

RESOLUTION NO. 2319

A RESOLUTION OF THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, APPROVING AND AUTHORIZING THE MAYOR TO EXECUTE AN AGREEMENT BETWEEN CRESCENT RESOURCES, LLC, AND THE TOWN OF PAYSON RELATING TO THE RIM CLUB OUTDOOR SWIMMING POOL.

WHEREAS, Crescent Resources, LLC ("Crescent"), is the successor in interest to the developer of The Rim Club Subdivision; and

WHEREAS, a dispute has developed between Crescent and the Town regarding the permissibility of constructing an outdoor swimming pool at the Rim Club Subdivision; and

WHEREAS, to resolve the dispute, Crescent and the Town have developed an agreement,

NOW, THEREFORE, THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, DO HEREBY RESOLVE AS FOLLOWS:

Section 1. That the Agreement Between Crescent Resources, LLC, and the Town of Payson, attached hereto marked Exhibit "A" and made a part hereof by this reference, be and is hereby approved in substantially the form as attached.

Section 2. That F. Robert Edwards, Mayor of the Town of Payson, be and is hereby authorized to execute said Agreement in substantially the form attached as Exhibit "A".

Section 3. That the Town of Payson be and is hereby authorized to take and perform such other and further actions as are necessary or appropriate to carrying out the purposes of this Resolution and the terms of said Agreement.

PASSED AND ADOPTED BY THE MAYOR AND COMMON COUNCIL OF THE TOWN OF PAYSON, ARIZONA, this \_\_\_\_ day of \_\_\_\_\_, 2007, by the following vote:

AYES \_\_\_\_\_ NOES \_\_\_\_\_ ABSTENTIONS \_\_\_\_\_ ABSENT \_\_\_\_\_

\_\_\_\_\_  
F. Robert Edwards, Mayor

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Silvia Smith, Town Clerk

\_\_\_\_\_  
Samuel I. Streichman, Town Attorney

# EXHIBIT "A"

to Resolution No. 2319

## AGREEMENT BETWEEN CRESCENT/ARIZONA, LLC AND THE TOWN OF PAYSON

THIS AGREEMENT is made effective this \_\_\_\_\_ of \_\_\_\_\_, 2007, by and between Crescent/Arizona, LLC, a North Carolina limited liability company authorized to conduct business in the State of Arizona ("Crescent"), and the Town of Payson, an Arizona municipal corporation, organized under the laws of the State of Arizona ("TOP") (collectively, the "Parties").

### RECITALS

- A. Crescent is the successor in interest to the developer of the subdivisions of Chaparral Pines and The Rim Club, located within the Town.
- B. Crescent desires to install an outdoor swimming pool at its Rim Club location (the "Pool").
- C. The Town has adopted its Ordinance Number 620 which prohibits building outdoor swimming pools within the Town.
- D. A dispute has thus developed between the Parties regarding the permissibility of constructing an outdoor swimming pool at The Rim Club subdivision (the "Dispute").
- E. The Dispute arises from a complex series of events and actions of the Parties which do not admit of a simple solution.
- F. To resolve the Dispute and to avoid costly litigation, the Parties have developed this agreement and choose respectively to enter into the same.

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

- 1. Town will grant a building permit to Crescent for the construction and installation of one outdoor swimming pool.
- 2. Upon issuance of the building permit, Crescent will construct and install a swimming pool of the following configuration and characteristics:
  - a. The Pool will have one lap lane with a small wading area concentrated at one end.
  - b. The Pool will be no greater than four feet deep.
  - c. The Pool will contain no more than 1,155 square feet of surface area.

- d. The Pool will be covered at water level when not in use.
  - e. Normal, yearly evaporation of water from the pool will not exceed 2,336 gallons per month.
  - f. The Pool will have limited times of use.
  - g. The Pool will include a standard hot tub.
3. Crescent waives and foregoes the right to develop one previously approved lot within The Rim Golf Club Subdivision. Crescent shall work with the Town to identify such lot (the "Lot") and, when the Lot is identified, Crescent will not sell or allow the development of a residence or any other building upon the Lot or will combine the Lot with another platted lot and sell the combined lot as one. If the Lot is combined with another lot, such combination will be completed to the satisfaction of the Town prior to the issuance by the Town of a certificate of occupancy for the Pool. The Town shall be under no obligation to issue the certificate of occupancy for the Pool until such lot combination is completed. Crescent shall work with the Town to perform such acts (such as amending the final plat or creating a record of survey) as are necessary or appropriate to eliminating the Lot. The resulting savings of one equivalent residential unit of water shall be applied to water use in the Pool.
  4. Crescent shall pay to the Town the sum of Two Hundred Thousand Dollars (\$200,000.00) for use for the benefit of the Town in any manner that the Town determines. Crescent may pay this amount at the rate of Three Thousand Thirty Dollars and Thirty Cents (\$3,030.30) at the closing of the sale each remaining lot available for sale in The Rim Club Subdivision. Crescent shall instruct each and every title company at which closings of the sale of lots in The Rim Club Subdivision are held that said sum of \$3,030.30 shall be required to be placed in escrow and taken from escrow funds and distributed to the Town within ten (10) days of the close of each escrow. In the event that the total amount of \$200,000.00 is not paid prior to December 31, 2009, any amount of said total sum remaining unpaid at such time shall be paid to the Town on or before December 31, 2009, and prior to the issuance of any further permits or approvals by the Town.
  5. In consideration of the Town granting a construction permit for the Pool, Crescent for itself and its respective successors, assigns, directors, and for each owner of property within The Rim Club Subdivision, agrees to hold the Town, its officers, elected officials, employees, agents, and servants, harmless from and against and do hereby forever release, acquit, and discharge the Town, its officers, elected officials, employees, agents, and servants from any and all claims, demands, actions, causes of action, damages, expenses or losses arising from or in any way growing out of any act or omission of the Town or occurrence up to the present time, including, but not limited to any claim, demand, action, cause of action, damages, expense or loss arising from or in any way growing out of or related to the Pool, its installation, or the refusal of the Town to issue a permit for the building of the pool. Crescent, for themselves and their successors and assigns, directors, and for each owner of property within The Rim Club Subdivision, agrees to commence

no action concerning any part of the subject matter of this agreement. Crescent hereby binds itself, its successors and assigns, directors, and for each owner of property within The Rim Club Subdivision as to this agreement and specifically as to this paragraph 5 and understands that the Town, its officers, elected officials, employees, agents and servants hereby admit no liability of any sort by reason of this agreement or otherwise and the consideration in connection herewith. This agreement contains the entire agreement between the Parties and is contractual and not a mere recital.

6. The undersigned have completely read this agreement, fully understand it, are signing it voluntarily and represent that they all have authority to sign this agreement for all the Parties named herein or otherwise involved in any controversy arising from any part of the subject matter hereof, and that they have had adequate opportunity to consult with legal counsel of their choice concerning this agreement and all matters pertaining hereto prior to signing the same.
7. Cooperation. The parties agree to undertake such other acts and to execute and deliver all such documents as reasonably necessary to give full force and effect to and carry out the intent of this Agreement.
8. Time of Essence and Successors. Time is of the essence of this Agreement and all of its parts. All of the provisions hereof shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.
9. Waiver. No delay in exercising any right or remedy shall constitute a waiver thereof, and no waiver by either party of the breach of any covenant of this Agreement shall be construed as a waiver of any preceding or succeeding breach of the same or any other covenant or condition of this Agreement, nor shall any waiver be a continuing waiver. Except as expressly provided in this Agreement, no waiver shall be binding unless executed in writing by the party making the waiver.
10. Construction. This Agreement shall be construed according to the internal law of Arizona without the application of any principles of conflicts of law that would require or permit the application of the laws of any other jurisdiction.
11. Further Documentation. Each party agrees in good faith to execute such further or additional documents as may be necessary or appropriate to fully carry out the intent and purpose of this Agreement.
12. Time Periods. Except as expressly provided for herein, the time for performance of any obligation or taking any action under this Agreement shall be deemed to expire at 5:00 p.m. (Payson time) on the last day of the applicable time period provided for herein. If the time for the performance of any obligation or taking any action under this Agreement expires on a Saturday, Sunday or legal holiday, the time for performance or taking such

action shall be extended to the next succeeding day which is not a Saturday, Sunday or legal holiday.

13. Headings and Counterparts. The headings of this Agreement are for purposes of reference only and shall not limit or define the meaning of any provision of this Agreement. This Agreement may be executed in any number of counterparts, each of which shall be an original but all of which shall constitute one and the same instrument.
14. Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter contained in this Agreement. All prior and contemporaneous agreements, representations and understandings of the Parties, whether oral or written, are superseded by and merged into this Agreement. No supplement, modification or amendment of this Agreement shall be binding unless in writing and executed by the parties.
15. Severability. If any provision of this Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which shall otherwise remain in full force and effect.
16. Cancellation. This Agreement is subject to the provisions of A.R.S. § 38-511.
17. Dispute Resolution. This Agreement shall be governed and construed in accordance with the internal laws of the State of Arizona. Any dispute, controversy, claim or cause of action arising out of or related to this Agreement may, but in no event need, with the written consent of both Parties be settled by submission to binding arbitration in accordance with the rules of the American Arbitration Association and the Arizona Uniform Arbitration Act, A.R.S. § 12-1501, et seq., and judgment upon any award rendered by the arbitrator(s) shall be entered in the Superior Court of Gila County, Arizona, or any such dispute, controversy, claim, or cause of action may be litigated in the Superior Court of Gila County, Arizona. The venue for any such dispute shall be Gila County, Arizona. Both Parties consent in advance to such venue and jurisdiction and waive any right to object that Gila County is an inconvenient or improper forum based upon lack of venue. Neither Party shall be entitled to recover from the other party any of its attorneys' fees, costs, or expert witness fees incurred in any such dispute, controversy, claim, or cause of action, but each party shall bear its own attorneys' fees, whether the same is resolved through arbitration, litigation in a court, or otherwise.
18. No Partnership. It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between the parties. No term or provision of this Agreement is intended to, or shall, be for the benefit of any person, firm, organization or corporation not a signatory hereto, and no such other person, firm, organization or corporation shall have any right or cause of action hereunder against either party, or otherwise.

19. Binding Effect. The parties hereto bind themselves, their partners, successors, assigns, and legal representatives to the other party to this Agreement and to the partners, successors, assigns, and legal representatives of such other party with respect to all covenants of this Agreement. Neither party shall assign this Agreement without the written consent of the other and any assignment made in violation of this Paragraph 19 is void.

CRESCENT ARIZONA, LLC,  
a North Carolina limited liability company  
authorized to conduct business in Arizona

TOWN OF PAYSON,  
an Arizona municipal corporation

By: \_\_\_\_\_

By: \_\_\_\_\_  
F. Robert Edwards, Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
Samuel I. Streichman, Town Attorney