

THIRD AMENDMENT TO AGREEMENT

THIS THIRD AMENDMENT TO AGREEMENT (“Third Amendment”) is made and entered into this _____ day of _____, 2021, by and between the CITY OF FERNLEY, a political subdivision of the State of Nevada, (the “City”) and D.L.G. Associates, LLC, a Nevada limited-liability company, (“DLG”) for the purpose of amending the terms and conditions of that certain AGREEMENT, executed on February 21, 1996, by and between the TOWN OF FERNLEY, a political subdivision of the State of Nevada (“Town”), and the predecessor-in-interest to the City, and MARC E. SIMONCINI and JULIA R. SIMONCINI in their capacity as Trustees of THE RAINBOW TRUST (“Rainbow Trust”), the predecessor-in-interest to DLG. The City and DLG are herein referred to individually as a “Party” and collectively as the “Parties.”

WITNESSETH

WHEREAS, on February 21, 1996, the Town and Rainbow Trust entered into an agreement concerning the conveyance and utilization of water rights for the development of property within the Town (the “1996 Agreement”); and

WHEREAS, in August of 2002, the City and DLG, as the respective successors-in-interest to the Town and Rainbow Trust, entered into an agreement ratifying the 1996 Agreement and providing DLG was required under said Agreement to construct certain irrigation improvements to support the development of its property (“2002 Agreement”); and

WHEREAS, on October 19, 2006, the City and DLG executed an Amendment to Agreement Dated February 21, 1996, amending certain provisions of the 1996 Agreement (“2006 Amendment”); and

WHEREAS, the 1996 Agreement, as amended, has a term of 25 years and will, therefore, expire on February 21, 2021; and

WHEREAS, the expiration of the 1996 Agreement, as amended, will be detrimental to both the City’s economic development efforts and DLG’s efforts to develop its property; and

WHEREAS, the Parties have agreed that it is in their mutual interests to extend the expiration of the 1996 Agreement, as amended, for an additional fifteen (15) years subject to the terms and conditions stated below.

NOW THEREFORE, in consideration of the mutual promises contained herein, the parties hereby agree to further amend the terms and conditions of the 1996 Agreement, as already amended by the 2002 Agreement and the 2006 Amendment, as follows:

AMENDMENT

1. **Scope:** During the term of this Third Amendment, all terms and conditions of the 1996 Agreement, as amended by both the 2002 Agreement and 2006 Amendment, shall remain in full force and effect except as otherwise expressly provided herein.
2. **Term:** The provisions of this Third Amendment shall become effective upon the date shown above and shall extend the terms of the 1996 Agreement, as amended, for an additional period of fifteen (15) years (until February 21, 2036), at which time any City obligation that arises from, and that has not already been performed under, the 1996 Agreement, as amended, shall expire. DLG agrees that upon expiration of the term of the 1996 Agreement, as amended: (i) the City shall have no continuing obligations arising from the 1996 Agreement, as amended, and (ii) DLG forever disclaims any interest, either express or implied, in any remaining water rights, if any, conveyed to the City under the terms of the 1996 Agreement, as amended.
3. **Compliance with Existing Ordinances:** DLG agrees that it shall comply with all applicable provisions of the FMC respecting the development of its property located within the City, including, without limitation, FMC Title 32 (Development Standards), and any amendments or successor ordinances thereto.
4. **Termination:** In the event that DLG fails to comply with any of its obligations under the 1996 Agreement, as amended, the City shall, at its sole but reasonable discretion, have the right, upon thirty (30) days prior written notice to DLG, to terminate the 1996 Agreement and all amendments thereto. The notice shall state with particularity the provisions of the 1996 Agreement, as amended, which DLG has failed to comply with. DLG shall have the right to cure any default identified by the City in the notice within thirty (30) days of the date the notice was sent in accordance with Section 16 hereof. This thirty (30) day period shall be extended by an additional ninety (90) days if (a) the failure cannot reasonably be cured within the thirty (30) day period despite diligent efforts, (b) the default is capable of being cured within the additional ninety (90) day period, and (c) DLG commences the cure within the original thirty (30) day period and is at all times thereafter diligently and continuously proceeding to cure the failure. Upon termination, the City shall have no continuing obligations arising from the 1996 Agreement, as amended, and DLG hereby agrees to forever disclaim any interest, either express or implied, in any remaining water rights conveyed to the City under the terms of the 1996 Agreement, as amended.
5. **Assignability:** DLG may assign its remaining beneficial interest in the water rights conveyed to the City under the 1996 Agreement, as amended (including, without limitation the Three Hundred Fifty Three and Ten One-Hundredths (353.10) acre-feet of water rights currently banked with the City pursuant to the 1996 Agreement, as set forth in the July 25, 2018 stipulated order resolving the dispute between DLG and the Rainbow Trust in the Third Judicial Court of the State of Nevada in and for the County of Lyon), to a third-party upon approval of the City, which approval shall not be unreasonably withheld, conditioned or delayed¹. Any assignment shall be subject to the restrictions and limitations contained

¹ The deleted language is contained in Section 6

in the 2006 Amendment including, without limitation, any restrictions on the place of use or manner of use of the water rights. Said assignment must be executed using the City's standard form for the assignment of banked water rights.

- 6. Retention of Rights:** The Parties agree that by executing this Third Amendment neither party waives, or shall be deemed to have waived, any claim, defense, or right related to: (a) the computation of the remaining beneficial interest held by DLG in the water rights conveyed to the City under the terms of the 1996 Agreement, as amended, or (b) any restrictions or limitations on the place of use or manner of use of the water rights included within the 1996 Agreement, 2002 Amendment, and 2006 Amendment. The Parties further agree that the sole purpose for the execution of this Third Amendment is to extend the expiration date of the 1996 Agreement, as amended, and nothing contained herein shall be deemed to have altered or amended the terms of the 1996 Agreement, 2002 Amendment, or 2006 Amendment with respect to any rights, limitations or restrictions on the use of the water rights included in those prior agreements and amendments including, without limitation, any restrictions on the place of use or manner of use of the water rights.
- 7. Incorporation of Recitals:** The recitals set forth above are incorporated into this Third Amendment by this reference.
- 8. Counterparts:** This Third Amendment may be executed in counterparts, each of which shall be deemed an original, and all of which, taken together, shall constitute but one and the same instrument.
- 9. Attorney's Fees and Costs:** Each Party shall bear its own costs with respect to the negotiation, preparation, and execution of this Third Amendment. In the event that any Party shall commence any lawsuit, action, or other administrative or judicial proceeding arising from, or concerning, the 1996 Agreement, or any amendments thereto, whether such lawsuit, action, or proceeding involves causes of action in contract or in tort, at law or in equity, the prevailing Party shall be entitled to recover all costs and expenses associated with such lawsuit, action, or proceeding, including, without limitation, reasonable attorney's fees, expert or consultant fees, and costs. The prevailing Party shall be determined by the court based upon an assessment of which Party's major arguments made or positions taken in the lawsuit, action, or proceeding could fairly be said to have prevailed over the other Party's major arguments or positions.
- 10. Authority:** Each individual executing this Third Amendment on behalf of the Parties hereto hereby warrants and represents that he/she is duly authorized to execute and deliver this Third Amendment on behalf of said Party. In particular, the individuals executing this Third Amendment on behalf of the City hereby warrant and represent that the City Council of the City of Fernley has given them all necessary power and authority to execute this Third Amendment and to bind the City. Likewise, the individuals executing this Third Amendment on behalf of DLG hereby warrant and represent that DLG is the lawful successor in interest to Rainbow Trust and that said Party is duly authorized by DLG to execute this Third Amended on DLG's behalf.

- 11. Conflict:** In the event that any provision of this Third Amendment conflicts with any provision contained within the 1996 Agreement, or any previous amendment thereto, the provisions of this Third Amendment shall prevail.
- 12. Entire Agreement:** The 1996 Agreement, as amended by the 2002 Agreement, 2006 Amendment, and this Third Amendment, constitutes the entire agreement between the parties with respect to the matters contained therein and there are no representations, conditions, warranties, or collateral agreements (expressed or implied), statutory or otherwise, with respect to the 1996 Agreement, as amended, other than as contained therein.
- 13. Modification:** The 1996 Agreement, as amended, may not be modified, changed, or supplanted, nor may any obligations thereunder be waived, except by written instrument signed by the Party to be charged or by its agent duly authorized in writing or as expressly permitted herein. Any amendments must be in writing and executed with the same formality as the 1996 Agreement and the amendments thereto.
- 14. No Third Party Beneficiary:** The parties hereto do not intend to confer or convey any benefit under the 1996 Agreement, as amended, to or on any person, firm, or corporation other than the parties hereto.
- 15. No Waiver:** No waiver of any breach of any provision contained in the 1996 Agreement, as amended, shall be deemed a waiver of any preceding or succeeding breach thereof or of any other agreement or provision. No extension of time for performance of any obligation or act shall be deemed an extension of time for performance of any other obligation or act. No failure or delay of either Party in the exercise of any right given to such Party under the 1996 Agreement, as amended, shall constitute a waiver thereof unless the time specified for the exercise of the right has expired.
- 16. Additional Acts:** The Parties agree to do and perform such further acts and to execute and deliver such additional agreements and instruments as the other may reasonably require to ensure the performance of the first Party's obligations under the 1996 Agreement, as amended.
- 17. Time is of the essence:** Time is of the essence with respect to each and every particular of the 1996 Agreement, as amended. Any time period computed pursuant to the 1996 Agreement, as amended, shall be computed by excluding the first day and including the last. If the last day falls on a Saturday, Sunday, or holiday, the last day shall be extended until the next day that the City is open for business.
- 18. Severability:** The determination that any covenant, condition, or provision of the 1996 Agreement, as amended, is invalid or unenforceable shall not affect the enforceability of the remaining covenants, conditions, or provisions and, in the event of such a determination, the 1996 Agreement, as amended, shall be construed as if such invalid covenant, condition, or provision were not included therein.
- 19. Notices:** All notices, demands, or requests which may be given or which are required to be given by either Party to the other, shall be sent by certified mail, return receipt requested,

in which case notice shall be deemed delivered five (5) Business Days after deposit, postage prepaid in the U.S. mail, to the address below. Any notice which a Party may or is required to give may be authorized or given by that Party's attorney with such notice having the same force and effect as if given by the Party itself.

TO THE CITY:

City Manager
City of Fernley
595 Silver Lace Blvd.
Fernley, NV 89408

TO DLG:

DLG Associates, LLC
c/o Friendly Capital Partners, LLC
P.O. Box 19688
Reno, NV 89511

WITH COPY TO:

Douglas J. Frye, Esq.
24955 Pacific Coast Highway, Suite A201
Malibu, CA 90265

The above addresses may be changed by written notice to the other Party; provided that no notice of a change of address shall be effective until actual receipt of such notice.

[Signature page follows]

IN WITNESS WHEREOF, the Parties have caused this Third Amendment to be executed by their authorized representatives on the day and year first above written.

CITY OF FERNLEY

By: _____
Roy Edgington, Jr., Mayor

ATTEST:

City Clerk

D.L.G. ASSOCIATES, LLC
a Nevada limited liability company

By: Friendly Capital Partners, L.P., a California limited partnership, its Manager,

By: Friendly Capital, Inc., a Nevada corporation, its General Partner

By: _____
Warren Trepp, President: