

RESOLUTION NO. 2412

A RESOLUTION OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, APPROVING AND AUTHORIZING THE MAYOR TO EXECUTE AN AGREEMENT WITH BISON COVE, LLC, FOR EXTENSION OF TIME TO UTILIZE TOWER WELL ERU CREDITS AND FOR THE CONSTRUCTION OF EVERGREEN AND MANZANITA STREETS.

WHEREAS, on April 14, 2005, the Town of Payson adopted Resolution Number 2052 approving an agreement with Terra-Payson 40, L.L.C., and Terra-Star Valley, L.L.C., relating to a new water source; and

WHEREAS, on August 25, 2005, the Town adopted Resolution No. 2098 approving a second water agreement with Terra-Payson 40, L.L.C., regarding a second new water source (collectively "The Agreements"); and

WHEREAS, on May 11, 2006, the Town, pursuant to the Agreements, accepted the Tower Well along with the related improvements and pipeline and granted Terra-Star Valley 40, L.L.C., one thousand (1,000) equivalent residential units ("ERUs"); and

WHEREAS, Terra-Star Valley 40, L.L.C., has sold or transferred some of said ERUs to various developers and property owners; and

WHEREAS, Bison Cove, LLC, has purchased some of the Tower Well ERU credits theretofore granted to Terra-Star Valley 40, L.L.C. (the "Credits"); and

WHEREAS, Bison Cove, LLC, wishes to extend the time within which to utilize the Credits; and

WHEREAS, the Town believes that it is in its best interest to grant such an extension of time; and

WHEREAS, the Town wishes to have Evergreen and Manzanita Streets constructed as soon as practicable; and

WHEREAS, Bison Cove, LLC, is willing to construct Evergreen and Manzanita Streets within a shorter time frame than otherwise might be the case; and

WHEREAS, the Credits were initially effective until April 17, 2010; and

WHEREAS, Resolution No. 2226 extended the effectiveness of the Credits until April 17, 2015; and

Prepared by Town of Payson Legal Department

SIS:ljf August 7, 2008 (1:06PM)

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AUG 07 2008 G.7

Amended 8-7-08, 1:50 pm

WHEREAS, the Town desires to extend the time within which the Credits owned by Bison Cove, LLC on or before December 31, 2006, may be used, until April 17, 2018,

NOW, THEREFORE, THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, DO HEREBY RESOLVE AS FOLLOWS:

Section 1. That the Agreement between the Town of Payson and Bison Cove, LLC, attached hereto, marked Exhibit "A" and made a part hereof by this reference, be and is hereby approved in substantially the form attached.

Section 2. That Kenny J. Evans, Mayor of the Town of Payson, be and is hereby authorized to execute said Agreement between the Town of Payson and Bison Cove, LLC, in substantially the form attached as Exhibit "A".

Section 3. The Town will recognize and accept the Bison Cove LLC, Credits between April 17, 2015 and April 17, 2018, provided that the holder of any such Credit pays to the Town for each Credit an amount equal to the Town's then existing Water Development Fee less the amount Bison Cove, LLC paid for the Credits (\$4,950.00 per credit), but in no event shall the amount paid to the Town be less than zero (0).

Section 4. That the Town of Payson be and is hereby authorized to take and perform such other further actions as are necessary or appropriate to carrying out the purposes provided for in this Resolution No. 2412.

Section 5. That any reference in Resolution No. 2226 to "Terra-Payson 450, L.L.C." is found to be a clerical error and is corrected to collectively read "Terra-Payson 40, L.L.C. and Terra-Star Valley, L.L.C."

PASSED AND ADOPTED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, this ____ day of _____, 2008, by the following vote:

AYES _____ NOES _____ ABSTENTIONS _____ ABSENT _____

Kenny J. Evans, Mayor

APPROVED AS TO FORM:

ATTEST:

Silvia Smith, Town Clerk

Samuel I. Streichman, Town Attorney

Prepared by Town of Payson Legal Department

SIS:ljf August 7, 2008 (1:06PM)

WHEN RECORDED, RETURN TO:

**Samuel I. Streichman, Town Attorney
Town of Payson Legal Department
303L North Beeline Highway
Payson, Arizona 85541
Phone: 928-474-5242, ext. 208**

**AGREEMENT FOR EXTENSION OF TIME TO UTILIZE
TOWER WELL ERU CREDITS
AND FOR THE
CONSTRUCTION OF EVERGREEN AND MANZANITA STREETS**

This Agreement for Extension of Time to Utilize Tower Well ERU Credits and for the Construction of Evergreen and Manzanita Streets ("Agreement") is entered into this ____ day of _____, 2008 (the "Effective Date"), by and between the Town of Payson, a municipal corporation organized under the laws of the State of Arizona ("Town"), and Bison Cove, LLC, an Arizona limited liability company ("Bison Cove") (collectively, the "Parties").

RECITALS

- A. On or about April 15, 2005, the Town entered into a Water Agreement with Terra-Payson 40, L.L.C. and Terra-Star Valley 40, L.L.C., under which one thousand (1,000) Tower Well ERU credits (the "Credits") were created that were to expire on April 18, 2010.
- B. On or about December 14, 2006, the Mayor and Common Council of the Town passed and adopted Resolution Number 2226 which, among other things, extended the expiration of the Credits until April 17, 2015.
- C. Bison Cove has purchased a number of Credits from Terra-Star Valley 40, L.L.C.
- D. Bison Cove wishes to extend the time within which to utilize the Credits and the Town wishes to grant such an extension of time.
- E. The Town also wishes to have Evergreen and Manzanita Streets constructed as soon as practicable and Bison Cove is willing to do so.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises and agreements set forth herein, the Parties hereto state, confirm and agree as follows:

AGREEMENT

1. **Recitals.** The Recitals set forth above are acknowledged by the Parties to be true and correct and are incorporated herein by this reference.
2. **Term.** The Term of this Agreement shall commence on the Effective Date and shall terminate on June 30, 2018.
3. **Use of Water Credits.** Any and all Tower Well ERU Credits (as that term is defined in the Agreement between the Town and Terra-Payson 40, L.L.C. and Terra-Star Valley 40, L.L.C., dated April 15, 2005, and as that term is defined in Resolution Numbers 2052 and 2226 of the Town), purchased by Bison Cove from Terra-Star Valley 40, L.L.C., on or before December 31, 2006, will be extended and recognized and accepted by the Town between April 17, 2015 (their current expiration date pursuant to Resolution Number 2052 and Resolution Number 2226) and April 17, 2018, pursuant to Resolution Number 2412, provided that Bison Cove or its successor, as the case may be, pays to the town an amount equal to the Town's then existing Water Development Fee less the amount paid by Bison Cove for each Credit; provided, however, that in no event shall the amount paid to the Town be less than zero (0). Between April 17, 2015 and April 17, 2018, use of the Credits shall be governed by Resolution Number 2226. On or before April 18, 2010, Bison Cove may use each Credit as provided in the agreement between the Town and Terra-Payson 40, L.L.C. and Terra-Star Valley 40, L.L.C., dated April 15, 2005 and Resolution Number 2052).
4. **Construction of Streets.** On or before April 17, 2015, Bison Cove shall commence and complete construction of the following:
 - A. Evergreen Street from Easy Street to Manzanita Street; and,
 - B. Manzanita Street from the north edge of Evergreen Street to the south lot line of the adjoining Bison Cove real property. The Bison Cove real property is described on Exhibit "A" attached hereto (the "Land").

Such portions of Evergreen and Manzanita Streets shall be constructed fully in compliance with the dimensions and specifications being prepared by Tetra Tech, Inc., as approved by the Town Engineer. The construction of such streets shall not be complete until each is finished to the satisfaction of the Town and accepted thereby.

5. **Warranty.** Bison Cove shall warrant to the Town the construction of Evergreen and Manzanita Streets against defective workmanship and/or defective materials for a period of two (2) years from the date of the Town's acceptance of such streets.

6. **Development Rights.** This Agreement grants only an extension of time for use of Tower Well ERU Credits. The Parties understand that any development within the Town requires zoning approvals, subdivision approvals, compliance with the Town Code, including the Unified Development Code and various other permits, all of which must be obtained independent of this Agreement in accordance with State and Town Codes, Rules and Regulations.

7. **Default.** Bison Cove's failure to perform any obligation on its part to be performed under this Agreement, within thirty (30) days after notice of non-performance, shall constitute an event of default under this Agreement. In the event that the default consists of the failure to construct Evergreen or Manzanita Streets as provided for herein by April 17, 2015, the extension of the time for the use of Tower Well ERU Credits set forth herein shall be void for all purposes and such credits shall expire, in the event of such default, on April 17, 2015, and no notice of default shall be required in such event.

8. **Notices.** All notices 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, to:

Town of Payson
 Debra A. Galbraith, Town Manager
 Town Manager
 303 North Beeline Highway
 Payson, Arizona 85541

BISON COVE, LLC
 c/o Bison Communities, LLC
 Attn: Gary A. Martinson, Manager
 16641 North 91st Street, #101
 Scottsdale, Arizona 85260

With a copy to:

With a copy to:

Samuel I. Streichman, Town Attorney
 303L North Beeline Highway
 Payson, Arizona 85541

Sam Ciatu
 Attorney for Bison Cove
 10953 North Frank Lloyd Wright Blvd.
 Suite 110
 Scottsdale, Arizona 85259-0001

9. **Mediation.** If a dispute arises out of or relates to this Agreement or the breach thereof, and if the dispute cannot be settled through negotiation, the Parties agree to first try to settle the dispute through non-binding mediation before resorting to some other dispute resolution procedure. In the event that the Parties cannot agree upon the selection of a mediator within fourteen (14) days, either Party may request the presiding judge of the Superior Court of Gila County to assign a mediator from a list of mediators maintained by the Arizona Municipal Risk Retention Pool.

10. **Dispute Resolution.** This Agreement shall be governed and construed in accordance with the internal laws of the State of Arizona. In particular, this Agreement is subject to the provisions of A.R.S. § 38-511, the terms of which are incorporated herein, and which provides for cancellation of contracts by the municipality for certain conflicts of interest. The venue for any dispute regarding this Agreement shall be Gila County, Arizona, and both

Parties consent in advance to such venue and jurisdiction and waive any right to object that Gila County is an inconvenient or improper forum. Neither Party shall be entitled to recover from the other Party any of its attorneys' fees, costs, or expert witness fees incurred in any dispute, controversy, claim, or cause of action arising from this Agreement, and each Party shall bear its own attorneys' fees, costs, and expert witness fees without contribution from the other Party, whether the same is resolved through mediation, litigation, or otherwise.

11. **Waiver.** No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by the Town or Bison Cove of the breach of any covenant of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this Agreement.
12. **Counterparts.** This Agreement 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.
13. **Headings.** The descriptive headings of the paragraphs of this Agreement are inserted for convenience only and shall not control or affect the meaning or construction of any of the provisions hereof.
14. **Further Acts.** Each of the Parties hereto shall execute and deliver all such documents and perform all such acts as are reasonably necessary, from time to time, to carry out the matters contemplated by this Agreement.
15. **Time of Essence.** Time is of the essence of this Agreement and all of its parts.
16. **Successors and Assigns.** With the prior consent of the Town, which shall not be unreasonably withheld or delayed, Bison Cove may:
 - A. Assign its obligations under this Agreement; or
 - B. Assign its rights under this Agreement; or
 - C. Assign both its rights and its obligations

to one or more persons or entities. Subject to the foregoing, all of the provisions hereof shall inure to the benefit of and be binding upon the successors and assigns of the Parties hereto.

17. **Water Credits to be attached to the Land.** The Tower Well ERU Credits which are the subject of this Agreement shall be attached to, run with, and benefit the land described on Exhibit "A". Notwithstanding the foregoing, so long as (a) Bison Cove or any successor or assignee is not in default of this Agreement and (b) so long as the Tower Well ERU Credits have not expired pursuant to the terms of this Agreement, any such water credits remaining after the full and complete development of the Land, or reasonably determined by the Town and Bison Cove to not be required for the development of the Land, may be assigned pursuant to Paragraph 16, above, to a person, entity or project not connected with the Land.

18. **No Partnership; Third Parties.** It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture, or other arrangement between Bison Cove and the Town. No term or provision of this Agreement is intended to, nor shall, be for the benefit of any person, firm, organization, or corporation not a party hereto, and no such other such person, firm, organization, or corporation shall have any right or cause of action hereunder.

18. **Entire Agreement.** This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter of this Agreement. All prior and contemporaneous agreements, representations, and understandings of the Parties, oral or written, are hereby superseded and merged herein.

19. **Amendment.** No change or addition is to be made to this Agreement except by a written amendment executed by the Town and Bison Cove.

20. **Bison Cove Good Standing; Authority.** Bison Cove represents and warrants that (a) it is an Arizona limited liability company fully organized, validly existing, and in good standing under the laws of the State of Arizona; and (b) the execution, delivery, and performance of this Agreement has been duly authorized by Bison Cove.

21. **Town Authority.** The Town represents and warrants that (a) its execution, delivery, and performance of this Agreement has been duly authorized and entered into in compliance with the Town Code of the Town of Payson; and (b) the individual(s) executing this Agreement on behalf of the Town are authorized and empowered to bind the Town.

22. **Recordation.** This Agreement shall be recorded by the Town in its entirety in the official records of Gila County, Arizona.

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year first above written.

BISON COVE, LLC
 an Arizona limited liability company
 By: Bison Communities, LLC
 an Arizona limited liability company

By: _____
 Gary A. Martinson, Manager

TOWN OF PAYSON
 an Arizona municipal Corporation

By: _____
 Kenny J. Evans, Mayor

ATTEST:

By: _____
 Silvia Smith, Town Clerk

STATE OF ARIZONA)
) ss
_____ County)

The foregoing Agreement between the Town of Payson and Bison Cove, LLC was signed before me this ____ day of _____, 2008, by _____, its _____ on behalf of Bison Cove, LLC.

Notary Public

My commission expires:

STATE OF ARIZONA)
) ss.
County of Gila)

The foregoing Agreement between the Town of Payson and Bison Cove, LLC, was signed before me this ____ day of _____, 2008, by Kenny J. Evans, Mayor of the Town of Payson, on behalf of the Town.

Notary Public

My commission expires:

**EXHIBIT “A”
LEGAL DESCRIPTION
OF
BISON COVE LAND**

A Parcel of property located in the northwest quarter of Section 2, T 10 N, R 10 E, G&SRM, Gila County, Arizona, more particularly described as follows:

Parcel Two of Record of Survey Map No. 3014, Gila County Recorders Office, Gila County, Arizona;

Except that portion of Easy Street included in the Second Amended Final Plat for Bison Cove Condominiums Phase 1 recorded as Map No. 791A through 791E, Gila County Recorders Office, Gila County, Arizona.

APPROVAL AS TO FORM

The Town of Payson Legal Department has reviewed this agreement and approved it as to form. When reviewing this agreement for form, the Legal Department considers whether the following situations have been addressed:

1. Identification of parties;
2. Offer and acceptance;
3. Existence of consideration (we do not review to determine if consideration is adequate);
4. That certain provisions specifically required by statute are included (i.e., provisions concerning non-availability of funds and conflict of interest, A.R.S. 38-511).

We have not reviewed the agreement for other issues. Therefore, approval as to form should not be considered as approval of the appropriateness of the terms or conditions of the agreement or the underlying transaction. In addition, approval as to the form should not be considered approval of the underlying policy considerations addressed by the agreement.

Dated: _____

By: _____
Samuel I. Streichman, Town Attorney