

2009-014705

Klamath County, Oregon



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11/16/2009 03:34:08 PM

Fee: \$77.00

After Recording, please return this  
original signed agreement, along  
with all exhibit attachments, to the  
City Attorney's Office at:  
P.O. Box 237, 500 Klamath  
Avenue, Klamath Falls, OR 97601

## City of Klamath Falls



## Development Agreement

1st 1486070

### *The Agreement is between the:*

City of Klamath Falls  
500 Klamath Avenue  
Klamath Falls, OR 97601  
Phone: 541-883-5314  
Fax: 541-883-5399  
("City")

and

Iris Glen Townhomes., LLC  
C/O Luckenbill-Drayton & Associates, L.L.C.  
1007 NW Rimrock Drive  
Redmond, OR 97756  
Phone: 541-504-2801  
Fax: 1-888-484-7149  
("Owner")

## RECITALS

- A. The City Planning Commission, on **April 28, 2009**, granted tentative approval of a certain project identified as: **Iris Glen Townhomes, City Planning File # 5-DR-09** ("Development"). Owner certifies it is the sole and legal owner of the Development and is now seeking the City's approval of the Development Plan in accordance with City Ordinances and City Code. The Development consists of: **6 Buildings with a total of 36 rental units, and one single family home which shall be occupied by the manager of the rental unit complex.**
- B. The parties agree that good and valuable consideration exists as a basis for this Agreement including, but not limited to the City's approval of the Development, which Owner agrees is a special benefit to the Development.
- C. This agreement is made for the purpose of ensuring Owner performs the perpetual care, proper operation, maintenance, and good upkeep of all private infrastructure, including without limitation: **Common Areas, private easements, private utilities, private drainage facilities, private storm detention ponds, private storm discharge control structures, associated piping, etc.**
- D. It is mutually understood that the approval by the City of the plan for this Development is not deemed acceptance by the City of any Improvements in the Development, or any other physical improvements shown on the Plan for maintenance, repair or operations thereof. Owner shall remain and be fully responsible and assume all of the risks and liabilities thereof. Owner shall be fully response and assume all of the risks and liabilities therefore for the construction of all dedicated infrastructure, until final written acceptance of the Development and dedicated infrastructure has been issued by the City. Owner agrees the City's final written acceptance of the Improvements or signing of the Plan does not relieve the Owner of liability in respect to express or implied warranties or responsibility for faulty or defective materials or workmanship.

City of Klamath Falls Development Agreement  
Iris Glen Townhomes, Planning File # 5-DR-09, Master File # 2644T9

Page 1 of 6

Owner's Initials: cmz

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## AGREEMENT

The Parties hereby incorporate the Recitals set forth above as material and contractual terms of this Agreement. The terms of this Agreement are the product of negotiations between the Parties with the advice of their own legal counsel. In consideration of the City's approval of the Development Plan, and in order to ensure satisfactory performance by Owner of Owner's obligations under this Agreement and according to the applicable ordinances of the City, the parties agree as follows:

### Section 1. CONSTRUCTION OF IMPROVEMENTS

**1(a)** Neither Owner, nor any of Owner's agents or contractors in connection with Owner's obligations under this Agreement are, or shall be considered to be, agents of City.

**1(b)** Owner shall develop and construct the Development and all infrastructure improvements in the Development ("Improvements"), pursuant to, and in accordance with:

- i. The provisions of the City's Community Development Ordinances and City Code;
- ii. The City Planning Commission Final Order for the Development on file with City Planning;
- iii. The City approved construction design plans ("construction plans" or "plan") on file with City Engineering under City Master File # 2644T9;
- iv. The City Public Works Engineering Design Standards;
- v. The requirements identified in the City's Site Construction Permit(s) on file with City Engineering under City Master File # 2644T9;
- vi. The Construction Improvements Agreement and Assurance of Performance executed between City and Owner; and
- vii. Any applicable federal, state, or county laws that may apply.

### Section 2. TIMING OF PERFORMANCE

**2(a) Improvements Construction:** Owner shall execute a Construction Improvements Agreement and Assurance of Performance with the City, guaranteeing the timely and proper completion of the Improvements in the Development, and any off-site improvements required for the Development.

**2(b)** Owner acknowledges that until Owner has obtained the City's final written acceptance of all on-site and off-site Improvements within the Development, Owner or any subsequent owner shall not make any private connection to any City dedicated infrastructure improvement (i.e. water or sewer), and no building or structure within the Development may be occupied. Check with the Klamath County Building Department, the Klamath County Fire District, and the City Community Development Department for additional restrictions on occupancy requirements that may apply to this project.

### Section 3. MAINTAINANCE OF PRIVATE FACILITIES AND EASEMENTS; PUBLIC EASEMENTS; ENCROACHMENT PERMITS

**3(a)** The City shall not assume ownership of, operate, or maintain private utilities, private storm water drainage facilities, private alleys/roads, private easements, private structures, private utilities located with a public right-of-way, etc.

**3(b)** The Owner shall perform, or properly delegate and make all necessary payments, to ensure the perpetual care, proper operation, maintenance, repairs and good upkeep of:

- i. **The portion of Old Fort Road (a.k.a. Fort Klamath Road) beginning at the southern end of the intersection with Herbert Street and Laguna Street, and continuing south to the intersection with**

**Crater Lake Parkway, as well as all portions of the alley which transects Block 12 Dixon Addition.**

- a. **Owner shall provide or perform all maintenance and make all repairs in this area to include, without limitation all: snow removal and de-icing, striping (parking spaces, crosswalks, lane striping, etc), ADA ramps, traffic calming devices, signage, and sweeping in this area. The City shall continue to maintain/replace/repair the asphalt and any curbing in these areas. City maintenance, replacements, and/or repairs of the asphalt and curbing shall be performed in locations and at times in the sole discretion of the City.**
- ii. **Storm Drainage system** - The storm drainage system located in Old Fort Road (a.k.a. Fort Klamath Road) will be maintained by the City, but all other storm drainage systems, including without limitation any detention areas, for this Development shall be the responsibility of the Owner.

**3(c) Owner shall create the following public easements on the final Plan:**

- i. **See the City approved construction plans under Master File# 2644T9.**

**3(d) Owner shall create the following private easements on the final Plan:**

- i. **See the City approved construction plans under Master File# 2644T9.**

**3(e) Owner shall execute with the City, a Revocable License and Encroachment Permit for all private utilities installed in a public right-of-way. Owner shall record the executed permit with the County Clerk of Klamath County, Oregon after "as-built" information is obtained, and before obtaining final written acceptance of the Development or project.**

#### **Section 4. LEGAL REVIEW**

**4(a)** The City has provided no legal advice, opinions, nor has it made any determinations in regards to the completeness or adequacy of Owner's Plan for this Project as it relates to Owner's needs, and City has provided no legal advice nor has it provided any legal opinion in regards to any applicable associated documents [i.e. whether the Owner is required to comply with the terms of the Oregon Planned Community Act (ORS 94.550 to 94.783) or the Oregon Condominium Act (ORS 100.005 to 100.900)].

**4(c)** Owner has filed a deed restriction (restrictive covenant) for this Development with the County Clerk of Klamath County, Oregon, **on the 26<sup>th</sup> day of August, 2009** as document # **2009-011440**, that prohibits the individual sale of any of the subject lots, rental units, or manager housing independent from the rest of the Development. Owner shall ensure this restriction prohibits the individual sale of any of the subject lots, rental units, and manager housing, and that said Development is held together by a single property owner. The City has provided no legal advice nor has it provided any legal opinion regarding the sufficiency of the aforementioned-recorded document.

#### **Section 5. NOTICE(S)**

**5(a) Recording:** Owner shall, after obtaining the necessary signatures, record this Agreement in the office of the County Clerk, in order to put prospective purchasers and other interested parties on notice of its terms. Owner shall return the original signed recorded Agreement to the City Attorney's Office.

**5(b) Development Agreement:** Owner shall provide purchasers of the Development, prior to close of sale, a copy of this Agreement.

**5(c) Construction Improvements Agreement:** Owner shall provide purchasers of this Development a copy of the executed Construction Improvements Agreement and Assurance of Performance, until such time that purchasers have no obligations under that agreement.

**5(d)** All written notices shall be addressed to and filed with the addresses identified in this agreement, unless written notice of change of contact information is received by the parties.

#### **Section 6. THIRD PARTY RIGHTS.**

**6(a)** No person or entity, who or which is not a party to this Agreement, has any right of action against the City under this Agreement including, without limitation, a trustee in bankruptcy, lenders, buyers, material suppliers, laborers, or others providing work, services, or materials for the Development. Nor does any such person or entity have any interest in or claim to any security provided by the Owner to the City.

#### **Section 7. SUCCESSORS IN INTEREST**

**7(a)** This Agreement shall run with the land and is binding on the Owner, the Owner's heirs, executors, administrators, successors, and assigns, all jointly and individually.

#### **Section 8. AMENDMENT AND WAIVER**

**8(a) Amendments:** This Agreement may only be amended by mutual written agreement between the original parties or their successors in interest; executed by duly authorized representatives of each party. The Owner shall record any such amendments in the office of the County clerk and shall comply with the notice requirements in section 6 above.

**8(b) No Waiver:** No waiver of any provision of this Agreement will be deemed or constitute a waiver of any other provision, nor will it be deemed or constitute a continuing waiver unless expressly provided for by a written amendment to this Agreement. No waiver of any default under this Agreement will be deemed a waiver of any subsequent defaults of the same type. The failure at any time to enforce this Agreement or any covenant by the City, the Owner, or their respective heirs, executors, administrators, successors or assigns, whether any violations thereof are known, does not constitute a waiver or estoppel of the right to do so.

#### **Section 9. INDEMNIFICATION**

**9(a)** The Owner shall defend, indemnify, hold harmless and defend, City, its elective, officers, employees, and agents (collectively referred to as "Indemnities"), against all liability or loss, and against all suits, claims, actions, losses, costs, penalties and damages of whatsoever kind or nature based upon or arising out of damage or injury (including death) to any persons or property caused by or sustained in connection with the construction or repair of the Improvements, or the performance of this Agreement, or by conditions created thereby, or based upon the Owner's violation of any statute, ordinance or regulation. Owner shall also indemnify City against all liability and loss in connection with, and shall assume full responsibility for payment of all Federal, State and local taxes or contributions imposed or required by this agreement.

**9(b)** Owner agrees if any of the Indemnities are made a party to any litigation against Owner or any litigation commenced by any party, other than Owner, relating to this Agreement, Owner shall, at its own expense, promptly investigate all claims and demands, attend to their prompt settlement, defend the Indemnities in all actions with counsel acceptable to City, and pay all charges of attorneys and all other costs and expenses of any kind arising from any liability, damage, loss, claims, demands, and actions.

9(c) The City shall promptly notify the Owner of any claim, action, or proceeding, and cooperate fully in the defense of any claim, action or proceeding.

#### Section 10. LEGAL ACTIONS

10(a) This agreement will be construed under the laws of the **State of Oregon** and is enforceable only in **Klamath County Oregon**. If legal action is necessary by either party, with respect to the enforcement of any or all of the terms or conditions herein, exclusive venue for the enforcement of this Agreement will lie with the **Klamath County Circuit Court**.

#### Section 11. ATTORNEY FEES

11(a) In the event suit or action is initiated to enforce the terms of this Agreement, the prevailing party is entitled to recover reasonable attorney fees and all other fees, cost and expenses incurred in connection with the suit or action, including all appeals. If the court awards relief to both parties, each will bear their own costs in their entirety.

#### Section 12. STATUTORY COMPLIANCE

12(a) This Agreement is intended to conform to all applicable statutory requirements. Any applicable requirement of any statute omitted from this Agreement is deemed to be included herein as if fully set forth. The invalidity, in whole or in part, of any term of this Agreement does not affect the validity of the remainder of this agreement.

#### Section 13. HEADINGS

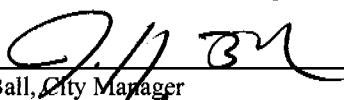
13(a) Headings to any plans, divisions, sections, paragraphs, subparagraphs and forms are inserted for convenience of reference only and shall not affect the interpretation of this Agreement.

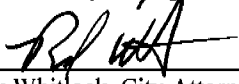
#### Section 14. AMBIGUITIES


14(a) The terms of this Agreement are the product of negotiations between the Parties with the advice of their own legal counsel. Therefore, the Parties agree that any rule of construction which provides that any ambiguities in the Agreement be construed against the draftsman shall not apply.


#### Section 15. CITY STAFF APPROVALS

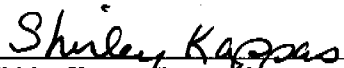
15(a) Reviewed and accepted by (Owner(s) must sign, date and attach signing authority first):

 on this 16<sup>th</sup> day of November, 2009.  
Jeff Ball, City Manager

 on this 12<sup>th</sup> day of November, 2009.  
Rick Whitlock, City Attorney

 on this 13 day of November, 2009.  
Tom Del Santo, City Development Coordinator / City Surveyor

 on this 13 day of November, 2009.  
Erik Nobel, City Planning Manager

 attested on this 16<sup>th</sup> day of November, 2009.  
Shirley Kappas, Deputy City Recorder

**Section 16. OWNER APPROVAL \*\* Attach proof of signing authority \*\***

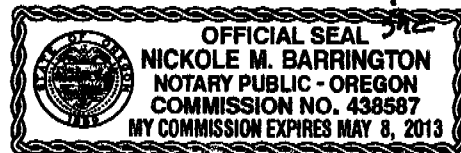
The terms of this Agreement are hereby accepted and effective this 16<sup>th</sup> day of 20 09

Claudette M. Luckenbill Claudette M. Luckenbill  
Print Name and Title of Owner

STATE OF OREGON )  
County of Klamath )

Personally appeared before me, Claudette M. Luckenbill, who being duly sworn, stated that ~~he~~ <sup>she</sup> is the  
Managing Member of Iris Glen Townhomes, LLC and that  
this instrument was signed on behalf of said limited liability company by authority of its Members and ~~he~~ <sup>she</sup> acknowledged said  
instrument was its voluntary act and deed.

Nickole M. Barrington  
Oregon Notary Public



**Section 17. EXHIBIT LIST**

None

**FOR CITY USE AND DISTRIBUTION**

Original document to: City Attorney's Office (City Attorney's Office will forward originals to Recorder's Office)

Attorney's office will  
email copies to:

City Planning Division – Sandra Zaida, Erik Nobel, and Karen Burg (to print for your files)  
City Engineering – Tom Del Santo, and Janna Thompson, (to print for your files)  
City Water Division – Steve Seratt, Randy Travis, and Rod Denson  
City Streets Division – Chuck Cox and Joe David  
City Sewer Division – Jeff Fritz and Mel Smith  
Klamath County Building Department – Rex Turner  
Klamath County Fire District # 1 - Jim Kenworthy

Owner's Initials: CML

## EXHIBIT A

All that certain real property located in the County of Klamath, State of Oregon, described as follows:

A portion of Lots 4, 5 & 6, Block 11, Dixon Addition to the City of Klamath Falls, in the County of Klamath, State of Oregon, more particularly described as follows:

Beginning on the east side of Hillside Avenue at a point 36 feet south of the Northwest corner of Lot 6, Block 11, Dixon Addition to the City of Klamath Falls, Oregon; Running thence south along the east side of said Hillside Avenue a distance of 37 feet; thence east and parallel with the north line of said Lot 6 to the northwesterly line of Fort Klamath Road to a point where said line intersects with a line drawn east from said point of beginning and parallel with the north line of said Lot 6; thence west to the point of beginning, being a tract of land fronting 37 feet on said Hillside Avenue and extending across Lots 6, 5 and 4 of said Block 11 to Fort Klamath Road, Situate in southwest quarter of southeast quarter of Section 28, Township 38 South, Range 9 East of the Willamette meridian, Klamath County, Oregon. Together with an easement for a driveway across the southerly and easterly side of said Lot 4, Block 11, conveniently wide for a drive from the alley in the rear of said Lot 4.

Lots 4, 6, 7, 8, 9, 10 and 11, Block 12, Dixon Addition to the City of Klamath Falls, in the County of Klamath, State of Oregon, except portion deeded to the State of Oregon by deeds recorded in Book 169 at Page 194 and in Book 19 at Page 458, Deed Records of Klamath County, Oregon.

Lot 3, Block 11, Dixon Addition to the City of Klamath Falls, in the County of Klamath, State of Oregon.

**RESOLUTIONS OF THE MEMBER OF  
LDA KLAMATH DEVELOPMENT, LLC**

These matters having come before the sole member of LDA Klamath Development, LLC, an Oregon limited liability company ("LKD") at a special meeting held on October 29, 2009 in Redmond, Oregon, and having considered the matters, the member adopts the following resolutions:

**I.**

WHEREAS, Luckenbill-Drayton & Associates, LLC, an Arizona limited liability company ("LDA") together with LKD, whose sole member and manager is LDA, authorized and have formed Iris Glen Townhomes, LLC, an Oregon limited liability company (the "Company"); and

WHEREAS, LKD and LDA, as the sole members of the Company, desire to amend and restate the Company's Operating Agreement to: (i) admit one or more members affiliated with Homestead Capital ("Homestead") as a member of the Company; (ii) admit Klamath Housing Authority, a public corporation created pursuant to ORS 456.005 et. seq. ("KHA") as a member of the Company; and (iii) effect the withdrawal of LDA as a member of the Company; and

WHEREAS, Homestead, as a member, will contribute an amount of capital to the Company which has been determined to be in the best interests of the Company.

BE IT RESOLVED, that the execution, delivery and performance of the Letter of Intent relating to the proposed Amended and Restated Operating Agreement of the Company among LKD, Homestead, KHA and LDA (as withdrawing member), is hereby authorized and that Claudette M. Luckenbill, as manager of LDA, as manager of LKD is authorized on behalf of the Company to execute and deliver an Amended and Restated Operating Agreement in such form as the person executing such Agreement, after advice of counsel, deems to be in the best interest of LKD and the Company.

**II.**

WHEREAS, Homestead and LKD have entered into or have agreed to enter into certain agreements related to the admission of Homestead as a member of the Company.

BE IT RESOLVED, that Claudette M. Luckenbill, as manager of LDA, as manager of LKD is authorized on behalf of LKD or as manager of the Company, as the case may be, to execute and deliver the following documents:



- Guaranty Agreement;
- Company Management Services Agreement;
- Development Services Agreement between the Company and LDA;
- As required, one or more security agreements relating to LKD's interest in the Company in favor of Homestead;
- As required, one or more UCC-1 filing statements relating to security interests granted by LKD;
- As required, one or more certificates of representation by LKD and/or the Company, as may be the case and addressed to counsel for LKD, the Company, Homestead or its counsel as may be appropriate;
- Such other documents reasonably necessary to the effectuation of the resolutions adopted as of this date and reasonably related to the development of the Project.

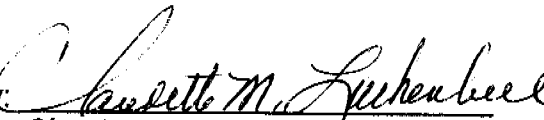
together with such amendments, additions or other changes as the signer, after advice of counsel, shall deem to be in the best interest of the Company and/or LKD, as the case may be.

### III.

To the extent any action authorized herein has previously been taken, the same is hereby ratified and affirmed.

The foregoing resolutions were adopted by the sole member of LKD effective as of the 29th day of October, 2009.

Luckenbill-Drayton & Associates, LLC

By:   
Claudette M. Luckenbill, Manager