Staff Summary Report

Tempe

Council Meeting Date: 01-08-09 **Agenda Item Number:** 45

SUBJECT: Request approval of a resolution authorizing the Mayor to execute a First Amendment to Development and Disposition Agreement with TEMPE RI, LLC regarding the development of a Marriott Hotel at the southwest corner of 5th Street and Forest Avenue.

DOCUMENT NAME: 20090108cdcm01 **COMM DEV/REDEVELOPMENT ADM (0403-01)** RESOLUTION NO. 2008.107

COMMENTS: The First Amendment to the Development Agreement would provide GPLET funds to the Developer to assist in financing the hotel. The advance would be reimbursed with interest over the term of a 15 year GPLET Lease. In return, the developer would relinquish a proportionate share of their parking rights in the garage (currently under construction) thereby making them available to the public.

PREPARED BY: Chris Messer, Principal Planner **Ext. X 8562**

REVIEWED BY: Jerry Hart, Financial Services Manager **Ext. X 8505**

LEGAL REVIEW BY: Cynthia McCoy, Assistant City Attorney. **Ext. X 2187**

DEPARTMENT APPROVAL: Chris Salomone, Community Development Manager. **Ext. X 8294**

FISCAL NOTE: See Below.

RECOMMENDATION: Approval of Resolution No. 2008.107

ADDITIONAL INFO: In December of 2007, the City entered into a development agreement with TEMPE RI LLC. In that agreement the City committed to constructing a garage for use by the hotel and for the general public. Since that time the City has almost completed the Garage and the developer has completed construction documents, submitted for permits, pulled a Foundation Permit and is close to being able to pull a full Building Permit and start construction.

The developer has asked the City to provide Government Property Lease Excise Tax abatement advance for a period of 15 years. During that time the Developer will pay the City rent in the amount of $359,764.00 per year for a total of $5,396,460.00. In addition the Developer will make a $50,000 annual in lieu payment to the City for distribution to the school districts. The Developer would also relinquish its rights to 68 of its 218 parking spaces in the Garage thereby making them available to the Public. The preferred method of financing this advance would be an excise tax bond. These funds would not be available to the developer until a certificate of occupancy for the hotel is issued.

RESOLUTION NO. 2008.107

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE THE FIRST AMENDMENT TO DEVELOPMENT AGREEMENT BETWEEN THE CITY OF TEMPE AND TEMPE RI, LLC, A FLORIDA LIMITED LIABILITY COMPANY.

WHEREAS, the City and Tempe RI, LLC, a Florida limited liability company ("Developer"), are parties to that certain Development and Disposition Agreement dated as of December 13, 2007, and recorded as Instrument No. 2008-0093738, Official Records of Maricopa County, Arizona (the "Development Agreement"), wherein the City and Developer agreed to undertake coordinated redevelopment of certain real property located within the City and more particularly described therein; and

WHEREAS, as part of the redevelopment, the City agreed to and has commenced construction of a Parking Structure, and has incurred various other costs to satisfy its obligations under the Development Agreement. City has invested in excess of $20,000,000 building the Parking Structure, which is scheduled for completion in January of 2009; and

WHEREAS, Developer has advised City that given current economic conditions, financing for construction of its planned Hotel is in jeopardy without economic incentives and assistance from the City. Developer's inability to proceed with construction of the Hotel would be detrimental to City and impair the value of the Parking Facility; and

WHEREAS, the Property is located within a redevelopment area created pursuant to Title 36, Chapter 12, Article 3 of the Arizona Revised Statutes, as amended, and is hereby determined to be in need of the tax incentives provided for in the First Amendment and City believes the project will invigorate and stimulate economic growth in the City and, in connection with such benefits and other tangible and intangible benefits to be derived from the project, the City has agreed to provide additional economic development incentives for the benefit of Developer.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, as follows:

That the Mayor is authorized to execute the First Amendment to Development Agreement, and other documents referenced therein, copies of which are on file with the City Clerk's office and to take such further actions as are necessary to implement its terms.

PASSED AND ADOPTED BY THE CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, this _____ day of _____, 2009.

_____
Hugh Hallman, Mayor

ATTEST:

_____
CITY CLERK

APPROVED AS TO FORM:

_____
CITY ATTORNEY

When recorded, return to:

City of Tempe
31 East Fifth Street
Tempe, Arizona 85281
Attention: City Clerk

FIRST AMENDMENT TO
DEVELOPMENT AND DISPOSITION AGREEMENT
(C2007-212)

THIS FIRST AMENDMENT TO DEVELOPMENT AND DISPOSITION AGREEMENT ("Amendment") is made as of the _____ day of _____, 2008, by and between THE CITY OF TEMPE, an Arizona municipal corporation (hereinafter called the "City"), Tempe RI, LLC, a Florida limited liability company (hereinafter called the "Developer").

RECITALS

A. City and Developer are parties to that certain Development and Disposition Agreement dated as of December 13, 2007, and recorded as Instrument No. 2008-0093738, Official Records of Maricopa County, Arizona (the "Development Agreement"), wherein the City and Developer agreed to undertake coordinated redevelopment of certain real property located within the City and more particularly described therein.

B. As part of the redevelopment, the City agreed to and has commenced construction of a Parking Structure, and has incurred various other costs to satisfy its obligations under the Development Agreement. City has invested in excess of $20,000,000 building the Parking Structure, which is scheduled for completion in January of 2009.

C. Developer has advised City that given current economic conditions, financing for construction of its planned Hotel is in jeopardy without economic incentives and assistance from the City. Developer's inability to proceed with construction of the Hotel would be detrimental to City and impair the value of the Parking Facility.

D. City and Developer acknowledge that the redevelopment of their properties as contemplated in the Development Agreement will result in improvements to the Parcels, and that the City and the general public will directly and indirectly realize substantial tangible and intangible benefits from the redevelopment of the Parcels as described in the Development Agreement. The City and Developer hereby acknowledge and agree that development of the Hotel will further implement the City's prior plans and policies for redevelopment of the Parcels, including, without limitation, the creation of improvements

to and new uses of the Developer's Property, the stimulation of further economic development within the City. Delay or cancellation of the Hotel would be detrimental to the City's overall plans for development of the East City Hall area.

E. City and Developer now desire to amend the Development Agreement in certain respects, as more particularly set forth below.

F. This Amendment is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, the parties agree as set forth below:

1. **Definitions**. In addition to any words or terms defined elsewhere in this Amendment, capitalized terms used herein without definition shall have the meanings given such terms in the Development Agreement.

2. Section 2.1 of the Development Agreement is hereby amended in its entirety to read as follows:

> **2.1** **Duration of Development Agreement.** The term of this Agreement shall commence on the Effective Date and continue until the date all conditions imposed under Articles III and IV have been satisfied or waived; provided that the obligations set forth in Section 4.7 hereof shall survive until one year after the termination or expiration of the Lease referenced in Section 4.7 hereof (the "Termination Date"). Notwithstanding the foregoing, Sections 3.2, 3.4, 3.5, 3.6, 4.5 and 5.1 shall survive termination of this Agreement.

3. The Development Agreement is hereby amended by adding a new Section 4.7 as follows:

> **4.7.** **Tax Abatement; Special Tax Rate**. The Developer has asserted that because of the increased costs of and impediments to the financing of the development of the Hotel arising from current economic conditions, completion of the Hotel is economically feasible only by the commitment of the City to provide the Developer with the benefit of certain statutorily-authorized property tax abatements and the application of reduced tax rates, currently available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209. Given the unique inter-relationship between the Parking Structure and the Hotel, and the City's desire to avoid any impact on the value of the Parking Facility resulting from Developer's inability to complete the Hotel, the City has agreed to provide such abatements. Therefore, to avoid impairment of the City's investment in the Parking Facility, the City agrees to grant to Developer the statutorily-authorized property tax abatement pursuant to the provision of A.R.S. §§ 42-6201 through 42-6209 for an eight (8) year period and a reduced tax

rate for the seven (7) year period following the tax abatement pursuant to the provisions of A.R.S. §§42-6201 through 42-6209. In connection therewith, the Developer shall convey the Developer's Property and the Hotel to the City no later than the 30th day following the date that Developer receives a Certificate of Occupancy for the Hotel from the City. City agrees to accept such conveyance and lease-back all such property and improvements to Developer concurrently with such conveyance for a term not to exceed fifteen (15) years, on the terms and conditions set forth in a lease to be approved by Council, subject to the following conditions:

4.7.1 Insurance Provisions for Lease. Any lease entered into with the City for the purpose of providing statutorily-authorized property tax abatements shall provide that during the term of the lease, the tenant thereunder shall, at the tenant's expense, carry and maintain, for the mutual benefit of the City and the tenant, general public liability insurance against claims for bodily injury, death or property damage occurring in, upon or about the premises, with limits of not less than $5,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products and completed operations. All of the tenant's policies of liability insurance shall name the City and all leasehold mortgagees as additional insureds and shall contain no special limitations on the coverage, scope or protection afforded to the City, its officials, employees or volunteers. The tenant's policy of liability insurance shall be primary with respect to the City and any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City. Full policies or certificates with respect to all policies of insurance required to be carried by the tenant shall be delivered to the City in form and with insurers reasonably acceptable to the City which shall clearly evidence all insurance required and provide that such insurance shall not be cancelled, allowed to expire or be materially reduced in coverage without thirty (30) days prior written notice to City.

4.7.2 Indemnification Provision for Lease. Any lease entered with the City for the purpose of providing statutorily-authorized property tax abatements shall provide that during the term of the lease, the tenant shall indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense arising, directly or indirectly, in whole or in part, out of the performance of the lease.

4.7.3 In-lieu Payments; Administrative Fee. Developer shall be responsible for an annual in-lieu payment to the City of $50,000.00 per year during the property tax abatement period under A.R.S. §§ 42-6201 through 42-6209. In addition to the in-lieu payment referenced above, during the term of the Lease, Developer shall pay to City rent equal to $5,396,466.00 payable in equal annual installments of $359,764.00 per year during the entire Lease term, provided that if the Lease is terminated prior to the expiration of its stated term, the unpaid rent shall be accelerated and shall automatically become due and payable in full, without premium or penalty of any kind.

4.7.4 Leasehold Mortgagee Protections. City and Developer shall cooperate in including in the lease by suitable amendment from time to time any provision which may be reasonably requested by any proposed leasehold mortgagee for the purpose of implementing mortgagee-protection provisions, allowing leasehold mortgagees reasonable means to protect or preserve the lien of its leasehold mortgage upon the occurrence of a default under the terms of the lease and of confirming the elimination of the ability of Developer to modify or terminate the lease or waive any of its provisions without the prior written approval of the leasehold mortgagee. City and Developer each agree to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effect any such amendment; provided, however, that any such amendment shall not in any way affect the term or rent under the lease.

4. Developer has represented to City that its ability to obtain financing for the Project is contingent on the receipt of commitments for additional third-party funding, that current efforts to locate alternate sources of funding have been fruitless, and that although it will continue to seek such alternate sources, events in the credit and financial markets make success unlikely. In addition, Developer has provided written certification signed by its Manager that it has pursued other avenues for obtaining the requisite financing, specifying in reasonable detail the nature of its financing efforts. Developer, including its equity investors, has invested approximately $6,800,000.00 and Residence Inn by Marriott, LLC ("Manager") has committed $1,000,000.00 to ensure the success of the Project. Manager serves as the manager of the Project pursuant to the terms of that certain Management Agreement dated as of December 31, 2007 by and between Developer and Manager (the "Management Agreement"). At such time as the Hotel has received a Certificate of Occupancy, within thirty (30) days after receipt of written request from Developer, City shall advance to Developer the sum of $4,000,000.00 (the "Advance") in consideration of Developer's waiver and relinquishment of its rights under Sections 3.2 and 3.5 of the Development Agreement to use and obtain a permanent license of 68 additional Parking Spaces and Developer's agreement to pay the sum of $5,396,466.00 to City as rent under the lease to be entered into pursuant to Section 4 of this Amendment; provided, however, that Developer shall not request the Advance until City, Developer and Manager have executed a mutually acceptable comfort letter that among other things affords the Manager the right to cure a default under any lease entered pursuant to Section 4.7 hereof. City's obligation to make the advance shall

be conditioned on Developer's concurrent execution and delivery of the special warranty deed conveying the Developer's Property and the Hotel to City, and a fully executed lease and memorandum of lease as contemplated in Section 4.7. The City's payment of the Advance to Developer shall constitute a condition precedent to Developer's obligation to convey the Project to the City as contemplated by Section 4 of this Amendment. City agrees to grant Developer the right to repurchase the relinquished Parking Spaces at the rates originally specified in the Parking License, on mutually acceptable terms and conditions. City and Developer shall execute such other and further documents, including modifications of the current form of Parking License, as may be reasonably necessary to evidence such relinquishment and repurchase right. Notwithstanding anything herein to the contrary, until such time as the Advance has been received by Developer, Developer shall have the right to elect in writing not to receive the Advance by delivering written notice to the City, whereupon Sections 3 and 4 of this Amendment shall be deemed null and void and of no further force or effect. If Developer elects not to request the Advance, Developer may nevertheless request the abatement contemplated by Section 4.7 of the Development Agreement and Section 3 of this Amendment.

5. **Payment of Additional Costs on Failure to Construct Hotel.** In light of current economic conditions affecting the financing of the costs of construction of the Hotel, the City and Developer hereby amend and restate Section 4.1 of the Development Agreement in its entirety to read as follows:

> **Payment of Additional Costs on Failure to Construct Hotel.** The Hotel and Parking Structure are intended to be compatible structures built on the same property line. Should (a) the Developer fail to commence construction of the Hotel on or before July 15, 2009 or (b) the Developer fail to construct improvements on the Hotel parcel to a height in excess of the height of the Parking Structure within eighteen months following commencement of construction of the Hotel, subject to extension due acts of God, strikes, labor and materials unavailability or shortages, government delays or orders, war, terrorism, inclement weather or other acts or events beyond the reasonable control of Developer or delays occasioned by the City, the Developer hereby agrees to reimburse the City for the lesser of (x) cost of architectural details constructed as part of the East elevation of the Parking Structure that were required because the Hotel was to be built adjacent to that elevation or (y) $500,000.00. The current cost estimate for such architectural detail is $500,000.00. Further, if Developer fails to commence construction of the Hotel within sixty (60) days following the deadline therefor in the Construction Schedule, the City's deadline to complete construction of the Parking Facility shall be extended one day for each subsequent day that Developer fails to commence construction. As used herein, "commence construction" shall mean that Developer has obtained building permits and initiated substantive construction of the Hotel (as evidenced by the commencement of pouring of the footings or driving of the pilings (or pier installation) for the Hotel). To facilitate and expedite construction of the

Hotel, the City agrees to provide a single point of contact at the City for all building permit and other construction matters related to the construction of the Hotel. The City and Developer shall use reasonable good faith efforts to cooperate in the relocation of all utility lines to the extent necessary or desirable in connection with the construction of the Hotel and the Parking Structure.

6. A new Section 8.1.1 is hereby added to the Development Agreement as follows:

8.1.1 <u>Additional Developer Defaults</u>. In addition to the foregoing, it shall be a default hereunder if: (a) except as otherwise approved by the City, Developer sells, assigns, conveys, or alienates the Property, or any part thereof, or any interest in the Property, or shall be divested of title or any interest therein in any manner or way, whether voluntarily or involuntarily other than as permitted by this Agreement; (b) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the "Bankruptcy Code") or for any form of relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against Developer or any partnership of which Developer is a partner, their respective assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing; (c) Developer makes an assignment for the benefit of creditors, is not paying debts generally as they become due which failure to pay continues beyond any applicable notice or cure period provided under the documents evidencing such indebtedness, or is granted an order for relief under any chapter of the Bankruptcy Code; (d) a custodian, as defined by the Bankruptcy Code, takes charge of any property of Developer or any property of any partnership of which Developer is a partner and such custodian is not dismissed within ninety (90) days of such appointment; (e) garnishment, attachment, levy or execution is issued against any of the property or effects of Developer, or any partnership of which Developer is a partner, and such issuance is not bonded against within ninety (90) days; (f) the dissolution or termination of existence of Developer; or (g) any change in control of Developer (including a change in those persons who are its managers, or controlling members, partners or shareholders), its merger or consolidation (whether in one transaction or in a series of transactions) with or into any other entity, the sale, lease, transfer or other disposition of all or a substantial part of its assets, including any sale and leaseback transaction except as expressly permitted herein or otherwise approved by City.

7. Section 8.3 of the Development Agreement is hereby amended in its entirety as follows:

8.3 <u>City's Remedies.</u> If the Developer is in default under this Agreement beyond any applicable notice or cure period and the parties do not resolve the Developer's default pursuant to the nonbinding mediation described in Section 9.1, then the City shall have the right to terminate this Agreement immediately upon written notice to Developer and to pursue any other rights or remedies provided hereunder, at law or in equity; provided that in no event shall the Developer be liable or responsible for incidental, consequential or punitive damages. Notwithstanding anything herein to the contrary, upon the occurrence of a

default that continues beyond any applicable notice or cure that takes place prior to the time the City has made the Advance, the City's sole and exclusive alternative remedies shall be to (x) terminate this Agreement and/or (y) recover a liquidated damages payment equal to the lesser of (1) cost of architectural details constructed as part of the East elevation of the Parking Structure that were required because the Hotel was to be built adjacent to that elevation or (2) $500,000.00, pursuant to Section 4.1 of this Development Agreement.

8. Section 9.3 of the Development Agreement is hereby amended in its entirety to read as follows:

9.3 **Successors and Assigns**. This Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto. Notwithstanding the foregoing, Developer shall not assign its interest in this Agreement prior to receiving a Certificate of Occupancy for the Project without first obtaining Landlord's prior written consent. Landlord agrees not to unreasonably withhold its consent to any assignment to a transferee that has demonstrated to the Manager's satisfaction its capacity to construct the Hotel and has been accepted by the Manager as successor to Developer and the transferee agrees in writing to assume all of Developer's obligations hereunder.

9. **Governing Law**. This Amendment shall be governed by and construed in accordance with the laws of the State of Arizona. This Amendment has been made and entered into in Maricopa County, Arizona.

10. **Successors and Assigns**. This Amendment shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

11. **Waiver**. No waiver by either party of any breach of any of the terms, covenants or conditions of this Amendment shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

12. **Severability**. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Amendment 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 Amendment shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

13. **Schedules and Exhibits**. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

14. Entire Agreement. This Amendment constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

15. Recordation of Amendment. This Amendment shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

IN WITNESS WHEREOF, the City has caused this Amendment to be duly executed in its name and behalf by its Mayor and its seal to be hereunto duly affixed and attested to by the City Clerk, and Developer and Connelly have executed the same on or as of the day and year first above written.

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

"CITY"

THE CITY OF TEMPE, an Arizona municipal corporation

By_____
Hugh L. Hallman, Mayor

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared Hugh L. Hallman, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation,

_____ whom I know personally.

_____ whose identity was proven to me on the oath of _____, a credible witness by me duly sworn.

_____ whose identity was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument

_____ whose identity I verified on the basis of his _____, and 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

"DEVELOPER"

TEMPE RI, LLC, a Florida limited liability company

By: Tempe RI Manager, LLC, a Florida limited liability company

By_____
Name_____
Title_____

STATE OF _____)
) ss.
COUNTY OF _____)

On this _____ day of _____, 2007, before me, the undersigned officer, personally appeared _____, who acknowledged himself to be _____ the Managing Member of Tempe RI Manager, LLC, a Florida limited liability company, the manager of Tempe RI, LLC, a Florida 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 was proven to me on the basis of satisfactory evidence to be the person whose name is subscribed to this instrument

_____ whose identity I verified on the basis of his _____, and 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