TOWN OF TIMNATH, COLORADO

ORDINANCE NO. 77, SERIES 2009

AN ORDINANCE OF THE TOWN OF TIMNATH, COLORADO APPROVING THE DEVELOPMENT AGREEMENT FOR GATEWAY TIMNATH SOUTH SUBDIVISION, GENERALLY LOCATED SOUTH OF AND ADJACENT TO HARMONY ROAD, WEST OF WEITZEL STREET

WHEREAS, Cache La Poudre Investors North (the "Developer") has submitted to the Town of Timnath a Development Agreement (Exhibit A) for the Gateway Timnath South Subdivision (the "Property") with a total of 15.3 acres of non-residential uses located south of and adjacent to Harmony Road, west of Weitzel Street; and

WHEREAS, the Developer has requested vested property rights for a duration of twenty (20) years for the site specific development plan of the Property; and

WHEREAS, the hearing upon application for approval of a site specific development was properly noticed in accordance with Section 16.5.2 of the Timnath Land Use Code; and

WHEREAS, on September 2, 2009 the Town Council of the Town of Timnath, after holding all necessary public hearings and having received a recommendation from the Timnath Planning Commission, approved the Final Plat for Gateway Timnath South Subdivision on September 2, 2009 by Resolution No. 45, Series 2009; and

NOW, THEREFORE, BE IT ORDAINED BY THE TOWN COUNCIL OF THE TOWN OF TIMNATH, COLORADO:

Section 1. Development Agreement Approved

The Development Agreement for the Gateway Timnath South Subdivision is approved in substantially the same form as attached hereto as Exhibit A. The Development Agreement constitutes a site specific development plan creating vested property rights in excess of three years pursuant to Article 68 of Title 24, C.R.S., as amended.

Section 2. Severability

If any article, section, paragraph, sentence, clause, or phrase of this Ordinance is held to be unconstitutional or invalid for any reason, such decision shall not affect the validity or constitutionality of the remaining portions of this Ordinance. The Council hereby declares that it would have passed this Ordinance and each part or parts hereof irrespective of the fact that any one or parts be declared unconstitutional or invalid.

Section 3. Effective Date
This Ordinance shall take effect upon adoption at second reading, as provided by Section 3.5.5 of the Charter. The Town Clerk shall certify to the passage of this ordinance and make not less than one copy of the adopted Ordinance available for inspection by the public during regular business hours.

INTRODUCED, MOVED, AND ADOPTED BY THE TOWN COUNCIL OF THE TOWN OF TIMNATH ON FIRST READING, ON SEPTEMBER 2, 2009, AND SET FOR PUBLIC HEARING AND SECOND READING AT 7:00 P.M. ON SEPTEMBER 16, 2009 AT THE TIMNATH TOWN HALL, 4100 MAIN STREET, TIMNATH COLORADO AND ORDERED PUBLISHED BY TITLE THIS 3RD DAY OF SEPTEMBER, 2009.

MOVED, SECONDED AND FINALLY ADOPTED ON SECOND READING FOLLOWING PUBLIC HEARING BY THE TIMNATH TOWN COUNCIL ON SEPTEMBER 16, 2009.

TOWN OF TIMNATH, COLORADO

[Signature]
Donna Benson, Mayor

ATTEST:

[Signature]
Milissa McGuire, Town Clerk
EXHIBIT A

Development Agreement

[attached]
DEVELOPMENT AGREEMENT
BETWEEN
CACHE LA PoudRE INVESTORS SOUTH, LLC
AND
THE TOWN OF TIMNATH

Approval of this Agreement constitutes a vested property right pursuant to Article 68 of Title 24, C.R.S., as amended
DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this "Agreement") is made and entered into as of this 16th day of September, 2009, by and between CACHE LA Poudre INVESTORS SOUTH, LLC, a Colorado limited liability company ("Developer"), the TOWN OF TIMNATH, a municipal corporation of the State of Colorado ("Town") and the TIMNATH DEVELOPMENT AUTHORITY, a body corporate duly organized and existing as an urban renewal Authority under the laws of the State of Colorado (together with any successors thereto, the "Authority") (with respect to Section 3.7 only).

RECITALS

A. Developer owns certain real property 15.3 acres located within the Town boundaries, as more particularly described in Exhibit A attached to this Agreement (the "Property").

B. Developer desires to develop the Property for commercial uses consistent with the Approved Uses (as defined in Section 1.1), zoned and entitled to permit commercial buildings with an FAR of up to one square foot for each square feet of area of the Property, together with open space, recreational amenities and other related uses (the "Project").

C. Development of the Project in accordance with the terms and conditions of this Agreement will require substantial investments in infrastructure improvements and public facilities, both on and off-site, that will serve the needs of the Project and the Town, including, but not limited to roads, drainage facilities, grading, landscaping, parking facilities and utility facilities. Completion of these improvements will require substantial investments by Developer, in addition to the Town.

D. The Vested Property Rights Statute (as defined in Section 1.1) provides for the establishment of vested property rights in order to advance the purposes stated therein and, together with the Town's Municipal Code, authorizes the Town to enter into development agreements with landowners providing for vesting of property development rights for periods of greater than three years.

E. Based upon the reasonable expectations of the parties as of the Effective Date, development of the Project in accordance with this Agreement will provide for orderly and well-planned growth in accordance with the policies and goals set forth in the Town's Comprehensive Plan, will provide a significant benefit to the surrounding properties, will increase the Town's sales and property tax base, will create new employment opportunities, will stimulate economic growth within the Town, will secure the reasonable investment-backed expectations of Developer, will foster cooperation between the public and private sectors in the area of land use planning, will ensure reasonable certainty, stability and fairness in the land use planning process, and otherwise will achieve the goals and purposes of the Vested Property Rights Statute. In exchange for these benefits and the other benefits to the Town contemplated by this Agreement, together with the public benefits served by the orderly and well planned development of the
Property, Developer desires to receive the assurance that it may proceed with development of the Property pursuant to the terms and conditions of this Agreement.

AGREEMENT

NOW, THEREFORE, in consideration of the terms, conditions and covenants set forth in this Agreement and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

ARTICLE 1
Definitions and General Provisions

1.1. Definitions. The following terms and references shall have the meanings indicated:

1.1.1. Affiliate. Any entity of which Developer has the majority of equity or majority of voting interest or is the managing member or managing partner.

1.1.2. Agreement. This Development Agreement.

1.1.3. Approved Uses. The primary uses and accessory uses for the Property, the density and the intensity of use, and the development standards for the Property established through the PD Overlay, all as set forth in the Rezoning Application, including, without limitation, an FAR of up to one square foot for each square foot of area of the Property and all approved uses permitted in the C2- Community Commercial zone district plus the following additional permitted uses: tire and oil change services, drive through facilities for pharmacy operation and restaurant uses, liquor sales, outdoor storage (including, without limitation, bale and pallets storage and trailer storage), recreation vehicle and trailer parking, twenty-four hour operation, no limit on delivery hours, and outdoor/seasonal sales (no limitation on the number of days per calendar year).

1.1.4. Authority. The Timnath Development Authority.

1.1.5. Concept Plan. The Concept Plan for the Project set forth on Exhibit B.


1.1.7. Developer. Cache La Poudre Investors South, LLC, a Colorado limited liability company or any Affiliate thereof.

1.1.8. Effective Date. The effective date of the Council ordinance approving this Agreement.
1.1.9. Exhibits. The following Exhibits to this Agreement, all of which are incorporated by reference into and made a part of this Agreement:

Exhibit A - Legal Description of the Property

Exhibit B – Concept Plan

1.1.10. Existing Annexation Agreement. That certain Memorandum of Annexation by and between Harmony Road Enterprises, LLLP, a Colorado limited liability limited partnership (Developer’s predecessor in interest) and the Town, recorded at Reception No. 20010192155 on March 15, 2001.

1.1.11. FAR. Floor area ratio.

1.1.12. Fee Agreement. That certain Fee Agreement between the Developer and Town regarding Developer’s payment of fees associated with applicable planning applications.

1.1.13. Final Approval. The forty-first (41st) day after publication following final action by Council to approve the latest of the ordinances by which Council approves (a) this Agreement, and (b) the Rezoning Application. Final Approval shall be deemed not to have occurred if a Legal Challenge occurs prior to the time periods specified above, unless Developer elects to waive this requirement and such Legal Challenge is concluded or resolved affirming such approvals within a period of time acceptable to Developer in its sole discretion.


1.1.15. Legal Challenge. For purposes of this Agreement, either of the following shall constitute a “Legal Challenge”: (1) any third party commences any legal proceeding or other action that directly or indirectly challenges this Agreement, rezoning of the Property, or any of the Town’s resolutions or ordinances approving the Rezoning Application or this Agreement; or (2) any third party submits a petition for a referendum seeking to reverse or nullify any of such ordinances.

1.1.16. Municipal Code. The Town Code of the Town of Timnath, as in effect from time to time (or, where this Agreement expressly states, at the particular time stated).

1.1.17. Parties. Collectively, Town and Developer, and Authority with respect to Section 3.7 only.

1.1.18. PD Overlay. The PD Overlay for the Project.

1.1.19. Project. As defined in Recital B.

1.1.20. Property. As defined in Recital A.
1.1.21. **Rezoning Application.** Developer’s application for rezoning of the Property within the C-2 Community Commercial zone district together with the PD Overlay requesting approval of the Approved Uses.

1.1.22. **ROW Agreement.** That certain Right-of-Way Agreement, dated June 21, 2007, by and between the Town and Harmony Road Enterprises, LLLP, a Colorado limited liability limited partnership (Developer’s predecessor in interest to the Property), recorded at Reception No. 20070061480 on August 9, 2007.

1.1.23. **Sewer District.** South Fort Collins Sanitation District.

1.1.24. **Sewer IGA.** That certain Intergovernmental Agreement between The Timnath Development Authority and the South Fort Collins Sanitation District, dated May 16, 2007.

1.1.25. **Site Plan.** One or more site plan(s) (individually or collectively) for the Project to be approved by the Town, as amended in accordance with the Municipal Code and the terms and conditions of this Agreement, which plans shall be consistent with the Approved Uses.

1.1.26. **Term.** As defined in Section 1.3.

1.1.27. **Town.** The Town of Timnath, a municipal corporation of State of Colorado.

1.1.28. **Traffic Study.** That certain Timnath Retail Traffic Impact Study prepared by Drexel, Barrell & Co., dated October 2006, as supplemented by that certain Traffic Impact Memorandum dated June 17, 2009, as updated accordingly throughout the development of the Project.

1.1.29. **Vested Property Rights Statute.** Sections 24-68-101, et seq. of the Colorado Revised Statutes in effect as of the Effective Date.

1.2. **Covenants.** The provisions of this Agreement shall constitute covenants or servitudes which shall touch, attach to and run with the land comprising the Property, and the burdens and benefits of this Agreement shall bind and inure to the benefit of all estates and interests in the Property and all successors in interest to the parties to this Agreement, except as otherwise provided in Section 1.3 below.

1.3. **Term of Vested Rights.** In recognition of the benefits the Town will derive from development of the Project, the size of the development contemplated under this Agreement, the substantial investment and time required to complete the development of the Project and related infrastructure and public facilities and the possible impact of economic cycles and varying market conditions during the course of development, the term of the vested property rights established under this Agreement shall commence on the Effective Date and shall continue until
the twentieth (20th) anniversary of the Effective Date (the "Term"). After expiration of the Term, the Property shall continue to be subject to the charter, ordinances, rules and regulations of the Town for so long as it is located within the municipal boundaries of Town, and the vested property rights established by this Agreement shall be deemed terminated and of no further force or effect; provided, however, that such termination shall not affect (a) any common-law vested rights obtained prior to such termination; or (b) any right, whether characterized as vested or otherwise, arising from Town permits, approvals, rezoning, or other land use entitlements for the Property or the Project which were granted or approved prior to, subsequent to, concurrently, or in conjunction with the approval of this Agreement.

1.4. Amendment of Agreement. Except as otherwise set forth in this Agreement, this Agreement may be amended or terminated only by mutual consent in writing of Developer and the Town following the public notice and public hearing procedures required for approval of this Agreement. For the purposes of any amendment to this Agreement, "Developer" shall mean only the entity executing this Agreement that constitutes the Developer and those parties, if any, to whom such signatories have specifically granted, in writing, the power to enter into such amendment.

1.5. Existing Annexation Agreement. The Parties hereby amend and restate in its entirety the Existing Annexation Agreement and agree that this Agreement shall govern and control with respect to the development of the Property. Notwithstanding the foregoing, nothing in this Agreement shall be construed to affect the previous annexation of the Property into the Town in 2001. It is expressly acknowledged and agreed that the Property is within the Town boundaries.

ARTICLE 2
Streets

2.1. Access: Streets. Unless otherwise agreed to by Developer, all streets within the Project shall be privately owned and maintained by Developer or its successors or assigns in the manner provided in the declaration of covenants that will govern the Property. All street design standards and specifications within the Project shall be in accordance with requirements set forth in the Traffic Study. Access points for each lot within the Property will be determined at the time of development of such lot; provided, however, at least one additional access point will be provided onto Weitzel Street and, in Developer's sole discretion, one access point maybe provided onto Swetsville Zoo Road.

2.1.1. Harmony Road. Due to previous dedications, Developer is not required to dedicate any additional right-of-way along Harmony Road. In addition, Developer is not required to complete any improvements within the existing right-of-way for Harmony Road, including, without limitation, any landscaping improvements, sidewalk improvements, lighting
or similar (the “ROW Improvements”), nor is Developer required to perform any maintenance obligations along Harmony Road.

2.1.2. Weitzel Street. Due to previous dedications, Developer will not be required to dedicate any additional right-of-way along Weitzel Street unless a dedicated right-turn lane into the Project is required in connection with the development of Lot 4. Any additional road improvements along Weitzel Street will be established based upon the direct impact the Project will have to Weitzel Street as determined by an applicable update to the Traffic Study. Further, Developer will complete and maintain the ROW Improvements along Weitzel Street commencing at the intersection of Harmony Road and ending at the northern boundary of the Access Road (as defined below); provided, however, that Developer will not be required to install the ROW Improvements until such time the Town installs the ROW Improvements along the southern portion of Harmony Road as described in Section 2.1.1 above. As an interim measure and in connection with the development of Lot 3, Developer shall install and maintain landscaping along Weitzel Street consisting of a low-water grass variety seed such as crested wheat or similar. Developer will complete and maintain the ROW Improvements commencing at the northern boundary of the Access Road and continuing to the southern boundary of the Property in connection with the development of Lot 4.

2.1.3. Access Road. The intersection of Weitzel Street with the “Access Road” into the Property (also known as Outlot B on the Final Plat) will continue to be a full movement intersection until it is determined and documented that that the northbound queue from the Harmony Road/Weitzel Street intersection consistently blocks the left-turning movements at the Weitzel Street/Access Road intersection and if the left-turning movements at the Weitzel Street/Access Road intersection are determined to be operating at a LOS E or F. At such time the triggers mentioned above are reached, the following will apply:

1. If movements are to be restricted, appropriate signage, striping and/or physical construction may be implemented by the Town as deemed appropriate.

2. At no point will access for the subject intersection be restricted to less than a right-in/right-out intersection.

3. The Town will take into consideration any and all comments and concerns the developer/owner of the property which this access road serves may have in regards to modifying this access.

Additionally, it is understood that the access will not be modified until such time an additional access to Weitzel Street (south of the subject access) is constructed. Construction of this second access will be completed in conjunction with the development of Lot 4. The additional access will accommodate those vehicular movements that may or may not be restricted at the subject access.
2.1.4. Swetsville Zoo Road. As of the date of this Agreement, the current alignment for Swetsville Zoo Road is considered temporary. Any road improvements along Swetsville Zoo Road will be established based upon the direct impact the Project will have to Swetsville Zoo Road as determined by an applicable update to the Traffic Study.

2.1.5. Structural Pavement Design. Notwithstanding anything to the contrary in this Agreement, it is expressly understood that Developer is not responsible for any improvements along Harmony Road, Weitzel Street and Swetsville Zoo Road that are attributable to structural pavement design and the Project will not be construed to provide any direct impact to the structural design of either aforementioned streets.

ARTICLE 3
Water, Sewer, Utilities and Municipal Services

3.1. Water. The Town does not currently provide water service to the Property. Developer will meet Loveland/Fort Collins Water District’s requirements for water service. The Town will require proof of purchase of a water tap for any building site before any building permit will be issued for the site. In the event that the Town in the future undertakes to include water utility service within the scope of its municipal services, the Town will provide water utility service to the Property on the same terms and conditions that it provides water utility service to other property within the Town.

3.2. Sewer. The Town does not currently provide sewer service to the Property. Developer will meet Sewer District’s requirements for sewer service. The Town will require proof of purchase of a sewer tap for any building site before any building permit will be issued for the site. In the event that the Town in the future undertakes to include sewer utility service within the scope of its municipal services, the Town will provide sewer utility service to the Property on the same terms and conditions that it provides sewer utility service to other property within the Town.

3.3. Utilities. Developer will meet Poudre Valley REA, Xcel Energy, Qwest and Comcast’s requirements for gas, electrical, telecommunications and cable service to the Property.

3.4. Fire Protection. Developer will meet Poudre Fire Authority’s requirements for fire protection service to the Property. Developer shall be solely responsible for installing all fire hydrants and other fire protection measures on the Property and its perimeter as may be required by the Poudre Fire Authority.

3.5. Storm Drainage. Developer shall design, finance and cause the construction of all on-site storm drainage facilities and any off-site storm drainage facilities to the extent required, in accordance with the requirements of the Municipal Code in effect as of the Submission Date. The applicable scope of improvements, construction standards, technical requirements and construction schedules shall be determined by the Town Engineer based on future drainage...
studies provided by Developer in connection with future permit applications and approvals for the Project.

3.6. **Municipal Services.** Except as this Agreement expressly states otherwise, the Town shall have the responsibility and obligation to provide all municipal services to the Project on an equivalent basis to those provided to any other area of the Town on a uniform and non-discriminatory basis, including, without limitation: police and fire protection, snow removal and road construction, building code enforcement, maintenance of such public facilities as defined in the Municipal Code, and other administrative and utility services.

3.7. **Participation Fee.** Pursuant to the Sewer IGA, a participation fee is required for certain properties within the Town. The Parties will address issues relating to the participation fee for Lot 4 at the time of development of Lot 4. In accordance with the Sewer IGA, the amount of the participation fee for Lot 3 is Twenty-Two Thousand Five Hundred Dollars ($22,500.00)(the “Lot 3 Participation Fee”). The Town will waive the Developer’s payment of the Lot 3 Participation Fee contingent upon the sales tax to be generated by the Property, in accordance with the following:

3.7.1. Commencing on the date the Town issues the first certificate of occupancy for the Project (the “Commencement Date”) and continuing until the fifth anniversary of the Commencement Date, if the annual sales tax revenue for the Property exceeds the first threshold of $100,000.00, the Lot 3 Participation Fee shall be waived. Secondarily, if the first threshold is not met by the fifth anniversary of the Commencement Date, then the annual sales tax revenue for the Property must exceed $133,000.00 on or before the seventh anniversary of the Commencement Date for the Lot 3 Participation Fee to be waived. If neither of these thresholds are satisfied, the Lot 3 Participation Fee shall be due and payable no later than the day after the seventh anniversary of the Commencement Date.

3.8. **Special Improvement District.** If the Town establishes a special improvement district or similar taxation district for the purpose of recovering or financing costs attributable to street, bridge, water, sewer, storm sewer or similar infrastructure within any area of the Town, the Town will not include the Property as part of such taxation district under any circumstances, unless Developer provides the Town with its prior written consent, in its sole discretion. Any attempt by the Town to include the Property within such taxation district without Developer’s prior written consent will be null and void. Notwithstanding the foregoing, nothing in this Section 3.8 shall be construed to (i) prohibit the Town from establishing a new tax with general applicability for the entire Town and such taxation will be applicable to the Project or (ii) affect any modification, extension or similar for the Authority.
ARTICLE 4
Future Reimbursement

4.1. Future Development. Due to the unknown use for Lot 4, the Parties are unable to quantify the fiscal impact the Project will bring to the Town. Within a timely manner after finalizing the use of Lot 4, the Town and Developer will work together in good faith to determine a mutually acceptable public-private partnership agreement, that may include, among other things, reimbursement for the Waterline Costs (as defined below) and any other public improvements within the Project, based upon the fiscal impact analysis completed by Developer and submitted to the Town. Prior to the date of this Agreement, Developer paid for the installation of an off-site waterline across Harmony Road to facilitate water service on the Property (the “Waterline”). The total costs for the Waterline was $79,632.57 (the “Waterline Costs”).

4.2. Replat. As of the Effective Date, the final configuration of “Lot 4” (as defined on the Final Plat) is not known. The Town agrees that any future subdivision of Lot 4 may proceed through the “replat” process set forth in Section 16.4.11 of the Municipal Code and such process will only require a “final plat” (as such term and procedure is set forth in the Municipal Code). In connection with the Project’s Final Plat, the Town has reviewed and approved applicable requirements for Lots 1 through 3 and Outlot A. The following items will be modified and updated accordingly in connection with the replat process for Lot 4: (i) open space plan; (ii) utility plan; and (iii) drainage plan. The following items will be submitted with respect to each lot specifically prior to receipt of a building permit for such lot, as applicable: (i) Construction Dewatering Permit, 404 Permit and Work in Ditch Permit; (ii) SIA and Improvements Guarantee (if applicable); and (iii) Construction plans and profiles.

ARTICLE 5
Public Land Dedication

5.1. Public Land Dedication. The Property is subject to the ROW Agreement that provided for, among other things, the dedication of certain right-of-way along Harmony Road and the current location of Weitzel Street. The Town agrees the applicable dedications pursuant to the ROW Agreement exceed the requirements of the Municipal Code for public land dedication. Subject to Section 2.1.2 above, Developer is not required to dedicate any additional property to the Town. Notwithstanding the foregoing, Developer will dedicate all required easements to applicable utility providers that service the Property.

ARTICLE 6
Zoning and Development

6.1. Rezoning. Concurrently with taking final action on the ordinance approving this Agreement, the Council shall take final action on an ordinance approving the Rezoning Application for the Property. Developer’s consent to rezoning of the Property is contingent on
obtaining the Town’s approval of rezoning for the Property that is substantially consistent with the Project as described in this Agreement. As used herein, the phrase “substantially consistent with the Project” means the Town’s approval of a final, non-appealable ordinance rezoning the Property to the “C2 – Community Commercial” zone district consistent with the Rezoning Application. The development parcel sizes and locations, roadway locations and other aspects of the Project shall be as generally depicted on the Concept Plan. The Approved Uses shall be permitted uses in accordance with the Municipal Code.

6.2. Subdivision Plat, Site Plan and Other Plans Review Process. Concurrently with taking final action on the ordinance approving this Agreement and the rezoning of the Property, the Council shall consider a resolution regarding the approval of the Final Plat. With respect to future site plan applications, in the event of any conflict between the Municipal Code and the Rezoning Application (as approved), the approved Rezoning Application shall control. The Town will process and review in an expeditious manner all subdivision plats, replats, site plans, grading permits, building plans and specifications and other plans relating to the development of the Property, filed by Developer.

6.3. LOMR. An approved CLOMR currently affects only Lot 1 of the Property. The Town’s Flood Plain Administrator will permit the issuance of a temporary certificate of occupancy for Lot 1 prior to Developer’s receipt of an approved LOMR, provided all other applicable requirements for such temporary certificate of occupancy have been met. Such temporary certificate of occupancy shall be valid for a period not to exceed twelve months, with Developer’s option to extend for an additional six months if necessary by providing written notice to the Town.

6.4. Impact Fees. Developer shall pay the impact fee of nine cents ($0.09) per square foot of commercial building space in accordance with the requirements of the Municipal Code in effective as of the Effective Date. Developer shall not be subject to any additional impact fees adopted by the Town after the Effective Date.

ARTICLE 7
Vested Property Rights

7.1. Vesting of Property Rights. This Agreement constitutes an approved “site-specific development plan” as defined in the Vested Property Rights Statute. Each subdivision plat, site plan and each amendment to any of the foregoing, that Developer submits to the Town subsequent to the Effective Date shall, if Developer so requests, be processed as a “site specific development plan” as defined in the Vested Property Rights Statute. The vested property rights created in connection with such approved subdivision plats, site plans, and each amendment to any of the foregoing, shall be supplemental and in addition to those property rights initially vested through this Agreement as of the Effective Date, and shall be vested pursuant to the Vested Property Rights Statute until the twentieth (20th) anniversary of the Effective Date.
7.2. **Compliance with General Regulations.** Subject to the terms, conditions and limitations of the Vested Property Rights Statute and except as otherwise provided in this Agreement, the establishment of vested property rights pursuant to this Agreement shall not preclude the application on a uniform and non-discriminatory basis of Town regulations of general applicability (including, but not limited to, building, fire, plumbing, electrical and mechanical codes, the Municipal Code, and other Town rules and regulations) or the application of state or federal regulations, as all of such regulations exist on the Effective Date or may be enacted or amended after the Effective Date. Developer does not waive its right to oppose the enactment or amendment of any such regulations.

7.3. **Property Rights Vested.** Subject to the terms, conditions and limitations of the Vested Property Rights Statute and except as otherwise provided in this Agreement, the rights identified below shall constitute the vested property rights under this Agreement during the Term:

7.3.1. The right to develop, plan and engage in land uses within the Property in the order, at the rate and at the time as market conditions dictate, in a manner that is substantially consistent with the Project as described in this Agreement and in the Rezoning Application, including the Approved Uses and the entitlement to develop at an FAR of one square feet for each square feet of area of the Property.

7.3.2. The right to commence and complete development of the Project (including, without limitation, the right to receive all Town approvals and permits necessary for the development of the Project) with conditions, standards and dedications which are no more onerous than those imposed by the Town upon other developers in the Town on a uniform, non-discriminatory and consistent basis.

7.3.3. The right to apply for and, upon compliance with the terms and conditions of this Agreement and the Municipal Code, to receive grading permits, building permits, certificates of occupancy, and other permits necessary for development, construction and occupancy of improvements within the Project.

7.3.4. The right to have the Town accept and process applications for subsequently required development approvals including, without limitation, each subdivision plat, site plan, and each amendment to any of the foregoing, as site specific development plans which, if approved, shall establish vested property rights pursuant to the Vested Property Rights Statute in the manner described in Section 7.1 above.

7.3.5. Except as the Vested Property Rights Statute expressly provides otherwise, no initiated or referred zoning/rezoning, subdivision, land use or other legal or administrative action which would directly or indirectly have the effect of materially and adversely altering, impairing, preventing, diminishing, imposing a moratorium on development,
delaying or otherwise adversely affecting any of the Developer's rights set forth in this Agreement shall apply to or be effective against the Property or the Project.

7.4. **No Obligation to Develop.** Developer shall have no obligation to develop all or any portion of the Project and shall have no liability under this Agreement to the Town or to any other party for its failure to develop all or any part of the Project. The Parties contemplate that the Project will be developed in phases. Developer shall have no obligation to develop all or any portion of any phase, notwithstanding the development or non-development of any other phase, and Developer shall have no liability under this Agreement to the Town or any other party for its failure to develop all or any portion of any phase of the Project.

**ARTICLE 8**

**Legal Challenges**

8.1. **Expiration or Termination During Pendency of Legal Challenge.** Notwithstanding any contrary provision of this Agreement, if a Legal Challenge occurs, this Agreement shall not expire or terminate during the pendency of any Legal Challenge and shall, unless earlier terminated or modified by a written amendment signed by all parties hereto, remain in full force and effect through and until the thirty-first (31st) day following entry of a final, non-appealable order resolving such Legal Challenge.

8.2. **Successful Legal Challenge Contingency.** If any Legal Challenge successfully voids, enjoins, or otherwise invalidates the rezoning of the Property, this Agreement or any portion thereof, the Town and Developer shall cooperate to cure the legal defect and to pursue the rezoning of the Property or portion thereof in a manner that most fully implements the intent and purpose of this Agreement.

**ARTICLE 9**

**Default; Remedies; Termination**

9.1. **Default by Town.** A "breach" or "default" by the Town under this Agreement shall be defined as subsequent to the approval of the rezoning of the Property in accordance with the Rezoning Application, any zoning/rezoning, land use or other action or inaction, direct, indirect or pursuant to an initiated measure, taken without Developer's consent, that alters, impairs, prevents, diminishes, imposes a moratorium on development, delays or otherwise materially and adversely affects any development, use or other rights of Developer under this Agreement.

9.2. **Default by Developer.** A "breach" or "default" by Developer shall be defined as Developer's failure to fulfill or perform any material obligation of Developer contained in this Agreement.
9.3. **Notices of Default.** In the event of a default by either party under this Agreement, the non-defaulting party shall deliver written notice to the defaulting party of such default, at the address specified in Section 10.12, and the defaulting party shall have twenty (20) days from and after receipt of such notice to cure such default. If such default is not of a type which can be cured within such 20-day period and the defaulting party gives written notice to the non-defaulting party within such 20-day period that it is actively and diligently pursuing such cure, the defaulting party shall have a reasonable period of time given the nature of the default following the end of such 20-day period to cure such default, provided that such defaulting party is at all times within such additional time period actively and diligently pursuing such cure.

9.4. **Remedies.**

9.4.1. **Default by the Town.** If Default by the Town occurs and is continuing hereunder, Developer may (i) seek damages at law for actual out-of-pocket expenses, but not consequential damages, lost profits or punitive damages; (ii) seek enforcement of the Town’s obligations hereunder by any equitable remedies, such as specific performance or injunction, to the extent allowed by law; or (iii) elect to terminate this Agreement; provided that except pursuant to § 24-68-105(1)(c), C.R.S., Developer’s remedies for a default by the Town resulting from an initiated measure shall be limited to specific performance.

9.4.2. **No Effect on Vested Rights.** The Town acknowledges that since this Agreement extends the period of vesting for more than three years, as provided in the Vested Property Rights Statute, in the event of a breach or default by the Town, in addition to any of the foregoing remedies, Developer shall be entitled to recover from the Town any damages and/or compensation that would have been specifically available to Developer as contemplated in § 24-68-105(1)(c), C.R.S. as in effect on the Effective Date.

9.4.3. **Default by Developer.** If Default by Developer occurs and is continuing hereunder, the Town, may (i) seek any available remedy at law for actual out-of-pocket expenses, but not consequential damages, lost profits or punitive damages; or (ii) seek enforcement of Developer’s obligations hereunder by any equitable remedies, such as specific performance or injunction. In addition, Town is under no obligation to grant any permits or proceed with any application or formal action relating to the Property, while such default remains unresolved.

9.5. **Action to Terminate.** Notice of termination must be accomplished by written notification delivered to the other parties hereto in accordance with Section 10.12. Termination will be effective on the date specified in such notice.

9.6. **Venue.** Venue for any action to enforce or interpret the terms of this Agreement shall be in District Court, Larimer County, Colorado.
ARTICLE 10
Miscellaneous

10.1. **Expiration.** This Agreement shall expire on the twentieth (20th) anniversary of the Effective Date.

10.2. **No Waiver of Town Power.** Nothing contained in this Agreement shall constitute or be interpreted as a repeal of existing codes or ordinances or as a waiver or abnegation of Town’s legislative, governmental, or police powers to promote and protect the health, safety, or general welfare of the municipality or its inhabitants; nor, subject to the terms and conditions of 10.6 of this Agreement, shall this Agreement prohibit the enactment by the Town of any fee which is of uniform or general application.

10.3. **Applicable Law.** This Agreement shall be construed and enforced in accordance with the laws of the State of Colorado.

10.4. **No Joint Venture or Partnership.** No form of joint venture or partnership exists between the Town and Developer, and nothing contained in this Agreement shall be construed as making Town and Developer joint venturers or partners.

10.5. **Merger and Ratification.** This Agreement constitutes the entire understanding and agreement of the parties, integrates all of the terms and conditions mentioned therein and incidental thereto, and supersedes all negotiation or previous agreements between the parties with respect to all or any part of the subject matter hereof. All waivers of this Agreement must be made in writing and signed by the appropriate authorities of the Town or of the Developer. All amendments hereto must be in writing signed by the appropriate authorities of the Town and Developer in a form suitable for recording.

10.6. **Expenses.** Except as otherwise provided in this Agreement and subject to that certain Fee Agreement between the parties, Developer and the Town shall each bear their respective costs and expenses associated with implementing and enforcing the terms of this Agreement.

10.7. **Attorney’s Fees.** If any action is filed or maintained by either party in relation to this Agreement, the substantially prevailing party shall be awarded its reasonable costs and attorney’s fees, which rights shall survive termination of this Agreement.

10.8. **Waiver.** No waiver of one or more of the terms of this Agreement shall constitute a waiver of other terms. No waiver of any provision of this Agreement in any instance shall constitute a waiver of such provision in other instances.

10.9. **Town Findings.** Town hereby finds and determines that execution of this Agreement is in the best interests of the public health, safety, and general welfare and the
provisions of this Agreement are consistent with the Town’s Comprehensive Plan, development laws, regulations and policies.

10.10. **Severability.** If any term, provision, covenant or condition of this Agreement is held by a court of competent jurisdiction to be invalid, void or unenforceable, the remaining provisions of this Agreement shall, unless amended or modified by mutual consent of the parties, continue in full force and effect so long as enforcement of the remaining provisions would not be inequitable to the party against whom they are being enforced under the facts and circumstances then pertaining.

10.11. **Further Assurances.** Each party shall execute and deliver to the other all such other further instruments and documents as may be reasonably necessary to carry out this Agreement in order to provide and secure to the other party the full and complete enjoyment of its rights and privileges under this Agreement.

10.12. **Notices.** Any notice or communication required under this Agreement between the Town and Developer must be in writing, and may be given either personally or by registered or certified mail, return receipt requested. If given by registered or certified mail, the same shall be deemed to have been given and received on the first to occur of (i) actual receipt by any of the addressees designated below as the party to whom notices are to be sent, or (ii) five days after a registered or certified letter containing such notice, properly addressed, with postage prepaid, is deposited in the United States mail. If personally delivered, a notice shall be deemed to have been given when delivered to the party to whom it is addressed. Any party hereto may at any time, by giving written notice to the other party hereto as provided in this Section, designate additional persons to whom notices or communications shall be given, and designate any other address in substitution of the address to which such notice or communication shall be given. Such notices or communications shall be given to the parties at their addresses set forth below:

If to Town:

Town of Timnath
4800 Goodman Street
Timnath, Colorado 80547
Attention: Becky Davidson

With a required copy to:

Kissinger & Fellman
3773 Cherry Creek North, Suite 900
Denver, Colorado 80209
Attention: Ken Fellman
If to Developer, by mail delivery:
Cache La Poudre Investors South, LLC
C/o Goldberg Properties
195 West 12th Avenue
Denver, Colorado 80204
Attention: Mark Goldberg

With a required copy to:

Packard & Dierking, LLC
2595 Canyon Blvd., Suite 200
Boulder, Colorado 80302
Attention: Keirstin Beck

10.13. **Assignment.** This Agreement shall be binding upon and, except as otherwise provided in this Agreement, shall inure to the benefit of the successors in interest or the legal representatives of the parties hereto. Developer shall have the right to assign or transfer all or any portion of its interests, rights or obligations under this Agreement to third parties acquiring an interest or estate in the Property, including, but not limited to, purchasers or long term ground lessees of individual lots, parcels, or of any improvements now or hereafter located within the Property, provided that to the extent Developer assigns any of its obligations under this Agreement, the assignee of such obligations shall expressly assume such obligations. The express assumption of any of Developer's obligations under this Agreement by its assignee or transferee shall, upon written notice to Town, thereby relieve Developer of any further obligations under this Agreement with respect to the matter so assumed.

10.14. **Counterparts.** This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original and all of which taken together shall constitute one and the same agreement.

10.15. **No Third-Party Beneficiaries.** It is expressly understood and agreed that enforcement of the terms and conditions of this Agreement, and all rights of action relating to such enforcement, shall be strictly reserved to the parties hereto, their successors and assigns, and nothing contained in this Agreement shall give or allow any claim or right of action by any other or third person under this Agreement. It is the express intention of the parties that any person other than the parties receiving services or benefits under this Agreement shall be deemed to be an incidental beneficiary only.

[Signature Page Follows]
IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date first written above.

DEVELOPER:

CACHE LA Poudre Investors South, LLC, a Colorado limited liability company

By:  
Name: William H. McDowell  
Title: Manager

By:  
Name: Mark A. Goldberg  
Title: Manager

TOWN:

TOWN OF TIMNATH, a municipal corporation of the County of Larimer, State of Colorado

By:  
Name: Donna Benson  
Title: Mayor

ATTEST:

Town Clerk

Approved as to legal form by:

Town Attorney
AUTHORITY (With respect to Section 3.7):

TIMNATH DEVELOPMENT AUTHORITY, a body corporate

By:  

Name: Donna Benson  
Title: TDA Chairperson

ATTEST:

Authority Secretary

Approved as to legal form by:

Authority Attorney
STATE OF COLORADO

COUNTY OF Denver

The foregoing instrument was acknowledged before me this 4th day of November, 2009, by William H. McDowell, as Manager of Cache La Poudre Investors South, LLC, a Colorado limited liability company.

Witness my hand and official seal.

Notary Public
My commission expires:

8/19/13

STATE OF COLORADO

COUNTY OF Denver

The foregoing instrument was acknowledged before me this 4th day of November, 2009, by Mark A. Goldberg, as Manager of Cache La Poudre Investors South, LLC, a Colorado limited liability company.

Witness my hand and official seal.

Notary Public
My commission expires:

8/19/13

{00028805 DOC:3}
EXHIBIT A-1
Legal Description of the Property
EXHIBIT B
Concept Plan
{See Attached}