

## **MAINTENANCE AGREEMENT**

**THIS MAINTENANCE AGREEMENT** (“Agreement”) is made and entered into at Dillon, Colorado this \_\_\_\_ day of \_\_\_\_\_, 2013, (the “Effective Date”) by and between the TOWN OF DILLON, a Colorado municipal corporation (“Town”) and LAKE DILLON CONDOMINIUMS, INC., a Colorado nonprofit corporation (referred to herein after as “LDCI”).

### **RECITALS**

**WHEREAS**, the Town is the owner of real property situated in the Town of Dillon and zoned as Parks and Open Space, more particularly described on **Exhibit “A,”** attached hereto and incorporated herein by this reference (“Town Park”), which Town Park is contiguous to the Lake Dillon Condominiums under the control and supervision of LDCI; and,

**WHEREAS**, LDCI has previously installed landscaping and water irrigation systems on portions of the Town Park and has previously and does currently maintain the Town Park in accordance with an informal, unwritten agreement with the Town; and,

**WHEREAS**, the landscaping and water irrigation systems on the Town Park include, but are not limited to, landscaping, water sprinkling and irrigation systems, sod, trees, and related personal property (herein after the “Improvements”), and the LDCI desires to place and keep the Improvements in place on the Town Park and to be responsible for the watering, care, maintenance, repair, replacement of such Improvements and the liability related to such Improvements; and,

**WHEREAS**, the Town and the LDCI are in agreement to allow the LDCI to place and keep the Improvements in place on Town Park for the general benefit of the community and the benefit of the LDCI in return for the LDCI being solely responsible for the watering, care, cost, maintenance, repair, replacement of such Improvements and liability related to such Improvements; and,

**WHEREAS**, the Town has concurrently with the entering into of this Agreement entered into a Revocable License Agreement (“Revocable License Agreement”) with the LDCI wherein the LDCI is allowed to occupy and use the Town Park for the maintenance purposes set forth in this Agreement, as more specifically set forth therein; and,

**WHEREAS**, the Town and the LDCI desire to set forth herein their agreement as to allowing the Improvements to be placed on and to remain on Town Park; the LDCI being solely responsible for the watering, care, cost, maintenance, repair, replacement of such Improvements; the LDCI being solely responsible for any and all liability related to such Improvements; and, the LDCI’s general obligations related thereto.

**NOW, THEREFORE**, in consideration of the mutual promises, covenants and obligations of the parties hereto, the terms, covenants and conditions hereof, the consideration set forth herein, and intending to be legally bound, the Town and the LDCI agree as follows:

1. Maintenance of Improvements on Town Park. The LDCI shall, at its sole cost, expense and liability, place, keep and maintain the Improvements on Town Park. The LDCI shall keep and maintain the Improvements in good condition and repair; shall have the sole responsibility for the upkeep, maintenance, replacement, and repair of the Improvements, as limited by the provisions set forth in this Agreement; and, shall have sole responsibility for all liability related to the Improvements. The LDCI shall pay the cost of the water used by the Improvements and shall replace the Improvements if and when necessary in order to keep and maintain the Improvements in good condition, all at the sole cost of the LDCI. The Town shall have no cost for the upkeep, maintenance, replacement, or repair of the Improvements nor shall the Town have any liability for any claims, losses or damages related to the Improvements. The LDCI shall pay all fees and costs associated with providing water to the Improvements. The Town shall have no cost for providing water to the Improvements.

2. Term. This Agreement shall commence as of the Effective Date set forth above and shall automatically renew annually, unless otherwise terminated as provided for in Paragraph 8, below.

3. No Interest In Land. The LDCI understands, acknowledges and agrees that this Agreement does not create or grant to the LDCI any interest or estate in or to the Town Park. The Town retains all legal right, title, ownership and interest in and to the Town Park. The sole purpose of this Agreement is to enumerate the responsibilities and liabilities of the LDCI and to grant to the LDCI the personal privilege to place, keep and maintain the Improvements on the Town Park throughout the term of this Agreement.

Notwithstanding the expenditure of time, money or labor by the LDCI on the Town Park, this Agreement shall in no event be construed to create an assignment coupled with an interest in favor of the LDCI. The LDCI shall expend any time, money or labor at the LDCI's own risk and peril.

4. Limited Scope of Rights. This Agreement is limited in its scope and rights granted to the keeping, maintenance and replacement of existing Improvements by the LDCI. Any alterations, expansions, or changes to the Improvements or in activities of the LDCI within or on the Town Park, other than the replacement of existing Improvements, shall be first submitted in writing to the Town, in advance, for approval or denial by the Town. The Town's approval or denial of such request shall be at the sole determination and discretion of the Town.

5. Use by the Public. The LDCI understands, acknowledges and agrees that Town Park is publicly held land and, as such, is open for use by the public. The LDCI may not in any manner interfere with the public's use of the Town Park nor may it prohibit the public's use of the Town Park.

6. No Assignment. LDCI shall not assign this Agreement or any of the obligations and responsibilities hereunder without first obtaining the prior written consent of Town, which consent may be withheld by the Town in its sole discretion.

7. Default. In the event LDCI defaults in the performance of any of the covenants or agreements to be kept, done or performed by it under the terms of this Agreement, the Town shall notify the LDCI in writing of the nature of such default. Within fifteen (15) days following receipt of such notice the LDCI shall correct such default; or, in the event of a default not capable of being corrected within fifteen (15) days, the LDCI shall commence correcting the default within fifteen (15) days of receipt of notification thereof and thereafter correct the default with due diligence. If the LDCI fails to correct the default as provided hereinabove, the Town, without further notice, shall have the right to declare that this Agreement is terminated pursuant to Paragraph 8 hereof effective upon such date as the Town shall designate. The rights and remedies provided for herein may be exercised singly or in combination.

8. Termination. This Agreement and the rights granted herein to the LDCI are fully terminable in accordance with the following terms and conditions:

A. Town Termination Upon Notice. The Town may terminate this Agreement, without liability for breach, by giving notice of such termination to the LDCI. If notice of termination is given, this Agreement shall terminate thirty (30) days from the date of the notice of termination. The notice provision established by this paragraph 8.A. shall conclusively be deemed to be reasonable.

B. Recording Of Notice Of Termination. Upon termination of this Agreement the Town may cause to be recorded with the Clerk and Recorder of Summit County, Colorado a written Notice of Termination.

C. Termination Upon Default. This Agreement may be terminated by the Town upon the default of the LDCI in the performance of the terms of this Agreement, in accordance with the provisions of Paragraph 7 of this Agreement.

D. No Compensation to the LDCI. In the event of termination of this Agreement for any reason, the LDCI shall not be entitled to receive a refund or compensation of any type for the Improvements or for any new improvements or landscaping which it has installed on the Town Park.

E. Return of Town Park; Condition. In the event of the termination of this Agreement for any reason, the LDCI shall, within a reasonable period of time, remove the Improvements from the Town Park and re-seed the Town Park with a native seed mixture approved in advance by the Town in order to achieve a condition equivalent to the condition of the open space property adjacent to or in the vicinity of the Town Park. The LDCI may abandon the water sprinkling and irrigation system in place, with pipes and sprinklers capped.

9. Insurance. LDCI shall procure and maintain, and shall cause any subcontractor of LDCI to procure and maintain, the minimum insurance coverages listed below, in addition to that insurance coverage required by the Revocable License Agreement. Such coverages shall be procured and maintained with forms and insurers acceptable to the Town. All coverages shall be continuously maintained to cover all liability, claims, demands, and other obligations assumed by

LDCI pursuant to this Agreement. In the case of any claims-made policy, the necessary retroactive dates and extended reporting periods shall be procured to maintain such continuous coverage.

A. Workmen's Compensation Insurance and Employer's Liability Insurance to cover obligations imposed by applicable laws for any employee of LDCI or a subcontractor engaged in the performance of work on the Town Park or under this Agreement.

B. General liability insurance in an amount and coverage as set forth in the Revocable License Agreement executed concurrently herewith.

C. The policy required by subparagraph B, above, shall be endorsed to include the Town and the Town's officers and employees as additional insureds. Every policy required above shall be primary insurance, and any insurance carried by the Town, its officers, or its employees, or carried by or provided through any insurance pool of the Town, shall be excess and not contributory insurance to that provided by the LDCI. The LDCI shall be solely responsible for any deductible losses under any policy required above.

D. A certificate of insurance shall be completed by the LDCI's insurance agent and provided to the Town as evidence that policies providing the required coverages, conditions, and minimum limits are in full force and effect, and shall be reviewed and approved by the Town prior to commencement of the Agreement. The certificate shall identify this Agreement and shall provide that the coverages afforded under the policies shall not be cancelled until at least thirty (30) days prior written notice has been given to the Town. LDCI shall notify the Town within ten (10) days if the coverages afforded under the policies are materially changed. The completed certificate of insurance shall be sent to: Town Clerk, Town of Dillon, 275 Lake Dillon Drive, P.O. Box 8, Dillon, Colorado 80435.

E. Notwithstanding any other portion of this Agreement, failure on the part of LDCI to procure or maintain policies providing the required coverages, conditions, and minimum limits shall constitute a material breach of this Agreement for which the Town may immediately terminate this Agreement, or, at its discretion, the Town may procure or renew any such policy or any extended reporting period thereto and may pay any and all premiums in connection therewith, and all money so paid by the Town shall be repaid by the LDCI to the Town upon demand.

F. The parties hereto understand and agree that the Town is relying on, and does not waive or intend to waive by any provision of this Agreement, the monetary limitations or any other rights, immunities, and protections provided by the Colorado Governmental Immunity Act, Section 24-10-101, et seq., C.R.S., as from time to time amended, or any other law, protection or limitation otherwise available to the Town, its officers, or its employees.

10. LDCI's Waiver Of Claims Against Town. As a part of the consideration received for this Agreement, the LDCI hereby waives any and all claims which the LDCI now has or may or might hereafter have or acquire against the Town for loss or damage to the LDCI's Improvements which now exist or which may hereafter be added by the LDCI on the Town Park arising from the use by the Town, or the public, of the Town Park for any purpose.

11. Indemnification. LDCI shall indemnify and hold harmless the Town against and from any and all claims arising from LDCI's use of the Town Park, the Improvements, the LDCI's maintenance, repair, replacement, or upkeep of the Improvements or any claim arising from any breach or default on LDCI's part under the terms of this Agreement, or from any act, omission, or negligence of LDCI, or any officer, agent, employee, guest or invitee of LDCI, and from all costs, attorneys' fees, and liabilities incurred in or about the defense of any such claim or any action or proceeding brought thereon. LDCI assumes all risk of damage to Improvements, of the LDCI's presence upon or about the Town Park, and from any and all causes other than Town's negligence or intentional malfeasance. LDCI waives all claims with respect thereof against Town. LDCI shall give prompt notice to Town in case of casualty or accidents in the Town Park.

12. Mechanics' Liens. The LDCI shall not allow any mechanics' or similar liens to be filed against the Town Park arising from any work done by the LDCI on the Town Park, and the LDCI shall indemnify and hold the Town harmless with respect thereto, including any attorney's fees incurred by the Town in connection with any such lien or claim. If any mechanics' or other liens shall be created or filed against the Town Park by reason of labor performed by, or materials furnished for, the LDCI, the LDCI shall within ten (10) days thereafter, at the LDCI's own cost and expense, cause such lien or liens to be satisfied and discharged of record together with any Notices Of Intention To File Mechanic's Lien that may have been filed. Failure to do so shall constitute a default hereunder for which the Town may terminate this Agreement immediately.

13. Notices. Any notice required or permitted under this Agreement shall be in writing and shall be sufficient if personally delivered or mailed by certified mail, return receipt requested, addressed to the following:

If to the Town:

Town Manager  
Town of Dillon  
275 Lake Dillon Drive  
P.O. Box 8  
Dillon, Colorado 80435

If to LDCI:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notices mailed in accordance with the provisions of this Paragraph shall be deemed to have been given upon mailing. Notices personally delivered shall have been deemed to have been given upon delivery. Either party may change its address by giving notice thereof to the other party in the manner provided for herein.

14. Attorney's Fees. If any action is brought in a court of law by either party to this Agreement concerning the enforcement, interpretation or construction of this Agreement, the prevailing party, either at trial or upon appeal, shall be entitled to reasonable attorney's fees as well as costs, including expert witness's fees, incurred in the prosecution or defense of such action.

15. Waiver. The failure of either party to exercise any of its rights under this Agreement shall not be a waiver of those rights. A party waives only those rights specified in writing and signed by the party waiving its rights.

16. Entire Agreement. This Agreement constitutes the entire agreement and understanding between the parties hereto and supersedes any prior agreement or understanding relating to the subject matter of this Agreement, with the exception of the Revocable License Agreement entered into between Dillon and LCDI of same date hereof, which shall remain in full force and effect. Any other such prior agreement shall be deemed to be null and void and of no further effect.

17. Modification. This Agreement may be modified or amended only by a duly authorized written instrument executed by the parties hereto.

18. Paragraph Headings. Paragraph headings are inserted for convenience only and in no way limit or define the interpretation to be placed upon this Agreement.

19. Terminology. Wherever applicable, the pronouns in this Agreement designating the masculine or neuter shall equally apply to the feminine, neuter and masculine genders. Furthermore, wherever applicable within this Agreement, the singular shall include the plural, and the plural shall include the singular.

20. Situs, Venue and Severability. The laws of the State of Colorado shall govern the interpretation, validity, performance and enforcement of this Agreement. For the resolution of any dispute arising hereunder, venue shall be in the Courts of the County of Summit, State of Colorado. If any provision of this Agreement shall be held to be invalid or unenforceable, the validity and enforceability of the remaining provisions of this Agreement shall not be affected thereby.

21. Remedies. Upon the occurrence of any default of the requirements of this Agreement by the LDCI, the Town shall have the option to pursue any one or more of the remedies it may have pursuant to law and equity, including, but not limited to, the obtaining of an injunction and the pursuit of damages.

*[Signatures on following page]*



## **EXHIBIT A**

[description of Town Park]