

RESOLUTION NO. 2019-20

**A RESOLUTION OF THE MAYOR AND COUNCIL OF THE CITY OF SEDONA,
ARIZONA, APPROVING A DEVELOPMENT AGREEMENT WITH AXYS CAPITAL
TOTAL RETURN FUND, LLC, FOR THE UPTOWN ROADWAY IMPROVEMENTS
PHASE OF THE SEDONA IN MOTION (SIM) PROJECT.**

WHEREAS; the City of Sedona ("City") and Axys Capital Total Return Fund, LLC, an Arizona limited liability corporation, intend to enter into a development agreement for the Uptown Roadway Improvements phase of the Sedona In Motion Project (SIM). The project includes the construction of a new roundabout on SR 89A and a neighborhood connection via a new roadway, to be known as the Schnebly Extension, from 89A at the point of the new roundabout, and part of the construction of the new roundabout on SR 89A and the Schnebly Extension requires that the City acquire permanent right-of-way on parcels 401-08-006 and 401-14-075.


NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND THE COUNCIL OF THE CITY OF SEDONA, ARIZONA, THAT the City of Sedona, through its Mayor and Council, hereby finds that the development agreement is allowable pursuant to A.R.S. § 9-500.05, and approves of the agreement, authorizing the signature by the Mayor and recording by law.

APPROVED AND ADOPTED by the Mayor and Council of the City of Sedona, Arizona, this 22nd day of October, 2019.




Sandra J. Moriarty, Mayor

ATTEST:



Susan L. Irvine, CMC, City Clerk

APPROVED AS TO FORM:



Robert L. Pickels, Jr., City Attorney

WHEN RECORDED, RETURN TO:

City Clerk
City of Sedona
102 Roadrunner Drive
Sedona, Arizona 86336

**DEVELOPMENT AGREEMENT
(Axys Capital Total Return Fund LLC)**

This Development Agreement (“*Agreement*”) is entered into as of the 26th day of November, 2019 (the “*Effective Date*”), by and between the **CITY OF SEDONA, ARIZONA**, an Arizona municipal corporation (the “*City*”) and **AXYS CAPITAL TOTAL RETURN FUND LLC**, a Delaware limited liability company (“*Axys*”).

RECITALS

A. Axys owns the real property located in Sedona, Arizona commonly referred to as: APN 401-08-002A, 006; APN 401-09-001A, 001-B, 001C; APN 401-13-059; APN 401-14-015, 016, 017, 064, 065, 075, 163, and 164.

B. The City is engaged in the Uptown Roadway Improvements phase of the Sedona In Motion Project (SIM), which includes the construction of a new roundabout on SR.89A and a neighborhood connection via a new roadway, to be known as the Schnebly Extension, from 89A at the point of the new roundabout.

C. As part of the construction of the new roundabout on SR 89A and the Schnebly Extension, the City requires the acquisition of permanent right-of-way on parcels 401-08-006 and 401-14-075.

D. Arizona Revised States (“ARS”) Section 9-500.05 allows a municipality and a landowner or any other person having an interest in real property located in a municipality to enter into a development agreement pertaining to any matter relating to the use of such real property, including applicable land use rules, regulations and official policies; permitted land uses; density and intensity of land use; phasing of development and duration of the development agreement; and development fees.

E. The City desires to release its rights in certain real property and other valuable consideration to Axys in exchange for the dedication by Axys of its real property necessary for the completion of the 89A roundabout and Schnebly Extension portion of the Uptown Roadway Improvements.

AGREEMENT

NOW, THEREFORE, in consideration of the premises above and the mutual covenants and agreements contained herein the parties, intending to be legally bound, covenant and agree, for themselves, and their successors-in-ownership and assigns, as follows:

1. **Recitals**. The Recitals set forth above are acknowledged by the Parties to be true and correct and are incorporated herein by this reference.

2. **Covenants of Axys**. Axys agrees as follows:
 - (a) To dedicate and convey to the City permanent right-of-way on parcels 401-08-006 and 401-14-075, as depicted and described in Exhibit 1 to this Agreement (hereinafter referred to as the “Axys to Sedona Dedication”).
 - (b) To record the dedication and conveyance no later than November 30, 2019.

3. **Covenants of City**. City agrees as follows.
 - (a) To convey to Axys an approximately 10,000 square feet area of existing City right-of-way (hereinafter referred to as the “Sedona to Axys Dedication”) as depicted and described in Exhibit 1 to this Agreement.
 - (b) To record the conveyance simultaneous to the recordation of the Axys to Sedona Dedication.
 - (c) To provide Axys with developer reimbursement (hereinafter referred to as “Impact Fee Credits”), pursuant to Sedona City Code Section 14.05.100, equal to the value of the Net Dedicated Land Area as calculated by subtracting the recorded area of the Sedona to Axys Dedication from the recorded area of the Axys to Sedona Dedication.¹
 - (d) That the value of the Net Dedicated Land Area will be based on the most recent appraisal obtained and provided to City by Axys calculated by dividing the total appraised value of all Axys parcels identified herein, as listed in the appraisal, by the total area of Developable Land, and multiplying the result by the Net Dedicated Land Area.²
 - (e) That the Impact Fee Credits:
 - a. May be applied in part or in whole to any of the parcels owned, as of the date hereof, by Axys that are also identified in this Agreement (hereinafter referred to as the “Axys Parcels”), at Axys’ discretion, and;
 - b. Shall never expire; and,
 - c. May be transferred to any future owner or owners of any of the Axys Parcels, at Axys’ discretion.


¹ The Net Dedicated Land Area is estimated to be approximately 10,043 square feet.

² Developable Land shall be defined as all parcels of land included in the appraisal which are, or can be zoned for developments which would increase the market value of the parcel or parcels.

4. **Miscellaneous.**

- 4.1. **Notice.** Unless otherwise specifically provided in this Agreement, all notices, demands or other communication to be given shall be in writing and shall be deemed to have been duly delivered upon personal delivery by overnight carrier, or email transmission:

To City:
City of Sedona
Attn: J. Andy Dickey, Director of Public Works / City Engineer
102 Roadrunner Drive
Sedona Arizona 86336
SCraver@sedonaaz.gov

To Axys:
Axys Capital Total Return Fund LLC
Attn: Christopher Hamm, Manager
~~520 N State Route 89A~~ *1613 S. Capital of Texas Hwy STE 201*
~~Sedona, Arizona 86336~~ *Austin, TX 78746*
chris.hamm@axysgroup.com 

With a copy to:
Arcus Private Capital Solutions
Attn: Andrew Martin
4915 E Baseline Rd., Suite 105
Gilbert, AZ 85234
amartin@arcuscapital.com

Either party may change the notice recipient, address or email by giving written notice to the other party as provided above.

- 4.2. **Amendments.** This Agreement may be amended only by a mutual written agreement fully executed by the parties.
- 4.3. **Governing Law.** This Agreement shall be governed by and construed under the laws of the State of Arizona.
- 4.4. **Waiver.** No waiver by either party of a breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same or any other term, covenant or condition.
- 4.5. **Severability.** If any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining

portions of this Agreement shall not be affected thereby and shall remain in force and effect to the fullest extent permissible by law, provided that the fundamental purposes of this Agreement are not defeated by such severability.

- 4.6. Exhibits. All exhibits attached to this Agreement are incorporated herein by reference as though fully set forth in this Agreement. The exhibits are as follows:

Exhibit 1: Dedication and conveyance of the “Axys to Sedona Dedication,” and the “Sedona to Axys Dedication.”

Legal Descriptions and exhibits for the purposes of recording the dedication and conveyance will be prepared after execution of this Agreement.

- 4.7. Entire Agreement. This Agreement and the referenced exhibits and collateral materials constitute the entire agreement between the parties pertaining to the subject matter and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties, oral or written, are superseded and merged in this Agreement.
- 4.8. Counterparts. This Agreement may be executed in multiple counterparts.
- 4.9. Consents and Approvals. City and Axys shall at all times act reasonably and in good faith with respect to any and all matters which require either party to review, consent or approve any act or other matter pertaining to the subject matter of this Agreement.
- 4.10. Mutual Benefits. City and Axys agree that in making the promises contained in this Agreement that certain benefits and advantages will accrue to both parties as a result of the performance of this Agreement, and that this Agreement is entered into in reliance upon the actual benefits afforded each of the parties.
- 4.11. Conflict of Interest. No member, official or employee of City may have any direct or indirect interest in this Agreement, nor participate in any decision relating to the Agreement which is prohibited by law. All parties acknowledge that this Agreement is subject to cancellation pursuant to the provisions of ARS Section 38-511.
- 4.12. Enforcement by Either Party. This Agreement shall be enforceable by either party notwithstanding any change in any applicable general plan, specific plan, zoning ordinance, subdivision ordinance or building ordinance adopted by City which substantially changes, alters or amends the applicability of said plans or ordinances to the Agreement.

- 4.13. Cumulative Remedies. Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are cumulative, and the exercise by any party of one or more of such rights or remedies will not preclude the exercise by it, at the same time or different times, of any other rights or remedies for the same default or any other default by such defaulting party.
- 4.14. Attorneys' Fees. In any arbitration, quasi-judicial or administrative proceedings or any other action in any court of competent jurisdiction, brought by either party to enforce any covenant or any of such party's rights or remedies under this Agreement, including any action for declaratory or equitable relief, the prevailing party shall be entitled to reasonable attorneys' fees and all reasonable costs, expenses in connection with such action.
- 4.15. Assignment and Successors. This Agreement shall be binding upon and shall inure to the benefit of the parties and their successors and assigns; provided, however, anything herein or elsewhere to the contrary notwithstanding, the Impact Fee Credits are not appurtenant to and do not run with the land, do not inure to the benefit of successors or assigns and do not automatically transfer with a conveyance of the Axys Parcels or portions thereof and shall only be transferred by express written assignment by Axys
- 4.16. No Third-Party Beneficiaries and No Partnership. This Agreement is made and entered into for the sole protection and benefit of the parties. No person other than the parties and their successors in interest shall have any right of action based upon any provision of this Agreement. Nothing contained in this Agreement shall create any partnership, joint venture or agency relationship between the parties.
- 4.17. Effective Date, Term and Recordation. This Agreement will be effective ("*Effective Date*") upon execution by the undersigned parties and recordation in accordance with ARS Section 9-500.05.
- 4.18. Time of the Essence. Time is of the essence in this Agreement.

[SIGNATURES APPEAR ON THE FOLLOWING PAGES]

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

CITY:
CITY OF SEDONA, ARIZONA, an Arizona municipal corporation

By: Sandra J. Moriarty
Sandra J. Moriarty, Mayor

ATTEST:

Susan L. Irvine
Susan L. Irvine, CMC, City Clerk

APPROVED AS TO FORM:

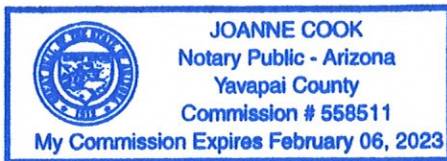
Robert L. Pickels, Jr.
Robert L. Pickels, Jr., City Attorney

STATE OF ARIZONA
County of Yavapai

On this 31st day of October, 2019, before me personally appeared Sandra J. Moriarty, the Mayor of the CITY OF SEDONA, ARIZONA, an Arizona municipal corporation, for and on behalf thereof, whose identity was proven to me on the basis of satisfactory evidence to be the person who she claims to be and acknowledged that she signed the above/attached document.

[Affix notary seal here]

Jo Anne Cook
Notary Public



AXYS:
AXYS CAPITAL TOTAL RETURN FUND LLC, A DELAWARE
LIMITED LIABILITY COMPANY

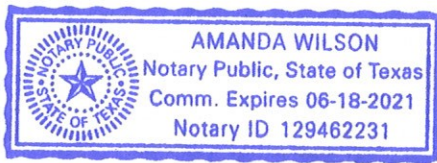
BY: 
CHRISTOPHER HAMM, MANAGER

STATE OF ~~ARIZONA~~ *Texas*
County of ~~Yavapai~~ *Travis*

On this 26th day of November, 2019, before me personally appeared Christopher Hamm, whose identity was proven to me on the basis of satisfactory evidence to be the person who he claims to be, and acknowledged that he signed the above/attached document.

[Affix notary seal here]


Notary Public



**EXHIBIT A
TO
DEVELOPMENT AGREEMENT**

Site Plan

See following page

OWNER: IRA
 SERVICES TRUST
 CUSTODIAN WILSON
 ALAN DEAN
 APN: 401-14-006

OWNER: AXYS CAPITAL
 TOTAL RETURN FUND LLC
 APN: 401-14-015, 401-14-016,
 401-14-017, 401-14-064,
 401-14-065, 401-14-075

PROP. RIGHT OF WAY
 AREA: 14,133 SQ FT

RIGHT OF WAY TO
 AXYS
 AREA: 10,245 SQ FT

OWNER: LILLY
 INN LLC
 APN: 401-13-016

OWNER: LSRI
 GANESHA LLC
 APN: 401-14-018A

PROP. RIGHT OF WAY
 AREA: 6,155 SQ FT

OWNER: AXYS CAPITAL
 TOTAL RETURN FUND LLC
 APN: 401-08-006

