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OFFICE OF THE LAND USE APPEAL AUTHORITY
IN AND FOR GRAND COUNTY, STATE OF UTAH

PEAK VIEW DEVELOPMENT, LLC;

Appellant,

vs.

**GRAND COUNTY UTAH, GRAND
COUNTY COMMISSION**

Respondents

ADMINISTRATIVE APPEAL

Hearing Officer: Craig Call

Appellant Peak View Development, LLC, by and through its attorneys, for its Administrative Appeal against Respondents Grand County Utah and the Grand County Commission, states as follows:

PARTIES, JURISDICTION AND TYPE OF APPEAL

Appellant Peak View Development, LLC, is a Utah limited liability company conducting business in Grand County, Utah (“Peak View”). Respondent, Grand County Utah, is a body politic and political subdivision of the State of Utah (the “County” or “Grand”). Respondent Grand County Commission is the legislative body of Grand County, Utah (the “Commission”).

The *Grand County Rules and Regulations for High Density Housing Overlay Developments* (the “Rules and Regulations”), which are the subject of this administrative appeal, were passed and made effective on March 2, 2021, by the Commission in Grand County, Utah. Despite the county's legislative body (the “Commission”) approving the Rules and Regulations, the County has determined that the decision itself is administrative, not legislative. Accordingly, the County did not undertake the formal public hearing process required to pass an amendment to the Grand County Land Use Code (the “Land Use Code”) pursuant to U.C.A. §17-27a-502. At a regular meeting of the County Commission on February 16, 2021, the County Attorney represented to all present that the County Commission’s approval of the Rules and Regulations was an administrative decision and not legislative. The courts have established that “where a government body possesses both legislative and administrative authority, a county’s characterization of the capacity in which it acted informs our analysis of whether it acted administratively or legislatively.” See *Suarez v. Grand Cty.*, 2012 UT 72, ¶ 42, 296 P.3d 688, 699. While Peak View disagrees with the County’s characterization of its action in adopting the Rules and Regulations as an administrative action and believes that such action was an illegal act in violation of state law and its own ordinances, Peak View had no choice but to bring this appeal in this forum in order to exhaust its administrative remedies.

Based on the County’s characterization of the action taken, the Office of the Land Use Appeal Authority has jurisdiction pursuant to U.C.A. §17-27a-701. Therefore, in order to exhaust its administrative remedies, and pursuant to U.C.A. §63G-4-40 and U.C.A. §17-27a-801, the Appellant appeals the administrative decision of the County Commission to the Office of the Land Use Authority for Grand County.

STANDARD OF REVIEW

1. The Rules and Regulations are an incorrect interpretation of a land use regulation and are contrary to law. “[A] decision is illegal if the decision is: based on an incorrect interpretation of a land use regulation; or contrary to law.” Utah Code Ann. § 17-27a-801.

2. Not only is the decision illegal, but it is also arbitrary and capricious. “Municipal land use decisions should be upheld unless those decisions are arbitrary and capricious or *otherwise illegal*. *Bradley v. Payson City Corp.*, 2003 UT 16, ¶ 10, 70 P.3d 47, 50 (emphasis added). “When a land use decision is made as an exercise of administrative... powers... we have held that such decisions are not arbitrary and capricious if they are supported by “substantial evidence.” *Id.* at 51. The Court has defined “substantial evidence” as meaning “that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion.” *Id.* at 52. The decision by the County to adopt the Rules and Regulation that clearly conflict with and seek to amend the Land Use Code is arbitrary and capricious because there is simply no “quantum or quality of evidence” to support the County’s action or its interpretation of the Land Use Code.

STATEMENT OF FACTS

Grand County passed ordinances 584 and 591 (the “HDHO Ordinance”) in 2019 to establish the High Density Housing Overlay District (“HDHO”) with a stated purpose of “Facilitating the provision of new housing units for primary residential *occupancy* by actively employed households” (emphasis added). *See* Grand County Land Use Code 4.7.1(A). Soon thereafter, Peak View commenced working with the County towards submitting an application for an HDHO development. County employees assisted Peak View with the design and lot make

up of its development. Specifically, County employees encouraged Peak View to add a number of multi-units and twin-homes that it could sell to outside investors. In reliance upon the advice of County staff, Peak View incorporated these elements into their final design. Upon completing its application, Peak View applied for a zone map amendment to have its underlying property located at approximately 3640 Spanish Valley Drive, Moab, Utah 84532 (the “Property”) rezoned to be included in the HDHO.

The County Council passed Grand County, Utah Ordinance #591, on November 6, 2019, which applied the HDHO District 25 to the Property, and approved the Peak View Subdivision HDHO Development Master Plan. The Commission approved Phase I of the Peak View Subdivision on August 4, 2020. Peak View received its first building permit on December 17, 2020 and broke ground on December 17, 2020

In early February, Peak View learned of a proposed change to the HDHO Ordinance and commenced its review of the same. On February 8, 2021, the Grand County Planning Commission heard the County Attorney's presentation regarding the Grand County Rules and Regulations for High Density Housing Overlay Developments (the “Rules and Regulations”). One member of the Planning Commission recused himself from the discussion and vote because he was directly affected by the same. Nevertheless, he voiced his opposition to the adoption of the Rules and Regulations during the “Citizens to be Heard” portion of the meeting. Other landowners took the same opportunity to voice their opposition to the Rules and Regulations. Disregarding the issues raised in the opposition to the adoption of the Rules and Regulations, the Planning Commission voted to recommend the adoption of the Rules and Regulation to the County Commission. The County Commission took up the matter on February 16, 2021. Citizens

of the County were able to voice their concerns during the “Citizens to be Heard” portion of the meeting, but not during the actual discussion because it was not a public hearing. Opposition from developers and citizens caused the Commission to table the matter to allow for further discussions concerning the same outside of the public meeting. On March 2, 2021, the Commission once again took up the issue, and despite public opposition, voted to approve and adopt the Rules and Regulations.

ARGUMENTS

1. THE RULES AND REGULATIONS CONSTITUTE AN ILLEGAL AMENDMENT TO THE LAND USE CODE

“[A]dministrative rules and interpretations of those rules must be consistent with the governing statutes. *Fussell v. Dep't of Com., Div. of Occupational & Pro. Licensing*, 815 P.2d 250, 254 (Utah Ct. App. 1991). Rules that impose “additional requirements... that are not contained within the plain meaning of the statutory language...” are not consistent with the governing statute and must be held invalid. See *Id.*

- a. The Rules and Regulations abridge, enlarge, extend and otherwise modify the HDHO Ordinance by adding additional ownership and oversight requirements that are illegal and inconsistent with the Land Use Code.**

While the facts in *Fussell* differ from the facts in the present case, *Fussell* is important in emphasizing that administrative rules cannot be used to materially amend ordinances. In *Fussell*, the Court invalidated an administrative rule that attempted to amend statutory law. *Fussell* 816 P.2d at 254. At issue was a statutory requirement for becoming a licensed psychologist in Utah, specifically, that the candidate hold a doctorate degree “based on a program of studies whose

content was primarily psychological.” *Id.* Administrative rules adopted in connection with the statute mandated that a candidate have a doctorate degree in psychology as opposed to a doctorate in a degree which content was primarily psychological. *Id.* The Court held that the administrative rule was invalid because it “engrafted” onto the statutory law the licensing requirement that the candidates “have a doctoral degree specifically in psychology rather than simply one obtained through studies primarily in psychology.” *Id.* The Court found that “had the legislature intended to require graduation from programs labeled as psychology programs, it could have easily done so, as it did with respect to the licensing of many other professions...” *Id.* Therefore, where an administrative rule attempts to engraft on to the statutory law additional requirements that are not consistent with the language of such, Utah courts will invalidate it.

i. The Ownership Requirement

Similarly, the Rules and Regulations are invalid because the ownership requirements are not consistent with the Land Use Code and attempt to engraft additional requirements onto the statutory language. The HDHO Ordinance makes clear that “HDHO lots and units may be owner-occupied or renter-occupied as long as the *residents* meet the occupancy and active employment requirements...” (the “Residency Requirement”). *See* Land Use Code Section 4.7.4(A) (emphasis added). In contrast, the Rules and Regulations engraft onto the HDHO Ordinance an additional requirement that “*ownership...* of HDHO Lots and Units shall be limited to qualified Actively Employed Households...” (the “Ownership Requirement”) *See* Rules and Regulations Section 2 (A) (emphasis added). Like *Fussell*, had the Commission intended to incorporate the Ownership Requirement into the statute, it could have easily done so

as it did with respect to renters. However, where the Commission omitted such a requirement, the Ownership Requirement is an impermissible addition to the Land Use Code.

ii. HASU Oversight Requirements

The Rules and Regulations are invalid because the municipal oversight provisions are not consistent with the Land Use Code and attempt to engraft additional requirements onto the statutory language. The Rules and Regulations require that all individuals who wish to purchase or reside in an HDHO Unit must apply to and receive permission from the Housing Authority of Southeastern Utah before moving forward with a purchase contract or a lease (the “HASU Oversight Requirements”). *See generally* Rules and Regulations. Like in *Fussell*, if the Grand County legislative body intended to incorporate the HASU Oversight Requirements into the statute, they could have easily done so, as it evidently did with respect to other enforcement provisions. In point of fact, the only statutorily established oversight the Land Use Code permits the County to do is to penalize violators of the statute (*see* 4.7.11(A)), or to “institute legal actions or proceedings to ensure compliance...” (*see* 4.7.11(B)).

By implementing the Ownership Requirements and HASU Oversight Requirements, the County has created “stricter... requirements than the statute contemplated...” thereby “improperly encroach[ing] upon the legislature’s sole province” and illegally amending the Land Use Code by not following statutorily mandated amendment procedures. *See Fussell* 816 P.2d at 254. Therefore, the Ownership Requirement and HASU Oversight Requirements are illegal amendments to the Land Use Code.

b. The County Improperly Relies on the Enforcement Section of the HDHO Ordinance in its Interpretation of the Land Use Code because such an

interpretation is out of harmony with (i) the plain language and (ii) the context of the HDHO Ordinance.

In an attempt to justify the Ownership Requirement, the County reinterprets an isolated provision of the enforcement section within the Land Use Code to mean that no person can sell or rent an HDHO lot or unit to any person or entity that is not an “Actively Employed Household”. The relevant provision states, “it shall also be a Class C misdemeanor for any person, firm, entity, or corporation to sell or rent an HDHO lot or unit to a household not qualified under this section...” (the “Enforcement Provision”). Land Use Code Section 4.7.11(A). Such an interpretation is out of harmony with the plain language and context of the rest of the HDHO Ordinance.

i. Plain Language of the Land Use Code

The Courts have routinely held that when interpreting a statute, they must “...begin by analyzing the plain language.” *Metro. Water Dist. of Salt Lake & Sandy v. SHCH Alaska Tr.*, 2019 UT 62, ¶ 16, 452 P.3d 1158, 1164. The plain language of the ordinance makes it illegal to sell or rent an HDHO lot or unit *to a household not qualified* under the HDHO Ordinance. The term “household” is an explicitly defined term of the Land Use Code that means “one adult living alone, two or more adults related to each other by blood, marriage, or another legally recognized relationship, or a maximum of five unrelated adults *residing* in the same residence.” Land Use Code Section 4.7.3 (I) (emphasis added). Accordingly, the meaning of “household” specifically refers to the status of adults residing in a home, and the definition omits from consideration any mention of ownership. Indeed, the courts have reviewed similar omissions and held that they must “seek to give effect to omissions in statutory language by presuming all

omissions to be purposeful.” *Marion Energy, Inc. v. KFJ Ranch P'ship*, 2011 UT 50, ¶ 14, 267 P.3d 863, 866 . If the omission regarding ownership as it relates to households is purposeful, then the County’s interpretation of the Enforcement Provision is out of harmony with the Land Use Code, and the addition of the Ownership Requirement has no basis in statute. Therefore, the Hearing Officer should invalidate the Ownership Requirement because it is an illegal amendment of the Land Use Code.

ii. Within the Context of the HDHO Ordinance

In addition to examining the plain language of the statute, the Courts must not “interpret the plain meaning of a statutory term in isolation.” *Metro Water* at ¶ 16. Instead, the Court must “determine the meaning of the text given the relevant context of the statute...”. *Id.* The County’s interpretation that the Enforcement Provision justifies the Ownership Requirement is isolated and out of harmony with the rest of the ordinance. Indeed, the absence of lingual evidence supporting the Ownership Requirement anywhere else in the statute supports a different interpretation of the Enforcement Provision, i.e., that the Land Use Code and the Enforcement Provision govern residency in an HDHO lot or unit and not ownership. This interpretation establishes a penalty to prevent an owner from (i) *residing* in an HDHO lot or unit when they themselves do not qualify as an “Actively Employed Household,” or (ii) renting an HDHO lot or unit to someone residing in the HDHO lot or unit that does not qualify as an “Actively Employed Household.” Such an interpretation would prevent Owners from using the HDHO lot or unit as a vacation home or from using it as a rental for short term overnight accommodations, both issues with which the County is currently struggling. Further, such an interpretation harmonizes the

enforcement language with the context of the rest of the statute, thereby further invalidating the County's isolated interpretation that the Enforcement Provision restricts ownership.

c. The County's interpretation of the Enforcement Provision cannot be correct because it is a violation of state law.

The Court has generally held that where explicit State law preempts municipal law, the municipal law is void. *Allgood v. Larson*, 545 P.2d 530, 532 (Utah 1976) (“If the ordinance penalty conflicts with that of the general law of the state covering the same subject, the ordinance penalty is void.”). In 2020 the Utah State Legislature revised the Utah State Code to read, “a county may not impose a criminal penalty greater than an infraction for a violation pertaining to... an individual's use of the individual's residence...” Utah Code Ann. §17-53-223. The sale of one's residence is undoubtedly a use thereof. *See Anderson v. Provo City Corp.*, 2005 UT 5, ¶ 26, 108 P.3d 701, 709, discussing *Gangemi v. Zoning Bd. of Appeals of Town of Fairfield*, 255 Conn. 143, 151, (2001) (holding that owners of real property only have three uses for such: living in it, renting it, or *selling* it.) The Enforcement Provision makes it a criminal misdemeanor for a person or entity to sell their property to an unqualified household. The new statute makes such a penalty void on its face as a matter of state preemption. Therefore, the Enforcement Provision does not support the County's argument that the HDHO ordinance was meant to restrict ownership rather than residency because the provision, since it was preempted by state law and therefore void, could not have been a part of the Land Use Code at the time the Commission approved the Rules and Regulations.

2. THE RULES AND REGULATIONS CONSTITUTE AN ILLEGAL VIOLATION OF THE VESTED RIGHTS DOCTRINE

“The vested rights doctrine is the body of law that addresses at what point development rights “vest” such that subsequent zoning changes and other land use regulatory changes cannot be retroactively applied... In Utah, rights in a development application vest upon submission of a completed application that conforms to the county land use and zoning ordinances in effect at the time.” *Keith v. Mountain Resorts Dev., L.L.C.*, 2014 UT 32, ¶ 31, 337 P.3d 213, 223.

Importantly, the vested rights doctrine is more than an amorphous common law principle; it is statutorily mandated. Succinctly, “[a] county may not impose on a holder of an issued land use permit or a final, unexpired subdivision plat a requirement that is not expressed... (i) in a land use permit; (ii) on the subdivision plat; (iii) in a document on which the land use permit or subdivision plat is based; (iv) in the written record evidencing approval of the land use permit or subdivision plat; (v) in this chapter; or (vi) in a county ordinance.” Utah Code Ann. § 17-27a-508. Pursuant to established statutory and common law, upon the submission of Peak View’s preliminary application, its rights became vested and, the County lost the opportunity to retroactively change the regulations.

With the law in this area so well established, it begs the question: Why did the County choose to pass an administrative rule instead of a legislative amendment? By passing an administrative rule, the County has attempted to retroactively apply new requirements to Peak View by reinterpreting the meaning of the HDHO Ordinance. In other words, the County considered the statute as written insufficient, but it could not retroactively cure the deficiency by amendment because such an amendment would fail to affect those developers with vested rights.

In an effort to cure the deficiency and to circumvent Utah Code Ann. § 17-27a-508, the County introduced the Rules and Regulations as an administrative rule. Such a rule does not require a public hearing and would, in theory, apply to developers because the Rules and Regulations make it seem as if the Ownership Requirement and HASU Oversight Requirements were a part of the HDHO Ordinance from the beginning. Such a veiled effort, regardless of form, constructively amended the Land Use Code without due process. Therefore, the Rules and Regulations do not apply to Peak View or any other HDHO landowner with vested rights because they are an illegal amendment of the Land Use Code and a clear violation of Peak View's vested rights.

3. THE RULES AND REGULATIONS CONSTITUTE BOTH A DIRECT AND INDIRECT ILLEGAL RESTRAINT ON ALIENATION

A restraint on alienation is any restriction or rule that prevents or makes difficult the right of a property owner to dispose of their property. *Page v. Page*, 15 Utah 2d 432, 434, 394 P.2d 612, 613 (1964). The Courts have held that “the ownership of land by legal title in fee carries with it... the right to sell, mortgage or alienate the property at any time; consequently... any provision... which purports to prohibit or restrain the... owner in fee from alienating the property... is void.” *Id.* The Courts have identified two kinds of restraint on alienation, direct and indirect. *Anderson*, 2005 UT 5 at ¶ 25. Direct restraints are restrictions that are expressly stated: “in property conveyances or contracts.” *Id.* Indirect restraints arise “when an attempt is made to accomplish some purpose other than the restraint of alienability, but with the incidental result that the instrument, if valid, would restrain practical alienability.” *Id.* The Rules and Regulations contain both direct and indirect restraints on alienation.

a. Direct Restraint on Alienation.

Utah courts have held that any person “who owns land by legal title in fee cannot by any provision of the instrument of conveyance to him, nor by provisions of a later instrument... be restrained from alienating the property even for a limited time, whether by language of naked prohibition or by a condition or a limitation over in case of alienation made.” *See Page* at 434.

In *Page*, the Court invalidated a provision of a settlement agreement that prevented a property owner from selling or mortgaging the party’s real property without the other party’s consent. *Id.* In particular, the Court stated that “provisions in any form against alienation of land by the legal owner in fee without the *consent or joinder of some other person* designated are void. *Id.* (emphasis added).

Similar to *Page*, the Rules and Regulations contain express provisions that (i) limit to whom an owner of a “Deed Restricted” parcel may sell their home, and (ii) require all buyers of “Deed Restricted” parcels to apply to and receive the consent of the Housing Authority of Southeastern Utah (“HASU”) before buying said parcels. The Deed Restriction required by the County in relevant part reads as follows:

The real property described herein shall be used for *Primary Residential Housing for Actively Employed Households* as required by Grand County Land Use Code, Section 4.7, High Density Overlay Districts Overlay, in perpetuity. The real property is further subject to the Development Agreement recorded in the real property records of Grand County, Utah on _____ (Date) at Entry No. _____. (emphasis added).

It is important to note that the Deed Restriction required by the County deals with residency and not ownership. The provisions of the Rules and Regulations restricting ownership are analogous to the settlement agreement referred to in *Page* because by adding the Ownership Requirement,

such provisions require the “consent of some other person” before a fee simple property owner can sell its property. Therefore, the Hearing Officer should find that the Rules and Regulations constitute a direct restraint on alienation and are “void as being against the public policy.” *Id* at 433.

b. Indirect Restraint on Alienation.

Where direct restraints are almost always void, the Courts have found that indirect restraints are enforceable if the restraint is “reasonably necessary to protect a justifiable or legitimate interest of the parties.” *See Redd v. Western Save and Loan Co.* 646 p.2d 761, 764 (Utah 1982). The Ownership Requirement is clearly an indirect restraint on alienation because it makes it illegal for lenders to take possession of and sell foreclosed HDHO lots or units. The typical residential financing structure in Utah is based on the system of Deeds of Trust. See generally Utah Code Title 57, chapter 1. If an individual fails to make their payments or otherwise defaults on their loan, the primary recourse available to a lender is to go through the statutorily mandated process to retake possession and auction off the property. See Utah Code Ann. §§ 57-1-19 to 57-1-41. Not only does the lender take constructive ownership in such a case, but the statutes mandate that the lender or its agent “shall sell the property at public auction to the highest bidder... Any person, including the [lender], may bid at the sale.” Utah Code Ann. § 57-1-27. Where the Rules and Regulations restrict ownership of such HDHO lots or Units to those who meet the Ownership Requirement and are prequalified by HASU, it would be a direct violation of the Rules and Regulation for a lender to take title to the property or to hold the statutorily mandated public auction. As such, the Ownership Requirement and the HASU Oversight Requirement cause an indirect restraint on lenders' ability to alienate such HDHO lots

or units. By taking away a lenders ability to foreclose, the HDHO lots or units become unfinanceable.

The County may argue that, like in *Anderson*, supra, there are two competing public legitimate interests and that the public policy restricting non-qualified ownership outweighs the public policy against restraints on alienation. However, and importantly, the County itself has designed in the Rules and Regulations several exceptions to the Ownership Restriction. For example, under the Rules and Regulations the Ownership Restriction does not apply to co-signers of loans, owners on leaves of absences, retirees, a qualified owner that later loses his qualification, and ownership by non-qualified original developers. These exceptions to the Rules and Regulation belie the County's argument that its control of ownership in addition to that of residency supersedes the public policy against unreasonable restrains on alienation. Therefore, the Hearing Officer should hold that the Rules and Regulations constitute an indirect restraint on alienation that is not necessary to protect a justifiable or legitimate interest in controlling residency.

4. THE RULES AND REGULATIONS CONSTITUTE A MATERIAL MODIFICATION TO THE DEVELOPMENT AGREEMENT AND ARE THEREBY A BREACH OF CONTRACT SUBJECT TO DAMAGES IN A COURT OF LAW

The elements of a breach of contract claim are (i) the presence of a valid contract, (ii) performance by the party seeking recovery, (iii) breach of the contract by the other party, and (iv) damages. *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 15, 342 P.3d 224, 230. Peak View and the County executed and entered into the Development Agreement on August 4, 2020.

It was later recorded on October 30, 2020, in the Official Records of Grand County Utah as entry no. 538983. The Development Agreement is attached hereto as Exhibit “A” and by this reference made a part hereof. Under The Development Agreement, Peak View agreed to strictly comply with the HDHO Ordinance, and the County agreed to apply the HDHO District to the Peak View Subdivision. The HDHO Ordinance was incorporated into the Development Agreement as codified on the date of execution, August 4, 2020. The Development Agreement makes clear that such may only be amended by a written amendment executed by both parties. Adoption of the Rules and Regulations not only amended the Land Use Code but also constituted a material amendment of the Development Agreement without Peak View’s consent, thus constituting a material breach of the Development Agreement by the County. In summary, the attempted addition to the Land Use Code of the Ownership Requirement and the HASU Oversight Requirement have at the very least damaged Peak View to the extent that (i) Peak View can no longer sell investor-designated multi and twin units to outside investors (ii) the HDHO lots and units are no longer financeable, and (iii) even Actively Employed Households who wished to purchase the lots are choosing alternative housing options due to the unreasonable restraints on alienation imposed by the Rules and Regulations and the HASU Oversight Requirement.

In *Tooele Associates Ltd Partnership v. Tooele City*, the municipality breached its development agreement with a developer, making it impossible for the developer to uphold the covenants required thereunder. 2012 UT App 214, ¶ 31, 284 P.3d 709, 718. The resulting lawsuit based on the County’s breach occasioned a judgement in favor of the developer for over 22 million dollars. Similarly, the County’s breach of contract has made it impossible for Peak View

to complete its subdivision as originally contemplated and approved by the County. The Rules and Regulations have severely damaged Peak View's reputation, its financial position, and its goodwill within the community. If the Rules and Regulations are upheld by the appeal authority, Peak View will establish in court the damages it has suffered and will continue to suffer until the County honors the Development Agreement.

CONCLUSION

The Commission adopted the Rules and Regulations with the intent of changing the Residency Requirements and enforcement provisions of the Land Use Code. Such changes are not authorized by law and as such constitute (i) an illegal amendment to the Land Use Code, (ii) a violation of Peak View's vested rights, (iii) a voidable direct and indirect restraint on alienation, and (iv) a breach of the Development Agreement by the County. Peak View respectfully requests that the Rules and Regulations be deemed void and invalid.

RESPECTFULLY SUBMITTED this 30th day of March 2021.

HIRSCHI BAER & CLAYTON, PLLC



David P. Hirschi
Wesley J. Felice
Attorneys for Peak View Development, LLC

EXHIBIT “A”

PEAK VIEW DEVELOPMENT AGREEMENT

(Attached)

After recording return to:
 Hirschi, Baer & Clayton
 Attn: David P. Hirschi
 68 South Main Street, Suite 600
 Salt Lake City, Utah 84101

Ent 538983 Bk 906 Pg 442-449
 Date: 30-OCT-2020 12:25:39PM
 Fee: \$44.00 Check Filed By: GKN
 JOHN ALAN CORTES, Recorder
 GRAND COUNTY CORPORATION
 For: PEAK VIEW DEVELOPMENT CO LLC

**DEVELOPMENT AGREEMENT
 AND DEED RESTRICTION
 HIGH DENSITY HOUSING OVERLAY DISTRICT**
 Pursuant to Grand County Code Section 4.7

This **DEVELOPMENT AGREEMENT AND DEED RESTRICTION** (this "Agreement") is made and entered into as of this 4th day of August 2020 (the "Effective Date") by and between **Peak View Development, LLC**, a Utah limited liability company with its principal place of business located at 3597 Spanish Valley Drive, Moab, Utah 84532 ("Owner/Developer"), and **Grand County**, a political subdivision of the State of Utah ("County").

Recitals

- A. WHEREAS, Owner/Developer owns that certain property situated in Grand County, Utah, as more particularly described in Exhibit A (the "Property"), which is attached hereto and incorporated herein by this reference.
- B. WHEREAS, Owner/Developer has petitioned Grand County to apply the High Density Housing Overlay District (the "HDHO District") to the Property to take advantage of the Development Standards and other Development Incentives set forth in Section 4.7 of the Grand County Land Use Code, as amended (the "Code").
- C. WHEREAS, the Grand County Council has, in the exercise of its legislative discretion and following all required public hearings, approved the application of the HDHO District to the Property, provided that no fewer than eighty percent (80%) of the Lots developed on the Property are deed restricted for Primary Residential Housing for Actively Employed Households, as defined in Section 4.7.3 of the Code.
- D. WHEREAS, pursuant to the authority of Utah Code §17-27A-102 and Code Section 4.7, the Parties desire to enter into this Agreement for the purpose of formalizing certain obligations of Owner/Developer with respect to the Property, and such other matters as the County and the Owner/Developer have agreed.

Agreement

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. **DEFINITIONS.** All capitalized terms herein (unless otherwise expressly defined herein) shall have those meanings assigned in Section 4.7 of the Code.

2. **COVENANT TO COMPLY WITH CODE SECTION 4.7.** In consideration of the application of the HDHO District to the Property, and specifically the Development Standards set forth in Code Section 4.7.5, Owner/Developer hereby covenants and agrees to strictly comply with the provisions, duties, and obligations of Code Section 4.7, which provisions, duties, and obligations are incorporated herein by this reference.

3. **DEED RESTRICTION.**

3.1. At least eighty percent (80%) of all lots or Lots developed in each Phase of the Subdivision on the Property (each an "HDHO Lot" or "HDHO Unit") shall be deed restricted for Primary Residential Occupancy for Actively Employed Households, as designated on the Final Plat or Site Plan.

i Fifty (50%) of the HDHO Lots (each a "Value Restricted HDHO Lot") shall be value restricted such that the appreciation applicable to each value Restricted HDHO Lot shall not exceed Three percent (3%) per year above the initial selling price of the value Restricted HDHO Lot for the first five (5) years after the Initial Sale of the Value Restricted HDHO Lot. In addition, ten (10) of the Value Restricted HDHO Lots shall be designated on the Master Plan as "Sale Restricted HDHO Lots," and the initial sales price for such Sale Restricted HDHO Lots shall not exceed one hundred and ten percent (110%) of the development cost of such Lots. Value Restricted HDHO Lots besides those designated as Sales Restricted HDHO Lots may be sold at market value. All Value Restricted and Sale Restricted HDHO Lots, will be designated as such in the Master Plan.

3.2. Each deed of conveyance for an HDHO Lot on the Property shall include the following Deed Restriction:

The Property shall be used for Primary Residential Housing for Actively Employed Households as required by Grand County Land Use Code, Section 4.7, High Density Overlay Districts Overlay, in perpetuity. The Property is further subject to a Development

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Agreement and Master Plan recorded against the Property in the real property records of Grand County, Utah.

Grand County reserves the right to revoke, deny or suspend any permit, including a land development permit, conditional use permit, building permit, certificate of occupancy, or discretionary approval upon a violation or breach of this Deed Restriction by a record owner of any HDHO Lot or Unit.

- 3.3. Each HDHO Lot is required to have and maintain those minimum standards of physical condition set forth in Exhibit B, Minimum Standards, to Code Section 4.7, which Minimum Standards are incorporated herein by this reference. Grand County reserves the right to revoke, deny or suspend any permit, including a land development permit, conditional use permit, building permit, certificate of occupancy, or discretionary approval upon a violation or breach of this Section 3.3 by a record owner of any HDHO Lot in Grand County.
- 3.4. Owner/Developer shall include the deed restriction contained in Section 3.2 above in each and every deed of original conveyance of an HDHO Lot, and each deed of conveyance thereafter shall include the same. Further, Owner/Developer shall integrate this Section 3 by reference into the Declaration of Covenants, Conditions and Restrictions recorded against the Property.

4. DEFAULT.

- 4.1. A violation or breach of any provision hereunder, or Code Section 4.7, shall constitute an Event of Default. Upon the occurrence of any Event of Default, the County shall provide written notice by certified mail, postage prepaid, to the defaulting owner at the address on file with the Grand County Assessor's office, which notice shall be effective as of the date of deposit in the United States Mail. The defaulting owner shall have thirty (30) days to remedy the Event of Default, after which time the County may enforce all remedies available to it under this Agreement, Code Section 4.7, or Utah law including specific performance and monetary fines pursuant to this Section 4.2.
- 4.2. In the event an Event of Default is not cured under Section 4.1 of this Agreement, fines in the amount of \$50 per day shall accrue until the Event of Default is cured. The County reserves the right to seek judicial enforcement of these fines, including a judgment lien and foreclosure.

5. MISCELLANEOUS.

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- 5.1. Owner/Developer hereby waives any defenses, rights or remedies that it might otherwise assert against the County in connection with: (i) the application of the rule against perpetuities to this Agreement; or (ii) any claim that the covenants in this Agreement recorded against the HDHO Lots are not covenants running with the land upon the Property. This waiver shall be binding upon and inure to the benefit of the successor and assigns of the Owner/Developer and the County.
- 5.2. Whenever possible, each provision of this Agreement shall be interpreted in such a manner as to be valid under applicable law. If any provision of any of the foregoing Agreement shall be invalid or prohibited under applicable law, such provisions shall be ineffective to the extent of such invalidity or prohibition without invalidating the remaining provisions in this Agreement.
- 5.3. If any party shall take or defend against any action for any relief against another party arising out of this Agreement, the prevailing party in such action or defense shall be entitled to reimbursement by the other party for all costs including, but not limited to, reasonable attorneys' fees and court costs incurred by the prevailing party in such action or defense and/or enforcing any judgment granted therein, all of which costs shall be deemed to have accrued upon the commencement of such action and/or defense and shall be paid whether or not such action or defense is prosecuted to judgment. Any judgment or order entered in such action or defense shall contain a specific provision providing for the recovery of attorneys' fees and costs incurred in enforcing such judgment.
- 5.4. This Agreement shall be governed by and construed under Utah law.
- 5.5. Except as otherwise provided herein, the provisions and covenants contained herein shall inure to and be binding upon the heirs, successors, and assigns of the parties.
- 5.6. Paragraph or section headings within this Agreement are inserted solely for convenience of reference and are not intended to, and shall not, govern, limit or aid in the construction of any terms or provisions contained herein. Further, whenever the context so requires herein, the neuter and gender shall include any or all genders and vice versa and the use of the singular shall include the plural and vice versa.
- 5.7. This Agreement may be amended only upon written amendment executed by both Parties, recorded in the real property records of Grand County, Utah; provided, however, that all material terms and provisions, including the percentage of HDHO Lots, may not be amended or modified without reapplication to the County.

5.8. This Agreement shall be recorded by Owner/Developer prior to recordation of a final plat or issuance of a building permit for any Lot within a site plan approved hereunder, as required by Section 4.7.

[Signature Page Follows]

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EXHIBIT A

LEGAL DESCRIPTION OF THE PROPERTY

BEGINNING AT THE N 1/4 CORNER OF SECTION 27, T26S, R22E, SLM AND PROCEEDING THENCE N 89 DEG. 55' E 883.6 FT. TO THE CENTER LINE OF SPANISH VALLEY DRIVE, THENCE ALONG SAID CENTER LINE S 45 DEG. 37' E 317.9 FT. THENCE ALONG A 2 DEG. 10' CURVE 431.8 FT. THENCE S 36 DEG. 16'30" E 204.7 FT.; THENCE W 1513.8 FT. TO A 1/2" REBAR ON THE WEST LINE OF THE NE 1/4 OF SAID SECTION 27; THENCE N 0 DEG. 03' 930" W 711.8 FT. TO THE POINT OF BEGINNING. BEARINGS ARE BASED ON THE EAST LINE OF SAID SE 1/4 OF SECTION 27. (NORTH 0 DEG. 01' WEST)

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