

MEMORANDUM OF UNDERSTANDING

THIS MEMORANDUM OF UNDERSTANDING (hereinafter the "MOU") is executed on this 27th day of May, 2015, by and among *Lawrence E. Tokarski, Trustee of the Lawrence E. Tokarski Revocable Living Trust* and *Augusta Real Estate, LLC*, an Oregon limited liability company, (collectively the "Applicant"), *Creekside Homeowners Associations, Inc.*, an Oregon non-profit corporation (hereinafter the "HOA"), and the *City of Salem*, an Oregon municipal corporation (hereinafter the "City"). This MOU is intended to describe the understanding among the Parties to facilitate the extinguishment of the appeal and issues raised in LUBA Case No. 2015-008:

RECITALS:

- A. Whereas, on May 27, 2003, the City granted tentative plan approval for Planned Unit Development (PUD) 03-01 (hereinafter "*PUD 03-01*"), which is a phased development; the continued validity of such phased tentative plan approval is disputed by the HOA. On October 13, 2006, the City granted approval for an amendment of PUD 03-01;
- B. Whereas, on July 8, 2014, Applicant filed City of Salem Application No. PUD-SUB03-01A2, requesting a second amendment of PUD 03-01 to divide approximately 26.65 acres of land into twenty-three (23) lots together with a Class 2 Adjustment to allow portions of the street grade of Lone Oak Road SE to exceed a maximum of eight percent (8%) (collectively, hereinafter the "*Application*"). The real property subject to the Application is commonly known as the 6200 to 6400 Blocks of Lone Oak Road SE, Salem, Oregon, and is legally described on *Exhibit A*, which is attached hereto and incorporated herein by reference (hereinafter "*Subject Property*");
- C. Whereas, on October 1, 2014, the Application was deemed complete, and required mailed notice was timely provided;
- D. Whereas, on October 3, 2014, notice was timely posted on the Subject Property pursuant to Salem Revised Code ("*SRC*") requirements;
- E. Whereas, on November 10, 2014, the Planning Administrator issued a decision approving the Application;
- F. Whereas, on November 14, 2014, Applicant timely appealed the Planning Administrator's decision, and on November 25, 2014, the HOA timely appealed the Planning Administrator's decision;
- G. Whereas, on November 26, 2014, notice of public hearing on the appeals was timely sent to the Applicant, HOA, the neighborhood association, and owners of surrounding property pursuant to SRC requirements;
- H. Whereas, on December 4, 2014, notice of the appeal hearing was timely posted on the Subject Property;

- I. Whereas, on December 16, 2014, a public hearing was timely held before the City of Salem Planning Commission (the "*Commission*");
- J. Whereas, on January 14, 2015, the City issued Order No. PUD-SUB03-01A2 (the "*Order*"), adopting findings modifying the Planning Administrator's November 10, 2014 decision;
- K. Whereas, the Order was subject to seventeen (17) conditions of approval, attached as *Exhibit B*, and incorporated herein by this reference (hereinafter "*Conditions of Approval*");
- L. Whereas, on February 2, 2015, the HOA timely filed a Notice of Intent to Appeal (hereinafter the "*NOITA*") with the Land Use Board of Appeals (hereinafter "*LUBA*"), Case No. 2015-008;
- M. Whereas, on February 17, 2015, the HOA and the City filed a Stipulated Motion for Stay; and
- N. Whereas, the Parties have met and now wish to resolve their differences amicably to avoid the expense, delay, and uncertainty of the LUBA process.

UNDERSTANDING:

NOW, THEREFORE, in consideration of the mutual benefits and obligations set forth herein, including the matters described in the foregoing recitals, the receipt and sufficiency of which is hereby acknowledged, the undersigned Parties agree as follows:

1. Conditions of Approval - Applicant

Applicant acknowledges and agrees that the Conditions of Approval (Exhibit B) are valid conditions of approval of the Order. Applicant further agrees to comply with the Conditions of Approval contained in Exhibit B, including but not limited to the dedication of right-of-way along the full length of the future improvement of Lone Oak Road. In addition, the Applicant acknowledges that Lone Oak Road will be improved as successive phases of PUD-SUB03-01A2 are completed. It is further anticipated by the Parties that Lone Oak Road will be completed at the time the Lone Oak Road bridge construction is funded and ready to be completed.

2. Dismissal of Appeal - HOA

The HOA agrees that LUBA Case No. 2015-008 shall be dismissed. Within three (3) business days from the execution of this MOU, the HOA shall move for the Appeal to be dismissed pursuant to ORS 197.860 and OAR 661-010-0065. Such motion for dismissal shall request a dismissal without award of attorney fees or costs to any Party.

3. Approval of Agreement by Referendum - HOA

On or before the execution of this MOU, the HOA shall adopt a written resolution authorizing execution of this MOU pursuant to the HOA's bylaws and the governing covenants, conditions and restrictions for the Golf Club Estates at Creekside.

4. **CIP Process - City**

4.1 **Capital Improvement Plan**

The City adopted its five-year Capital Improvement Plan for Fiscal Years 2015-16 through 2019-20 (hereinafter "*CIP*") on March 23, 2015. The adopted CIP specifically includes the construction of that certain bridge improvement necessary pursuant to Condition of Approval 5(a), which requires the design and construction of the full improvement of Lone Oak Road SE between Muirfield Avenue SE and its existing terminus of Augusta Street SE (hereinafter "*Bridge*").

4.2 **Bridge Amount**

The City further agrees that City staff will propose the inclusion of the Bridge improvement amount on the CIP for Fiscal Years 2015-16 through 2019-20 and such proposed amount will not be less than Seven Hundred Fifty Thousand and 00/100 Dollars (\$750,000.00).

5. **Miscellaneous**

5.1 **Entire Agreement**

The Parties agree that this MOU contains the entire understanding among the Parties hereto and supersedes all prior understandings and agreements between the Parties, with respect to the subject matter hereof.

5.2 **Acknowledgement**

The Parties state that they have read the foregoing MOU, that they have discussed its terms with their representatives, and that they fully understand the same and they sign the same as their own free act and deed.

6. **Rule of Construction**

The rule of construction that ambiguities in a document are construed against the drafter shall not apply to the interpretation and construction of this MOU.

7. **Counterparts**

This MOU may be executed simultaneously in one or more counterparts, each of which shall be deemed an original, and all of which together shall constitute one and the same instrument.

8. **Assignment**

The covenants and conditions herein contained shall, subject to the provisions as to assignment, apply to and bind the heirs, successors, personal representatives, and assigns of all the parties hereto.

9. Headings

The headings used in this MOU are solely for convenience of reference, are not part of this MOU and are not to be considered in construing or interpreting this MOU.

10. Voluntary Commitment

This MOU reflects an entirely voluntary commitment among the Parties. No Party shall have any right, power, or authority to create any obligation, express or implied, on behalf of any other Party or Parties hereto.

11. Employment of Attorneys

The law firm of Saalfeld Griggs PC of Salem, Oregon, has been employed by Applicant to prepare this MOU, and such attorneys represent only Applicant in this matter. The HOA is represented by Wallace W. Lien in this matter. The City is represented by the City Attorney's Office of the City of Salem.

IN WITNESS WHEREOF, the Parties hereto have executed this MOU on the dates set forth below.

LAWRENCE E. TOKARSKI, TRUSTEE:

CREEKSIDE HOMEOWNERS ASSOCIATIONS, INC.:

L. E. Tokarski
Date: 05/12/15

By: _____
Name: Michael Fargo
Its: President
Date: _____

AUGUSTA REAL ESTATE, LLC:

CITY OF SALEM:

By: _____
Name: Curtis Pence
Its: Member
Date: _____

By: _____
Name: Kacey Duncan
Its: Interim City Manager
Date: _____

DEPARTMENT APPROVAL:

Peter Fernandez
Public Works Director

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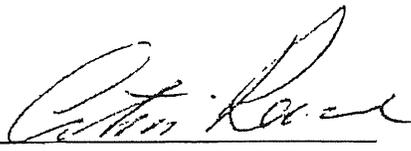
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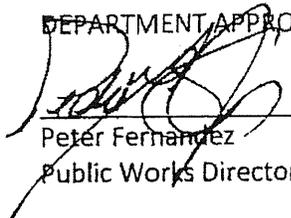
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Date: _____

By: Kacey Duncan
Name: Kacey Duncan
Its: Interim City Manager
Date: 5/27/15

DEPARTMENT APPROVAL:


Peter Fernandez
Public Works Director

**EXHIBIT A
LEGAL DESCRIPTION
(TO BE ATTACHED)**

Overall Legal

Beginning at a 5/8" iron rod at the North 1/16 corner of Section 21 & 22, Township 8 South, Range 3 West, of the Willamette Meridian, located in Salem, Marion County, Oregon; thence along the 1/16 line North 89°05'18" West 1,330.54 feet to a 5/8" iron rod at the NE 1/16 corner of Section 21; thence north along the 1/16 line North 00°09'39" West 190.10 feet to a 5/8" iron rod at the Southwest corner of Golf Club Estates at Creekside Phase 10 P.U.D., Book 45, Page 102, Marion County Book of Town Plats; thence along the South line of said Plat the following nine calls, 180.84 feet along a 539.81 foot radius curve to the right (the chord of which bears North 71°38'38" East 180.00 feet) to a 5/8" iron rod; 39.63 feet along a 187.03 foot radius curve to the left (the chord of which bears North 75°10'14" East 39.56 feet) to a 5/8" iron rod; North 69°06'01" East 12.87 feet to a 5/8" iron rod; North 54°25'10" East 67.48 feet to a 5/8" iron rod; North 58°44'56" East 60.58 feet to a 5/8" iron rod; North 44°42'48" East 60.00 feet to a 5/8" iron rod; North 53°37'43" East 66.29 feet to a 5/8" iron rod; North 27°15'41" East 31.44 feet to a 5/8" iron rod; North 76°20'03" East 60.00 feet to a 5/8" iron rod; North 88°41'58" East 81.65 feet to a 5/8" iron rod; thence South 25°39'54" West 79.46 feet to a 5/8" iron rod; thence N78°33'43" East 45.25 feet to a 5/8" iron rod; thence North 87°32'01" East 138.78 feet to a 5/8" iron rod; thence South 78°25'42" East 195.11 feet to a 5/8" iron rod; thence South 48°56'12" East 114.75 feet to a 5/8" iron rod; thence South 57°39'39" East 61.23 feet to a 5/8" iron rod; thence South 73°56'13" East 83.13 feet to a 5/8" iron rod; thence South 71°47'47" East 148.19 feet to a 5/8" iron rod; thence North 84°30'19" East 108.74 feet to a 5/8" iron rod; thence North 25°41'51" East 112.64 feet to a 5/8" iron rod; thence North 72°22'26" East 116.16 feet to a 5/8" iron rod; thence South 23°33'15" East 98.81 feet to a 5/8" iron rod; thence South 42°05'14" East 124.82 feet to a 5/8" iron rod; thence South 77°27'44" East 120.25 feet to a 5/8" iron rod; thence South 65°28'59" East 93.55 feet to a 5/8" iron rod; thence South 56°41'54" East 157.11 feet to a 5/8" iron rod; thence South 50°26'28" East 170.85 feet to a 5/8" iron rod; thence South 19°26'57" East 87.00 feet to a 5/8" iron rod; thence South 08°11'37" East 191.71 feet to a 5/8" iron rod; thence South 03°19'38" East 223.91 Feet to a 5/8" iron rod; thence South 15°28'33" East 153.96 feet to a 5/8" iron rod; thence South 17°22'08" West 53.15 feet to a 5/8" iron rod; thence South 87°18'23" West 222.27 feet to a 5/8" iron rod; thence South 02°41'37" East 335.84 feet to a 5/8" iron rod; thence South 00°57'10" East 48.50 feet to a 5/8" iron rod; thence 32.41 feet along a 25.00 foot radius curve to the right (the chord of which bears South 37°56'12" West 30.19 feet) to a 5/8" iron rod on the North right of way of Augusta Street; thence along said right of way the following four calls, 72.36 feet along a 125.00 foot radius curve to the left (the chord of which bears South 58°29'17" West 71.35 feet) to a 5/8" iron rod; 61.87 feet along a 75.00 foot radius curve to the right (the chord of which bears South 65°32'01" West 60.13 feet) to a 5/8" iron rod; South 89°09'49" West 199.03 feet to a 5/8" iron rod; 48.29 feet along a 125.00 foot radius curve to the

right (the chord of which bears North 79°46'02" West 47.99 feet) to a 5/8" iron rod at the Southeast corner of Lot 508, Golf Club Estates at Creekside Phase 12 PUD, Book 46, Page 70, Marion County Book of Town Plats; thence along East and North Lines of said Plat the following eleven calls, North 21°54'37" East 218.22 feet to a 5/8" iron rod; North 30°55'41" East 124.00 feet; North 14°40'55" East 103.91 feet to a 5/8" iron rod; North 02°00'58" East 109.48 feet to a 5/8" iron rod; North 04°02'50" West 107.99 feet to a 5/8" iron rod; North 17°45'26" West 104.00 feet to a 5/8" iron rod; North 19°08'46" West 93.26 feet to a 5/8" iron rod; North 20°35'52" West 102.16 feet to a 5/8" iron rod; North 29°12'08" West 10.46 feet to a 5/8" iron rod; North 43°32'35" West 145.87 feet to a 5/8" iron rod; South 78°19'45" West 193.82 feet to a 5/8" iron rod at the Northwest corner of Lot 497, of Golf Club Estates at Creekside Phase 12 PUD and on the Section line of 21 & 22; thence North 00°31'36" West 274.39 feet to the point of beginning.

EXHIBIT B
CONDITIONS OF APPROVAL

- Condition 1:** All common open space and common facilities within the proposed development shall be owned and maintained by a Homeowners Association. A copy of the Articles of Incorporation of the Homeowners Association shall be submitted for review and approval by the Planning Administrator at the time of final PUD plan/plat approval. The Articles of Incorporation of the Homeowners Association shall specify how all common open space and common facilities within the proposed development will be maintained.
- Condition 2:** All street names shall be shown on the final PUD plan/plat in conformance with the requirements of SRC Chapter 255.
- Condition 3:** If the approved density changes by 10 percent more or less than permitted by the 1999 Amendment to the Infrastructure Agreement, apply for and receive approval of a new UGA preliminary declaration or a new amendment to the UGA preliminary declaration. The permitted number of dwelling units under the 1999 Amendment to the Infrastructure Agreement is 767 dwelling units for the entire Creekside PUD development. The applicant shall verify the exact number of dwelling units within the entire Creekside PUD development at the time of final PUD plan/plat approval.
- Condition 4:** As a condition of Phase 1:
- a) Prior to final PUD plan/plat approval:
 - 1) Complete a preliminary design of Lone Oak Road SE between Muirfield Avenue SE and its existing terminus north of Augusta Street SE in sufficient detail to determine right-of-way alignment and slope easements.
 - 2) Convey a minimum 60-foot-wide right-of-way along the full length of the future improvement of Lone Oak Road SE.
 - b) Prior to building permit application for any new building or structure on lots other than Lots 1, 5, or 6; or prior to further division of Lots 2, 3, or 4:
 - 1) Design and construct the full improvement of Lone Oak Road SE between Muirfield Avenue SE and its existing terminus north of Augusta Street SE as a minimum 34-foot-wide collector street.
 - 2) In conjunction with the construction of Lone Oak Road SE, abandon the existing 10-inch waterline within Phase 2 and relocate the existing 16-inch S-3 waterline within Phase 3 to align within the future Lone Oak Road SE right-of-way. Prior to abandonment of the 10-inch portion of waterline, verify with the City that the 16-inch waterline is capable of functioning independently.
- Condition 5:** Prior to final PUD plan/plat approval for Phase 2 or Phase 3:
- a) Design and construct the full improvement of Lone Oak Road SE between Muirfield Avenue SE and its existing terminus north of Augusta Street SE as a minimum 34-foot-wide collector street.
 - b) Convey a minimum 60-foot-wide right-of-way along the full length of the improvement of Lone Oak Road SE.

- c) In conjunction with the construction of Lone Oak Road SE, abandon the existing 10-inch waterline within Phase 2 and relocate the existing 16-inch S-3 waterline within Phase 3 to align within the future Lone Oak Road SE right-of-way. Prior to abandonment of the 10-inch portion of waterline, verify with the City that the 16-inch waterline is capable of functioning independently.

Condition 6: Prior to PUD final plan/plat approval for Phases 2 and 3, dedicate a drainage easement adjacent to Jory Creek. The width of the easement shall be the greater of the following:

- a) Ten feet from the top of recognizable bank;
- b) Fifteen feet from the centerline; or
- c) The identified 100-year floodway.

Condition 7: Prior to final PUD plan/plat approval for each phase, construct public sanitary sewer lines within the proposed development to provide adequate sewer capacity for the proposed use and upstream parcels.

Condition 8: Prior to final PUD plan/plat approval for Phases 2 and 3, submit proof of Department of State Lands (DSL) concurrence for those areas of the site that may be affected by wetlands. All wetlands identified as jurisdictional by DSL are subject to the regulations of that agency.

Condition 9: Prior to any excavation or fill activity within Phases 1, 2, and 3, submit an updated geotechnical report reflecting the proposed lot layout as required by SRC 810.020.

Condition 10: Prior to final PUD plan/plat approval for each phase, provide a final report from a qualified geotechnical engineer that describes construction monitoring activities for all site earthwork and addresses the geotechnical considerations for each individual building lot within that phase.

Condition 11: Prior to final PUD plan/plat approval for each phase, demonstrate to the satisfaction of the Public Works Director that all proposed lots can be adequately served by the S-3 water service system.

Condition 12: Prior to final PUD plan/plat approval for Phase 1, pave the flag lot accessway to a minimum width of 20 feet. The flag lot accessway and turnaround shall conform to Salem Fire Prevention Code Standards.

Condition 13: "NO PARKING — FIRE LANE" signs shall be posted on both sides of the flag lot accessway.

Condition 14: Building construction on Lots 1, 4, 5, and 6, of Phase 1 shall include automatic fire sprinkler system installation in accordance with the Salem Fire Prevention Code (SRC Chapter 58).

Condition 15: Prior to final PUD plan/plat approval for each phase, design water, sewer, and stormwater systems to serve all proposed lots in that phase, and construct all facilities that are proposed in a public right-of-way or easement.

Condition 16: Prior to final PUD plan/plat approval for each phase, show all necessary access and utility easements on the plat and provide appropriate documentation of infrastructure maintenance agreements as approved by the Public Works Director and required by SRC 802.040.

Condition 17: The street grade of Lone Oak Road SE shall not exceed 13.75 percent.