

## ORDINANCE NO. NS-2413

### AN ORDINANCE ADOPTING A STATUTORY DEVELOPMENT AGREEMENT WITH BEND PARKS AND RECREATION DISTRICT FOR PARCELS 1, 2, AND 3 OF PARTITION PLAT 2008-06

#### Findings:

- A. This ordinance adopts a Statutory Development Agreement (the "Development Agreement") between the City of Bend ("City") and Bend Parks & Recreation District ("BPRD"). The Development Agreement was initiated following an Intergovernmental Agreement between the City, BPRD, and Oregon State University – Cascades ("OSU-Cascades") for the construction of two roundabouts at SW Colorado Ave & SW Columbia Street and SW Simpson Ave & SW Columbia Street (the "Simpson Roundabout"). It was processed in accordance with Bend Development Code (BDC) Section 4.1.1500 *Development Agreements*.
- B. The purpose of the Development Agreement is to provide for the timing, construction, and funding of infrastructure previously required by Ordinances NS-2224 and NS-2015, adopted by the Bend City Council, and applicable to property owned by BPRD legally described as Parcels 1, 2, and 3 of Partition Plat No. 2008-06, at the northwest corner of Simpson Avenue & Columbia Street (50 SW Shevlin-Hixon Drive, 1000 SW Bradbury Way, and 1001 SW Bradbury Way) (together, the "Subject Property"). To date, BPRD has completed all of the transportation mitigation requirements of those ordinances, including a cash-in-lieu payment for improvements at the Century Drive/Simpson Avenue roundabout, striping improvements at the intersection of Simpson Avenue/Columbia Street, curb bulb-outs and rebuilding of ADA ramps along Columbia Street or a cash-in-lieu payment for these improvements, and a contribution toward the Westside Transportation Growth Management, except for BPRD's obligations with respect to the Simpson Roundabout.
- C. Ordinances NS-2224 and NS-2105 also required construction of the Simpson Roundabout prior to the occupancy of any additional development on the Subject Property other than the multi-purpose recreation pavilion on Parcel 3. The Simpson Roundabout is being constructed by the City, through the Intergovernmental Agreement referenced in Finding A, above. As set forth in the Intergovernmental Agreement, BPRD will dedicate right-of-way and make a contribution towards the costs of the Simpson Roundabout. Upon performance of BPRD's obligations under the Intergovernmental Agreement, BPRD will have fully satisfied its obligations under Ordinances NS-2224 and NS-2015.
- D. The Development Agreement provides BPRD and the community with certainty about the level of development that may be constructed on the Subject Property without additional offsite transportation mitigation requirements. On-site improvements not addressed in this Development Agreement, including but not limited to access points and frontage improvements, are not governed or vested by

this Development Agreement and will be addressed through subsequent development approval. Off-site improvements other than transportation infrastructure improvements ("Other Off-site Improvements") are not governed or vested by this Agreement and will be addressed through subsequent development approval. Other Off-site Improvements may include water and sewer infrastructure improvements, but shall not include multimodal bike path and pedestrian connections, interim safety improvements, emergency vehicle access, or anything else transportation related.

- E. The City provided timely and sufficient notice of the public hearing for the Development Agreement in accordance with the Type III application procedures contained in Section 4.1.400 of the Bend Development Code. On April 28, 2021, notice of the May 19, 2021, City Council public hearing was mailed to surrounding owners of record of property within 500 feet of the subject properties, as shown on the most recent property tax assessment roll, and to the River West and Southern Crossing Neighborhood Association representatives. Additionally, Notice of Proposed Development signs were posted on the subject property along abutting public ways throughout the duration of the required public comment period.
- F. The City Council held a public hearing on May 19, 2021, to accept evidence, receive public testimony and consider the staff recommendation. The City Council finds that the Development Agreement follows the provisions of ORS 94.504 through 94.528, which are specifically addressed within the Development Agreement, and authorizes the City Manager to sign the Development Agreement in substantially the same form as presented at the first reading.

**Based on these findings, THE CITY OF BEND ORDAINS AS FOLLOWS:**

Section 1. The Development Agreement is adopted in the form contained in Attachment A and applies to the Subject Property, which is further identified on the map depicted in Exhibit A of the Development Agreement.

Section 2. If any provision, section, phrase, or word of this ordinance or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions that can be given effect without the invalid provision or application.

First Reading: May 19, 2021

Second reading and adoption by roll call vote: June 2, 2021

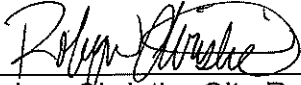
YES: Mayor Sally Russell  
Mayor Pro Tem Gena Goodman Campbell  
Councilor Barb Campbell  
Councilor Melanie Kebler  
Councilor Anthony Broadman  
Councilor Megan Perkins  
Councilor Rita Schenkelberg

NO: none



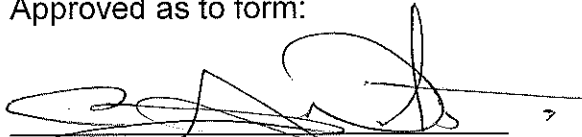
Sally Russell, Mayor

Attest:



Robyn Christie, City Recorder

Approved as to form:



Mary A. Winters, City Attorney

# EXHIBIT A

3-56

**PARTITION PLAT NO. 2008-6**  
A PARTITION OF PARCEL 2, PARTITION PLAT NO. 2006-78  
LOCATED IN THE NE 1/4 OF THE NE 1/4, SECTION 6, TOWNSHIP 18 SOUTH, RANGE 12 EAST,  
WILLAMETTE MERIDIAN, CITY OF BEND, DESCHUTES COUNTY, OREGON  
DECEMBER, 2007

CITY OF BEND APPROVAL NO. PZ 07-32

**CURVE TABLE**

CURVE	LENGTH	RADIUS	DELTA	CHORD	BEARING
C1(C)*	205.73'	585.55'	20°31'18"	206.61'	S20°15'49"W
C2(C)*	43.48'	55.00'	45°17'36"	42.36'	S22°43'19"E
C3	192.94'	220.00'	50°14'56"	186.82'	N64°47'56"E
C4	219.25'	250.00'	50°14'56"	212.23'	N54°44'56"E
C5	245.50'	280.00'	50°14'56"	237.77'	N64°42'56"E
C6	241.51'	232.00'	60°08'51"	230.57'	S39°26'49"W
C7	210.01'	200.00'	60°08'51"	200.50'	S39°26'49"W
C8	178.51'	170.00'	60°08'51"	170.42'	S39°26'49"W
C9	88.83'	170.00'	25°56'17"	87.82'	N54°33'36"E
C10	104.50'	200.00'	25°56'17"	103.37'	N54°33'36"E
C11	120.18'	230.00'	25°56'17"	118.82'	N54°33'36"E

**REFERENCES**

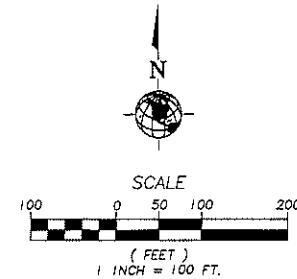
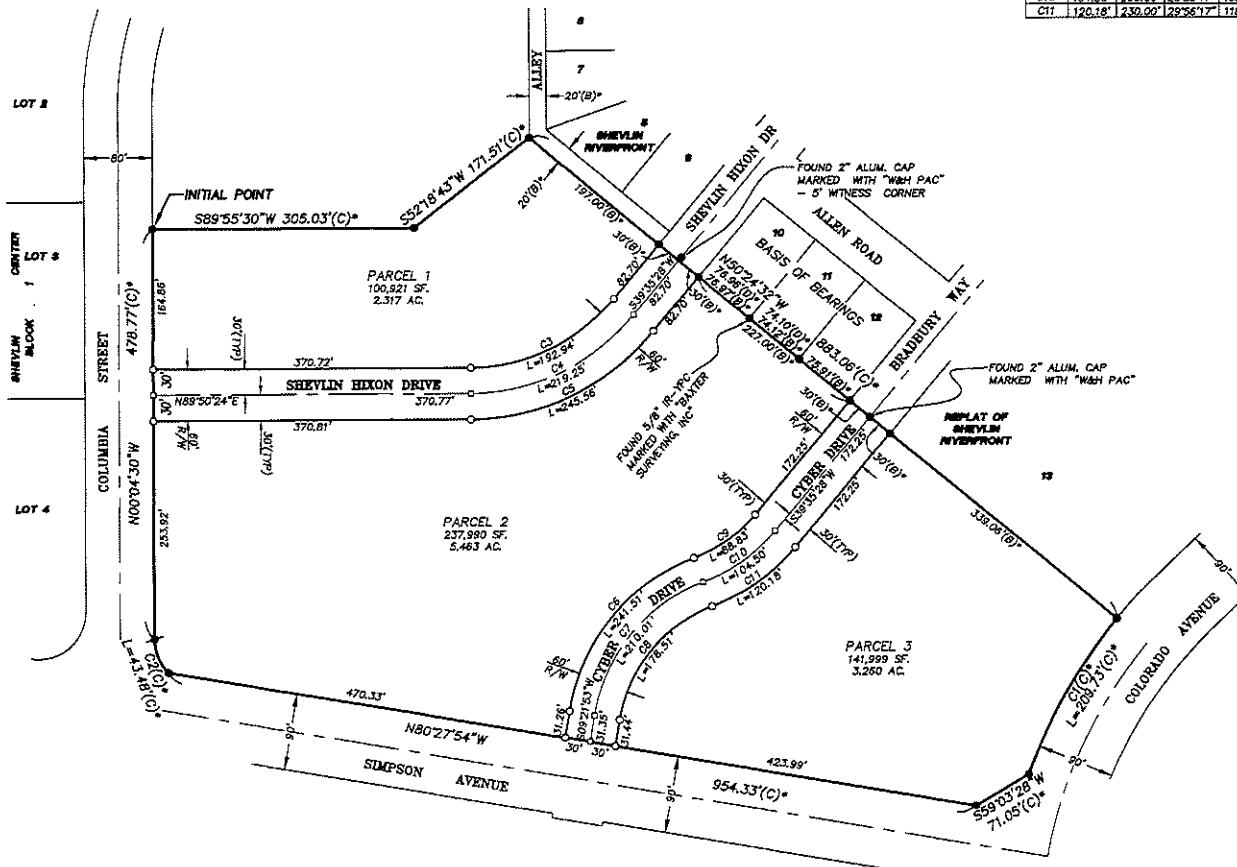
- (A) PARTITION PLAT NO. 1994-49 BY W&H PACIFIC, DESCHUTES COUNTY SURVEY NO. CS 12038
- (B) REPLAT OF SHEVLIN RIVERFRONT BY W&H PACIFIC, DESCHUTES COUNTY SURVEY NO. CS 13364
- (C) PARTITION PLAT NO. 2006-78, BY W&H PACIFIC, DESCHUTES COUNTY SURVEY NO. 17161.
- (D) LOT 11 REPLAT OF SHEVLIN RIVERFRONT, BY BAXTER LAND SURVEYING, INC CS 16882

**LEGEND**

- FOUND 5/8" REBAR WITH YELLOW PLASTIC CAP MARKED "W&H PACIFIC" UNLESS OTHERWISE NOTED
- ✱ FOUND YELLOW PLASTIC CAP IN ASPHALT MARKED "C.W.E.C." UNLESS OTHERWISE NOTED PER CS 08725
- SET 5/8"x30" REBAR WITH YELLOW PLASTIC CAP MARKED "W&H PACIFIC".
- ( ) RECORD DATA PER REFERENCE NOTED
- MEASURED DATA SAME AS RECORD
- PUE PUBLIC UTILITY EASEMENT
- CALCULATED POINT - NOTHING FOUND OR SET

**LOT SUMMARY**

PARCEL 1	100,921 SF.	2.317 ACRES
PARCEL 2	237,990 SF.	5.463 ACRES
PARCEL 3	141,999 SF.	3.260 ACRES
ROW DEDICATION	71,450 SF.	1.640 ACRES
<b>TOTAL PLAT</b>	<b>552,360 SF.</b>	<b>12.680 ACRES</b>



REGISTERED  
PROFESSIONAL  
LAND SURVEYOR  
  
  
OREGON  
JUNE 30, 1997  
DANIEL E. WOBBE  
2225  
RENEWAL DATE: 06/30/2008

SHEET 2 OF 2

**W&H PACIFIC**  
820 SW EMKAY DR. SUITE C-100  
BEND, OREGON 97703  
www.wahpacific.com  
TEL: (541)388-4255 FAX: (541)388-4229  
Planning/Engineering/Surveying/Landscape Architecture

## **STATUTORY DEVELOPMENT AGREEMENT**

This Statutory Development Agreement ("Agreement") is between the City of Bend, a municipal corporation of the State of Oregon (the "City") and Bend Park and Recreation District, an Oregon special district ("BPRD") (each a "Party" and, collectively, the "Parties"), in accordance with ORS 94.504 through 94.528. The purpose of this Agreement is to provide for the timing, construction, and funding of infrastructure necessary to support urban development on the properties legally described as Parcels 1, 2, and 3, Partition Plat No. 2008-06, City of Bend, Deschutes County, Oregon recorded as Document No. 2008-05014 in the Deschutes County Official Records (the "Properties"), which is generally located at the northwest corner of Simpson Avenue & Columbia Street (see map attached as Exhibit A).

### **RECITALS**

A. BPRD is the owner of the Properties. For the purposes of this Agreement, BPRD includes any successors in interest to all or a portion of the Properties during the term of this Agreement.

B. BPRD's predecessor in interest to the Properties submitted a development application, in File PZ-06-0570, for a private, mixed-use development and rezone of the Properties. A package of off-site transportation improvements were required as part of the conditions of approval, memorialized in Bend Ordinances NS-2105, adopted October 1, 2008, and NS-2224, adopted August 6, 2014.

C. The required off-site transportation mitigation improvements from File PZ-05-0570 were found to be sufficient to support development on the Properties of up to 469 p.m. peak hour trips.

D. BPRD subsequently completed, or is under contract to complete, all the required off-site transportation mitigation described in Bend Ordinances NS-2105 and NS-2224.

E. BPRD developed Parcel 3 of the Properties with a community recreation facility known as the "Pavilion", which accounts for 42 p.m. peak hour trips, as described in Ordinance NS-2224.

F. Given the previously determined transportation infrastructure mitigation, the Parties agree that the costs and timing of the required infrastructure improvements should be determined and allocated as part of this Agreement in a comprehensive, collective, and equitable manner.

### **AGREEMENT**

In consideration of the mutual promises and performance obligations of each Party set out in this Agreement, the Parties agree to the following terms and conditions.

**1. Effective Date and Term of Agreement (ORS 94.504(2)(a); ORS 94.504(6)).** This Agreement shall be effective upon: (a) adoption of an ordinance by the City approving this Agreement in accordance with ORS 94.508; and (b) execution of this Agreement by the Parties. The effective date of this Agreement shall be the later of (i) the date the Agreement is last signed by a Party or (ii) the effective date of the City's adopting ordinance (as applicable, the "Effective Date"). This Agreement shall continue in effect for a period of 15 years after the Effective Date, or until development on the Properties accounts for a total of 469 p.m. peak hour trips described in Section 5.3, whichever comes first. Nothing in this section shall preclude the Parties from mutually agreeing to reopen, extend, terminate, or consider amendments to this Agreement at any time, if otherwise allowed by statute. Any amendments shall be made as provided in Section 10 below.

**2. Description of Development Authorized and Required by this Agreement.**

2.1 Generally (ORS 94.504(2)(b)). This Agreement is not intended to authorize or control any particular uses of the Properties.

2.2 Density and Intensity (ORS 94.504(2)(c)). As noted above, density and intensity of uses on the Properties are governed by the Bend Development Code ("BDC") at the time of development application submittal.

2.3 Height and Size of Structures (ORS 94.504(2)(d)). Height and size of structures will be governed by the requirements of the BDC at the time of development application submittal.

2.4 Reservation or Dedication of Land for Public Purposes (ORS 94.504(2)(e)). Any requirements for reservation or dedication of additional land for public purposes shall be determined at the time of development approval for each of the Properties in accordance with City regulations in effect at the time of development application submittal. Notwithstanding the foregoing, no additional reservations or dedications will be required for transportation related purposes provided development of the Properties remains under the number of trips specified in Section 5.3 below except as otherwise provided in Section 5.3.

2.5 Schedule of Fees and Charges (ORS 94.504(2)(f)). Except as expressly provided for in this Agreement, fees and charges will be determined at the time of specific development applications for each of the Properties in accordance with the applicable City regulations in effect at the time of application submittal.

**3. Schedule and Procedure for Compliance Review (ORS 94.504(2)(g)).** BPRD must demonstrate compliance with applicable BDC approval criteria, including but not limited to off-site sewer and water infrastructure adequacy for proposed development of the Properties (or portion thereof) at the time of development application submittal. This Agreement demonstrates compliance with those sections of the BDC applicable to off-site transportation infrastructure adequacy for development of all the Properties subject to this Agreement.

**4. Infrastructure Improvements (ORS 94.504(2)(h)).** Because the uses and density on the Properties are prescribed by the Bend Comprehensive Plan ("BCP") and BDC, and because BPRD completed certain previously required transportation infrastructure requirements, the purpose of this Agreement is to allow for development of the Properties to the level for which those transportation improvements were made (i.e. the number of trips specified in Section 5.3 below).

**4.1 Transportation Infrastructure.** BPRD's predecessor in interest to the Properties conducted a Transportation Study, submitted with File PZ-06-0570, that analyzed the impacts of the full development of the Properties on the transportation system at the end of the planning period for a large-scale mixed-use development project and rezone of the Properties from Industrial Light (IL) to Mixed Employment (ME) (the "Study"). The Study was submitted to and reviewed by the City pursuant to City Permit PZ 06-0570 and Bend Ordinances NS-2105 and NS-2224. The Study determined certain infrastructure improvements were necessary to support a total p.m. peak hour trip load of 469 trips to the Properties (279 net new p.m. peak hour trips above the 190 p.m. peak hour trips predicted to be generated by IL development on the Properties in 2022). Those infrastructure improvements were memorialized as conditions of approval to PZ 06-0570 and Bend Ordinances NS-2105 and NS-2224. To date, BPRD completed or is under agreement with the City to complete all of infrastructure improvements and other conditions of approval collectively required by PZ 06-0570 and Bend Ordinances NS-2105 and NS-2224 including, without limitation, the following:

**4.1.1** A cash-in-lieu payment of \$98,000 to construct improvements at the Century Drive/Simpson Avenue roundabout to provide better emergency vehicle access. The City completed the Century Drive/Simpson Avenue roundabout improvements.

**4.1.2** Striping improvements at the intersection of Simpson Avenue/Columbia Street to improve intersection awareness and visibility in an effort to reduce crashes.

**4.1.3** Cash-in-lieu payment of \$83,000 for ADA and curb ramp improvements along Columbia Street to provide traffic calming for the neighborhood and to provide better pedestrian connectivity between the Properties and the neighborhood.

**4.1.4** Construction of a roundabout at the intersection of Columbia Street/Simpson Avenue, and donation of right-of-way to the City for its construction. BPRD entered into an intergovernmental agreement, dated June 17, 2020, as amended April 2, 2021, with the City and Oregon State University – Cascades to collaboratively fund construction of the roundabout (the "IGA"). The City plans to construct this roundabout in 2021. By entering into the IGA and making payments and the right-of-way donation as contemplated in that agreement, BPRD will fulfill this requirement.

4.1.5 Contribution of \$25,000 toward the funding of the Westside Transportation Growth Management (TGM) project.

## **5. Effect of Agreement/Vesting.**

5.1 Requirement of the Roundabout at Columbia Street/Simpson Avenue. The provisions of Section 5 of this Agreement shall not be effective unless and until the earlier of:

5.1.1 BPRD has donated right-of-way and made payment to the City as contemplated under the IGA, so that the City can contract for and begin construction of a roundabout at the intersection of Columbia Street/Simpson Avenue; or

5.1.2 BPRD has completed construction of a roundabout at the intersection of Columbia Street/Simpson Avenue, if such roundabout is not constructed pursuant to the terms of the IGA.

5.2 Agreement Binding on the Parties for the Term of the Agreement. The City agrees and finds that the infrastructure improvements and mitigation payments previously made or provided for in this Agreement comply with the BCP, BDC, and City regulations. Findings demonstrating compliance with BDC Chapter 4.7 pertaining to vehicular infrastructure adequacy are included with Bend Ordinances NS-2105 and NS-2224. Except as provided in Section 5.3, below, the City will not require any additional dedications or reservations for transportation purposes or impose any additional off-site infrastructure improvements or mitigation payments for transportation infrastructure as conditions of approval of any subsequent development on the Properties that together do not exceed the number of trips specified in Section 5.3 below. Notwithstanding the foregoing, the City may impose additional dedications or reservations or require additional off-site vehicular transportation improvements as a condition of approval to further develop the Properties if required by the Oregon Department of Transportation ("ODOT") in order to demonstrate compliance with OAR Chapter 660, Division 12 (the "Transportation Planning Rule") for transportation facilities under ODOT's jurisdiction.

5.3 Transportation. The analysis from which these mitigation measures were derived followed the methodology required to ensure consistency with the Transportation Planning Rule for transportation facilities under the City's jurisdiction, which will allow the Properties to be developed consistent with the current zoning designations. The Parties may rely on this Agreement for the purposes of development approval, and the City is bound to accept this Agreement and the evidentiary support referenced by exhibits as demonstrating compliance with BDC Chapter 4.7. As noted in Section 4.1 of this Agreement, the relative transportation impacts on the system are based on the amount of development on the Properties as indicated in the Study. As BPRD has completed or intends to complete the transportation infrastructure improvements identified in the Study and described in Section 4.1, above, the Properties may be collectively developed with up to 469 p.m. peak hour trips, less the 42 p.m. peak hour trips BPRD has already used in development of the Pavilion on Parcel 3 of the Properties, for 427 remaining p.m. peak hour trips.

5.3.1 Development applications for the Properties will only be required to submit a Transportation Facilities Report, the number of p.m. peak hour trips the proposed development will generate, and the remaining number of trips available for development on the Properties if the proposed development is constructed. No additional transportation analysis will be required unless and until development on the Properties exceeds a total of 469 p.m. peak hour trips, or this Agreement terminates, whichever is sooner. If that occurs, the code then in effect for transportation analysis and mitigation will apply.

5.3.2 BPRD may allocate the 427 remaining p.m. peak hour trips amongst the Properties, in BPRD's sole discretion, through a debit letter executed by BPRD in favor of its successors to any portion of the Properties. BPRD's successors to the Properties may rely on the allocation of p.m. peak hour trips to the same degree as BPRD for their developments on the Properties.

5.4 On-Site and Related Improvements. On-site improvements not addressed in this Agreement, including but not limited to access points and frontage improvements, are not governed or vested by this Agreement and will be addressed through subsequent development approval. Off-site improvements other than transportation infrastructure improvements ("Other Off-site Improvements") are not governed or vested by this Agreement and will be addressed through subsequent development approval. Other Off-site Improvements may include water and sewer infrastructure improvements, but shall not include multimodal bike path and pedestrian connections, interim safety improvements, emergency vehicle access, or anything else transportation related.

**6. Continuing Effect of Agreement (ORS 94.504(2)(i)).** In the case of any change in regional policy or federal or state law or other change in circumstance that renders compliance with this Agreement impossible or unlawful, or inconsistent with such laws, rules, or policies, the Parties will attempt to give effect to the remainder of this Agreement, but only if such effect does not prejudice the substantial rights of any Party under this Agreement. If the substantial rights of any Party are prejudiced by giving effect to the remainder of this Agreement, then the Parties shall negotiate in good faith to revise this Agreement to give effect to its original intent. If, because of a change in policy, law, or circumstance, this Agreement fails its essential purpose—vesting of

allowed uses and limitations on development conditions and certain payments—then the Parties shall be placed into their original position to the extent practical.

**7. Assignability of Agreement (ORS 94.504(2)(k)).** This Agreement runs with the land until termination and will bind the Parties and their successors, affiliates, and assigns.

**8. Effect of Annexation (ORS 94.504(2)(L)).** All Properties subject to this Agreement are currently within the boundaries of the City. The Properties are not subject to future annexation.

**9. Default; Remedy (ORS 94.504(2)(j)).**

9.1 Default/Cure. The following shall constitute defaults by a Party:

9.1.1 A breach of a material provision of this Agreement, whether by action or inaction of a Party that continues and is not remedied within 60 days after the other Party has given notice specifying the breach—provided that if the nonbreaching Party determines that such breach cannot with due diligence be cured within a period of 60 days—the nonbreaching Party may allow the breaching Party a longer period of time to cure the breach and, in such event, the breach shall not constitute a default so long as the breaching Party diligently proceeds to effect a cure, and the cure is accomplished within the longer period of time granted by the nonbreaching Party; or

9.1.2 Any assignment by a Party for the benefit of creditors, or adjudication that a Party is bankrupt, or appointment of a receiver, trustee, or creditor's committee over a Party.

9.2 Remedies. Each Party shall have all available remedies at law or in equity to recover damages and compel the performance of the other Party under to this Agreement. The rights and remedies afforded under this Agreement are not exclusive and shall be in addition to and cumulative with any and all rights otherwise available at law or in equity. The exercise by any Party of any one or more of such remedies shall not preclude the exercise by it, at the same or different time, of any other such remedy for the same default or breach or of any of its remedies for any other default or breach by any other Party, including without limitation the right to compel specific performance.

9.3 Mediation. Notwithstanding the forgoing, the Parties agree to try to resolve any dispute or issue arising under this Agreement amicably and at a project level. If the dispute is not settled, the Parties shall participate in mediation as a next alternative step for dispute resolution before commencement of litigation. Such mediation will occur in Bend, Oregon. The Parties shall seek a mediator with experience in land use, real estate, or development. The mediation must commence within 90 days of the date the mediator is retained. The mediator's fees and expenses will be shared equally by all the Parties. All Parties agree to exercise their best efforts in good faith to resolve all disputes in the mediation.

**10. Amendment or Termination of Agreement.** This Agreement may only be amended or terminated by the mutual consent of all the Parties or their successors in interest in accordance with ORS 94.522.

**11. Miscellaneous Provisions.**

11.1 Notice. A notice or communication under this Agreement by any Party shall be in writing and shall be dispatched by registered or certified mail, postage prepaid, return receipt requested, or delivered by either personal delivery or nationally-recognized overnight courier (such as UPS or FedEx), or by electronic mail, delivered during business hours (i.e., before 5:00 p.m., Pacific Time), with a hard copy of such electronically-delivered notice subsequently delivered personally or by overnight courier, and

11.1.1 In the case of a notice or communication to BPRD, addressed as follows:

Michelle Healy  
Deputy Executive Director  
Bend Park & Recreation District  
799 SW Columbia Street  
Bend, Oregon 97702  
[michelleh@bendparksandrec.org](mailto:michelleh@bendparksandrec.org)

With a copy to:

Paul Taylor  
Bryant, Lovlien & Jarvis, PC  
591 SW Mill View Way  
Bend, Oregon 97702  
[taylor@bljlawyers.com](mailto:taylor@bljlawyers.com)

11.1.2 In the case of a notice or communication to the City, addressed as follows:

City of Bend  
710 NW Wall Street  
Bend, Oregon 97703

With a copy to:

City Attorney  
City of Bend  
710 Northwest Wall Street  
Bend, Oregon 97703  
[mwinters@bendoregon.gov](mailto:mwinters@bendoregon.gov)

11.1.3 A Party may from time to time designate other or additional notice parties for the purpose of this Section 11 in writing and delivered as provided in this Section 11.

11.2 Headings. Section headings in this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

11.3 Effect of Recitals (ORS 94.504(6)). The Recitals set forth above are the assumptions of the Parties and are incorporated as part of this Agreement.

11.4 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed to be an original, and such counterparts shall together constitute one and the same instrument.

11.5 Waivers.

11.5.1 No waiver made by any Party with respect to the performance, or the manner or time thereof, of any obligation of any other Party, or any condition inuring to its benefit under this Agreement, shall be considered a waiver of any other rights of the Party making the waiver. No waiver by a Party of any provision of this Agreement or any breach thereof shall be of any force or effect unless in writing, and no such waiver shall be construed to be a continuing waiver.

11.5.2 The Parties know and understands their rights under *Dolan v. City of Tigard* and its progeny and by entering into this Agreement waive any requirement that the City demonstrate that the public improvements and other obligations of the Parties set forth in this Agreement are roughly proportional to the burden and demands placed on the urban facilities and services by the development of the Properties. The Parties further acknowledge that the requirements and obligations of the Parties, including but not limited to the required public improvements, are roughly proportional to the burden and demands on urban facilities and services that will result from development of the Properties. This waiver does not apply to public improvements, payments, or other exactions not governed by this Agreement.

11.6 Attorney Fees. In the event of a suit, action, arbitration, or other proceeding of any nature whatsoever, including without limitation any proceeding under U.S. Bankruptcy Code, is instituted to interpret or enforce any provision of this Agreement, or with respect to any dispute relating to this Agreement, including without limitation any action in which a declaration of rights is sought or an action for rescission, the prevailing Party shall be entitled to recover from the losing Party its reasonable attorney, paralegal, accountant, and other expert fees, and all other fees, costs, and reasonably necessary expenses actually incurred, as determined by the judge or arbitrator at trial or arbitration, as the case may be, or on any appeal or review, in addition to all other amounts provided by law. This provision shall cover costs and attorney fees related to or with respect to proceedings in federal bankruptcy courts, including those related to issues unique to bankruptcy law. In the event the prevailing

Party is represented by "in-house" counsel, the prevailing Party shall nevertheless be entitled to recover reasonable attorney fees based on the reasonable time incurred and the attorney fee rates and charges reasonably and generally accepted in the Bend, Oregon, area for the type of legal services performed.

11.7 Time of the Essence. Time is of the essence for this Agreement.

11.8 Choice of Law. This Agreement shall be interpreted under the laws of the State of Oregon.

11.9 Calculation of Time. All periods of time referred to in this Agreement shall include Saturdays, Sundays, and legal holidays in the State of Oregon, except that if the last day of any period falls on any Saturday, Sunday, or legal holiday in the State of Oregon, the period shall be extended to include the next day that is not a Saturday, Sunday, or legal holiday.

11.10 Construction. In construing this Agreement, singular pronouns shall be taken to mean and include the plural, and the masculine pronoun shall be taken to mean and include the feminine and the neuter, as the context may require.

11.11 Severability. If any clause, sentence, or any other portion of the terms and conditions of this Agreement becomes illegal, null, or void for any reason, the remaining portions will remain in full force and effect to the fullest extent permitted by law.

11.12 Merger. This Agreement constitutes the entire agreement between all the Parties and supersedes all prior agreements except as such prior agreements are expressly incorporated by reference.

11.13 Place of Enforcement. Any action or suit to enforce or construe any provision of this Agreement by any of the Parties shall be brought in the Circuit Court of the State of Oregon for Deschutes County or in the United States District Court for the District of Oregon.

11.14 Good Faith and Reasonableness. The Parties intend that the obligations of good faith and fair dealing apply to this Agreement generally, and that no negative inferences be drawn by the absence of an explicit obligation to be reasonable in any portion of this Agreement. The obligation to be reasonable shall only be negated if arbitrariness is clearly and explicitly permitted as to the specific item in question, such as in the case of a Party being given "sole discretion" or being allowed to make a decision in its "sole judgment."

11.15 Condition of City Obligations (ORS 94.504(5)). All City obligations under this Agreement that require the expenditure of funds are contingent on future appropriations by the City as part of the local budget process. Nothing in this Agreement implies an obligation on the City to appropriate any such monies.

11.16 Cooperation in the Event of Legal Challenge. In the event of any legal action instituted by a third party or other governmental entity or official challenging the

validity of any provision of this Agreement, the Parties agree to cooperate in defending such action.

11.17 Enforced Delay, Extension of Times of Performance. In addition to the specific provisions of this Agreement, delayed performance or nonperformance by any Party shall not be a default when such delayed performance or nonperformance is caused by war, insurrection, strikes, riots, floods, drought, earthquakes, fires, casualties, acts of nature, epidemic or pandemic, governmental restrictions imposed or mandated by governmental entities other than the City, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulation or litigation, or similar bases for excused performance that are not within reasonable control of the Party to be excused.

11.18 Other Necessary Acts. Each Party shall execute and deliver to the other all such further instruments and documents and take such additional acts (which, in the case of the City, may require adopting necessary ordinances and resolutions) as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other Parties the full and complete enjoyment of rights and privileges under this Agreement.

11.19 No Partnership. This Agreement does not create a partnership or joint venture among the Parties. Each Party is solely and independently responsible for its obligations under this Agreement, and no Party is responsible for payment or performance by any other Party.

11.20 Recording. The City shall cause this Agreement to be recorded in accordance with ORS 94.528. The Parties shall reimburse the City for the cost of recording this Agreement.

11.21 Form of Agreement; Exhibits. This Agreement consists of 10 pages and one (1) exhibit.

**Bend Park & Recreation District,  
an Oregon special district**

**City of Bend, an Oregon municipal  
corporation**

\_\_\_\_\_  
Don P. Horton, Executive Director  
Approved as to Form:

\_\_\_\_\_  
Eric King, City Manager  
Approved as to Form:

\_\_\_\_\_  
BPRD Counsel

\_\_\_\_\_  
City Attorney's Office

STATE OF OREGON                   )  
  )ss.  
County of Deschutes               )

This instrument was acknowledged before me on \_\_\_\_\_, 2021 by Don P. Horton, as Executive Director of Bend Park & Recreation District.

\_\_\_\_\_  
Notary Public for Oregon

STATE OF OREGON                    )  
  )ss.  
County of Deschutes                )

This instrument was acknowledged before me on \_\_\_\_\_, 2021, by Eric King as City Manager of the City of Bend.

\_\_\_\_\_  
Notary Public for Oregon