

Staff Summary Report



Council Meeting Date: December 11, 2008

Agenda Item Number: _____

SUBJECT: Request approval of a resolution authorizing the Mayor to execute a First Amendment to Development Agreement with UNIVERSITY SQUARE INVESTORS, LLC regarding the University Square development at University Drive and Forest Avenue.

DOCUMENT NAME: 20081211cdcm01 **COMM DEV/REDEVELOPMENT ADM (0403-01) RESOLUTION NO.**
2008.104

COMMENTS: The First Amendment to the Development Agreement would provide for a Government Property Lease Excise Tax abatement in exchange for Parking.

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

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. 2008.104

ADDITIONAL INFO: In June of 2007, the City entered a development agreement with UNIVERSITY SQUARE INVESTORS, LLC.. Since that time, the project has been modified to address market demands. The current project consists of a 328 room hotel, 95,000 s.f. conference/convention space, and 110,000 s.f. of retail. With this amendment, the City will no longer provide a Community Facility District as a financing mechanism. Instead, the City will provide for an eight year Government Property Lease Excise Tax Abatement. UNIVERSITY SQUARE INVESTORS, LLC will provide the City with 180 designated parking spaces within their parking garage and will also give naming rights of the Conference/Convention space to the City of Tempe. If the City sells the naming rights, the developer (UNIVERSITY SQUARE INVESTORS, LLC) would be entitled to half of the profits. In addition to the current restrictions on transfer of the property, the amendment adds as a default any change in control of the developer.

RESOLUTION NO. 2008.104

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 UNIVERSITY SQUARE INVESTORS, LLC, AN ARIZONA LIMITED LIABILITY COMPANY.

WHEREAS, the City and University Square Investors, LLC ("Developer"), are parties to a Development Agreement dated as of June 28, 2007, and recorded October 3, 2007 as Instrument No. 2007-1087879, Official Records of Maricopa County, Arizona (the "Development Agreement"); and

WHEREAS, the Developer has modified the scope of the project, in part to satisfy a desire of the City to have a convention/conference facility established in the downtown Tempe area and to reflect the diminished demand for residential development in downtown Tempe; and

WHEREAS, City believes the modified project will invigorate and stimulate economic growth in the City and that, in connection with such benefits and other tangible and intangible benefits to be derived from the development of the modified 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 _____, 2008.

Signature page follows.

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
Attn: City Clerk

**FIRST AMENDMENT
TO DEVELOPMENT AGREEMENT
(University Square)
C2007-116A
Resolution No. 2008.104**

THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT (this "First Amendment") is made and entered into as of the ____ day of _____, 2008, by and between the CITY OF TEMPE, an Arizona municipal corporation (the "City"), and UNIVERSITY SQUARE INVESTORS, LLC, an Arizona limited liability company ("USI" or "Developer").

RECITALS

- A. The City and USI entered into that Development Agreement dated as of June 28, 2007, and recorded October 3, 2007 as Instrument No. 2007-1087879, Official Records of Maricopa County, Arizona (the "Development Agreement"). The Development Agreement contemplated the development of the real property described therein as a mixed-use project consisting of (i) approximately 422 residential condominium dwelling units, (ii) approximately 304 hotel rooms, together with approximately 15,000 square feet of meeting space, (iii) approximately 240,000 feet of office space, (iv) approximately 44,000 square feet of retail uses, and (v) structured parking facilities containing approximately 2,100 parking spaces (the "Original Project").
- B. Since the execution of the Development Agreement, USI has modified the scope of the Original Project, in part to satisfy a desire of the City to have a convention/conference facility established in the downtown Tempe area and to reflect the diminished demand for residential development in downtown Tempe. In connection therewith, USI's present intention is to develop the Property into a mixed-use development consisting of (i) a hotel with approximately 328 rooms, (ii) a convention/conference facility containing approximately 95,000 square space of meeting space, (iii) approximately 111,000 square feet of retail uses, and (iv) structured parking facilities containing approximately 1,217 parking spaces (the "Modified Project"). The Modified Project is intended to be developed in accordance with the Conceptual Development Plan approved by the Development Review Commission on October 28, 2008 and on file in the Development Services Department of the City of Tempe, reference PAD08017 and DRP08204.
- C. The City acknowledges that the Modified Project will invigorate and stimulate economic growth in the City and that, in connection with such benefits and other tangible and intangible benefits to be derived from the development of the Modified Project, the City

has agreed to provide additional economic development incentives for the benefit of USI and the Modified Project as more particularly set forth in this First Amendment.

NOW, THEREFORE, in consideration of the foregoing premises and the mutual promises and agreements set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto state, confirm and agree as follows:

A G R E E M E N T

1. Definitions. All initial capitalized terms used in this First Amendment shall have the meanings ascribed thereto in the Development Agreement, except to the extent further modified, amended or otherwise defined herein. In connection therewith, the following defined terms set forth in the Development Agreement are hereby modified as follows:

"1.2 "Developer" shall mean and refer to USI and any successor in interest or assignee of USI acquiring all or any portion of the Modified Project, including, without limitation, any Phase therein.

1.6 "Modified Project" shall mean and refer to the development of the Property for the uses, intensities and densities currently shown in the Conceptual Development Plan."

From and after the date of this First Amendment, all references in the Development Agreement all references to the "Project" shall be deemed to refer to the Modified Project, and all references to the foregoing defined terms shall be deemed to mean and refer to such terms as modified and amended by this First Amendment.

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

"2.1 Scope of Development. The Conceptual Development Plan sets forth the scope of development for the Property depicting the types of basic land uses, permissible range of the intensity and density of such uses, and a permissible range and the relative height, bulk and size of buildings and structures to be developed on the Property. Notwithstanding anything contained in the foregoing, however, the City acknowledges that, while the Developer intends that the Modified Project be developed in general conformance with the Conceptual Development Plan, in order to make the Modified Project economically viable and otherwise feasible, Developer may make modifications and alterations to the Conceptual Development Plan in connection with the application for approval of a PAD with respect to the Property or any portion thereof. The City hereby agrees that, in connection with all submittals for approvals relating to the development of the Property and with respect to the construction of Improvements on the Property, no extraordinary plan or review requirements will be imposed by the City on the Developer; provided, however, that nothing contained herein shall preclude the City from the exercise of its normal review processes and requirements in connection with its approval of such submittals. If the Conceptual Development

Plan is hereafter modified or altered so that the Modified Project no longer contains a Hotel with at least 300 rooms and a convention/conference facility of at least 75,000 square feet, then unless City and Developer otherwise agree in writing, the Developer shall not be entitled to the incentives provided for in Section 6.1.1 hereof and shall have no obligation to provide the City Parking Rights required by Section 4.3.."

3. The following provision is hereby added to the Development Agreement as Section 2.2:

"2.2 Appointment of Representative. In order to ensure continuity throughout the development of the Modified Project, the City hereby agrees to designate a representative (the "City Representative") of the City to act as a liaison between the Developer and the City and its various departments. The City Representative shall be available at all reasonable times to serve as such liaison, it being the intention of this Section 2.2 to provide Developer with one individual as the City's principal representative with respect to the Project. Developer shall also designate a representative (the "Developer Representative") who shall serve as a liaison on behalf of the Developer with respect to the Project. The initial City Representative shall be Chris Messer, and the initial Developer Representative shall be Scott Turkington. Representatives may be changed at any time by the parties giving notice as provided in Section 9.1 of the Development Agreement."

4. Parking Facilities. Section 4.3 of the Development Agreement is hereby amended and restated in its entirety to read as follows:

"4.3 Parking Facilities. As part of the development of the Modified Project, the Developer shall provide 1,217 vehicular parking spaces to be located within a parking garage and at grade (the "Parking Facilities"), of which 182 parking spaces shall be provided to and designated for the exclusive use of the City (or for the use of the City's designees), without cost or expense, at all times (the "City Parking Rights"). The City Parking Rights shall be made available to the City not later than thirty (30) days after the issuance of a certificate of occupancy for the Parking Facilities and shall be provided either through the use of parking access cards, or through any other means mutually agreed to by Developer and the City. The parking spaces to be provided to the City shall be (i) marked and designated "reserved" in a manner reasonably acceptable to the City, (ii) provided on not more than two (2) separate floors within the Parking Facilities, but in no event on the roof of the Parking Facilities, and (iii) comprised of areas containing not less than twenty-five (25) contiguous spaces. City and Developer agree to reasonably and in good faith cooperate with one another to agree upon the location of the parking spaces—and, in addition, shall work together in good faith to agree upon an operation and maintenance agreement with respect to the Parking Facilities, which shall contain (a) policies and procedures regarding the operation of the Parking Facilities, (b) the allocation between the City and the Developer of the costs of the operation, maintenance, repair and insurance with respect to the Parking Facilities, and (c) any other terms or conditions relating to the ongoing

operation and maintenance of the Parking Facilities which may be mutually agreed to by the City and Developer."

5. Naming Rights. The following provision is hereby added to the Development Agreement as Section 4.5:

"4.5 Naming Rights. As a material part of the consideration to the City for the City's commitment and agreement to provide the development incentives hereinafter described, upon completion of construction of the convention/conference center component of the Modified Project, the Developer shall grant and assign to the City all naming rights with respect to the convention/conference center; provided, however, that the City must obtain the Developer's prior written consent and approval of the name of the convention/conference center, which approval shall not be unreasonably withheld, delayed, denied or conditioned; and provided, further, that in the event the City derives or otherwise realizes any revenue from such naming rights, for example, in connection with a naming rights agreement entered into by the City with a private enterprise, all net revenues realized there from shall be shared equally between the City and Developer. For the purposes of this Agreement, "net revenues" shall be deemed to mean the gross revenues realized by the City in connection with any naming rights agreement, less the actual out-of-pocket costs and expenses incurred by the City in connection therewith, including legal fees and the like. In connection with the foregoing, Developer hereby approves of the name "Tempe Convention Center" as the name of the convention/conference center."

6. Development Incentives. Section 6.1 of the Development Agreement is hereby amended and restated in its entirety to read as follows:

"6.1 Economic Incentives. The City and Developer hereby acknowledge that, as a result of certain inherent risks and costs of redevelopment of real property within downtown Tempe, and in consideration of the benefits to be realized by the City in connection with the development of the Modified Project, including, without limitation, the convention/conference facilities to be developed as part of the Modified Project, and the City Parking Rights to be provided by the Developer without cost or expense to the City, the economic incentives hereinafter set forth are necessary and appropriate for the economic viability of the Modified Project and to otherwise aid in the successful development of the Property:

6.1.1 Government Property Lease Excise Tax Abatement. The City hereby acknowledges and agrees that Developer shall be entitled to all statutorily authorized property tax abatements, including, without limitation, all such abatements currently available pursuant to the provisions of A.R.S. §§42-6201 through 42-6209, inclusive. Therefore, the City agrees to grant to Developer the statutorily authorized government property lease excise tax abatement pursuant to the provisions of A.R.S. §§42-6201 through 42-6209 for the eight (8) year period allowed by statute, which eight-year period shall commence upon the issuance of a certificate of occupancy by

the City for Improvements constructed within any Phase with respect to which the Developer makes a request for such excise tax abatement. Notwithstanding anything contained in the foregoing to the contrary, Developer shall be responsible for payment of an annual in-lieu payment to the City for the Tempe School District (the "District") for the abatement period in an amount equal to the lesser of (a) that portion of the *ad valorem* property tax applicable to such Phase which would have been payable to the District but for such tax abatement, or (b) \$60,000.00.

7. Section 6.2. Section 6.2 of the Development Agreement is hereby deleted in its entirety and, from and after the date of this First Amendment, shall have no further force or effect.

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

"8.1.1 **Additional Developer Defaults.** In addition to the foregoing, it shall be a default hereunder if: (a) Developer sells, assigns, conveys or alienates the Property, or any part thereof, or shall be divested of title or any interest therein in any manner or way, whether voluntarily or involuntarily except as expressly permitted herein or otherwise approved by City; (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, 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 material debts as they become due, 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 portion of the Property then owned by Developer; (e) the dissolution or termination of existence of Developer at any time while Developer continues to have an interest in the Property; (f) 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; or (g) there is a material default or material breach of any representation, warranty or covenant, or there is a material false statement or material omission, by Developer under this Agreement."

9. No Further Modifications. Except as specifically modified or hereby, the terms and conditions of the Development Agreement are hereby ratified and affirmed by the parties and shall remain in full force and effect, unchanged and unmodified in any way.

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

SIGNATURE PAGES FOLLOW

IN WITNESS WHEREOF, the undersigned have executed this First Amendment to Development Agreement as of the day and year first above written.

"DEVELOPER"

UNIVERSITY SQUARE INVESTORS,
LLC, an Arizona limited liability company

By _____
Name _____
Title _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this _____ day of _____, 2008, before me, the undersigned officer, personally appeared _____, who acknowledged him/herself to be _____ of UNIVERSITY SQUARE INVESTORS, LLC, 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

"CITY"

WITNESSETH:

CITY OF TEMPE,
an Arizona municipal corporation

City Clerk

By _____
Name _____
Title _____

Approved as to form:

City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On this ____ day of _____, 2008 before me, the undersigned officer, personally appeared _____, who acknowledged him/herself to be _____ 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 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