RESOLUTION NO. 37
Series of 2016

A RESOLUTION AUTHORIZING THE TOWN MANAGER TO ENTER INTO A PRE-DEVELOPMENT AGREEMENT WITH TRIUMPH DEVELOPMENT WEST, LLC; AND SETTING FORTH DETAILS IN REGARD THERETO.

WHEREAS, the Town of Vail (the "Town"), in the County of Eagle and State of Colorado is a home rule municipal corporation duly organized and existing under the laws of the State of Colorado and the Town Charter (the "Charter");

WHEREAS, the members of the Town Council of the Town (the "Council") have been duly elected and qualified;

WHEREAS, the Town is the owner of certain real property more particularly described as 2310 Chamonix Road, Parcel B, Resubdivision of Tract D, Vail Das Schone Filing 1 (the "Property");

WHEREAS, the Town wishes to redevelop the Property for employee housing;

WHEREAS, Triumph Development West LLC, (the "Developer") is willing to redevelop the Property for affordable housing; and

WHEREAS, the Town and the Developer wish to enter into a Pre-Development Agreement (the "Agreement") to establish terms of the preliminary services to be provided by the Developer for the Project.

NOW THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF VAIL, COLORADO THAT:

Section 1.   The Council hereby approves the Agreement and authorizes the Town Manager to enter into the Agreement with the Developer on behalf of the Town in substantially the same form as attached hereto as **Exhibit A** and in a form approved by the Town Attorney.

Section 2.   This Resolution shall take effect immediately upon its passage.

INTRODUCED, PASSED AND ADOPTED at a regular meeting of the Town Council of the Town of Vail held this 20th day of December, 2016.

_____
Dave Chapin
Town Mayor

ATTEST:

_____
Patty McKenny
Town Clerk

PRE-DEVELOPMENT AGREEMENT

THIS PRE-DEVELOPMENT AGREEMENT (the "Agreement") is made this 1st day of January, 2017 (the "Effective Date"), by and between the Town of Vail, Colorado, a Colorado home rule municipality with an address of 75 South Frontage Road, Vail, Colorado 81657 (the "Town"), and Triumph Development West, LLC, a Delaware limited liability company with an address of 12 Vail Road, Suite 700, Vail, Colorado ("Developer") (each individually a "Party" and collectively the "Parties").

WHEREAS, the Town is the owner of certain real property more particularly described as 2310 Chamonix Road, Parcel B, Resubdivision of Tract D, Vail Das Schone Filing 1 (the "Property");

WHEREAS, the Town wishes to redevelop the Property for employee housing (the "Project");

WHEREAS, Developer is willing to redevelop the Property for affordable housing; and

WHEREAS, the Parties wish to establish terms of the preliminary services to be provided by Developer for the Project.

NOW, THEREFORE, for and in consideration of the mutual promises and covenants contained herein, the sufficiency of which is mutually acknowledged, the Parties agree as follows:

1. <u>Purpose</u>. The purpose of this Agreement is to set forth the services to be provided by Developer prior to execution of the development agreement for the Project.

2. <u>Development Agreement</u>. The Project shall be subject to a mutually acceptable development agreement ("DA"), which shall contain the following essential terms, at a minimum:

    a. The construction of the Project shall at all times be subject to the Vail Town Code and other applicable law.

    b. The Project shall include 32 townhome-style residential dwelling units, the location of which shall be determined by the Vail Town Council through its typical land use approval process.

    c. Developer shall be solely responsible for all construction necessary for the Project, including insurance and utility costs. This shall include construction of any public improvements necessary for the Project, including streets, sidewalks and utilities.

    d. Developer shall be required to post security to guarantee the public improvements.

e.   Developer shall provide the Town with a warranty for the public improvements, for a minimum of two years.

f.   Developer shall provide the Town with a warranty for the residential dwelling units, for a minimum of one year. Such warranty shall be fully transferable to subsequent individual owners of the residential dwelling units.

g.   Developer shall include the Town as an additional insured on a policy of general liability insurance sufficient to cover construction defects for the term of the applicable statute of limitations and statute of repose.

h.   Developer shall be entitled to a development fee (the "Development Fee") in connection with its development of the Property. The amount of the Development Fee is projected to be approximately 3% of the total construction costs for the Project.

i.   In addition to the Development Fee, Developer shall be compensated in the amount of $3,000 per month for its construction administration services (the "Administration Fee"), up to a maximum amount of $45,000.

j.   In addition to the Development Fee and the Administration Fee, Developer shall be compensated in the amount of $2,500 per month for conducting marketing services and communicating with to the all purchasers under contract to purchase units in the Project (the "Marketing Fee"), up to a maximum amount of $37,500.

k.   The Town shall grant to Developer, for the benefit of the Property, easements that are mutually determined to be necessary for the Development, including without limitation utility, drainage, and access easements.

l.   The Town shall be responsible for all permit fees for permits issued by the Town in connection with the Project.

m.   The residential dwelling units on the Property shall be subject to a deed restriction limiting the occupancy of the dwelling units to employees, as that term is defined in the deed restriction.

n.   The DA shall include a "not to exceed" amount for construction of the Project. It is anticipated that Developer will use a Guaranteed Maximum Price ("GMP") contract with the general contractor for the Project, but it will be Developer's choice as to how to remain within the "not to exceed" amount in the DA. The "not to exceed" amount shall be mutually determined by the Town and Developer.

o.   Developer shall select the general contractor for the Project, with the Town's approval, which shall not be unreasonably withheld.

p.   Developer shall obtain, and shall require all of its subcontractors to obtain, insurance in sufficient amounts to cover Developer's liability under the DA.

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q.   Developer shall maintain all books and records related to the Project for public inspection. Upon request by the Town, Developer shall provide evidence of all costs, expenses and mark-ups related to the Project.

3.   Scope of Services. During the term of this Agreement, Developer shall perform the following services:

a.   Developer shall conduct all due diligence necessary to determine whether the Property is suitable for the Project.

b.   Developer shall prepare and submit to the Town a development application for the Project, including a *pro forma*, in sufficient time to be presented to the Planning and Environmental Commission at its meeting on January 9, 2017. The development application must be consented to and signed by the Town, because the Town will remain the fee owner of the Property. `

c.   Developer shall ensure that the final plat for the Project includes a plat note limiting construction defect claims, in a form approved by the Town.

d.   Developer shall provide marketing for the Project, in cooperation and consultation with the Town, and shall submit a marketing plan to the Town for approval, which shall include, at a minimum:

i.   Leadership of the design and marketing team in the production of marketing collaterals, the creation of a project website, and newspaper and online marketing;

ii.   Preparation of the questionnaire for interested buyers;

iii.   Preparation of and facilitation of community open houses;

iv.   Maintenance of and communication with list of interested buyers;

v.   Management of interested buyer lottery process;

vi.   Assistance with preparation of reservation agreement and purchase and sale agreement;

vii.   Management of reservation process, including the collection and tracking of deposits.

viii.   Assistance with the Town and closing companies in closing the sale of units.

e.   Developer shall work with the Town to establish the financing necessary for construction of the Project.

f.   A change in the Scope of Services shall not be effective unless authorized as an amendment to this Agreement. If Developer proceeds without such written authorization, Developer shall be deemed to have waived any claim for additional compensation, including a claim based on the theory of unjust enrichment, quantum merit or implied contract. Except as expressly provided herein, no agent, employee, or representative of the Town is authorized to modify any term of this Agreement, either directly or implied by a course of action.

g.   The Parties acknowledge that the Scope of Services contemplated by this Agreement will require Developer to contract with third-party designers, engineers, consultants and contractors to perform some of the services set forth in the Scope of Services.

h.   Developer shall maintain all books and records related to the Project for public inspection. Upon request by the Town, Developer shall provide evidence of all costs, expenses and mark-ups related to the Project.

4.   <u>Compensation</u>.

a.   For successful completion of the Scope of Services, the Town shall pay Developer as follows:

Monthly Fees
Monthly Preconstruction Administration (maximum 7 months)	$5,000
Monthly Marketing (maximum 7 months)	$3,000

One-time Fees
Execution of this Agreement	$50,000
Approval of Design Review Board Application	$50,000
Executed Purchase Agreements for 30% of Phase 1*	$60,000
Execution of DA	$35,000

          * Phase 1 shall be determined by the Town during the development approval process

b.   In addition to the compensation outlined above, the Town shall reimburse Developer for all actual amounts paid by Developer to the third-party designers, engineers, consultants and contractors authorized to perform the Scope of Services under this Agreement, up to a maximum amount of $630,000. The Town shall make such payments on a monthly basis, within 30 days of receipt of copies of such third-party invoices and proof of payment by Developer. Notwithstanding the foregoing, the Town shall have no direct contractual relationship with such third-parties, such third-parties are not intended beneficiaries of this Agreement, and should any dispute arise regarding compensation for such third-parties, such third-parties shall not be entitled to seek payment directly from the Town.

5. Term and Termination.

a. This Agreement shall commence on the Effective Date, and shall continue until terminated as provided herein.

b. Either Party may terminate this Agreement upon 30 days advance written notice. The Town shall pay Developer for all work previously authorized and completed prior to the date of termination. If, however, Developer has substantially or materially breached this Agreement, the Town shall have any remedy or right of set-off available at law and equity.

6. Professional Responsibility.

a. Developer hereby warrants that it is qualified to assume the responsibilities and render the services described herein and has all requisite corporate authority and professional licenses in good standing, required by law.

b. The work performed by Developer shall be in accordance with generally accepted professional practices and the level of competency presently maintained by other practicing professional firms in the same or similar type of work in the applicable community. The work and services to be performed by Developer hereunder shall be done in compliance with applicable laws, ordinances, rules and regulations.

c. The Town's review, approval or acceptance of, or payment for any services shall not be construed to operate as a waiver of any rights under this Agreement or of any cause of action arising out of the performance of this Agreement.

7. Ownership. Any materials, items, and work specified in the Scope of Services, and any and all related documentation and materials provided or developed by Developer or its consultants shall be exclusively owned by the Town. Developer expressly acknowledges and agrees that all work performed under the Scope of Services constitutes a "work made for hire." To the extent, if at all, that it does not constitute a "work made for hire," Developer hereby transfers, sells, and assigns to the Town all of its right, title, and interest in such work. The Town may, with respect to all or any portion of such work, use, publish, display, reproduce, distribute, destroy, alter, retouch, modify, adapt, translate, or change such work without providing notice to or receiving consent from Developer.

8. Insurance.

a. Developer agrees to procure and maintain, at its own cost, a policy or policies of insurance sufficient to insure against all liability, claims, demands, and other obligations assumed by Developer pursuant to this Agreement. At a minimum, Developer shall procure and maintain, and shall cause any subcontractor to procure and maintain, the insurance coverages listed below, with forms and insurers acceptable to the Town.

i. Worker's Compensation insurance as required by law.

ii. Commercial General Liability insurance with minimum combined single limits of $1,000,000 each occurrence and $1,000,000 general aggregate. The policy shall be applicable to all premises and operations, and shall include coverage for bodily injury, broad form property damage, personal injury (including coverage for contractual and employee acts), blanket contractual, products, and completed operations. The policy shall contain a severability of interests provision, and shall include the Town and the Town's officers, employees, and contractors as additional insureds. No additional insured endorsement shall contain any exclusion for bodily injury or property damage arising from completed operations.

iii. Professional liability insurance with minimum limits of $1,000,000 each claim and $1,000,000 general aggregate.

c. Such insurance shall be in addition to any other insurance requirements imposed by law. The coverages afforded under the policies shall not be canceled, terminated or materially changed without at least 30 days prior written notice to the Town. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage. Any insurance carried by the Town, its officers, its employees, or its contractors shall be excess and not contributory insurance to that provided by Developer. Developer shall be solely responsible for any deductible losses under any policy.

d. Developer shall provide to the Town a certificate of insurance as evidence that the required policies are in full force and effect. The certificate shall identify this Agreement.

9. <u>Indemnification</u>.

a. Developer agrees to indemnify and hold harmless the Town and its officers, insurers, volunteers, representative, agents, employees, heirs and assigns from and against all claims, liability, damages, losses, expenses and demands, including attorney fees, on account of injury, loss, or damage, including without limitation claims arising from bodily injury, personal injury, sickness, disease, death, property loss or damage, or any other loss of any kind whatsoever, which arise out of or are in any manner connected with this Agreement if such injury, loss, or damage is caused in whole or in part by, the act, omission, error, professional error, mistake, negligence, or other fault of Developer, any subcontractor of Developer, or any officer, employee, representative, or agent of Developer, or which arise out of a worker's compensation claim of any employee of Developer or of any employee of any subcontractor of Developer.

b. Developer's liability under this Section shall be to the fullest extent of, but shall not exceed, that amount represented by the degree or percentage of negligence or fault attributable to Developer, any subcontractor of Developer, or any officer, employee, representative, or agent of Developer or of any subcontractor of Developer.

c.   If Developer is providing architectural, engineering, surveying or other design services under this Agreement, the extent of Developer's obligation to indemnify and hold harmless the Town may be determined only after Developer's liability or fault has been determined by adjudication, alternative dispute resolution or otherwise resolved by mutual agreement between the Parties, as provided by C.R.S. § 13-50.5-102(8)(c).

10.   <u>Illegal Aliens</u>.

a.   <u>Certification</u>. By entering into this Agreement, Developer hereby certifies that, at the time of this certification, it does not knowingly employ or contract with an illegal alien who will perform work under this Agreement and that Developer will participate in either the E-Verify Program administered by the United States Department of Homeland Security and Social Security Administration or the Department Program administered by the Colorado Department of Labor and Employment to confirm the employment eligibility of all employees who are newly hired to perform work under this Agreement.

b.   <u>Prohibited Acts</u>. Developer shall not knowingly employ or contract with an illegal alien to perform work under this Agreement or enter into a contract with a subcontractor that fails to certify to Developer that the subcontractor shall not knowingly employ or contract with an illegal alien to perform work under this Agreement.

c.   <u>Verification</u>.

i.   If Developer has employees, Developer has confirmed the employment eligibility of all employees who are newly hired to perform work under this Agreement through participation in either the E-Verify Program or the Department Program.

ii.   Developer shall not use the E-Verify Program or Department Program procedures to undertake pre-employment screening of job applicants while this Agreement is being performed.

iii.   If Developer obtains actual knowledge that a subcontractor performing work under this Agreement knowingly employs or contracts with an illegal alien who is performing work under this Agreement, Developer shall: notify the subcontractor and the Town within 3 days that Developer has actual knowledge that the subcontractor is employing or contracting with an illegal alien who is performing work under this Agreement; and terminate the subcontract with the subcontractor if within 3 days of receiving the notice required pursuant to subsection 1 hereof, the subcontractor does not stop employing or contracting with the illegal alien who is performing work under this Agreement; except that Developer shall not terminate the subcontract if during such three days the subcontractor provides information to establish that the subcontractor has not knowingly employed or contracted with an illegal alien who is performing work under this Agreement.

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d.   Duty to Comply with Investigations. Developer shall comply with any reasonable request by the Colorado Department of Labor and Employment made in the course of an investigation conducted pursuant to C.R.S. § 8-17.5-102(5)(a) to ensure that Developer is complying with the terms of this Agreement.

e.   Affidavits. If Developer does not have employees, Developer shall sign the "No Employee Affidavit" attached hereto. If Developer wishes to verify the lawful presence of newly hired employees who perform work under the Agreement via the Department Program, Developer shall sign the "Department Program Affidavit" attached hereto.

11.   Miscellaneous.

a.   Modification. This Agreement may only be modified by subsequent written agreement of the Parties.

b.   Integration. This Agreement and any attached exhibits constitute the entire agreement between Developer and the Town, superseding all prior oral or written communications.

c.   Binding Effect. This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective heirs, successors and assigns.

d.   Severability. If any provision of this Agreement is determined to be void by a court of competent jurisdiction, such determination shall not affect any other provision hereof, and all of the other provisions shall remain in full force and effect.

e.   Governing Law and Venue. This Agreement shall be governed by the laws of the State of Colorado, and any legal action concerning the provisions hereof shall be brought in Eagle County, Colorado.

f.   Assignment. There shall be no transfer or assignment of any of the rights or obligations of Developer under this Agreement without the prior written approval of the Town.

g.   Third Parties. There are no intended third-party beneficiaries to this Agreement.

h.   Contingency; No Debt. Pursuant to Article X, § 20 of the Colorado Constitution, any financial obligations of the Town under this Agreement are specifically contingent upon annual appropriation of funds sufficient to perform such obligations. This Agreement shall never constitute a debt or obligation of the Town within any statutory or constitutional provision.

i.   No Joint Venture. Notwithstanding any provision hereof, the Town shall never be a joint venture in any private entity or activity which participates in this Agreement, and the Town shall never be liable or responsible for any debt or obligation of any participant in this Agreement.

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j.   Independent Contractor.   Developer is an independent contractor. Notwithstanding any other provision of this Agreement, all personnel assigned by Developer to perform work under the terms of this Agreement shall be, and remain at all times, employees or agents of Developer for all purposes. Developer shall make no representation that it is a Town employee for any purposes.

k.   Notice. Any notice under this Agreement shall be in writing, and shall be deemed sufficient when directly presented or sent pre-paid, first class United States Mail to the Party at the address set forth on the first page of this Agreement.

WHEREFORE, the Parties have executed this Agreement as of the Effective Date.

TOWN OF VAIL, COLORADO

_____
Stan Zemler, Town Manager

ATTEST:

_____
Patty McKenny, Town Clerk

DEVELOPER

By: _____
Name: _____
Its: _____

STATE OF COLORADO   )
) ss.
COUNTY OF _____)

The foregoing instrument was subscribed, sworn to, and acknowledged before me this _____ day of _____, 2016, by _____ as the _____ of Triumph.

My commission expires:
(S E A L)   _____
                                        Notary Public

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NO EMPLOYEE AFFIDAVIT

[To be completed only if Developer has no employees]

1.   Check and complete one:

☐   I, _____, am a sole proprietor doing business as _____. I do not currently employ any individuals. Should I employ any employees during the term of my Agreement with the Town of Vail (the "Town"), I certify that I will comply with the lawful presence verification requirements outlined in that Agreement.

OR

☐   I, _____, am the sole owner/member/shareholder of _____, a _____ [specify type of entity – *i.e.*, corporation, limited liability company], that does not currently employ any individuals. Should I employ any individuals during the term of my Agreement with the Town, I certify that I will comply with the lawful presence verification requirements outlined in that Agreement.

2.   Check one.

☐   I am a United States citizen or legal permanent resident.

The Town must verify this statement by reviewing one of the following items:
- *A valid Colorado driver's license or a Colorado identification card;*
- *A United States military card or a military dependent's identification card;*
- *A United States Coast Guard Merchant Mariner card;*
- *A Native American tribal document;*
- *In the case of a resident of another state, the driver's license or state-issued identification card from the state of residence, if that state requires the applicant to prove lawful presence prior to the issuance of the identification card; or*
- *Any other documents or combination of documents listed in the Town's "Acceptable Documents for Lawful Presence Verification" chart that prove both Developer's citizenship/lawful presence and identity.*

OR

☐   I am otherwise lawfully present in the United States pursuant to federal law.

Developer must verify this statement through the federal Systematic Alien Verification of Entitlement ("SAVE") program, and provide such verification to the Town.

_____   _____
Signature   Date

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DEPARTMENT PROGRAM AFFIDAVIT

[To be completed only if Developer participates in the Department of Labor Lawful Presence Verification Program]

I, _____, as a public contractor under contract with the Town of Vail (the "Town"), hereby affirm that:

1.   I have examined or will examine the legal work status of all employees who are newly hired for employment to perform work under this public contract for services ("Agreement") with the Town within 20 days after such hiring date;

2.   I have retained or will retain file copies of all documents required by 8 U.S.C. § 1324a, which verify the employment eligibility and identity of newly hired employees who perform work under this Agreement; and

3.   I have not and will not alter or falsify the identification documents for my newly hired employees who perform work under this Agreement.

_____   _____
Signature   Date

STATE OF COLORADO   )
) ss.
COUNTY OF _____   )

The foregoing instrument was subscribed, sworn to and acknowledged before me   this   ___   day   of   _____,   2016,   by   _____   as _____ of _____.

My commission expires:

(S E A L)   _____
                                                              Notary Public

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