

REIMBURSEMENT AGREEMENT
per Town Code §14-04-070

Mingus West Water Transmission Line Upsizing

THIS AGREEMENT dated December 8, 2022, is made by and between the TOWN OF PRESCOTT VALLEY, ARIZONA, a municipal corporation of Arizona (“Town”) and ASH DORN, LLC, a Virginia limited liability company (“Developer”).

RECITALS

WHEREAS, Developer has entered into that certain Option Agreement, Real Estate Purchase Agreement and Escrow Instructions dated November 19, 2020, as evidenced by the Memorandum of Option recorded on November 23, 2020, in Yavapai County, AZ, attached as Exhibit “A” and expressly made a part hereof (“Option Agreement”), and proposes to embark on a project of developing Units 5 – 9 of Mingus West (“Project”); and

WHEREAS, Town Code §14-04-015(A) provides that developers of residential subdivisions shall finance and construct all on-site and off-site street and utility improvements required as a condition of plat approval; and

WHEREAS, Town Code §14-04-070(A) further authorizes the Town Manager to require developers to upsize such improvements in order to accommodate anticipated nearby development. In such cases, Town Code §14-04-070(B) gives the Town the option to agree to cover the incremental cost of upsizing (in whole or in part) through development agreements or separate reimbursement agreements. In these agreements the Town may serve as intermediary and reimburse developers from buy-in fees charged to subsequent developers who connect to the improvements (as such fees are collected), or reimburse developers directly through various means then reimburse itself through subsequent buy-in fees collected; and

WHEREAS, the Town Manager has requested that Developer increase the size of certain water transmission lines (“Water Mains”) to increase the flow capacity between the existing water tanks and the existing service area in order to improve water supply to the Fairgrounds area further to the west (and potentially other areas). It is anticipated that such installation shall include approximately 4600 linear feet of 12-inch ductile iron pipe (DIP) water line and 600 feet of 8-inch DIP water line, with associated valves and appurtenances, in approximately the same locations and alignments as the existing 10-inch and 6-inch PVC Water Mains (see Exhibit “B” attached hereto and expressly made a part hereof); and

WHEREAS, the Town and Developer agree that this proposed upsizing of the Water Mains is not a requirement to provide water service to the Project; and

WHEREAS, Developer has indicated that, instead of receiving credits against System Capacity Charges it would rather be directly reimbursed for the cost of upsizing the Water Mains; and

WHEREAS, it is anticipated that any upsizing would be done during construction of Units 6 and 8 as estimated by Developer's Engineer in Exhibits "C1" and "C2" (attached hereto and expressly made a part hereof); and

WHEREAS, the Town has identified budgeted funds with which it could directly reimburse Developer for upsizing the Water Mains; and

WHEREAS, the Town anticipates that the construction involved with the upsizing would come within the exception in ARS §34-201(D) so that in each case it would not require formal public bidding, but would otherwise ensure (in cooperation with Developer) that the construction would be in accordance with the requirements in Title 34, Chapter 2 of the Arizona Revised Statutes (and any related Town requirements);

NOW THEREFORE, for and in consideration of the mutual covenants of the parties hereto (and other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged), the parties now agree as follows:

SECTION ONE. The foregoing Recitals are hereby incorporated by reference.

SECTION TWO. The Water Mains shown in Exhibit "B" shall be constructed (upsized) by Developer during the term of this Agreement in accordance with Town-approved Engineering Plans and under permit from the Town within existing public easements or rights of way or those to be dedicated by Developer. During and at completion of construction, the Water Mains may be inspected by Town representatives to determine if the same has been constructed in accordance with the Town-approved Engineering Plans. Upon approval by the Town (which approval shall not be unreasonably withheld), the Water Mains shall be dedicated or conveyed to and accepted by the Town for continuous maintenance and/or operation no later than 60 days after acceptance and approval.

SECTION THREE. It is understood that Developer's obligations under this AGREEMENT are expressly conditioned upon whether it purchases and develops Mingus West Unit 6 and/or Mingus West Unit 8. Developer's obligation to construct (upsized) the Water Mains in Mingus West Unit 6 shall arise only at such time as Developer closes on the purchase of fee simple title to Mingus West Unit 6 and the recording of the plat for Mingus West Unit 6. And, Developer's obligation to construct (upsized) the Water Mains in Mingus West Unit 8 shall arise only at such time as Developer closes on the purchase of fee simple title to Mingus West Unit 8 and the recording of the plat for Mingus West Unit 8. In the event Developer does not construct (up-size) the Water Mains in either Unit 6 or Unit 8 in a timely manner (prior to the time needed to serve the Fairgrounds or other areas), the Town may upsize the needed Water Mains (or require another party to upsize the same) in roughly the same locations, lines and grades as the existing water lines. If such upsizing occurs, any future work by Developer over said upsized water lines must protect or move the water lines at Developers' sole expense.

SECTION FOUR. Prior to construction of the Water Mains, Developer shall secure an actual bid for the Water Mains installation for (1) 12-inch DIP and 10-inch PVC and (2) 8-inch DIP and 6-inch PVC from the subcontractor installing the Mingus West Units 6 and 8

subdivision waterline improvements and submit this to the Town for review. The Town shall pay only the cost difference (the upsizing costs) between the: (1) 12-inch Ductile Iron and the 10-inch PVC costs; and (2) 8-inch DIP and the 6-inch PVC costs. Any additional costs, such as design costs, temporary piping or relocation costs, fencing or other similar costs needed to facilitate construction or construction scheduling, shall be the sole cost of Developer.

The Town and Developer shall discuss any significant difference between the estimated costs in Exhibits C1 and/or C2 and the actual bid costs. Thereupon, the Developer and the Town shall mutually determine what, if any, modifications are needed to the approved Engineering Plans to ensure the actual bid costs do not exceed the exception in ARS §34-201(D). After the Town issues a permit to construct the Water Mains (and after completion of the Water Mains installation), Developer shall submit a final invoice to the Town for the finalized actual bid costs. Such invoice shall include appropriate documentation of the detailed cost incurred by Developer for construction of the Water Mains, including invoices and/or pay applications from the contractors involved with construction of the Water Mains. Within 30 days of receiving Developer's documentation for the finalized actual bid costs, the Town shall reimburse Developer the upsizing costs as defined above.

SECTION FIVE. In accordance with Town Code §14-04-070(C)(9), the term of this Agreement shall be from the date first-above written through June 30, 2032.

SECTION SIX. Nothing herein is intended to create any partnership, joint venture or other arrangement between Developer and the Town. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization or corporation not a party hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder.

SECTION SEVEN. Failure or unreasonable delay by either party to perform or otherwise act in accordance with any term or provision of this Agreement for a period of 30 days ("Cure Period") after written notice thereof from the other party shall constitute a default under this Agreement. However, if the failure or delay is such that more than 30 days would reasonably be required to perform such action or comply with any term or provision hereof, then such party shall have such additional time as may be necessary to perform or comply so long as such party commences performance or compliance within said 30-day period and diligently proceeds to complete such performance or fulfill such obligation. Said notice shall specify the nature of the alleged default and the manner in which said default may be satisfactorily cured, if possible. In the event such default is not cured within the Cure Period, the non-defaulting party shall have all rights and remedies which may be available under law or equity including, without limitation, the right to specifically enforce any term or provision hereof and/or the right to institute an action for damages.

SECTION EIGHT. The Town and Developer shall each mutually defend, indemnify and hold harmless the other (including officers, employees, agents and successors, but only to the extent authorized by law) from any and all claims and costs (including, but not limited to, reasonable attorney fees and other reasonable administrative, consultant or other reasonable costs) actually and directly incurred by the Town and Developer (including officers, employees,

agents and successors) in any subsequent proceeding challenging the approval, execution or performance of this Agreement. The Town and Developer shall have the right to intervene and assist in the defense of any legal action arising out of the approval or execution of this Agreement, and to participate fully in any negotiations and settlements involving any such actions.

SECTION NINE. This Agreement may only be amended by a written agreement fully executed by Developer and the Town.

SECTION TEN. This Agreement shall inure to the benefit of and shall be binding upon the successors in interest of each of the parties hereto. Each of the parties to this Agreement may assign all or any portion of its rights hereunder to any one or more persons or entities, on such terms and conditions as each may deem appropriate. Provided, however, that no party may convey all or any portion of its rights hereunder unless either (a) the corresponding obligations of that party are completely assumed by the assignee of the party's rights, the assignee accepts such obligations and demonstrates its ability to perform them, and the obligations are specifically listed in the assignment, or (b) the party remains personally obligated to perform said corresponding obligations after such assignment. Otherwise, any such assignment shall be void.

SECTION ELEVEN. No waiver by any party of a breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, covenant or condition herein contained. Furthermore, no delay in exercising any right or remedy shall constitute a waiver thereof. In the event any action shall be instituted between any of the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs, including reasonable attorney fees. If either party hereto is prevented from performing any of its obligations under this Agreement by reason of natural disasters, wars, insurrections, strikes, acts of government or any other circumstances beyond its control, the particular failure or failures occasioned thereby shall be waived during such period of prevention and shall not be considered breaches of this Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof, and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are superseded and merged herein.

SECTION TWELVE. In the event any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy for any reason or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in force and effect to the fullest extent permissible by law.

SECTION THIRTEEN. This Agreement may be canceled without penalty pursuant to ARS §38-511 in the event of a conflict-of-interest as described therein by any person significantly involved in negotiating this Agreement on behalf of the Town.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be duly executed by their authorized representatives as of the day first-above written.

Town of Prescott Valley, Arizona, a municipal
corporation of Arizona

Kell Palguta, Mayor

ATTEST:


Fatima Fernandez, Town Clerk

APPROVED AS TO FORM:

Ivan Legler, Town Attorney

ASH-DORN, LLC, a Virginia limited liability
company

By:



Adolfo Canales

Its: Division President

ATTEST:



Duane Hunn
Vice President of Land

EXHIBIT “A”

Option Agreement

EXHBIT “B”

Water Mains Description

EXHIBIT “C1” & “C2”

Water Mains Estimated Costs Units 6 & 8