comply with this Section 5. Each such person or entity agrees to provide written evidence of that subjection and

subordination within fifteen (15) days following a written request for the same from, and in a form reasonably satisfactory to, the City and/or Developer.

Section 6. Cooperation and Implementation.

A. Processing of Subsequent Approvals. Upon submission by Developer of all appropriate applications and processing fees for any Subsequent Approval to be granted by the City, the City shall promptly and diligently commence and complete all steps necessary to act on the Subsequent Approval application including, without limitation, 1) the notice and holding of all required public hearings, and 2) the granting of the Subsequent Approval as set forth herein. The City's obligations under this Section 6 are conditioned on Developer's provision to the City, in a timely manner, of all documents, applications, plans and other information necessary for the City to meet such obligations. It is the express intent of the Developer and the City to cooperate and work diligently and in good faith to obtain any and all Subsequent Approvals. The City may deny the application for a Subsequent Approval by the Developer only if the application is incomplete, does not comply with existing law, or violates a City Ordinance or Resolution. If the City denies an application for a Subsequent Approval by the Developer, the City must specify the modifications required to obtain such approval.

B. Other Governmental Permits.

1. The Developer shall apply for such other permits and approvals as may be required by other governmental or quasi-governmental agencies in connection with the development of, or the provision of services to the Project.
2. The City shall cooperate with the Developer in its efforts to obtain such permits and approvals, provided that such cooperation complies with Section 4.B of this Agreement. However, the City shall not be required by this Agreement to join or become a party to any manner of litigation or administrative proceeding instituted to obtain a permit or approval from, or otherwise involving any other governmental or quasi-governmental agency.

Section 7. Default and Termination.

A. General Provisions.

1. Defaults by Developer. Any failure by either Party to perform any term or provision of this Agreement, which failure continues uncured for a period of thirty (30) days following written notice of such failure from the other Party, unless such period is extended by written mutual agreement, shall constitute a default under this Agreement. Any notice given pursuant to the preceding sentence shall specify the nature of the alleged failure and, where appropriate, the manner in which said failure may be satisfactorily cured. If the nature of the

alleged failure is such that it cannot reasonably be cured within such thirty (30) day time period, then the commencement of the cure within such time period, and the diligent prosecution to completion of the cure thereafter, shall be deemed to be a cure within such thirty (30) day period. Upon the occurrence of an uncured default under this Agreement, the non-defaulting Party may institute legal proceedings to enforce the terms of this Agreement or, in the event of a material default, terminate this Agreement. If the default is cured, then no default shall exist and the noticing Party shall take no further action.

2. Termination. If the City elects to consider terminating this Agreement due to a material default of Developer, then the City shall give to Developer a written notice of intent to terminate this Agreement and the matter shall be scheduled for consideration and review by the City Council at a duly noticed public meeting. Developer shall have the right to offer written and oral evidence prior to or at the time of said public meeting. If the City Council determines that a material default has occurred and is continuing and elects to terminate this Agreement, the City Council shall send written notice of termination of this Agreement to Developer by certified mail and this Agreement shall thereby be terminated thirty (30) days thereafter. In addition, the City may thereafter pursue any and all remedies at law or equity. By presenting evidence at such public meeting, Developer does not waive any and all remedies available to the Developer at law or in equity.
 3. Review by the City. The City may, at any time and in its sole discretion, request that the Developer demonstrate that Developer is in full compliance with the terms and conditions of this Agreement. Developer shall provide any and all information reasonably requested by the City within thirty (30) days of the request, or at a later date as agreed between the Parties.
 4. Determination of Non-Compliance. If the City Council finds and determines that Developer has not complied with the terms of this Agreement, and non-compliance may amount to a default if not cured, then the City may deliver a Default Notice pursuant to section 7.A of this Agreement. If the default is not cured in a timely manner by Developer, the City may terminate this agreement as provided in Section 7 of this Agreement and as provided under Applicable Law.
- B. Default by the City. In the event the City defaults under the terms of this Agreement, Developer shall have all rights and remedies provided in Section 7 of this Agreement, and as provided under Applicable Law.
- C. Enforced Delay; Extension of Time of Performance. Notwithstanding anything to the contrary contained herein, neither Party shall be deemed to be in default where delays in performance or failures to perform are due to, and a necessary outcome of, war, insurrection, strikes or other labor disturbances, walk-outs, riots, floods, earthquakes,

fires, casualties, acts of God, restrictions imposed or mandated by other governmental entities, enactment of conflicting state or federal laws or regulations, new or supplemental environmental regulations, or similar basis for excused performance which is not within the reasonable control of the Party to be excused. Upon the request of either Party hereto, an extension of time for such cause shall be granted in writing for the period of the enforced delay, or longer as may be mutually agreed upon.

Section 8. Notice of Compliance.

- A. Timing and Content. Within fifteen (15) days following any written request which Developer may make from time to time, and to the extent that it is true, the City shall execute and deliver to Developer a written “Notice of Compliance,” in recordable form, duly executed and acknowledge by the City, certifying that 1) this Agreement is unmodified and in full force and effect, or if there have been modifications hereto, that this Agreement is in full force and effect as modified and stating the date and nature of such modification; 2) there are no current uncured defaults under this Agreement or specifying the dates and nature of any such default; and 3) any other reasonable information requested by Developer. Developer shall be permitted to record the Notice of Compliance.
- B. Failure to Deliver. Failure to deliver a Notice of Compliance, or a written refusal to deliver a Notice of Compliance if the Developer is not in compliance, within the time set forth in Section 8.A shall constitute a presumption that as of fifteen (15) days from the date of Developer’s written request: 1) this Agreement was in full force and effect without modification except as represented by Developer; and 2) there were no uncured defaults in the performance of Developer. Nothing in this Section, however, shall preclude the City from conducting a review under Section 7, or issuing a notice of default, notice of intent to terminate or notice of termination under Section 7 for defaults which commence prior to the presumption created under this Section 8, and which have continued uncured.

Section 9. Change in Developer, Assignment, Transfer and Required Notice. The rights of Developer under this Agreement may be transferred or assigned, in whole or in part, with the written consent of the City, which shall not be unreasonably withheld. Developer shall give notice to the City of any proposed transfer or assignment at least thirty (30) days prior to the proposed date of the transfer or assignment.

Section 10. Miscellaneous Terms.

- A. Incorporation of Recitals and Introductory Paragraph. The Recitals contained in this Agreement, and the introductory paragraph preceding the Recitals, are hereby incorporated into this Agreement as if fully set forth herein.
- B. Severability. If any term or provision of this Agreement, or the application of any term or provision of this Agreement to a particular situation, is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining terms and provisions of this Agreement, or the application of this Agreement to other situations, shall continue in full force and effect unless amended or modified by mutual written consent of the Parties. Notwithstanding the foregoing, if any material provision of this Agreement, or the application of such provision to a particular situation, is held to be invalid, void or unenforceable by the final order of a court of competent jurisdiction, either Party to this Agreement may, in its sole and absolute discretion, terminate this Agreement by providing written notice of such termination to the other Party.
- C. Other Necessary Acts. Each Party shall execute and deliver to the other Party any further instruments and documents as may be reasonably necessary to carry out the objectives and intent of this Agreement, the Conditions of Current Approvals, and Subsequent Approvals and to provide and secure to the other Party the full and complete enjoyment of its rights and privileges hereunder.
- D. Other Miscellaneous Terms. The singular shall be made plural; the masculine gender shall include the feminine; “shall” is mandatory; “may” is permissive.
- E. Covenants Running with the Land and Manner of Enforcement. The provisions of this Agreement shall constitute real covenants, contract and property rights and equitable servitudes, which shall run with all of the land subject to this Agreement. The burdens and benefits of this Agreement shall bind and inure to the benefit of each of the Parties, and to their respective successors, heirs, assigns and transferees. Notwithstanding anything in this Agreement to the contrary, the owners of the individual lot in the Project shall have no right to bring any action under this Agreement as a third-party beneficiary. The City may look to Developer, its successors and/or assigns, or the lot owners for performance of the provisions of this Agreement relative to the portions of the Projects owned or controlled by such party. The City may, but is not required to, perform any obligation of Developer that Developer fails adequately to perform. Any cost incurred by the City to perform or secure performance of the provisions of this Agreement shall constitute a valid lien

on the Project, including prorated portions to the individual lots or units in the Project.

- F. Waiver. No action taken by any Party shall be deemed to constitute a waiver of compliance by such Party with respect to any representation, warranty, or condition contained in this Agreement. Any waiver by any Party of a breach or default of any condition of this Agreement shall not operate or be construed as a waiver by such Party of any subsequent breach or default.

- G. Remedies. Either Party may institute an equitable action to cure, correct or remedy any default, enforce any covenant or agreement herein, enjoin any threatened or attempted violation thereof, enforce by specific performance the obligations and rights of the Parties hereto, or to obtain any remedies consistent with the foregoing and the purpose of this Agreement; provided, however, that no action for monetary damages may be maintained by either Party against the other Party for any act or failure to act relating to any subject covered by this Agreement (with the exception of actions secured by liens against real property), notwithstanding any other language contained elsewhere in this Agreement. In no event shall either Party be entitled to recover from the other Party either directly or indirectly, legal costs or attorney's fees in any action instituted to enforce the terms of this Agreement (with the exception of actions secured by liens against real property).

- H. Utah Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Utah.

- I. Attorney's Fees. In the event of litigation or arbitration between the Parties regarding an alleged breach of this Agreement, neither Party shall be entitled to any award of attorney's fees.

- J. Covenant of Good Faith and Fair Dealing. Each Party shall use its best efforts and take and employ all necessary actions in good faith consistent with this Agreement and Applicable Law to ensure that the rights secured to the other Party through this Agreement can be enjoyed.

- K. Representations. Each Party hereby represents and warrants to the other Party that the following statements are true, complete and not misleading as regards to the representing and warranting Party:
 - 1. Such Party is duly organized, validly existing and in good standing under the laws of the state of its organization.

2. Such Party has full authority to enter into this Agreement and to perform all of its obligations hereunder. The individual(s) executing this Agreement on behalf of such Party do so with the full authority of the Party that those individuals represent.
3. This Agreement constitutes the legal, valid and binding obligation of such Party, enforceable in accordance with its terms, subject to the rules of bankruptcy, moratorium, and equitable principles.

L. No Third-Party Beneficiaries. This Agreement is between the City and Developer. No other party shall be deemed a third-party beneficiary or have any rights under this Agreement.

Section 11. Notices.

Any notice or communication required hereunder between the City and Developer must be in writing and may be given either personally or by registered or certified mail, return receipt requested. If given by registered or certified mail, such notice or communication shall be deemed to have been given and received on the first to occur of (1) actual receipt by any of the addressees designated below as the Party to whom notices are to be sent, or (ii) five (5) days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United State mail. If personally delivered, a notice shall be deemed to have been given when delivered to the Party to whom it is addressed. Any Party may at any time, by giving ten (10) days written notice to the other Party, designate any other address to which notices or communications shall be given. Such notices or communications shall be given to the Parties at their addresses as set forth below:

If to Midway City:

Director
Planning Department
Midway City
P.O. Box 277
Midway, Utah 84049

With Copies to:

Corbin B. Gordon
Midway City Attorney
345 West 600 South
Heber City, Utah 84032

If to Developer:

Midway Heritage Development, LLC
143 W. Farm Springs Ln.
Midway, UT 84049

Section 12. Entire Agreement, Counterparts and Exhibits. Unless otherwise noted herein, this Agreement, including its Exhibits, along with the Annexation Agreement, as amended, is the final and exclusive understanding and agreement of the Parties and supersedes all negotiations or previous agreements between the Parties with respect to all or any part of the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the City and of Developer.

Section 13. Signing and Recordation of Agreement. Unless the City and Developer mutually agree otherwise in writing, this Agreement must be signed by both Developer and the City no later than ninety (90) days after the Agreement is approved by a vote of the Midway City Council, or else the City's approval of the Project will be rescinded. The City Recorder shall cause to be recorded, at Developer's expense, a fully executed copy of this Agreement in the Official Records of the County of Wasatch no later than the date on which the first plat for the Project is recorded.

[Signatures on Following Page]

IN WITNESS HEREOF, this Agreement has been entered into by and between Developer and the City as of the date and year first above written.

MIDWAY CITY

Attest:

Celeste Johnson, Mayor

Brad Wilson, City Recorder

STATE OF UTAH)
 :SS
COUNTY OF WASATCH)

The foregoing instrument was acknowledged before me this ___ day of _____, 2022, by Celeste Johnson, who executed the foregoing instrument in her capacity as the Mayor of Midway City, Utah, and by Brad Wilson, who executed the foregoing instrument in his capacity as Midway City Recorder.

NOTARY PUBLIC

THE DEVELOPER OF THE VILLAGE – PHASE 2

By: _____
Its: _____

STATE OF UTAH)
 :SS
COUNTY OF WASATCH)

The foregoing instrument was acknowledged before me this ___ day of _____, 2022, by _____, who executed the foregoing instrument in his/her capacity as the _____ of the Developer.

NOTARY PUBLIC

EXHIBIT A

(Legal Description of the Property)