


WHEN RECORDED, MAIL TO:  
Holland & Hart LLP  
222 South Main, Suite 2200  
Salt Lake City, Utah 84101  
Attention: Christopher Hogle



ENT 99794:2018 PG 1 of 10  
JEFFERY SMITH  
UTAH COUNTY RECORDER  
2018 Oct 17 1:21 pm FEE 28.00 BY MA  
RECORDED FOR PAYSON CITY CORPORATION

## FIRST AMENDMENT TO DEVELOPMENT AGREEMENT

THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT (the "*First Amendment*") is made and entered into as of the 2<sup>nd</sup> day of ~~August~~<sup>October</sup>, 2018 (the "*First Amendment Effective Date*"), by and between Eversage Partners, LLC, a Utah limited liability company ("*Developer*") and the City of Payson, a Utah municipal corporation ("*City*").

### RECITALS

A. Developer and City are parties to that certain Development Agreement, dated October 17, 2017, recorded in the office of the Utah County Recorder, State of Utah on November 7, 2017 as Entry No. 110878:2017 (the "*Development Agreement*").

B. City has approved the development of an apartment complex at 752 North 400 West in Payson, Utah, known as the Apartments at The Depot (which is more particularly defined in the Development Agreement as the "*Project*").

C. Such City approval requires Developer to construct and develop certain roadway improvements on portions of 400 West fronting the Project (the "*400 West Improvements*" to be installed within the "*400 West Improvement Area*").

D. On June 14, 2018, the South Utah Valley Electric Service District ("*District*") sent a letter to Developer, alleging that the District "owns electric distribution infrastructure located in a sixty foot wide easement adjacent to the Apartments at the Depot development, owned by Eversage Partners LLC," claiming that "any and all construction, grading or clearing work within SESD's easement is a trespass," and demanding that Developer "cease and desist from all activity within 60 feet of SESD's electricity poles."

E. On June 15, 2018, District initiated a legal dispute in the case captioned as South Utah Valley Electric Service District v. Payson City, Case No. 180400994 (which, together with any directly related legal action, represent the "*Dispute*") to prevent construction activity and the removal of its electric utility infrastructure that presently runs over a portion of the 400 West Improvement Area, based on the existence of an alleged 60-foot wide utility easement running in favor of the District (the "*Disputed District Easement*"). The 400 West Improvement Area and the Disputed District Easement are depicted on attached Exhibit A.

F. On June 15, 2018, Judge Kraig Powell of the Fourth District Court in and for Utah County, State of Utah, issued a temporary restraining order enjoining City from, among other

things, entering on to the Disputed District Easement and accessing the District's electrical facilities, including power poles, within a portion of the 400 West Improvement Area.

G. On June 26, 2018, Judge Powell vacated that portion of the temporary restraining order but continued in effect an injunction that prevents City from providing electric service to SESD customers in Utah County located on the west side of 3550 West, Payson City in violation of Utah Code § 10-8-14(4)(a).

H. District claims that this injunction and its claims in the Dispute prevent the completion of the 400 West Improvements.

I. As required and contemplated by the Development Agreement and other City approvals relating to the Project, Developer would ordinarily be scheduled to complete the 400 West Improvements. Because of the Dispute, however, Developer is effectively prohibited from completing the 400 West Improvements as planned.

J. In response to this change in circumstances, City and Developer now desire to amend those terms of the Development Agreement, and of any other City approvals that are affected by the Dispute, relating to Developer's completion of the Project, including the 400 West Improvements.

K. Consistent with the provisions of Utah State law, City's governing body has authorized execution of this First Amendment by Resolution 09-05-2018 A, a copy of which is attached to this First Amendment as Exhibit B.

L. Developer and City now desire to amend the Development Agreement as set forth herein.

## AGREEMENT

NOW THEREFORE, in consideration of promises, covenants, representations, and warranties hereinafter set forth, and for other valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Developer and City agree as follows:

1. Recitals and Definitions. The Recitals and defined terms above are hereby incorporated into this First Amendment for all purposes.

2. Capitalized Terms. Except as otherwise set forth herein, each capitalized term not otherwise defined in this First Amendment shall have the meaning ascribed to it in the Development Agreement.

3. Exhibits. The Exhibits are intended to be included as if in the body of this First Amendment and regulated as such:

Exhibit A – 400 West Improvement Area and the Disputed District Easement

Exhibit B – Adopting Resolution

4. Certificate of Occupancy. City shall not require completion of any further Work that conflicts with or is prevented or interrupted by, or inconsistent with, District claims or Judge

Powell's June 26, 2018 ruling in the Dispute including (1) the removal of existing power poles located within the 400 West Improvement Area, (2) laying down road base and asphalt within areas occupied by existing power poles (the "*Disputed Work*"). Developer is hereby released of any and all requirements to complete the Disputed Work, and City shall issue any and all certificates of occupancy and zoning compliance for structures within the Project as though all of the Disputed Work on the Project had been fully and satisfactorily completed, inspected, and approved by City.

5. Performance Guarantee. As required by City code, Developer has posted a performance guarantee of Seven Hundred Forty-Nine Thousand Four Hundred Fifty-Five and 80/100 Dollars (\$749,455.80), which amount is equal to One Hundred Twenty Percent (120%) of the estimated cost of all required offsite Project infrastructure improvements (the "*Guarantee*"). Upon completion of all Work, other than the Disputed Work, and in accordance with City policy, City shall issue a partial bond release equal to Eighty Percent (80%) of the Guarantee. The remaining Twenty Percent (20%) shall be retained as a warranty of workmanship for a period of one year (the "*Warranty Guarantee*"). The Warranty Guarantee provides security against construction defects in the completed Work, but it will not secure the completion of the Disputed Work. One year following completion of the Work, less and excepting the Disputed Work, City shall either promptly release the Warranty Guarantee upon Developer's satisfaction of warranty claims or release portions of the Warranty Guarantee that are not necessary to satisfy warranty claims. The Warranty Guarantee may not be used by City to pay for the completion of the Disputed Work, which Developer is released from performing.

6. Electric Power. If the Court in the Dispute concludes that City may provide electric utility service to the Project, but that it may not do so with facilities located in the Disputed District Easement, City shall provide sufficient electric power to the Project for full occupancy and use via existing overhead powerlines to the south of the Project. Developer agrees to dedicate or cause to be dedicated any required utility easements on or across the Project as may be necessary to facilitate City's provision of such electrical utility service and such power to the Project. In the event that the Court in the Dispute concludes that City is prohibited from providing electrical utility service to the Project, City shall take any and all action necessary to enable the District to provide electric utility service to the Project at no additional expense to Developer, including but not limited to, indemnifying Developer and holding Developer harmless from any cost or expense assessed by District to Developer.

7. Inconsistency. In the event of any inconsistency between the terms of this First Amendment and those of the Development Agreement, the terms of this First Amendment shall control.

8. Headings. The descriptive section headings in this First Amendment are inserted for convenience only and shall not control or affect the meaning or construction of any provision of this First Amendment.

9. Full force and effect. Except as set forth in this First Amendment, the Development Agreement shall remain unchanged and in full force and effect.

10. Fees. If any party hereto brings legal action or takes any other action to enforce this First Amendment, the prevailing party in litigation or the party seeking to otherwise enforce the terms hereof shall be entitled to reasonable attorney's fees and related costs.

11. Authority. The persons executing this First Amendment on behalf of Developer and City do warrant that such persons are duly authorized to execute this First Amendment and bind the party for which they are executing, and that all necessary actions have been taken to give full force and effect to this First Amendment.

12. Severability. If any of the provisions of this First Amendment are declared void or unenforceable, such provision shall be severed from this First Amendment, which shall otherwise remain in full force and effect, provided that the fundamental purpose of this First Amendment and Developer's ability to complete the Project is not defeated by such severance.

13. Third Parties. There are no third-party beneficiaries to this First Amendment, and no person or entity not a party hereto shall have any right or cause of action hereunder.

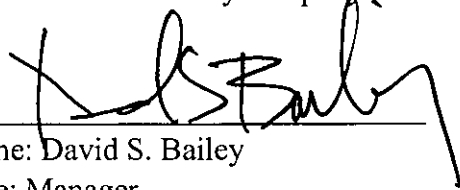
14. Counterparts. This First Amendment may be signed in counterparts and signatures delivered hereon by facsimile or electronic mail shall be deemed originals for all purposes.

*[Signature Pages Follow]*

IN WITNESS WHEREOF, the parties have executed this First Amendment as of the day and year first above written:

**DEVELOPER**

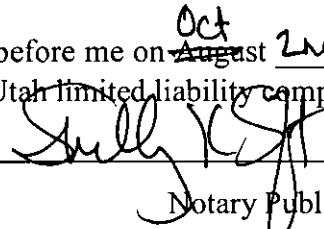
EVERSAGE PARTNERS, LLC,  
a Utah limited liability company.

By:   
Name: David S. Bailey  
Title: Manager

STATE OF UTAH )  
 )  
COUNTY OF SALT LAKE COUNTY )



The foregoing instrument was acknowledged before me on ~~August~~ <sup>Oct</sup> 2nd, 2018 by David S. Bailey, the Manager of Eversage Partners, LLC, a Utah limited liability company.

  
Notary Public

CITY

ATTEST:

CITY OF PAYSON  
A Utah municipal corporation

By: *[Signature]*  
Name: Kim E. Holindrake  
Title: Deputy City Recorder

By: *[Signature]*  
Name: Bill Wright  
Title: Payson City Mayor

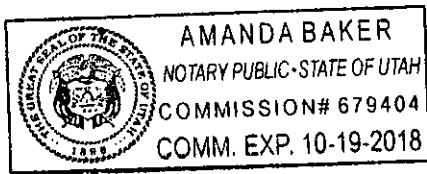
APPROVED AS TO FORM:

By: *[Signature]*  
Name: MARK A. SORENSON  
Title: Payson City Attorney



STATE OF Utah )  
 )  
COUNTY OF Utah )

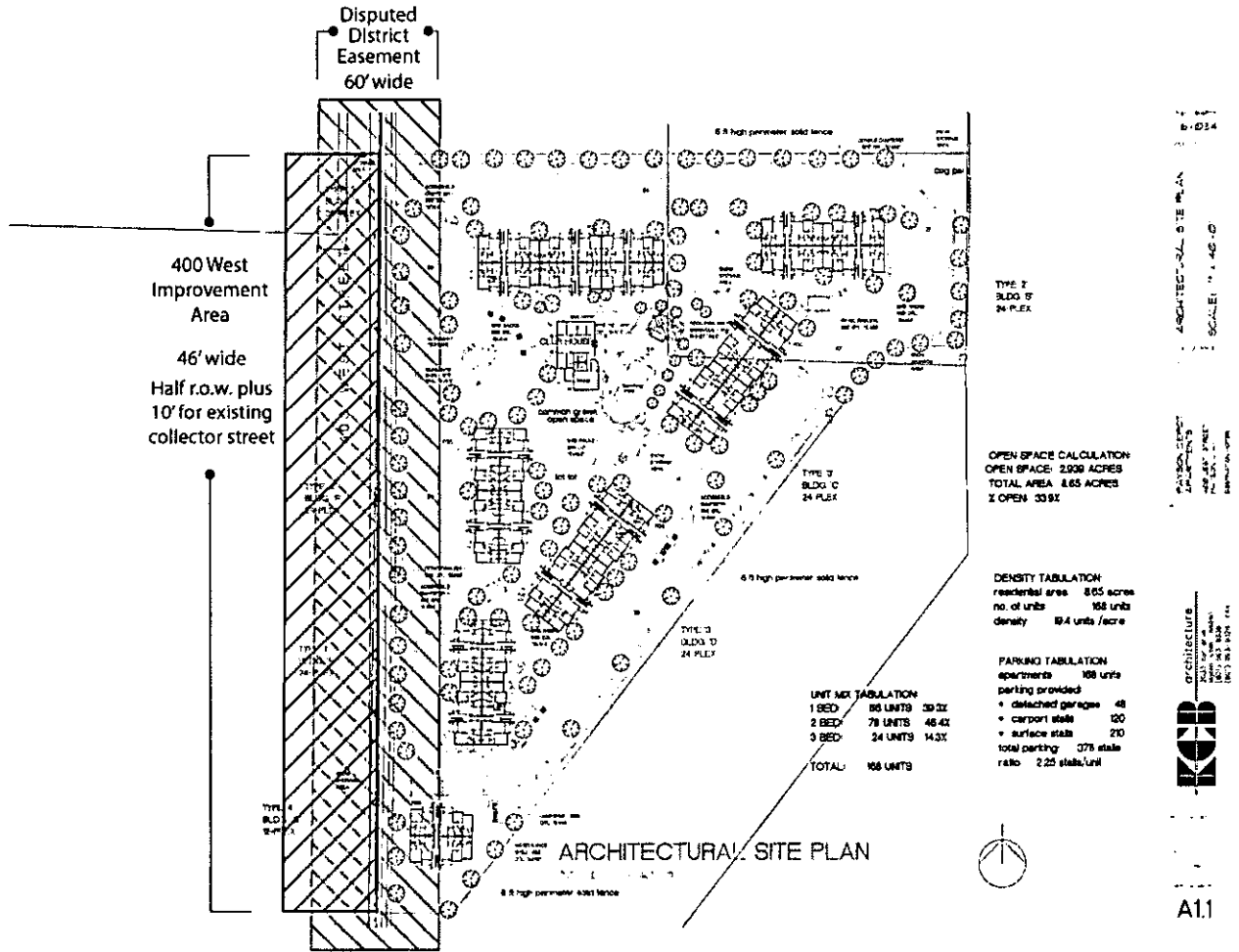
The foregoing instrument was acknowledged before me on October 1, 2018 by Bill Wright, Payson City Mayor.



*[Signature]*  
Notary Public

### Exhibit A

### 400 West Improvement Area and the Disputed District Easement



## Exhibit B

RESOLUTION NO. 09-05-2018 A

**RESOLUTION AUTHORIZING THE MAYOR, ON BEHALF OF PAYSON CITY, TO EXECUTE THE FIRST AMENDMENT TO DEVELOPMENT AGREEMENT AMENDING CERTAIN PROVISIONS OF THE DEVELOPMENT AGREEMENT FOR THE APARTMENTS AT THE DEPOT**

WHEREAS, Payson City, Utah (the "*City*") is a political subdivision and body politic duly and regularly created, established, organized, and existing under, and by virtue of, the Constitution and laws of the State of Utah; and

WHEREAS, Eversage Partners, LLC, a Utah limited liability company, a subsidiary of Destination Homes, Inc., a Utah corporation ("*Developer*") and City did enter in to that certain Development Agreement for the Apartments at The Depot ("*Project*") dated October 17, 2017, recorded in the office of the Utah County Recorder, State of Utah on November 7, 2017 as Entry No. 110878:2017 (the "*Development Agreement*"); and

WHEREAS, the Development Agreement stipulates that in connection with development of the Project, Developer shall construct and install certain roadway improvements on that portion of 400 West adjacent to the Project ("*400 West Improvement Area*"); and

WHEREAS, counsel for South Utah Valley Electric Service District ("*District*") has initiated a legal dispute to prevent construction activity and the relocation of their electricity infrastructure that presently runs over a portion of the 400 West Improvement Area (the "*Disputed District Easement*") (the "*Dispute*"); and

WHEREAS, because of the Dispute, Developer is effectively prohibited from removing District's power poles from the Disputed District Easement area and from completing the 400 West Improvements; and

WHEREAS, City and Developer desire that the issuance of certificates of occupancy for the Project not be delayed due to the Dispute; and

WHEREAS, City and Developer desire City to provide electrical power to the Project; and

WHEREAS, City and Developer desire to stipulate how the performance guarantee for offsite improvements shall be released.

NOW THEREFORE, BE IT RESOLVED BY THE PAYSON CITY COUNCIL, that Mayor Bill Wright is authorized and directed to execute the attached First Amendment to Development Agreement amending certain provisions of the Development Agreement for the Apartments at the Depot ("*First Amendment to Development Agreement*").

(FIRST AMENDMENT TO DEVELOPMENT AGREEMENT ATTACHED HERETO AND INCORPORATED HEREIN)

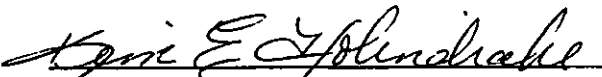
This Resolution shall take effect immediately upon its passage by the Payson City Council adopted in a public meeting.



RESOLUTION NO. 09-05-2018 A passed by the Payson City Council this 5th day of September, 2018.

  
Mayor Pro Tem Doug Welton

Attest:

  
Kim E. Holindrake, Deputy City Recorder



**Legal Description – Apartments at The Depot**

LOT 3, PLAT A, THE DEPOT SUBDIVISION