

Exhibit N

MPD Funding Agreement

MPD Funding Agreement

This AGREEMENT (hereinafter “**MPD Funding Agreement**” or “**Agreement**”) is dated the ____ day of _____, 2011, and is entered into by and between BD Village Partners, LP (“**BD Village**”), a Washington limited partnership, BD Lawson Partners, LP, a Washington limited partnership (“**BD Lawson**”) (BD Lawson and BD Village are collectively referred to herein as the “**Developer**”), and the City of Black Diamond, a Washington municipal corporation (the “**City**”).

RECITALS

- A. WHEREAS, on June 29, 2007, the City, BD Village, and BD Lawson, LP entered into that certain City of Black Diamond Staff and Facilities Funding Agreement (the “**Staff and Facilities Funding Agreement**”) to provide funding for city staff, city consultants, related support facilities, equipment expenses, and legal costs; and
- B. WHEREAS, on April 16, 2009, the City, BD Village, and BD Lawson executed an amendment to that Staff and Facilities Funding Agreement (the “**First Amendment**”) that allowed for the funding of certain pre-approved economic development activities and increased the frequency of payments under the Staff and Facilities Funding Agreement in order to decrease the City’s working capital; and
- C. WHEREAS, BD Village has applied for and received approval from the City for The Villages Master Planned Development (the “**Villages MPD**”) pursuant to City of Black Diamond Ordinance No. 10-946 (the “**Villages MPD Approval**”); and
- D. WHEREAS, BD Lawson has also applied for and received approval from the City for the Lawson Hills Master Planned Development (the “**Lawson Hills MPD**”) pursuant to City of Black Diamond Ordinance No. 10-947 (the “**Lawson Hills MPD Approval**”); and
- E. WHEREAS, Condition of Approval 2 in Exhibit C of Ordinance No. 10-946 requires that a development agreement (“**The Villages Development Agreement**”) be executed between the City and BD Village before the City approves any subsequent implementing permits or approvals for the Villages MPD; and
- F. WHEREAS, Condition of Approval 156 in Exhibit C of Ordinance No. 10-946 requires that The Villages Development Agreement include a “specific ‘MPD Funding Agreement’ which shall replace the existing City of Black Diamond Staff and Facilities Funding Agreement; and
- G. WHEREAS, Ordinance No. 10-947 similarly requires that BD Lawson enter into a separate development agreement with the City (the “**Lawson Hills Development Agreement**”) and that such development agreement contain a new funding agreement to replace the existing Staff and Facilities Funding Agreement; and

- H. WHEREAS, BD Village, BD Lawson, and the City agree that executing a new tri-party MPD funding agreement satisfies Ordinances Nos. 10-946 and No-947; and
- I. WHEREAS, the City, BD Village and BD Lawson intend for this Agreement to replace and supersede the Staff and Facilities Funding Agreement and the First Amendment in their entireties; and
- J. WHEREAS, the City, BD Village and BD Lawson recognize that while the City currently does not have sufficient revenues to pay for the staff necessary to effectively and efficiently handle its current workload, the parties expect that the Villages MPD and Lawson Hills MPD will produce revenue for the City and, as a result, that the need for some portions of the funding under this MPD Funding Agreement will be reduced over time and ultimately eliminated; and
- K. WHEREAS, the City, BD Village and BD Lawson acknowledge that revenue from the Villages MPD and Lawson Hills MPD, including sales tax, real estate excise tax, utility taxes, franchise fees, business license revenues, increased property tax receipts associated with higher land value, and other revenues from any business or land use, as well as the BD Village's and BD Lawson's infrastructure obligations imposed by the Villages MPD Approval and Lawson Hills MPD Approval, respectively, are expected to be sufficient to maintain the Village MPD's and Lawson Hills MPD's proportionate share of the City's adopted staffing levels of service and capital facility needs; and
- L. WHEREAS, on an ongoing basis, the City, BD Village and BD Lawson agree to manage their operations in a fiscally responsible manner; and
- M. WHEREAS, the City, BD Village, and BD Lawson hereby agree that the purpose of this MPD Funding Agreement is to create an instrument to fund City staff as necessary to implement the Villages MPD and The Villages Development Agreement as well as the Lawson Hills MPD and the Lawson Hills Development Agreement; and
- N. WHEREAS, the City, BD Village and BD Lawson hereby also agree that the intent of this MPD Funding Agreement includes the following: (i) to create a mechanism to reduce the Developer's Total Funding Obligation (as defined below) by ultimately eliminating the Developer's funding of City Staffing Shortfalls (as defined below) and instead funding one hundred percent (100%) of such City staff with City revenue; (ii) to establish a hierarchy of City staff necessary to provide basic administrative services within the City and for sufficient City staff to implement the Villages MPD and Lawson Hills MPD, The Villages Development Agreement and Lawson Hills Development Agreement, and to review and process implementing development permits for the Villages MPD and Lawson Hills MPD; (iii) to ensure funding of City staff assigned to the Master Development Review Team ("MDRT") to be established as defined herein; (iv) to provide the ability for the City to use consultants for professional review support related to the Villages MPD's and Lawson Hills MPD's implementing development permits; (iv) to provide the ability for the City to be able to quickly adapt to differing levels of work associated with the Villages

MPD and Lawson Hills MPD without hiring permanent staff; and (vi) to allow efficient and consolidated review of implementing development permits for the Villages MPD under The Villages Development Agreement and City code as well as the Lawson Hills MPD under the Lawson Hills Development Agreement and City code; and

- O. WHEREAS, the City, BD Village and BD Lawson further agree that this MPD Funding Agreement is intended to cover three types of costs: (i) certain City staffing costs on an interim basis (i.e., City Staffing Shortfalls as defined below); (ii) MDRT Costs (as defined below); and (iii) any fiscal shortfalls created by the Villages MPD pursuant to Condition of Approval 156 of Ordinance No. 10-946 and the Lawson Hills MPD pursuant to Condition of Approval 160 of Ordinance No. 10-947 (defined hereinafter as “**City Fiscal Shortfalls**”).

NOW, THEREFORE, in consideration of the mutual agreements set forth herein and other valuable consideration, the receipt and sufficiency of which is hereby acknowledged, BD Village, BD Lawson and the City hereby agree as follows:

AGREEMENT

1. **Termination of Staff and Facilities Funding Agreement.** This MPD Funding Agreement replaces and supersedes the Staff and Facilities Funding Agreement and First Amendment as to all lands within the Villages MPD and Lawson Hills MPD as legally described in Exhibit A attached hereto and incorporated herein.
 - a. **Release of Existing Security.** As a result of the parties’ termination of the Staff and Facilities Funding Agreement, the City hereby agrees to execute of the release of the Staff and Facilities Funding Agreement’s existing security in the form attached hereto and incorporated herein as Exhibit B.
2. **City Staffing Funding Shortfalls.** Subject to the MDRT Costs provision of this Agreement, Developer commits to fund one hundred percent (100%) of the then-actual salary and benefit costs of the City staff positions listed on Exhibit C attached hereto and incorporated herein, less any amounts actually received by the City from another applicant for payment of such salary and benefit costs (the “**City Staffing Shortfalls**”). Developer’s funding obligation in this Section 2 is subject to the condition that all such salary and benefit costs be competitive with similar positions in the municipal community, as evidenced by reference to the Association of Washington Cities annual salary survey and similar documentation. In addition, Developer shall fund one hundred percent (100%) of the total furniture, fixture, and equipment costs (“**FFE**”) associated with the City staff positions identified on Exhibit C, less any amounts actually received by the City pursuant to a separate agreement with another applicant or otherwise for payment of such FFE; provided, Developer’s share of such FFE shall not exceed \$15,000 per month.

The City staff positions identified on Exhibit C may participate in processing implementing development permits for the Villages MPD and Lawson Hills MPD, and assist other staff who will process development applications submitted by the Developer and Third Parties. The parties acknowledge that the City will solely determine the method and manner of hiring and retaining the

City staff positions identified on Exhibit C, and will be solely responsible for all personnel decisions, including compensation amounts which shall be competitive with similar positions in the municipal community.

- a. **Reduction of City Staffing Shortfalls.** If the most recent Fiscal Analysis (as defined below) or Annual Review (as defined below), whichever is more current, projects a fiscal benefit for the City, then the City and Developer shall promptly meet and negotiate in good faith to determine whether and when the salary and benefit costs of one or more City staff positions identified on Exhibit C should be funded by the City. If so, then the City shall identify the appropriate City staff position to be removed from the Developer's Total Funding Obligation under this Agreement whether or not the Wind-Down timing threshold associated with such City staff position (identified in Section 2(c)) has been triggered.
- b. **Voluntary Agreement.** The parties acknowledge that the Developer's commitment to fund City Staffing Shortfalls is a voluntary agreement into which the Developer freely enters pursuant to state law.
- c. **Wind-Down and Wind-Up.** In recognition that: a) the Villages MPD and Lawson Hills MPD build-out may fluctuate to follow market demands; and b) the voluntary nature of the Developer's City Staffing Shortfalls funding obligation, BD Village or BD Lawson may provide notice to the City of Wind-Downs and Wind-Ups of certain City staff positions outlined in Exhibit C.
 - i. Wind-Down Notices shall be delivered to the City and shall state that BD Village and/or BD Lawson intends on a date certain to cease paying for certain City Staffing Shortfall positions. In order to be effective, a Wind-Down Notice must comply with the following provisions:
 - ii. No Wind-Down Notice may be delivered to the City or otherwise be effective during the first twelve months following the Effective Date of this Agreement. Thereafter, the date certain required to be identified in a Wind-Down Notice may not be sooner than six months after delivery of the Wind-Down Notice to the City.
 - iii. During months 13 through 18 following the Effective Date, only Support Staff positions identified on Exhibit C may be subject to a Wind-Down Notice from BD Village or BD Lawson.
 - iv. During months 19 through 24 following the Effective Date, some or all Support Staff positions and/or Essential Staff positions identified on Exhibit C may be subject to a Wind-Down Notice from BD Village or BD Lawson. This notice may require Wind-Down of the identified Support Staff and Essential Staff simultaneously.

- v. After month 25 following the Effective Date, Support Staff, Essential Staff, and/or Core Staff positions may be subject to a Wind-Down Notice from BD Village or BD Lawson, which Notice may require wind-down of identified City staff simultaneously.
- vi. Upon receipt of a Wind-Down Notice and compliance by BD Villages or BD Lawson as appropriate with the above criteria, the City shall thereafter be responsible to determine whether it wants to continue funding the subject staff position(s). Wind-down shall include both the staff position and any related FFE costs.
- vii. Wind-Up Notices shall state that BD Village and/or BD Lawson intends to re-initiate payment of certain City Staffing Shortfall costs and request the rehiring of certain City staff or consultant positions.
- viii. If no Core Staff position has received a Wind-Down Notice pursuant to subsection (c) above, then City shall complete the hiring of City staff or consultants positions identified in the Wind-Up Notice within six (6) months after receipt of the Notice. In the event the Wind-Up Notice requests Essential Staff or Support Staff, then City shall complete the hiring of the staff and consultants positions identified in the Notice within nine (9) months after receipt of the Notice unless otherwise agreed to by the Developer.
- ix. If any Core Staff position has received a Wind-Down Notice pursuant to subsection (c) above, then City shall complete the hiring of staff or consultants positions identified in a Wind-Up Notice within twelve (12) months after receipt of the Wind-Up Notice unless otherwise agreed to by the Developer. In such circumstances, Developer may request rehire of Core Staff positions only or may request Core Staff positions plus Essential Staff positions and/or Support Staff positions.

3. **Master Development Review Team.** The primary function of the MDRT is to process, review, and implement development permits and development agreements of the Villages MPD and the Lawson Hills MPD. The MDRT shall become effective upon approval of The Villages or Lawson Hills Development Agreement, provided that if an additional staff member or consultant has not yet been hired, the City agrees to review and process implementing development permits using City staff funded pursuant to the City Staffing Funding Shortfalls section outlined above.

- a. **MDRT Composition.** The MDRT shall initially be comprised of the following current positions, or their functional equivalent: (i) City's Economic Development Director; (ii) the City's Community Development Director; (iii) the City's MPD planner; (iv) a new City administrative support position; (v) necessary consultants as determined in the City's sole, reasonable discretion after consultation with the Developer; and (vi) additional City staff as identified by the Developer through the Annual Review described in Section 6. The MDRT composition may be modified by mutual agreement of the

parties. In recognition of the advantage of both parties of ensuring continuity through the review and processing of implementing development permits, the City may choose to offer multiyear employment contracts to some or all members of the MDRT; provided, however, that such contracts shall not increase Developer's Total Funding Obligation nor impair Developer's ability to exercise its rights pursuant to Section 2(c) ("Wind-Down and Wind-Up") as set forth herein.

- i. For purposes of this Agreement, consultants include, but are not limited to, professional engineering firms, planning and transportation firms, and the City Attorney (which, for purposes of this Agreement, includes any attorney or professional staff in the City Attorney's law firm) and other legal consultants when performing services related to The Villages MPD and Lawson Hills MPD.
- b. **MDRT Costs.** The Developer shall fund one hundred percent (100%) of the costs of the MDRT by paying: (i) the salary and benefit costs of City Staff MDRT members identified in Section 3(a), less any amounts actually received by the City from others pursuant to Section 2; (ii) the actual amounts invoiced by consultants; and (iii) the FFE associated with such City Staff MDRT members (the "**MDRT Costs**"). MDRT Costs shall also initially include the purchase of three (3) vehicles exclusively for the MDRT – two (2) pool vehicles and one (1) inspection vehicle – the costs of which shall not exceed \$125,000.00 in total. In determining such vehicle purchases, the City shall consider the purchase of hybrid or similar "green" vehicles. Thereafter, the MDRT's FFE shall include all costs associated with the ongoing expense and maintenance of these three (3) vehicles.
 - i. **MDRT Cost Allocation.** The City shall allocate MDRT Costs to BD Village and BD Lawson on a proportionate share basis based on time spent.
- c. **Reduction or Elimination of MDRT Costs.** In recognition that the Villages MPD and Lawson Hills MPD build-out may fluctuate to follow market demands, the Parties acknowledge and agree that BD Village and/or BD Lawson may elect to reduce, or eliminate, MDRT staffing during the Annual Review described in Section 6. If, during Annual Review, BD Village and/or BD Lawson elect to cease paying all MDRT Costs for a given calendar year, the City's obligations under this Section 3 shall also cease for such calendar year.
- d. **City Fee Provision.** In consideration for the Developer's funding of the MDRT and paying the MDRT Costs, the City shall not collect permit or administrative fees or deposits otherwise applicable to implementing project permits sought for the Villages MPD or the Lawson Hills MPD, except for: (i) fees or other charges as required by this Agreement, (ii) fees associated with building permits provided building staff is not included within the MDRT, and (iii) pass-through fees collected by the City for another jurisdiction or entity (e.g., State of Washington building permit surcharge); provided, however, that this subsection 3(d) shall be void and Developer shall be fully responsible for all permit and administrative fees or deposits otherwise applicable to implementing

project permits sought for the Villages MPD, the Lawson Hills MPD, and any other property within the City if BD Village or BD Lawson elects to cease paying all MDRT Costs pursuant to Section 3(c).

4. **City Fiscal Shortfalls**. The Developer shall prepare and submit to the City the fiscal analysis in the manner prescribed by Condition of Approval 156 of City of Black Diamond Ordinance No. 10-946 and Section 13.6 of The Villages Development Agreement (the “**Village Fiscal Analysis**”), and by Condition of Approval 160 of City of Black Diamond Ordinance No. 10-947 and Section 13.6 of the Lawson Hills Development Agreement (the “**Lawson Fiscal Analysis**”) (collectively the “**Fiscal Analysis**”).

- a. **Fiscal Impact**. If the Fiscal Analysis projects a deficit in City revenue required to fund necessary service and maintenance costs (staff and equipment) of facilities that are required to be constructed as a condition of the Villages or Lawson Hills MPD Approvals or any related implementing development permits (the “**City Fiscal Shortfalls**”), then the City, after consultation with Developer, shall determine in its sole reasonable discretion the staff, facilities, and/or equipment necessary for Developer to provide at its sole expense in order to satisfy the interim funding obligations required by the MPD Approvals. To the extent that Developer disagrees with the City’s decision regarding the City Fiscal Shortfalls, Developer may pay any disputed amounts or otherwise comply under protest. Developer shall retain the right to utilize the Dispute Resolution process set forth in Section 24. The potential limitation on the use of interim funding set forth in Condition of Approval 156 of City of Black Diamond Ordinance No. 10-946 and Condition of Approval 160 of City of Black Diamond Ordinance No. 10-947 regarding the Fiscal Analysis prepared and submitted to the City prior to the commencement of Phase III shall remain fully applicable. In such case, and prior to City approval of any implementing development permits for projects in Phase III, the City and Developer agree to promptly negotiate in good faith solutions to cure the Phase III fiscal deficit. The City shall not approve any implementing development permits for projects in Phase III before agreement is actually reached in writing on solutions to cure the Phase III fiscal deficit.
5. **Developer’s Total Funding Obligation**. The Developer’s total funding obligation under this Agreement shall be the sum of the City Staffing Shortfalls plus the MDRT Costs plus the City Fiscal Shortfalls, if any (hereinafter “**Total Funding Obligation**”), less any duplication in Developer’s payment obligation among those three funding categories.
6. **Annual Review**. Prior to September 20th of each calendar year or on a date mutually agreed to by the City and Developer, the City and Developer shall conduct an annual review with members of the MDRT (the “**Annual Review**”). The Annual Review shall include, but not be limited to, a review of each of the following items:
- a. Work completed by the MDRT during the prior year including the length of implementing development permit review timeframes and processes;

- b. MDRT costs incurred during the prior year and during the term of this Agreement;
- c. Extent of work the Developer expects to submit to the City during the next calendar year;
- d. MDRT staffing levels needed for the next calendar year commencing in January to perform the work projected by the Developer;
- e. Consultants necessary to provide review support and the rate schedule of consultants on the City's MDRT roster;
- f. The prior year's Quarterly Accountings;
- g. Necessary FFE to support MDRT members for the following calendar year;
- h. Fiscal performance of the City as related to the most recent Fiscal Analysis submitted by the Developer. The City and Developer shall review the City's projected budget amounts to determine which, if any, City staff identified on Exhibit C may be removed from the Developer's Total Funding Obligation established by this Agreement and funded by the City; and
- i. In the event of: (i) a full Wind-Down of Support Staff, Essential Staff, and Core Staff positions by BD Village and/or BD Lawson; or (ii) a decision by BD Village and/or BD Lawson to cease operations of the MDRT for a calendar year, the City shall exercise its best efforts to organize and make available to Developer at Developer's cost copies of all public records related to the affected MPD or MPDs, and to summarize any open MDRT items.

Provided, however, the first Annual Review to be completed by the City and Developer by September 20, 2011 (or a date mutually agreed to by the City and Developer), shall only review the above items from the Execution Date to the date of the Annual Review itself. During each Annual Review and based upon the above items, the City and Developer shall mutually agree in writing to at least the following items: (i) an annual budget for MDRT Costs for the following calendar year to be included in the Monthly Fixed Amount (as defined below); (ii) a MDRT staffing and work plan/program for the following calendar year; and (iii) any other items required by this Agreement or The Villages Development Agreement or Lawson Hills Development Agreement.

7. **Payment Procedure.**

- a. **Monthly Fixed Amount.** During Annual Review, City and Developer shall mutually agree to and determine a monthly fixed amount that the Developer shall deposit with the City by the first (1st) day of each month to cover one-twelfth of the Developer's Total Funding Obligation for that given year (the "**Monthly Fixed Amount**"). Such Monthly Fixed Amount is subject to modification between Annual Reviews upon mutual written agreement of the parties.
- b. **Consultant Deposit.** Within forty-five (45) days of the Effective Date, Developer shall provide to the City funds in the amount of fifty thousand dollars (\$50,000.00) (the

“**Consultant Deposit**”) as a security deposit for ongoing consulting fees and costs incurred under the MDRT for the Villages MPD and/or Lawson Hills MPD implementing development permit review and processing. The City shall invoice the Developer monthly for actual consulting costs paid, which Developer shall pay in the normal course of business. If Developer fails to pay any such invoices within forty-five (45) days, City shall be entitled to deduct the full amount of any such invoices from the security deposit referenced above. In such event, Developer shall replenish the full amount deducted from the security deposit within ten (10) days. The City shall place the Consultant Deposit in an interest bearing account. The City shall relinquish the Consultant Deposit and any accrued interest to the Developer by the later of thirty (30) days after terminating this Agreement or thirty (30) days after payment of all Consultant invoices for services performed prior to the effective date of a Wind-Down Notice from the Developer for all consultants. The amount of funds to be retained as a Consultant Deposit shall be reviewed by the parties during the Annual Review.

- c. **Quarterly Accounting.** Within fifteen (15) days after the last day of each calendar quarter, the City shall provide BD Village and BD Lawson with an accounting for the previous quarter (the “**Quarterly Accounting**”). This Quarterly Accounting shall include actual monthly costs of City staff positions included within the Developer’s Total Funding Obligation as well as any credits due under the Non-MPD Related Credit Procedure (Section 8) from the previous calendar quarter. In addition, the Quarterly Accounting shall include reports with descriptions for each MDRT member (including City staff and consultants) depicting the amount of time that each MDRT member allocated to MDRT activities during the previous quarter. Any refund or additional amount due shall be invoiced to the Developer, which shall either reduce the next Monthly Fixed Amount due from the Developer or the Developer shall promptly pay the additional amount due with the next Monthly Fixed Amount due within forty-five (45) days. If the Quarterly Accounting shows a deviation of greater than ten (10) percent between actual monthly costs and the Monthly Fixed Amount, the City and Developer shall promptly meet to discuss in good faith whether the Monthly Fixed amount should be adjusted upward or downward for the remainder of the applicable calendar year.
- d. **Third Party Payment.** If a Third Party submits to the City a Villages MPD-related implementing development permit application (e.g., building permits) or Lawson Hills MPD-related implementing development permit application that is reviewed by the MDRT, the City shall invoice directly the Third Party for the MDRT’s costs of such review on a monthly basis together with such Third Party’s proportionate share of any MDRT Costs described in Section 3(b) above. Each quarter, the City shall deduct the total payments received from such Third Parties from the Developer’s Monthly Fixed Amount. The City shall exercise its best efforts to identify separately in the Quarterly Accounting the deductions associated with Village MPD-related implementing development permit applications and the deductions associated with Lawson Hills MPD-related implementing development permit applications.

8. **Non-MPD Related Credit Procedure.** As part of the Quarterly Accounting, the City shall account for any non-Villages MPD and non-Lawson Hills MPD related permit revenue over five hundred dollars (\$500.00) that was received by the City as a result of City staff positions listed on Exhibit C. The Quarterly Accounting shall show the City providing the Developer a credit towards the following month's Monthly Fixed Amount by that amount of non-Villages MPD and non-Lawson Hills MPD related permit revenue received by the City, provided City staff positions funded by this Agreement worked on that non-Villages MPD and non-Lawson Hills MPD permit.
9. **Building Permit Surcharge.** As anticipated in the Staff and Facilities Funding Agreement, but only to the extent permitted by law or other agreement between Developer and its purchasers and only then if the City Council adopts a resolution, the City hereby agrees to apply a per dwelling unit or equivalent fee on each future building permit issued within the Villages MPD and the Lawson Hills MPD. This fee is intended to recapture the costs incurred by the Developer under the Staff and Facilities Funding Agreement (the "**Surcharge**"), and shall only be assessed on building permits for new construction within The Villages MPD or the Lawson Hills MPD. Remodels, tenant improvements, or reconstruction due to fire damage or other catastrophe shall not be assessed the Surcharge. This Surcharge shall also not apply to Public Uses as defined in The Villages Development Agreement or Lawson Hills Development Agreement.
 - a. **Surcharge Calculation.** The Surcharge for the Villages MPD (the "**Village Surcharge**") shall be calculated based on the costs incurred by BD Village from execution date of the Staff and Facilities Funding Agreement to the execution date of The Villages Development Agreement divided by the number of dwelling units or an equivalent thereof. BD Village shall determine the unit number to be included within the calculation of the Village Surcharge prior to the City's issuance of the first building permit for the Villages MPD. As part of the Annual Review, BD Village may request to modify how the Village Surcharge is assessed, such as removing commercial development from the Village Surcharge. The Surcharge for the Lawson Hills MPD (the "**Lawson Surcharge**") shall be calculated based on the costs incurred by BD Lawson from execution date of the Staff and Facilities Funding Agreement to the execution date of the Lawson Hills Development Agreement divided by the number of dwelling units or an equivalent thereof. BD Lawson shall determine the unit number to be included within the calculation of the Lawson Surcharge prior to the City's issuance of the first building permit for the Lawson Hills MPD. As part of the Annual Review, BD Lawson may request to modify how the Lawson Surcharge is assessed, such as removing commercial development from the Lawson Surcharge
 - b. **Surcharge Accounting.** Within sixty (60) days following execution of The Villages Development Agreement or the Lawson Hills Development Agreement, the City shall provide BD Village or BD Lawson, respectively, with an accounting of all costs incurred by such party under the Staff and Facilities Funding Agreement and the First Amendment. Within thirty (30) days of receipt of the City's accounting, BD Village or BD Lawson shall review the cost figures and provide the City with the fee structure for the Village Surcharge or Lawson Surcharge, respectively, based on this final cost.

- c. **Surcharge Collection.** The City will collect the Village Surcharge and Lawson Surcharge for BD Village and BD Lawson, respectively, at the issuance of each building permit within the Villages MPD and Lawson Hills MPD, as applicable. As a part of the Quarterly Accounting, the City shall provide an accounting to BD Village and BD Lawson of the Village and Lawson Surcharges collected and the amount due to the BD Village and BD Lawson, respectively. The City shall issue a check in this amount to BD Village and BD Lawson within thirty (30) days of the Quarterly Accounting's issuance.
- d. **Surcharge Indemnity.** BD Village shall indemnify, defend and hold harmless the City, its officers, officials, and employees from and against any and all claims, losses, damages, liabilities, actions, and judgments of third parties (including reasonable attorney and expert witness fees) arising out of, relating to, resulting from, or caused by the City's application of the Village Surcharge to the Villages MPD building permits. Similarly, BD Lawson shall indemnify, defend and hold harmless the City, its officers, officials, and employees from and against any and all claims, losses, damages, liabilities, actions, and judgments of third parties (including reasonable attorney and expert witness fees) arising out of, relating to, resulting from, or caused by the City's application of the Lawson Surcharge to the Lawson Hills MPD building permits.

10. Security. Security shall be provided by the Developer to the City to assure that, in the event of Developer's default, the City Staffing Shortfalls and MDRT Costs provided under this Agreement are timely paid to the City.

- a. **Security Schedule.** The Developer shall provide security as follows:
 - i. Commencing on the Effective Date and until December 31, 2011, collectively BD Village and BD Lawson shall provide security of three million dollars (\$3,000,000.00). To meet this obligation, BD Village and BD Lawson shall collectively provide to the City a letter of credit in a form reasonably acceptable to the City evidencing cash or other liquid assets in the minimum amount of two million dollars (\$2,000,000.00). BD Village shall also provide a first position deed of trust to the City on King County Parcel Nos. 0221069024, 0221069030, and 1121069006 of at least one million dollars (\$1,000,000.00) no later than the Effective Date (the "**Deed of Trust**") in the form attached hereto as Exhibit D.
 - ii. For the calendar year 2012, following the Annual Review in year 2011 and until December 31, 2013, BD Village and BD Lawson collectively shall provide a letter of credit to the City totaling 125% of its projected annual City Staffing Shortfalls and MDRT Costs less consultant costs. The City shall automatically release the Deed of Trust when this letter of credit is renewed on December 31, 2011.
 - iii. Thereafter, the City and Developer shall negotiate renewed and extended security in an amount equal to at least 100% of the projected annual City Staffing Shortfalls and MDRT Costs less consultant costs up to a maximum of two

million dollars (\$2,000,000.00), after consideration of the extent of development completed at that time.

- b. **Security Termination.** The Developer's obligation to provide security shall automatically terminate with termination of this Agreement.

11. **Definitions.** Previously undefined capitalized terms used throughout this Agreement shall be defined as follows:

- a. **Support Staff:** Those positions identified on Exhibit C.
- b. **Essential Staff:** Those positions identified on Exhibit C.
- c. **Core Staff:** Those positions identified on Exhibit C.
- d. **Third Party:** Any party other than BD Village or BD Lawson submitting permit applications for development within the Villages MPD or the Lawson Hills MPD.
- e. **MPD:** Master Planned Development.
- f. **Phase:** The Villages MPD and the Lawson Hills MPD are collectively planned in four Phases: Phase 1A, Phase 1B, Phase 2, and Phase 3. The land areas for each Phase, together with infrastructure plans for each Phase, are shown in Chapter 9 of The Villages Master Planned Development Application dated December 31, 2009 and Chapter 9 of the Lawson Hills Master Planned Development Application dated December 31, 2009.
- g. **Non-Villages MPD and Non-Lawson Hills MPD related permit revenue:** Fees generated by permit applications for development not located within the Villages MPD or the Lawson Hills MPD.

12. **Term.**

- a. **Effective Date.** This Agreement shall take effect upon the date of full execution, which shall be consistent with the date of execution by the last of the parties, as provided in the signature blocks at the end of this Agreement.
- b. **Termination Date.** This MPD Funding Agreement shall terminate upon the later of: (i) the Villages MPD build-out is complete or expiration or revocation of the Villages MPD Approval; or (ii) Lawson Hills MPD build-out is complete or expiration or revocation of the Lawson Hills MPD Approval.

13. **Amendments.** The City or Developer may request changes to this MPD Funding Agreement. Proposed changes that are mutually agreed upon by all parties will be incorporated by mutually executed written agreement.

14. **Notices.** Any notice or other communication to any party given under this Agreement will be effective only if in writing and delivered (1) personally, (2) by certified mail, return receipt requested and

postage prepaid, (3) by facsimile transmission with written evidence confirming receipt, or (4) by overnight courier (such as UPS, FedEx, or Airborne Express) to the following addresses:

If to BD Village:

BD Village Partners, LP
10220 NE Points Drive, Suite 310
Kirkland, WA 98033
Attn: Brian Ross
Fax: 425-898-2139

With Copy to:

Cairncross & Hempelmann
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Attn: Nancy Rogers
Fax: 206-587-2308

If to BD Lawson:

BD Lawson Partners, LP
10220 NE Points Drive, Suite 310
Kirkland, WA 98033
Attn: Brian Ross
Fax: 425-898-2139

With Copy to:

Cairncross & Hempelmann
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
Attn: Nancy Rogers
Fax: 206-587-2308

To the City:

City of Black Diamond
P.O. Box 599
Black Diamond, WA 98010
Attn: Mayor
Fax: 360-886-2592

With Copy to:

Michael R. Kenyon
Kenyon Disend, PLLC
11 Front Street South
Issaquah, Washington 98027
Fax: 425-392-7071

The addresses and facsimiles to which notice is to be given may be changed by written notice given in the manner specified in this Section 14 and actually received by the addressee.

15. **Attorney's Fees and Expenses.** In the event that any party requires the services of an attorney in connection with the dispute resolution process outlined in Section 24 of this Agreement, the substantially prevailing party shall be entitled to recover its reasonable attorney, expert witness, and paralegal fees, together with costs, expenses, and arbitration costs.

16. **Successors and Assigns/Binding Effect.** This Agreement shall bind and inure to the benefit of the parties and their respective receivers, trustees, insurers, successors, subrogees, transferees, and assigns. BD Village or BD Lawson shall have the right to assign its obligations under this Agreement as the master developer of the Villages MPD and the master developer of the Lawson Hills MPD, respectively, provided BD Village or BD Lawson gives the City thirty (30) days prior written notice of such assignment and successor/assignee provides evidence of its ability to meet the security obligation outlined in Section 10.

17. **Choice of Law.** This Agreement shall be construed and governed by the laws of Washington State. Any legal proceeding to enforce the terms of this Agreement shall be in King County, Washington.

18. **Execution in Counterparts.** This Agreement may be executed in one or more counterparts and as executed shall constitute one Agreement, binding on all parties, notwithstanding that all parties are not signatory to the same counterpart.

19. **Severability; Captions.** In the event that any clause or provision of this Agreement should be held to be void, voidable, illegal, or unenforceable, the remaining portions of this Agreement shall remain in full force and effect. In lieu of each clause or provision that is determined to be void, voidable, illegal, or unenforceable, there shall be added as a part of this Agreement a similar clause or provision as similar as possible that is legal, valid, and enforceable. Headings or captions in this Agreement are added as a matter of convenience only and in no way define, limit or otherwise affect the construction or interpretation of this Agreement.

20. **Interpretation.** This Agreement shall be given a fair and reasonable interpretation of the words contained in it without any weight being given to whether a provision was drafted by one party or its counsel. The parties hereby acknowledge that this Agreement has been reached as a result of arm's length negotiations with each party represented by counsel. No presumption shall arise as a result of one party or the other having drafted all or any portion of this Agreement.

21. **Entire Agreement.** This Agreement contains all of the terms, promises, conditions and representations made or entered into by and between the parties, supersedes all prior discussions, agreements and memos, whether written or oral between the parties, and constitutes the entire understanding of the parties and shall be subject to modification or change only in writing and signed by all parties. Waiver of any default will not be deemed to be a waiver of any subsequent default. Waiver or

breach of any provision of the Agreement will not be deemed to be a waiver of any other or subsequent breach and will not be construed to be a modification of the terms of this Agreement.

22. **Time of the Essence**. Time is of the essence with respect to the performance of every covenant and condition of this Agreement.

23. **Authority**. Each party represents and warrants to the other party that it has full power and authority to make this Agreement and to perform its obligations hereunder and that the person signing this Agreement on its behalf has the authority to sign and to bind that party.

24. **Dispute Resolution**. If a conflict arises under this Agreement, the Parties shall have the right to file a lawsuit to enforce the rights and obligations hereunder and/or to enter into nonbinding mediation pursuant to RCW 7.07, the Uniform Mediation Act. Either Party may initiate mediation by serving a request on the other Party. If either Party files a lawsuit, and mediation has not yet been initiated, then the other Party shall have the right to require the filing Party to enter into nonbinding mediation by serving the filing Party with a notice of mediation within ten (10) days after a complaint is filed. In any case, the mediation shall be scheduled for the earliest date possible, but in no event later than forty-two (42) days before the deadline for filing dispositive motions or a motion for a permanent injunction pursuant to the court's scheduling order.

[Signatures appear on following page]

IN WITNESS WHEREOF, the parties have executed this MPD Funding Agreement.

BD VILLAGE PARTNERS, LP

By: Yarrow Bay Development, LLC, its general partner

By: BRNW, Inc., its member

By: _____
Brian Ross, President

Date: _____

BD LAWSON PARTNERS, LP

By: Yarrow Bay Development, LLC, its general partner

By: BRNW, Inc., its member

By: _____
Brian Ross, President

Date: _____

CITY OF BLACK DIAMOND

Rebecca Olness, Mayor

Date: _____

Attest:

City Clerk

EXHIBIT A

The Villages MPD and Lawson Hills MPD Legal Description

EXHIBIT B

SECURITY RELEASE

REQUEST FOR RECONVEYANCE

To: Stewart Title Company
18000 International Blvd. South, Suite 510
Seattle, Washington 98188

The undersigned "Beneficiary" is the legal owner and holder of the right to payment under that certain City of Black Diamond Staff and Facilities Funding Agreement dated June 29, 2007 (the "Agreement") secured by that certain Deed of Trust dated as of June 29, 2007 (the "Deed of Trust") in which BD Village Partners, LP, a Washington limited partnership, is the "Grantor" and Stewart Title Company is the "Trustee," filed for record on April 8, 2008 under recording number 20080408000669 in the real property records of King County, Washington.

You are requested and directed to reconvey, without warranty, to the Grantor described in the Deed of Trust the right, title and interest now held by you as Trustee under the Deed of Trust in and to the real property covered by the Deed of Trust. The Agreement has been terminated in full and replaced in its entirety with that certain MPD Funding Agreement dated _____, 2011 between Beneficiary and Grantor.

Dated: _____, 2011.

CITY OF BLACK DIAMOND, a

Washington municipal corporation

By _____

Name _____

Title _____

EXHIBIT C

CITY STAFF POSITIONS & DESIGNATIONS

CORE STAFF

- Asst. City Administrator/City Clerk
- Community Development Director
- Economic Development Director
- Associate Planner (MPD Planner)

ESSENTIAL STAFF

- Public Works Director
- Stewardship Director
- Finance Director
- Permit Technician Supervisor

SUPPORT STAFF

- Deputy Finance Director
- Public Works Administrative Asst.
- IS Manager
- Facilities Coordinator
- Code Enforcement/Building Inspector

EXHIBIT D

DEED OF TRUST

WHEN RECORDED RETURN TO:

**Aleana W. Harris
Alston, Courtnage & Bassetti LLP
1000 Second Avenue, Suite 3900
Seattle, Washington 98104-1045**

Document Title: DEED OF TRUST

Grantor: BD Village Partners, LP

Grantee: City of Black Diamond

Legal Description:

Abbreviated Legal Description: Ptn. Sec. 2, T 21 N, R 6 E, W.M., King
County, Washington

Full Legal Description: See Exhibit A attached

Assessor's Tax Parcel No.: 022106-9030, 112106-9006, 022106-9024

Reference Nos. of Documents Released or Assigned: N/A

DEED OF TRUST

This Deed of Trust ("Deed of Trust"), made this ____ day of April, 2011 between BD Village Partners, LP ("Grantor"), whose address is _____; Stewart Title Company ("Trustee"), whose address is 18000 International Blvd. South, Suite 510, Seattle, Washington; and City of Black Diamond, a Washington municipal corporation ("Beneficiary"), whose address is _____.

WITNESSETH:

Grantor hereby sells and conveys to Trustee in trust, with power of sale, the real property known as Assessor's Parcel Numbers 1121069006, 0221069030, and 0221069024 in King County, Washington, which is legally described on attached Exhibit A, together with all the tenements, hereditaments and appurtenances now or hereafter thereunto belonging or in any ways appertaining, and the rents, issues and profits thereof (the "Property"). The Property is not used principally for agricultural or farming purposes.

This Deed of Trust is for the purpose of securing performance of each agreement of Grantor herein contained, and Grantor's obligation to make certain payments (as described in that certain MPD Funding Agreement dated _____, 2011 as set forth in the Agreement between Grantor and Beneficiary (the "Agreement")). Beneficiary and Grantor agree and acknowledge that this Deed of Trust is secondary security for Grantor's payment obligations in the Agreement behind a letter of credit in the amount of Two Million and No/100 Dollars (\$2,000,000.00) posted by Grantor for the benefit of Beneficiary, as described in the Agreement. Notwithstanding anything herein to the contrary, Grantor and Beneficiary agree that in the event of a foreclosure sale under this Deed of Trust, any foreclosure proceeds (net of sale costs) in excess of One Million and No/100 Dollars (\$1,000,000.00) will be immediately delivered to Grantor by Trustee.

To protect the security of this Deed of Trust, Grantor covenants and agrees as follows:

1. To keep the Property in good condition and repair and to permit no waste thereof; and to comply with all laws, ordinances, regulations, covenants, conditions, and restrictions affecting the Property. Nothing herein will be interpreted as prohibiting or limiting Grantor's right to develop the Property.
2. To pay before delinquent all lawful taxes and assessments upon the Property; and to keep the Property free and clear of all other charges, liens, or encumbrances impairing the security of this Deed of Trust.
3. To defend any action or proceeding purporting to affect the security hereof or the rights or powers of Beneficiary or Trustee, and to pay all costs and expenses, including costs of a title search and attorney's fees in a reasonable amount, in any such action or proceeding, and in any suit brought by Beneficiary to foreclose this Deed of Trust. The parties agree that in the event Beneficiary is required to enforce this Deed of Trust, Beneficiary shall be entitled to its actual reasonable attorney's fees, costs and expenses incurred for the following purposes: any efforts to collect upon the underlying obligation or realize upon any security interest granted by Grantor; the prosecution of any collection proceeding, including actions commenced in litigation, arbitration or any other dispute resolution forum; any efforts to

preserve the Beneficiary's rights to payment or to the underlying collateral in any bankruptcy or other insolvency proceeding (including efforts to monitor or participate in such proceedings); and to any actions of Beneficiary to enforce any judgment, or to execute upon any deficiency judgment or judgment lien. Grantor and Beneficiary agree that any such judgment lien upon the Property of Grantor, now existing or hereafter acquired, shall be in an amount of no less than the cumulative total of Beneficiary's judgment, post-judgment interest, collection costs, reasonable attorney's fees and other related expenditures incurred by Beneficiary.

4. To pay all costs, fees, and expenses in connection with this Deed of Trust, including the expenses of the Trustee incurred in enforcing the obligation secured hereby and Trustee's and attorney's fees actually incurred, as provided by statute.

5. Should Grantor fail to pay when due any taxes, assessments or other charges against the Property hereinabove described, Beneficiary may pay the same, and the amount so paid, with interest at the rate of 8%, shall be added to and become a part of the debt secured in this Deed of Trust.

IT IS MUTUALLY AGREED THAT:

1. In the event any portion of the Property is taken or damaged in an eminent domain proceeding, the entire amount of the award or such portion as may be necessary to fully satisfy the obligation secured hereby, shall be paid to Beneficiary to be applied to said obligation.

2. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right to require prompt payment when due of all other sums so secured or to declare default for failure to so pay.

3. The Trustee shall reconvey all or any part of the Property covered by this Deed of Trust to the person entitled thereto upon the earlier of the following: (i) on written request of the Beneficiary; (ii) on December 31, 2011; (iii) upon satisfaction of the obligation secured hereby and written request for reconveyance made by the Beneficiary or the person entitled thereto; or (iv) if the underlying Agreement is properly terminated by the Grantor and written request for reconveyance made by the Beneficiary or the person entitled thereto.

4. Upon (i) default by Grantor in the payment of the cost described in Section _____ of the Agreement, or (ii) default in the performance of any obligation contained in this Deed of Trust after delivery of written notice to Grantor and expiration of a thirty (30) day cure period, unless the default may not reasonably be cured within thirty (30) days, then such additional time as is reasonably necessary, provided that Grantor commences to cure the default within the 30-day period and diligently pursues the cure to completion, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In such event and upon written request of Beneficiary, Trustee shall sell the trust Property in accordance with the Deed of Trust Act of the State of Washington, at public auction to the highest bidder. Any person except Trustee may bid at the Trustee's sale. Trustee shall apply the proceeds of the sale as follows: (a) to the expense of the sale, including a reasonable Trustee's fee and reasonable attorney's fee; (b) to the obligation secured by this Deed of Trust; and (c) the surplus, if any, shall be distributed to the persons entitled thereto.

5. Trustee shall deliver to the purchaser at the sale its deed, without warranty, which shall convey to the purchaser the interest in the Property which Grantor had or had the power to convey at the time of his execution of this Deed of Trust, and such as he may have acquired thereafter. Trustee's deed shall recite the facts showing that the sale was conducted in compliance with all the requirements of law

and of this Deed of Trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value.

6. The power of sale conferred by this Deed of Trust and by the Deed of Trust Act of the State of Washington is not an exclusive remedy; Beneficiary may cause this Deed of Trust to be foreclosed as a mortgage.

7. The Beneficiary may appoint in writing a successor trustee, and upon the recording of such appointment in the mortgage records of the county in which this Deed of Trust is recorded, the successor trustee shall be vested with all powers of the original trustee. The Trustee is not obligated to notify any party hereto of a pending sale under any other Deed of Trust or of an action or proceeding in which Grantor, Trustee, or Beneficiary shall be a party unless such action or proceeding is brought by the Trustee.

8. This Deed of Trust applies to, inures to the benefit of, and is binding on not only on the parties hereto, but on their heirs, devisees, legatees, administrators, executors, and assigns.

9. If the Property is sold or transferred by Grantor, other than to an affiliate of Grantor, without Beneficiary's prior written consent, or if title to the Property transfers to an entity other than Grantor by operation of law, Beneficiary may, at Beneficiary's option, declare all the sums secured by this Deed of Trust to be immediately due and payable.

10. Beneficiary agrees that Grantor may substitute other property for some or all of the Property that is the subject of this Deed of Trust. Any such substitution will be subject to the Beneficiary's approval, which shall not be unreasonably withheld, conditioned, or delayed as long as the substitute property has a fair market value of at least One Million and No/100 Dollars (\$1,000,000.00) and the Beneficiary will be in first lien position. More particularly, Beneficiary agrees to respond to requests for reconveyance or partial reconveyance within fourteen (14) days of Grantor's request. Grantor shall prepare, for Beneficiary's approval, the documents required for reconveyance and amendment of this Deed of Trust with regard to approved substitution of the Property.

[Signature appears on following page]

GRANTOR:

BD VILLAGE PARTNERS, LP, a Washington limited partnership

By: Yarrow Bay Development, LLC, a Washington limited liability company, its General Partner

By: BRNW, Inc., a Washington corporation, its Member

By _____
Brian Ross, President

STATE OF WASHINGTON)
) ss.
COUNTY OF _____)

On this _____ day of April, 2011, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn personally appeared **Brian Ross**, known to me to be the President of BRNW, Inc., a member of Yarrow Bay Development, LLC, a general partner of **BD VILLAGE PARTNERS, LP**, the limited partnership that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said limited partnership, for the purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

I certify that I know or have satisfactory evidence that the person appearing before me and making this acknowledgment is the person whose true signature appears on this document.

WITNESS my hand and official seal hereto affixed the day and year in the certificate above written.

Signature

Print Name

NOTARY PUBLIC in and for the State of Washington, residing at _____.
My commission expires _____.

EXHIBIT A

Legal Description

King County Parcel Number 1121069006:

W 1/2 OF NW 1/4 LESS PACIFIC COAST RY R/W THIS PARCEL DESIGNATED FOREST LAND
PURSUANT TO SUBSECTION (3) OF RCW 84.33.120 OR 84.33.130

King County Parcel Number 0221069030:

LOT Y OF KING COUNTY LOT LINE ADJUSTMENT NO. L05L0097, RECORDED UNDER
RECORDING NO. 20051209900003, SITUATE IN SECTION 2, TOWNSHIP 21 NORTH, RANGE 6,
EAST, W.M., N KING COUNTY, WASHINGTON.

King County Parcel Number 0221069024:

LOT Z OF KCLLA #L05L0097 REC# 20051209900003 SD LOT BEING LOCATED IN POR OF SW
1/4 OF SW 1/4 OF SEC 2-21-6 & OF SE 1/4 OF SE 1/4 OF SE 1/4 OF SEC 3-21-6

