



Staff Summary Report

Council Meeting Date: January 22, 2005

Agenda Item Number: _____

SUBJECT: Request approval of a resolution authorizing the Mayor to execute Amended and Restated Development Agreement with Insight North America, Inc.

DOCUMENT NAME: 20090122cdsws01 **COMMUNITY DEVELOPMENT/REDEVELOPMENT (0403-01)**
RESOLUTION NO. 2008.12

COMMENTS: N/A

PREPARED BY: Sheri Wakefield-Saenz, Deputy Manager, Community Development (Ext. 8812)

REVIEWED BY: Chris Salomone, Community Development Manager (Ext. 8249)

LEGAL REVIEW BY: Cynthia Y. McCoy, Assistant City Attorney (Ext. 8127)

DEPARTMENT APPROVAL: Chris Salomone, Community Development Manager (Ext. 8249)

FISCAL NOTE: n/a

RECOMMENDATION: Adopt resolution as presented.

ADDITIONAL INFO: The original development agreement (C2008-95) approved in May 2008 is being amended and restated to allow the sale/lease-back of the Insight headquarter property and accommodate the use of artistic display panels.

RESOLUTION NO. 2009.12

A RESOLUTION OF THE MAYOR AND CITY COUNCIL OF THE CITY OF TEMPE, ARIZONA, AUTHORIZING THE MAYOR TO EXECUTE A FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT BETWEEN THE CITY OF TEMPE AND INSIGHT NORTH AMERICA, INC., AN ARIZONA CORPORATION.

WHEREAS, Insight North America, Inc. (“Insight”) desires to relocate a portion of its corporate headquarters to certain property in Tempe, Arizona (the “Project”);

WHEREAS, City previously approved the execution of a Development Agreement with Insight pertaining to the Project (C2008-95); and

WHEREAS, the original Development Agreement was never executed, and City and Insight now desire to amend and restate the Development Agreement in its entirety.

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

That the Mayor or his designee be and hereby is authorized to execute the First Amended and Restated 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 this Resolution and the First Amended and Restated Development Agreement.

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

Hugh L. Hallman, Mayor

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

WHEN RECORDED, RETURN TO:

City of Tempe Basket

**FIRST AMENDED AND RESTATED
DEVELOPMENT AGREEMENT**
No. C2008-95

THIS FIRST AMENDED AND RESTATED DEVELOPMENT AGREEMENT (this "Agreement") is made and entered into as of the ____ day of _____, 2009, between the City of Tempe, an Arizona municipal corporation (the "City"), and Insight North America, Inc., an Arizona corporation ("Insight").

RECITALS

WHEREAS, Insight desires to locate a portion of its corporate headquarters (the "Project") to a building located on the real property more particularly described on Exhibit A hereto (the "Property") in Tempe, Arizona known as 910 W. Carver Road (the "Building"); and

WHEREAS, significant constraints exist on the Property which make the development of the Project infeasible without relief from City development standards; and

WHEREAS, the City and Insight hereby acknowledge and agree that significant benefits will accrue to the City from the ultimate development of the Project by Insight, including a capital investment of at least \$4 million, the addition of 375 new administrative jobs within the City, and other tangible and intangible, direct and indirect, benefits to the City and its citizenry; and

WHEREAS, Developer has requested certain modifications of that certain Development Agreement (C2008-95), previously negotiated and approved by the City but not executed; and

WHEREAS, City and Developer desire to amend and restate the original Development Agreement in its entirety. This Agreement is a development agreement pursuant to the provisions of A.R.S. §900.05.

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. The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise.

1.1 “City” shall mean the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

1.2 “Insight” shall mean Insight North America, Inc., an Arizona corporation.

1.3 “Owner” shall mean the owner of fee simple title to the Panel Property; at the date of this Agreement, Insight is the Owner.

1.4 “Panel Property” shall mean the real property identified and at the locations identified on the conceptual plan attached hereto as **Exhibit A**.

1.5 “Parties” and “Party” shall mean all of the parties to this Agreement collectively or each of the parties individually, as the context may require.

1.6 “Project” shall mean the relocation of a portion of Insight’s corporation headquarters to the Property with at least a \$4 million dollar capital investment and the creation of 375 new administrative jobs at an average salary of \$50,000 per year within one (1) year after the relocation.

1.7 “Property” shall mean the real property depicted in **Exhibit B**.

2. **Development Issues.**

2.1 **Duration of Development Agreement.** The term of this Agreement shall commence on the date it is executed by all of the Parties and continue until May 31, 2018, unless sooner terminated as provided herein. The term of this Agreement may be extended for not more than one additional period of five (5) years in accordance with Section 2.3.1 hereof.

2.2 **Completion of Project.** Insight shall complete the relocation of a portion of its headquarters within six (6) months after the date this Agreement is executed and shall complete the balance of the Project no later than twelve months after the date this Agreement is executed. Insight shall submit to City within one year of the date of execution of this Agreement, a compliance certificate executed by its Chief Financial Officer attesting to completion of the Project, confirming the number of persons then employed at the Project and their salary levels. Insight shall notify City within thirty (30) days after Insight ceases to employ at the headquarters office located on the Property or other locations within the City of Tempe, either 375 administrative employees having an average salary of \$50,000 per year or employees with aggregate annual salaries of \$18,750,000.00.

2.3 **Artistic Display Panels.** In consideration of Insight’s completion of the Project, City hereby agrees that Owner or its designee may construct, install, maintain, renovate, repair, rebuild and lease (to third parties for profit) two two-faced artistic display panels (the “Panels”) on the Panel Property. The Panels shall not exceed 55’ in height (measured from the average road grade level to the top of the Panel), and their dimension shall not exceed 14’ x 48’.

2.3.1 The Panels may remain on the Panel Property until May 31, 2018 (the “Term”); provided that Owner may extend the term for a five-year period by submitting a

written notice to City not later than 360 days prior to the end of the Term, which written notice shall be accompanied by an extension fee of Fifty Thousand Dollars (\$50,000.00).

2.3.2 The Panels may only be used for graphic display of information or products that are consistent with the community and moral standards of the City. Owner agrees to request that the contractor responsible for marketing the panels use its best efforts to display products of Insight or of its corporate partners prior to using the Panels for graphic display of information or products of any other entities.

2.3.3 The Panels shall be consistent from a design standpoint with City standards, and the final location and design of the Panels shall be reviewed and approved in writing by the City Architect prior to their construction and installation on the Panel Property. If Owner fails to obtain such approval, City shall have the right to cause the Panels to be removed at Owner's expense. The City Architect shall not unreasonably withhold such review and/or approval.

2.3.4 Owner shall comply with all laws, rules and regulations applicable to the Panels, including without limitation those imposed by the Arizona Department of Transportation.

2.3.5 On each transfer of the Panel Property, each successive Owner shall pay to City a transfer fee in the amount of \$100,000.00 payable concurrently with the written acceptance referenced in Section 7.4 hereof.

2.4 General Cooperation. City and Insight acknowledge and agree that they shall cooperate in good faith with each other and use their respective good-faith and commercially reasonable efforts to pursue the Project as contemplated by this Agreement. City agrees to use its reasonable best efforts to assist Insight or its affiliates with other governmental agencies as appropriate including the State of Arizona Department of Commerce.

3. Cooperation. To further the commitment of the parties to cooperate in the implementation of this Agreement, the City and Insight shall each designate and appoint a representative to act as liaison between the City and its various departments and Insight. Insight hereby designates its Senior Vice President – Strategic Partnerships and Marketing as its representative, and the City hereby designates the Director or Deputy Director of Economic Development or her designee as its representative. The representatives shall be available at all reasonable times to discuss and review the performance of the parties to this Agreement and the progress of the development.

4. Annual Corporate Charitable Contributions. Insight desires to further the City's social service and community development efforts by making an annual contribution of not less than \$20,000 directly to agencies participating in Tempe United Way during the initial ten-year term of this Agreement. Insight shall provide City with written notification of the identity of, and amounts contributed to, such agencies on an annual basis on each May 31st during the term of this Agreement.

5. Indemnification of City.

5.1 With respect to the Project and Property, Insight 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 clean-up 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 this Agreement by Insight, except to the extent resulting from the negligence or intentional misconduct of the City or any of its employees, contractors or agents.

5.2 With respect to the Panel Property, Owner 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 clean-up 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 this Agreement by Owner, except to the extent resulting from the negligence or intentional misconduct of the City or any of its employees, contractors or agents.

6. Default; Remedies; Termination.

6.1 Default. It shall be a default hereunder if any party fails to perform any of its obligations hereunder and such failure continues for a period of thirty (30) days after written notice from the non-defaulting party specifying in reasonable detail the nature of the failure; provided that if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the defaulting party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion within ninety (90) days.

6.1.1 Additional Defaults. In addition to the foregoing, it shall be a default hereunder if: (a) Insight ceases to operate the Project within the parameters established in this Agreement without the prior written consent of City, which consent may be granted or withheld in City's unfettered discretion; (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 Insight, Owner or any partnership of which it is a partner, their respective assets or affairs, and such petition or application is not dismissed within ninety (90) days of such filing; (c) Insight or Owner 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 property of Insight or Owner or any property of any partnership of which either of them is a partner; (e) garnishment, attachment, levy or execution in an amount in excess of an amount equal to ten percent (10%) of its net worth is issued against

any of the property or effects of Owner or Insight, or any partnership of which either is a partner, and such issuance is not bonded against within ninety (90) days; (f) the dissolution or termination of existence of Insight or Owner, or the sale of all or substantially all of the assets or stock of Insight or Owner, unless its obligations hereunder have been assumed by an entity whose financial capacity has been approved in advance by City (such approval not to be unreasonably withheld or delayed); 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 Insight or Owner under any other document forming part of the transaction in respect of which this Agreement is made.

6.2 City's Remedies; Right to Terminate Agreement. If, after the passage of any applicable cure period, Insight remains in default under this Agreement, then the City shall have the right and option, without obligation, to terminate Insight's participation in this Agreement immediately upon written notice to Insight, in which event Insight shall pay to City an in-lieu fee equal to \$100,000.00, as liquidated damages, provided that the liquidated damage amount shall be reduced by 10% on each anniversary of the date this Agreement is executed by City and Insight (such that the fee shall be eliminated in its entirety on the tenth such anniversary). City and Insight hereby acknowledge that they have discussed and negotiated in good faith upon the question of the damages that would be suffered by City in the event Insight fails to perform its obligations under the Agreement and have endeavored to reasonably estimate such damages and they agree that (a) such damages are and will be impracticable or extremely difficult to fix, (b) liquidated damages in the amount stated above are and will be reasonable, and (c) in consideration of the payment of such liquidated damages, City shall be deemed to have waived all other claims for damages or relief at law or in equity on account of Insight's failure to perform. On any such termination, this Agreement shall remain in effect as to Owner, and Owner's rights and obligations hereunder shall not be affected by the termination of Insight's rights and obligations.

If, after the passage of any applicable cure period, Owner remains in default under this Agreement, then the City shall have the right and option, without obligation, to (a) terminate this Agreement immediately upon written notice to Owner, in which event Owner shall remove the Panels within 60 days after termination, and (b) exercise such other remedies as are available at law or in equity for breach of contract. On any such termination, this Agreement shall be of no further force or effect other than the indemnification provisions which shall survive the expiration or termination of this Agreement.

6.3 Development Rights in the Event of Termination. Upon the termination of this Agreement as provided herein, Owner shall have all customary rights to develop the Panel Property. However, future uses and development occurring on the Panel Property shall be subject to all of the City's then applicable development standards and review processes, and termination shall constitute the immediate revocation of the privileges and rights granted under Section 2.3 hereof, and Owner shall remove the Panels within 60 days after termination or expiration of this Agreement.

6.4 Developer's Remedies. If the City is in default under this Agreement and the parties do not resolve the City's default pursuant to the nonbinding mediation described in this

Agreement, Owner shall have the right to terminate this Agreement upon written notice to the City. Within 60 days after any such termination, Owner shall remove the Panels.

7. General Provisions.

7.1 Notices. All Notices which shall or may be given pursuant to this Agreement shall be in writing and may be given in person or transmitted by registered or certified mail, return receipt requested, addressed as follows:

TO Insight: Insight North America, Inc.
6820 South Harl
Tempe, AZ 85283
Attn: David Casillo

With a copy to: ***Legal Department***
1305 West Auto Drive
Tempe, Arizona 85285

TO OWNER: to such address as Owner shall specify by written notice to City

TO THE CITY: City Manager
City of Tempe
P. O. Box 5002
31 East 5th Street
Tempe, Arizona 85281

With a copy to: ***City Attorney***
Tempe City Attorney's Office
P. O. Box 5002
21 E. Sixth Street, Suite 201
Tempe, Arizona 85281

Any Party hereto shall have the right to change its designated notice address by providing to the other Parties written notice of such change in the manner described above.

7.2 Dispute Resolution. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The matter in dispute shall be submitted to a mediator mutually selected by the parties. In the event that the parties cannot agree upon the selection of a mediator within seven (7) days, then within three (3) days thereafter, the parties shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator

selected shall have at least five (5) years experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the parties. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation subsequent to the moratorium.

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

7.4 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; provided, however, that this Agreement shall automatically terminate if any Owner who is not an initial party to this Agreement fails to execute and deliver to City a written acknowledgement and acceptance of the terms of this Agreement within thirty (30) days after title to the Panel Property is conveyed to such Owner.

7.5 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement 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.

7.6 Attorneys' Fees. In the event of any litigation between the parties in connection with this Agreement, excluding the mediation process pursuant to section 7.2, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

7.7 Severability; No Merger. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement 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 Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, to the extent the material provisions of this Agreement are not vitiated.

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

7.9 Entire Agreement. This Agreement 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.

7.10 Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

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

7.12 No Partnership or Joint Venture. Under no circumstances shall the parties hereto be considered partners or joint venturers.

7.13 Conflict. This Agreement is subject to cancellation per ARS 38-511.

7.14 Force Majeure. In the event that City, Owner or Insight shall be delayed, hindered in or prevented from the performance of any act required hereunder (other than the payment of money) by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive governmental laws or regulations, riots, insurrection, the act, failure to act or default of the other party, war or other reason beyond their control, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay.

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

ATTEST:

CITY OF TEMPE, an Arizona municipal corporation

City Clerk

By _____
Hugh Hallman, Mayor

APPROVED AS TO FORM:

City Attorney

Insight North America, Inc., an Arizona corporation

By _____
Name _____
Title _____

List of Exhibits

Exhibit A Conceptual Site Plan and Description of Panel Property

Exhibit B Legal Description of Project Property