

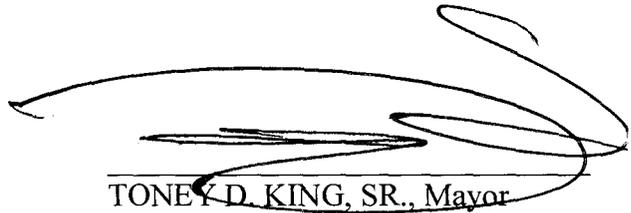
RESOLUTION 47-2012

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF BENSON, ARIZONA, AUTHORIZING THE CITY MANAGER TO EXECUTE A SECOND ADDENDUM TO THE WHETSTONE ANNEXATION DEVELOPMENT AGREEMENT

WHEREAS, it is in the best interest of the residents and citizens of Benson to clarify the mutual obligations of the parties regarding the operation of the Whetstone wastewater treatment plant.

NOW, THEREFORE, BE IT RESOLVED that the Mayor and Council of the City of Benson, Arizona, hereby authorize the City Manager to execute the Second Addendum to the Whetstone Development Agreement with Whetstone Partners, L.L.P., attached hereto as Exhibit "A".

PASSED, APPROVED AND ADOPTED BY THE MAYOR AND COUNCIL OF THE CITY OF BENSON, COUNTY OF COCHISE, STATE OF ARIZONA, this 27th day of August, 2012.



TONEY D. KING, SR., Mayor

ATTEST:



VICKI L. VIVIAN, CMC, City Clerk

APPROVED AS TO FORM:



MICHAEL J. MASSEE, City Attorney

EXHIBIT "A"
DRAFT SECOND ADDENDUM TO THE
WHETSTONE DEVELOPMENT AGREEMENT

When recorded mail to:

City Clerk
City of Benson
120 W. Sixth Street
Benson, AZ 85602

**SECOND ADDENDUM TO
WHETSTONE ANNEXATION DEVELOPMENT AGREEMENT**

This Second Addendum to Whetstone Annexation Development Agreement is entered into as of this 27th day of August, 2012 by and between the City of Benson, a body politic (the “City”) and WHETSTONE DEVELOPMENT COMPANY, an Arizona corporation (the “Developer”).

RECITALS

A. In 1993, the City entered into a comprehensive Annexation Development Agreement (the “Agreement”) with Chicago Title Insurance Company, acting solely in its capacity as trustee of Trust No. 12076, pursuant to which it held legal title to approximately 15,500 acres.

B. Developer is successor in interest to Chicago Title Insurance Company in respect to a portion of the original 15,500 acres, some of which portion is described in Exhibit A hereto (the “Property”), and further known as “The Canyons” residential subdivision development.

C. The Agreement provided for the development of the Property, including construction of necessary water and wastewater facilities, including the Whetstone Wastewater Treatment Plant (“WWTP”) that benefits the Property, and included the condition that the source of funding of infrastructure shall be the Property, and that the construction of said infrastructure shall not adversely affect the pre-annexation area of the City.

D. Pursuant to the terms of the Agreement and the Amendment thereto dated March 28, 2005 and the Addendum thereto dated March 21, 2006, the City is to accept the WWTP as a City asset upon its successful operation for one year. Prior to City acceptance, the operation of the WWTP is an obligation of Developer as owner and developer of the Property.

NOW THEREFORE, in consideration of the mutual covenants and agreements set forth in this Agreement, County and Developer state, confirm and agree as follows:

AGREEMENT

The parties acknowledge and agree that the Agreement, together with its Amendment and Addendum, control the mutual obligations among the parties to construct and operate water and

wastewater facilities necessary for the development of the Property. The parties further desire to clarify these mutual obligations as follows:

1. INCORPORATION OF RECITALS:

1.1 The above Recitals are incorporated into this Second Addendum by this reference.

2. PURPOSE OF SECOND ADDENDUM:

2.1 The purpose of this Second Addendum to the Agreement is to set forth the mutual obligations of the parties during the period when residential wastewater is being generated from the homes built on the Property and prior to the time when the WWTP may be economically and effectively operated as an independent primary treatment plant that is capable of treating and disposing of wastewater generated within the Property subdivision in accordance with state environmental standards.

3. DEVELOPER'S COMMITMENTS:

3.1 Pursuant to the comprehensive Agreement, Developer has constructed certain wastewater facilities on and off the Property for the benefit of the Property. Certain already constructed on-site sewer lines have been dedicated to and accepted by the City. Developer continues to own and operate the WWTP, which is not located within the Property.

3.2 Due to the limited number of homes constructed within the Property, the WWTP has been unable to operate as designed as an independent primary treatment plant. Instead, the only practical manner of operation is for the wastewater produced by the homes located within the Property to be temporarily vaulted and stored at the WWTP for later hauling to the City's treatment plant.

3.3 Developer acknowledges its obligations assumed under the Agreement as owner and developer of the Property to operate the WWTP, and during the interim period until the WWTP is capable of operation as a primary treatment plant, is responsible for the costs of hauling wastewater from the WWTP to the nearest manhole that allows for gravity flow to the City wastewater treatment plant.

3.4 Developer acknowledges its obligation under the Agreement to pay all costs of this wastewater hauling service within thirty days of presentment of an invoice from the City. Developer further acknowledges that the City is entitled under the Agreement to interest at the statutory rate pertaining to judgments for all amounts outstanding after thirty days.

3.5 Developer further agrees that any and all amounts not paid within thirty days of written demand therefore shall become a lien upon the Property upon recordation of said demand, and that such lien shall relate back in time to the date of recording of the Agreement.

3.6 Developer hereby acknowledges receipt of invoices demonstrating that the amount that is now past due to the City for the above-described wastewater hauling service is

\$125,072.00, and upon recording of this Second Addendum shall be a lien upon the Property for said amount, and further shall relate back to the recording of the Agreement.

4. CITY'S COMMITMENTS:

4.1 Pursuant to the obligations of the Agreement, the City has been providing wastewater hauling service benefiting the Property and will continue to do so, until such time as the WWTP is capable of operating as a primary treatment plant, so long as the developer of the Property remains responsible for reimbursing the City for the cost of this service and said costs are timely paid.

4.2 The City may either directly provide the above-described hauling service or at its sole discretion may bid the work to a third party that has the equipment and business acumen to adequately provide the service.

4.3 The City agrees to use its best efforts to provide the service at the lowest reasonable cost, consistent with the WWTP's limited capacity for temporarily vaulting wastewater and the need to comply with state environmental laws.

MISCELLANEOUS

5. HEADINGS:

5.1 The descriptive headings of the paragraphs of this Agreement are inserted for convenience and shall not control or affect the meaning or construction of any of the provisions hereof.

6. COUNTERPARTS:

6.1 This Second Addendum may be executed in two or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument. The signature pages from one or more counterparts may be removed from such counterparts and such signature pages all attached to a single instrument.

7 WAIVER:

7.1 No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by City or Developer of the breach of any covenant of this Second Addendum shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this Second Addendum.

8. SUCCESSORS:

8.1 All of the provisions hereof shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Notwithstanding the foregoing, Developer's rights

and obligations hereunder may only be assigned by a written instrument, recorded in the Official Records of Santa Cruz County, Arizona, expressly assigning such rights and obligations.

9. TERM:

9.1 Except as provided for below, the term of this Agreement shall commence on the date of execution by all parties hereto and shall automatically terminate on the fifth (5th) anniversary of such date; provided, however, that either party hereto shall have the right to extend the term hereof for one additional period of five (5) years upon written notice delivered to the other at least one (1) year prior to the expiration hereof with a copy thereof recorded in the Official Records of Cochise County, Arizona.

10. NO PARTNERSHIP:

10.1 It is not intended by this Agreement to, and nothing contained in this Second Addendum shall, create any partnership, joint venture or other arrangement between Developer and City.

11. AUTHORITY

The undersigned signatories represent that they have been vested by their respective boards with authority necessary to execute this Agreement.

12. PRIOR AGREEMENTS:

11.1 This Second Addendum constitutes a clarification and memorialization of the duties between the parties hereto pertaining to the parties' obligations regarding operation of the wastewater facilities benefiting the Canyons residential subdivision. As such, it should be read and interpreted in light of the parties' prior agreements, which remain in full force and effect.

13. GOVERNING LAW:

12.1 This Agreement shall be construed and interpreted under the law of the State of Arizona.

14. RECORDATION AND EFFECT:

14.1 This Second Addendum shall be recorded in its entirety in the Official Records of Cochise County, Arizona, not later than ten (10) days after its execution and shall constitute covenants that run with the Property and are binding on successors in interest, subject to Paragraphs 8 and 9.

15. TERMINATION FOR CONFLICT:

15.1 The City, pursuant to A.R.S. § 38-511, may terminate this Agreement without penalty or further obligation, within three (3) years after its execution, if any person significantly involved in initiating, negotiating, securing drafting or creating the Second Addendum on behalf

of City is, at any time while the Second Addendum or any extension thereof is in effect, an employee or agent of any other party to the Second Addendum in any capacity or a consultant to any other party with respect to the subject matter of this agreement.

16. CONSTRUCTION OF THE AGREEMENT:

15.1 This agreement has been arrived at by negotiation and shall not be construed against either party to it or against the party who prepared the last draft.

17. DISPUTE RESOLUTION:

17.1 Failure by either party to perform or otherwise act in accordance with any term or provision of this Agreement for a period of thirty (30) days (the "Cure Period") after written notice thereof from the other party, shall constitute a default under this agreement; provided, however, that if the failure to delay is such that more than thirty (30) days would reasonably be required to perform such action or comply with any term or provision hereof, then such party shall have such additional time as may be necessary to perform or comply so long as such party commences performance or compliance within said 30-day period and diligently proceeds to complete such performance or fulfill such obligation. Said notice shall specify the nature of the alleged default and the manner in which said default may be satisfactorily cured, if possible. In the event such default is not resolved within the Cure Period, the non-defaulting party shall have all the rights and remedies which may be available under law or equity, including without limitation the right to specifically enforce any term or provision hereof and/or the right to institute an action for damages. The City shall further have the right to withhold any permit including but not limited to building permits sought by any person for a lot or portion of the Property, should Developer fail to perform or otherwise act in accordance with the agreement.

17.2 Any dispute, controversy, claim or cause of action arising out of or relating to this agreement shall be governed by Arizona law and may be settled by submission of the matter by both parties to binding arbitration in accordance with the rules of the American Arbitration Association and the Arizona Uniform Arbitration Act, A.R.S. 12-1501, et seq., and judgment upon the award rendered by the arbitrator(s) may be entered in any court of competent jurisdiction.

18. NOTICES

18.1 All notices, filings, consents, approvals and other communications provided for herein or given in connection herewith shall be validly given, filed, made, delivered or served if in writing and delivered personally or sent by certified United States Mail, postage prepaid, return receipt requested, if to:

City: City of Benson
120 W. Sixth Street
Benson, AZ 85602
Attn.: City Attorney
Attn.: City Clerk

Developer: Whetstone Development Company
7101 N. Corrida de Venado
Tucson, AZ 85718

or to such other addresses in either party hereto may from time to time designate in writing and deliver in a like manner.

18.2 Notice, filings, consents, approvals and communication given by mail shall be deemed delivered upon receipt or twenty-four hours following deposit in the U.S. Mail, postage prepaid and addressed as set forth above, whichever occurs first.

19. EXHIBITS

18.1 The following Exhibits attached hereto shall be deemed to have been incorporated herein by this reference with same force and effect as if fully set forth in the body hereof:

- A. Legal Description of the Property
- B. Outstanding invoices for wastewater hauling costs as of July, 2012.

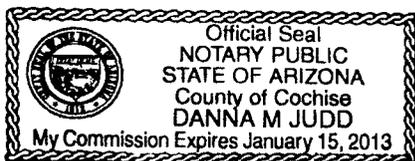
IN WITNESS WHEREOF, the parties have executed this Agreement on the date first written above.

DEVELOPER
Whetstone Development Company

By: *Ernest Graves*
Ernest Graves
Its: President

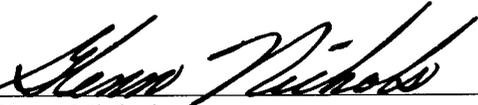
STATE OF ARIZONA)
) ss.
County of Cochise)

This instrument signed and acknowledged before me this 27 day of August, 2012 by Ernest Graves as President of Whetstone Development Company.



Danna M Judd
Notary Public

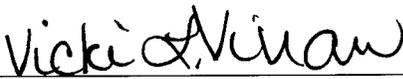
CITY OF BENSON
an Arizona municipal corporation

By: 
Glenn Nichols
City Manager

APPROVED AS TO FORM

By: 
Michael J. Masee
City Attorney

ATTEST:

By: 
Vicki L. Vivian, C.M.C.
City Clerk

**ACTION BY RESOLUTION OF
THE BOARD OF DIRECTORS
OF
WHETSTONE DEVELOPMENT COMPANY**

Pursuant to the provisions of Arizona Revised Statutes, Section 10-821, the following resolutions hereby are duly adopted by the Board of Directors of Whetstone Development company, an Arizona corporation ("Corporation"), in lieu of holding a special meeting of same, consent to the action indicated therein and adoption of such resolutions being denoted by the signature of all members of the Board of Directors affixed hereto:

RESOLVED that, the Board of Directors has removed James D. Lynch as President and CEO of the Corporation, and has elected Ernest L. Graves to serve as President and CEO of the Corporation and that Ernest L. Graves is authorized to execute and deliver any and all documents and instruments in connection with the business and affairs of the Corporation, including without limitation agreements to sell and close on the sale of real property owned by the Corporation, dissolve the Corporation with Board approval, and to delegate such authority to third person from time to time pursuant to written delegation of authority.

FURTHER RESOLVED that, the Board of Directors has removed James D. Lynch as the Statutory Agent of the Corporation, and has appointed Ernest L. Graves to serve as the Statutory Agent of the Corporation.

FURTHER RESOLVED that, the Board of Directors has changed the domestic address of the Corporation to be c/o Ernest L. Graves, 7101 N. Corrida de Venado, Tucson, Arizona 85718.

WE FURTHER CERTIFY that the foregoing resolutions are still in full force and effect and have not been amended or revoked.

DATE OF ADOPTION: July 15, 2012;

Lloyd Graves, Director



Ethan Steele, Director

Charles N. Johnson, Director

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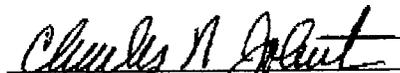
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