

**RESOLUTION NO. 2011-38**

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING THE FIRST AMENDMENT TO DEVELOPMENT AGREEMENT WITH FIREROCK PLAZA, L.L.C.

**BE IT RESOLVED** BY THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS as follows:

SECTION 1. The First Amendment to Development Agreement between the Town of Fountain Hills and Wells Fargo Bank, N.A., as successor in interest to Firerock Plaza L.L.C. (the "First Amendment") is hereby approved in substantially the form attached hereto as Exhibit A and incorporated herein by reference.

SECTION 2. The Mayor, the Town Manager, the Town Clerk and the Town Attorney are hereby authorized and directed to cause the execution of the First Amendment and to take all steps necessary to carry out the purpose and intent of this Resolution.

**PASSED AND ADOPTED BY** the Mayor and Council of the Town of Fountain Hills, December 1, 2011.

**FOR THE TOWN OF FOUNTAIN HILLS:**

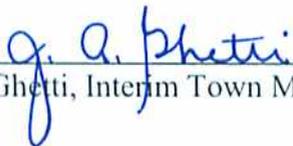
**ATTESTED TO:**

  
Jay T. Schlum, Mayor

  
Bevelyn J. Bender, Town Clerk

**REVIEWED BY:**

**APPROVED AS TO FORM:**

  
Julie Ghetti, Interim Town Manager

  
Andrew J. McGuire, Town Attorney

EXHIBIT A  
TO  
RESOLUTION NO. 2011-38

[First Amendment to Development Agreement]

See following pages.

WHEN RECORDED, RETURN TO:

ATTENTION: TOWN CLERK  
TOWN OF FOUNTAIN HILLS  
16705 E. Avenue of the Fountains  
Fountain Hills, Arizona 85268

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**FIRST AMENDMENT  
TO  
DEVELOPMENT AGREEMENT  
BETWEEN  
THE TOWN OF FOUNTAIN HILLS  
AND  
FIREROCK PLAZA, L.L.C.**

THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT (this "First Amendment") is entered into December 1, 2011 by and between the TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation (the "Town") and WELLS FARGO BANK, National Association ("Wells Fargo") as successor in interest to FIRE BRICK PLAZA LLC, an Arizona limited liability company, which was the successor in interest to FIREROCK PLAZA LLC, an Arizona limited liability company (the "Developer").

RECITALS

A. Wells Fargo is the owner of certain real Property located on the south side of Shea Boulevard, north of the Beeline Highway, within the corporate limits of the Town consisting of approximately 2.61 acres, as more particularly described in Exhibit 1, attached hereto and incorporated herein by reference (the "Property").

B. The Developer and the Town entered into that certain Development Agreement dated March 16, 2006 and recorded as Document No. 2006-0525632 in the Official Records of Maricopa County, Arizona (the "Original Agreement") in order to facilitate the development of the Property by providing for among other things, conditions, terms, restrictions and requirements for the construction and installation of certain infrastructure improvements as more particularly identified in Section 1.2 of the Original Agreement and depicted on the Site Plan for the Property prepared by DeLorme & Associates, dated February 16, 2006.

C. Wells Fargo became the successor in interest to the Developer through that certain Trustee's Deed and Bill of Sale, recorded August 12, 2010 as Document No. 2010-690736 in the Official Records of Maricopa County, Arizona, a true and correct copy of which attached hereto as Exhibit 2 and incorporated herein by reference.

D. The Town and Wells Fargo desire to amend the Original Agreement to terminate the Developer's obligation to install a traffic signal under Section 1.2(a) of the Original Agreement and to deem fully satisfied the Developer's obligations to complete all improvements

under Sections 1.2(b), (c) and (d) that remain incomplete as of the date of this First Amendment (collectively, the “Incomplete Improvements”).

## AGREEMENT

NOW, THEREFORE, IN CONSIDERATION of the foregoing recitals, which are incorporated herein by reference, the mutual promises and agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereby agree as follows:

1. Payment in Lieu of Incomplete Improvements. The Town and Wells Fargo agree that, in lieu of completion of the Incomplete Improvements, Wells Fargo may satisfy the Developer’s obligations under Section 1.2 of the Original Agreement by paying to the Town the sum of \$200,000.00 in lawful U.S. currency (the “In Lieu Payment”) as set forth below.

1.1 Timing of Payment. Wells Fargo shall pay the In Lieu Payment to the Town in two payments, as follows: (A) \$50,000 within ten business days of the date the Town executes this First Amendment; and (B) \$150,000 prior to the date of the earliest to occur of the following: (1) issuance of a certificate of occupancy for a new tenant on the Property or (2) close of escrow of any transaction conveying the Property, or any portion thereof, from Wells Fargo to any other party.

1.2 Effect of Payment. Upon receipt of the In Lieu Payment, the Town shall deem the Developer’s obligations under Section 1.2 of the Original Agreement fully satisfied and shall not look to Wells Fargo or its successor in interest to pay for or install the Incomplete Improvements as a condition of development on the Property. Additionally, after the payment of the In Lieu Payment, the Town shall not unreasonably delay or withhold issuance of any certificate of occupancy for any portion of the Property due to the Incomplete Improvements.

1.3 Town’s Anticipated Improvements. The Town intends to complete a portion of the Incomplete Improvements in conjunction with its Shea Boulevard capital improvement project (S6005), which is currently under design (the “Shea Improvements”). To the extent practical and at the Town’s sole discretion, the Town will include the offsite improvements that comprise a portion of the Incomplete Improvements, with the exception of the traffic signal, in the design for the Shea Improvements, but is under no obligation to do so.

2. Traffic Signal. Section 1.2(a) of the Original Agreement is hereby deleted, and neither Wells Fargo nor any successor owner of the Property shall be obligated for the installation or payment of a traffic signal in connection with the Property, and no future permits or certificates of occupancy shall be conditioned upon the installation of, or payment (in whole or in part) for, any traffic signal; provided, however, that in the event that Wells Fargo or its successor in interest later requests a traffic signal serving the Property, the cost of design and installation of such traffic signal shall be the sole responsibility of such requesting party.

3. Receipt of Payment. The Town acknowledges and agrees that the payment required under Section 2.1 of the Original Agreement has been paid in full.

4. Notices and Requests. The notice provisions set forth in Section 4 of the Original Agreement are hereby modified to update the addresses for notice as follows:

- If to the Town: Town of Fountain Hills  
16705 East Avenue of the Fountains  
Fountain Hills, Arizona 85268  
Facsimile: (480) 837-3145  
Attn: Town Manager
- With copy to: GUST ROSENFELD, P.L.C.  
One East Washington Street, Suite 1600  
Phoenix, Arizona 85004-2553  
Facsimile: (602) 254-4878  
Attn: Andrew J. McGuire, Esq.
- If to Wells Fargo: Wells Fargo Bank  
2030 Main Street, Suite 100  
Irvine, California 92614  
Facsimile: (877) 302-2061  
Attn: Peter Moon
- With a copy to: Quarles & Brady LLP  
One Renaissance Square  
Two North Central Avenue  
Phoenix, Arizona 85004  
Facsimile: (602) 229-5690  
Attn: Stanton E. Johnson, Esq.

5. Effect of Amendment. In all other respects, the Original Agreement is affirmed and ratified and, except as expressly modified herein, all terms and conditions of the Original Agreement shall remain in full force and effect.

6. Non-Default. By executing this First Amendment, Wells Fargo affirmatively asserts that (i) the Town is not currently in default, and, to the actual knowledge of Wells Fargo, has not been in default at any time prior to this First Amendment, under any of the terms or conditions of the Original Agreement and (ii) any and all claims, known or unknown relating to the Original Agreement and existing on or before the date of this First Amendment are forever waived.

7. Conflict of Interest. This First Amendment may be cancelled by the Town pursuant to ARIZ. REV. STAT. § 38-511.

8. Counterparts. This First Amendment may be executed in any number of counterparts, all of which, when taken together, shall constitute one and the same instrument.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the parties hereto have executed this instrument as of the date and year first set forth above.

“Town”

TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation

J. Ghatti  
Julie Ghatti, Interim Town Manager

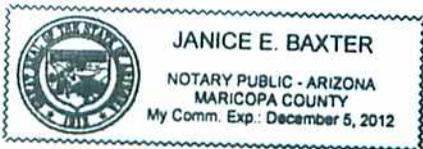
ATTEST:

Bevelyn J. Bender  
Bevelyn J. Bender, Town Clerk

(ACKNOWLEDGEMENT)

STATE OF ARIZONA )  
 )ss.  
County of Maricopa )

This First Amendment to Development Agreement, dated November 17, 2011, consisting of three pages (excluding signature pages and exhibits), was acknowledged before me 5, 2011, by Julie Ghatti, the Interim Town Manager of the TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation, on behalf of the Town of Fountain Hills.



Janice E. Baxter  
Notary Public in and for the State of Arizona

(affix notary seal here)

**“Wells Fargo”**

WELLS FARGO BANK, National Association

By: 

Name: Peter Moon

Title: Assistant Vice President

By: 

Name: Christopher W. Evans

Title: Vice President

(ACKNOWLEDGEMENTS ON FOLLOWING PAGE)

STATE OF CALIFORNIA )

COUNTY OF Orange )

On November 29, 2011 before me, Susan M. Zorfias, notary public  
(insert name and title of the officer)

personally appeared Peter Moon,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same  
in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument  
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Susan M. Zorfias (Seal)



STATE OF CALIFORNIA )

COUNTY OF Orange )

On November 29, 2011 before me, Susan M. Zorfias, notary public  
(insert name and title of the officer)

personally appeared Christopher Evans,  
who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are  
subscribed to the within instrument and acknowledged to me that he/she/they executed the same  
in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument  
the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the  
foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature Susan M. Zorfias (Seal)



**EXHIBIT 1  
TO  
FIRST AMENDMENT TO  
DEVELOPMENT AGREEMENT  
BETWEEN  
THE TOWN OF FOUNTAIN HILLS  
AND  
FIREROCK PLAZA, L.L.C.**

[Legal Description]

Lots 5 and 6, Block 6 of FOUNTAIN HILLS ARIZONA Final Plat No. 412-B, according to the Plat of Record in the Office of the County Recorder of Maricopa County, Arizona, recorded in Book 163 of Maps, Page 2;

EXCEPT all minerals as reserved unto the United States of America in patent of said land recorded February 28, 1956 in Docket 1839, Page 426, Records of Maricopa County, Arizona; and

EXCEPT all gas, coal and minerals whatsoever, already found or which may hereafter be found in or under said land; and

EXCEPT all underground water, in, under or flowing through said land and water rights appurtenant thereto as reserved in Instrument recorded in Docket 13772, Pages 1142 and 1144.

**EXHIBIT 2  
TO  
FIRST AMENDMENT TO  
DEVELOPMENT AGREEMENT  
BETWEEN  
THE TOWN OF FOUNTAIN HILLS  
AND  
FIREROCK PLAZA, L.L.C.**

[Wells Fargo Trustee's Deed]

See following pages.

**FIRST AMERICAN TITLE**

**COURTESY RECORDING  
NO TITLE LIABILITY**

**WHEN RECORDED, RETURN TO:**

OFFICIAL RECORDS OF  
MARICOPA COUNTY RECORDER  
HELEN PURCELL  
20100690735 08/12/2010 12:23  
429044SA-6-5-5-  
ELECTRONIC RECORDING

Michael Migliaccio, Esq.  
Quarles & Brady LLP  
One Renaissance Square  
Two North Central Avenue  
Phoenix, Arizona 85004  
NCS - 429044 - SA

**TRUSTEE'S DEED AND BILL OF SALE  
(EXEMPT PURSUANT TO A.R.S. § 11-1134(B)(1))**

Michael Migliaccio, a Member of the State Bar of Arizona, as the duly appointed Successor Trustee of the Construction Deed of Trust, Assignment of Rents, Security Agreement and Financing Filing (as modified and amended, the "Deed of Trust") hereinafter described, does hereby grant and convey, but without covenant or warranty, express or implied, to Wells Fargo Bank, National Association, whose address is Commercial ORE Real Estate Managed Assets Group, 333 Market Street, 17th Floor, San Francisco, California 94105, Attn: Patrick F. Fisher (hereinafter "Grantee"), the property, situate in the County of Maricopa, State of Arizona, described as follows:

**SEE EXHIBIT "A" ATTACHED**

Successor Trustee states that:

This conveyance is made pursuant to the powers, including the power of sale, conferred upon Successor Trustee by the Deed of Trust, which was dated as of February 28, 2005, and was executed by Firerock Plaza, LLC, as Trustor, to Wells Fargo Financial National Bank, as Trustee, and to Wells Fargo Bank, National Association, as Beneficiary, and was recorded on February 28, 2005, at Recorder's No. 2005-0247276, in the office of the County Recorder of said County and State. Thereafter a Notice of Substitution of Trustee naming Michael Migliaccio, Esq., as Successor Trustee, was recorded on March 4, 2010, at Recorder's No. 2010-0185113, in the office of the County Recorder of said County and State. Successor Trustee has fulfilled the conditions specified in the Deed of Trust, and has complied with the laws of the State of Arizona authorizing this conveyance, including compliance with all requirements of law regarding recording the Notice of Trustee's Sale and mailing, posting and publishing copies thereof and regarding the Trustee's Sale and all proceedings leading thereto.

The property was sold by Successor Trustee at public auction on August 6, 2010, at the place named in the Notice of Trustee's Sale, in the County of Maricopa, State of Arizona, in which the property is situate. Grantee, being the highest bidder at the sale, became the purchaser of the property and made payment therefor to the Successor Trustee of the amount bid, namely \$960,000.00, which payment was made by the partial satisfaction of the obligations then secured by the Deed of Trust, together with the fees, costs and expenses relative thereto.

IN WITNESS WHEREOF, Michael Migliaccio, a Member of the State Bar of Arizona, as Successor Trustee, has duly executed this Trustee's Deed this 11<sup>th</sup> day of August, 2010.

Michael Migliaccio  
Michael Migliaccio, Successor Trustee

STATE OF ARIZONA        )  
  ) ss.  
County of Maricopa        )

The foregoing instrument was acknowledged before me this 11<sup>th</sup> day of August, 2010, by Michael Migliaccio, a Member of the State Bar of Arizona, as Successor Trustee.

Jason Carl Antonino  
Notary Public

My Commission Expires:  
March 7, 2011



## **EXHIBIT "A"<sup>1</sup>**

All of Trustor's present and future right, title and interest in and to all of the following property (severally and collectively, the "Property"):

(a) All of that certain real property located in Maricopa County, Arizona, and more particularly described on Schedule 1 attached hereto (the "Real Property"), and all development rights relating thereto;

(b) All present and future tenements, hereditaments, easements, rights, leases (whether written or oral, or for a definite term or month-to-month, together with all income, receipts, revenues, rents, issues and profits, now or hereafter arising therefrom, or from the Real Property, including parking and common area maintenance charges and fees, owners association membership charges (to the full extent lawfully assignable), and contributions toward real estate taxes, insurance premiums, utilities and other services), guaranties of leases, subleases, licenses, benefits, privileges, permits, water, water rights, including any type 2 non-irrigation grandfathered water rights, irrigation rights, ditch rights, shares of stock in irrigation districts or evidencing water rights, contracts for effluent, contracts for Central Arizona Project water, all other contractual rights to water, rights of way, pipes, ditches, fences and appurtenances belonging or in any way appurtenant to, and all oil, gas and other hydrocarbons and other minerals produced from or underlying, the Real Property or any portion thereof or any improvements or development thereon, and all reversions, remainders, rents, issues, and profits thereof;

(c) All buildings and improvements now or hereafter erected on the Real Property or any portion thereof (the "Buildings"), and all equipment, inventory and fixtures now or hereafter attached to or located on or used in connection with the Real Property;

(d) All present and future licenses, permits, approvals and agreements from or with any governmental or quasi-governmental agency or entity or any other person relevant to the zoning, subdivision, division, development, improvement, use, lease, sale or other disposition of the Real Property or any portion thereof, or any buildings or improvements now or hereafter erected, placed or located on the Real Property or any portion thereof, including Trustor's parking rights, together with all parking permits, stickers, gate cards, placards, and other forms of identification or similar devices which evidence or facilitate the exercise of parking rights;

(e) All present and future plans, specifications, drawings, analyses, surveys, reports and other design products, relating to all present and future buildings and tenant and other improvements (including landscaping) constructed on the Real Property or any portion thereof, and all rights in and to all architectural and engineering contracts, construction management agreements, construction contracts, surety bonds, warranties, land use plans, studies, building contracts, soils reports, appraisals, feasibility and market studies, management agreements, operating agreements, service contracts, development contracts, design and sign design contracts, space planning contracts and any other agreements with respect to planning, designing,

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<sup>1</sup> Capitalized terms used herein shall have the same meanings as defined in the Deed of Trust.

developing, or inspecting construction on, the Real Property or any portion thereof and any buildings or improvements thereon, including the right to maintain signage with respect to the Real Property or any business conducted thereon, whether or not appurtenant to the Real Property, together with any accounts and funds maintained under, pursuant to, or in connection with any such contracts and agreements; the foregoing agreements include (i) the Construction Contract (defined in the Loan Agreement) and the contract with the Architect (defined in the Loan Agreement);

(f) All of the beneficial interest of Trustor in any subdivision or holding trust, if title or any interest of Trustor in the Real Property is vested in or held by a trustee, and all rights to further encumber the Real Property or any portion thereof or any interest therein for debt;

(g) All present and future water service and wastewater capacity reservation agreements and security agreements, and all other present and future contracts, agreements, books and records relating to the development, improvement, use, leasing, sale, disposition, operation and management of the Real Property or any portion thereof, all buildings and other improvements or personal property now or hereafter placed, erected or located on the Real Property, and any accounts and funds maintained under, pursuant to, or in connection with any such contracts and agreements;

(h) All present and future rights under or with respect to: (i) any declarations of restrictions governing or imposing rights or responsibilities on or with respect to any subdivisions, horizontal property regimes, condominiums, planned area developments, planned unit developments or master plans which are partially or wholly located on or affect the Real Property, as may hereafter be amended, modified, supplemented or assigned, including all of Trustor's right, title and interest thereunder as a declarant, owner, occupant, developer or member, or in any other capacity; (ii) any design review or architectural review committee and any property owners' or similar association described in or created by the documents referred to in the foregoing clause (i), together with any voting rights therein; and (iii) any and all other documents and instruments and any amendments relating to the operation, organization, control or development of the Real Property;

(i) All adjacent streets (open or proposed), roads, sidewalks, alleys, public places, parking areas, and strips and gores of land now or hereafter appurtenant to or used or useful in connection with the Real Property or any portion thereof, or any buildings or other improvements now or hereafter erected, placed or located on the Real Property or any portion thereof;

(j) All rights in and to any present or future contracts, agreements, commitments, options, revenues, deposits (including deposits with any public or private utility with respect to utility services furnished to the Real Property), refunds, credits, retentions, or other rights or considerations that in any way relate to or arise out of any development, use improvement, sale or disposition of the Real Property or any portion thereof, or any buildings or other improvements or personal property now or hereafter erected, placed or located on the Real Property or any portion thereof, or any business now or hereafter conducted on the Real Property;

(k) All rights in and to all present and future agreements or commitments for the purpose of financing, refinancing, selling or otherwise disposing of any interest in the Real Property or any portion thereof, and any buildings and other improvements now or hereafter located on the Real Property or any portion thereof;

(l) All rights to the use of any trade name or trademark by which the Real Property or any portion thereof, or any improvements or development thereon, are known;

(m) All rights under any policy of policies of insurance (including premium refunds and credits and insurance proceeds) insuring against damage or loss with respect to any portion of the Property, including all fire, casualty, business interruption, rent loss and flood insurance, whether or not such insurance is required by this Deed of Trust or Beneficiary;

(n) All rights in and to any present and future deposit accounts (general time or demand, provisional or final) or investment or other accounts (including all accounts held jointly with someone else) maintained with Beneficiary, or with another institution into which proceeds of the loan secured hereby have been deposited;

(o) All goods, materials, supplies, fixtures, machinery, furniture and furnishings, appliances, attachments, equipment, inventory, general intangibles, accounts, chattel paper, instruments, promissory notes, drafts, investment property, commercial tort claims, letters of credit, letter-of-credit rights, supporting obligations, documents and other personal property; and

(p) All (i) replacements and substitutions for, (ii) additions to, (iii) proceeds and products of (including all insurance proceeds and condemnation awards (or proceeds of any purchase in lieu thereof) which are or may become payable with respect to), and (iv) books, records and files relating to, all or any portion of the items described in the preceding paragraphs.

**Schedule 1**

**(Legal Description)**

**Lots 5 and 6, Block 6 of FOUNTAIN HILLS ARIZONA Final Plat No. 412-B, according to the Plat of Record in the Office of the County Recorder of Maricopa County, Arizona, recorded in Book 163 of Maps, Page 2;**

**EXCEPT all minerals as reserved unto the United States of America in patent of said land recorded February 28, 1956 in Docket 1839, Page 426, Records of Maricopa County, Arizona; and**

**EXCEPT all gas, coal and minerals whatsoever, already found or which may hereafter be found in or under said land; and**

**EXCEPT all underground water, in, under or flowing through said land and water rights appurtenant thereto as reserved in Instrument recorded in Docket 13772, Pages 1142 and 1144.**