

## PRE-DEVELOPMENT AGREEMENT

THIS PRE-DEVELOPMENT AGREEMENT (this "Agreement") is made on the \_\_\_\_\_ day of \_\_\_\_\_, 2021 (the "Effective Date"), by and between the Town of Vail, a Colorado home rule municipality with an address of 75 South Frontage Road, Vail, CO 81657 (the "Town") and Triumph Development West LLC, a Delaware limited liability company with an address of 12 Vail Road, Suite 700, Vail, CO 81657 ("Triumph") (each individually a "Party" and collectively the "Parties").

WHEREAS, the Town owns Lot 3, Middle Creek (the "Middle Creek Property") and the Timber Ridge Village Apartments (the "Timber Ridge Property"), both as more particularly described in **Exhibit A**, attached hereto and incorporated herein by this reference; and

WHEREAS, Triumph wishes to redevelop the Middle Creek Property, in cooperation with the Town, as a 100% deed-restricted employee housing project (the "Middle Creek Project");

WHEREAS, Triumph wishes to redevelop the Timber Ridge Property, in cooperation with the Town, as a 100% deed-restricted employee housing project with a minimum of 200 units (the "Timber Ridge Project"); and

WHEREAS, by this Agreement, the Parties wish to set forth their expectations regarding the Middle Creek Project and the Timber Ridge Project.

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

1. Purpose. The purpose of this Agreement is to establish the terms of the future development agreements, ground leases and other necessary agreements for the Middle Creek Project and the Timber Ridge Project.

2. Middle Creek Project.

a. The Town and Triumph, as co-applicants, will file all necessary development applications for the Middle Creek Project. The Town will be responsible for all related costs through final approval of such applications. The Town will have sole ownership rights to all application materials and approved development plans.

b. The Town will contract with Triumph to manage the entitlement process for the Middle Creek Project, which contract will include a management fee not to exceed \$300,000 (the "Management Fee"), plus all out-of-pocket expenses for design and development consultants not to exceed \$390,000. The payment schedule of the management fee shall be based upon the schedule of completion of key design development/entitlement process milestones, as defined in **Exhibit B**, attached hereto

and incorporated herein by this reference. Triumph shall commence work on the Effective Date.

c. The Parties will cooperate to establish the number of units to be constructed and the appropriate unit types for the Middle Creek Project, provided that the Middle Creek Project shall include a minimum of 144 beds.

d. The Town and Triumph will enter into a long-term ground lease that will be subordinated to a construction loan for the Middle Creek Property, and upon expiration of the ground lease, all improvements on the Middle Creek Property will transfer to the Town. Triumph will commit to maintaining such improvements in an acceptable condition, and to maintain adequate capital improvements reserve funds, throughout the term of the ground lease. The Town's interest in the ground lease will be freely assignable following the issuance of a certificate of occupancy for the Middle Creek Project, without Triumph's consent.

e. Construction of the Middle Creek Project will begin in September 2021, and will be completed by November 2022.

f. The Town will have the option to master lease and sublease units in the Middle Creek Project.

g. If necessary for tax purposes, the Vail Local Housing Authority will be granted a nominal ownership interest in the entity formed by Triumph to construct and manage the Middle Creek Project.

h. Triumph acknowledges that it will not be entitled to any Employee Housing Unit credit for the Middle Creek Project under Sections 12-23-7 and 12-24-7 of the Vail Town Code.

i. After receiving all required Town approvals to construct the Middle Creek Project, if Triumph fails to deliver the Middle Creek Project in compliance with the development agreement later executed between the Parties, Triumph agrees to reimburse the Town for all of the Town's costs and expenses incurred in the Middle Creek Project, up to the date of final approval of the development applications, including without limitation the Management Fee.

### 3. Timber Ridge Project.

a. Triumph will have the right to pursue the Timber Ridge Project at Triumph's own cost. As the owner of the Timber Ridge Property, the Town will sign the development applications for the Timber Ridge Project, provided that the Town will have no responsibility for any costs associated with such applications.

b. The Timber Ridge Project shall include a minimum of 200 deed-restricted employee housing units of varying types. The Parties will cooperate to establish the appropriate unit types for the Timber Ridge Project, based on a housing market study to be prepared for the Parties, with each Party responsible for 50% of the cost of such study.

c. The Town and Triumph will enter into a long-term ground lease that will be subordinated to a construction loan for the Timber Ridge Property, and upon expiration of the ground lease, all improvements on the Timber Ridge Property will transfer to the Town. Triumph will commit to maintaining such improvements in an acceptable condition, and maintain adequate capital reserve funds, throughout the term of the ground lease. The Town's interest in the ground lease will be freely assignable following the issuance of a certificate of occupancy for the Timber Ridge Project, without Triumph's consent.

d. Construction of the Timber Ridge Project may not begin prior to the completion of the Middle Creek Project, or April 2023, whichever occurs first, and shall be completed by November 2025.

e. The Town will have the option to master lease and sublease units in the Timber Ridge Project.

f. If necessary for tax purposes, the Vail Local Housing Authority will be granted a nominal ownership interest in the entity formed by Triumph to construct the Timber Ridge Project.

g. Triumph acknowledges that it will not be entitled to any Employee Housing Unit credit for the Timber Ridge Project under Sections 12-23-7 and 12-24-7 of the Vail Town Code.

h. The Parties acknowledge that there will be separate development agreements for the Middle Creek Project and the Timber Ridge Project, and that the development agreement for the Middle Creek Project will be completed and signed first. Triumph shall have the exclusive right to negotiate with the Town for development rights related to the Timber Ridge Project until May 5, 2021, and the Town will not enter into any negotiations related to the Timber Ridge Project with any other parties on or before that date.

#### 4. Booth Heights.

a. So long as development agreements for both the Middle Creek Project and the Timber Ridge Project have been executed by the Town and Triumph, Triumph hereby agrees that it will not pursue any development that would otherwise be permitted under the development applications filed with and approved by the Town in PEC19-0018, PEC19-0019 and DRB19-0625 (the "Booth Heights Project").

b. Triumph acknowledges that, if the Town is presented with applications to proceed with the Booth Heights Project, and such applications comply with all applicable Town regulations and the approved development plans for the Booth Heights Project, the Town will not be in a position to deny such applications, regardless of who asserts an ownership interest in such approved development plans.

c. Triumph agrees to indemnify and hold harmless the Town and its officers, insurers, agents, and employees from and against any and all losses, costs, liabilities, expenses and damages incurred by the Town, including reasonable attorney fees, arising

out of any claim against the Town by the owner of any property interest in the Booth Heights Project, which claim is based upon the effect or alleged effect of this Agreement upon such owner's interest, including without limitation claims of diminution of value, inverse condemnation and violation of vested property rights.

5. Breach and Remedies.

a. *By the Town.* If the Town defaults on any obligation under this Agreement for any reason, Triumph may seek damages, but Triumph shall not be entitled to enforce this Agreement through an action for specific performance.

b. *By Triumph.* If Triumph defaults on any obligation under this Agreement, the Town may: seek damages; and/or withhold issuance of building permits or certificates of occupancy not yet issued for any improvements on either the Middle Creek Property or the Timber Ridge Property until said default has been cured or waived. In addition to the specific remedies set forth herein, the Town shall have all other remedies available at law or equity, and the exercise of one remedy shall not preclude the exercise of any other remedy.

6. Miscellaneous.

a. *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.

b. *Integration.* This Agreement represents the entire agreement between the Parties with respect to the subject matter hereof, and all prior or extrinsic agreements, understandings or negotiations shall be deemed merged herein.

c. *Waiver.* No provision of this Agreement may be waived to any extent unless and except to the extent the waiver is specifically set forth in a written instrument executed by the Party to be bound thereby.

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

e. *Governing Law and Venue.* This Agreement shall be governed by and construed in accordance with the laws of the State of Colorado, and venue for any legal action arising out of this Agreement shall be in Eagle County, Colorado.

f. *No Third Party Beneficiaries.* No third party is intended to or shall be a beneficiary of this Agreement, nor shall any third party have any rights to enforce this Agreement in any respect.

g. *No Joint Venture or Partnership.* No form of joint venture or partnership exists between the Parties, and nothing contained in this Agreement shall be construed as making the Town and Triumph joint venturers or partners.

h. *Notices.* A notice under this Agreement shall be in writing and be given by U.S. Mail, postage prepaid, to the address set forth on the first page of this Agreement.

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

j. *Governmental Immunity.* Nothing herein shall be construed as a waiver of any protections or immunities the Town and its officials, representatives, attorneys and employees may have under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended.

k. *Tolling.* Should any of the land use applications for the Project be approved by the Town, but the approvals are challenged by referendum or other legal action, any deadlines in this Agreement shall be tolled for the period of the legal action, plus 30 days.

l. *Force Majeure.* Neither Party shall be in breach of this Agreement if a failure to perform any of the duties under this Agreement is due to Force Majeure, which shall be defined as the inability to undertake or perform any of the duties under this Agreement due to acts of God, floods, storms, fires, sabotage, terrorist attack, strikes, riots, war, labor disputes, forces of nature, pandemics or the authority and orders of government.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

**TOWN OF VAIL**

\_\_\_\_\_  
Scott Robson, Town Manager

ATTEST:

\_\_\_\_\_  
Tammy Nagel, Town Clerk



**EXHIBIT A  
Legal Descriptions**

**Middle Creek Property**

LOT 3, AMENDED FINAL PLAT MIDDLE CREEK SUBDIVISION, A RESUBDIVISION OF LOT 1, COUNTY OF EAGLE, STATE OF COLORADO.

**Timber Ridge Property**

LOT 1, TIMBER RIDGE SUBDIVISION, COUNTY OF EAGLE, STATE OF COLORADO.

**EXHIBIT B**  
**Management Fee Milestones**

The milestones for payment of the Middle Creek Project management fee are as follows:

Approval by the Town of the budget, scope of work and schedule for the design development and entitlement process by February 2, 2021	\$50,000
Execution of a final development agreement, ground lease	\$50,000
Planning and Environmental Commission development application submittal to the Town or development application submittal to the Town on or before February 19, 2021	\$75,000
Final Planning and Environmental Commission and Design Review Board action on the development applications	\$75,000
Issuance of a building permit and execution of an operating agreement to include the VLHA on or before September 30, 2021	\$50,000
Total management fee	\$300,000