

Memo

To: President and Board of Directors
From: Scott Randall, General Manager
Date: 2/10/2012
Re: Motion - - Approving Development Agreement/Mt. Carmel Community at the Village

At the Board's February 1st work session, plans for a new 75-unit senior citizen assisted living facility were introduced. At that time, the Board and community comments were quite favorable. Today, the Board is being asked to formally approve this project - - including the project's site plan and the attached Development Agreement.

PROJECT DESCRIPTION

As proposed, this development would consist of 75-units. located on an 11.12 acre tract, sitting at the northwest corner of Highway 5 and Ponce de Leon Drive, immediately outside the Balboa Gate. Based on the site plan and preliminary building plans, the building will consist of approximately 60,250 s.f., with 70 on-site parking spaces.

DEVELOPMENT AGREEMENT

Since this is the first time that the POA Board of Directors has been responsible for the review and ultimate approval of a commercial development, as a vehicle for processing such an application, staff has prepared the attached Development Agreement, outlining the various responsibilities of both the developer and the POA. Some of the more significant items are summarized below:

Section 2.1 - - Approves the site plan referenced in Exhibit B and attached to this package; and authorizes the Director of Planning and Inspections to approve final building plans, after the ACC and staff are satisfied with these submissions.

Section 2.2 - - Construction to commence no later than July 1, 2012; and be completed by December 31, 2013.

Section 2.5 - - Requires proof of adequate insurance.

Section 4.2 - -

- (A) Water Service - The developer will pay for the extension of water service at a cost not to exceed \$95,000.
- (B) The developer will pay for the extension of sanitary sewer service at a cost not to exceed \$35,000.

- (C) Staff has estimated and the developer agrees to pay all building permit and other development fees at a total cost of \$36,085.
- (D) During the first year of occupancy, the developer will pay monthly property owner assessments based on the number of units that are currently occupied; and after the first year, assessments will be paid for all 75 units, regardless of occupancy. Furthermore, the Developer will be a POA member, with all requisite rights and responsibilities.
- (E) The development is considered a non-residential project and will pay the prevailing fees and charges imposed by the POA for other non-residential users within the Village.

MOTION: I move to approve the Development Agreement with Mt. Carmel Community at the Village, as presented.

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT is made and entered into effective as of the _____ day of February, 2012 by and between the Hot Springs Village Property Owners' Association, hereinafter referred to as the "POA", an Arkansas Not-For-Profit Corporation and Mt. Carmel Community at the Village, LLC (together with its successors and assigns, the "Developer"), an Arkansas limited liability company.

RECITALS

WHEREAS, Developer owns certain real property located in Hot Springs Village, as more particularly described in Exhibit A attached hereto (the "Project Site"), on which Developer desires to construct a 75-unit, senior citizen assisted living facility as depicted on the Approved Site Plan attached hereto as Exhibit B, including 60,250 square feet of living space and parking for 70 cars (collectively, the "Project Improvements"),

NOW, THEREFORE, for and in consideration of the foregoing Recital (which is incorporated into this Agreement as an integral part hereof) and the promises, covenants and agreements contained herein, the POA and Developer do hereby agree, as follows:

ARTICLE I DEFINITIONS; EXHIBITS

1.1 Definitions. In addition to the terms defined elsewhere in this Agreement, the following capitalized words and terms shall have the following meanings:

"Approved Site Plan" means the Special Development District site development plan attached as Exhibit B and as amended herein.

"Building Permit" means any and all demolition, grading and/or building permits required by the POA to construct all or any portion of the Project Improvements.

1.2 Exhibits. The following exhibits are attached to and incorporated into this Agreement:

Exhibit A	Legal Description of the Project Site
Exhibit B	Site Plans
Exhibit C	Building Plans

ARTICLE II PROJECT

2.1 Project. Subject to the terms and conditions of this Agreement, Developer shall develop and construct the Project in accordance with the Approved Site Plan, as approved herein; the Building Plans to be approved by the Director of Planning and Inspections, after submission; and all applicable federal, state and local laws, rules, regulations and POA policies.

2.2 Deadline for Acquisition and Construction of Project

(a) The Developer represents that it owns all of the property (excluding rights-of-way and other POA owned property) in the Project Site. The POA represents and warrants that Developer's interest in the Project Site is sufficient for purposes of processing all necessary approvals and permits for the Project.

(b) Subject to **Section 3.1** hereof, if Developer fails to commence construction of the Project Improvements on or before July 1, 2012, or if Developer fails to substantially complete construction of the Project Improvements on or before December 31, 2013, all development rights granted hereunder, shall expire and terminate. In addition, the time to commence construction may be extended if the Developer can demonstrate to the reasonable satisfaction of the POA that a general economic downturn or similar market-wide circumstance has temporarily rendered further capital investment in the Project economically or practically unfeasible. For purposes of this paragraph (i) "commence construction" means the clearing and demolition of all the improvements located on the Project Site on which the initial building will be constructed as part of the Project Improvements and the pouring of foundations for at least 75% of such structure, as shown on the Approved Site Plan and (ii) "substantially complete" means the POA's issuance of the Certificate of Occupancy.

2.3 Site Plan The approved Site Plan is attached hereto as Exhibit B and hereby approved.

The Developer may make changes to the Approved Site Plan as site conditions or other issues of feasibility may dictate or as may be necessary or desirable in the sole determination of Developer to enhance the economic viability of the Project; provided that (1) Developer may not make any material changes to the Approved Site Plan (i.e., changes which either expand or reduce the square footage or intended uses of the Project by more than 10%) whether individually or in the aggregate, without the advance written consent of the POA and (b) Developer shall obtain the POA's consent to any changes. Developer shall promptly furnish the POA with a current site plan in the event of any changes thereto.

2.4 Financial Ability. Developer shall submit to the POA, prior to the execution of this Agreement: (a) evidence that Developer has received a firm commitment for a construction loan for the financing of the Project reasonably acceptable to the POA, or evidence that Developer has closed on a construction loan for the financing of the Project, and (b) reasonably acceptable performance bonds as required by the POA's Declaration and Protective Covenants, issued in connection with the completion of all private and public improvements to be constructed by Developer for the Project. The POA and Developer shall be named as obligees on the bonds. The POA will not issue a building permit for any structure in the Project Site until Developer submits to the POA the items specified in this Section.

2.5 Insurance. Not less than ten (10) days prior to commencement of construction of the Project, Developer and/or its general contractor shall provide the POA with a certificate of insurance evidencing a commercial general liability insurance policy with coverages of not less than \$2,000,000 for claims arising out of a single accident or occurrence. The policy shall provide that it may not be cancelled, terminated, allowed to lapse or be substantially modified without at least thirty (30) days prior written notice to the POA. The POA shall be listed as an additional insured on such certificate.

2.6 Project Maintenance. Upon substantial completion of the Project and so long as this Agreement is in effect, Developer or its successor(s) in interest, as owner or owners of the affected portion(s) of the Project Site, shall maintain or cause to be maintained the buildings and improvements within the Project Site which it owns in a good state of repair and in conformity with applicable state and local laws, and POA policies.

ARTICLE III FORCE MAJEURE

3.1 Force Majeure.

(a) Upon satisfaction of the provisions of paragraph (b) of this Section, the time periods provided for herein shall be extended by the number of days of delay caused by actions or events beyond the control of Developer, including acts of God, strikes, lockouts, civil disorder, war, lack of issuance of any permits and/or legal authorization by any governmental entity necessary for the Developer to proceed with the construction of the Project (but only if Developer files all necessary documentation relating thereto in a timely manner), shortage or delay in the shipment of material or fuel, fire, unusually adverse weather or soil conditions or unknown or unforeseen buried obstacles, litigation that challenges this Agreement or by any other cause which the POA's General Manager reasonably determines may justify the delay.

(b) No event under (a) shall be deemed to exist as to any matter that could have been avoided by the exercise of due care on the part of Developer; as to any matter initiated or unreasonably sustained by Developer; and unless Developer provides the POA with a written notice within 30 days of the commencement of such claimed event specifying the event of *force majeure*.

3.2 Extensions. In addition to any extension permitted pursuant to **Section 3.1** of this Agreement, the POA Board of Directors may in its sole discretion, upon request of Developer at least 45 days before the applicable time for performance, extend times within which development activities are to commence.

ARTICLE IV FINANCING

4.1 Exemption. Neither the Developer of this project is eligible for or is expected to receive any financial support for or exemption from any prevailing or future fees imposed by the POA.

4.2 Reimbursement for Project Costs. The Developer is responsible for the payment of all project-related development costs incurred by the POA.

(a) **Water Service** – The POA will assume responsibility to extend its existing water distribution system to the site, a distance of approximately 1,850 linear feet, at maximum cost of \$95,000. Developer will reimburse the POA on progressive percentages of completion during the course of the work. The Developer will make this reimbursement within 30 days of billing. This system improvement will be completed by July 1, 2012.

(b) **Sanitary Sewer Service** – The POA will assume responsibility to extend its existing sanitary sewer service to the site, a distance of approximately 1,000 linear feet, at a maximum cost of \$35,000. Developer will reimburse the POA on progressive percentages of completion during the course of the work. The Developer will make this reimbursement within 30 days of billing. This system improvement will be completed by July 1, 2012.

(c) **Building Permit** – The POA estimates that the cumulative building permit fee will be \$36,085 based on the size and scope of this development. Actual fees will be determined upon the submission of building plans and charged in accordance with the POA's prevailing fee schedule for commercial development; and paid by the Developer prior to the issuance of a building permit.

(d) **Monthly Assessments** – The Developer agrees to pay the POA the prevailing monthly property owner assessment (currently \$36 per month) for each of the 75 residential units constructed. During the first twelve months after the first certificate of occupancy is issued, the Developer will pay monthly assessments based on each unit that is occupied for any portion of that month; and at the conclusion of that twelve month period, the Developer will pay such fees for all units, regardless of occupancy. The Developer shall be considered a member of the POA and entitled to access all amenities of the POA, including voting, based upon the number of paid assessments.

(e) **Other Fees and Charges** – The Developer and POA agree that this project will pay all other fees and charges, including but not limited to water, sewer and sanitation, as a non-residential (commercial) user in accordance with the fee structure periodically adopted by the POA and as charged to other non-residential users within the Village.

ARTICLE V DEFAULT AND REMEDIES

5.1 Default and Remedies.

(a) **Event of Default** Default occurs if the Developer fails to timely perform, in all material respects, any obligation or covenant of Developer under this Agreement, and such failure is not cured to the POA's reasonable satisfaction within thirty (30) days after the POA gives written notice thereof to Developer, or if it cannot reasonably be cured within thirty (30) days, Developer is not diligently proceeding to cure same.

(b) **Remedies.** The POA shall have the following remedies upon the occurrence of a Developer Event of Default:

(i) The POA may terminate this Agreement provided the Developer shall remain liable for their respective amounts due the POA.

(ii) In the event of non-compliance with completion dates as herein provided the Association shall have the right, but not the obligation, to attach the Developer's Performance Bond, hire a contractor and/or contractors to perform the work and furnish the materials necessary for compliance.

ARTICLE VI GENERAL PROVISIONS

6.1 Modifications; Successors and Assigns. The terms, conditions and provisions of this Agreement shall not be modified or amended except by mutual agreement in writing between the POA and Developer. This Agreement shall be binding upon and inure to the benefit of the POA and Developer and their respective successors and assigns; provided, however, Developer may not assign its rights under this Agreement without the specific approval of the POA.

6.2 Representatives Not Personally Liable. No elected or appointed official, agent, employee or representative of the POA shall be personally liable to Developer in the event of any default or breach by any party under this Agreement, or for any amount which may become due to any party or any obligations under the terms of this Agreement.

6.3 Indemnification and Hold Harmless. The indemnification and covenants contained in this Section shall survive expiration or earlier termination of this Agreement. As used in this Section, the term "Developer" shall include the authorized successors and assigns of Developer.

Developer hereby agrees that, anything to the contrary herein notwithstanding, it will defend, indemnify and hold harmless the POA, its governing body members, officers, agents, servants and employees against any and all claims, demands, actions, causes of action, loss, damage, injury, liability and/or expense (including attorneys' fees and court costs) resulting from, arising out of, or in any way connected with (1) a Developer Event of Default, (2) the negligence or intentional misconduct of Developer, its employees, agents, contractors, or subcontractors, or (3) the presence of hazardous wastes, hazardous materials or other environmental contaminants on any property within the Project Site. Notwithstanding the foregoing terms, Developer is not obligated to defend, hold harmless or indemnify the POA with respect to any matter or expense resulting from or arising out of the negligence or willful misconduct of the POA and/or its elected and/or appointed officers, governing body, members, servants, employees, agents, contractors or subcontractors.

The POA and its governing body members, officers, agents, servants and employees shall not be liable for any damage or injury to the persons or property of Developer or its officers, agents, servants or employees or any other person who may be about the Project Site, or to the construction of the Project, except for matters arising out of the willful misconduct or negligence of the POA of its governing body members, officers, agents, servants, employees, contractors or subcontractors.

6.4 Notices. Whenever notice or other communication is called for herein to be given or is otherwise given pursuant hereto, it shall be writing and shall be personally delivered or sent by registered or certified mail, return receipt requested, or nationally recognized overnight courier, addressed as follows:

(a) If to the POA:

895 DeSoto Blvd.
Hot Springs Village, AR 71909
Attention: General Manager

(b) If to the Developer:

3505 Boone Rd.
Benton, AR 72015
Attention: _____

Notices shall be deemed given when personally delivered, on the next business day if sent by a nationally recognized overnight courier or three business days after deposit in the United States mail as aforesaid. A change of designated officer or address may be made by a party by providing written notice of such request to the other party.

6.5 Severability. The provisions of this Agreement shall be deemed severable. If any provision of this Agreement is found by a court of competent jurisdiction to be invalid, the remaining provisions of this Agreement shall remain valid unless the court finds that the valid provisions are so essentially and inseparably connected with and so dependent upon the invalid provision that it cannot be presumed that the parties hereto would have agreed to the valid provisions of this Agreement, or unless the Court finds the valid provisions, standing alone, are incomplete and incapable of being executed in accordance with the contracting parties' intent.

6.6 Headings. The headings and captions of this Agreement are for convenience and reference only, and in no way define, limit or describe the scope or intent of this Agreement or any provision hereof.

6.7 Governing Law; Venue; Other Applicable Provisions. This Agreement shall be governed by and construed in accordance with the domestic laws of the State of Arkansas without giving effect to any choice or conflict of law provision or rule (whether of the State of Arkansas or any other jurisdiction) that would cause the application of the laws of any jurisdiction other than the State of Arkansas. Any action arising out of, or concerning, this Agreement shall be brought only in the Circuit Court of Garland County, Arkansas. All parties to this Agreement consent to the jurisdiction and venue of that court. The terms of this Agreement do not usurp or limit the POA's or any other governmental entity's exercise of administrative and/or legislative discretion as to review and approval of land uses, infrastructure improvements, site plan, architectural elements and related matters.

6.8 Developer's Right of Termination. At any time prior to commencement of construction of the Project, Developer may, by giving written notice to the POA, abandon the Project and terminate this Agreement if Developer determines in its sole discretion that the Project is no longer economically feasible. Upon termination of this Agreement, the parties shall have no further rights or obligations hereunder except as may expressly survive termination.

6.9 Counterparts. This Agreement may be executed in several counterparts, each of which shall be an original and all of which together shall constitute one and the same instrument.

(Remainder of page intentionally left blank.)

IN WITNESS WHEREOF, the parties have set their hands and seals the day and year first above written.

ASSOCIATION:

ATTEST:

HOT SPRINGS VILLAGE PROPERTY OWNERS' ASSOCIATION

By: _____
Jerry Kosoglow, President

Scott Randall
General Manager

DEVELOPER:
MT. CARMEL COMMUNITY AT THE VILLAGE, LLC

By: _____

ACKNOWLEDGEMENTS

STATE OF ARKANSAS)
COUNTY OF GARLAND) SS

On this _____ day of _____, 2012, before me appeared Jerry Kosoglow and Scott Randall, to me personally known to be the President and Secretary/General Manager of the Hot Springs Village Property Owners' Association, and that the seal affixed to the foregoing instrument is the seal of said Association, and said instrument was signed and sealed in behalf of said Association by authority of its Board of Directors.

Subscribed and sworn to before me this _____ day of _____ 2012.

Notary Public

My Commission Expires: _____

STATE OF ARKANSAS)
COUNTY OF _____) SS

On this _____ day of _____, 2012, before me appeared _____, to me personally known to be the General Partner of the Mt. Carmel Community at the Village, LLC and that the seal affixed to the foregoing instrument is the seal of said Company, and said instrument was signed and sealed in behalf of said Association by authority of its Board of Directors.

Subscribed and sworn to before me this _____ day of _____ 2012.

Notary Public

My Commission Expires: _____

EXHIBIT A

“PROJECT SITE”

The project is located on 11.12 acres on the north side of STH 5, on the west side of Ponce de Leon Dr., immediately outside of the Balboa Gate of Hot Springs Village in Garland County, Arkansas. A total of approximately 8 acres will be distributed as part of this project.

“LEGAL DESCRIPTION”

LOT 1, BLOCK 1, BALBOA COMMERCIAL SUBDIVISION, HOT SPRINGS VILLAGE,
GARLAND COUNTY, ARKANSAS IN PLAT BOOK 14, PAGE 263, AND BEING
MORE PARTICULARLY DESCRIBED AS FOLLOWS:

A PARCEL OF LAND LYING IN THE NORTHWEST QUARTER OF SECTION 26, TOWNSHIP 1 SOUTH, RANGE 18 WEST OF THE FIFTH PRINCIPAL MERIDIAN, GARLAND COUNTY, ARKANSAS, BEING MORE PARTICULARLY DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWEST CORNER OF GUINDOLA SUBDIVISION AS RECORDED IN PLAT BOOK 7 PAGE 165 OF THE PLAT RECORDS OF GARLAND COUNTY, ARKANSAS; RUN SOUTH 87°34'26". EAST ALONG THE SOUTHERLY LINE OF SAID SUBDIVISION FOR A DISTANCE OF 1031.10 FEET; THENCE SOUTH 00°49'00" WEST ALONG A WESTERLY LINE OF SAID SUBDIVISION FOR A DISTANCE OF 128.00 FEET; THENCE SOUTH 77°40'58" EAST ALONG A SOUTHERLY LINE OF SAID SUBDIVISION FOR A DISTANCE OF 4.21 FEET TO THE POINT OF BEGINNING; THENCE CONTINUING SOUTH 77°40'58" EAST ALONG LAST SAID SOUTHERLY LINE OF GUINDOLA SUBDIVISION FOR A DISTANCE OF 215.46 FEET TO THE WESTERLY RIGHT-OF-WAY OF PONCE DE LEON DRIVE; THENCE SOUTHERLY ALONG SAID WESTERLY RIGHT-OF-WAY THE FOLLOWING COURSES AND DISTANCES: SOUTH 08°34'17" EAST 481.70 FEET, SOUTHEASTERLY ALONG A CURVE TO THE LEFT HAVING A CENTRAL ANGLE OF 26°04'15" WITH A RADIUS OF 727.63 FEET FOR A DISTANCE OF 331.09 FEET TO A POINT WHICH BEARS SOUTH 21°36'25" EAST 328.24 FROM THE LAST SAID POINT, SOUTH 34°38'32" EAST 92.27 FEET, SOUTHEASTERLY ALONG A CURVE TO THE RIGHT HAVING A CENTRAL ANGLE OF 39°48'40" WITH A RADIUS OF 327.49 FEET FOR A DISTANCE OF 227.55 FEET TO A POINT WHICH BEARS SOUTH 14°44'12" EAST 223.00 FEET FROM THE LAST SAID POINT AND SOUTH 05°12'06" WEST 267.07 FEET TO THE PROPOSED NORTHERLY RIGHT-OF-WAY OF ARKANSAS HIGHWAY NO. 5; THENCE ALONG SAID PROPOSED NORTHERLY RIGHT-OF-WAY THE FOLLOWING COURSES AND DISTANCES: NORTH 79°41'06" WEST, 226.27 FEET, NORTH 76°33'12" WEST, 129.51 FEET; NORTH 80°58'54" WEST, 115.00 FEET, AND SOUTH 48°27'02" WEST, 57.98 FEET TO THE EXISTING NORTHERLY RIGHT-OF-WAY OF HIGHWAY 5; THENCE NORTH 00°44'51" EAST LEAVING SAID NORTHERLY RIGHT-OF-WAY, 1334.92 FEET, TO THE POINT OF BEGINNING.

EXHIBIT B

“SITE PLAN”