

RESOLUTION 2017-28

A RESOLUTION OF THE MAYOR AND COUNCIL OF THE TOWN OF FOUNTAIN HILLS, ARIZONA, APPROVING THE FIRST AMENDMENT TO DEVELOPMENT AGREEMENT BETWEEN THE TOWN AND AMERICANA DEVELOPMENT & BUILDING CO., LLC.

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 Americana Development & Building Co., LLC is hereby approved in substantially the form and substance 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 execute all documents and take all steps necessary to carry out the purpose and intent of this Resolution.

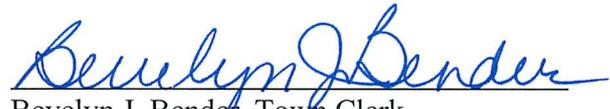
PASSED AND ADOPTED by the Mayor and Council of the Town of Fountain Hills, Arizona, August 15, 2017.

FOR THE TOWN OF FOUNTAIN HILLS:

ATTESTED TO:



Linda M. Kavanagh, Mayor



Bevelyn J. Bender, Town Clerk

REVIEWED BY:

APPROVED AS TO FORM:



Grady E. Miller, Town Manager



Andrew J. McGuire, Town Attorney

EXHIBIT A
TO
RESOLUTION 2017-28

[First Amendment]

See following pages.

When Recorded Return To:
Town of Fountain Hills
Attn: Town Clerk
16705 East Avenue of the Fountains
Fountain Hills, Arizona 85268

**FIRST AMENDMENT
TO
DEVELOPMENT AGREEMENT**

THIS FIRST AMENDMENT TO DEVELOPMENT AGREEMENT (this “First Amendment”) is entered into August 15, 2017, by and between the TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation (the “Town”) and AMERICANA DEVELOPMENT & BUILDING CO., LLC, an Arizona limited liability company (the “Developer”).

RECITALS

A. The Town and the Developer entered into that certain Development Agreement dated August 18, 2016, recorded at Document No. 2016-0609889 in the Official Records of the Maricopa County Recorder’s Office (the “Agreement”), relating to development of approximately 12.27 acres of real property located at the northwest corner of Avenue of the Fountains and La Montana Drive, Fountain Hills, Arizona (the “Property”). Unless otherwise defined herein, all capitalized terms used in this First Amendment shall have the meanings set forth in the Agreement.

B. The Developer has requested additional time for performance of certain obligations set forth in the Agreement, and the Town has determined it is in its best interest to amend the Agreement to grant the Developer additional time.

C. The Developer has requested flexibility to construct Phase 1 and Phase 2, as shown on Exhibit B to the Agreement, either in the order shown on Exhibit B, or with Phase 2 first, followed by Phase 1, to allow Developer to better respond to market conditions. The Town has determined it is in its best interest to amend the Agreement to grant the Developer the requested flexibility with respect to the development phases.

AGREEMENT

NOW, THEREFORE, in consideration of the foregoing introduction and recitals, which are incorporated herein by reference, the following mutual covenants and conditions, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Town and the Developer hereby agree as follows:

1. Modification of Developer Acquisition Obligations. Section 6.2 of the Agreement (Acquisition of the Property) is hereby deleted in its entirety and replaced with the following:

6.2 Acquisition of the Property. Developer agrees to complete the acquisition of the Property (close escrow and confirm ownership) for development of the Project not later than 450 days after the Effective Date. The Town agrees that this acquisition requirement may be satisfied by an assignment of this Agreement by Developer to the owner of the Property. Such assignment will only be valid with the prior, written consent of the Town, which consent may be withheld for any reason by the Town in its sole discretion.

2. Modification of Developer Phasing Options. Section 6.9 of the Agreement (Phased Development) is hereby deleted in its entirety and replaced with the following:

6.9 Phased Development. The Town acknowledges that Developer plans to develop the Property in four phases (1, 2, 3A and 3B) as generally set forth in Exhibit B, as more particularly described in the Concept Plans as approved by the Town Council. The Developer may reverse the order of the improvements in Phases 1 and 2, as described and depicted in Exhibit B, at its discretion; provided, however, that the Town may require Developer to construct portions of the Phase 1 infrastructure as necessary to accommodate proper site circulation and safe utilization of the Property. The Town will review and approve the public infrastructure needs of each phase (the “Public Infrastructure Improvements”) as part of its approval of the construction documents of each phase. The Developer shall construct or cause to be constructed and installed any and all portions of the Public Infrastructure Improvements. The Town Engineer may require that the Developer construct portions of the Public Infrastructure Improvements not directly related to the phase being constructed by the Developer if, in the Town Engineer’s sole discretion, he determines that the construction sequence requested by the Developer will be detrimental to the Town or to the public.

3. Substitution of Exhibits. The Schedule of Performance attached as Exhibit D to the Agreement is hereby deleted in its entirety and replaced with the revised Schedule of Performance, attached hereto as Exhibit 1 and incorporated herein by reference.

4. Consistency; Modification. Except as modified by this First Amendment, all of the terms and conditions of the Agreement shall remain in full force and effect. This First Amendment and the Agreement shall not be further modified in any manner other than by a written amendment executed by the Town and the Developer or its successors or assigns. If any clause, sentence or other portion of this First Amendment shall become illegal, null or void for any reason, or shall be held by any court of competent jurisdiction to be so, the remaining portions thereof shall remain in full force and effect.

5. Non-Default. By executing this First Amendment, Developer affirmatively asserts that (i) the Town is not currently in default, nor has been in default at any time prior to this First Amendment, under any of the terms or conditions of the Agreement and (ii) any and all

claims, known and unknown, relating to the Agreement and existing on or before the date of this First Amendment are forever waived.

6. Successors and Assigns. This First Amendment shall be binding upon and inure to the benefit of the successors and assigns of the respective parties.

7. Conflict of Interest. This First Amendment is subject to the provisions of ARIZ. REV. STAT. § 38-511. The Town may cancel this First Amendment without penalty or further obligations by the Town or any of its departments or agencies if any person significantly involved in initiating, negotiating, securing, drafting or creating this agreement on behalf of the Town or any of its departments or agencies is, at any time while the agreement or any extension of the agreement is in effect, an employee of any other party to the agreement in any capacity or a consultant to any other party of the agreement with respect to the subject matter of the agreement.

8. Recording of Agreement. Within 10 days after execution of this First Amendment by the Town, such First Amendment shall be recorded in the Maricopa County Recorder's Office.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the Parties have executed this First Amendment as of the date first set forth above.

“Town”

TOWN OF FOUNTAIN HILLS
an Arizona municipal corporation

By: *Linda M. Kavanagh*
Linda M. Kavanagh, Mayor

ATTEST:

Bevelyn J. Bender
Bevelyn J. Bender, Town Clerk

(ACKNOWLEDGMENT)

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

On August 16, 2017, before me personally appeared Linda M. Kavanagh, the Mayor of the TOWN OF FOUNTAIN HILLS, an Arizona municipal corporation, whose identity was proven to me on the basis of satisfactory evidence to be the person who she claims to be, and acknowledged that she signed the above document, on behalf of the Town of Fountain Hills.



Patricia Jo Toal
Notary Public

(Affix notary seal here)

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

“Developer”

• AMERICANA DEVELOPMENT & BUILDING CO., LLC
an Arizona limited liability company

By: _____
Dan Carter, Managing Member

(ACKNOWLEDGMENT)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

On _____, 2017, before me personally appeared Dan Carter, the Managing Member of AMERICANA DEVELOPMENT & BUILDING CO., LLC, an Arizona limited liability company, whose identity was proven to me on the basis of satisfactory evidence to be the person who he claims to be, and acknowledged that he signed the above document, on behalf of such company.

Notary Public

(Affix notary seal here)

ACKNOWLEDGMENT

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California
County of Riverside

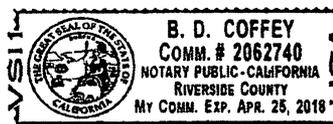
On Aug 9 2017 before me, B.D. Coffey Notary Public
(insert name and title of the officer)

personally appeared Dan Carter
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 B.D. Coffey (Seal)



“Developer”

AMERICANA DEVELOPMENT & BUILDING CO., LLC
an Arizona limited liability company

By: 

Dan Carter, Managing Member

(ACKNOWLEDGMENT)

STATE OF CALIFORNIA)
) ss.
COUNTY OF RIVERSIDE)

On _____, 2017, before me personally appeared Dan Carter, the
Managing Member of AMERICANA DEVELOPMENT & BUILDING CO., LLC, an Arizona
limited liability company, whose identity was proven to me on the basis of satisfactory evidence
to be the person who he claims to be, and acknowledged that he signed the above document, on
behalf of such company.

*See attached
acknowledgement*

Notary Public

(Affix notary seal here)

EXHIBIT 1
TO
FIRST AMENDMENT TO DEVELOPMENT AGREEMENT
BETWEEN
THE TOWN OF FOUNTAIN HILLS
AND
AMERICANA DEVELOPMENT & BUILDING CO., LLC

[Revised Schedule of Performance]

SCHEDULE OF PERFORMANCE

Deadline to Perform Task

From Effective Date of Agreement

Task/Obligation

Original	Amended	
230 days	450 days	Complete Acquisition of the Property (subject to the assignment provisions in Section 6.2)
Phase 1 – Either Independent Senior Living Building & Clubhouse or Assisted Living (AL), Memory Care (MC) & Medical Rehabilitation (Rehab).		
8 Months	20 Months	Developer to have submitted Concept Plan & Construction Documents for Phase 1 improvements, including Public Infrastructure Improvements
14 Months	26 Months	Developer to have begun construction of Phase 1 Improvements.
30 Months	42 Months	Developer to have completed construction of Phase 1 improvements. Developer to have completed Public Infrastructure Improvements for Phase 1.
Phase 2 – Either Independent Senior Living Building & Clubhouse or Assisted Living (AL), Memory Care (MC) & Medical Rehabilitation (Rehab), whichever was not constructed in Phase 1.		
30 Months	42 Months	Developer to have submitted Concept Plan and Construction Documents for Phase 2 improvements, including Public Infrastructure Improvements.
54 Months	66 Months	Developer to have completed construction of Phase 2 improvements. Developer to have completed Public Improvements for Phase 2.
Phase 3a – Commercial / Retail Building		
30 Months	42 Months	Developer to have submitted a Concept Plan and Construction Documents for Phase 3a improvements, including Public Infrastructure Improvements.
54 Months	60 Months	Developer to have completed construction of Phase 3a improvements. Developer to have completed Public Improvements for Phase 3a.
Phase 3b – Commercial / Retail Building		
60 Months	60 Months	Developer to have submitted a Concept Plan and Construction Documents for Phase 3b improvements, including Public Infrastructure Improvements.