RESOLUTION - ACTION REQUESTED 2017-608

MEETING: September 12, 2017

TO: The Board of Supervisors

FROM: Sarah Williams, Planning Director

RE: Agreement of Indemnity - Tenaya Cabins Project

RECOMMENDATION AND JUSTIFICATION:
Approve an Indemnification Agreement with Delaware North Parks and Resorts at Tenaya, Inc. for the Tenaya Cabins Project; and Authorize the Board of Supervisors Chair to Sign the Indemnification Agreement.


The indemnification agreement for the Tenaya Cabins Project does not follow the standard format for indemnification agreements previously approved by the Board of Supervisors (used primarily for land division approvals). Changes to the format were requested by the applicant.

The proposed indemnification agreement was approved for legal sufficiency.

When executed, the agreement will ensure that legal costs for defending the County’s action(s) to approve private discretionary projects are paid for by the project applicant, should the County’s action(s) be challenged in a court of law.

BACKGROUND AND HISTORY OF BOARD ACTIONS:
Resolution 04-346 (July 20, 2004) and Resolution 05-117 (April 5, 2005); Indemnification Agreement standard format

Resolution 2017-434 (June 27, 2017); Tenaya Cabins Project approvals

Ordinance 1125 (July 11, 2017); Tenaya Cabins Project approval

ALTERNATIVES AND CONSEQUENCES OF NEGATIVE ACTION:
Revise the agreement.
Negative action would result in no indemnification agreement for the project.

FINANCIAL IMPACT:
No budget action required.
ATTACHMENTS:
Tenaya Cabins Project (Delaware North) Agreement of Indemnity  (PDF)

CAO RECOMMENDATION
Requested Action Recommended

RESULT:  ADOPTED BY CONSENT VOTE [UNANIMOUS]
MOVER:  Kevin Cann, District IV Supervisor
SECONDER:  Rosemarie Smallcombe, District I Supervisor
AYES:  Smallcombe, Jones, Long, Cann, Menetrey
AGREEMENT OF INDEMNITY

THIS AGREEMENT is entered into between the County of Mariposa (“County”) and DNC Parks & Resorts at Tenaya, Inc., a Delaware Corporation (“Developer”), and effective upon the 27th day of June 2017 (the “Effective Date”).

WHEREAS, Developer has filed applications with County for the approval of certain land use entitlements for a development project known as Specific Plan Zoning Amendment No. 2014-163, Land Division Application No. 2014-165, and Conditional Use Permit No. 2014-164 (the “Requested Entitlements”), for the “Tenaya Cabins Project” (the “Project”); and

WHEREAS, the County has concluded the preparation of various environmental documents, staff reports, exhibits, approvals and other entitlements and decisions pertaining to the Requested Entitlements; and

WHEREAS, the various Project approvals will inure to the substantial economic benefit of the Developer; and

WHEREAS, the Developer is willing to assist the County in the event that a legal challenge is filed against the Requested Entitlements;

NOW, THEREFORE, County and Developer agree as follows:

1. Developer agrees to defend, indemnify, and hold harmless the County and its agents, officers, officials, and employees (the Indemnified Parties) from any claim, action, or proceeding against the Indemnified Parties to attack, set aside, void, or annul the Requested Entitlements and/or certification of CEQA review approved by County or its officers, officials, agents or employees concerning the Requested Entitlements and other proceedings, or to impose personal liability against such officers, officials, agents or employees resulting from their involvement in any and all proceedings or actions taken by County in connection with the processing of the Requested Entitlements, specifically including but not limited to any claim for damages, attorney fees, costs of court, or expenses of litigation claimed by or awarded to any party from County in such litigation (the Indemnity Obligations).

2. County agrees that it shall promptly notify Developer of any claim, action or proceedings giving rise to an Indemnity Obligation. In addition, County shall reasonably cooperate in the defense of an Indemnity Obligation. Developer may select counsel, having sufficient qualifications and experience to provide such defense, subject to Board of Supervisors approval.

3. Notwithstanding the foregoing, the County reserves the right, at its sole discretion to elect to participate in the defense of any such claim, action, or proceeding, with counsel of its own choosing, provided that it shall bear its own attorney’s fees and costs for such counsel.

4. Neither Developer nor the Indemnified Parties shall settle any of the claims against an Indemnified Party without such party’s written consent, provided, however, that if Developer fails to fully comply with Paragraph 1 above, the Indemnified Parties may, in addition to any other remedies, settle any of the claims at their sole discretion, up to and including revocation of the Requested Entitlements. Developer and Indemnified Party shall not unreasonably withhold its consent to settlement of such claim, action or proceeding, provided, however, no Indemnified
Party shall be required to consent to any settlement of such claim, action or proceeding that imposes any financial liability upon such party unless Developer agrees to fully assume, pay and discharge such liability and includes in any settlement agreement that they will be fully paid and discharged by Developer. Any settlements shall be approved by the Board of Supervisors of County as required by law.

5. County and Developer agree to mediate any dispute or claim arising between them out of this Agreement, before resorting to arbitration or court action. Mediation fees, if any, shall be divided equally among the parties involved. If, for any dispute or claim to which this section applies, any party commences an action without first attempting to resolve the matter through mediation or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney’s fees even if they would otherwise be available to that party in any such action.

6. County and Developer agree that any dispute or claim in law or equity arising between them out of this Agreement which is not settled through mediation shall be submitted to nonbinding arbitration. The arbitrator shall be a retired judge or justice, or an attorney with at least 10 years of CEQA and/or land use experience, unless the parties mutually agree to a different arbitrator, who shall render an award in accordance with substantive California law. In any action, proceeding or arbitration proceeding, the prevailing party shall be entitled to reasonable attorney’s fee and costs from the nonprevailing party, except as provided in Section 5.

7. This Agreement shall expire in one year from the Effective Date (the “Expiration Date”). Notwithstanding the foregoing, if County is a party to any pending claim, action or proceeding on the Expiration Date, Developer’s obligations under this Agreement shall continue until the pending claim, action or proceeding, including the exhaustion of any appeal, is completed.

8. In the event of a transfer, Developer’s obligation shall continue until such time as Developer and transferee execute an assignment and assumption agreement acceptable to County. Notwithstanding the foregoing, if County is a party to any pending claim, action or proceeding on the Expiration Date, Developer’s obligations under this Agreement shall continue until the pending claim, action or proceeding, including the exhaustion of any appeal, is completed.

COUNTY OF MARIPosa

Marshall Long, Chair

Date: 9-13-17

DEVELOPER

Scott Socha, President DNC Parks and Resorts at Tenaya, Inc., Developer

Date: 8/22/17

ATTEST:

René La Roche
Clerk of the Board of Supervisors

APPROVED AS TO FORM:

Steven W. Dahlem
County Counsel