

OFFICIAL RECORD

Requested By:

STEWART TITLE

Douglas County - NV  
Werner Christen - Recorder

Page: 1 Of 11 Fee: 24.00

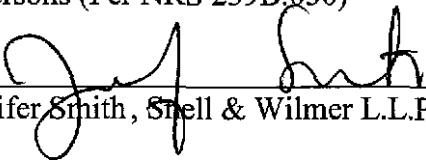
BK-0308 PG- 4332 RPTT: 0.00



APNs: 1220-09-710-011 through 056 and  
1220-09-310-001 through 017

Recording Requested By:  
Snell & Wilmer L.L.P.  
3883 Howard Hughes Parkway, Suite 1100  
Las Vegas, NV 89169  
Attn.: Pat Curtis, Esq.

I the undersigned hereby affirm that this document submitted for recording does not contain the social security number of any person or persons (Per NRS 239B.030)

  
Jennifer Smith, Snell & Wilmer L.L.P.

  
Paralegal

**FORBEARANCE AND LOAN MODIFICATION AGREEMENT**

This document is recorded as an **ACCOMMODATION ONLY** and without liability for this consideration therefore, or as to the validity or sufficiency of said instrument, or for the effect of such recording on the title of the property involved.

## FORBEARANCE AND LOAN MODIFICATION AGREEMENT

THIS FORBEARANCE AND LOAN MODIFICATION AGREEMENT (this "Agreement") is dated as of March 1, 2008, by and among KIM POSNIEN CONSTRUCTION AND DEVELOPMENT COMPANY ("Borrower"), KIMBALL A. POSNIEN, an individual ("K. Posnien"), DEBBIE A. POSNIEN, an individual ("D. Posnien"), ("K. Posnien, D. Posnien and sometimes Borrower, collectively, the "Guarantor"), and CITY NATIONAL BANK, a national banking association, successor to Business Bank of Nevada ("Lender").

### RECITALS

A. Borrower has received from Lender a construction loan (the "Loan") in the original principal amount of \$5,690,440.00, as evidenced by a Promissory Note dated August 10, 2005, executed by Borrower in favor of Lender, as the same may have been amended, restated and/or replaced from time to time (the "Note") and a Construction Loan Agreement, dated August 10, 2005, executed by Borrower and Lender, as the same may have been amended, restated and/or replaced from time to time (the "Loan Agreement").

B. The proceeds of the Loan were to be disbursed to pay a portion of the costs to develop certain real property consisting of approximately 15.53 acres located generally at the intersection of Dresslerville Road and Tillman Lane, in Gardnerville, Nevada 89410, and construct thereon certain improvements to consist of 67 finished lots and a 2,299 square foot community clubhouse and related infrastructure improvements (the "Project").

C. As a condition, among others, to making the Loan to Borrower, K. Posnien and D. Posnien each guaranteed the Loan and other indebtedness of Borrower to Lender, as evidenced by two Commercial Guaranty instruments, each dated August 10, 2005 and executed by each such Guarantor in favor of Lender (collectively, the "Commercial Guaranty").

D. As a further condition, among others, to making the Loan to Borrower, Borrower guaranteed the completion and performance of construction of the Project, as evidenced by a Guaranty of Completion and Performance, dated August 10, 2005, executed by such Guarantors in favor of Lender (the "Completion Guaranty," and together with the Commercial Guaranty, the "Guaranty").

E. The Loan is secured by, among other things, (i) a Construction Deed of Trust, dated August 10, 2005, from Borrower as trustor, to Stewart Title of Douglas County, as trustee, in favor of Lender, recorded August 12, 2005, in the Official Records of the Recorder of Stewart Title of Douglas County, Nevada as Document No. 0652160 in Book 0805, Page 6281 (the "Deed of Trust"), (ii) an Assignment of Construction Contracts, dated August 10, 2005, from Borrower as assignor in favor of Lender as assignee and acknowledged by A&A as contractor (the "Assignment of Contracts"), (iii) a UCC-1 Financing Statement(s) designating Borrower as debtor and Lender as secured party, filed with the Secretary of State of the State of Nevada on October 11, 2005, as Document No. 2005032067-0 (the "UCC-1"), (iv) a Commercial Security Agreement, dated August 10, 2005, from Borrower as debtor in favor of Lender as secured party (the "Security

Agreement”), and (v) certain other instruments (such instruments, together with the Deed of Trust, Assignment of Contracts, UCC-1 and Security Agreement are herein, collectively, the “*Security Instruments*”).

F. The Note, Loan Agreement, Security Instruments, Guaranty, that certain Hazardous Substances Certificate and Indemnity Agreement, from Borrower as indemnitor, in favor of Lender, dated August 10, 2005 and recorded August 12, 2005, in the Official Records of the Recorder of Stewart Title of Douglas County, Nevada as Document No. 0652161 in Book 0805, Page 6306 (the “*Environmental Indemnity*”), the Change in Terms Agreement, dated August 9, 2006, between Borrower and Lender and acknowledged by K. Posnien and D. Posnien as Guarantors, the Change in Terms Agreement, dated March 12, 2007, between Borrower and Lender and acknowledged by K. Posnien, D. Posnien and Borrower as Guarantors, and all other documents, resolutions, instruments, agreements or writings evidencing or securing, or executed in connection with the Loan (including any and all addendums, riders, schedules and exhibits attached to such documents, and all amendments, modifications, restatements and replacements thereof) are collectively referred to as the “*Loan Documents*.” All terms not otherwise defined herein shall have the meanings subscribed to them in the Loan Documents.

G. The Loan matured on September 12, 2007 and Borrower was in default as a result of its failure to repay the Loan in full by such date.

H. Borrower and Guarantor have requested that Lender: (i) agree to a further extension of the maturity of the Loan to October 15, 2008; and (ii) further forbear and delay exercise of Lender’s rights and remedies with respect to the Loan as a result of the defaults. Lender is willing to do so, but only strictly on the terms and conditions set forth in this Agreement.

### **AGREEMENT**

NOW, THEREFORE, in consideration of the mutual benefits accruing to each, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

1. **Unpaid Principal Balance, etc.**

(a) Borrower and Guarantor acknowledge and confirm that, as of March 1, 2008, the outstanding principal balance of the Note equals \$4,116,140.00 plus accrued interest and fees.

(b) Borrower and Guarantor further acknowledge and confirm that (i) they do not have any valid off-sets or defenses to their obligations under the Loan Documents, and (ii) the recital of facts set forth in this Agreement is true and correct in all material respects.

2. **Forbearance, Conditions Precedent and Conditions Subsequent.** In reliance upon the agreements of Borrower and Guarantor set forth herein, Borrower and Guarantor acknowledging that such agreements have specifically induced Lender to enter into this Agreement, Lender agrees to forbear from exercising its rights and remedies under the Loan



Documents with respect to the defaults set forth in the recital of facts; *subject, however,* to and conditioned upon the complete and timely satisfaction of the following conditions:

(a) The following shall be delivered to Lender for receipt no later than the date indicated:

(i) An original of this Agreement, executed and properly acknowledged by Borrower and Guarantor, no later than March 15, 2008;

(ii) Payment of any and all outstanding interest, fees, and late charges due in connection with the Loan, no later than March 31, 2008.

(b) Except as provided in the Loan Documents with respect to the release of any of the Collateral consisting of improved single family residential lots in accordance with the terms and provisions thereof, or as otherwise approved by Lender, none of the Project, any of the Collateral or any interest therein, shall be further encumbered, conveyed, transferred, sold or assigned.

3. Reaffirmation of Obligations by Borrower and Guarantor. Borrower and Guarantor shall not be relieved of or released by Lender from any duties, obligations and liabilities currently owing or arising hereafter under the Loan Documents, as modified herein. Borrower and Guarantor hereby expressly (a) acknowledge, agree, reaffirm and understand that Borrower and Guarantor remain liable under the Loan Documents, as modified herein, to the extent of their respective obligations and liabilities thereunder, (b) confirm that all Loan Documents, as modified herein, shall continue in full force and effect, and (c) ratify the Loan Documents in their entirety, as modified herein. Borrower and Guarantor reaffirm and remake, for the benefit of Lender and in order to induce Lender to enter into this Agreement, each of their respective waivers, consents and other agreements set forth in the Loan Documents.

4. Modification of Loan Documents. Upon satisfaction of all conditions set forth hereinabove, effective as of the date of this Agreement, the Loan Documents shall be modified as follows:

(a) The Loan Documents are hereby amended to: (i) include a reference to this Agreement as one of the Related Documents, and to secure the performance by Borrower and Guarantor of the covenants and agreements contained in this Agreement; and (ii) provide that a default by Borrower and/or Guarantor under this Agreement shall be an Event of Default under the Loan Documents.

(b) The final maturity date of the Note is hereby extended to October 15, 2008 (i.e., expiration of the forbearance period); IT BEING UNDERSTOOD AND AGREED THAT LENDER SHALL NOT EXPLICITLY NOR IMPLIEDLY BE OBLIGATED IN ANY WAY TO PROVIDE ADDITIONAL MODIFICATIONS OR EXTENSIONS, OR OTHERWISE FORBEAR BEYOND THE TERM OF THIS AGREEMENT (October 15, 2008).



(c) From and after March 15, 2008, the per annum interest rate to be applied to the unpaid principal balance of the Note will be at a rate of three and one-half (3.50%) percentage points over the Index.

(d) All further availability under the Loan has been eliminated pursuant to the First Forbearance Agreement, and Borrower shall continue to not be entitled to any further advances thereunder.

(e) All Collateral described in each Security Instrument shall secure all obligations, debts and liabilities, plus interest thereon, of Borrower to Lender, as well as any claims by Lender against Borrower, whether now existing or hereafter arising, whether related or unrelated to the purposes of the Loan Documents and/or this Agreement, whether voluntary or otherwise, whether due or not due, direct or indirect, determined or undetermined, absolute or contingent, liquidated or unliquidated, whether Borrower may be liable individually or jointly with others, whether obligated as guarantor, surety, accommodation party or otherwise, and whether recovery upon such amounts may be or hereafter may become barred by any statute of limitations, and whether the obligation to repay such amounts may be or hereafter may become otherwise unenforceable.

5. No Waiver by Lender. No omission or delay by Lender in exercising any right or power under this Agreement or the Loan Documents will impair such right(s) or power(s) or be construed to be a waiver of any Event of Default or acquiescence therein, and any single or partial exercise of any such right or power will not preclude other or future exercises thereto or the exercise of any other rights or powers. The rights and remedies of Lender hereunder are cumulative and not exclusive. No waiver thereof will be valid unless in writing signed by Lender and then only to the extent specified. It is expressly understood and agreed that Lender's granting of a forbearance does not constitute an express or implied waiver of any of Lender's rights or remedies under the Loan Documents or applicable law, or a waiver of any other or future Event of Default under the provisions of the Loan Documents. It is further understood and agreed that Lender's granting of a forbearance does not constitute any course of dealing, an express or implied promise to grant any additional indulgences, similar forbearance agreements or any extensions in the future. Lender hereby expressly reserves all of its rights and remedies under the Loan Documents, this Agreement and applicable law.

6. Representations and Warranties. Borrower and Guarantor each hereby represent and warrant to Lender as follows:

(a) This Agreement, and all instruments and agreement required hereunder, are within the powers of the parties executing such documents, have been duly authorized, and do not conflict with any of the organizational or other papers governing the conduct of such party's businesses.

(b) This Agreement is a legal, valid and binding agreement, enforceable in accordance with its terms, and any instrument or agreement required hereunder, when executed and delivered, will be similarly legal, valid, binding and enforceable.



(c) All necessary approvals and consents, governmental or otherwise, have been obtained and are in full force and effect with respect to this Agreement.

(d) The execution, delivery and performance of this Agreement, and all instruments and agreements required hereunder, do not in any way violate or conflict with any instrument or agreement to which Borrower or Guarantor is a party or by which any such party's assets are bound, or any right, title or interest of any other person or entity with respect to such assets of the party.

7. Waiver and Release. As additional consideration to Lender for entering into this Agreement, Borrower and each Guarantor does for itself, himself or herself as the case may be, and on behalf of its/his/her heirs, successors and assigns, hereby release, acquit and forever discharge Lender, all of Lender's predecessors in interest, and all of Lender's past and present officers, directors, attorneys, affiliates, employees and agents, of and from any and all claims, demands, obligations, liabilities, indebtedness, breaches of contract, breaches of duty or of any relationship, acts, omissions, misfeasance, malfeasance, causes of action, defenses, offsets, debts, sums of money, accounts, compensation, contracts, controversies, promises, damages, costs, losses and expenses, of every type, kind, nature, description or character, whether known or unknown, suspected or unsuspected, liquidated or unliquidated, each as though fully set forth herein at length (each, a "*Released Claim*" and collectively, the "*Released Claims*"), that such Borrower or Guarantor now has or may acquire as of the date on which such Borrower or Guarantor executes and delivers this Agreement or a counterpart hereof to Lender (hereafter, such party's "*Release Date*"), including without limitation, those Released Claims in any way arising out of, connected with or related to any and all prior credit accommodations, if any, provided by Lender, or any of Lender's predecessors in interest, to Borrower, and any agreements, notes or documents of any kind related thereto, or the transactions contemplated thereby or hereby, or any other agreement or document referred to therein or herein.

Each of Borrower and Guarantor hereby acknowledges, represents and warrants to Lender that it/he/she agrees to assume the risk of any and all unknown, unanticipated or misunderstood defenses and claims which are released by the provisions hereof in favor of Lender, and waives and releases all rights and benefits which it/he/she might otherwise have under any state or local law or statute with regard to the release of such unknown, unanticipated or misunderstood defenses or claims.

Each of Borrower and Guarantor acknowledges that it/he/she has read and understood each of the provisions of this release. Each of Borrower and Guarantor fully understands that this release constitutes a general release, and that it has important legal consequences. Each of Borrower and Guarantor understands and confirms that it/he/she is hereby releasing any and all Released Claims that it/he/she may individually have as of its/his/her respective Release Date. Each of Borrower and Guarantor hereby acknowledges that it/he/she has had a full and fair opportunity to obtain a lawyer's advice concerning the legal consequences of this release.

Each of Borrower and Guarantor hereby specifically acknowledges and agrees that: (1) no element of this release shall be construed as or constitute an admission of any liability on the part of Lender; (2) this release shall constitute an absolute bar to the bringing of any Released Claim,



whether any such Released Claim is based on contract, tort, warranty, mistake or any other theory, whether legal, statutory or equitable; and (3) any attempt to assert a Released Claim barred by the provisions of this release shall subject the asserting party to the provisions of applicable law setting forth the remedies for the bringing of groundless, frivolous or baseless claims or causes of action.

8. Full Force and Effect. Except as herein modified, all the terms, covenants and conditions of the Loan Documents remain in full force and effect without modification or change. Nothing herein shall be deemed to affect or modify the priority or perfection of the lien of Lender's security interests and/or liens in any of the Collateral subject to any of the Security Instruments. All references to the Loan Documents in any document shall be deemed to mean such Loan Documents as herein modified.

9. Binding Effect. All agreements, covenants, conditions and provisions of this Agreement shall be binding upon and inure to the benefit of the successors and assigns of each of the parties hereto.

10. Final and Complete Expression. This Agreement, and the various other documents executed in connection herewith, constitutes the final and complete expression of the parties with respect to the transactions contemplated herein and may not be modified, amended, altered or superseded except by an agreement in writing signed by all parties hereto.

11. No Joint Venture. Nothing contained herein or in any of the Loan Documents shall be construed as creating a partnership or joint venture between or among Borrower and Lender or between Lender and any other party, or cause Lender to be responsible in any way for the debts or obligations of Borrower or any other party, it being the express intent of the parties that the relationship between Borrower and Lender is, and at all times shall remain, that of a borrower and lender.

12. Third Party Beneficiaries. Nothing contained herein or in any of the Loan Documents shall be construed as creating a third-party beneficiary relationship between and among Borrower, Lender and any other party.

13. Severability. If any provision of this Agreement or the application thereof to any person or circumstance shall be determined to be invalid or unenforceable, the remainder of this Agreement or the application of such provision to persons or circumstances other than those as to which it is invalid or unenforceable shall not be affected thereby and each provision of this Agreement shall be valid and be enforced to the fullest extent permitted by law.

14. Further Assurances. Borrower and Guarantor agree to (a) execute such other instruments and provide Lender with such further assurances as Lender deems necessary to protect its security or to more fully carry out the intent and purposes of this Agreement, and (b) furnish Lender with such other documents, information and materials as Lender may require in connection with the Loan.

15. Conflicts Between Documents. In the event of a conflict in the terms and conditions of any of the Loan Documents and this Agreement, the terms and conditions of this Agreement shall prevail.

16. Counterparts. This Agreement may be executed in a number of identical counterparts. If so executed, each of such counterparts shall collectively constitute one agreement.

17. Revival. If the payment of money hereunder should for any reason be subsequently declared to be "fraudulent" within the meaning of any state or federal law relating to fraudulent conveyances, preferential or otherwise voidable or recoverable, in whole or in part, for any reason, under the United States Bankruptcy Code or any other federal or state law (collectively, "*Voidable Transfers*"), and Lender is required to pay or restore any such Voidable Transfers, or any portion thereof, then as to the amount repaid or restored pursuant to any such Voidable Transfers (including all costs, expenses and attorney's fees of Lender relating thereto, including, without limitation, relief from stay or similar proceedings), the liability of Borrower or Guarantor, as appropriate, shall automatically be revived, reinstated and restored, and shall exist as though such Voidable Transfers had never been made to Lender. Nothing set forth herein is or should be construed to be an admission that such Voidable Transfers have occurred.

18. Bankruptcy. In the event any proceeding under any bankruptcy or insolvency law is commenced by or against Borrower or Guarantor, Borrower and Guarantor unconditionally and irrevocably agree (i) not to object or otherwise oppose a motion by Lender to lift the automatic stay under section 362 of the United States Bankruptcy Code or any similar or equivalent provision of applicable law, (ii) that Lender shall be entitled to immediate relief from the automatic stay so as to take possession of the Collateral, and to exercise its rights and remedies under the terms of the Loan Documents and applicable non-bankruptcy law without delay, (iii) that sufficient cause exists to grant Lender relief from the automatic stay, including but not limited to the lack of adequate protection of Lender's interests, (iv) that there is no equity in the Collateral, (v) that the Collateral is not necessary to an effective reorganization, and (vi) that any bankruptcy or similar proceeding in which any of Borrower or Guarantor fail to honor any of the above agreements shall be deemed to have been commenced in bad faith to frustrate the exercise of Lender's rights and remedies with respect to the Loan and under the Loan Documents and at law. The terms of this paragraph shall survive any default hereunder.

19. Indemnification. Borrower shall indemnify and hold Lender harmless from any loss, liability, damages, judgments and costs of any kind relating to or arising directly or indirectly out of (a) this Agreement or any document required hereunder, (b) any credit extended or committed by Lender, and (c) any litigation or proceeding related to or arising out of this Agreement. This indemnity extends to Lender, its subsidiaries and affiliates and all of their directors, officers, employees, agents, successors, attorneys and assigns. This indemnity shall survive repayment of Borrower's obligations to Lender.

20. Waiver of Right to Jury Trial. **BORROWER AND GUARANTOR, TO THE FULL EXTENT PERMITTED BY LAW, HEREBY KNOWINGLY, INTENTIONALLY AND VOLUNTARILY, WITH AND UPON THE ADVICE OF COMPETENT COUNSEL,**





**WAIVE, RELINQUISH AND FOREVER FOREGO THE RIGHT TO A TRIAL BY JURY IN ANY ACTION OR PROCEEDING BASED UPON, ARISING OUT OF, OR IN ANY WAY RELATING TO THIS AGREEMENT, THE LOAN DOCUMENTS, THE LOAN OR ANY CONDUCT, ACT OR OMISSION OF LENDER, BORROWER OR GUARANTOR, OR ANY OF THEIR RESPECTIVE DIRECTORS, OFFICERS, PARTNERS, MEMBERS, EMPLOYEES, AGENTS OR ATTORNEYS, OR ANY OTHER PERSONS AFFILIATED WITH LENDER, BORROWER OR GUARANTOR, IN EACH OF THE FOREGOING CASES, WHETHER SOUNDING IN CONTRACT, TORT OR OTHERWISE.**

21. Time of Essence. Time is of the essence under this Agreement and in the performance of every term, covenant and obligation contained herein.

22. Governing Law. This Agreement is made with reference to and is to be construed in accordance with the laws of the State of Nevada.

[Signatures begin on next page.]



IN WITNESS WHEREOF, the parties hereto have entered into this Agreement as of the day and year first above written.

**BORROWER:**

KIM POSNIEN CONSTRUCTION AND DEVELOPMENT COMPANY

By: Kimball A. Posnien  
Kimball A. Posnien, President

**GUARANTOR:**

Kimball A. Posnien  
KIMBALL A. POSNIEN, an individual

Debbie A. Posnien  
DEBBIE A. POSNIEN, an individual

KIM POSNIEN CONSTRUCTION AND DEVELOPMENT COMPANY

By: Kimball A. Posnien  
Kimball A. Posnien, President

**LENDER:**

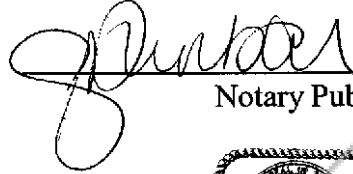
CITY NATIONAL BANK, a national banking association

By: Jerry McDermott  
Name: Jerry McDermott  
Title: VP

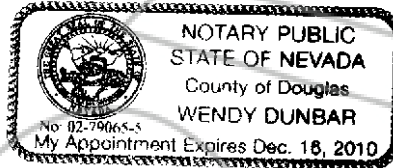


STATE OF NEVADA )  
 ) ss.  
COUNTY OF Douglas )

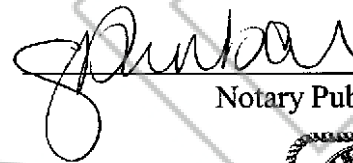
This instrument was acknowledged before me on March 12, 2008, by Kimball A. Posnien, as President of Kim Posnien Construction and Development Company.

  
\_\_\_\_\_  
Notary Public

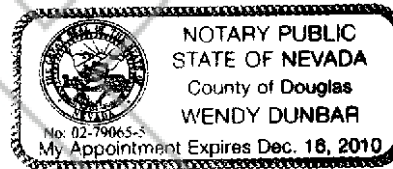
STATE OF NEVADA )  
 ) ss.  
COUNTY OF Douglas )



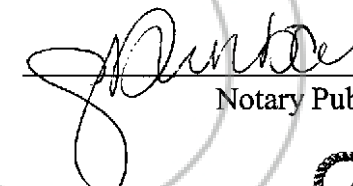
This instrument was acknowledged before me on March 12, 2008, by Kimball A. Posnien, an individual.

  
\_\_\_\_\_  
Notary Public

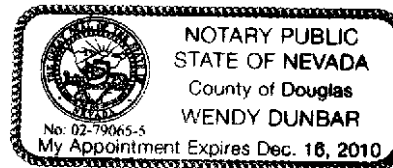
STATE OF NEVADA )  
 ) ss.  
COUNTY OF Douglas )



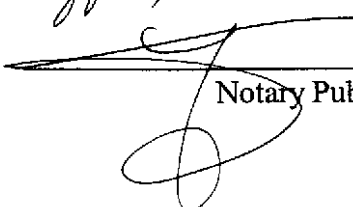
This instrument was acknowledged before me on March 12, 2008, by Debbie A. Posnien, an individual.

  
\_\_\_\_\_  
Notary Public

STATE OF NEVADA )  
 ) ss.  
COUNTY OF Douglas )



This instrument was acknowledged before me on March 13, 2008, by Jeremy McDermott, as Officer/Leader of City National Bank.

  
\_\_\_\_\_  
Notary Public

