

DEVELOPMENT AGREEMENT
(Birdhouse)

THIS DEVELOPMENT AGREEMENT (the "Agreement") is made and entered into this ____ day of December, 2019 (the "Effective Date"), by and between the TOWN OF ERIE, a Colorado municipal corporation with an address of P.O. Box 750, Erie, CO 80516 (the "Town"), and RTR BIRDHOUSE HOLDINGS LLC, a Colorado limited liability company with a principal place of business at 11013 Circle Drive, Golden, CO 80403 ("Developer") (each a "Party" and collectively the "Parties").

WHEREAS, Developer is the owner of the real property more particularly described in **Exhibit A** attached hereto and incorporated herein by this reference (the "Property");

WHEREAS, Developer wishes to develop the Property (the "Development"), and has filed an application for approval of a minor plat amendment (the "Plat"); and

WHEREAS, the Town and Developer mutually acknowledge and agree that the matters hereinafter set forth are reasonable conditions and requirements to be imposed by the Town in connection with its approval of the Development, and that such matters are necessary to protect, promote and enhance the public health, safety and welfare of the Town.

NOW, THEREFORE, in consideration of the promises and the mutual covenants herein contained, the sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Purpose. The purpose of this Agreement is to set forth the terms, conditions and fees to be paid by Developer in connection with the Improvements for the Development. All conditions in this Agreement are in addition to any requirements of the Erie Municipal Code (the "Code"), state law and other Town ordinances, and are not intended to supersede any requirements contained therein.

2. Construction of Improvements.

a. *General.* Developer shall, at its own expense, design, construct and install all public improvements necessary for the Development (collectively the "Improvements"). A list of the required Improvements is set forth in **Exhibit B**, attached hereto and incorporated herein by this reference. Omission of any necessary Improvement from **Exhibit B** does not relieve Developer from responsibility for furnishing, installing or constructing such Improvement.

b. *Deadline.* All Improvements shall receive Initial Acceptance pursuant to Section 5 hereof on or before June 30, 2020.

c. *Construction Standards.* Developer shall construct the Improvements in accordance with plans and specifications approved by the Town, as well as the Town's Standards and Specifications for Design and Construction of Public Improvements (the "Standards"). Developer shall furnish, at its expense, all necessary engineering and consulting services relating to the design and construction of the Improvements. These services shall be performed by or under the supervision of a professional engineer licensed by the State of Colorado.

d. *Testing and Inspection.* Developer shall employ, at its own expense, a licensed testing company to perform all testing of materials or construction reasonably required by the Town. Developer shall furnish copies of test results to the Town on a timely basis. At all times during construction, the Town shall have access to inspect materials and work, and all materials and work not conforming to the approved plans or Standards shall be repaired or removed and replaced at Developer's expense.

e. *Rights-of-way and Easements.* Prior to construction any Improvements that require additional rights-of-way or easements, Developer shall acquire at its own expense all such rights-of-way and easements. Any easements or rights-of-way conveyed to the Town shall be free and clear of liens, taxes and encumbrances (other than any accepted by the Town in its sole discretion in any title report) and shall be conveyed on documents in a form acceptable to the Town.

f. *Permits.* Developer shall, at its own cost, obtain the following permits, as applicable:

- i. Any permits required by the United States Corps of Engineers;
- ii. Colorado Department of Health and Environment General Permit for Stormwater Discharges Associated with Construction Activity.
- iii. Town Grading and Stormwater Quality Permit.
- iv. Air Quality Permit.

g. *As-Built Drawings.* Upon completion of construction of the Improvements, Developer shall provide the Town with complete "as-built" drawings in the form required by the Standards.

h. *Applicable Law.* Developer shall at all times comply with all applicable law, including without limitation all current and future federal, state and local statutes, regulations, ordinances and rules relating to: the emission, discharge, release or threatened release of a Hazardous Material into the air, surface water, groundwater or land; the manufacturing, processing, use, generation, treatment, storage, disposal, transportation, handling, removal, remediation or investigation of a Hazardous Material; and the protection of human health, safety or the indoor or outdoor environmental, including without limitation the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, *et seq.* ("CERCLA"); the Hazardous Materials Transportation Act, 49 U.S.C. § 1801, *et seq.*; the Resource Conservation and Recovery Act, 42 U.S.C. § 6901, *et seq.* ("RCRA"); the Toxic Substances Control Act, 15 U.S.C. § 2601, *et seq.*; the Clean Water Act, 33 U.S.C. § 1251, *et seq.*; the Clean Air Act; the Federal Water Pollution Control Act; the Occupational Safety and Health Act; all applicable environmental statutes of the State of Colorado; and all other federal, state or local statutes, laws, ordinances, resolutions, codes, rules, regulations, orders or decrees regulating, relating to, or imposing liability or standards of conduct concerning any hazardous, toxic or dangerous waste, substance or material, as now or at any time hereafter in effect.

3. Specific Improvements. Developer shall cause to be constructed or furnished and installed, at Developer's own expense and in conformance with Town-approved plans and the Standards, all of the following Improvements:

a. *Streets and Sidewalks.* Developer shall construct all required street and sidewalk improvements in conformance with the drawings, plans and specifications accepted by the Town and in accordance with the Standards.

b. *Water.* Developer shall install all required water mains, lines, and appurtenances.

c. *Wastewater.* Developer shall install all required sewer lines and appurtenances.

d. *Drainage Facilities.* Developer shall install all required drainage facilities, in compliance with Urban Drainage and Flood Control District design standards.

e. *Landscaping.* Developer shall install required landscaping in accordance with a Town-approved landscape plan.

f. *Utilities.* Developer shall install all on-site and off-site electric, natural gas, telephone, cable and other utilities, underground as required by the Code.

g. *Fencing.* Developer shall install fencing in accordance with the Code.

4. Acceptance of Improvements and Warranty.

a. *Initial Acceptance.* No later than 10 days after Improvements are substantially complete, Developer shall request an inspection by the Town. If Developer does not request this inspection, the Town may conduct the inspection without Developer's approval.

i. If the Improvements are satisfactory, the Town shall grant Initial Acceptance.

ii. If the Improvements are not satisfactory, the Town shall provide written notice to Developer of the repairs, replacements, construction or other work required to receive Initial Acceptance. Developer shall complete all needed repairs, replacements, construction or other work within 30 days of said notice. After Developer completes the repairs, replacements, construction or other work required, Developer shall request of the Town a re-inspection of such work to determine if Initial Acceptance can be granted, and the Town shall provide written notice to Developer of the acceptability or unacceptability of such work prior to proceeding to complete any such work at Developer's expense. If Developer does not complete the repairs, replacements, or other work required within 30 days, Developer shall be in breach of this Agreement. The costs of re-inspection shall be borne by Developer.

b. *Final Acceptance.* At least 30 days before 2 years has elapsed from the issuance of Initial Acceptance, or as soon thereafter as weather permits, Developer shall request an inspection by the Town. If Developer does not request this inspection, the Town may conduct the inspection without Developer's approval.

- i. If the Improvements are satisfactory, the Town shall grant Final Acceptance.
 - ii. If the Improvements are not satisfactory, the Town shall provide written notice to Developer of the repairs, replacements, construction or other work required to receive Final Acceptance. After Developer completes the repairs, replacements, construction or other work required, Developer shall request of the Town a re-inspection of such work to determine if Final Acceptance can be granted, and the Town shall provide written notice to Developer of the acceptability or unacceptability of such work prior to proceeding to complete any such work at Developer's expense. If Developer does not complete the repairs, replacements, or other work required within 30 days, Developer shall be in breach of this Agreement.
 - c. *Warranty.* For all Improvements to be dedicated to the Town, Developer shall provide the Town with a 2-year warranty, commencing on the date of Initial Acceptance. Specifically, but not by way of limitation, Developer shall warrant that: the title is marketable and its transfer rightful; the Improvements are free from any security interest or other lien or encumbrance; and the Improvements are free of defects in materials or workmanship. During the warranty period, Developer shall, at its own expense, take all actions necessary to maintain the Improvements and make all necessary repairs or replacements.
5. Maintenance. Unless dedicated to and accepted by the Town for maintenance, all Improvements shall be maintained by Developer.
6. Improvement Guarantee.
- a. *Amount.* To secure the construction and installation of the Improvements, Developer shall provide a letter of credit or cash in an amount equal to 115% of the total costs listed in **Exhibit B** (the "Improvement Guarantee"). The Estimated Costs may increase in the future. Accordingly, the Town reserves the right to review and adjust the Estimated Costs on an annual basis. Adjustments shall be made according to changes in the Construction Costs Index as published by the Engineering News Record. If the Town adjusts the Estimated Costs, the Town shall give written notice to Developer, and Developer shall, within 30 days after receipt of said written notice, provide the Town with a new or amended Improvement Guarantee in the amount of the adjusted Estimated Costs.
 - b. *Timing.* Developer shall submit the Improvement Guarantee to the Town within 7 days of the Effective Date.
 - c. *Draw.* If the Improvements are not constructed or completed within the period of time specified herein, the Town may, after the notice and cure period described in Section 12(b), draw on the Improvement Guarantee to complete the Improvements. If the Improvement Guarantee is to expire within 14 calendar days and Developer has not yet provided a satisfactory replacement, or completed the Improvements, the Town may draw on the Improvement Guarantee for the amount of incomplete work and either hold such funds as security for performance of this Agreement or spend such funds to finish the Improvements or correct problems with the Improvements as the Town deems appropriate. If the Town has drawn on the

Improvement Guarantee, and a satisfactory replacement guarantee is provided or the Improvements have been completed, then the Town will release any funds received as a result of its draw within a reasonable period of time, or within 10 calendar days of a request by Developer.

d. Reduction. Upon Initial Acceptance of all of the Improvements, the Improvement Guarantee shall be reduced to the amount of 25% of the total actual cost of construction and installation of the Improvements. The reduced Improvement Guarantee shall be held by the Town during the 2-year warranty period.

7. Reimbursements. Within 7 days of the Effective Date, Developer shall reimburse the Town in the amount of \$1,722 for the NWRF Interceptor. All other reimbursements shall be governed by the Redevelopment Project Reimbursement Agreement dated March 7, 2019 and the Supplemental Agreement to Redevelopment Project Reimbursement Agreement dated October 8, 2019.

8. Indemnification. Developer hereby agrees to indemnify and hold harmless the Town, its officers, employees, agents or servants from any and all suits, actions and claims of every nature and description caused by, arising from or on account of any act or omission of Developer, or of any other person or entity for whose act or omission Developer is liable, with respect to construction of the Improvements (the "Claims"); and Developer shall pay any and all judgments rendered against the Town as the result of any such suit, action or claim, together with all reasonable expenses and attorney fees incurred by the Town in defending any such suit, action or claim arising out of or related to Claims. In addition, Developer shall pay all property taxes on property underlying the Improvements to be dedicated to the Town before acceptance by the Town, and shall indemnify and hold harmless the Town for any such property tax liability.

9. Developer's Representations and Warranties. Developer hereby represents and warrants to the Town that all of the following are true and correct as of the date of signature and the Effective Date: this Agreement has been duly authorized and executed by Developer as the legal, valid and binding obligation of Developer, and is enforceable as to Developer in accordance with its terms; the person executing this Agreement on behalf of Developer is duly authorized and empowered to execute and deliver this Agreement on behalf of Developer; to the best of Developer's knowledge, there is no pending or threatened litigation, administrative proceeding or other proceeding pending or threatened against Developer which, if decided or determined adversely, would have a material adverse effect on the ability of Developer to undertake its obligations under this Agreement nor, to the best of Developer's knowledge, is there any fact or condition of the Property known to Developer that may have a material adverse effect on Developer's ability to develop the Property as contemplated; and neither the execution of this Agreement nor the consummation of the transaction contemplated by this Agreement will constitute a breach under any contract, agreement or obligation to which Developer is a party or by which Developer is bound or affected.

10. Vested Rights. The Plat constitutes a site specific development plan as defined in C.R.S. § 24-68-101, *et seq.*, and Chapter 3 of Title 9 of the Erie Municipal Code, and shall create vested property rights for 3 years from the date of approval of the Plat, provided that all required

procedures are followed. The Plat shall include the language required by C.R.S. § 24-68-102(4)(a). Developer shall be responsible for publication of the notice required by C.R.S. § 24-68-103(c).

11. Breach.

a. *Remedies.* If Developer breaches this Agreement, the Town may take such action as permitted or authorized by law, this Agreement or the ordinances of the Town, as the Town deems necessary to protect the public health, safety and welfare. The remedies include, but are not limited to:

- i. The refusal to issue any building permit or certificate of occupancy;
- ii. The revocation of any building permit previously issued under which construction directly related to such building permit has not commenced, except a building permit previously issued to a third party;
- iii. A demand that the security given for the completion of the Improvements be paid or honored; or
- iv. Any other remedy available at law or in equity.

b. *Notice.* Unless necessary to protect the immediate health, safety and welfare of the Town, or to protect the interest of the Town with regard to the Improvement Guarantee, the Town shall provide Developer 30 days' written notice of its intent to take any action under this Section, during which Developer may cure the breach and prevent further action by the Town.

c. *Nature of Remedies.* The rights and remedies of the Town under this Agreement are in addition to any other rights and remedies provided by law. The expiration of this Agreement shall in no way limit the Town's legal or equitable remedies, or the period in which such remedies may be asserted, for work negligently or defectively performed.

12. Miscellaneous.

a. *Assignment.* This Agreement shall not be assigned by Developer in whole or in part without the prior written authorization of the Town.

b. *Governing Law and Venue.* The laws of the State of Colorado shall govern this Agreement, and the exclusive venue for any legal proceeding arising out of this Agreement shall be Weld County, Colorado.

c. *No Third-Party Beneficiaries.* There are no intended third-party beneficiaries to this Agreement.

d. *Severability.* If any provision of this Agreement is found by a court of competent jurisdiction to be unlawful or unenforceable for any reason, the remaining provisions hereof shall remain in full force and effect.

e. *Governmental Immunity.* Nothing herein shall be construed as a waiver of any protections or immunities the Town or its employees, officials or attorneys may have under the Colorado Governmental Immunity Act, C.R.S. § 24-10-101, *et seq.*, as amended.

f. *No Joint Venture.* Notwithstanding any provision hereof, the Town shall never be a joint venture in any private entity or activity which participates in this Agreement, and the Town shall never be liable or responsible for any debt or obligation of any participant in this Agreement.

g. *Notice.* Notices under this Agreement shall be sufficiently given if sent by regular U.S. mail, postage prepaid, to the address on the first page of this Agreement.

h. *Integration.* This Agreement, together with all exhibits attached hereto, constitute the entire understanding and agreement of the Parties, integrates all the terms and conditions mentioned herein or incidental thereto, and supersedes all negotiations or previous arrangements between the Parties with respect to any and all of the subject matter hereof.

i. *Recordation.* This Agreement shall be recorded in the real estate records of the Boulder County Clerk and Recorder, and shall be a covenant running with the Property.

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the Effective Date.

TOWN OF ERIE, COLORADO

Jennifer Carroll, Mayor

ATTEST:

Jessica Koenig, Town Clerk

The foregoing instrument was subscribed, sworn to, and acknowledged before me this
 ____ day of _____, 2019, by _____ as the
 _____ of RTR BIRDHOUSE HOLDINGS LLC.

(S E A L)

8

EXHIBITS LIST

EXHIBIT A – Legal Description

EXHIBIT B – Improvements

EXHIBIT A
Legal Description

EXHIBIT B

Improvements