City of Benson
City Council Communication

Regular Meeting **March 28, 2016**

To: Mayor and Council Agenda Item # 4

From: Bradley J. Hamilton, P.E. Director of Public Works/City Engineer

Subject:

Discussion and possible action regarding a Trust Assurance Agreement to Construct Subdivision Improvements with Whetstone Partners, L.L.P., an Arizona Limited Liability Partnership for Cottonwood Highlands, Lots 1-85, inclusive and Common Areas A, B6 through B9, inclusive and C1 through C3, inclusive

Discussion:

This Trust Assurance Agreement for the subdivision known as Cottonwood Highlands is with the new owners, Whetstone Partners, L.L.P. so that they can proceed with improvements to complete the subdivision.

Staff Recommendation:

Approval of the Trust Assurance Agreement to Construct Subdivision Improvements with Whetstone Partners, L.L.P., an Arizona Limited Liability Partnership for Cottonwood Highlands, Lots 1-85, inclusive and Common Areas A, B6 through B9, inclusive and C1 through C3, inclusive

TRUST ASSURANCE AGREEMENT
FOR COMPLETION OF SUBDIVISION IMPROVEMENTS

THIS TRUST ASSURANCE AGREEMENT FOR COMPLETION OF SUBDIVISION IMPROVEMENTS (this "Agreement") is entered into and dated for reference purposes as of March 23, 2016, between, Pioneer Title Agency, Inc., an Arizona corporation, as Trustee under Trust No. 70900369, (herein referred to as "Trustee"), Whetstone Partners, LLP, an Arizona Limited Liability Partnership as Beneficiary of Trust No. 70900369, (hereinafter referred to as "Beneficiary") and the CITY OF BENSON, ARIZONA, (herein referred to as the "City of Benson").

RECITALS

A. Trustee is owner of a certain parcel of real property (the "Property") located in the City of Benson, Arizona, and described in **Exhibit "A"** attached hereto. The property is the subject of a subdivision plat identified as: Cottonwood Highlands, recorded in the Office of the Cochise County Recorder, State of Arizona, in Book 15 of Maps and Plats, Page 25 hereinafter referred to as the "Subdivision"; and

B. Beneficiary has established Trust No. 70900369 for the purpose of developing a subdivision of the City of Benson and has conveyed legal title to the Property to Trustee.

C. The parties hereto wish to establish specific terms, conditions and guidelines for compliance with the provision of A.R.S. § 11-806.01 and the City of Benson Subdivision Regulations.

AGREEMENT

In consideration of the City of Benson approving a final plat for the Property which is the subject matter of this Agreement, and in order to comply with A.R.S. § 11-806.01, the parties mutually agree that:

1. Property. The Property which is the subject matter of this Agreement is described in **Exhibit "A"** attached hereto.

2. Assurances. This Agreement is submitted as a means of assuring the completion of the subdivision improvements required by A.R.S. § 11-806.01,City of Benson Subdivision Regulations, all Plans and Specifications approved and on file with the City of Benson, and any special conditions, if applicable, on **Exhibit "B"** attached hereto and made a part hereof. These subdivision improvements include but are not limited to, streets, alleys, sidewalks, curbs and gutters, sanitary sewer systems, water supply, lot

staking and monuments, traffic and street signs, and drainage and flood control improvements, if applicable.

3. Existing Utilities. Any relocation or modification of existing utilities or public improvements necessary to construct the improvements shall be done at no expense to the City. Subdivider's performance of this requirement shall be considered in determining whether to release assurances under Sections 12 and 13 hereinafter.

4. Conveyances and Transfers of Title. Trustee shall not transfer title to, consummate contracts for sale of Property, lease, or in any way convey, in whole or in part, any of the Property without obtaining prior written approval from the City of Benson, except as authorized in this Agreement. A Release of Assurances and authorization to convey the Property shall be given by the City of Benson upon satisfactory completion, or partial completion, as applicable, in accordance with the City of Benson Subdivision Ordinances and the Annexation Development Agreement between the City of Benson dated November 3, 1993 (the "Development Agreement").

5. Bulk Sales. Notwithstanding Section 4, Trustee may sell or convey all of the Property described in Section 1 in one (1) transaction or more bulk transactions, provided that such successor, prior to the conveyance, shall have either been assigned and assumed all of Beneficiaries rights and obligations under this Agreement or entered into an appropriate agreement with the City of Benson to assure completion of the improvements, and the City of Benson has approved, in writing, the transfer.

6. Conveyance Out of Trust for the Purpose of Encumbrance: Condition on Other Interests. Notwithstanding Section 4, Trustee may convey the Property to Beneficiary for the limited purposes of encumbering the Property or allowing any obligations secured by the Trust, other than those which are the subject of this Agreement with the City of Benson, to be subordinated to loans for the purpose of constructing on-site or off-sight improvements for the benefit of the Property or to create a security interest in the Property for loans for the purchase of the Property or the construction of such on-site or off-site improvements. In such event, the Property shall immediately thereafter be reconveyed to Trustee. This Agreement shall be deemed to be a condition on and restriction on the rights and interests of any third party whose interest in the Property arises after the date of this Agreement, however such interest is created, the same as if such party were included as a signatory of this Agreement.

7. Substitution of Assurances. Subdivider ("the Subdivider") or Beneficiary may offer substitute assurances at any time during the term of this Agreement in accordance with the provisions of the City of Benson Subdivision Regulations. The Assurance shall be in a form and amount acceptable to the City of Benson, and shall to the extent applicable, partially or wholly replace the Assurances in this Agreement.

8. Start of Construction. The required Improvements shall be completed by the Subdivider within five (5) years from the date of this Agreement. This date for completion of improvements may be extended by separate agreement of the parties where Subdivider or Beneficiary is prevented from completing the improvements by act of God, strike or similar event or circumstances beyond its control, or at the description of the City o Benson.

9. Diligence. Subdivider shall diligently pursue completion of the Improvements. Subdivider's failure to do substantial work on the Improvements for a period of thirty (30) consecutive calendar days shall be presumptive evidence that Subdivider is failing to diligently pursue construction of the Improvements.

10. Completion of Improvements. The required improvements shall be completed by the Subdivider within two (2) years from the date of this Agreement. The Improvements shall not be considered completed unless and until they have been constructed in accordance with all applicable plans, City, State, and Federal regulations, and inspected by City for compliance with said plans and regulations. Further, all utility Improvements shall not be considered completed unless and until the City has received all necessary approvals for operation of the utility systems from the appropriate State and/or Federal regulatory agencies, if applicable.

11. Inspection and Approval of Improvements. The City of Benson shall provide for inspection of the improvements to ensure satisfactory completion. Until the improvements have been satisfactorily completed, the rights-of-way in which the improvements are located have been dedicated or conveyed to the City, and the City, by formal action, has accepted said dedication or conveyance of the improvements and rights-of-way in which they are located, the City of Benson will not release the Property subject to this Agreement. Once satisfactorily completed, the Property shall be released as provided in **Sections 14 and 15** below.

12. Warranty. Subdivider warrants that the improvements will be free from defects for a period of one (1) year from the date City accepts the maintenance of the last improvement completed by the Subdivider.

13. Payment of Applicable Property Taxes. The City of Benson shall not release, in whole or in part, any of the Property described in paragraph 1 until all Property and taxes and assessments due and owing on the subject Property have been paid in full.

14. Partial Release of Assurances. The City of Benson, upon receipt of a written request from Beneficiary, shall give the Trustee a Release of Assurances for all or a portion of the lots created by the subdivision plat described in paragraph 1, provided that all of the improvements required in connection with such lots have been satisfactorily completed and accepted, and provided further that the lots released and improvements

associated with such lots can function independently on a permanent basis in the event the remaining portion of the subdivision is never developed.

15. Release of Assurances. Upon completion of all improvements required under this Agreement, the City of Benson shall release the Assurances in this Agreement, and this Agreement shall be deemed cancelled.

16. Failure to Complete Improvements. Trustee and Beneficiary hereby agree that in the event the required improvements are not completed within the time period provided by paragraph 7, the City of Benson may replat that portion of the Property described in paragraph 1 for which a release of assurances has not been given. The purpose of the new plat will be to abandon the portion of the subdivision not completed, and return that portion of the Property to approximately the same boundary configurations of record as existed before the subdivision plat was recorded. Prior to the initiating any action to replat, the City of Benson shall provide Trustee and Beneficiary with thirty (30) days written notice of the intent to replat.

The City of Benson, by this Agreement, is expressly authorized to replat this Property after the required notice has been provided. All expenses by the City of Benson, including legal costs if applicable, in executing a replat shall be paid for by Beneficiary, and shall, if unpaid, become a lien on the Property.

17. Effect on Trust Agreement. Trustee and Beneficiary agree that any provision of Trust No. 70900369 that is incompatible or inconsistent with this Agreement shall be null and void and not enforceable. The Trust shall not be revoked prior to a full Release of Assurances without prior written consent of the City of Benson. Nor shall any amendment which would alter this Assurance Agreement be effective until the City of Benson has approved such amendment.

18. Purpose of Agreement. The purpose and intent of this Agreement is to prohibit the sale of individual subdivision lots to the public prior to the completion of the subdivision improvements that are associated with such lots. The sale or conveyance of such lots without the necessary improvements is harmful to the public and places excessive burdens on the City of Benson. The terms and conditions of this Agreement shall be construed and interpreted as broadly as necessary to accomplish this purpose.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement on the dates shown following their respective names below.

ATTEST:

_____

Date
_____

APPROVED AS TO FORM:

_____
By :
City of Benson Attorney

Date
_____
"City of Benson"

CITY OF BENSON, ARIZONA

By _____

City of Benson City Manager

Date _____

"TRUSTEE"

_____
R. Keith Newlon, as Trust Officer of Pioneer Title Agency, Inc., an Arizona corporation , as Trustee under Trust No. 70900369 only and not in its capacity

Date _____

STATE OF ARIZONA)
) ss.
COUNTY OF COCHISE)

On this the _____ day of March, 2016 before me, the undersigned officer, personally appeared R. Keith Newlon, who acknowledged himself to be the Trust Officer of Pioneer Title Agency, Inc., an Arizona corporation, and that he as such officer being authorized so to do, executed the foregoing instrument for the purposes therein contained by signing the name of the corporation by himself as such officer.

In witness whereof, I have hereunto set my hand and official seal.

_____
Notary Public

My Commission Expires: _____

OWNER/BENEFICIARY

Whetstone Partners, LLP an Arizona Limited Liability Partnership
by Kino V, LLC, an Arizona Limited Liability Company, as Manager

_____
Ernest L. Graves, Manager

State of [Arizona] }
} ss.
County of [Cochise] }

The foregoing instrument was acknowledged before me this 23rd day of March, 2016, by Ernest L. Graves, as Manager of Kino V, LLC, an Arizona Limited Liability Company, as Manager of Whetstone Partners, LLP, an Arizona Limited Liability Partnership.

My commission expires: _____
NOTARY PUBLIC

We, the undersigned Trustee and Beneficiary of Trust No. 70900369, have executed the attached Assurance Agreement for the subdivision to be known as Cottonwood Highlands, and we hereby authorize the City of Benson, or its designated representative, to complete the recording information required in paragraph 1 of the Assurance Agreement.

Dated this 23rd day of March, 2016

Trustee:
Pioneer Title Agency, Inc., an Arizona corporation , as Trustee under Trust No. 70900369 only and not in its capacity

_____
R. Keith Newlon, as Trust Officer

Owner/Beneficiary
Whetstone Partners, LLP an Arizona Limited Liability Partnership
by Kino V, LLC, an Arizona Limited Liability Company, as Manager

_____
Ernest L. Graves, Manager

EXHIBIT "A"

Lots 1 through 85, inclusive and Common Areas A, B-6 through B-9, inclusive and C-1 through C-3, inclusive, COTTONWOOD HIGHLANDS, according to Book 15 of Maps, page 25, records of Cochise County, Arizona;

EXCEPT all reservations contained in Document recorded in Document No. 8712-31763, records of Cochise County, Arizona.

EXHIBIT "B"

In addition to all subdivision requirements as set forth in the City of Benson Subdivision Regulations, Subdivider shall also be required to assure completion of the following subdivision improvements:

1. Completion of all streets, to include paving, all required curbs, sidewalks, drive aprons, handicap ramps and survey monuments as shown on the approved preliminary plat, final plat and improvement plans.

2. Drainage improvements, including but not limited to, detention basins, drainage channels, outlet streets and erosion control required by the approved Drainage Report, and as shown on the approved preliminary plat, improvement plans and grading plans.

3. A public water system acceptable to the City of Benson Public Works Department.

4. A public sanitary sewer system acceptable to the City of Benson Public Works Department.

5. A fire prevention system acceptable to the City of Benson Fire Department.

6. All utility trenches and civil appurtenances satisfactory to the City Engineer and participating utility companies and in conformance with all applicable State and Federal regulations.

7. Installation of all required street signage.

8. Required off-site improvements to as shown on the approved preliminary plat, improvement plans and grading plans.

9. Arizona Department of Transportation (ADOT) permits be secured.