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Gary Christensen Washington County Recorder
08/26/2022 09:36:03 AM Fee \$ 40.00
By CW DESERT COLOR LLC



WHEN RECORDED RETURN TO:

CW Desert Color, LLC
1222 W. Legacy Crossing Blvd. Suite 6
Centerville, UT 84014

Parcel Number(s): see exhibit A

JOINT USE, COST ALLOCATION, AND EASEMENT AGREEMENT

This JOINT USE, COST ALLOCATION, AND EASEMENT AGREEMENT (“**Agreement**”) is entered into between CW DESERT COLOR, LLC, a Utah limited liability company, the COVE CONDOMINIUM ASSOCIATION, a Utah nonprofit corporation, and all other Owners who’s signatures appear below (collectively the “**Parties**” and individually as a “**Party**”), and shall be effective as of the date it is recorded in the Washington County Recorder’s Office.

RECITALS

- A. The Cove Condominium, Desert Color Phase 5, and Atkinville subdivision plats have been, or will be, recorded in the office of the Washington County Recorder. The property, Lots, and parcels within such plats identified by the legal descriptions in Exhibit A shall be collectively referred to herein as the “**Project**”.
- B. Community Amenities have, or will be, constructed within the Project with related facilities and improvements.
- C. The Parties desire to enter into an agreement to define the rights and obligations of the Parties for the shared use, maintenance, repair and replacement of the Community Amenities and the allocation and collection of costs incurred for such purposes.
- D. The Parties desire to grant easement rights for the use of the Community Amenities and related land and facilities, and such rights shall be binding on the successors and assigns of each Lot or parcel.

AGREEMENT

In consideration of the foregoing recitals and the mutual covenants of the Parties contained in this Agreement, the receipt and adequacy of which are hereby acknowledged, the Parties agree and are bound as follows:

- 1. **Definitions.** The capitalized terms in this Agreement shall have the meanings set forth in this Section or as otherwise indicated throughout this Agreement.
 - (a) “**Allocable Share**” shall mean the interest of the Owner of a Lot which shall be applicable for the purposes of the payment of Common Expenses, and for other purposes indicated in this Agreement. It is contemplated that upon final platting of all areas of the Project, there will be 36 condominium units and 70 townhome units. Accordingly, the

Allocable Share for each Lot will be 1/106 fractional amount, or 0.943%. Notwithstanding the forgoing estimates for Lot participation under this Agreement, the Manager shall always have the right to adjust the fractional amount of each Lot's Allocable Share by using the number 1 in the numerator and the total number of Lots participating under this Agreement as the denominator. The Manager shall have the authority to annex or withdraw Lots from the provisions of this Agreement with the corresponding consent of the Owner of the Lot being annexed or withdrawn.

(b) "**Community Amenities**" means the "Promenade, Surf and Sand" structures, and all related land, improvements, and facilities located within the Cove Condominium plats recorded in the office of the Washington County Recorder, including, but not limited to, spa, fire pits, cooking station, tables, chairs, raised deck, and related amenities.

(c) "**Common Expenses**" means: (i) reasonable costs, expenses, fees and other amounts (including appropriate reasonable reserves) paid or incurred by the Manager in connection with the operation, management, maintenance and repair of the Community Amenities and the performance of the Manager's rights and duties under Sections 3 and 4 or any other provision of this Agreement, including, without limitation, all reasonable costs, expenses, fees and other amounts relating to maintaining Community Amenities improvements; (ii) any culinary or secondary water or other utility fees for the Community Amenities or other areas of the Project that are paid for by the Manager; (iii) trash removal services for the Community Amenities; (iv) managerial, clerical and overhead costs, expenses, fees and other amounts for the performance of the duties contemplated herein; and (v) Common Expenses due but not recoverable (after reasonable effort) from a responsible Lot Owner, together with all interest on, and costs and attorney fees incurred in connection with, such unpaid Common Expenses.

(d) "**Common Expense Share**" means, with respect to each Party, the product obtained by multiplying the total Common Expenses for the relevant period by the Allocable Share applicable to such Lot or Party.

(e) "**Lot**" means any of the separately identified single family lots or condominium units within the Project plats, which includes both townhome lots and condominium units.

(f) "**Manager**" means the Cove Condominium Association or any subsequent owner or designated agent of the Community Amenities, unless and until such owner assigns its rights and duties as the Manager. The Manager's rights and duties under this Agreement may be assigned to (a) any other Lot Owner, or (b) any owner's association that is formed for the purpose of performing the Manager's functions under this Agreement. Any transfer of Manager rights shall be accomplished through a recorded instrument.

(g) "**Owner**" means the fee owner of each Lot within the Project. If any Lot has more than one Owner, the rights and liability of each such Owner under this Agreement shall be joint and several.

(h) "**Cove Condos**" means the Cove Condominium Association, governing the 36 condominium units within the Project pursuant to the Declaration of Condominium for Cove Condominiums filed in the office of the Washington County Recorder. Pursuant to this Agreement, Cove Condos shall be obligated to pay the Common Expense Share for all of the condominium units governed by its Declaration.

2. **Grant of Easement.** Subject to the rights, restrictions, and collection of the required payments set forth in this Agreement, each Party and their successors are hereby granted a nonexclusive easement over and across the Community Amenities areas and parcels for the use and enjoyment of each Lot Owner and their successors and assigns. This reciprocal easement is granted as a benefit and right appurtenant to ownership of a Lot within the Project and shall not be separated therefrom.

3. **Manager's Rights and Duties.** The Manager shall timely perform or cause to be performed the duties set forth in this Section for which the Manager shall be reimbursed in accordance with this Agreement. All costs, expenses, fees and other amounts incurred or payable by the Manager in connection with the duties set forth in this Section are part of the Common Expenses payable by the Owners under Section 4 of this Agreement. The Manager shall have no obligation to perform, and no liability for failure to perform, any obligation set forth in this Agreement if the funds to pay for such obligation are not timely received by the Manager pursuant to Section 4.

(a) **Maintenance.** The Manager shall be responsible for the management, maintenance, repair, and replacement of the Community Amenities improvements and shall keep such improvements in a reasonably clean, orderly and usable condition and in a good state of maintenance and repair. Notwithstanding the foregoing, no failure by manager (alleged or actual) to maintain, repair, or replace any of the Community Amenities Improvements shall be a basis for a party to withhold payment of an invoice for its Common Expense Share, any such defense to collection of Common Expenses being expressly waived herein.

(b) **Insurance.** The Manager may maintain general liability insurance, casualty, or other insurance for the operation of the Community Amenities improvements in the Manager's sole discretion. If insurance is obtained, then the costs of such policy shall be a Common Expense.

(c) **Assessment to Specific Owner.** If the need for maintenance or repair of the improvements is caused by the willful or negligent acts of an Owner or its members, occupants, guests, tenants, or invitees, the Manager may cause such repairs to be made and the cost of such maintenance or repair work shall be added to and become a charge to the Owner, and against such Owner's Lot, in addition to its Common Expense Share.

(d) **Rules.** The Manager may adopt rules for the regulation and operation of the Community Amenities and improvements. If rules are adopted, they shall be consistently and uniformly enforced. Each Party to this Agreement shall be obligated to ensure that the rules promulgated in accordance with this Section are communicated to their permitted users, occupants and guests. Each Owner or Party shall be required to take enforcement action against their permitted users, occupants and guests as directed by the Manager, including the imposition of fines. The Manager's determination as to whether a particular activity being conducted or to be conducted violates or will violate the rules shall be conclusive. The Manager shall have the right and authority to restrict access to the Community Amenities and facilities governed by this Agreement for any person or Owner who has violated the rules, or who has not paid their fines or Common Expense Share, in the Manager's sole discretion. All fines collected for violations of the rules shall be remitted to the Manager. The Manager may take enforcement action against individual persons

who may not be Owners, and shall assess all costs incurred to the applicable Party or Owner.

(e) **Exemption of Lots.** Upon request to the Manager, and in the Manager's sole discretion, the Manager may exempt a Lot from the rights and obligations existing under this Agreement upon the terms and conditions that the Manager so elects to make available to a requesting Lot Owner. If the Manager exempts a Lot pursuant to this authority, then the fractional amount of each Lot's Allocable Share shall be adjusted accordingly.

4. Common Expenses.

(a) **Collection.** The Manager is expressly authorized by each Party to incur or allocate all costs, expenses, fees and other amounts included within the definition of "Common Expenses" set forth in Section 1(c), and each Party or subsequent Owner shall contribute such Owner's Common Expense Share in the manner described in this Agreement. The Manager shall invoice each Owner in advance based on the Manager's reasonable annual estimate of the Common Expense Share. Each Owner shall pay such Owner's Common Expense Share in equal installments on the first day of each month. If at the end of the year the monthly installment payments made by Owners aggregate less than the actual amount of the Common Expenses for such calendar year, the Manager may submit an invoice for the deficiency to each Owner and each Owner shall pay the deficiency amount owing to the Manager within thirty (30) days after such final invoice is furnished. If the aggregate Owner payments are more than the Common Expenses incurred by the Manager for such calendar year (including scheduled reserves), the excess amounts shall be applied to future Common Expense Share amounts due from each Owner. Any amount required to be paid under this Section which is not timely paid shall accrue interest on and after the date due until paid in full, before and after judgment, at the rate of eighteen percent (18%) per annum. In addition, a late charge of five percent (5%) of such payment may be charged by the Manager for any payment not made within ten (10) days after the date due. The acceptance by the Manager of any payment that is less than the entire amount then due shall be a credit toward the Owner's outstanding obligation only and shall not constitute a waiver of the obligation to pay such Owner's entire Common Expense Share amount. All records and accounts maintained by the Manager which relate to the Common Expenses shall be open to examination by any Owner with at least ten (10) days' prior written notice to the Manager.

(b) **Certain Obligations and Rights.** The obligations of each Owner for the payment or reimbursement of Common Expenses, and for all other provisions of this Agreement are the personal obligations of such Owner and may be enforced by the Manager. No Owner may avoid or diminish the personal nature of such obligations by abandonment of such Owner's Lot or by waiver of any of the services provided for in this Agreement. Suit to recover a money judgment for any amount due may be maintained by the Manager. All remedies set forth in this Agreement are cumulative and are in addition to any remedies otherwise available at law or in equity, which shall include the right to restrain by injunction any violation or threatened violation of this Agreement and to compel by decree specific performance, it being agreed that the remedy at law for any breach may be inadequate.

(c) **Temporary Suspension of Common Expense Obligation.** The Owners of Lots shall be exempt from paying their applicable Common Expense Share until the Lot has received a certificate of occupancy and has been transferred from CW Desert Color, LLC, to an unrelated third-party Owner.

5. Enforcement. The restrictions, covenants, and obligations in this Agreement are for the benefit of each Owner and they shall inure to and pass with each and every Lot and shall run with the land and shall apply to and bind the respective successors in interest. Each Owner by acceptance of a deed to a Lot, whether or not it shall be so expressed in such deed, is deemed to have accepted all the restrictions, covenants and obligations in this Agreement and agrees to contribute the Owner's proportional share of the Common Expenses. Each Owner hereby agrees that such Common Expense costs shall be a charge on the land and shall be a continuing lien upon the Lot of any Owner who has failed to contribute its proportional share of the Common Expense costs. The Manager shall be entitled to record a lien against a delinquent Owner's Lot if such Owner fails to pay its Common Expense Share. The Manager shall be entitled to pursue its lien rights to the fullest extent permitted by law, which lien shall include all interest, late fees, attorney fees, and other costs of collection. This lien right against all Lots within the Project shall arise and be perfected as of the date of the recording of this Agreement. Each Owner's Common Expense Share shall also be the obligation of the person who was the Owner of such Lot at the time when the Common Expense incurred. The Manager shall also have the right to pursue a legal action for a money judgement to personally recover from delinquent Lot Owners to the fullest extent permitted by law. In the event of default, all residents or occupants of the defaulting Owner's Lot(s) shall immediately lose all access and use rights to the Community Amenities.

6. Indemnification. Each Owner shall indemnify, defend and hold harmless the Manager and each other Owner from and against all losses, damages, claims, causes of action, demands, obligations, suits, controversies, costs, expenses (including, without limitation, litigation expenses and attorneys' fees, whether incurred with or without the filing of suit, on appeal or otherwise), liabilities, judgments and liens, of whatever kind or character, which are caused by such Owner's negligent or willful acts or omissions, or through the use or release of any hazardous substances, pollutants, or contaminants on any Lot by the indemnifying Owner, or any person leasing or occupying the Lot owned by such indemnifying Owner, or by any agent, employee, contractor, invitee or licensee of the indemnifying Owner.

7. Restriction on Use. No Owner or their permitted users shall place any obstruction on the Community Amenities parcels whatsoever without the written permission of the Manager.

8. Covenants to Run with Land. This Agreement shall constitute a covenant running with the land, and shall be binding on and shall inure to the benefit of the Manager, each Owner, any other party holding any interest in any Lot, any party holding an interest in the Community Amenities, and their respective successors and assigns. This Agreement shall be binding on each Lot, and all interests in each Lot shall be subject to this Agreement. By any way coming to have any interest in or occupying any Lot, the person so coming to have such interest or occupying agrees to be bound by this Agreement; provided, however, that no such person shall have personal liability under this Agreement for any acts committed prior to the time such person became an Owner.

9. Joint and Several Liability of Owner and Future Owners. The Owner and any future Owners of a Lot are jointly and severally liable for all Common Expenses accruing related to that Lot prior to and during the time that an Owner is an Owner. An Owner is not liable for any Common Expenses accruing after the person has lawfully transferred the Lot to another Owner. The recording of a deed to a person that has not agreed to take ownership of the Lot shall not be considered a legal conveyance of title. The obligation in this Section is separate and distinct from any lien rights associated with the Lot. Cove Condos (or any successor association governing the detached home Lots) shall be jointly and severally liable for the Common Expense Share of all Lots governed by its declaration of covenants, conditions and restrictions.

10. No Merger. The easements, covenants, restrictions and other provisions contained in this Agreement shall remain in full force and effect despite the fact that one or more Lots may be owned by the same person(s) or entity(ies) from time to time, it being the intention of this Agreement to create a common scheme for the management of the Community Amenities which will not be terminated by the doctrine of merger or otherwise, unless this Agreement is terminated in accordance with its terms.

11. Notices. Any notice required or permitted to be given to any Owner according to the provisions of this Agreement shall be deemed to have been properly furnished if personally delivered in writing, emailed, or if mailed, postage prepaid, to the address provided to the Manager by such Owner. If no email or mailing address is provided, then notice shall be effective if delivery is made to the latest email or mailing address for such Person appearing in the records of the Washington County Recorder at the time notice is sent, or by posting on the door of the dwelling on a Lot.

12. Attorney Fees. If any action is brought because of a default under, or to enforce or interpret this Agreement, in addition to the relief to which such party is entitled, the party prevailing in such action shall be entitled to recover, from the unsuccessful party, all reasonable attorney fees (including those incurred prior to the filing of a lawsuit and in connection with any appeal), the amount of which shall be fixed by the court and made a part of any judgment rendered.

13. Waiver. Failure of any Party at any time to require performance of any provision of this Agreement shall not limit such Party's right to enforce such provision, nor shall any waiver of breach of any provision of this Agreement constitute a waiver of any succeeding breach of such provision or waiver of such provision itself.

14. Amendment. This Agreement may be amended or terminated only by an instrument recorded in the official records of Washington County which is approved by both: (a) the Manager; and (b) at least sixty-seven percent (67%) of the Allocable Shares of the Lot Owners. Any amendment(s) must be executed by the Manager and include the Manager's certification that the required threshold of Owner consent as received. Such amendment(s) shall be effective as of the recording date. The term of this Agreement will begin on the date it is recorded in the office of the Washington County Recorder and shall continue in full force and effect in perpetuity, or until amended or terminated pursuant to the terms set forth herein.

15. No Public Dedication. The provisions of this Agreement are not intended to and do not constitute a dedication for public use of any portion of the Community Amenities

or the easements created hereby.

16. Non-Use. No obligation arising out of this Agreement, or right granted under this Agreement shall lapse because of non-use by a Party or its members.

17. Waiver. Failure of a Party at any time to require performance of any provision of this Agreement shall not limit such Party's right to enforce such provision, nor shall any waiver of breach of any provision of this Agreement constitute a waiver of any succeeding breach of such provision or waiver of such provision itself.

18. Governing Law. This Agreement shall be construed pursuant to the laws of the State of Utah.

19. Recording. This Agreement shall be recorded in the official records of Washington County, Utah.

* * * *

[Signature Pages Follow]

EXHIBIT A
LEGAL DESCRIPTION OF PROJECT

Lots 501 through 529 of DESERT COLOR RESORT PHASE 5, according to the official plat filed in the office of the Washington County Recorder on October 22, 2021 as Entry Number 20210068545.

Parcel Numbers: SG-DCR-5-501 through SG-DCR-5-505
and SG-DCR-5-507 through SG-DCR-5-529

Lot 2 of DESERT COLOR ATKINVILLE RESORT SUBDIVISION, according to the official plat thereof on file and of record in the office of the Washington County Recorder on November 19, 2021 as Entry Number 20210074288.

Parcel Number: SG-DCAR-2

Such Parcel shall include 44 total townhome lots following subsequent subdivision