

GRADING AND IMPROVEMENT AGREEMENT

This Agreement ("Agreement") is made and entered into this ____ day of _____, 2024 ("Effective Date"), by and between Middletown Apartments LP, a California Limited Partnership ("Developer") and the **City of Placerville**, a municipal corporation of the State of California ("City").

RECITALS

WHEREAS, Developer is vested with fee title to the parcel located in the City of Placerville, County of El Dorado, State of California, and intends to begin construction of certain public and private improvements prior to obtaining final approval of the improvement plans; and

WHEREAS, Developer has the need to perform grading operations in conformance with that certain Grading Plans entitled "Middletown Apartments Rough Grading Plans – Revision 1" (hereinafter called "Grading Plans") prepared by Phillipi Engineering Inc. and dated February 29, 2024, which includes construction of retaining walls and underground utility improvements (the "Grading Improvements"); and

WHEREAS, City requires a valid permit to perform any project grading improvements pursuant to Section 8-7-5 of the Grading Ordinance of the City of Placerville; and

WHEREAS, Developer has the need to construct certain improvements within the City Right of Way as part of the Grading Plans; and

WHEREAS, as a requirement of City Code Section 8-9-3, Developer is required to construct street frontage improvements in conformance with the plans entitled "Middletown Apartments Off-site Improvement Plans" (hereinafter called "Improvement Plans") prepared by Phillipi Engineering and dated January 23, 2024, which include curb, gutter, sidewalk, bike lanes, street paving, and street lighting on Middletown Road and Cold Springs Road (the "Frontage Improvements"); and

WHEREAS, the City Engineer has determined that the nature of the work proposed requires the Developer to execute a Grading and Improvement Agreement and to furnish financial security for the construction of the Grading Improvements before commencing or causing to be commenced any construction of project improvements included in the Grading Plans; and

WHEREAS, the City Engineer has determined that the nature of the work to construct the proposed Frontage Improvements will alter the existing street frontage in such a way that requires the Developer to execute a Grading and Improvement Agreement to furnish financial security for the construction of the Frontage Improvements before commencing or causing to be commenced any construction of project improvements included in the Grading Plans; and

NOW, THEREFORE, the parties hereto in consideration of the recitals, terms and conditions herein, do hereby agree as follows:

AGREEMENT

1. The Developer will make or cause to be made all or a portion of the Grading Improvements in the Grading Plans required by City Code and shown or described in the Grading Plans which were approved by the City of Placerville, and which are described in the cost estimates attached hereto as **Exhibit A**. The estimated cost of installing the Grading Improvements agreed to be performed herein is one million three hundred and eighty-five thousand and seven hundred dollars (\$1,385,700).

2. The Developer will install or cause to be installed the Frontage Improvements in accordance with the Improvement Plans, and described in the cost estimates attached hereto as **Exhibit A**. The estimated cost of installing the improvements agreed to be performed herein is two hundred and seventy-eight thousand five hundred and forty-nine dollars and fifth cents (\$278,549.50).

3. The Developer will complete the construction of said improvements on or before December 31, 2025.

4. The Developer will post security for the construction and maintenance of the improvements, including erosion control, as determined by the City Engineer, as follows:

4.1 Security for the cost to construct the improvements listed in Section 1, plus 20%, in an amount of one million six hundred and sixty-two thousand eight hundred and forty dollars (\$1,662,840).

4.2 Security for the cost to construct the improvements listed in Section 2, plus 20%, in an amount of three hundred and thirty-four thousand two hundred and fifty-nine dollars and forty cents (\$334,259.40).

4.3 Security to maintain on-site erosion control in the amount shall be one hundred thousand dollars (\$100,000).

5. Security.

5.1 Security Amount and Form. Developer shall furnish the City security concurrently with the execution of this Agreement in the total combined amount of \$2,079,099.40. The security shall be in the form of one or both of the following: (i) a performance bond under the terms set forth in Section 5.2 below; (ii) a cash deposit, either with the City or responsible escrow agent or trust company, at the option of the City, or (iii) an irrevocable letter of credit from one or more financial institutions regulated by the state or federal government pledging that the funds necessary to carry out the act or agreement are on deposit and guaranteed for payment and will only be released upon receipt of written instruction from the City, the form of which must be approved by the City.

5.2 Bond Surety Requirements.

5.2.1 Any bonds submitted as security pursuant to this Section shall be executed by a surety company authorized to transact a surety business in the State of California. All required securities shall be in a form approved by the City.

5.2.2 No change, alteration, or addition to the terms of this Agreement or the Grading Improvements and Frontage Improvements described herein shall in any manner affect the obligation of the sureties.

5.2.3 The securities shall be irrevocable, shall not be limited as to time and shall provide that they may be released, in whole or part, only upon the written approval of the City Manager. All securities provided pursuant to this Agreement shall expressly obligate the surety for any extension of time authorized by the City, whether or not the surety is given notice of such an extension by the City.

5.3 Release of Security. The security may be released sixty (60) days after the City's acceptance of the constructed improvements, the sufficiency of which is to be determined by the City in its sole discretion. City may expressly require the surety not to release the amount of security deemed necessary by City to assure payment of reasonable expenses and fees, including reasonable attorney's fees that may be due to the City. Acceptance of the constructed improvements will also require the following:

5.3.1 Developer will prepare as-built plans prepared by a licensed civil engineer and filed with the City Engineer as provided in section 8-7-40 of the City Code.

6. Defense, Indemnification and Hold Harmless. Developer shall protect, indemnify, hold harmless and defend, in any actions of law or in equity, City, its officers, employees, agents, and elective and appointive boards, from any and all claims, losses, damage, including property damage, personal injury, including death, and liability of every kind, nature and description, including attorney's fees and costs, directly or indirectly arising out of or in any way connected with performance under this Agreement by Developer, Developer's agents, consultants, contractor, or of any person directly or indirectly employed by, or acting as agent for Developer, or Developer's contractor or subcontractor, except where caused by the active negligence, sole negligence, or willful misconduct of the City. This indemnification shall extend to claims, losses, damage, injury and liability for injuries occurring before or after completion of the constructed improvements and shall apply regardless of whether or not the City accepted the Grading or Frontage Improvements. Acceptance of insurance certificates required under this Agreement does not relieve Developer from liability under this indemnity and hold harmless clause.

7. Developer Not Agent of City. Neither Developer nor any of Developer's agents, contractors, or subcontractors are or shall be considered to be agents of the City in connection with the performance of Developer's obligations under this Agreement.

8. Notice of Breach and Default.

8.1 Breach. If Developer fails to construct the improvements by the Recording Deadline, or Developer should be adjudged bankrupt, or Developer should make a general assignment for the benefit of Developer's creditors, or if a receiver should be appointed in the event of Developer's insolvency, or if Developer or any of Developer's contractors, agents or employees should violate any of the provisions of this Agreement, then Developer shall be deemed to be in breach of this Agreement.

8.2 Notice of Breach and Remedies. In the event Developer is in default, the City may thereafter deliver a notice of breach or failure of construction of the improvements to Developer and Developer's surety for payment of the bond or letter of credit amount to the City. If the form of security is other than a bond, then the City may proceed to collect against the security in the

manner provided by law and the terms of this Agreement and/or the security instrument. The City reserves to itself all remedies available to it at law or in equity for a breach of Developer's obligations under this Agreement. In addition to any other remedy the City may have, a breach of this Agreement by the Developer shall constitute consent to the filing by the City of a notice of violation against the Property. The City may then use any security proceeds to take over the work to complete the construction of the improvements and associated maintenance costs. This would be at the expense of the Developer, and Developer shall be liable to the City for any excess cost or damages incurred by the City.

9. Successors and Assigns -- Covenant Running With the Land. This Agreement shall inure to the benefit of, and be binding upon, the successors and assigns of the respective parties. A memorandum of this Agreement shall be recorded in the Office of the Recorder of El Dorado County, in the form attached as **Exhibit B**, attached hereto and incorporated herein (the "Memorandum"). This Agreement shall constitute a covenant running with the land and an equitable servitude upon the real property of the Project.

10. Assignment of Developer Obligations. Developer shall not assign this Agreement or any of its obligations under this Agreement without the prior written consent of the City, which shall be approved in the City's reasonable discretion upon the condition that the Developer and the assignee enter into an assignment and assumption agreement reasonable approved by the City. If Developer, as part of the assignment, requests that all or a portion of its security be released as part of the assignment, then the assignee shall replace the security in accordance with the terms of Section 2 above.

11. Notices. All notices required under this Agreement shall be in writing, and delivered in person or sent by overnight, registered or certified mail, postage prepaid. Notices required to be given to City shall be addressed as follows:

City of Placerville
3101 Center Street
Placerville, CA 95667
Attn: City Manager, Cleve Morris

Notices required to be given to Developer shall be addressed as follows:

Middletown Apartments LP

Attn: _____

Any party may change such address by notice in writing to the other party and thereafter notices shall be addressed and transmitted to the new address.

12. Waiver. The waiver by either party of a breach by the other of any provision of this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach of either the same or a different provision of this Agreement.

13. Attorney Fees. In the event any legal action is brought to enforce or interpret this Agreement, the prevailing party shall be entitled to an award of reasonable attorney fees, in addition to any other relief to which it may be entitled.

14. Approvals by City. Any approval or consent that is to be given by the City under this Agreement shall be in writing, and any approval or consent that is not in writing shall not be binding on the City.

15. Severability. The provisions of this Agreement are severable. If any portion of this Agreement is held invalid by a court of competent jurisdiction, the remainder of the Agreement shall remain in full force and effect unless amended or modified by mutual written consent of the parties.

16. Actions. Any action by any party to this Agreement, or any action concerning a security furnished pursuant thereto, shall be brought in the appropriate court of competent jurisdiction within the County of El Dorado, State of California, notwithstanding any other provision of law which may provide that such action may be brought in some other location. The law governing this Agreement is the law of the State of California.

17. Integration. This Agreement is an integrated agreement. It supersedes all prior negotiations, representations, or agreements, either written or oral.

18. Modification. This Agreement may be amended only by a written instrument signed by the parties. Developer shall bear all costs of amendments to this Agreement that are requested by the Developer.

19. Counterparts. This Agreement may be signed in one (1) or more counterparts, and will be effective when the parties have affixed their signatures to counterparts, at which time the counterparts together shall be deemed one (1) original document; provided, however, that all executed counterparts are provided to the City Clerk.

IN WITNESS WHEREOF, the parties hereto are executing this Agreement on the dates set forth below.

“CITY”

“DEVELOPER”

City of Placerville,
a municipal corporation

MIDDLETOWN APARTMENTS, LP
a limited partnership

By: _____
Name: **M. Cleve Morris**
Title: City Manager

By: _____
Name: _____
Title: _____

APPROVED AS TO FORM:

Mona Ebrahimi, City Attorney

EXHIBIT A

(Cost Estimates)

EXHIBIT B

(See attached Form of Memorandum of Agreement)

**No recording fee required pursuant to
Government Code Section 27383**

Recording Requested by and
When Recorded Return to:

City of Placerville
3101 Center Street
Placerville, CA 95667
Attn: City Clerk

SPACE ABOVE THIS LINE FOR RECORDER'S USE

MEMORANDUM OF AGREEMENT

This Memorandum of Agreement is made this ____ day of _____, 2024, by and between the **City of Placerville**, a California municipal corporation ("City") and **MIDDLETOWN APARTMENTS, LP**, a California limited partnership ("Developer"), collectively referred to as the "Parties."

City and Developer are Parties to that certain "Grading and Improvement Agreement" dated _____, 2024, the terms and conditions of which are made a part hereof as though fully set forth herein, and which Agreement controls the development of that certain real property, including any improvements and personal property, situated in the County of El Dorado, State of California, legally described as follows:

[See **Exhibit A**]

"CITY"

City of Placerville,
a municipal corporation,

By: _____
Name: **M. Cleve Morris**
Title: City Manager

"DEVELOPER"

MIDDLETOWN APARTMENTS, LP
a California limited partnership

By: _____
Name: _____
Title: _____

CERTIFICATE OF ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
)
County of _____)

On _____ before me, _____, Notary Public, personally appeared _____, who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
)
County of _____)

On _____ before me, _____, Notary Public, personally appeared _____, who 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.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)