

RESOLUTION NO. 12-18

APPROVE RESOLUTION AUTHORIZING THE EXECUTION OF THE MEMORANDUM OF UNDERSTANDING WITH DESTINATION CALDWELL FOR THE OVERALL SUPERVISION AND MANAGEMENT OF THE INDIAN CREEK PLAZA LOCATED IN DOWNTOWN CALDWELL.

BE IT HEREBY RESOLVED by the Mayor and Council of the City of Caldwell, Idaho, that the Caldwell City Council authorizes the execution of the Memorandum of Understanding with Destination Caldwell made apart hereof as set forth in full.

PASSED BY THE COUNCIL of the City of Caldwell, Idaho this 16th day of January, 2018.

APPROVED BY THE MAYOR of the City of Caldwell, Idaho this 16th day of January, 2018.

Approved

By



Garret L. Nancolas
Mayor

ATTEST:

By



City Clerk

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("Agreement") is made and entered into effective the 1st day of January, 2018, by and between the CITY OF CALDWELL, IDAHO, an Idaho municipal corporation, of 411 Blaine Street, Caldwell, Idaho 83605, hereinafter referred to as "Caldwell," and DESTINATION CALDWELL, INC., an Idaho non-profit corporation, of 106 S. Kimball Avenue, Caldwell, Idaho 83605, hereinafter referred to as "Destination Caldwell."

RECITALS

WHEREAS, Caldwell owns a certain parcel of real property located wholly within the corporate limits of Caldwell, Idaho, addressed as 120 S. Kimball, Ave, Caldwell, Idaho, and commonly known as "Indian Creek Plaza" ("Plaza"), said property being more particularly described in Exhibit "A," attached hereto and made a part hereof by this reference; and

WHEREAS, Caldwell is in the process of developing the Plaza as a venue for public gathering and events to include an ice "ribbon" skating rink, water feature, event stage and associated infrastructure and the term Plaza, as used herein, shall include the real property as well as all improvements, fixtures and appurtenances now existing or hereafter constructed; and

WHEREAS, the Plaza is anticipated to host approximately 150 events/activities annually; and

WHEREAS, Caldwell desires to contract with Destination Caldwell to supervise, manage, operate, maintain, and promote the Plaza, and usage of the Plaza; and

NOW, THEREFORE, in consideration of the covenants, representations and warranties herein contained and the Recitals set forth above, which are a material part of this Agreement, and for other good and valuable consideration, the parties agree as follows:

1 TERM

1.1 The initial term of this Agreement shall be ten (10) years, commencing on January 1, 2018, the effective date of this agreement, and upon the expiration of the initial ten (10) year term, shall renew automatically for additional successive five (5) year terms unless and until this agreement is otherwise terminated by the parties.

2 DUTIES AND AUTHORITY OF DESTINATION CALDWELL

The City hereby relinquishes and grants sole responsibility and authority for the following during the Term of this agreement:

2.1 During the term of this agreement, Destination Caldwell will be solely responsible for the overall supervision and management of the Plaza and all operations occurring thereon.

2.2 During the term of this agreement, Destination Caldwell will, in its sole discretion, supervise, market and promote the Plaza and supervise and direct the business associated with or related to the Plaza's daily operations.

2.3 Destination Caldwell will, in compliance with all state, federal, and local laws, hire, discharge, transfer and supervise all labor and employees required, in Destination Caldwell's sole estimation, to manage the Plaza. All such acts shall be in the name of Destination Caldwell, and any employees, so hired, shall be on the payroll of the Destination Caldwell.

2.4 Subject to the duties undertaken by the City in Sections 3.5 and 3.6, herein, during the term of this agreement, Destination Caldwell will coordinate and bear responsibility for all maintenance and repair of all non-fixture materials and equipment associated with performing Destination Caldwell's duties under this agreement, excepting vehicles, equipment and tools regularly used by the City as it performs its duties under Sections 3.5 and 3.6, herein. Destination Caldwell will coordinate, and the City will finance the routine maintenance, improvements to, and repair of all City owned fixed assets (fixtures), materials, equipment and improvements located at the plaza, including but not limited to, the ice ribbon/rink, ice resurfacing equipment, splash pads, stage, and AV-related equipment, irrigation and plumbing and other similar improvements associated with the Plaza. Destination Caldwell shall not commit any intentional waste upon or unreasonable damage to the Plaza nor permit any waste upon or damage by its customers, employees, agents, assigns, contractors or those persons going on the Plaza for the purpose of attending or participating in Plaza events.

2.5 Destination Caldwell shall maintain a comprehensive liability insurance policy covering the Plaza during the term of this Agreement with an insurance company licensed by the Idaho Department of Insurance at the sole cost and expense of Destination Caldwell and naming Caldwell as an additional insured. Destination Caldwell shall annually furnish Caldwell with a certificate of such liability insurance stating that said insurance is in full force and effect during the term of this Agreement and any extension hereof Destination Caldwell shall require and obtain certificates of insurance naming Caldwell as an additional insured on all sub-licensee contracts. Insurance provided for in this paragraph shall be for limits of not less than \$1,000,000.00 and shall cover both property damage and bodily injury.

2.6 Destination Caldwell will abide by all applicable state and municipal laws relating to the serving and sale of food and alcohol as well as the promotion and holding of events.

2.7 Destination Caldwell will select, contract with, and oversee all vendors, suppliers, and independent contractors and subcontractors for the Plaza and events held there.

2.8 Destination Caldwell will negotiate and enter into such routine agreements as it deems necessary or advisable for the furnishing of services and supplies, and such other agreements which may benefit the Plaza or are deemed by Destination Caldwell to be incidental to the management of the Plaza.

2.9 Destination Caldwell will provide marketing and promotional services including message and media selection, media buys, signage and banners for the Plaza at Destination Caldwell's expense.

2.10 Destination Caldwell will have control over and responsibility for making all decisions in connection with the daily operations of the Plaza.

2.11 Destination Caldwell will arrange, contract for, and pay for all utilities for the operation of the Plaza, other than those specific utilities expressly set forth in Section 3.5, and except to the extent set forth in Section 3.6, below, with respect to payment of all or a portion of costs associated with the provision of electricity/power to the Plaza during the first three years of operation of the Plaza.

2.12 Destination Caldwell will keep and maintain full and adequate books of account, operating statements, and other records reflecting the results of its operation of the Plaza and its expenditure of any funds originating from the Downtown Caldwell Business Improvement District, in accordance with generally accepted accounting principles.

2.13 In coordination with Caldwell, and at all times during the term of this agreement, Destination Caldwell shall have the right to access, occupy and use the Sweetwater Building, adjacent to the Plaza at 123 S. 7th Ave., for the purpose of fulfilling and carrying out Destination Caldwell's duties under this Agreement, which use and access shall include, but is not limited to, rentals related to the ice ribbon, storage of equipment and materials, and a public restroom. Destination Caldwell and the City shall each be given all necessary keys, codes or passwords to access and use the Sweetwater Building as provided for herein.

3 DUTIES AND AUTHORITY OF CALDWELL

3.1 Caldwell will reasonably cooperate with Destination Caldwell in the performance of duties under this Agreement.

3.2 Caldwell will execute any documents or instruments, reasonably necessary for Destination Caldwell to perform its duties and obligations pursuant to this Agreement.

3.3 Caldwell will establish, maintain and, consistent with generally accepted accounting principles, account for a dedicated fund for the purposes described in this Agreement.

3.4 In coordination with Destination Caldwell, Caldwell shall have the right to enter the Plaza at reasonable times to perform ordinary services and other activities related to its duties under this agreement. Both Caldwell and Destination Caldwell shall have keys, codes or passwords for access to all parts of the Plaza.

3.5 Caldwell shall provide, at its sole expense, those ordinary services to the Plaza that it provides to other city park facilities, including trash service, irrigation, and general maintenance to all areas of the Plaza, but shall not be responsible for payment of charges resulting from use of power/electricity at the Plaza, as such maintenance and said charges are the responsibility of Destination Caldwell, as set forth in Section 5.1, below. Provided further, Caldwell shall be responsible for repair and replacement, when necessary, of fixtures associated with the Plaza, including but not limited to, the condensers and other equipment related to the ice skating ribbon, as well as water, plumbing, irrigation, the stage and AV related equipment. The City of Caldwell shall provide general police and fire services to the Plaza at no additional expense to Destination Caldwell; provided, however, Destination Caldwell shall provide additional security, when necessary, for events and activities occurring at the Plaza.

3.6 During the first three (3) years of operation, and commencing upon the formal opening date of the Plaza, Caldwell will pay one-hundred (100%) percent of the costs of providing electricity/power to the Plaza, up to a maximum of \$25,000.00 each year. Thereafter, Destination Caldwell will be responsible for payment of all costs of providing electricity/power to the Plaza, as with respect to all other utilities not expressly set forth in Section 3.5. Should costs exceed the maximums set forth above during the first three (3) years of operation, Destination Caldwell will be responsible for payment of all costs in excess of said maximums.

3.7 Caldwell shall obtain and maintain general liability insurance coverage for the Plaza under its municipal insurance policy with Idaho Counties Risk Management (ICRMP).

4 REPRESENTATIONS AND WARRANTIES

4.1 Caldwell makes the following representations and warranties which shall be true and accurate as of execution of this document and remain so thereafter until this Agreement is no longer in effect:

4.1.1 All actions and proceedings necessary to be taken by Caldwell or any person in connection with the transactions or obligations contemplated by this Agreement have been taken and this Agreement has been properly authorized, executed, and delivered by Caldwell and constitutes the legal, valid, and binding obligations of Caldwell, enforceable against Caldwell in accordance with and subject to its terms.

4.1.2 Caldwell has no knowledge that this Agreement violates or conflicts with the terms of any other agreement, contract, lease, indenture, understanding, law, regulation, or order.

4.2 Destination Caldwell makes the following representations and warranties which shall be true and accurate as of execution of this document and remain so thereafter until this Agreement is no longer in effect:

4.2.1 Destination Caldwell is an Idaho non-profit corporation in good standing under the laws of the state of Idaho.

4.2.2 All actions and proceedings necessary to be taken by Destination Caldwell or any person in connection with the transactions or obligations contemplated by this Agreement have been taken and this Agreement has been properly authorized, executed, and delivered by Destination Caldwell and constitutes the legal, valid, and binding obligations of Destination Caldwell, enforceable against Destination Caldwell in accordance with and subject to its terms.

4.2.3 Destination Caldwell has no knowledge that this Agreement violates or conflicts with the terms of any other agreement, contract, lease, indenture, understanding, law, regulation, or order.

5 BUDGETING AND FUNDING; ASSETS

5.1 Except as expressly set forth herein, all costs associated with the Plaza, including without limitation expenses incurred for the supervision, management, operations, maintenance,

and promotion of the Plaza and costs associated with the events to be held there shall be paid by Destination Caldwell. Revenues collected in connection with the Downtown Caldwell Business Improvement District will be used to assist Destination Caldwell in the payment of such costs, to the extent appropriate when considering the purposes for which the district was formed and pursuant to its foundational documents. As set forth in Section 3.5 above, Caldwell will provide the ordinary services it provides to other city park facilities, including trash service, irrigation, and general maintenance to all areas of the Plaza *other* than the ice skating rink. However, in addition to the other costs generally referred to above, and subject to Sections 3.5 and 3.6, Destination Caldwell will be responsible for all power/electricity at the Plaza, and for all costs associated with maintenance of the ice skating rink.

5.2 All revenues generated from the operation of the Plaza shall be held by Destination Caldwell for use in association with its management of the Plaza.

5.3 In accomplishing the purposes of this agreement, the parties acknowledge that all revenues generated by assessments of the Downtown Caldwell Business Improvement District shall be used solely for the purposes set forth and allowed under Idaho Code §§ 50-2611 and -2612, and, more specifically, in Ordinance No. 3067 adopted by the Caldwell City Council on August 15, 2016.

5.4 All assets purchased or acquired in whole or in part with moneys originating from revenues of the Downtown Caldwell Business Improvement District, or other Caldwell funds, shall be and remain the property of the City of Caldwell.

5.5 Destination Caldwell shall prepare and present to Caldwell, between October 1 and December 31 of each year, a financial summary and general report of Destination Caldwell's activities and operations of the Plaza and performance of its obligations under this Agreement for the preceding year, and shall present a prospective budget for the following year, which shall include a summary of anticipated revenues, expenses, and fund balances.

6 DEFAULT: Upon receipt of written notice of a breach of any term of this Agreement, the breaching party shall have thirty (30) days in which to cure or correct the breach. Should such breach continue for thirty (30) days beyond such notice, the non-breaching party may avail itself of all remedies available at law or in equity. In addition, if the breach is not cured after thirty (30) days the non-breaching party shall have the ability to terminate this Agreement by providing written notice to the breaching party.

7 TERMINATION

7.1 Either party may terminate this Agreement for cause upon one-hundred twenty (120) days written notice.

7.2 It is understood and agreed that the voluntary or involuntary filing of bankruptcy by Destination Caldwell shall automatically terminate this Agreement and Caldwell shall be entitled to immediate possession of the Plaza.

7.3 Upon termination, Destination Caldwell agrees to surrender possession of the Plaza to Caldwell in the same condition as when this Agreement commenced, normal wear and tear, reasonable use and occupancy and damage by the elements excepted.

7.4 This agreement may be terminated by either party, upon ninety (90) days written notice, in the event the Downtown Caldwell Business Improvement District is disestablished.

8 IMPROVEMENTS and ALTERATIONS: Caldwell shall have the right to make capital improvements and the right to build additions or other improvements to the Plaza or its fixtures and to erect such other buildings or fixtures as it shall see fit or deem proper. Destination Caldwell agrees to cooperate with Caldwell on joint capital improvements. Provided, however, that the financial responsibilities of each party related to such improvements shall be set forth in a signed, written agreement. The parties shall coordinate and communicate with respect to any anticipated alterations, renovations, or capital improvements to the Plaza. Destination Caldwell shall make no permanent improvements or alterations to the Plaza without the prior written consent of Caldwell. All improvements, alterations and fixtures constructed by any party during the terms of this Agreement shall become the sole property of Caldwell upon expiration or termination of this Agreement. Destination Caldwell shall have no authority to bind Caldwell to any obligation or expenditure of funds. Likewise, Caldwell shall have no authority to bind Destination Caldwell to any obligation or expenditure of funds.

9 RELATIONSHIP: Nothing contained in this Agreement will constitute or be construed to be or create a partnership, employment arrangement, agency or joint venture between Caldwell and Destination Caldwell. Destination Caldwell shall be an independent contractor in relation to Caldwell.

10 ASSIGNMENT: Neither this Agreement nor any right hereunder shall be assignable by Caldwell or Destination Caldwell without the express prior written consent of the other party.

11 GOVERNING LAW: The validity of this Agreement, the construction of its terms, and the interpretation of the rights and duties of the parties shall be governed by the laws of the state of Idaho.

12 ENTIRE AGREEMENT: This instrument contains the entire agreement of the parties with respect to the subject matter hereof and supersedes and replaces any and all prior agreements or discussion, verbal or written, relating to the same or similar subject matter.

13 NOTICES: Any notice required or permitted herein to be given shall be in writing and shall be personally delivered or mailed, first-class postage prepaid to the party to be notified at such address as is customarily used by that party.

14 SEVERABILITY: Should any term or provision hereof be deemed invalid, void, or unenforceable either in its entirety or in a particular application, the remainder of this Agreement shall remain in full force and effect.

15 MODIFICATION: This is the complete agreement between the parties. This Agreement may be amended or modified at any time by the parties provided that the same is reduced to writing and signed by each party through appropriate corporate approval process. This Agreement may not be modified by any oral or informal communication.

16 **WAIVER:** No waiver of a breach or violation of any provision of this Agreement shall operate or be construed as a waiver of any subsequent breach. No delay in the enforcement of a breach or violation of any provision of this Agreement shall operate or be construed as a waiver of such breach or any subsequent breach.

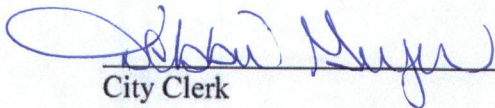
IN WITNESS WHEREOF, Caldwell and Destination Caldwell do execute this Agreement the day and year first above written.

THE CITY OF CALDWELL
an Idaho municipal corporation

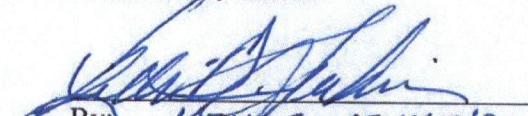


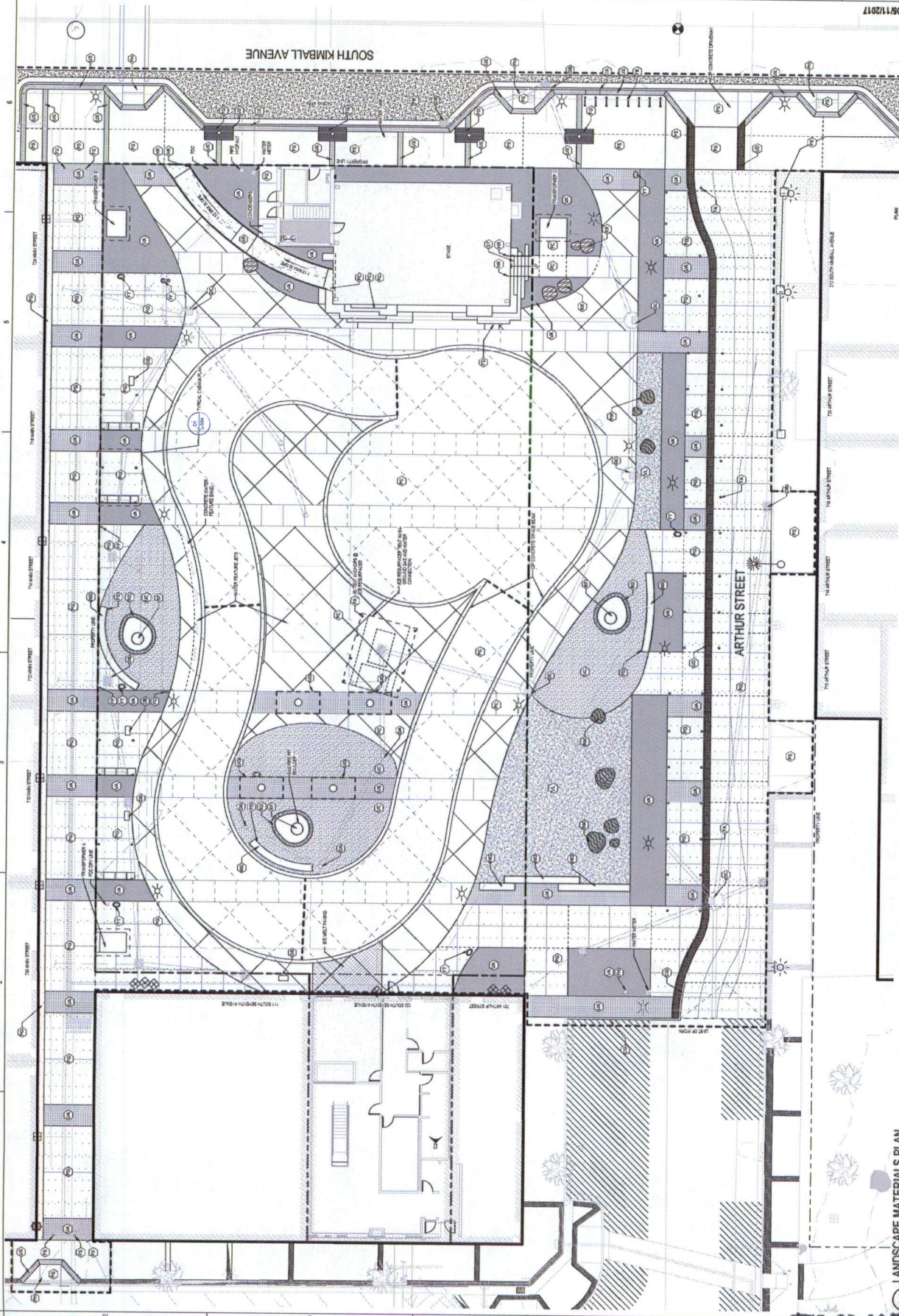
Garrett Nancolas
Mayor

Attest:


City Clerk

DESTINATION CALDWELL, INC.,
an Idaho corporation


By: KEITH G. JENKINS
Its: PRESIDENT

[illegible][illegible]

BUILDING PERMIT SUBMITTAL SET - 05/11/2017

EXHIBIT A

1 of 2

EXHIBIT A

LEGAL DESCRIPTION FOR PLAZA

A portion of the SW $\frac{1}{4}$ of Section 22, Township 4 North, Range 3 West, Boise Meridian, Canyon County, Idaho, being more particularly described as follows:

Lots 13-24 inclusive AND the alley adjacent to Lots 1-12, 13, 19-24, and 30 in Block 4 AND the right-of-way for Arthur Street immediately adjacent to and southwesterly of Lots 18-24 of Block 4 of Original Townsite of Caldwell, according to the official plat thereof, filed in Book 1 of Plats at Page(s) 20, official records of Canyon County, Idaho.

EXHIBIT A

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