1ST Amendment

When recorded return to:

Town Clerk Town of Gilbert 50 East Civic Center Drive Gilbert, Arizona 85296 OFFICIAL RECORDS OF MARICOPA COUNTY RECORDER HELEN PURCELL 20091165756 12/21/2009 02:42 N ELECTRONIC RECORDING Gilbert248-9-1-1--

Contract #2008-7101-0248

EXHIBIT A

FIRST AMENDMENT TO THE DEVELOPMENT AND DISPOSITION AGREEMENT

THIS FIRST AMENDMENT (this "Amendment") is entered into this ___ day of December, 2009, by and between HERITAGE MARKETPLACE, L.L.C, an Arizona limited liability company ("Heritage Marketplace"), and the TOWN OF GILBERT, ARIZONA, an Arizona municipal corporation ("Gilbert"). Heritage Marketplace may be collectively referred to as "Developer".

RECITALS:

- A. Gilbert and Developer are parties to the DEVELOPMENT AND DISPOSITION AGREEMENT (the "Agreement") dated September 25, 2007 for the redevelopment of Gilbert's historic downtown, an area known as the "Heritage District." The property is located at the northwest corner of Gilbert Road and Vaughn Avenue, and more specifically described in the attached Exhibit B to the Amended Agreement ("Property").
- B. Gilbert and Developer desire to amend the Agreement in certain respects, and the parties desire to enter into this Amendment, which upon execution hereof and approval by Gilbert and recordation shall be fully binding upon the parties.
- C. The Project has received final approval of the revised site plan for Heritage Marketplace pads A & B and conceptual approval for building pads 1, 2, 3 and 4. In addition, the Parking Structure design and location have also received final approval.
- D. Heritage Marketplace L.L.C. has advised Gilbert that the Agreement dated September 25, 2007 presents obstacles to Developer for the acquisition of financing for the development of the property.
- E. Accordingly, the Parties desire to amend the Agreement so as to: 1) Facilitate Developer's acquisition of financing for the Property's development; and 2) Permit Gilbert to participate in the profits from any sale of the Property, exclusive of building pads 1, 2, 3, or 4 by the Developer between the dates of approval of this Amendment and prior to any improvements being made on the Property.
- F. This Amendment is being entered into for the purposes of satisfying the above Recitals and is consistent with the Redevelopment Plan for the Heritage District and Gilbert's General Plan.

AGREEMENT:

NOW, THEREFORE, in consideration of the foregoing and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. The fourth sentence of Subparagraph 2.1 is hereby amended to read as follows:

The Project also includes four (4) proposed individual lots (totaling approximately 60,900 square feet of land area) that are expected to be marketed as "for-sale" build-to-suit opportunities to retail, restaurant, office and/or residential users.

2. The following insert is placed after the second sentence of Paragraph 3:

Furthermore, it is the stated intent of the Developer to purchase and develop the property in accordance with the terms outlined in this Agreement and that Gilbert has the same expectation of the Developer. If the Developer sells the Property outlined in this Agreement between the dates of approval of this Amendment and prior to "Improvements" (as defined below) made on the Property, then the Developer agrees to share 50% of any "Profits" (as defined below) accruing to Developer from the sale of the Property with Gilbert. However, the Parties agree and covenant that Developer may sell the four (4) pad designated sites, identified on Exhibit B, Conceptual Development Plan as parcels 1, 2, 3, and 4 and not have to share the Profits from those sales with Gilbert.

"Profits" is defined as the monetary benefit to Developer from the sale of the Property, exclusive of the four pad sites identified on the Conceptual Development Plan, and is derived by taking the sales price for the Property, less the total cost of the project which includes the purchase price of the Property of \$5.00 per square foot plus site development costs, exclusive of any administrative and management fees paid to the Developer.

"Improvements" is defined as having the Property "Pad Ready." Pad Ready is defined as having the sidewalks, utilities, building pad preparation, parking lot and driveways in place before, or concurrent with, the construction of either Building A or Building B.

3. The following new Subparagraph 3.5 shall be added to the Agreement:

Gilbert agrees to subordinate the Agreement and the Amendment to the construction loan and the permanent loan Developer acquires, with the understanding that Gilbert's lien position through this Amendment will be subordinated to only the outstanding balance of the first deed of trust financing for the construction loan and the permanent loan and such financing shall only be for the purchase price and construction costs.

4. The following new Subparagraph 3.6 shall be added to the Agreement:

The Profits shall be paid to Gilbert at close of escrow of the sale of the Property or any portion of the Property which occurs prior to "Improvements" (as defined above) made on the Property. As used in this paragraph, "sale" includes a sale, option to purchase, sale and leaseback, or any similar transaction in which the beneficial interest in the Property or portion of the Property is or is intended to be conveyed to another entity.

Developer shall give written notice to Gilbert of pending sales (as defined herein) at least thirty (30) days prior to closing any such sale.

5. The second sentence of Subparagraph 4.1.1 is hereby amended as follows:

The Parking Structure received final design approval on March 19, 2009 and construction of the Parking Structure will begin no later than thirty (30) days following the date which Developer has "dried in" (windows and doors installed, roof covered, building paper on exterior of building) either Building A or Building B, as determined by the Gilbert Building Inspector pursuant to the Gilbert building codes, or such other date mutually agreeable to the Parking Structure Commencement Date"), in order for Gilbert to complete construction of the Parking Structure no later than two hundred and ten (210) days following the Parking Structure Commencement Date.

6. The fourth sentence of Subparagraph 4.1.1 is hereby amended as follows:

For the first seven (7) years after the completion of construction of the Parking Structure Gilbert shall not charge a parking fee to the general public or patrons of the Property, including employees of tenants, visitors, and guests of Buildings A, B and pad sites 1, 2, 3 and 4, as designated on the Conceptual Development Plan, for use of the Parking Structure, except as provided in paragraphs 5.11 and 5.11.1 of this Agreement.

- 7. The last sentence of Subparagraph 4.1.1 shall be deleted since the location and design of the Parking Structure have already received final approval.
- 8. The first four sentences of Subparagraph 4.1.2 are hereby amended as follows:

Except in the event of Unavoidable Delay (as that term is defined in Subparagraph 6.1), if construction of the Parking Structure is not completed by the Parking Structure Completion Date, the Developer will then have the right to provide a written notice of default to Gilbert stating the Gilbert has sixty (60) days to complete the Parking Structure without penalty. If Gilbert does not complete the Parking Structure within the 60 day period Gilbert shall pay \$23,600 to the Developer for each month that the Parking Structure is not complete for a period up to four months and an amount not to exceed \$94,400. Gilbert shall also be responsible for providing sufficient surface parking within a reasonable proximity to either Building A or Building B at no additional cost to the Developer. If Gilbert has still not completed construction of the Parking Structure after the additional cure period of four months, the Developer may construct the Parking Structure pursuant to the requirements of the public bidding laws and in conformance to the design prepared by Gilbert.

9. Subparagraph 5.8 is hereby amended as follows:

The Parties agree that construction of the Project is expected to commence no later than December 31, 2010, subject to delays caused by the occurrence of any Unavoidable Delays (as that term is defined in Subparagraph 6.1) or if Gilbert fails to meet obligations established in Subparagraph 4.3.

10. Subparagraph 5.8.1 is hereby amended as follows:

Except in the event of Unavoidable Delay (as that term is defined in Subparagraph 6.1), if Developer has commenced construction on the Property by December 31, 2010, or such later date as the parties agree in writing, but thereafter fails to substantially complete construction (as defined as a point in time when Gilbert is able to issue a Temporary Certificate of Occupancy for the building) of either Building A or Building B by September 1, 2011, or such later date as the parties agree in writing, subject to the occurrence of any Unavoidable Delays or delays caused by Gilbert, then Gilbert shall have the right to provide a written notice of default to Developer stating that the Developer has sixty (60) days to complete either Building A or Building B without penalty. If the Developer does not complete either Building A or Building B within the 60 day period the Developer shall pay \$23,600 to Gilbert for each month that either Building A or Building B is not complete for a period up to four months and an amount not to exceed \$94,400.

11. The following new Subparagraph 6.18 is added to the Agreement:

Assignability of Duties and Obligations: Developer shall not assign or transfer any of its rights and duties under this First Amendment to the Development and Disposition Agreement, the Development and Disposition Agreement, the Parking License Agreement, the Real Estate Purchase Agreement, or any other agreement known of between the Parties, without the express written approval of Gilbert. A breach of this requirement by Developer shall constitute a material breach of the First Amendment and the Agreement, entitling Gilbert to recover all profits Developer may earn from such assignment. Such profits to be recovered are not limited to the Profits, as that term is defined in Paragraph 3. It is the intent of the parties that any assignee shall have the experience and financial capacity to develop and operate a Class A office complex/mixed-use retail/restaurant project consistent with the intent of the Agreement and this First Amendment. Gilbert may withhold its consent to the assignment, transfer or sale by the Developer to a third party if it determines that such third party does not have the experience and financial capacity to develop and/or operate the Project as a Class A office complex/mixed-use retail/restaurant project consistent with the intent of the Agreement and this First Amendment. If Gilbert withholds its consent to an assignment, transfer or sale by the Developer, the Developer may submit to arbitration the issue of whether the proposed assignee has the experience and financial capacity to develop and operate the Project as a Class A office complex/mixed-use retail/restaurant project. The arbitration shall be conducted in accordance with the rules of the American Arbitration Association. Each party shall choose a single arbitrator and the two so chosen shall choose a third arbitrator. The arbitrators shall base the decision solely on whether the proposed assignee has the experience and financial capacity to develop and/or operate the Project as a Class A office complex/mixed-use retail/restaurant project consistent with the intent of the Agreement and this First Amendment. Either Party may be represented by legal counsel. The decision of the arbitrators shall be final and conclusive and the right to appeal is hereby waived.

12. Exhibit C, Section IX, Close of Escrow, Subparagraph B of the Heritage Marketplace Real Estate Purchase Contract is hereby amended as follows:

The balance of the Purchase Price shall be paid and the Close of Escrow shall occur no later than ninety (90) days prior to the commencement of construction date as defined in section 5.8 of the First Amendment to the Development and Disposition Agreement or

anytime earlier at the Buyer's discretion. Subject to satisfaction of the conditions precedent to closing as described in Section 3 of the Development and Disposition Agreement and Subparagraphs 3.5 and 3.6 of the First Amendment to the Development and Disposition Agreement and subject to the provisions of Section VI of the Heritage Marketplace Real Estate Purchase Contract. Close of Escrow will be at the offices of Fidelity National Title Insurance Company in Phoenix, Arizona.

- 13. Exhibit A (Legal Description of Property) to Development & Disposition Agreement will be replaced with a revised Exhibit A as soon as it is available.
- 14. Exhibit B (Conceptual Development Plan) to Development & Disposition Agreement is replaced with the attached revised Exhibit B dated 12/15/09.
- 15. Exhibit E (Schedule of Performance) to Development & Disposition Agreement is replaced with the attached revised Exhibit E dated 12/15/09.
- 16. Exhibit 1 to Purchase Contract (Property Description for Heritage Marketplace) will be replaced with a revised Exhibit 1 as soon as it is available.
- 17. Except as otherwise herein amended, the Agreement is in all respects hereby ratified and confirmed.

[SIGNATURES FOLLOW]

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

TOWN OF GILBERT, an Arizona municipal corporation

	John W. Lewis, Mayor
STATE OF A	
COUNTY OF) ss. MARICOPA)
appeared John	On this 15th day of December, 2009, before me, the undersigned officer, personally W. Lewis, who acknowledged himself to be the Mayor of the TOWN OF GILBERT, an ipal corporation:
	whom I know personally; whose identity was proven to me on the oath of , a credible witness by
	me duly sworn; whose identity I verified on the basis of his
	capacity, being authorized so to do, executed the foregoing instrument for the purposes ed on behalf of that entity.
	IN WITNESS WHEREOF, I hereunto set my hand and official seal.
NOTARY SEA	AL: Notary Public

"OFFICIAL SEAL"
Brandy Hayton
Notary Public-Arizona
Maricopa County
My Commission Expires 4/12/2011

HERITAGE MARKETPLACE, L.L.C. an Arizona Limited Liability Company

STATE OF ARIZONA) ss. COUNTY OF MARICOPA) On this 18⁻⁴ day of December, 2009, before me, the undersigned officer, personally appeared RHET C BORDNER , who acknowledged of HERITAGE MARKETPLACE, (him/herself to be PARTNER L.L.C., an Arizona limited liability company: ___ whom I know personally; whose identity was proven to me on the oath of _____, a credible witness by me duly sworn; whose identity I verified on the basis of his/her and s/he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity. IN WITNESS WHEREOF, I hereunto set my hand and official seal. NOTARY SEAL: Notary Public

Its Partner

Cassie Smith
Notary Public
Maricopa County, Arizona
My Comm. Expires 10-8-11

EXHIBIT B CONCEPTUAL DEVELOPMENT PLAN

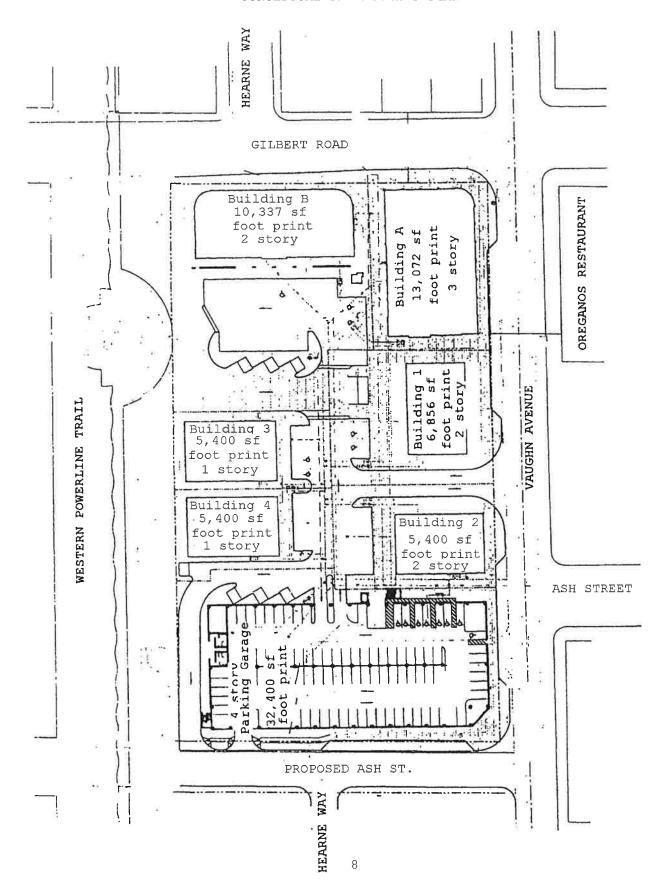


EXHIBIT E

SCHEDULE OF PERFORMANCE

The following revised schedule is preliminary in nature and represents approximate submittal dates and plan turn-around times. Since the Project will be part of the P.E.R.T. program, a final schedule will be reached by mutual consent of the Gilbert Development Services Department and representatives of Heritage Marketplace, L.L.C. prior to submittal of plans.

Site Plan/Architecture

All Planning Division submittals and hearings, except for signage, are complete for Buildings A & B and the Parking Structure and the Project has been approved by the Design Review Board, Redevelopment Commission and Town Council. Future approvals will be needed for the individual pad sites as they are developed as they have only received conceptual approval from the Redevelopment Commission. The following draft schedule is representative of the design review/approval process:

Applicant to submit required documentation for the individual pad sites to the Redevelopment Commission.

Redevelopment Commission hearing to be heard within two months (approximate) from date of submittal.

A more exact schedule will be worked out through the P.E.R.T. process.

Permits

Typical turn-around time for construction drawing permits is 20 working days for first review and 10 working days for second review. A more exact schedule will be worked out through the P.E.R.T. process.

Commencement/Completion of Construction

HERITAGE MARKETPLACE, L.L.C. will commence construction for development of the Property no later than December 31, 2010 and complete construction no later than September 1, 2011. Commencement of construction will be defined by the start of the concrete foundations for either Building A or Building B. Completion of construction will be defined as the date a certificate of completion (or equivalent) as issued by Gilbert for either Building A or Building B.

12/15/09