

ENCROACHMENT EASEMENT AGREEMENT

THIS ENCROACHMENT EASEMENT AGREEMENT ("Agreement") is made this 20th day of September, 2004 ("**Effective Date**"), by and between Idarado Legacy, LLC, a Colorado limited liability company ("**Grantor**") and Thomas Mortell, Jr. and Ken Grodberg ("**Grantee**"). Grantor and Grantee are sometimes collectively referred to as the "**Parties**" and sometimes individually referred to as a "**Party**".

RECITALS

- A. Grantor is the fee simple owner of certain real property which was platted as a portion of Marshall Avenue, as depicted on the plat recorded in Plat Book 28, page 20, located in San Miguel County, Colorado, which property is included in a subdivision generally and commonly referred to as the Idarado Legacy Subdivision and designated as Lot BV-1, Idarado Legacy Subdivision, established and depicted by the Final Record Plat of Idarado Legacy Subdivision recorded February 10, 2004 in Plat Book 1 at Page 3238, Reception No. 364049 ("**Plat**"), in the Office of the Clerk and Recorder of San Miguel County, Colorado, and according to the Declaration of Covenants, Conditions and Restrictions for Idarado Legacy Subdivision, recorded at Reception No. 367146 ("**Grantor Property**").
- B. Grantee is the owner of Lot 15 and Lot 16, Block B, Royer Creek Placer, as per plat recorded in Plat Book 28, page 20, located in San Miguel County, Colorado ("**Grantee Property**").
- C. Grantor has constructed certain residential improvements on the Grantee Property, which exist as of the Effective Date of the Agreement as depicted and described on attached **Exhibit "A"**, a portion of which improvements encroach upon the Grantor Property ("**Encroachments**") as indicated on attached **Exhibit "A"**.
- D. Grantor has agreed to grant to Grantee an easement ("**Easement**") over a portion of the Grantor Property at such locations and for such uses as stated in this Agreement.
- E. Grantor desires by this instrument (a) to establish and to grant to Grantee the Easement, and (b) to establish certain restrictions with respect to the Easement.
- F. Grantee desires by this instrument (a) to accept said Easement subject to the restrictions set forth herein, and (b) to assume certain responsibilities in connection therewith.
- G. The Parties intend that this easement shall terminate, replace and supercede in its entirety that certain easement granted by Grant of Easement recorded on July 30, 1998 and recorded in Reception No. 320309.

AGREEMENT

NOW, THEREFORE, for and in consideration of the mutual covenants and agreements set forth herein, and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, Grantor and Grantee agree as follows:

1. **Grant and Use of Easement.**

- 1.1. Grantor hereby grants and conveys to Grantee, their heirs, successors and assigns, at no cost, a perpetual, nonexclusive easement ("Easement") over and across that portion of the Grantor Property ("Easement Area") as such Easement Area is depicted and described on attached **Exhibit "A"**. Grantee, for itself and its successors, designees and assigns, hereby accepts the Easement in an "as is" condition, subject to the restrictions herein contained, and subject to all patent or latent defects, conditions, circumstances or problems of any kind or nature.
- 1.2. Grantor authorizes the Grantee to utilize the Easement Area only to gain access to and maintain the Encroachments, provided that nothing herein shall authorize Grantee to enlarge, intensify, expand or otherwise increase the Encroachment further into Grantor Property. In the event that the Encroachment is removed or destroyed and replacement or reconstruction is not commenced within eighteen months after such removal or destruction, this Easement shall automatically terminate and Grantee shall have no further right to reconstruct this Encroachment or construct any other structures of improvements upon the Grantor Property.
- 1.3. Grantor has good and sufficient title to the Grantor Property and is authorized to grant the easements stated herein.
- 1.4. This Easement is granted subject to all prior encumbrances and other matters of record, burdening and affecting Grantor Property, in San Miguel County, Colorado, provided that nothing herein shall mean the Encroachment itself or Grantee's Property is subject to the Declaration of Covenants, Conditions and Restrictions for Idarado Legacy Subdivision, recorded at Reception No. 367146.
- 1.5. Grantee is not and shall not be construed as the agent of Grantor in contracting for any improvements to the Easement Area, and shall have no authority to pledge, mortgage, hypothecate or otherwise encumber any interest in the Easement Area or any other property of Grantor, except for Grantee's easement rights hereunder.
- 1.6. Grantor expressly reserves unto itself, the right to: (A) use and enjoy the land covered by the Easement Area for all lawful purposes that will not unreasonably interfere with the rights hereby granted to Grantee; and (B) grant additional easements or rights-of-way upon or across the Easement Area to other persons or entities.
- 1.7. Grantee agrees to obtain and maintain at its expense at all times that the Encroachment exists on the Grantor Property a comprehensive general liability insurance policy and property damage insurance policy, or other such policy as may be required to insure Grantor against liability for bodily injury and property damage, and to compensate Grantor for any damage to the Grantor Property and residential and other improvements located thereon which may arise out of or result from Grantee's use of the Easement and the Improvements, which policy shall be in the minimum amount of \$1,000,000.00 combined single limit for bodily injury and property damage. Grantor shall be named as an additional insured party thereon. The insurance carrier name and form and substance of Grantee's policy shall be promptly provided to Grantor upon request by Grantor.

Grantee shall deliver to Grantor an initial certificate of such insurance and subsequently upon request by Grantor.

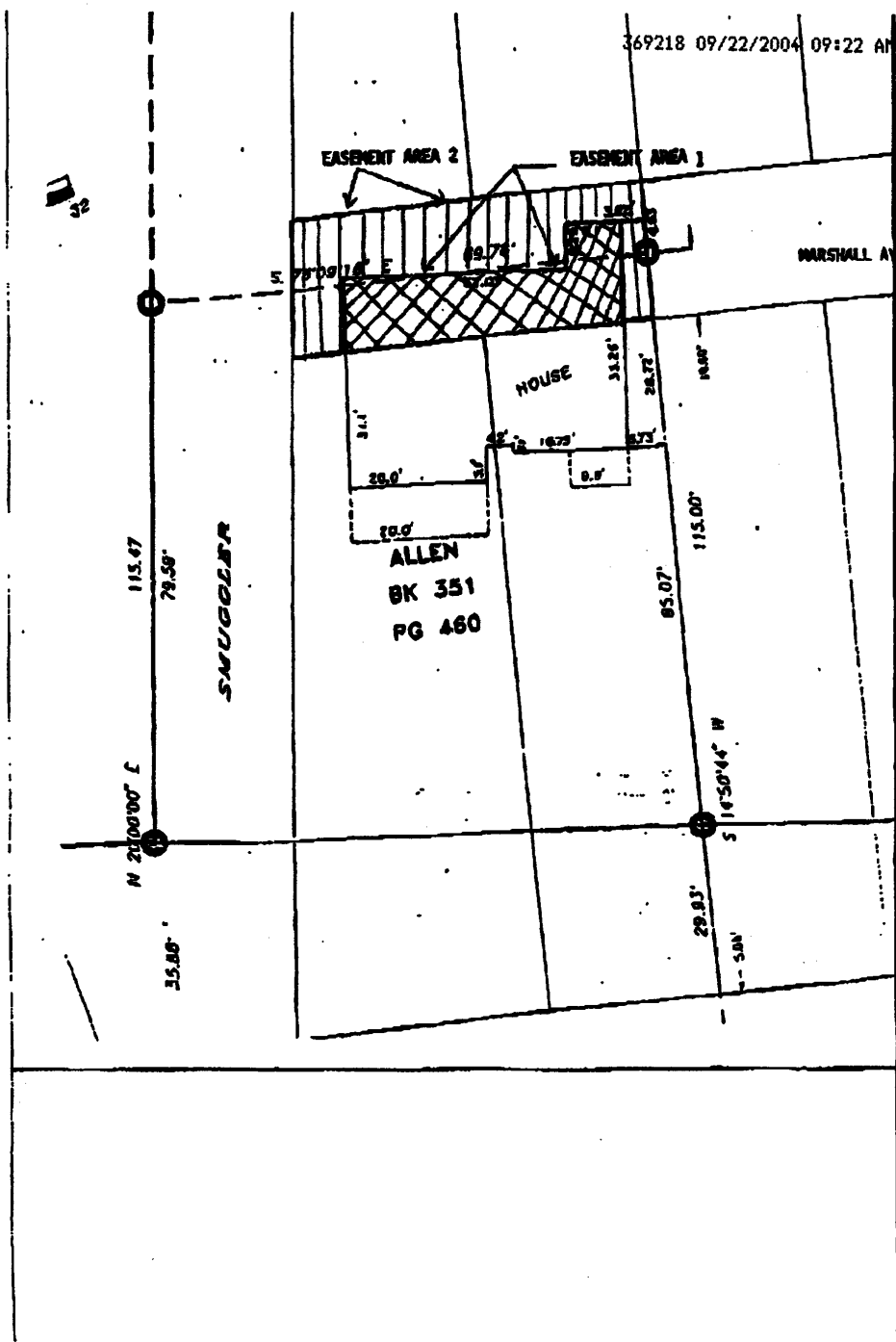
2. **Miscellaneous.**

- 2.1. **Run With The Land. Heirs, Successors and Assigns.** The easements, benefits and rights granted and agreed to herein and the burdens, duties and obligations imposed and agreed to herein shall run with the Easement Area. Further, the easements, benefits and rights granted and agreed to herein and the burdens, duties and obligations imposed and agreed to herein shall be binding upon and shall inure to the benefit of, and be a burden upon, the heirs, designees, successors and assigns of the Parties.
- 2.2. **Recordation.** This Agreement is intended to be recorded by the Parties in the office of the Clerk and Recorder of San Miguel County, Colorado.
- 2.3. **Effective Upon Execution.** This Agreement shall not be binding or effective on any party until executed on its behalf. The Parties acknowledge and agree that all obligations of Grantee herein and hereunder shall apply to Grantee with equal force and effect to, and Grantee shall be responsible for the actions or inactions of Grantee's employees, representatives, agents, contractors, subcontractors, suppliers and materialmen.
- 2.4. **Counterparts.** This Agreement may be executed in multiple counterparts or by legible facsimile copy, each of which shall constitute an original, but all of which, taken together, shall constitute one and the same instrument. The facsimile transmission of a signed copy of this Agreement shall be considered valid and constitute a signed original. A signed "hard copy" of the document shall be executed by the Parties and delivered to Grantee for recordation.
- 2.5. **Indemnification.** By accepting the Easement granted herein, Grantee hereby agrees to defend and hold harmless Grantor and its successors and assigns in the record ownership of the Grantor Property, or any part thereof, to the full extent allowed under Colorado law, from and against any and all claims, demands, causes of action, damages, losses, liabilities, costs and expenses of any kind or nature (including those involving death, personal injury or property damage and including reasonable attorney's fees) arising from or incurred in any way in connection with the presence of the Encroachment on the Grantor Property and/or the use of the Encroachment or Easement, excepting any such claims or losses which may arise directly from the willful, intentional, reckless, and grossly negligent acts of Grantor, its agents or employees.
- 2.6. **Further Assurances.** Recognizing that the Parties hereto may find it necessary from time to time to establish to lenders, mortgagees, accountants or other persons or parties of the then current status of performance hereunder, each party bound or benefited by this Agreement agrees, upon written request, that it will from time to time, with reasonable promptness, furnish a written statement in recordable form on the status of any matter relating to this Agreement.
- 2.7. **Governing Law. Enforcement.** This Agreement and the rights and obligations of the Parties hereto shall be interpreted, construed and enforced in accordance with the laws of the State of Colorado. In the event of any interference or

threatened interference with the Easement herein granted or with the other rights and obligations of the Parties hereunder, a party may pursue all available remedies, including, without limitation, injunctive relief or specific performance to ensure performance of another Parties obligations hereunder. In any action for enforcement of rights hereunder, the prevailing party shall be entitled to an award for recovery of their costs and fees, including reasonable attorney fees. Except as may be expressly otherwise stated or provided, with respect to all required acts of the Parties, time is of the essence.

- 2.8. **Modification.** This Agreement may not be modified, except in writing signed by the Parties.
- 2.9. **Captions.** Captions are for convenience only and are not to be construed as defining or limiting in any way the scope of intent of the provisions of such sections.

Exhibit "A"
UTILITY EASEMENT AGREEMENT



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FROM PEAKS REAL ESTATE