



\*W2365568\*

E# 2365568 PG 1 OF 8  
ERNEST D ROWLEY, WEBER COUNTY RECORDER  
18-SEP-08 11:14 AM FEE \$29.00 DEP KA  
REC FOR: LEGACY LAND TITLE COMPANY  
ELECTRONICALLY RECORDED

**RECORDING REQUESTED BY  
AND WHEN RECORDED MAIL TO:**

Wells Fargo Bank, National  
Association  
Real Estate Group (AU #07572)  
1512 Eureka Road  
Suite 350  
Roseville, CA 95661

Attn: Eileen V. Oquendo  
Loan No. 1343OU

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**MODIFICATION AGREEMENT  
(Secured Swap Contract)**

THIS MODIFICATION AGREEMENT ("Modification Agreement") is executed to be effective as of July 23, 2008, by and between Wells Fargo Bank, National Association ("Lender"), and Boyer-Washington Boulevard Associates No. 2, Ltd., a Utah limited partnership ("Borrower").

- A. Pursuant to the terms of a loan agreement ("Loan Agreement") between Borrower and Lender, dated October 17, 2002, Lender made a loan to Borrower in the principal amount of Three Million Nine Hundred Twenty Four Thousand Five Hundred Ninety Five and 00/100ths Dollars (\$3,924,595.00) ("Loan"). The Loan is evidenced by a promissory note and by certain other documents described in the Loan Agreement (the "Loan Documents"). The Loan Documents are secured by, among other things, a deed of trust ("Deed of Trust") dated October 17, 2002, executed by Borrower, as Trustor, in favor of Lender, as Beneficiary. The Deed of Trust was recorded on November 7, 2002, as Instrument No. 1888073, in Book 2283, at Page 2018, in the Official Records of Weber County, Utah. The real property which is the subject of the Deed of Trust is hereafter defined as the "Property".
- B. Since the date of the Loan, Borrower and Lender have entered into a separate interest rate exchange transaction evidenced by that certain Confirmation Agreement, dated April 25, 2008 (hereinafter the "Swap Contract"). The term "Swap Contract" includes all documents and agreements which form a part of or supplement the Confirmation Agreement together with modifications, extensions and renewals of any such documents.
- C. Borrower's obligations to Lender under the Swap Contract are to be secured by the

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Deed of Trust. Lender's obligations to pay money to Borrower under the Swap Contract, if any, are to be assigned to Lender as additional collateral for the Loan.

NOW, THEREFORE, Borrower and Lender agree as follows:

1. **REPRESENTATIONS AND WARRANTIES.** Borrower represents and warrants, as of the effective date above, that:
  - 1.1 **Title To The Property.** Since the recordation date of the Deed of Trust (stated above), Borrower has not further encumbered the Property, including, without limitation, by entering into any Deed of Trust or mortgage, ground lease, and/or any option to purchase or right of first refusal with respect to the Property.
  - 1.2 **No Default.** No Default (as defined in the Deed of Trust), breach or failure of condition has occurred, or would exist with notice or the lapse of time or both, under the Deed of Trust (or under any of the Loan Documents) and all representations and warranties herein and in the Loan Documents are true and correct.
2. **MODIFICATION OF DEED OF TRUST.** The Deed of Trust (and the other Loan Documents) are hereby supplemented and modified to incorporate the following terms, which shall supersede and prevail over any conflicting provisions:
  - 2.1 **Secured Obligations.** The Secured Obligations (as defined in the Deed of Trust) are hereby amended to include, in addition to all existing Secured Obligations, the payment and performance of all covenants and obligations of Borrower under the Swap Contract.
  - 2.2 **Cross-Default.** The existence of any default by Borrower under the Swap Contract shall be a Default (as defined in the Deed of Trust) under the Deed of Trust and any Default by Borrower under the Deed of Trust (or under any of the other Loan Documents) shall be a Default under the Swap Contract. Any breach of any representation or condition under this Modification Agreement shall be a Default under the Deed of Trust and under the Swap Contract.
  - 2.3 **Security Interest.** In order to further secure payment and performance of all of the Secured Obligations, Borrower grants to Lender a security interest in, and unconditionally and irrevocably assigns, conveys, pledges, and transfers unto Lender, all of Borrower's right, title and interest, now or hereafter acquired, to the payment of money from Lender to Borrower under the Swap Contract.
3. **NON-IMPAIRMENT.** Except as expressly provided herein, nothing in this Modification Agreement shall alter or affect any provision, condition, or covenant contained in the Deed of Trust (or in any other Loan Document) or affect or impair any rights, powers, or remedies of Lender.

- 4. **MISCELLANEOUS.** This Modification Agreement shall be governed by and interpreted in accordance with the laws of the State of Utah, except if preempted by federal law. Time is of the essence of each term hereof.
- 5. **COUNTERPARTS.** This Modification Agreement may be executed in several counterparts by the parties with the same effect as if the parties executing the several counterparts had all executed one counterpart.
- 6. **INTEGRATION; INTERPRETATION.** This Modification Agreement contains or expressly incorporates by reference the entire agreement of the parties with respect to the matters contemplated therein and supercedes all prior negotiations or agreements, written or oral, and shall not be modified except by written instrument executed by all parties.

IN WITNESS WHEREOF, Borrower and Lender have caused this Modification Agreement to be duly executed as of the date first above written.

"BENEFICIARY/LENDER"

Wells Fargo Bank, National Association

By: Ben Bliss  
Ben Bliss, Assistant Vice President

"BORROWER/TRUSTOR"

Boyer-Washington Boulevard Associates No. 2, Ltd., a Utah limited partnership

By: The Boyer Company, L.C., a Utah limited liability company, General Partner

By: Steven B. Geller  
Steven B. Geller, President and Manager

By: Gardner Property Holdings, L.C., a Utah limited liability company, General Partner

By: Kem Q. Gardner  
Kem Q. Gardner, Manager/Member

(ALL SIGNATURES MUST BE ACKNOWLEDGED)

**GUARANTOR'S CONSENT**

The undersigned ("Guarantor") consents to the foregoing Fifth Modification Agreement and the transactions contemplated thereby and reaffirms its obligations under those two Repayment Guaranty (collectively "Guaranty") dated October 17, 2002 and May 21, 2004. Guarantor further reaffirms that its obligations under the Guaranty are separate and distinct from Borrower's obligations.

**Agreed and Acknowledged:**

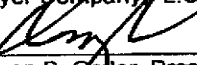
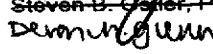
Dated as of: July 23, 2008

"GUARANTOR"

Gardner Property Holdings, L.C., a Utah limited liability company

By:   
Kern C. Gardner, Manager/Member

The Boyer Company, L.C., a Utah limited liability company

By:   
Steven B. Foster, President and Manager  
 (ALL SIGNATURES MUST BE ACKNOWLEDGED)

**HAZARDOUS INDEMNITOR'S CONSENT**

The undersigned ("Indemnitor") consents to the foregoing Fifth Modification Agreement and the transactions contemplated thereby and reaffirms its obligations under the Hazardous Materials Indemnity Agreement (Unsecured) ("Indemnity") dated October 17, 2002, and its waivers, as set forth in the Indemnity, of each and every one of the possible defenses to such obligations. Indemnitor further reaffirms that its obligations under the Indemnity are separate and distinct from Borrower's obligations.

**Agreed and Acknowledged:**

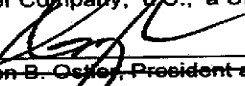

Dated as of: July 23, 2008

"INDEMNITOR"

Gardner Property Holdings, L.C., a Utah limited liability company

By:   
Kem C. Gardner, Manager/Member

The Boyer Company, L.C., a Utah limited liability company

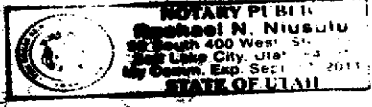
By:   
Steven B. Oester, President and Manager  
 (ALL SIGNATURES MUST BE ACKNOWLEDGED)

STATE OF UTAH

SS.

COUNTY OF Salt Lake

The foregoing instrument was acknowledged before me this 11<sup>th</sup> day of August, 2008, by Dennis Glenn, as manager of The Baker Company, L.C., a Utah limited liability company.



Rachael Niusulu  
NOTARY PUBLIC  
residing at Salt Lake City

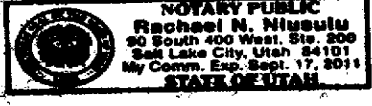
My commission expires: 9-17-11

STATE OF UTAH

SS.

COUNTY OF Utah

The foregoing instrument was acknowledged before me this 11<sup>th</sup> day of August, 2008, by Kem C Gardner, as Manager / Member of Gardner Property Holdings, L.C., a Utah limited liability company.



Rachael Niusulu  
NOTARY PUBLIC  
residing at Salt Lake City

My commission expires: 9-17-11

STATE OF UTAH

SS.

COUNTY OF SALT LAKE

The foregoing instrument was acknowledged before me this 21 day of August 2008, by BENJAMIN BLISS as AVP of WELLS FARGO BANK, N.A. a NATIONAL ASSOCIATION

	<p>MALERIE YOUNG Notary Public State of Utah My Commission Expires June 18, 2012 Commission #574999</p>	<p><u>Malerie Young</u> NOTARY PUBLIC residing at <u>299 S Main Floor 16 SLC, UT 84111</u></p>
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My commission expires: JUNE 18, 2012

Exhibit "A"

Unit Nos. 102, 201, 301, 501, 502 and 601 contained within the Ogden City Centre Condominium Project, as the same is identified in the Record of Survey Map recorded in Weber County, Utah, as Entry No. 1206747 (as said Record of Survey Map may have heretofore been amended or supplemented) and in the Declaration of Condominium of the Ogden City Centre Condominium Project recorded in Weber County, Utah as Entry No. 1206749 in Book 1649 at page 371 (as said Declaration may have heretofore been amended or supplemented).

TOGETHER WITH the undivided ownership interest in said Project's Common Areas and Facilities that is appurtenant to said Units as more particularly described in said Declaration.

Parcel Nos: 01-083-0002 ✓  
01-083-0003 ✓  
01-083-0004 ✓  
01-083-0007 ✓  
01-083-0006 ✓  
01-083-0008 ✓