City of Benson
City Council Communication

Regular Meeting **September 26, 2016**

To: Mayor and Council Agenda Item # 2

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

Subject:

Discussion and possible action regarding a Substitute Trust Assurance Agreement to Construct Subdivision Improvements with BIF-Benson, LLC for San Pedro Golf Estates, Lots 1-224 and Common Areas A, B, and C

Discussion:

This Substitute Trust Assurance Agreement is to renew the current Trust Assurance Agreement that will expire. All requirements of the approved subdivision plat and plans remain the same.

Staff Recommendation:

Approval of the Substitute Trust Assurance Agreement to Construct Subdivision Improvements with BIF-Benson, L.L.C for San Pedro Golf Estates, Lots 1-224 and Common Areas A, B, and C

SUBSTITUTE AGREEMENT TO CONSTRUCT SUBDIVISION IMPROVEMENTS

THIRD PARTY TRUST

BY THIS AGREEMENT made and entered into by and between Stardust Lot Development, L.L.C., an Arizona limited liability company (the "Subdivider"), First American Title Insurance Company, a California corporation as Trustee under Trust No. 8628 (the "Trustee") and the CITY OF BENSON, STATE OF ARIZONA, an Arizona body politic (the "City") (collectively the "Parties"), the Parties hereby confirm and agree as follows:

RECITALS

A. The Subdivider intends to subdivide the property more fully described in Exhibit "A" attached hereto and incorporated herein by this reference (the "Property"). The Property is the subject of a subdivision plat (the "Subdivision Plat") identified as San Pedro Golf Estates (Subdivision name), Lots 1-224 and Common Areas (Tracts A, B, and C) (The "Subdivision") recorded in the Office of the Cochise County Recorder in Book 15 of Maps and Plats, Page 69 and 69A, Fee No. 060832834; and

B. Development of the Property is subject to an existing agreement (the "Existing Agreement") to construct subdivision improvements entered into between the current owner of the Property and the City; and

C. The terms of this agreement are intended to take the place of and supersede the terms of the Existing Agreement at the time ownership of the Property transfers from the current owner to Subdivider and Trustee; and

D. The Parties to this Agreement wish to establish specific terms, conditions and guidelines to provide for assurances for the completion of the required subdivision improvements in compliance with the provisions of A.R.S. Section 9-463.01(C)(8) and the City Development Standard No. 1-04.0; and

E. The City seeks to protect the health, safety and general welfare of the community by requiring the completion of various improvements in the Subdivision and thereby to limit the harmful effects of substandard subdivisions, including premature subdivision which leaves property undeveloped and unproductive; and

F. This Agreement is intended to inure to the benefit of the Parties and is not intended for the benefit of third parties, such as, but not limited to, material men, laborers, or others providing work, services or materials for the Subdivision, or for the benefit of lot or home purchasers in the Subdivision.

AGREEMENT

NOW THEREFORE, based on the foregoing recitals and in consideration of the City approving a final plat (the "Subdivision Plat") for the Property, the Parties agree as follows:

1. **Construction of Subdivision Improvements.** Subdivider hereby agrees to construct and install, at its own expense, all subdivision improvements for the Property as described in Exhibit "B", attached hereto and incorporated herein by this reference (the "Improvements"). The Subdivider's obligation to complete the Improvements will arise as of the date of this Agreement, or the date of final plat approval for the Subdivision by the City, whichever event occurs later in time (the "Start Date"). The Subdivider's obligation to complete the Improvements is independent of any obligations of the City contained herein and is not conditioned on the sale of any lots or improvements within the Property. Nothing contained in this Agreement shall be construed as an undertaking by the Trustee to install, or to guarantee the installation of, or to indemnify any other person for the installation of the Improvements.

2. **Existing Utilities**. Any relocation or modification of existing utilities or public improvements to construct the Improvements shall be done at no expense to the public. Subdivider's performance of this requirement shall be considered in determining whether to release assurances under Paragraphs 10 and 11.

3. **Assurance of Construction.** This Agreement is submitted as an assurance that Subdivider will construct the Improvements as required by A.R.S. Section 9-463.01(C)(8) and the City Development Standard No. 1-04.0.

4. **Start of Construction.** Subdivider shall begin construction of the Improvements within thirty-six (36) months of the date of the Start Date, and will 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.

5. **Completion of Improvements.** The Improvements shall be completed by the Subdivider within two (2) years after beginning construction. The Improvements shall not be considered completed unless and until the Improvements have been constructed in accordance with all applicable plans and regulations and after the City has inspected them for compliance with the plans and regulations. The period for completion of the Improvements may be extended for good cause shown at the discretion of the City Council.

6. **Acceptance of Improvements.** The City shall not accept the Improvements or maintenance responsibility for the Improvements unless and until all of the following have occurred:

a. The Improvements have been completed in accordance with Paragraph 5 of this Agreement.

b. The Improvements and the right-of-way in which the Improvements are located has been dedicated or conveyed to the City by Subdivision Plat or separate instrument, as applicable.

c. The improvements, have been accepted by action of the City Council.

7. **Warranty.** The Subdivider warrants that the Improvements, each and every one of them, will be free from defects for a period of one year from the date that the City accepts the maintenance of the last improvement completed by the Subdivider.

8. **Security.** To secure performance of its obligations hereunder, the Subdivider has placed or will place the Property into a third party trust (the "Trust") that is subject to the terms of this Agreement. A copy of the trust agreement between the Subdivider and the Trustee is attached hereto and incorporated herein by this reference as Exhibit "C" (the "Trust Agreement"). Subdivider agrees that if the Trust Agreement is terminated for any reason before the completion of all Improvements required under this Agreement, Subdivider shall tender to the City 1) monetary assurances in an amount equal to the City's estimate of the total cost to complete the Improvements, or 2) other assurances acceptable to City.

9. **Limitation on Transfer of Title.** The Trustee shall not convey title to the Property or any portion of the Property without obtaining prior written approval from the City in the form of a Release of Assurance signed by the City Engineer.

10. **Release of Assurances.** This Agreement shall be released by the City and a Release of Assurance shall be given by the City Council only upon satisfactory completion and acceptance by the City of the Improvements in accordance with Paragraph 5, or the tender by Subdivider and acceptance by the City of substitute assurances.

11. **Partial Release of Assurances.** The City Engineer may issue a Release of Assurance for up to 75 percent of the lots created by the Subdivision Plat if both of the following have occurred:

a. The Subdivider request the release of not less than ten (10) lots;

b. All of the Improvements required in connection with the released lots have been completed in accordance with Paragraph 5 of this Agreement; and

c. The City Engineer finds that the released lots and Improvements required in connection with the released lots can be used and maintained separately from the Improvements not yet completed.

12. **Substitute of Assurances**. Subdivider may submit substitute assurances in a form and amount acceptable to the City at any time during which Subdivider is not in default of this Agreement. The City Engineer may approve a substitution of the Beneficiary or the Trustee of a third party assurances agreement (the "Substitute Assurance Agreement"), and execute the Substitute Assurance Agreement of behalf of the City.

13. **Contracts for Sale.** Notwithstanding Paragraph 9, the Trustee may enter into a contract or a deposit receipt agreement for the sale of the Property or any portion of the Property if the contract or agreement clearly states that no portion of the Property shall be conveyed until the Subdivider performs its obligation under this Agreement. Prior to entering into a contract or contracts for sale or deposit receipt agreement, the Trustee shall submit to the City for its approval a copy of the form of contract or agreement containing the disclosure of limitation on the power to convey.

14. **Bulk Sales.** Notwithstanding Paragraph 9, the Trustee may sell and convey all of the Property in one transaction to a single purchaser who has tendered to the City satisfactory assurances for the completion of the Improvements.

15. **Conveyance Out of Trust for the Purpose of Encumbrance.** Notwithstanding Paragraph 9, the Trustee may convey all or part of the Property to the Subdivider or Beneficiary of the Trust solely for the purpose of encumbering the property by the recording of mortgages or deeds of trust, provided that the Property is thereafter immediately reconveyed into the Trust.

16. **City's Option Upon Default.** If Subdivider defaults on its obligations under this Agreement, the Parties agree that, in addition to any other remedies the City may have against the Subdivider or Trustee for failure to perform as required under this Agreement, the City shall have and is hereby granted the right, at its sole discretion, to initiate a process to replat the Property to revert to acreage of approximately the same boundary configurations of record existing before recording of the Subdivision Plat for the Property. The Subdivider hereby authorizes the City to execute on behalf of the Subdivider all documents necessary to replat the Property. The replat may exclude any dedications to the public which were made on the Subdivision Plat or by separate instrument which the City deems necessary to serve the portions of the Property which are not replatted or to serve the public. Subdivider shall pay the reasonable costs incurred in replatting. Prior to initiating any action to replat the Property or any portion of the Property, the City shall give thirty (30) days first-class mailed notice to the Subdivider and Trustee at their last known address.

17. **Issuance of Permits.** The City shall not issue any permit for development of the Property or any portion of the Property, except permits for the completion of the Improvements, unless the City has on file acceptable assurances for the completion of the Improvements or the City has given a Release of Assurances for the Property or that portion of the Property subject to the development permits.

18. **Termination.** This Agreement shall remain in full force and effect until one of the following has occurred:

a. All the Improvements have been completed and accepted by the City Engineer as evidenced by a written statement from the City Engineer.

b. The execution of a substitute assurance agreement pursuant to Paragraph 12.

c. A new subdivision plat has been recorded for the Property in compliance with any and all applicable laws and regulations.

19. **Binding Effect.** If the legal or beneficial title to the Property changes, for any reason, without approval of substitute assurances or issuance of a Release of Assurance by the City, this Agreement shall remaining binding upon the Parties and their respective successors and assigns. This paragraph shall not be construed as a waiver of the limitation on the transfer of title contained in Paragraph 9 or the requirements for Release of Assurance or substitute assurance contained in Paragraphs 10 and 12.

20. **Severability.** If any portion of this Agreement is found to be invalid, such finding will not affect the validity of the remainder of this Agreement and to this end the provisions of this Agreement are severable.

21. **No Waiver.** No waiver of any provision of this Agreement shall be deemed or constitute a waiver of any other provision, nor shall it be deemed to be a continuing waiver unless expressly provided for by written amendment to this Agreement signed by both the City and the Subdivider; nor will the waiver of any default under this Agreement be deemed a waiver of any subsequent default of the same type. The City's failure to exercise any right under this Agreement will not constitute the approval of any wrongful act by the Subdivider.

22. **Notice.** The Subdivider agrees to provide written notice to the City, within ten (10) days of the occurrence of 1) a change of name, corporate identity or address of the Subdivider or the Trustee; 2) intent to transfer, or a transfer of title to the Property by deed, contract or operation of law; 3) the foreclosure of a lien against the Property or a portion of the Property; 4) the filing of a voluntary or involuntary petition of bankruptcy respecting the Subdivider; 5) any other event that may affect performance of the parties under this Agreement.

23. **Address of the Parties:**

Subdivider: Stardust Lot Development, L.L.C.
6720 N. Scottsdale Rd., Suite 220, Scottsdale, AZ 85253
Attention: Chris B. Heeter

Trustee: First American Title Insurance Company
Subdivision Trust Department
Mail: P.O. Box 52023, Phoenix, AZ 85072-2023
Delivery: 9000 E. Pima Center Parkway, Scottsdale, AZ 85258
Attention: Charlotte Knoll

City: City of Benson
120 W. 6th Street, Benson, Arizona 85602

24. **Date of Agreement.** The date of this Agreement shall for all purposes be the date of the signature of the last Party to sign this Agreement.

25. **Effect of Failure to Transfer Ownership of the Land.** If the ownership of the land is not transferred to Subdivider and Trustee, or if this Agreement does not become effective for any other reason, then the Existing Agreement shall remain in full force and effect.

TRUSTEE:
First American Title Insurance Company,

a California corporation, as Trustee under Trust No. 8628 and not in itcorporate Capacity and not otherwise

By: See Attached

Its: _____

SUBDIVIDER:
Stardust Lot Development,, L.L.C., an Arizona limited liability company

By _____

Its: Manager

STATE OF ARIZONA
)
) ss.
COUNTY OF Maricopa)

The foregoing instrument was acknowledged before me on this 15th day of September, 2016, by C.B. Heater on behalf of Stardust Lot Development,, L.L.C., an Arizona limited liability company DP (Subdivider).

Donna D. Parrish
Notary Public

My Commission Expires: 2/1/2017

DONNA D. PARRISH
Notary Public - Arizona
Maricopa County
My Comm. Expires Feb 1, 2017

STATE OF ARIZONA)
) ss.
COUNTY OF _____)

The foregoing instrument was acknowledged before me on this _____ day of See Attached, 20__, by _____, on behalf of First American Title Insurance Company, a California corporation as Trustee under Trust No. 8628 and not otherwise.

_____
Notary Public

My Commission Expires:

CITY OF BENSON,
an Arizona body politic

_____
City Engineer

ATTEST:

_____
City Clerk

APPROVED AS TO FORM this
___ day of _____, 20___.

_____

As City Attorney
and not personally

SUBSTITUTION AGREEMENT TO CONSTRUCT SUBDIVISION IMPROVEMENTS

THIRD PARTY TRUST

By and between Stardust Lot Development, L.L.C., an Arizona limited liability company (the "Subdivider") First American Title Insurance Company, a Nebraska corporation (redomesticated from California effective July 1, 2014) as Trustee under Trust No. 8628 and not in its corporate capacity (the "Trustee") and the CITY OF BENSON, STATE OF ARIZONA, an Arizona body politic (the "City"):

TRUSTEE:
First American Title Insurance Company, a Nebraska corporation,
(redomesticated from California effective July 1, 2014), as Trustee
Under Trust 8628, and not in its corporate capacity

BY: Charlotte A. Knoll
Senior Trust Officer

STATE OF ARIZONA)
) ss.
County of Maricopa)

On September 15th, 2016, before me, the undersigned Notary Public, personally appeared Charlotte A. Knoll, Senior Trust Officer, of FIRST AMERICAN TITLE INSURANCE COMPANY, a Nebraska corporation, (redomesticated from California effective July 1, 2014) as Trustee under Trust No. 8628 and not in its corporate capacity, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s) or the entity upon behalf of which the person(s) acted, executed the instrument.

WITNESS my hand and official seal.

Brandy Hodnett
Notary Public

My Commission Expires:
4-30-19

BRANDY HODNETT
Notary Public - State of Arizona
PINAL COUNTY
My Commission Expires April 30, 2019

Exhibit "A"

Legal Description

Lots 1 through 224, inclusive and Common Areas (Tracts A, B and C) of San Pedro Golf Estates Final Plat, according to the plat of record in the Office of the County Recorder of Cochise County, Arizona, Recorded in Book 15 of Maps, Page 69.

Exhibit "B"

List of Assurable Items for: San Pedro Golf Estates

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

2. Drainage improvements required by the approved Drainage Report, and as shown on the approved tentative plat, improvement plans and grading plans.

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

4. A public sanitary sewer system acceptable to the City of Benson Wastewater Management 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.

7. Installation of all required street signs.

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